



FEDERAL ELECTION COMMISSION
Washington, DC 20463

February 17, 2011

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

ADVISORY OPINION 2011-01

Marc E. Elias, Esq.
Ezra W. Reese, Esq.
Jonathan S. Berkon, Esq.
Perkins Coie, LLP
607 Fourteenth Street N.W.
Washington, DC 20005-2003

Dear Messrs. Elias, Reese, and Berkon:

We are responding to your advisory opinion request on behalf of Robin Carnahan for Senate (the “Committee”), concerning the application of the Federal Election Campaign Act of 1971, as amended (the “Act”), and Commission regulations to the establishment of a legal defense fund and the sources of money such a fund may accept and use to defray the Committee’s legal costs. The Commission concludes that amounts received and spent by the Fund would not be “contributions” or “expenditures” as defined in the Act and Commission regulations where these amounts are used to defend a copyright infringement and misappropriation lawsuit. Thus, no provision of the Act or Commission regulations prohibits the establishment of such a legal defense fund to defray the Committee’s legal costs.

Background

The facts presented in this advisory opinion are based on your letter received on January 6, 2011, your February 1, 2011 email confirmation of a telephone conversation between you and attorneys in the Commission’s Office of General Counsel, and publicly available reports filed by the Committee with the Commission and court documents.

The Committee is the principal campaign committee for Ms. Carnahan, who was a candidate in the 2010 election for the U.S. Senate in Missouri.¹ On September 15, 2010, Fox News Network, LLC and Chris Wallace filed a complaint against the Committee in U.S. District Court for the Western Division of Missouri, alleging that an advertisement aired by the

¹ Ms. Carnahan lost the 2010 general election. She is no longer a candidate for any Federal office nor does she hold any Federal office.

Committee that contained footage of a Fox News interview infringed Fox News' copyright, invaded Mr. Wallace's rights of privacy and publicity, and misappropriated his likeness and persona (the "Fox News lawsuit"). The litigation was recently settled by the parties. The Committee's costs to defend the lawsuit have exceeded \$85,000 and may continue to accrue until the settlement is finalized.

The Committee proposes that a separate legal defense fund ("the Fund") be established to defray the Committee's legal costs.² The Fund would be independent from the Committee and would not be administered or controlled by the Committee, nor would the Committee be involved in soliciting donations to the Fund. None of the individuals involved in establishing, administering, or operating the Fund would be Federal candidates or Federal officeholders. Solicitations for the Fund, either in person or in writing, would be accompanied by a letter stating the purpose of the Fund and noting that no amounts given to the Fund would be used for the purpose of influencing any Federal election. Solicitations for the Fund would be conducted separately from any solicitations for the Committee or any other Federal political committee. The Fund would accept unlimited amounts from individuals, political committees, corporations, and labor organizations. The Fund would terminate once all legal costs were paid, and any excess funds would be refunded or donated to a charity.

Questions Presented

- 1. May a separate legal defense fund be established to defray the Committee's costs of defending against the Fox News lawsuit?*
- 2. If so, may the Fund accept unlimited donations from individuals, political committees, corporations, and labor unions, and use those funds to defray the Committee's costs of defending against the Fox News lawsuit?*
- 3. If the Fund may not accept unlimited donations from individuals, political committees, corporations, and labor unions, which types of funds may it accept and use to defray the Committee's costs of defending against the Fox News lawsuit?*

Legal Analysis and Conclusions

- 1. May a separate legal defense fund be established to defray the Committee's costs of defending against the Fox News lawsuit?*
- 2. If so, may the Fund accept unlimited donations from individuals, political committees, corporations, and labor unions, and use those funds to defray the Committee's costs of defending against the Fox News lawsuit?*

Taking the first two questions together, the Commission concludes that, because the amounts received and disbursed by the Fund would not be "contributions" or "expenditures" as defined in the Act and Commission regulations, no provision of the Act or Commission

² The Requestor represents that the Fund would not reimburse the Committee for any costs.

regulations prohibits the establishment of such a legal defense fund to defray the Committee's legal costs. Thus, amounts received and disbursed by the Fund are not subject to the source prohibitions, amount limitations, or reporting requirements of the Act and Commission regulations.

The term "contribution" is defined in the Act and Commission regulations, in relevant part, as "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); 11 CFR 100.52(a). Similarly, the term "expenditure" is defined in part as "any purchase, payment, distribution, loan, advance, deposit, or gift 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(9)(A); 11 CFR 100.111(a).

The Commission has previously concluded that amounts received or disbursed for the purpose of defending against certain types of lawsuits are not "contributions" or "expenditures." *See, e.g.*, 1981-16 (Carter-Mondale Presidential Committee) (potential commercial contract litigation), 1981-13 (Moss) (claim of slander), and 1980-04 (Carter-Mondale Presidential Committee) (alleged violations of the Appropriations Act and Hatch Act, and infringements of constitutional rights).

In the circumstances described in your request, the amounts received and disbursed by the Fund would be strictly for the purpose of paying the Committee's legal costs in connection with the Fox News lawsuit. Specifically, this money would compensate the Committee's counsel for legal services that enabled the Committee to present a defense to a civil complaint in a lawsuit alleging copyright infringement, invasion of privacy and right of publicity, and misappropriation of likeness and identity, and to settle the case. The circumstances presented here are similar to those presented in Advisory Opinion 1980-04 (Carter-Mondale Presidential Committee), where a complaint named various Cabinet members and White House staff members as well as the Carter-Mondale Presidential Committee as defendants. In its opinion, the Commission concluded that there is no "basis under the Act for treating donated legal services to defend against a civil action as services rendered for the purpose of influencing the election for any person to Federal office. In this situation, the Committee has no choice but to defend itself or admit the violations alleged by the plaintiff. Thus the donated legal services do not present the Committee with anything of value that may be utilized for the purpose of influencing any election for Federal office." Advisory Opinion 1980-04 (Carter-Mondale Presidential Committee); *see also* Advisory Opinion 1981-16 (Carter-Mondale Presidential Committee) (concluding that funds raised or spent exclusively for commercial litigation involving Committee contracts and similar liabilities would not be "contributions" or "expenditures" under the Act, but that costs of post-election litigation in connection with compliance actions of the Commission and Commission audits "clearly emanate not only out of the election, but also from matters clearly within the scope of the Act"); *cf.* Advisory Opinion 1993-15 (Tsongas) (further delineating between costs of defending against an investigation relating to "activities clearly within the scope of the Act" and "donations and disbursements made for the purpose of defending a Federal officeholder with respect to activities unrelated to compliance with the Act"). Because the proposed Fund would be established and administered entirely separately and independently from the Committee, solicitations for the Fund would be conducted

separately from any solicitation for the Committee, and all amounts received by the Fund will be held separately from the Committee's funds, no amounts given to the Fund could be used for the purpose of influencing any Federal election.

Therefore such receipts and disbursements would not be "contributions" to, or "expenditures" by the Fund, as defined in the Act and Commission regulations, nor would they be in-kind "contributions" from the Fund to the Committee. Accordingly, the Commission concludes that nothing in the Act or Commission regulations would limit or prohibit the Fund from receiving donations from those sources described in your request. Nor would the Fund be required to register or file disclosure reports under the Act or Commission regulations.

3. If the Fund may not accept unlimited donations from individuals, political committees, corporations, and labor unions, which types of funds may it accept and use to defray the Committee's costs of defending against the Fox News lawsuit?

This question is moot, given the answers to Questions 1 and 2, above.

The Commission expresses no opinion regarding the possible applicability of Federal or State tax or other laws that are not within its jurisdiction.

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, www.fec.gov, or directly from the Commission's Advisory Opinion searchable database at <http://saos.nictusa.com/saos/searchao>.

On behalf of the Commission,

(signed)
Cynthia L. Bauerly
Chair