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FEDERAL ELECTION COMMISSION
Washington, DC 20463

AGENDA DOCUMENT NO. 13-20
AGENDA ITEM
For meeting of June 13, 2013

June 6, 2013

MEMORANDUM

TO: The Commission

FROM: Anthony Herman *AH*
General Counsel *hLS*

Adav Noti *AN*
Acting Associate General Counsel

Amy Rothstein *AR*
Assistant General Counsel

Esther Heiden *EH*
Attorney

Subject: Draft AO 2013-03 (Bilbray-Kohn)

Attached is a proposed draft of the subject advisory opinion.

Members of the public may submit written comments on the draft advisory opinion. We are making this draft available for comment until 12:00 pm (Eastern Time) on June 12, 2013.

Members of the public may also attend the Commission meeting at which the draft will be considered. The advisory opinion requestor may appear before the Commission at this meeting to answer questions.

For more information about how to submit comments or attend the Commission meeting, go to <http://www.fec.gov/law/draftaos.shtml>.

Attachment

2
3 Marc E. Elias, Esq.
4 Andrew H. Werbrock, Esq.
5 Perkins Coie LLP
6 700 Thirteenth Street, NW
7 Suite 600
8 Washington, D.C. 20005-3960
9

DRAFT

10 Dear Messrs. Elias and Werbrock:

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

17 ***Background***

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

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

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

¹ 26 U.S.C. 527.

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

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

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

15 In anticipation of her potential candidacy, Ms. Bilbray-Kohn resigned her
16 positions with Emerge Nevada. According to the request, after arm’s-length negotiations
17 between Ms. Bilbray-Kohn and the Board of Directors, Emerge Nevada retained her as a
18 paid consultant. As a consultant, Ms. Bilbray-Kohn expects to work approximately 20
19 hours per week for Emerge Nevada. Her duties will be limited to organizing and
20 conducting portions of the training program — a subset of the tasks that she previously
21 performed as Executive Director. She will also advise individual candidates for State and
22 local office on fundraising matters but will not solicit, direct, or receive any donations for

1 such candidates or for Emerge Nevada. Ms. Bilbray-Kohn will not have authority to
2 spend Emerge Nevada's funds, to make decisions regarding such spending, or otherwise
3 to exercise any control over the organization.

4 The request states that Emerge Nevada retained Ms. Bilbray-Kohn as a paid
5 consultant because of her past experience developing and running the organization's
6 training program, her expertise with Nevada politics, and the difficulty that Emerge
7 Nevada would have in obtaining these services from third-parties in the short term. The
8 request states that all compensation will be paid to her exclusively in consideration for
9 her consulting services. The amount of her compensation — based on the Board's
10 assessment of the value of her services — will be \$5,000 per month, which represents
11 half of her former salary plus an additional \$500 per month to account for some of the
12 extra costs that she will bear as a consultant (such as payroll taxes and business
13 expenses).² The request states that Emerge Nevada would expect to pay equivalent or
14 higher compensation to any other training consultant with Ms. Bilbray-Kohn's
15 knowledge and experience. Emerge Nevada has two other paid consultants: a
16 communications consultant who conducts an annual five-hour communications training
17 for candidates for a fee of \$2,500 per training, and a finance consultant who assists
18 Emerge Nevada with its organizational fundraising for approximately four hours per
19 week and is compensated at \$3,000 per month.

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.

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

1 Commission noted that, in analyzing FECA's related prohibition on national party
2 committees soliciting or receiving funds outside FECA's source and amount limitations,
3 the Supreme Court had described the statute as permitting those national committees to
4 "sit[] down with state and local party committees or candidates to plan and advise how to
5 raise and spend soft money." *McConnell v. FEC*, 540 U.S. 93, 160 (2003) ("As long as
6 the national party officer does not personally spend, receive, direct, or solicit soft money,
7 [2 U.S.C. 441i(a)] permits a wide range of joint planning and electioneering activity."),
8 *overruled in part on other grounds, Citizens United v. FEC*, 130 S. Ct. 876 (2010). The
9 Commission relied on this statement from *McConnell* to conclude that Senator Corzine
10 and his agents could consult with non-Federal candidates "to help them plan how to raise
11 and spend non-Federal funds, so long as Senator Corzine and his agents [did] not solicit,
12 receive, direct, transfer, spend, or disburse" non-Federal funds. Advisory Opinion 2005-
13 02 at 8 (Corzine II). The Commission also concluded that Senator Corzine and his agents
14 could recommend individuals for employment to non-Federal candidates, political
15 committees, and parties to conduct fundraising, even if those individuals' duties would
16 involve soliciting, receiving, or disbursing non-Federal funds, "so long as the
17 recommended individual is not acting as an agent for Senator Corzine." *Id.*

18 Similarly, under the facts presented here, section 441i(e)(1) would not prohibit
19 Ms. Bilbray-Kohn from consulting for Emerge Nevada after she becomes a candidate.
20 As a consultant, Ms. Bilbray-Kohn's duties will be limited to organizing Emerge
21 Nevada's training program, conducting candidate training sessions, and providing advice
22 to individual candidates. She will not solicit or receive funds for the candidates or

1 Emerge Nevada, and she will not direct or control any of the candidates' or
2 organization's spending of non-Federal funds. Although she will train State and local
3 candidates on fundraising, those candidates will not be acting as Ms. Bilbray-Kohn's
4 agents when they subsequently raise funds for their own non-Federal campaigns.
5 Therefore, in light of the limits on her role as described in the request, Ms. Bilbray-Kohn
6 may serve as a consultant to Emerge Nevada after becoming a candidate without
7 violating the prohibition on Federal candidates soliciting, receiving, transferring,
8 spending, or disbursing non-Federal funds.

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

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

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

18 (A) The compensation results from *bona fide* employment that is
19 genuinely independent of the candidacy;

20
21 (B) The compensation is exclusively in consideration of services
22 provided by the employee as part of this employment; and

23
24 (C) The compensation does not exceed the amount of
25 compensation which would be paid to any other similarly
26 qualified person for the same work over the same period of
27 time.

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2 11 C.F.R. 113.1(g)(6)(iii); *see, e.g.*, Advisory Opinion 2011-27 (New Mexico Voices for
3 Children) (applying section 113.1(g)(6)(iii) to determine whether compensation paid to
4 candidate would be contribution); Advisory Opinion 2006-13 (Spivack) (same); Advisory
5 Opinion 2004-17 (Klein) (same); Advisory Opinion 2004-08 (American Sugar Cane
6 League) (same).

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

21 Second, Ms. Bilbray-Kohn’s compensation will be “exclusively in consideration
22 of [her] services” as a consultant to Emerge Nevada. 11 C.F.R. 113.1(g)(6)(iii)(B). Ms.
23 Bilbray-Kohn will perform a subset of the duties she previously performed as Executive

1 Director, and she will be compensated only for those reduced duties, not for any activities
2 she undertakes as a candidate or on behalf of any other organization. Thus, her entire
3 compensation will be in consideration of the services she provides to Emerge Nevada.

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

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

17 This response constitutes an advisory opinion concerning the application of FECA
18 and Commission regulations to the specific transaction or activity set forth in your
19 request. *See* 2 U.S.C. 437f. The Commission emphasizes that, if there is a change in any
20 of the facts or assumptions presented, and such facts or assumptions are material to a
21 conclusion presented in this advisory opinion, then the requestor may not rely on that
22 conclusion as support for its proposed activity. Any person involved in any specific

1 transaction or activity that is indistinguishable in all its material aspects from the
2 transaction or activity with respect to which this advisory opinion is rendered may rely on
3 this advisory opinion. *See* 2 U.S.C. 437f(c)(1)(B). Please note that the analysis or
4 conclusions in this advisory opinion may be affected by subsequent developments in the
5 law including, but not limited to, statutes, regulations, advisory opinions, and case law.
6 The cited advisory opinions are available from the Commission's Advisory Opinion
7 searchable database at <http://www.fec.gov/searchao>.

8 On behalf of the Commission,
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10

11 Ellen L. Weintraub
12 Chair
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