



FEDERAL ELECTION COMMISSION
Washington, DC 20463

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CERTIFIED MAIL RETURN
RECEIPT REQUESTED

ADVISORY OPINION 2011-02

Daniel B. Winslow, Esq.
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Dear Mr. Winslow:

We are responding to your advisory opinion request on behalf of Senator Scott Brown and the Scott Brown for U.S. Senate Committee (the "Committee") concerning the application of the Federal Election Campaign Act of 1971, as amended (the "Act"), to several proposed activities relating to the upcoming publication and promotion of Senator Brown's autobiography (the "book").

The Commission concludes that Senator Brown and the Committee may engage in some of the proposed activities. The Committee's proposal to use campaign funds to purchase copies of the book from the book's publisher at the fair market price, and to have the publisher donate to charity Senator Brown's royalties from sales of the book to the Committee, is permissible. Consistent with prior Commission precedents discussed below, the Committee also may post a *de minimis* amount of material promoting the book on its website and social media sites. Furthermore, Senator Brown's proposal to personally reimburse the Committee for the fair market value of the rental of its lists to promote the book is permissible. The Commission could not approve a response on whether Senator Brown may host fundraising events in cities where the publisher pays his travel costs to promote the book, or whether the Committee may collect email addresses of people who attend the Senator's book signing and promotional events for the purpose of soliciting contributions in the future.

Background

The facts presented in this advisory opinion are based on your letter received on January 14, 2011, as supplemented by your emails received on January 24, January 28, and February 4, 2011.

The Committee is Senator Brown's principal campaign committee for his re-election to the United States Senate.¹ Senator Brown's autobiography, *Against All Odds*, will be published by Harper Collins (the "Publisher"), on or about February 20, 2011. Following the publication of the book, Senator Brown will promote the book in a national book tour during the Senate's February recess (the week of February 20, 2011).

Senator Brown's agreement with the Publisher was reviewed by the Senate Select Committee on Ethics, which determined that the agreement adheres to the traditional standards and practices in the publishing industry. The agreement provides for the Publisher's payment of advances as well as royalties to Senator Brown. The royalties will be determined as a percentage of net sales revenue.

The Committee proposes to purchase several thousand copies of the book, though not more than the number needed, for campaign-related activities. The Committee plans to use the book to influence Senator Brown's election, such as by distributing books as "thank you" gifts to campaign contributors and political supporters. The Committee will purchase these books at either (a) a bulk rate that is a standard fair market price that the Publisher, under normal industry practice, makes available on equal terms to other large purchasers that are not political organizations or committees, or (b) at the usual retail price of the book, if the bulk rate is unavailable. Senator Brown proposes to donate the royalties from the Committee's bulk purchase of the book to a charitable organization described in section 501(c)(3) of the Internal Revenue Code or under chapter 12, section 8, of the Massachusetts General Laws governing charitable organizations. Alternatively, the Publisher is willing to donate Senator Brown's royalties for sales of the book to the Committee to a charitable organization.

The Committee proposes to promote Senator Brown's book by posting information on its website about the book and the book tour. The Committee's website, www.scottbrown.com, includes pages grouped by tabs that divide website content into categories, such as News, Events, Issues, and Contribute. The Committee updates its website daily. The Committee would like to post information on its website home page, and this information will consume no more than 25 percent of the home page, with a link to another page with more information, including how to purchase the book and where to meet Senator Brown on the book tour. The Committee's website also includes links to the Committee's social media sites on Facebook and Twitter.

The Committee proposes to post similar information on its Facebook fan page, Twitter feed, and LinkedIn site.

¹ The Committee filed its first Statement of Organization with the Commission on September 17, 2009. On January 26, 2010, Senator Brown filed with the Commission a Statement of Candidacy for the 2012 Senate election.

- Facebook. The Committee proposes to post book promotional information on its Facebook Wall² or “Info” page. These posts would consume no more than 25 percent of the Facebook page on which they are posted.
- Twitter. The Committee would like to tweet³ about Senator Brown’s activities on the book promotional tour. For example, a tweet might state: “I’m at the bookstore in LA, come see me and say hello” and include a link to the website page with information about the book. The tweets about the book would comprise less than 10 percent of the Committee’s Twitter page.
- LinkedIn. Senator Brown’s LinkedIn page similarly contains information about him and links to his website. The Committee’s proposed posts on Senator Brown’s LinkedIn page would link to the Committee’s website page containing information about the book, would be small compared to other content, and be no more than 25 percent of a page.

The Committee also proposes to promote the book to individuals on the Committee’s email and mailing lists. The Committee’s email and mailing address database includes contact information for thousands of persons who have contributed to the Committee.

The Publisher will pay the travel and other costs of the book tour and promotional appearances. Travel will be on commercial carriers at ordinary commercial rates.

Although the principal reason for Senator Brown’s travel is to promote the book, Senator Brown, while on the book tour, also wishes to host fundraising events for the Committee in the cities to which he will travel. Senator Brown’s attendance at these fundraisers would be ancillary to his presence in those areas to promote his book. The Committee assumes that Senator Brown’s participation in fundraising would add no additional travel costs to those to be paid by the Publisher.

Finally, the Committee proposes to have a campaign staffer collect email addresses from people who attend Senator Brown’s book signing events on the book tour. The Committee does not propose to rely on the Publisher in collecting this data. The Committee plans to use the email addresses that it collects to apprise people of Committee news and activities and for future solicitations of contributions.

² A Facebook “Wall” is “a place to post and share content with your friends.” Facebook Help Center: Using Facebook, <http://www.facebook.com/help/?faq=13153> (last visited Feb. 2, 2011). The Committee characterizes Senator Brown’s Facebook Wall as “essentially a bulletin board where fans and friends can post notes.”

³ A “tweet” is a “message posted via Twitter containing 140 characters or fewer.” Twitter Help Center: The Twitter Glossary, <http://support.twitter.com/articles/166337-the-twitter-glossary> (last visited Feb. 2, 2011). As a verb, to “tweet” is to post a message on Twitter. *Id.*

Questions Presented

1. *May the Committee use campaign funds to purchase copies of the book at the fair market price, and, if so, may Senator Brown donate to charity the royalties from bulk sales of the book to the Committee, or must he forego those royalties entirely?*
2. *May the Committee post material promoting the book on its website and social media sites?*
3. *If Senator Brown personally reimburses the Committee for the fair market value of its email and mailing lists, based on an independent list appraisal, may Senator Brown use the lists to promote the sale of his book?⁴*
4. *May Senator Brown host fundraising events in cities where the book Publisher pays his travel costs to promote the book?*
5. *May the Committee collect email addresses of people who attend the Senator's book signing and promotional events, for the purpose of soliciting contributions in the future?*

Legal Analysis and Conclusions

Question 1. May the Committee use campaign funds to purchase copies of the book at the fair market price, and, if so, may Senator Brown donate to charity the royalties from bulk sales of the book to the Committee, or must he forego those royalties entirely?

Yes, the Committee may use campaign funds to purchase copies of the book from the publisher at the fair market price, and the publisher may donate to charity the amount that Senator Brown would have otherwise earned as royalties from bulk sales of the book to the Committee.

Under the Act and Commission regulations, a candidate and his authorized committee have wide discretion in making expenditures to influence the candidate's election. 2 U.S.C. 439a(a); 11 CFR 113.2. There are six categories of permissible uses of contributions received by a Federal candidate, including for otherwise authorized expenditures in connection with the candidate's campaign for Federal office and for any other lawful purpose. 2 U.S.C. 439a(a); 11 CFR 113.1(g) and 113.2(a). Such uses must not, however, result in the conversion of campaign funds to the personal use of the candidate or any other person. 2 U.S.C. 439a(b); 11 CFR 113.1(g) and 113.2(e)(5).

⁴ The advisory opinion request included two alternative questions, if the Commission does not give an affirmative response to Question 3. The Commission is not addressing these alternative questions because it concludes that the Committee may engage in the activity discussed in Question 3.

The Act provides that “a contribution or a donation shall be considered to be converted to personal use if the contribution or amount is used to fulfill any commitment, obligation or expense of a person that would exist irrespective of the candidate’s election campaign or individual’s duties as a holder of Federal office.” 2 U.S.C. 439a(b)(2); *see also* 11 CFR 113.1(g). The Act and Commission regulations provide a non-exhaustive list of uses of campaign funds that are *per se* personal use. 2 U.S.C. 439a(b)(2); 11 CFR 113.1(g)(1)(i). For uses of campaign funds not on this list, the Commission determines, on a case-by-case basis, whether a use of campaign funds would fall within the definition of “personal use.” 11 CFR 113.1(g)(1)(ii).

In several prior advisory opinions, the Commission has considered whether the purchase by an authorized committee of its candidate’s book is personal use. *See, e.g.*, Advisory Opinions 2006-18 (Granger), 2004-18 (Lieberman), 2001-08 (Specter), 1995-46 (D’Amato), and 1993-20 (Nighthorse Campbell). The facts presented in this request are particularly similar to those presented in Advisory Opinion 2001-08 (Specter). In that advisory opinion, the Commission determined that the use of the authorized committee’s campaign funds to purchase its candidate’s book would defray an expense that would not exist irrespective of the campaign and would not be an impermissible personal use. The Commission’s conclusion was based on several facts: the authorized committee’s funds would be used to purchase the book solely for distribution to the committee’s contributors and supporters, and thus would be used by the committee only for the purpose of influencing its candidate’s election to Federal office; the quantity purchased would not exceed the number needed for this described purpose; all royalties attributable to the committee’s purchase would be paid by the publisher to charity; and the committee’s purchase would be removed by the publisher from the royalty calculation.⁵

Similarly, here, the Committee’s funds would be used to purchase the book solely for distribution as gifts to the Committee’s financial contributors and political supporters, and thus would be used by the Committee only for the purpose of influencing Senator Brown’s election to Federal office; the quantity purchased would not exceed the number needed for this described purpose. As in Advisory Opinion 2001-08 (Specter), here, the Publisher is willing to donate Senator Brown’s royalties for sales of the book to the

⁵ Advisory Opinion 2001-08 (Specter) also addressed whether the Committee’s bulk purchase of the book at a discounted rate would result in an in-kind contribution by the publisher. *See* 2 U.S.C. 441b(a); 11 CFR 114.2(b). The Commission concluded that no in-kind contribution would result, because the discounted items were made available in the ordinary course of business and on the same terms and conditions to the vendor’s other customers that were not political committees. Advisory Opinion 2001-08 (Specter); *see also* Advisory Opinion 2004-18 (Lieberman). As in Advisory Opinion 2001-08 (Specter), the Committee here indicates that the bulk rate it would pay is a standard fair market price that the publisher, under normal industry practice, makes available on equal terms to other large purchasers that are not political organizations or committees. Accordingly, although not explicitly asked in the instant advisory opinion request, the Commission similarly concludes here that the Committee’s payment of this discounted bulk rate would not result in an impermissible in-kind corporate contribution from the publisher.

Committee to a charitable organization and not escalate the royalty calculation that would inure to Senator Brown personally.

The Act provides that “[a] contribution accepted by a candidate” may be used for, among other things, “contributions to an organization described in section 170(c) of the Internal Revenue Code of 1986.” 2 U.S.C. 439a(a); *see* 11 CFR 113.1(g)(2). However, the Act limits such contributions by providing that “[a] contribution or donation described in subsection (a) shall not be converted by any person to personal use.” 2 U.S.C. 439a(b)(1). Thus, Senator Brown may not personally accept royalties for sales of the book to the Committee, even if he then makes charitable contributions equal to that amount. Senator Brown must also not receive any personal benefit, tangible or intangible, for the royalties the Publisher donates to charity for the sales of the book to the Committee.⁶

Accordingly, as in Advisory Opinion 2001-08 (Specter), the use of Committee funds to purchase the book will defray an expense that would not exist irrespective of Senator Brown’s campaign and would not be an impermissible personal use of campaign funds if all royalties for the committee’s purchase are paid by the Publisher to charity with no personal benefit to Senator Brown.

Question 2. May the Committee post material promoting the book on its website and social media sites?

Yes, the Committee may post a *de minimis* amount of material promoting the book on its website and social media sites at *de minimis* cost without violating the restriction on personal use of campaign funds, as described below.

As noted above, the Act specifies that conversion to personal use occurs when a “contribution or amount is used to fulfill any commitment, obligation, or expense of a person that would exist irrespective of the candidate’s election campaign or individual’s duties as a holder of Federal office.” 2 U.S.C. 439a(b)(2); *see also* 11 CFR 113.1(g). Here, Senator Brown’s expenses as an author in marketing the book exist irrespective of his campaign. The Commission has previously determined that the expenses associated with marketing a book that a commercial publisher publishes and for which it pays royalties to the candidate are expenses that would exist irrespective of the candidate’s election campaign or duties as a holder of Federal office. *See* Advisory Opinion 2006-07 (Hayworth) (candidate received royalties); *see also* Advisory Opinion 2006-18 (Granger) (candidate donated royalties to charitable organizations). Therefore, the use of an authorized committee’s asset, such as the Committee’s website, to promote the candidate’s book would ordinarily constitute a prohibited personal use. *See* Advisory Opinions 2006-18 (Granger) and 2006-07 (Hayworth).

⁶ Pursuant to Advisory Opinion 2006-18 (Granger), Senator Brown may designate the charitable organization to which the Publisher donates royalties from the sale of the book to the Committee. *See also* Advisory Opinion 1995-46 (D’Amato).

Nonetheless, in Advisory Opinion 2006-07 (Hayworth), the Commission determined that the addition of a single sentence, or, at most, two sentences of promotional material about a candidate's book to an authorized committee's substantial website did not constitute a prohibited personal use of campaign funds, since both the amount of promotional material and the cost to the committee were *de minimis*. The addition of the material did not generate any revenue for the candidate or authorized committee beyond the usual royalties arising from book sales. *See* Advisory Opinion 2006-07 (Hayworth) (citing 11 CFR 113.1(g)(1)(ii)(D) (permitting *de minimis* vehicle expenses for personal activities)).

The Committee here proposes to post material promoting Senator Brown's book comprising up to 25 percent of the Committee website's homepage, 25 percent of the Committee's Facebook page, 10 percent of the Committee's Twitter page, and 25 percent of Senator Brown's LinkedIn page. Unlike in Advisory Opinion 2006-07 (Hayworth), this proposal does not appear to represent a *de minimis* amount of material. *Cf.* Advisory Opinion 2002-05 (Hutchinson) (finding that 25 percent of a trip spent on campaign related activity was not an "incidental" amount of time). The Committee may, however, consistent with Advisory Opinion 2006-07 (Hayworth), post a *de minimis* amount of material on its otherwise substantial website and social media sites.

Question 3. If Senator Brown personally reimburses the Committee for the fair market value of its email and mailing lists, based on an independent list appraisal, may Senator Brown use the lists to promote the sale of his book?

Yes. If Senator Brown personally reimburses the Committee for the fair market value of the rental of its email and mailing lists, based on an independent list appraisal, he may use the email and mailing lists to promote the sale of his book.

As noted above, the Act and Commission regulations provide that a candidate and the candidate's authorized committees have wide discretion in making expenditures to influence the candidate's election, but may not convert excess campaign funds to personal use. 2 U.S.C. 439a; 11 CFR 113.1(g) and 113.2; *see also* Advisory Opinions 2006-18 (Granger), 2006-07 (Hayworth), and 2001-08 (Specter). Additionally, Commission regulations provide that "the transfer of a campaign committee asset is not personal use so long as the transfer is for fair market value." 11 CFR 113.1(g)(3).

The Commission has long recognized that a political committee's mailing lists are assets that have value and that are frequently sold, rented, or exchanged in a market. *See, e.g.,* Advisory Opinions 2002-14 (Libertarian National Committee), 1982-41 (Dellums), and 1981-46 (Dellums). In Advisory Opinion 2006-18 (Granger), the Commission permitted a candidate's authorized committee to use the committee's mailing list to promote the candidate's book, without requiring that the candidate reimburse the committee for the fair market value of the use of the list. In that advisory opinion, however, the candidate was not receiving any royalties from the sale of the book. Therefore, the Commission found that "she will not personally gain from the use of

Committee funds or assets for the contemplated activities.” *Id.* The Commission determined that “in light of the absence of any such personal benefit from the proposed activities . . . the proposed activities do not constitute a prohibited personal use of campaign funds.” *Id.*

In this case, by contrast, Senator Brown *will* receive royalties from the sale of the book. Thus, the use of the Committee’s email and mailing lists are subject to the personal use regulations. 11 CFR 113.1(g). However, Senator Brown proposes to reimburse the Committee for the fair market value of the lists, as determined by an independent list broker. This proposed course of conduct will not result in a prohibited personal use of campaign funds.

Question 4. May Senator Brown host fundraising events in cities where the book Publisher pays his travel costs to promote the book?

The Commission was unable to approve a response to this question by the required four affirmative votes.

Question 5. May the Committee collect email addresses of people who attend the Senator’s book signing and promotional events, for the purpose of soliciting contributions in the future?

The Commission was unable to approve a response to this question by the required four affirmative votes.

The Commission expresses no opinion regarding the application of the rules of the United States Senate or any tax law ramifications of the proposed activities, because those are not within the Commission’s 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 requestor 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