

PUBLIC COMMENTS ON DRAFT ADVISORY OPINIONS

Members of the public may submit written comments on draft advisory opinions.

DRAFT ADVISORY OPINION 2012-16 is now available for comment. It was requested by J. Maurice Bisson, on behalf of Angus King for U.S. Senate Campaign and Pierce Atwood LLP, and is scheduled to be considered by the Commission at its public meeting on May 10, 2012. The meeting will begin at 10:00 a.m. and will be held in the 9th Floor Hearing Room at the Federal Election Commission, 999 E Street, NW, Washington, DC. Individuals who plan to attend the public meeting and who require special assistance, such as sign language interpretation or other reasonable accommodations, should contact the Commission Secretary, at (202) 694-1040, at least 72 hours prior to the meeting date.

If you wish to comment on DRAFT ADVISORY OPINION 2012-16, please note the following requirements:

- 1) Comments must be in writing, and they must be both legible and complete.
- 2) Comments must be submitted to the Office of the Commission Secretary by hand delivery or fax ((202) 208-3333), with a duplicate copy submitted to the Office of General Counsel by hand delivery or fax ((202) 219-3923).
- 3) Comments must be received by 9 a.m. (Eastern Time) on May 10, 2012.
- 4) The Commission will generally not accept comments received after the deadline. Requests to extend the comment period are discouraged and unwelcome. An extension request will be considered only if received before the comment deadline and then only on a case-by-case basis in special circumstances.
- 5) All timely received comments will be made available to the public at the Commission's Public Records Office and will be posted on the Commission's website at <http://saos.nictusa.com/saos/searchao>.

REQUESTOR APPEARANCES BEFORE THE COMMISSION

The Commission has implemented a pilot program to allow advisory opinion requestors, or their counsel, to appear before the Commission to answer questions at the open meeting at which the Commission considers the draft advisory opinion. This program took effect on July 7, 2009.

Under the program:

- 1) A requestor has an automatic right to appear before the Commission if any public draft of the advisory opinion is made available to the requestor or requestor's counsel less than one week before the public meeting at which the advisory opinion request will be considered. Under these circumstances, no advance written notice of intent to appear is required. This one-week period is shortened to three days for advisory opinions under the expedited twenty-day procedure in 2 U.S.C. 437f(a)(2).
- 2) A requestor must provide written notice of intent to appear before the Commission if all public drafts of the advisory opinion are made available to requestor or requestor's counsel at least one week before the public meeting at which the Commission will consider the advisory opinion request. This one-week period is shortened to three days for advisory opinions under the expedited twenty-day procedure in 2 U.S.C. 437f(a)(2). The notice of intent to appear must be received by the Office of the Commission Secretary by hand delivery, email (Secretary@fec.gov), or fax ((202) 208-3333), no later than 48 hours before the scheduled public meeting. Requestors are responsible for ensuring that the Office of the Commission Secretary receives timely notice.
- 3) Requestors or their counsel unable to appear physically at a public meeting may participate by telephone, subject to the Commission's technical capabilities.
- 4) Requestors or their counsel who appear before the Commission may do so only for the limited purpose of addressing questions raised by the Commission at the public meeting. Their appearance does not guarantee that any questions will be asked.

FOR FURTHER INFORMATION

Press inquiries: Judith Ingram
Press Officer
(202) 694-1220

Commission Secretary: Shawn Woodhead Werth
(202) 694-1040

Comment Submission Procedure: Kevin Deeley
Acting Associate General Counsel
(202) 694-1650

Other inquiries:

To obtain copies of documents related to Advisory Opinion 2012-16, contact the Public Records Office at (202) 694-1120 or (800) 424-9530, or visit the Commission's website at <http://saos.nictusa.com/saos/searchao>.

ADDRESSES

Office of the Commission Secretary
Federal Election Commission
999 E Street, NW
Washington, DC 20463

Office of General Counsel
ATTN: Kevin Deeley, Esq.
Federal Election Commission
999 E Street, NW
Washington, DC 20463

AGENDA DOCUMENT NO. 12-33



FEDERAL ELECTION COMMISSION
Washington, DC 20463

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2012 MAY -9 P 3:38

May 9, 2012

AGENDA ITEM

MEMORANDUM

TO: The Commission

FROM: Anthony Herman *AH*
General Counsel

Kevin Deeley *KD*
Acting Associate General Counsel

Robert M. Knop *RMK*
Assistant General Counsel

Jessica Selinkoff *JS*
Attorney

Subject: Draft AO 2012-16 (Angus King for U.S. Senate Campaign and
Pierce Atwood LLP)

For Meeting of 5-10-12

SUBMITTED LATE

Attached is a proposed draft of the subject advisory opinion. We have been asked to have this draft placed on the Open Session agenda for May 10, 2012.

Attachment

1 ADVISORY OPINION 2012-16

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3 J. Maurice Bisson

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Treasurer

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Angus King for U.S. Senate Campaign

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P.O. Box 368

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135 Main Street

8

Brunswick, ME 04011

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DRAFT

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Elizabeth R. Butler, Esq.

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Pierce Atwood LLP

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254 Commercial Street

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Portland, ME 04101

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Dear Mr. Bisson and Ms. Butler:

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We are responding to your advisory opinion request concerning the application of

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the Federal Election Campaign Act of 1971, as amended (the "Act"), and Commission

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regulations to proposed legal services for Angus King for U.S. Senate Campaign (the

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"Committee") to be provided by Pierce Atwood LLP (the "Firm") and its partners,

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associates, and other employees. The Commission concludes that the Firm may provide

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to the Committee *pro bono* legal services pertaining to compliance with the Act and

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Commission regulations. The Commission further concludes that the Firm's partners,

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associates, and other employees may, individually, volunteer their time as proposed.

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Background

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The facts presented in this advisory opinion are based on your letter received on

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March 30, 2012, and your email received on April 9, 2012.

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The Committee is the authorized campaign committee of Angus King, a United

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States Senate candidate from Maine. The Firm operates as a limited liability partnership.

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The Firm represents that it provides legal services, under a direct contract, to the

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Millennium Challenge Corporation, a special purpose "Federal corporation" as defined in

1 22 U.S.C. 7703 and 5 U.S.C. 103. The Firm is paid for these legal services by funds
2 appropriated from Congress. The Firm also intends to bid on and perform legal services
3 for other Federal agencies.

4 The Firm and the Committee have drafted a letter of agreement in which they set
5 forth terms governing (1) the Firm's proposed provision of *pro bono* legal services to the
6 Committee; (2) the Firm's proposed provision of other legal services to the Committee;
7 and (3) Firm partner, associate, and other employee volunteer time and expenses for the
8 Committee.

9 The Firm proposes to provide *pro bono* legal services to the Committee only for
10 the purpose of ensuring the Committee's compliance with the Act and Commission
11 regulations, consistent with the provisions of 2 U.S.C. 431(8)(B)(viii)(II) and 2 U.S.C.
12 431(9)(B)(vii)(II). The Firm will track the time spent on these *pro bono* legal services
13 and send the Committee a monthly statement indicating the time and value of the
14 services, as determined at the Firm's normal and usual rates. The Committee will report
15 the value of those services in accordance with 11 CFR 104.3. The Firm will bill the
16 Committee for any out-of-pocket expenses, such as delivery and courier fees, incurred in
17 the course of providing *pro bono* legal services. The firm will not bill the Committee for
18 the use of firm resources, such as research services or secretarial time, incurred in
19 providing *pro bono* legal services. The letter of agreement specifies that for legal
20 services not involving compliance with the Act or Commission regulations, the Firm will
21 bill the Committee, and the Committee will pay the Firm's normal and usual rates.

22 The letter of agreement also addresses the conditions under which the Firm's
23 partners, associates, and other employees, individually and independently, may volunteer

1 their time to the Committee. The Committee and the Firm represent that they do not
2 anticipate that any of the Firm's attorneys or other employees would volunteer so much
3 time that it would intrude significantly upon compensated time or require more than
4 occasional use of the Firm's facilities. The letter of agreement specifies that Firm
5 partners and employees must meet their anticipated work hours or targeted productivity
6 levels (per their arrangements with the Firm) within a reasonable period of time,
7 notwithstanding any volunteer time for the Committee; otherwise, they must report
8 volunteered time as earned vacation or leave time. Under the letter of agreement, a Firm
9 partner or associate whose volunteer time would prevent him or her from meeting his or
10 her work hours or targeted productivity levels would notify, in advance, the Firm's
11 Managing Partner, who would modify the arrangement to anticipate the reduced hours.
12 The effect on compensation of a partner or associate's reduced productivity resulting
13 from volunteer time for the Committee will be the same as the effect on compensation of
14 other reduced productivity.

15 Under the letter of agreement a Firm partner, associate, or other employee while
16 undertaking volunteer work for the Committee may make occasional, isolated, or
17 incidental use of the Firm's facilities. Individual volunteers would not have to reimburse
18 the Firm for this incidental use of facilities if the use does not result in any increase in the
19 Firm's operating or overhead costs. An individual's volunteer Internet activity, under the
20 letter of agreement, does not need to be reported as a reimbursable overhead cost so long
21 as the use complies with the Firm's general computer and Internet use policy and the
22 other terms of the letter of agreement.

1 A Firm partner, associate, or other employee who, while volunteering for the
2 Committee, makes more than occasional, isolated, or incidental use of the Firm's
3 resources will track the use and reimburse the Firm according to the usual and normal
4 fees for such use as set forth in the letter of agreement. The individual volunteer, under
5 the letter of agreement, is also required to report the reimbursed amounts as in-kind
6 contributions from the individual to the Committee.

7 ***Questions Presented***

8 1. *May the Firm, a limited liability partnership, provide pro bono legal*
9 *services pertaining to compliance with the Act and Commission regulations to the*
10 *Committee, even though the Firm is a Federal contractor?*

11 2. *May the Firm's partners, associates, or staff, individually, volunteer time*
12 *in the form of legal or other services to the Committee in accordance with the letter of*
13 *agreement without the Firm inadvertently providing the Committee a prohibited in-kind*
14 *contribution?*

15 ***Legal Analysis and Conclusions***

16 1. *May the Firm, a limited liability partnership, provide pro bono legal*
17 *services pertaining to compliance with the Act and Commission regulations to the*
18 *Committee, even though the Firm is a Federal contractor?*

19 Yes, the Firm may provide *pro bono* legal services pertaining to compliance with
20 the Act to the Committee, even though the Firm is a Federal contractor.

21 Under the Act and Commission regulations, a "contribution" includes the
22 "payment by any person of compensation for the personal services of another person if
23 those services are rendered without charge to a political committee for any purpose." 2

1 U.S.C. 431(8)(A)(ii); 11 CFR 100.54. The provision of services at less than the usual and
2 normal charge is also a contribution. 11 CFR 100.52(d).

3 The Act and Commission regulations generally prohibit partnerships that are
4 Federal contractors -- such as the Firm -- from making contributions to any candidate for
5 Federal office. See 2 U.S.C. 441c(a)(1); 11 CFR 115.2(a), 115.4(a); Advisory Opinion
6 2005-20 (Pillsbury Winthrop Shaw Pittman); Advisory Opinion 1975-31 (Shapp for
7 President Committee).

8 However, the Act and Commission regulations specifically exempt from the
9 definition of "contribution" certain legal services provided solely to ensure compliance
10 with the Act. See 2 U.S.C. 431(8)(B)(viii)(II); 11 CFR 100.86; Advisory Opinion 2006-
11 22 (Wallace). Legal services provided solely to ensure compliance with the Act rendered
12 to the authorized committee of a candidate or any other political committee are not
13 contributions if the person paying for such services is the regular employer of the
14 employee rendering the services. See 2 U.S.C. 431(8)(B)(viii)(II); 11 CFR 100.86;
15 Advisory Opinion 2001-07 (NMC PAC) (allowing a partnership to provide free legal and
16 accounting services to a political committee to ensure compliance with the Act). For
17 purposes of this exception to the definition of "contribution," a partnership is deemed the
18 regular employer of a partner. 11 CFR 100.86. Partnerships thus generally may pay
19 their partners, associates, and other employees to provide authorized committees *pro*
20 *bono* legal services pertaining to compliance with the Act, without these payments being
21 deemed contributions.

22 Because the prohibition on Federal contractor contributions is limited by the
23 definition of "contribution," the Firm may pay its partners, associates and other regular

1 employees to provide the Committee *pro bono* legal services pertaining to compliance
2 with the Act. *See Wagner v. FEC*, 11-1841 (JEB), 2012 WL 1255145 at *9 (D.D.C. Apr.
3 16, 2012) (concluding the prohibition on contributions by Federal contractors in 2 U.S.C.
4 441c does not prohibit Federal contractors from volunteering for campaigns).¹ The
5 amounts paid by the Firm for the services of its employees, including partners, must be
6 reported to the Committee in accordance with 11 CFR 104.3(h), as described in the
7 request.² *See* 11 CFR 100.86.

8 2. *May the Firm's partners, associates, or staff, individually, volunteer time*
9 *in the form of legal or other services to the Committee in accordance with the letter of*
10 *agreement without the Firm inadvertently providing the Committee a prohibited in-kind*
11 *contribution?*

12 Yes, the Firm's partners, associates, and other employees, individually, may
13 volunteer time in the form of legal or other services to the Committee in accordance with
14 the letter of agreement without the Firm inadvertently providing the Committee a
15 prohibited in-kind contribution.

16 The Act and Commission regulations specifically exempt certain uncompensated
17 volunteer activities by individuals from constituting "contributions." "Contribution" by
18 definition "does not include the value of services provided without compensation by any
19 individual who volunteers on behalf of a candidate or political committee." 2 U.S.C.

¹ The Commission has similarly applied the exception to the definition of "contribution" at 11 CFR 100.74 to permit volunteer activities of individual foreign nationals, who would otherwise be prohibited from making contributions. *See* Advisory Opinion 1987-25 (Otaola) (noting that the foreign national contribution prohibition in the Act is "limited in scope . . . to the meaning of the term 'contribution'").

² The Firm states that it will provide *pro bono* legal services to the Committee only for the purposes of ensuring the Committee's compliance with the Act and Commission regulations and that the Firm will bill the Committee for any out-of-pocket expenses, such as delivery and courier fees, incurred in the course of providing the *pro bono* legal services.

1 431(8)(B)(i); *see also* 11 CFR 100.74. Similarly, an individual's uncompensated
2 personal services related to certain Internet activities, are not contributions. *See* 11 CFR
3 100.94(a), (b).

4 The letter of agreement includes provisions regarding a Firm partner or employee
5 who, because of his or her volunteer activity providing services on behalf of the
6 Committee, does not anticipate meeting his or her arranged work hours or targeted
7 productivity levels. Such Firm personnel must report volunteered time as earned
8 vacation or leave time and notify, in advance, the Firm's Managing Partner so the
9 volunteers' employment arrangement and compensation can be modified in accordance
10 with the Firm's usual and normal treatment of reduced productivity. The individual
11 volunteer's time and services thus will not be "compensated" by the Firm and will not
12 constitute a contribution from the Firm to the Committee.³ *See* Advisory Opinion 2006-
13 13 (Spivak).

14 The Firm's and the Committee's proposal regarding volunteers' use of Firm
15 facilities and resources tracks the Commission's regulations governing the use of
16 corporate or labor organization facilities for individual volunteer activity by the
17 corporation's employees and stockholders or labor organization's officials, members, and
18 employees. *See* 11 CFR 114.9. Essentially, those provisions require a volunteer
19 employee to reimburse the corporation or labor organization for "occasional, isolated, or
20 incidental use only to the extent that the corporation or labor organization incurs

³ This reasoning applies to partners as well as Firm associates and employees. *See, e.g.*, 11 CFR 115.4(b) (permitting contributions by individual partners of Federal contractor partnership in their own names from their own personal assets); Advisory Opinion 1975-31 (Shapp) ("[A]n individual partner [of a Federal contractor partnership] can engage in a broad range of activities without affecting the legal relations between or among the partners or between the partners and . . . the Federal Government.").

1 expenses above its normal operating costs as a result of such [volunteer] activity” and for
2 any use of the facilities exceeding occasional, isolated, or incidental use. FEDERAL
3 ELECTION COMMISSION, EXPLANATION AND JUSTIFICATION FOR AMENDMENTS TO
4 FEDERAL ELECTION CAMPAIGN ACT OF 1971, H.R. DOC. NO. 95-44, at 115 (1977); *see*
5 *also* 11 CFR 114.9(a)(2)(i) (creating a safe harbor for “occasional, isolated, or incidental
6 use” of up to one hour per week or four hours per month).

7 Under the letter of agreement, an individual volunteer would not have to
8 reimburse the Firm for his occasional, isolated, or incidental use of the Firm’s facilities if
9 his use does not result in any increase in the Firm’s operating or overhead costs. As
10 proposed, individual Firm volunteers who make more than occasional, isolated, or
11 incidental use of the Firm’s resources, or whose use increases the Firm’s overhead costs,
12 would reimburse the Firm according to the usual and normal fees for such use and report
13 the reimbursed amounts as in-kind contributions from the individual to the Committee.

14 Accordingly, the Commission concludes that individual partners, associates, and
15 employees of the Firm who use the Firm’s facilities in the course of volunteering their
16 time and services to the Committee may reimburse the Firm as detailed in the letter of
17 agreement without the Firm providing the Committee a prohibited in-kind contribution.
18 *See* Advisory Opinion 2001-07 (NMC PAC) (concluding a partnership may, by analogy
19 to 11 CFR 114.9, allow a nonconnected committee to use its office facilities so long as
20 the nonconnected committee reimburse the partnership the usual and normal charge for
21 the use within a commercially reasonable time).

22 This response constitutes an advisory opinion concerning the application of the
23 Act and Commission regulations to the specific transaction or activity set forth in your

1 request. *See* 2 U.S.C. 437f. The Commission emphasizes that, if there is a change in any
2 of the facts or assumptions presented, and such facts or assumptions are material to a
3 conclusion presented in this advisory opinion, then the requestor may not rely on that
4 conclusion as support for its proposed activity. Any person involved in any specific
5 transaction or activity which is indistinguishable in all its material aspects from the
6 transaction or activity with respect to which this advisory opinion is rendered may rely on
7 this advisory opinion. *See* 2 U.S.C. 437f(c)(1)(B). Please note that the analysis or
8 conclusions in this advisory opinion may be affected by subsequent developments in the
9 law including, but not limited to, statutes, regulations, advisory opinions, and case law.
10 The cited advisory opinions are available on the Commission's website, or directly from
11 the Commission's Advisory Opinion searchable database at <http://www.fec.gov/searchao>.

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On behalf of the Commission,

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Caroline C. Hunter

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Chair