



FEDERAL ELECTION COMMISSION
Washington, DC 20463

January 29, 2010

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

ADVISORY OPINION 2009-32

Dr. Richard L. Jorgensen
P.O. Box 455
Norwich, NY 13815

Dear Dr. Jorgensen:

We are responding to your advisory opinion request, concerning the application of the Federal Election Campaign Act of 1971, as amended (“the Act”), and Commission regulations to your proposed sale of fundraising items for political committees. The Commission concludes that you may engage in your proposed sale of fundraising items under the Act and Commission regulations.

Background

The facts presented in this advisory opinion are based on your letter received on December 18, 2009, your e-mails received on December 31, 2009 and January 22, 2010, a telephone conversation with Commission attorneys on January 7, 2010, and your commercial website.¹

You conduct a web-based business as a sole proprietor. Through the site, you sell, among other things, prints of an artist’s drawings of President Obama, and President Obama with Secretary of State Clinton. You currently offer these prints for sale for \$49.95 plus \$5.00 shipping and handling. You propose to enter into agreements with political committees to sell these prints as fundraising items.

¹ The commercial website where you are currently selling the artwork you intend to offer as fundraising items is found at <http://store.mydestinies.com/paintings-by-minerva-diaz.html>, as accessed on January 21, 2010; this web address does not include the unique ID tag that will be assigned to each political committee, discussed below.

For each political committee with which you enter into an agreement, you will draft a solicitation e-mail promoting the artwork as a fundraiser for the committee. The political committee may request changes to the e-mail to customize it. You will charge the political committee a fee for providing the solicitation e-mail. The political committee will disseminate the e-mail to its own distribution list.

The e-mail will contain images of the products offered for sale, and hyperlinks to purchase the products from your website. The hyperlinks will contain an embedded ID tag, unique to each political committee, so that purchases resulting from each committee's fundraising efforts can be appropriately credited to that committee and contributor information can be collected and forwarded to the political committee for reporting purposes. You represent in your request that you will request and provide to the committees information from contributors, including their names, addresses, and the amount of their purchases and, for contributors whose purchases exceed \$200, their occupations and employers.

You indicated in a telephone conversation and e-mail correspondence with Commission attorneys that, for sales made through the proposed arrangements with political committees, the price will be marked up by an amount that you and the political committee agree upon, so that you and the artist receive the same dollar amounts you would receive from sales to the public generally and not made through political committees. When purchases are made from the website, payment will be collected via PayPal Pro, and deposited on a weekly basis into separate bank accounts for each political committee. From those accounts, funds will be sent to the artist for the print plus her shipping costs, to PayPal Pro for transaction fees, and to you for commission. The political committees will retain the remaining amount. The artist maintains an inventory of prints for you and other outlets, and will ship the prints to contributors as they are purchased.

You seek an advisory opinion regarding this proposal. In analyzing the proposal under the Act and Commission regulations, the Commission considers first whether your proposal to provide solicitation e-mails to political committees constitutes contributions from you to the committees, and second whether the proposed sale of artwork as fundraising items for those committees is permissible under the Act and Commission regulations, including whether such goods and services are contributions.

Question Presented

- 1) *May you provide solicitation e-mails to political committees without having your provision of those e-mails constitute contributions to the committees?*

- 2) *May you sell artwork as fundraising items for political committees without having your provision of the artwork constitute contributions to the committees?*

Legal Analysis and Conclusions

1) *May you provide solicitation e-mails to political committees without having your provision of those e-mails constitute contributions to the committees?*

Yes, you may provide the proposed solicitation e-mails to political committees. Your provision of the e-mails will not constitute contributions to the political committees, as long as the fee you receive is the usual and normal charge.

Under the Act, a contribution includes “any gift, subscription, loan, advance, or deposit of money or anything of value made by any person for the purpose of influencing any election for Federal office.” 2 U.S.C. 431(8)(A)(i); *see also* 11 CFR 100.52(a). The term “anything of value” includes all in-kind contributions, and “the provision of any goods or services without charge or at a charge that is less than the usual and normal charge for such goods or services is a contribution.” 11 CFR 100.52(d)(1). The “usual and normal charge” for goods means “the price of those goods in the market from which they ordinarily would have been purchased at the time of the contribution,” and the “usual and normal charge” for services means “the hourly or piecework charge for the services at a commercially reasonable rate prevailing at the time the services were rendered.” 11 CFR 100.52(d)(2).

You propose to charge a fee to draft a solicitation e-mail that each political committee will be able to send to its supporters to raise contributions.² Assuming that this drafting fee is at a commercially reasonable rate prevailing for such a service at the time the service is rendered, it will constitute the “usual and normal charge” under 11 CFR 100.52(d)(1).³ As such, the value of your drafting services will not constitute a contribution to the political committee.

2) *May you sell artwork as fundraising items for political committees without having your provision of the artwork constitute contributions to the committees?*

Yes, you may sell artwork as fundraising items for political committees. Your provision of the artwork will not constitute contributions to the political committees because the commission you propose to receive is a usual and normal charge in a commercially reasonable transaction.

You propose to sell the artwork for \$49.95, plus a markup to be agreed upon with the political committee and \$5.00 for shipping and handling. Because you will receive the same amount that you receive on sales that are not made through political committees, and therefore will not relinquish any portion of your fee to the political

² The political committees will bear the burden of ensuring that solicitation e-mails are not sent to prohibited sources, such as foreign nationals, corporations, labor organizations, or federal contractors, and that all required disclaimers are included in the text of the e-mails.

³ The fees charged by other vendors that provide similar services may provide a measure for the commercially reasonable rate for Dr. Jorgensen’s services.

committee, you will receive a usual and normal charge and will not be making a contribution to the political committee.⁴ 11 CFR 100.52(d). Moreover, because the political committees will receive funds from individual customers, and not from your sole proprietorship, the transactions will not result in your making any contributions under the Act. *See, e.g.*, Advisory Opinion 2008-18 (Mid-Atlantic Benefits) at 4.

Political committees participating in this proposed plan will authorize you as their agent to receive contributions (*see* 11 CFR 102.9), which imposes certain obligations under the Act and Commission regulations. Because the sale proceeds are contributions to the political committees, you must request and forward to the political committees the information necessary to comply with the recordkeeping and reporting requirements of the Act. This includes the name and address of any person contributing more than \$50, together with the date and full amount of such contribution, as well as the occupation and employer of any contributor whose contributions to the particular committee aggregate over \$200. 2 U.S.C. 432(c); 11 CFR 102.9(a). As described in the proposal, you will collect all such required information at the time of purchase and provide the information to the participating political committees in a timely manner to allow them to report such information.⁵

The Act and Commission regulations provide that all funds of a political committee shall be segregated from and may not be commingled with the personal funds of any individual. 2 U.S.C. 432(b)(3); 11 CFR 102.15. Further, all contributions received for a political committee must be forwarded to the treasurer of the political committee within a certain period of time, along with required contributor information. For contributions received for an authorized candidate committee, the contribution and contributor information must be forwarded to the treasurer of the political committee within ten days of receipt. 2 U.S.C. 432(b)(1); 11 CFR 102.8(a). For contributions received for other political committees, contributions of \$50 or less and their contributor information must be forwarded to the treasurer within thirty days, while contributions in excess of \$50 and their contributor information must be forwarded to the treasurer within ten days. 2 U.S.C. 432(b)(2); 11 CFR 102.9(b). This proposal to establish an account for each political committee, separate from your own personal and business accounts as well as from those of other political committees, and to transfer funds to those accounts on a weekly basis along with corresponding contributor information, will satisfy these requirements.

⁴ The commission you receive from your other sales of the artwork provide a measure for whether the commission you receive from the political committees is a usual and normal charge.

⁵ Contributions from foreign nationals, corporations, labor organizations, and federal contractors are prohibited. The political committee, not the vendor, is responsible for determining the legality of contributions, as well as determining whether contributions, when aggregated with other contributions from the same contributors, exceed the contribution limits. 11 CFR 103.3(b). Under Commission regulations, the entire amount paid as the purchase price for a fundraising item sold by a political committee is a contribution. 11 CFR 100.53. Here, the entire purchase price of the artwork, not just the amount forwarded to the political committees, will be a contribution from the purchaser, and the contributor information that you forward to each political committee should reflect that amount.

This proposal is also similar in some aspects to the proposal considered by the Commission in Advisory Opinion 1988-17 (Election Concepts, Inc.). In that advisory opinion, the Commission considered a plan by Election Concepts, Inc. (“ECI”) to provide medallions to Federal candidates’ campaigns for fundraising purposes. ECI, a corporation, proposed to contract with political committees for the sale and marketing of commemorative medallions. Each committee would pay ECI for the design and casting of the medallion, and ECI would in turn pay the mint for the artwork and the die for the medallion. ECI would also charge the political committees a fee for the work it did on their behalf, and the price of the medallions themselves would be determined by the “spot market” price for the precious metals used. The Commission concluded that, assuming that the amounts charged were usual and normal charges and that ECI followed its ordinary course of business, ECI’s proposal was permissible under the Act and Commission regulations. Similarly, you propose following your ordinary course of business, whereby the artist maintains an inventory of prints and ships them as they are ordered, with a portion of the purchase price going to the artist and a portion going to you as commission.⁶ The Commission concludes that nothing in the Act or Commission regulations prohibits anything in this proposal.

This response constitutes an advisory opinion concerning the application of the Act and Commission regulations to the specific transaction or activity set forth in your request. *See* 2 U.S.C. 437f. The Commission emphasizes that, if there is a change in any of the facts or assumptions presented and such facts or assumptions are material to a conclusion presented in this advisory opinion, then the requester may not rely on that conclusion as support for its proposed activity. Any person involved in any specific transaction or activity which is indistinguishable in all its material aspects from the transaction or activity with respect to which this advisory opinion is rendered may rely on this advisory opinion. *See* 2 U.S.C. 437f(c)(1)(B). Please note that the analysis or conclusions in this advisory opinion may be affected by subsequent developments in the law including, but not limited to, statutes, regulations, advisory opinions and case law. The cited advisory opinions are available on the Commission’s website at <http://saos.nictusa.com/saos/searchao>.

On behalf of the Commission,

(signed)
Matthew S. Petersen
Chairman

⁶ This proposal is distinguishable from the proposal considered by the Commission in Advisory Opinion 1989-21 (Create-a-Craft) where the artist’s proposal included an advance to a participating political committee, which the committee would retain, even if no goods were ever sold.