



FEDERAL ELECTION COMMISSION
Washington, DC 20463

June 13, 2013

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

ADVISORY OPINION 2013-03

Marc E. Elias, Esq.
Andrew H. Werbrock, Esq.
Perkins Coie LLP
700 Thirteenth Street, NW
Suite 600
Washington, D.C. 20005-3960

Dear Messrs. Elias and Werbrock:

We are responding to your advisory opinion request on behalf of Erin Bilbray-Kohn. Ms. Bilbray-Kohn is currently exploring whether to become a candidate for the U.S. House of Representatives, and she asks whether she may serve as a paid consultant to Emerge Nevada, a non-profit corporation, after becoming a candidate. The Commission concludes that, under the terms described in your request, Ms. Bilbray-Kohn may serve as a paid consultant to Emerge Nevada after becoming a candidate.

Background

The facts presented in this advisory opinion are based on your letter received on April 22, 2013, and email dated April 26, 2013.

Emerge Nevada is a non-profit Nevada corporation holding tax-exempt status as a “political organization” under section 527 of the Internal Revenue Code.¹ Ms. Bilbray-Kohn founded Emerge Nevada in 2006. The organization is not registered with the Commission, and it raises and spends funds that are not subject to the contribution limits and source restrictions of the Federal Election Campaign Act (“FECA”).

Emerge Nevada’s stated mission is to help elect Democratic women to State and local offices in Nevada. It advances this goal by recruiting women candidates to run for these offices and conducting a periodic training program for candidates. The program

¹ 26 U.S.C. 527.

trains participants in “all aspects of running a political campaign,” including public speaking and communications, fundraising, media and messaging, networking, field operations, and technology and new media.

Until recently, Ms. Bilbray-Kohn was employed as the Executive Director of Emerge Nevada and served as a member of the organization’s Board of Directors. In her role as Executive Director, Ms. Bilbray-Kohn raised funds for Emerge Nevada and directed its operations, organized its training program, and conducted most of the program’s training sessions.

Ms. Bilbray-Kohn is currently exploring whether she will become a candidate for the U.S. House of Representatives in Nevada’s Third Congressional District in the 2014 election. She states that she has not yet raised contributions or made expenditures aggregating in excess of \$5,000. Ms. Bilbray-Kohn further states that she has not used Emerge Nevada’s resources to support her testing-the-waters activities, nor will she use Emerge Nevada’s resources for campaign-related activities if she becomes a candidate.

In anticipation of her potential candidacy, Ms. Bilbray-Kohn resigned her positions with Emerge Nevada. According to the request, after arm’s-length negotiations between Ms. Bilbray-Kohn and the Board of Directors, Emerge Nevada retained her as a paid consultant. As a consultant, Ms. Bilbray-Kohn expects to work approximately 20 hours per week for Emerge Nevada. Her duties will be limited to organizing and conducting portions of the training program — a subset of the tasks that she previously performed as Executive Director. She will also advise individual candidates for State and local office on fundraising matters but will not solicit, direct, or receive any donations for such candidates or for Emerge Nevada. Ms. Bilbray-Kohn will not have authority to spend Emerge Nevada’s funds, to make decisions regarding such spending, or otherwise to exercise any control over the organization.

The request states that Emerge Nevada retained Ms. Bilbray-Kohn as a paid consultant because of her past experience developing and running the organization’s training program, her expertise with Nevada politics, and the difficulty that Emerge Nevada would have in obtaining these services from third-parties in the short term. The request states that all compensation will be paid to her exclusively in consideration for her consulting services. The amount of her compensation — based on the Board’s assessment of the value of her services — will be \$5,000 per month, which represents half of her former salary plus an additional \$500 per month to account for some of the extra costs that she will bear as a consultant (such as payroll taxes and business expenses).² The request states that Emerge Nevada would expect to pay equivalent or higher compensation to any other training consultant with Ms. Bilbray-Kohn’s knowledge and experience. Emerge Nevada has two other paid consultants: a communications consultant who conducts an annual five-hour communications training

² The request states that, as a contractor, Ms. Bilbray-Kohn will personally incur more than \$1,000 per month in business expenses and payroll tax obligations that she did not incur as an employee.

for candidates for a fee of \$2,500 per training, and a finance consultant who assists EmERGE Nevada with its organizational fundraising for approximately four hours per week and is compensated at \$3,000 per month.

Questions Presented

1. *May Ms. Bilbray-Kohn serve as a consultant to EmERGE Nevada after becoming a candidate?*
2. *Would consulting fees paid by EmERGE Nevada to Ms. Bilbray-Kohn after she becomes a candidate be prohibited contributions?*

Legal Analysis and Conclusions

1. *May Ms. Bilbray-Kohn serve as a consultant to EmERGE Nevada after becoming a candidate?*

Yes, Ms. Bilbray-Kohn may serve as a consultant to EmERGE Nevada, a non-profit political organization, after becoming a candidate because as a consultant she would not solicit, receive, direct, transfer, spend, or disburse funds outside FECA's limits and restrictions.

Federal officeholders and candidates may not raise or spend funds in connection with an election for Federal office "unless the funds are subject to the limitations, prohibitions, and reporting requirements" of FECA. 2 U.S.C. 441i(e)(1)(A); 11 C.F.R. 300.61. Such persons also may not raise or spend funds in connection with any non-Federal election unless the funds are raised within FECA's contribution limits and source restrictions. 2 U.S.C. 441i(e)(1)(B); 11 C.F.R. 300.62.

In Advisory Opinion 2005-02 (Corzine II), the Commission considered whether FECA prohibits a Federal officeholder from helping State and local candidates, State political committees, and State and local party committees to "plan the structure of their fundraising and spending." Advisory Opinion 2005-02 at 8 (Corzine II). The Commission noted that, in analyzing FECA's related prohibition on national party committees soliciting or receiving funds outside FECA's source and amount limitations, the Supreme Court had described the statute as permitting those national committees to "sit[] down with state and local party committees or candidates to plan and advise how to raise and spend soft money." *McConnell v. FEC*, 540 U.S. 93, 160 (2003) ("As long as the national party officer does not personally spend, receive, direct, or solicit soft money, [2 U.S.C. 441i(a)] permits a wide range of joint planning and electioneering activity."), *overruled in part on other grounds*, *Citizens United v. FEC*, 558 U.S. 310 (2010). The Commission relied on this statement from *McConnell* to conclude that Senator Corzine and his agents could consult with non-Federal candidates "to help them plan how to raise and spend non-Federal funds, so long as Senator Corzine and his agents [did] not solicit, receive, direct, transfer, spend, or disburse" non-Federal funds. Advisory Opinion

2005-02 at 8 (Corzine II). The Commission also concluded that Senator Corzine and his agents could recommend individuals for employment to non-Federal candidates, political committees, and parties to conduct fundraising, even if those individuals' duties would involve soliciting, receiving, or disbursing non-Federal funds, "so long as the recommended individual is not acting as an agent for Senator Corzine." *Id.*

Similarly, under the facts presented here, section 441i(e)(1) would not prohibit Ms. Bilbray-Kohn from consulting for Emerge Nevada after she becomes a candidate. As a consultant, Ms. Bilbray-Kohn's duties will be limited to organizing Emerge Nevada's training program, conducting candidate training sessions, and providing advice to individual candidates. She will not solicit or receive funds for the candidates or Emerge Nevada, and she will not direct or control any of the candidates' or organization's spending of non-Federal funds. Although she will train State and local candidates on fundraising, those candidates will not be acting as Ms. Bilbray-Kohn's agents when they subsequently raise funds for their own non-Federal campaigns. Therefore, in light of the limits on her role as described in the request, Ms. Bilbray-Kohn may serve as a consultant to Emerge Nevada after becoming a candidate without violating the prohibition on Federal candidates soliciting, receiving, transferring, spending, or disbursing non-Federal funds.

2. *Would consulting fees paid by Emerge Nevada to Ms. Bilbray-Kohn after she becomes a candidate be prohibited contributions?*

No, consulting fees paid by Emerge Nevada to Ms. Bilbray-Kohn after she becomes a candidate would not be prohibited contributions.

Corporations, including those exempt from taxation under section 527 of the Internal Revenue Code, are prohibited from making contributions to Federal candidates or their authorized committees. 2 U.S.C. 441b(a); 11 C.F.R. 114.2(b)(1). Payments of "compensation" to a candidate "shall be considered contributions" from the payor to the candidate unless:

- (A) The compensation results from *bona fide* employment that is genuinely independent of the candidacy;
- (B) The compensation is exclusively in consideration of services provided by the employee as part of this employment; and
- (C) The compensation does not exceed the amount of compensation which would be paid to any other similarly qualified person for the same work over the same period of time.

11 C.F.R. 113.1(g)(6)(iii); *see, e.g.*, Advisory Opinion 2011-27 (New Mexico Voices for Children) (applying section 113.1(g)(6)(iii) to determine whether compensation paid to candidate would be contribution); Advisory Opinion 2006-13 (Spivack) (same); Advisory Opinion 2004-17 (Klein) (same); Advisory Opinion 2004-08 (American Sugar Cane League) (same).

The Commission concludes that Emerge Nevada's consulting payments to Ms. Bilbray-Kohn will not be contributions because they will satisfy each of the three regulatory factors of section 113.1(g)(6)(iii). First, the compensation will result from Ms. Bilbray-Kohn's "*bona fide* employment" as a consultant, which will be "genuinely independent" of her candidacy. 11 C.F.R. 113.1(g)(6)(iii)(A). The request states that Emerge Nevada retained Ms. Bilbray-Kohn as a consultant because of her past experience in developing and running Emerge Nevada's training program, her expertise with Nevada politics, and the difficulty Emerge Nevada would otherwise face in obtaining such services in the short-term from other vendors. None of these factors is dependent upon — or even in any way related to — Ms. Bilbray-Kohn's candidacy for Federal office. Furthermore, there is no indication that Ms. Bilbray-Kohn's duties as a consultant or compensation for her services will change should she become a candidate. Hence, fees paid by Emerge Nevada for Ms. Bilbray-Kohn's consulting services after she becomes a candidate will be paid independent of her candidacy.

Second, Ms. Bilbray-Kohn's compensation will be "exclusively in consideration of [her] services" as a consultant to Emerge Nevada. 11 C.F.R. 113.1(g)(6)(iii)(B). Ms. Bilbray-Kohn will perform a subset of the duties she previously performed as Executive Director, and she will be compensated only for those reduced duties, not for any activities she undertakes as a candidate or on behalf of any other organization. Thus, her entire compensation will be in consideration of the services she provides to Emerge Nevada.

Third, Ms. Bilbray-Kohn's compensation will not exceed the amount that would be paid to any other similarly qualified person for the same work over the same period of time. 11 C.F.R. 113.1(g)(6)(iii)(C). The request states that the amount of her compensation is no more than Emerge Nevada is paying any other training consultant with her level of knowledge and experience.

In sum, because the fees paid to Ms. Bilbray-Kohn will result from her *bona fide* employment that is genuinely independent of her candidacy, will be exclusively in consideration of the services provided by Ms. Bilbray-Kohn as part of her *bona fide* employment, and will be no higher than compensation that would be provided to similarly qualified consultants, those fees will meet the requirements of 11 C.F.R. 113.1(g)(6)(iii). Accordingly, the Commission concludes that Emerge Nevada's payments to Ms. Bilbray-Kohn after she becomes a candidate, as described above, will not be contributions under FECA and the Commission's regulations.

This response constitutes an advisory opinion concerning the application of FECA 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 that 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 from the Commission's Advisory Opinion searchable database at <http://www.fec.gov/searchao>.

On behalf of the Commission,

(signed)
Ellen L. Weintraub
Chair