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BEFORE THE FEDERAL ELECTION COMMISSION

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**SENSITIVE**

In the Matter of )  
)  
Jeffrey Flake )  
Jeff Flake for Congress and )  
Jack Gibson, as treasurer )  
Ira Fulton )  
Arizona School Choice )  
Administration Corporation )  
Arizona School Choice Trust, Inc. and )  
Tom Patterson, as Chairman )

GENERAL COUNSEL'S REPORT # 2

**I. ACTIONS RECOMMENDED**

Find no reason to believe that Arizona School Choice Trust, Inc. and Tom Patterson, as Chairman, violated any provision of the Act or the Commission's regulations; take no further action against the remaining respondents; and close the file.

**II. INTRODUCTION**

This Report discusses whether payments to a federal candidate from an incorporated non-profit fundraising organization, where he was assertedly hired to set up employer-sponsored payroll deduction plans to fund the organization pursuant to state law, constituted prohibited or excessive contributions under the Act. This Office believes that there is insufficient evidence to support violations of the Act, as the information obtained during the investigation is consistent with the respondents' contentions that the consulting arrangement between the candidate and the organization was *bona fide* and independent of his candidacy, that any compensation he received was in consideration for, and commensurate with, services performed for the organization, and was not paid with donations earmarked for that purpose.

**III. BACKGROUND**

Founded in 1992, Arizona School Choice Trust, Inc. ("ASCT") is a section 501(c)(3) Arizona non-profit corporation that provides tuition scholarships to lower income families in Arizona to use at their school of choice. <<http://www.asct.org>>. In 1997, Arizona enacted a statute permitting state taxpayers to receive a limited dollar-for-dollar tax credit for their scholarship donations to "school tuition organizations" such as ASCT. See A.R.S. § 43-1089. In order to benefit from the tax credit, such organizations must allocate at least 90% of their annual revenue for scholarships. *Id.* To maintain this minimum allocation and to ensure continued compliance with the terms of the statute, ASCT set up an affiliated non-profit corporation in 1997, the Arizona School Choice Administration Corporation ("ASCAC"). Attachment 2 at 2. Donations to ASCAC are used to fund ASCT's operations, allowing ASCT to use all other donations for scholarship assistance. *Id.*

The complaint essentially alleged that Jeffry Flake entered into a sham arrangement with ASCT whereby donations were made by individuals and corporations to ASCT to cover Flake's salary while he campaigned for election as U.S. Representative from Arizona's First Congressional District. The available information showed that Flake was actually hired by ASCAC and paid \$8,000 per month from October 1999 through May 2000, a total of \$64,000.<sup>1</sup> The information suggested that Flake may have been compensated in excess of the amount of work he performed and that certain donations to ASCAC may have been made and used for the specific purpose of paying Flake's salary. In particular, one donor, Flake campaign co-finance

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<sup>1</sup> Although the complaint alleged that Flake had been hired by ASCT, ASCT's response to the complaint stated that Flake worked as a consultant to ASCAC. ASCT claimed that Flake's salary was paid solely by ASCAC and that a consulting agreement was entered into only between Flake and ASCAC. Based upon this information, the Commission internally generated ASCAC as a respondent and made findings against it rather than ASCT. See Attachments 4 and 7 of the First General Counsel's Report dated April 2, 2001 (ASCT's response to complaint and affidavit of Thomas W. Rouse, Esq.). In addition, although ASCT's response to the complaint referred to ASCAC as the Arizona School Choice Administrative Corporation, ASCAC's response to the reason-to-believe notification clarified that the organization's actual name is the Arizona School Choice Administration Corporation.

chair Ira Fulton, donated \$100,000 to ASCAC during Flake's tenure, suggesting that these funds may have been earmarked to pay Flake.

Based on this and other relevant information set forth in the First General Counsel's Report dated April 2, 2001 ("FGCR"), the Commission, on April 17, 2001, made the following reason-to-believe findings against these respondents:

Ira Fulton: 2 U.S.C. § 441a(a)(1)(A) for making excessive contributions to Jeff Flake for Congress ("Flake Committee") and 2 U.S.C. § 441f for making these contributions in ASCAC's name;

ASCAC: 2 U.S.C. § 441b(a) for making prohibited contributions by paying \$64,000 to Flake and, alternatively, 2 U.S.C. § 441f for knowingly permitting its name to be used to effect contributions from Ira Fulton;

Flake Committee (and treasurer<sup>2</sup>): 2 U.S.C. § 441b(a) for knowingly accepting prohibited contributions from ASCAC and, alternatively, 2 U.S.C. §§ 441a(f) and 441f for knowingly accepting excessive contributions from Ira Fulton through ASCAC;

Jeffry Flake: 2 U.S.C. § 441b(a) for knowingly accepting prohibited contributions from ASCAC (by suggesting that he be hired by ASCAC, soliciting donations to ASCAC from Ira Fulton and accepting salary payments from ASCAC) and, alternatively, 2 U.S.C. §§ 441a(f) and 441f for knowingly accepting excessive contributions from Ira Fulton through ASCAC.

The evidence gathered during the investigation, which is discussed in detail below as it relates to applicable regulatory criteria, includes the reason-to-believe response of ASCAC and documents it submitted pursuant to this Office's requests ("ASCAC response"); the reason-to-believe response of Jeffry Flake/Flake Committee and responses from Jeffry Flake to our follow-up questions ("Flake response"); Ira Fulton's answers to interrogatories and document requests;

<sup>2</sup> The reason-to-believe findings were made against the Flake Committee's former treasurer, Scott Johnson. In an amended Statement of Organization, Jeff Flake for Congress listed Jack Gibson as its current treasurer. In accordance with Commission policy, Gibson is named as the respondent treasurer in this Report.

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1 several other affidavits, most of which were appended to the responses; and interviews with the  
2 former chairman and the former executive director of ASCT/ASCAC.<sup>3</sup>

3 **IV. DISCUSSION**<sup>4</sup>

4 The Act and Commission regulations prohibit the conversion of campaign funds to any  
5 personal use. 2 U.S.C. § 439a; 11 C.F.R. § 113.2(d). Notwithstanding that the use of campaign  
6 funds for a particular expense would constitute personal use, payment of that expense by any  
7 person other than the candidate or the campaign committee shall be a contribution to the  
8 candidate, unless the payment would have been made irrespective of the candidacy. See  
9 11 C.F.R. § 113.1(g)(6). More specifically, the regulations provide that payments "that are  
10 compensation [to a candidate] shall be considered contributions unless"

- 11 (A) The compensation results from *bona fide* employment that is genuinely independent  
12 of the candidacy;  
13  
14 (B) The compensation is exclusively in consideration of services provided by the  
15 employee as part of this employment; and  
16  
17 (C) The compensation does not exceed the amount of compensation which would be paid  
18 to any other similarly qualified person for the same work over the same period of  
19 time.  
20  
21 11 C.F.R. § 113.1(g)(6)(iii).

22 These three criteria are analyzed separately below as they apply to the facts of this matter,  
23 followed by a discussion of the related issue of whether Ira Fulton's donation to ASCAC was a  
24 contribution to the Flake campaign.

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<sup>3</sup> This Office has attached the most relevant portions of documents gathered during discovery; the remaining documents are available in the Central Enforcement Docket.

<sup>4</sup> All of the facts in this matter occurred prior to the effective date of the Bipartisan Campaign Reform Act of 2002 ("BCRA"), Pub. L. 107-155, 116 Stat. 81 (2002). Accordingly, unless specifically noted to the contrary, all citations to the Act herein are as it read prior to the effective date of BCRA and all citations to the Commission's regulations herein are to the 2002 edition of Title 11, Code of Federal Regulations, which was published prior to the Commission's promulgation of any regulations under BCRA.

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1 made much progress" in initiating a program at ASCT/ASCAC to secure donations using this  
2 method. *Id.* at 33. Patterson explained in an interview that, prior to Flake's hiring, there was  
3 "minimal, no more than casual discussion" regarding the program. Patterson Report of  
4 Investigation ("ROI"), Attachment 3 at 1. He added that he believed ASCT/ASCAC's program  
5 was the first of its kind in the United States, and that there was still a tremendous amount of  
6 uncertainty involved in implementing employer-sponsored deduction plans. *Id.* at 1-2. Patterson  
7 stated in his affidavit that Flake "offered a unique opportunity to allow us to introduce the  
8 concepts of payroll deduction plans to the local business community because of his close  
9 associations with senior management at a number of Arizona-based corporations." Attachment 2  
10 at 33-34.

11 According to Patterson, Flake initially approached him about working for ASCAC and  
12 told him that he was leaving the Goldwater Institute, which Flake did in September 1999.  
13 Patterson ROI, Attachment 3 at 11. Flake told him that he needed something for "a year or so,"  
14 that he did not want a "nine-to-five job," and that he wanted "something in [the \$8,000/month]  
15 range." *Id.* at 12, 14. Patterson said that he thought "it would be a good fit" to hire Flake to set  
16 up a payroll deduction program for ASCT/ASCAC. *Id.* at 12. Patterson touted Flake's  
17 experience in school choice matters in Arizona, describing Flake as a "trailblazer" who could  
18 provide "a burst of energy" in initiating the program, so that little effort would be required to  
19 maintain it. *Id.* at 1, 4-5. Patterson stated that Flake assured him he would have time to  
20 implement the payroll deduction program even though he was running for Congress. Flake told  
21 him that the hours he put into his campaign were flexible, and that at some point he might have  
22 to terminate his employment with ASCAC if the demands of his campaign became too much. *Id.*

1 at 4. Patterson stated that Flake also agreed to assist ASCT/ASCAC in fundraising and to  
2 provide consulting services for ASCT's new executive director. *Id.* at 2.

3 Patterson's affidavit described his negotiations with Flake over the terms of Flake's  
4 consulting agreement with ASCAC. In negotiating terms of payment (described in more detail  
5 in section IV.C. below), Patterson reminded Flake that "any compensation he was to receive  
6 would necessarily be dependent upon available funds from donations raised by ASCAC."  
7 Attachment 2 at 34. He further reminded Flake that it would be important for him "to become  
8 involved in raising some or all of these funds." *Id.* Patterson stated that, "[a]t no time during  
9 these conversations, or at any other time, did [Flake] or I, or anyone else to my knowledge, reach  
10 any understanding that money he raised for ASCAC from any source would be specifically set  
11 aside to pay his compensation." *Id.* 34-35.

12 Patterson stated in his interview that when he informed ASCT's board of Flake's hiring,  
13 he also told the members about Flake's \$8,000 monthly salary. He stated that there was "little  
14 reaction" to the salary amount and that no members objected. Patterson ROI, Attachment 3 at 4.  
15 In his affidavit, Patterson stated that all compensation received by Flake "was disclosed in the  
16 Treasurer's report, distributed monthly to all members at each board meeting." Attachment 2 at  
17 35. As mentioned in the FGCR, a news article reported that one Board member expressed  
18 surprise about the amount of Flake's salary. Patterson stated that the member later  
19 acknowledged to him that he may have forgotten about the Board's discussion of Flake's salary.  
20 Patterson ROI, Attachment 3 at 6. Patterson stated that the Board did not formally vote on the  
21 matter, as he was acting in lieu of ASCAC's executive director – a position that was vacant at the  
22 time – in hiring Flake. *Id.* at 4.

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1 According to the terms of a written agreement dated October 14, 1999, Flake was to  
2 provide "management and operational consulting services" to ASCT/ASCAC "as needed" for  
3 \$8,000 per month, depending "on the availability of contributions" made to ASCAC.<sup>7</sup> The  
4 agreement stated that ASCAC determined that the amount of compensation "is reasonable owing  
5 both to [Flake's] unique qualifications and limited availability," and that Flake was not entitled  
6 to employee benefits "of any kind." The agreement provided that Flake was to use his "best  
7 efforts" to encourage Arizona businesses to establish payroll deduction plans to facilitate direct  
8 employee donations to ASCT.

9 The FGCR noted that, although the agreement was dated October 1999, it was not drafted  
10 and executed by the parties until January 2000. ASCT counsel Thomas Rouse, who drafted the  
11 agreement, stated in a sworn affidavit that "[t]here is only one reason for the three-month gap . . .  
12 the press of work for other clients." Attachment 2, at 30. Rouse stated that he made a "conscious  
13 decision to delay documenting the agreement until the slow time of the year." *Id.* He explained  
14 that, since he provides pro bono services to ASCAC, when other clients' work is available, "I  
15 will choose to do the work that produces income for our firm. . . . [T]he fourth quarter of every  
16 calendar year is my busiest time. Conversely, the period shortly after the beginning of each  
17 calendar year tends to be the slowest time of the year." *Id.* at 30-31. Rouse added that the verbal  
18 agreement reached between Flake and Patterson constituted a valid contract in September 1999,  
19 when they informed him "they had come to an agreement and provided a description of its  
20 material terms." *Id.* at 31.

21 The circumstances surrounding the hiring of Flake by ASCAC suggest that ASCAC had  
22 a specific need and purpose for the consulting position and that Flake's qualifications – including

<sup>7</sup> A copy of the executed "Independent Consulting Agreement" was included as Attachment 8 of the FGCR. The agreement was signed by Flake and Lynn Short, ASCT's executive director at the time, on or about January 18, 2000. See Attachment 17 of FGCR (affidavit of Lynn Short).

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1 his substantial fundraising experience and the close ties he had cultivated with potential donors at  
2 a prior fundraising job – were uniquely suited for that position. These circumstances tend to  
3 support the respondents' assertions that Flake and ASCAC entered into a *bona fide* consulting  
4 arrangement that was independent of his candidacy. See 11 C.F.R. § 113.1(g)(6)(iii)(A).

5 **B. Consideration Exclusively for Services Provided**

6 The evidence suggests that Flake's salary was tied to services rendered during the eight-  
7 month period of his fundraising activities at ASCAC. See 11 C.F.R. § 113.1(g)(6)(iii)(B). The  
8 Commission focused on this factor in concluding that a candidate's acceptance of half of his  
9 regular salary from his incorporated law firm would constitute a prohibited contribution, where  
10 the firm had temporarily released him from his duties and responsibilities, including all work  
11 assignments. See AO 2000-01. The Commission informed the candidate that his firm, in  
12 offering the reduced salary, "would consider elements other than your past employment or  
13 employee benefits granted to you because of your past services to the firm. For example, one of  
14 the reasons for granting the paid leave is whether it would benefit the firm, in some overall  
15 manner." *Id.* Unlike the candidate in AO 2000-01, Flake performed actual work in return for his  
16 \$8,000 monthly salary and, further, the evidence does not indicate that any portion of his salary  
17 was based on criteria unrelated to the performance of his duties and responsibilities at ASCAC.

18 Although the FGCR noted that there was little information about the amount of work  
19 performed by Flake, the investigation has revealed numerous contacts and activities undertaken  
20 by Flake in connection with his fundraising activities. Flake stated in his affidavit that, from  
21 October 1999 through his resignation in May 2000, he devoted 25 to 30 hours a week providing  
22 fundraising and management services to ASCAC. Attachment 1 at 13. Flake's work for  
23 ASCAC can be roughly broken down into three periods. First, from October 1999 through

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1 January 2000, Flake focused on identifying companies that might participate in payroll deduction  
2 plans. Second, from February through April 2000, Flake turned his attention to lobbying public  
3 officials to pass a law simplifying the process of deducting school-choice donations from an  
4 employee's pay. Third, in May 2000, Flake continued to work with the companies he had  
5 identified through his earlier efforts.

6 For the first period of activity, Flake stated in his affidavit that he met with chief  
7 executive officers, payroll managers, human resource directors and other decision-making  
8 individuals at a number of companies. *Id.* The Flake response included sworn affidavits from  
9 several executives and officials at the companies identified by Flake, who confirm that they were  
10 contacted by him about setting up payroll deduction plans.<sup>8</sup> The affiants indicate that Flake often  
11 had extensive discussions with them, providing substantive information about the plans and  
12 sometimes assisting them in disseminating that information to corporate employees. *See, e.g., id.*  
13 at 16-19, 21-24.

14 Flake also organized meetings and events with community and state leaders to publicize  
15 ASCT and the new payroll deduction program. Flake provided an example of a press conference  
16 he organized with the governor of Arizona, "where she made a \$500 contribution to ASCT and  
17 encouraged others to do the same." *Id.* at 13. Attached to the Flake response was an affidavit  
18 from an appointee at the Arizona Department of Education, who stated that he worked with  
19 Flake to "secure the Governor's support for the payroll deduction program," to "bolster year-end  
20 contributions" to ASCT, and to arrange the press conference described by Flake. *Id.* at 31.

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<sup>8</sup> This Office notes that seven of thirteen affiants made contributions to the Flake Committee and one is also Flake's brother-in-law; however, we have found no other information that would tend to discredit their statements.

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1 ASCAC's response noted that Flake made monthly reports of his activities to the Board  
2 of Directors, citing specific language in the minutes of the Board's meetings regarding Flake's  
3 "substantial progress" in establishing corporate payroll deduction programs at several  
4 companies. Attachment 2 at 11-14. In addition to attending Board meetings to report on his  
5 progress, Flake reported to ASCT/ASCAC's new executive director, Lynn Short, who has since  
6 left her position at ASCAC. Short stated in an interview that she and Flake consulted with each  
7 other on a regular basis, and that she would take advantage of his management experience and  
8 sometimes "bounce ideas off of him." Short ROI, Attachment 5 at 2-4. She said the nature of  
9 Flake's work required him to be out of the office most of the time, but that he was always  
10 available by phone. *Id.* She recalled that most of her early conversations with Flake "were  
11 related to who might be good prospects for payroll deduction," citing discussions with him about  
12 specific companies. *Id.* at 3. She described Flake as being "highly motivated" and a "key  
13 component to the mission" of ASCT/ASCAC. *Id.* at 2. She stated that, although she did not ask  
14 Flake for written progress reports, the letters he wrote and brochures he crafted helped to  
15 document his work product.<sup>9</sup> *Id.* at 3.

16 During the second period of activity, from February through April 2000, Flake's role  
17 appears to have shifted from fundraiser to lobbyist when the Arizona Department of Revenue  
18 determined that a change in state tax withholding law would be necessary to effect the type of  
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<sup>9</sup> Samples of such letters and brochures were included in Attachment 3 of the FGCR.

1 payroll deduction plans envisioned by ASCAC.<sup>10</sup> See, e.g., Attachment 1 at 31. As this  
2 development could greatly impact ASCT's fundraising potential, Flake assertedly contacted  
3 friends in the business and charity communities to elicit their support for clarifying the law, and  
4 devoted significant amounts of time meeting with state legislators and government officials. *Id.*  
5 at 13. Flake identified several state legislators, aides and executive branch officials that he  
6 lobbied on this issue. *Id.* Three individuals – two aides from the legislative branch and an  
7 official from the executive branch – submitted sworn affidavits confirming that Flake met with  
8 them frequently and devoted considerable efforts to support proposed tax legislation. *Id.* at 27-  
9 28, 31-32. Sworn affidavits from two other individuals indicate that they worked with Flake on  
10 the legislative issues or were present at meetings in which these issues were discussed. *Id.* at 20,  
11 25-26.

12 In February 2000, Flake reported to the Board that, "based on potential companies who  
13 have expressed interest in payroll deductions, it's estimated that perhaps \$460,000 will be raised  
14 by year end." Attachment 2 at 14. In April 2000, ASCAC prepared a chart of budget projections  
15 that broke down Flake's estimates month by month, including the name of each company and the  
16 number of participating employees. *Id.* at 15-17.

17 Despite Flake's lobbying efforts, the Arizona legislature ultimately failed to pass a law to  
18 simplify the withholding process of deducting contributions. See, e.g., *id.* at 14, Attachment 3 at

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<sup>10</sup> A more detailed explanation of the issue was provided in an advisory letter from a Certified Public Accountant in connection with Flake's contacts with one of the companies (included in Attachment 3 at 16 of the FGCR):

Arizona law does not provide for manipulation of the Arizona withholding amount, but only provides that Arizona withholding is calculated based on a percentage of the federal withholding. However, in theory the [payroll deduction] plan should work assuming your payroll service can automatically reduce the Arizona withholding by the contribution.

... The solution to this situation would be to have the withholding laws changed so that each employee could make an affirmative election on their [sic] Arizona withholding form (Form A-4) to allow the tax credit amount withhold [sic] from their [sic] pay reduce their [sic] calculated state withholding amount.

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1 15. Accordingly, very few companies appear to have implemented payroll deduction plans in  
2 response to Flake's efforts.<sup>11</sup> Executive director Lynn Short stated that she was initially  
3 disappointed with the results of Flake's efforts when it became clear that ASCT's payroll  
4 deduction program was not going to work as she had hoped; she explained that the organization  
5 was unable to follow up on these efforts. Short ROI, Attachment 5 at 4. Short said that she later  
6 realized how much Flake had accomplished when she "saw that there was no way" that anyone  
7 at ASCT/ASCAC could have "pick[ed] up where he stopped." *Id.* Patterson reflected Short's  
8 sentiments, describing the payroll deduction program as a "major disappointment" and adding  
9 that "we didn't do a good job of picking up the ball" after Flake left. Patterson ROI, Attachment  
10 3 at 5. Patterson opined that if a ruling from the Arizona Department of Revenue regarding  
11 payroll deduction had been reversed, "the program would be back on track." *Id.* at 15.

12 During the third period of his work for ASCAC, Flake appears to have resumed reaching  
13 out to companies he had identified through his earlier efforts, securing donation commitments  
14 that did not necessarily depend on payroll deduction plans. As an example, Flake stated in his  
15 affidavit that he secured a grant for ASCT from , although "the  
16 money didn't arrive until October 2000." Attachment 1 at 14. ASCAC's current executive  
17 director, hired in November 2000, submitted a sworn affidavit stating that ASCAC received the  
18 grant in December 2000 "directly as a result of the efforts" of Flake. Attachment 2 at 37.  
19 Although the investigation revealed specific instances of ASCT/ASCAC donations solicited by  
20 Flake (e.g., the above-described grant and the \$100,000 donation from Ira Fulton), the  
21 responses and supporting affidavits did not indicate the total amount of funds raised by him. In

<sup>11</sup> ASCAC provided a list of ASCT payroll deduction contributions received from January 1, 2000 through July 30, 2001. Four entities, including ASCAC, appear to have implemented payroll deduction plans during this period. Employees of these entities contributed \$34,108.19 in total contributions to ASCT through these plans. These plans were likely set up to reimburse employees' tax credits on an annual basis rather than from paycheck to paycheck so as to ensure compliance with Arizona tax law. See Attachment 2 at 28.

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1 his interview, Tom Patterson claimed that "it was not possible to estimate" the total funds raised  
2 by Flake as most donations "were not attributable to one solicitor or another." Patterson ROI,  
3 Attachment 3 at 5. Patterson added that he considered and rejected paying Flake based on  
4 commission, because the money that was to be generated by the payroll deduction program "was  
5 not expected in the near future." *Id.* at 14.

6 Flake stated in his affidavit that he "terminated [his] contract" with ASCAC in May 2000  
7 "in an effort to save it from any negative publicity" resulting from the complaint filed with the  
8 Commission. Attachment 1 at 14. A transcript of the Board's May 24, 2000 meeting stated that  
9 Flake "would continue his efforts on the payroll deduction program, but without pay . . . ."  
10 Attachment 2 at 44, 47. ASCAC asserted that the "conversion" of Flake's status from "paid to  
11 unpaid consultant" before the September primary and November general elections "was  
12 consistent with Commission precedents for periodic review and reduction in compensation  
13 . . . ." <sup>12</sup> *Id.* at 19-20.

14 Although Flake's activities on behalf of ASCAC during his eight-month consulting  
15 period did not achieve the desired results, he appears to have complied with the terms of his  
16 agreement, which called for him to use his "best efforts" to encourage Arizona businesses to  
17 establish payroll deduction plans to facilitate direct employee donations to ASCT. The evidence  
18 indicates that, throughout the term of his services, he was either attempting to set up payroll  
19 deduction plans at various companies or, when problems arose concerning the implementation of

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<sup>12</sup> Respondents cited AOs 1979-74 and 1980-115 to support this proposition. In AO 1979-74, the requestor wanted to maintain his lobbying and consulting business while running for Congress. He stated that if he was unable to perform or if he failed to perform the terms of a contract, his fee would be reduced or the contract terminated. Based on these and other facts, the Commission concluded that such compensation would not constitute a contribution or expenditure under the Act. In AO 1980-115, the requestor wanted to continue his law practice while running for Congress, noting that the number of client hours he worked would be substantially reduced during his candidacy. The Commission concluded that, because requestor's compensation was dependent in part on his number of client billable hours, a contribution from the firm would result if his pay was not reduced to reflect his lower number of hours.

1 those plans, lobbying government and legislative officials to pass beneficial tax legislation.  
2 Flake also appears to have fulfilled his agreement to provide "consulting services" to  
3 ASCT/ASCAC by making himself readily available to the executive director whenever she  
4 sought his advice.

5 Due to informal oversight by ASCAC over Flake (e.g., no work reports or similar written  
6 documentation; no estimates of time spent on projects), his claim that he worked 25 to 30 hours  
7 per week cannot be reliably confirmed. However, the evidence shows that he spent a  
8 considerable amount of time contacting, meeting and working with business executives,  
9 government officials and community leaders. Moreover, a narrow inquiry focusing on Flake's  
10 time would offer an incomplete picture of his work, since his agreement with ASCAC did not  
11 specify any hourly or other time-related requirements, and he was hired in part because of his  
12 relationships with potential donors that he had developed over the course of several years in the  
13 fundraising business. Accordingly, the evidence gathered during the investigation tends to show  
14 that Flake's compensation from October 1999 through March 2000 was exclusively in  
15 consideration of services provided by him to ASCAC. See 11 C.F.R. § 113.1(g)(6)(iii)(B).

16 **C. Compensation for Similarly Qualified Persons**

17 It appears that, based on the specialized nature of the work performed by Flake, his salary  
18 fell within the approximate range of similarly qualified persons doing the same work over the  
19 same period of time. See 11 C.F.R. § 113.1(g)(6)(iii)(C).

20 The ASCAC and Flake responses claimed that, based on Flake's "unique" qualifications,  
21 including his familiarity with the school choice issue combined with the contacts and experience  
22 he gained while working at the Goldwater Institute, his salary was commensurate with that of  
23 similarly qualified individuals hired to perform the same type of work. Attachment 2 at 20-21;

1 Attachment 1 at 8-10. ASCAC further asserted that Flake's compensation did not exceed  
2 payment to any other similarly qualified person for the same work over the same period of time  
3 because "no one would have accepted" the clause in the written agreement that conditioned  
4 Flake's salary on the availability of funds contributed to ASCAC. Attachment 2 at 20.

5 When asked how he arrived at an agreement to pay Flake \$8,000 per month, chairman  
6 Tom Patterson explained in his interview that it was difficult "to look at an analogous position"  
7 since there was no model of a payroll deduction program to examine. Patterson ROI,  
8 Attachment 3 at 14. Patterson believed that the salary amount was a "bargain" for ASCAC  
9 because the program was a "new, one-of-a-kind project." *Id.* at 3. Patterson explained that Flake  
10 knew many businessmen who might be interested in payroll deduction plans, and that Flake had  
11 a reputation of being an expert in education matters and maintained a "high profile figure in state  
12 education." *Id.* According to Patterson, "all this factored in" to the negotiated salary. *Id.*

13 In light of the specialized nature of the position, Patterson did not do exhaustive research  
14 concerning salaries paid to other fundraisers. He stated that Flake's salary was based on his  
15 impression of "what a similar flat rate non-commission basis job would cost." *Id.* Patterson  
16 stated that he obtained relevant information from his wife, a professional fundraiser for the  
17 United Way, but he could not recall the information and did not keep any related documents. *Id.*  
18 at 14.

19 ASCAC submitted an affidavit from a professional fundraiser who opined that Flake's  
20 \$8,000 monthly "retainer would fall well within the industry norms, given his unique  
21 qualifications for that position." Attachment 2 at 27. The affiant, who emphasized that he was  
22 considering only Flake's fundraising activities and not his management consulting services,  
23 stated that his opinion was based on the assumption that ASCAC actually met its annual



1 fundraising goals for the payroll deduction program, which it failed to do. The affiant stated that  
2 he had reviewed relevant documents and concluded that the Board's financial goals for the  
3 program "underestimated the degree of difficulty involved in reaching their financial targets,"  
4 adding that the "problem was not with Mr. Flake or his efforts."<sup>13</sup> *Id.*

5 Although ASCAC's information does not completely establish that Flake's compensation  
6 was not excessive, Commission precedent would appear to support ASCAC's position that  
7 Flake's "unique" qualifications should be taken into account in weighing the reasonableness of  
8 the payments. In Advisory Opinions 1980-115 and 1979-58, for example, the Commission  
9 recognized that various intangible factors may be considered in determining an employee's  
10 compensation (e.g., a partner's anticipated future contributions to a law firm, ability to attract  
11 clients, results obtained for clients, value as a counselor to co-workers). More recently, in  
12 MUR 5260 (Talent for Senate Committee), the Commission found no reason to believe that  
13 violations occurred in connection with payments a candidate received from a law firm and a  
14 university, where the information indicated that his high public profile as a four-term member of  
15 Congress may have factored into the amount of his compensation.

16 Flake's various activities cannot be easily reduced to figures such as hours spent, amount  
17 of funds raised, or number of employees signed up for payroll deduction plans; rather, his value  
18 to ASCAC stemmed at least in part from relationships he may have developed, and fundraising  
19 experience he may have gained, long before working for ASCAC. Further, this Office notes that  
20 Flake's \$8,000 monthly salary for what appears to have been a 25-30 hour work-week

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<sup>13</sup> The affiant began providing general fundraising services for ASCAC in February 2001. Regarding his salary, ASCAC submitted a draft agreement (available in the MUR 5014 file in Central Enforcement Docket) showing that, on an interim basis, he was to receive a commission of the amount of all donations received from new donors, and a commission of of the amount of all donations renewed from the previous year. This Office notes that comparisons between the affiant's payment terms and Flake's salary may not be appropriate, however, since Flake's duties went substantially beyond raising funds for ASCAC. See *supra* section IV.B for a detailed description of the nature of Flake's services.

1 approximates the salary he received from the Goldwater Institute, where he had  
2 been employed on a full-time basis; i.e., for comparable work at ASCAC he received roughly  
3 three-quarters of his former pay in return for devoting roughly three-quarters of the time.

4 Accordingly, Flake's salary does not appear to have exceeded the amount of  
5 compensation paid to a similarly qualified person for the same work over the same period of  
6 time. *See* 11 C.F.R. § 113.1(g)(6)(iii)(C).

7 **D. Ira Fulton's Donations to ASCAC**

8 As discussed *supra*, the contractual agreement between Flake and ASCT/ASCAC  
9 provided that Flake would be paid \$8,000 per month, depending "on the availability" of  
10 contributions" made to ASCAC. The information available at the FGCR stage suggested that  
11 ASCAC may have lacked sufficient contribution funds to pay Flake at the time he was hired,  
12 raising questions about the purpose of a \$25,000 donation made by Flake campaign finance co-  
13 chair Ira Fulton in September 1999, around the same time that Patterson informed the Board of  
14 Flake's hiring. Fulton made three subsequent \$25,000 donations to ASCAC during Flake's  
15 tenure – a total of \$100,000 – one in November 1999, another in February 2000 and the last one  
16 in April 2000.<sup>14</sup> During the investigation, ASCAC provided additional information and  
17 supporting financial documents showing that, even without Fulton's contributions, ASCAC's

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<sup>14</sup> Copies of cancelled checks obtained in the investigation show that, while the first check was made out to ASCAC, the three subsequent checks were made out to ASCT but deposited in ASCAC's account. Fulton stated that the three checks were "inadvertently" made payable to ASCT. Attachment 4 at 5. Patterson explained that it was not unusual for donation checks to be written to the wrong account, and that ASCT/ASCAC policy at the time was to attempt to establish the intent of the donor and then deposit the donation in the appropriate account. Attachment 3 at 10. He added that it was clearly understood that Fulton was contributing to ASCAC, not ASCT. *Id.* at 10-11. ASCAC's former executive director Lynn Short recalled receiving a check from Fulton made out to ASCT and subsequently contacting Fulton's office to obtain permission to deposit the check into ASCAC's account. Short ROI, Attachment 5 at 6. The cancelled checks show that Fulton's donations were actually made from a corporate account, Fulton Homes Sales Corporation. Attachment 4 at 7-13. Although the Commission's reason-to-believe findings were partly based on information suggesting that Fulton donated personal rather than corporate funds, this Office notes that no corrective actions are necessary if the Commission approves the recommendations in this Report and closes the file.

1 account contained sufficient funds to cover Flake's \$8,000 monthly salary, at least through April  
2 of 2001. *See, e.g.*, Attachment 2 at 9-10. Specifically, Fulton's \$100,000 donation was one out  
3 of a total of \$385,329.76 in charitable donations, from 57 different donors, deposited into  
4 ASCAC's general fund from January 1999 to June 2000. *Id.* at 7-8.

5       Regardless of ASCAC's ability to pay Flake's salary, and whether the payments were  
6 made solely in consideration of Flake's services and commensurate with comparable work, any  
7 arrangement or agreement to use Fulton's donations specifically to pay Flake's salary could be  
8 considered to be contributions to the Flake campaign. *See, e.g.*, MUR 4825 (Gex Williams).  
9 The evidence compiled during the investigation, however, was insufficient to establish the  
10 existence of such an arrangement or agreement.

11       ASCAC maintained that none of the donations made to ASCAC for administrative  
12 purposes was conditioned in any way on Flake's hiring or continued employment with ASCAC,  
13 nor conditioned in any way on Flake's political candidacy or limited to Flake's salary and  
14 expenses. Attachment 2 at 10. ASCAC's former chairman Patterson stated in his affidavit that  
15 Flake mentioned "the names of several potential donors to ASCAC," including Ira Fulton. *Id.* at  
16 34. Patterson stated that Flake informed him that Fulton was a likely candidate to help ASCAC  
17 "because he had a lengthy personal history of supporting organizations devoted to implementing  
18 'school choice.'" *Id.* However, during an interview Patterson denied ever participating in a  
19 meeting with Fulton concerning his donations to ASCAC, although he acknowledged that he had  
20 previously sought donations from Fulton to ASCT without success. Attachment 3 at 13.

21       As described in footnote 14, ASCAC's former executive director Lynn Short had  
22 discussions with Fulton's office concerning the proper account in which to deposit one of his  
23 donations. However, Short, who is Patterson's sister, stated in her interview that she could not

1 recall having any contact with Fulton while working at ASCAC, and could not recall being part  
2 of a meeting or conversation between Fulton and anybody else associated with ASCT/ASCAC.  
3 Attachment 5 at 5. Although she recalled having discussions with Patterson regarding how  
4 Fulton might be convinced to "support ASCT/ASCAC," she could not recall discussing Fulton  
5 with Flake while she was at ASCAC. *Id.* at 5-6. She stated that she was unaware of any  
6 earmarking or restrictions associated with Fulton's donations. *Id.* at 7.

7 In his response to this Office's written questions, Fulton stated that he was approached  
8 about making donations to ASCAC by Flake, Patterson and Lynn Short, but did not elaborate as  
9 to those contacts. Attachment 4 at 4.<sup>15</sup> Fulton stated that he was associated with both Patterson  
10 and Flake "socially and politically." *Id.* He had known Flake since 1993 through the Goldwater  
11 Institute, where Fulton served on the Board of Directors, and was also a member of his church.  
12 *Id.* at 5. Fulton stated that he had no official duties as co-finance chair of Flake's campaign, but  
13 he assisted Flake on occasion during the campaign in raising funds from some of Fulton's friends  
14 and associates. *Id.* According to Fulton, he had infrequent contact with Flake during the  
15 campaign, and other than the occasional fundraising he did, he did not have personal knowledge  
16 of Flake's other campaign activities. *Id.* at 6. Fulton asserted that he had no knowledge of  
17 Flake's source of income and that he did not loan any money to Flake after Flake resigned from  
18 the Goldwater Institute in 1999. *Id.*

19 Fulton stated that he donated monies to ASCAC because he had a "strong interest" in  
20 education and considered ASCAC to be a "worthy cause." *Id.* He decided that an appropriate  
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<sup>15</sup> In response to this Office's request for a telephone interview, Fulton requested that he be permitted to submit answers to written questions. This Office agreed and Fulton responded to this Office's informal interrogatories and request for documents; however, his response was not under oath.

1 amount to donate to ASCAC would be \$100,000 paid in installments over a 12 month period,  
2 which was "about the same amount over the same length of time as I had been giving to  
3 provide college scholarships" *Id.* at 5. Fulton  
4 stated that he gave over \$ 1999 and over \$ in 2000 to various charitable  
5 and non-profit organizations either from himself directly or through his company or family  
6 foundation. *Id.* Fulton asserted that he was told that the funds he donated to ASCAC would be  
7 used to meet the needs of administering ASCT's scholarship program. *Id.*

8 Flake stated in his affidavit that he came to know Fulton while working at the Goldwater  
9 Institute, and asked him to donate to ASCAC because "of his history of contributing to  
10 scholarships[,] charities and other educational projects." Attachment 1 at 14. Flake claimed that  
11 "[t]here was no discussion of my consulting fees during my solicitation" of Fulton's donation,  
12 and that the donation "was not earmarked for my consulting fee nor was there any implicit  
13 understanding that it would used to pay my fees." *Id.*

14 Based on the evidence gathered, Ira Fulton and Jeffry Flake discussed the solicitation of  
15 the donations at issue. According to Fulton, he was also approached by Tom Patterson and Lynn  
16 Short about donating to ASCAC. However, neither Patterson nor Short acknowledges soliciting  
17 Fulton for the donations at issue, and Flake has taken credit for soliciting them. Although Fulton  
18 and Flake acknowledge discussing the donations with one another, Flake denies there was any  
19 specific earmarking arrangement or understanding regarding the use of the funds to pay Flake's  
20 salary; Fulton was not directly asked whether he specifically earmarked his donations to pay  
21 Flake's salary and his response did not address this issue. As the statute of limitations does not  
22 start to run until October 2004, this Office could, should the Commission desire, seek to depose  
23 Fulton. However, we do not believe that such an effort would be an efficient use of the

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1 Commission's resources. Either Fulton's testimony would confirm Flake's denial, or, if Fulton  
2 contradicted Flake, an impasse would result from conflicting accounts of a conversation that  
3 appears to have been witnessed by nobody else. Also, the investigation has not uncovered any  
4 evidence that Flake or anyone else discussed Flake's salary needs with Fulton, or that Fulton  
5 attempted to designate his ASCAC donations for any particular use. At this juncture, therefore,  
6 this Office believes that additional investigation is unlikely to illuminate further whether an  
7 earmarking arrangement occurred.

8 V. CONCLUSION

9 As discussed above, the evidence obtained from the investigation indicates that Flake  
10 entered into a *bona fide* consulting agreement with ASCAC independent of his candidacy for  
11 Congress, that his \$8,000 monthly salary was exclusively in consideration of the services  
12 provided by Flake, and was commensurate with what similarly qualified persons doing the same  
13 work would earn over the same period of time. See 11 C.F.R. § 113.1(g)(6)(iii). In addition,  
14 there is insufficient evidence of an arrangement whereby Ira Fulton's donations were earmarked  
15 to pay Flake's salary. Accordingly, this Office recommends that the Commission take no further  
16 action against Jeffry Flake, Jeff Flake for Congress and Jack Gibson, as treasurer, the Arizona  
17 School Choice Administration Corporation and Ira Fulton.

18 Regarding ASCT and its former chairman, Tom Patterson, the Commission made no  
19 findings at the FGCR stage because, although ASCT was named in the complaint, Flake was  
20 actually paid by ASCAC. See footnote 2. Based on the lack of evidence that ASCT or Patterson  
21 made or consented to any contributions to Flake or the Flake Committee, this Office  
22 recommends that the Commission find no reason to believe that Arizona School Choice Trust,  
23 Inc. and Tom Patterson, as Chairman, violated any provision of the Act or the Commission's

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regulations. Because there are no remaining respondents in this matter, this Office recommends that the Commission close the file.

**VI. RECOMMENDATIONS**

1. Take no further action against Jeffry Flake.
2. Take no further action against Jeff Flake for Congress and Jack Gibson, as treasurer.
3. Take no further action against Arizona School Choice Administration Corporation.
4. Take no further action against Ira Fulton.
5. Find no reason to believe that Arizona School Choice Trust, Inc. and Tom Patterson, as Chairman, violated any provision of the Act or the Commission's regulations.
6. Approve the appropriate letters.

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7. Close the file.

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10/3/03  
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