



FEDERAL ELECTION COMMISSION
Washington, DC 20463

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MEMORANDUM

TO: The Commission

THROUGH: James A. Pehrkon *JAP*
Staff Director

FROM: Lawrence M. Noble *LN*
General Counsel

N. Bradley Litchfield *NBL*
Associate General Counsel

Jonathan M. Levin *JL*
Senior Attorney

Subject: Draft AO 2000-05

AGENDA ITEM
For Meeting of: 4-27-00

Attached is a proposed draft of the subject advisory opinion. We request that this draft be placed on the agenda for April 27, 2000.

Attachment

DRAFT

1 ADVISORY OPINION 2000-05

2
3 Markham C. Erickson
4 McGuinness & Holch
5 400 North Capitol Street, N.W.
6 Suite 585
7 Washington, D.C. 20001

8
9 Dear Mr. Erickson:

10 This responds to your letter dated March 30, 2000, on behalf of the Oneida Nation
11 of New York ("the Nation"), requesting an advisory opinion concerning the application
12 of the Federal Election Campaign Act of 1971, as amended ("the Act"), and Commission
13 regulations to contributions by the Nation totaling more than \$25,000 annually.

14 The Nation is a Federally-recognized Indian tribe located in central New York
15 State. It is a non-corporate entity which has been recognized by the United States on a
16 government-to-government basis. See 65 FR 13298, 13300 (March 13, 2000).¹ The
17 Nation has previously contributed to Federal candidates, following the \$1,000 limit at 2
18 U.S.C. §441a(a)(1)(A) for contributions by a person to the authorized committees of a
19 Federal candidate. The Nation has also voluntarily limited the total of its contributions to
20 Federal political committees during a calendar year to \$25,000, which is the limit
21 prescribed at 2 U.S.C. §441a(a)(3).

22 You state that, because 2 U.S.C. §441a(a)(3) applies only to "individuals," the
23 Nation is considering making contributions this year that would total in excess of
24 \$25,000. You ask the Commission to confirm that this \$25,000 limitation does not apply
25 to the Nation.

26 The Act defines the term "person" as including an "individual, partnership,
27 committee, association, corporation, labor organization, or any other organization or
28 group of persons, but such term does not include the Federal Government or any
29 authority of the Federal Government." 2 U.S.C. §431(11); see also 11 CFR 100.10. The

¹ This *Federal Register* document is from the U.S. Bureau of Indian Affairs ("BIA") and lists the Nation, along with numerous other Indian entities, that are "recognized and eligible for funding and services from [BIA] by virtue of their status as Indian tribes." 65 FR at 13298. The "listed entities are acknowledged to have the immunities and privileges available to other federally acknowledged Indian tribes by virtue of

1 Act also provides that no "person" may contribute in excess of \$1,000 to any Federal
2 candidate and his authorized political committees with respect to any election. 2 U.S.C.
3 §441a(a)(1)(A). In addressing annual contribution totals, however, the Act and
4 Commission regulations provide that no "individual" may make contributions
5 aggregating more than \$25,000 per calendar year. 2 U.S.C. §441a(a)(3); 11 CFR
6 110.5(b).²

7 As you indicate, the Commission has long interpreted the Act's definition of
8 "person" to include unincorporated Indian tribes, and thus their contributions to Federal
9 candidates were subject to the \$1,000 per election, per candidate limits.³ Advisory
10 Opinion 1978-51; *see also* Advisory Opinions 1999-32 and 1993-12 (where the
11 Commission stated that, as "persons," unincorporated Indian tribes were subject to the
12 prohibition on contributions by persons with Federal contracts if they are engaged in such
13 contracts). Although the Nation is a person under the Act, it is not an individual and is
14 therefore not subject to the \$25,000 limit on its annual total of contributions.⁴ The Nation
15 may make contributions subject to the discussion below.

16 The Nation's contributions would presumably be made from its general treasury
17 funds that are apparently comprised of revenues and profits derived from the Nation's
18 various business ventures. A review of the Nation's website, as well as other websites,
19 indicates that many, if not all, of these ventures are operated or owned by corporations.
20 As you know, the Act prohibits a corporation from making any contribution in

their government-to-government relationship with the United States as well as the responsibilities, powers, limitations and obligations of such tribes." 65 FR at 13299.

² The Act and Commission regulations clarify this restriction by adding that, for the purposes of this limit, any contribution made in a non-election year to a candidate or his authorized committee with respect to a particular election shall be considered as made during the calendar year in which such election is held. 2 U.S.C. §441a(a)(3); 11 CFR 110.5(c)(2); *see also* 11 CFR 110.5(c)(3) and (d).

³ The status of an Indian tribe or community as a "government" making a contribution has not been explicitly addressed in previous advisory opinions. As indicated by the language of 2 U.S.C. §431(1), the only government that is specifically construed not to be a person, and therefore not subject to the limitations and prohibitions of the Act, is the Federal Government. For example, the Commission has made clear that State governments and State-owned corporations are persons under the Act and are subject to its contribution provisions. Advisory Opinions 1999-7, 1982-26, and 1977-32.

⁴ As indicated in Advisory Opinion 1999-32, the Nation would more precisely fall into the category of "any other organization or group of persons."

1 connection with or for the purpose of influencing any Federal election. 2 U.S.C.
2 §441b(a). The term contribution as used in this general prohibition includes “any *direct*
3 *or indirect payment, distribution, loan, advance. . . or gift of money. . . to any candidate,*
4 *campaign committee, or political party or organization, in connection with any election*
5 *to”* Federal office. 2 U.S.C. §441b(b)(2) (emphasis added); *see* 11 CFR 114.1(a)(1)
6 [contribution shall include any direct or indirect payment or distribution to any candidate,
7 committee, organization or any other person in connection with any election to Federal
8 office].⁵ Notwithstanding the broad scope of this prohibition, Commission regulations
9 prescribe procedures and conditions under which some organizations, like the Nation,
10 may make lawful contributions. 11 CFR 102.5(b).

11 In general, section 102.5(b) applies to organizations that are not “political
12 committees” under the Act and that propose to make contributions to influence Federal
13 elections. Such an organization is required to comply with either one of two procedures
14 specified in the regulations: (i) establish a separate account to which only funds subject
15 to the prohibitions and limits of the Act shall be deposited and from which its
16 contributions shall be made, or (ii) demonstrate through “a reasonable accounting
17 method” that, whenever the organization makes a contribution, it has received “sufficient
18 funds subject to the limitations and prohibitions of the Act” to make the contribution. 11
19 CFR 102.5(b)(1)(i) and (b)(1)(ii). Under alternative (i), the organization is required to
20 keep records of deposits to and disbursements from the account used to make its
21 contributions, and under alternative (ii) it is required to keep records of amounts received
22 or expended under section 102.5(b)(1); upon request, the organization shall make these
23 records available to the Commission. *Id.* The Nation’s contributions must comply with

⁵ Alluding to the broad prohibition on direct or indirect corporate contributions, the Commission concluded in Advisory Opinion 1978-51 that, while the Act permitted a tribal entity to make limited contributions to a Federal candidate, such contributions could only be made “if its general funds do not include monies from entities or persons that could not make contributions directly under the Act.” Very recently, the Commission explained in Advisory Opinion 1999-32 that if an Indian nation received a distribution of revenues from a semi-autonomous utility authority, which operated within the nation’s reservation and held contracts with the Federal Government, such revenues could not be used to make contributions in Federal elections. (Persons with Government contracts are, like corporations, barred from making any contributions in Federal elections, pursuant to 2 U.S.C. §441c.) *See* Advisory Opinion 1998-11 concluding that the source of funds for contributions by a parent limited liability company, which

1 these regulations, and the records described therein must be made available to the
2 Commission, if requested.

3 This response constitutes an advisory opinion concerning the application of the
4 Act and Commission regulations to the specific transaction or activity set forth in your
5 request. See 2 U.S.C. §437f.

6 Sincerely,

7
8
9 Darryl R. Wold
10 Chairman

11
12 Enclosures (AOs 1999-32, 1999-7, 1998-11, 1993-12, 1982-26, 1978-51, and 1977-32)

owned two subsidiary companies that were Government contractors, "must be revenue other than that resulting from the operations of [its Government contractor subsidiaries]."

