AGENDA DOCUMENT NO. 07-50

RECEIVED
FEDERAL ELECTION
COMMISSION
SECRETARIAT

2007 JUL 10 P 5:32

FEDERAL ELECTION COMMISSION
Washington, DC 20463

July 10, 2007

MEMORANDUM

AGENDA ITEM
For Meeting of: 07-12-07

SUBMITTED LATE

TO: The Commission

FROM: Thomasenia P. Duncan TPD
General Counsel

Rosemary C. Smith RCS
Associate General Counsel

Amy L. Rothstein ALR
Assistant General Counsel

Richard T. Ewell RTE
Attorney

Subject: Draft AO 2007-08

Attached is a proposed draft of the subject advisory opinion. We request that this draft be placed on the agenda for July 12, 2007.

Attachment

ADVISORY OPINION 2007-08

Marc E. Elias, Esq.
Caroline P. Goodson, Esq.
Perkins Coie, LLP
607 14th Street, N.W.
Washington, D.C. 20005-2011

DRAFT

Dear Mr. Elias and Ms. Goodson:

We are responding to your advisory opinion request on behalf of Michael King, regarding whether, under the Federal Election Campaign Act of 1971, as amended (the "Act"), and Commission regulations, Mr. King may donate funds to certain charitable organizations to encourage or commemorate performances by professional entertainers at Federal election campaign events. Also, we are responding to your request regarding whether Mr. King may establish a foundation under section 501(c)(3) of the Internal Revenue Code ("the Foundation") to collect and donate funds for the same purpose.

The Commission concludes that Mr. King and the Foundation may donate funds to the charities described in your request to encourage or commemorate these performances, and that the Foundation may also do so under certain conditions. Mr. King and the Foundation may publicize their donations, as described below, and Mr. King may also solicit Federal candidate committees for donations to the charities.

Background

The facts presented in this advisory opinion are based on your letter received on May 7, 2007, your e-mail received on May 18, 2007, and telephone conversations on May 11 and May 17, 2007.

Mr. King wishes to focus the public's attention on the importance of certain charities that provide assistance to the families of U.S. military personnel who are

1 serving, or have served, in Iraq. Each of these organizations is organized under section
2 501(c)(3) of the Internal Revenue Code, and examples of these organizations are
3 provided at <www.americasupportsyou.mil/AmericaSupportsYou/military_family.html>.
4 In addition, Mr. King would like to encourage greater volunteer participation in Federal
5 campaigns by musicians and other performers. Mr. King is neither a candidate for public
6 office, nor a public officeholder.

7 To accomplish his goals, Mr. King plans to donate a portion of his personal funds
8 to one or more of the charities in honor of certain performances at campaign events of
9 political party committees or candidates for Federal office. Mr. King hopes that the
10 performances at the campaign events, in combination with the publicity surrounding his
11 donations to the charities, will provide a platform to raise public awareness of these
12 charities. Mr. King also intends to establish the Foundation, which would also be
13 organized under section 501(c)(3) of the Internal Revenue Code, to collect donations
14 from other persons and distribute them for the same purposes described above.

15 Mr. King or the Foundation would select the recipient charities, determine the
16 amount of each donation, and choose which performances to honor with donations,
17 possibly with suggestions from the performers. Each performer would volunteer in an
18 individual capacity only (rather than as an incorporated entity) and would select the
19 campaign events at which he or she performs, but would not receive any financial, tax, or
20 other tangible benefit from Mr. King, the Foundation, or any of the charities receiving the
21 donations. In some cases, Mr. King and the Foundation may make donations honoring
22 performers who have, independently of Mr. King, committed to perform at a campaign
23 event. In other cases, Mr. King may take a more active role in arranging the

1 performances by using his personal contacts in the entertainment industry to identify
2 performers who might be willing to volunteer their services at specific campaign events
3 and encouraging them to do so. He may take those actions either independently of any
4 political campaign or in coordination with a Federal candidate or political party
5 committee. Mr. King would not be compensated for his services, and all costs associated
6 with the performances themselves (such as expenses for the rental of the venue and
7 performer's travel) would be paid for by the campaign or political party committee, not
8 by Mr. King, the Foundation, or the performers.
9 In addition, Mr. King and the Foundation intend to publicize their charitable
10 donations on their own websites to draw attention to the work of the charitable
11 organizations. They will not make any "public communications" within the meaning of
12 11 CFR 100.26.
13
14 ***Questions Presented***
15 *1. May Mr. King make the proposed donations to the section 501(c)(3) charitable*
16 *organizations described in the request?*
17 *2. May the Foundation make the proposed donations to the section 501(c)(3)*
18 *charitable organizations described in the request?*
19 *3. May Mr. King and the Foundation publicize their activities through*
20 *communications other than "public communications" under 2 U.S.C. 431(22) and 11*
21 *CFR 100.26?*
22 *4. May Mr. King solicit the authorized committees of Federal candidates for*
23 *donations to the section 501(c)(3) charitable organizations described in the request?*

1

2 ***Legal Analysis and Conclusions***

3 *1. May Mr. King make the proposed donations to the section 501(c)(3) charitable*
4 *organizations described in the request?*

5 Yes, under the conditions described in the request, Mr. King may make the
6 proposed donations to the charitable organizations described in the request.[1]

7 A. Contributions

8 Under the Act and Commission regulations, contributions from individuals to
9 Federal candidates or political committees are subject to specific disclosure requirements,
10 limits, and prohibitions. *See* 2 U.S.C. 434, 441a, and 441b; 11 CFR 104.3, 110.1, 110.19,
11 110.20, and 115.2. A "contribution" is defined as: (1) "any gift, subscription, loan,
12 advance, or deposit of money or anything of value made by any person for the purpose of
13 influencing any election for Federal office," and (2) "the payment by any person of
14 compensation for the personal services of another person which are rendered to a political
15 committee without charge for any purpose." 2 U.S.C. 431(8)(A)(i) and (ii); *see also* 11
16 CFR 100.52 and 100.54.

17 The Act exempts from the definition of "contribution" "the value of services
18 provided without compensation by any individual who volunteers on behalf of a
19 candidate or political committee." 2 U.S.C. 431(8)(B)(i), 11 CFR 100.74; *see also*
20 Advisory Opinions 1980-42 (Hart) (entertainer may agree to provide free services to a

[1] In reaching this conclusion, the Commission assumes that Mr. King would not make donations as an agent of any candidate for Federal office, Federal officeholder, or any political party committee. *See* 2 U.S.C. 441i(a)(1), 441i(b)(1), 441i(d), 441i(e)(1)(B); 11 CFR 300.10, 300.37, 300.60, 300.62. "Agent" is defined as "any person who has actual authority, either express or implied," "to solicit, receive, direct, transfer, or spend funds in connection with any election." 11 CFR 300.2(b)(3).

1 political committee without the value of those services being considered as a
2 contribution) and 1982-04 (Apodaca) (uncompensated volunteer services provided by
3 carpenters, plumbers, electricians, carpet-layers, and other tradesmen in renovating
4 political committee building were not contributions).

5 Mr. King proposes to volunteer his time and assistance to Federal candidates and
6 political party committees by arranging for performers to appear at campaign events. He
7 would not be compensated for any of these services. As such, the value of Mr. King's
8 services would fall within the volunteer exception of 2 U.S.C. 431(8)(B)(i) and 11 CFR
9 100.74, and would not constitute a contribution to any Federal candidate or political
10 committee.[2]

11 Similarly, the value of the performers' services would also be exempted under 2
12 U.S.C. 431(8)(B)(i) and 11 CFR 100.74 from the definition of "contribution." Under Mr.
13 King's proposal, the performers would provide personal services to a Federal candidate
14 or political party committee in their individual capacities and without compensation, and
15 all costs associated with the performances themselves (such as expenses for the rental of
16 the venue and the performers' travel) would be paid for by the Federal candidate
17 committee or political party committee, not by Mr. King, the Foundation or the
18 performers.

---

[2] The exception for volunteer activities is restricted to donations of the volunteer's own time and services and does not generally exempt actual costs incurred on behalf of a Federal candidate or political party committee. For example, if Mr. King travels across the country at the request of a Federal candidate to arrange for an entertainer to perform at the candidate's campaign event, then Mr. King's unreimbursed payment for that travel would be a contribution to that candidate's committee to the extent that the travel costs exceed $1,000 per candidate or $2,000 per year. *See* 2 U.S.C. 431(8)(B)(iv) and 11 CFR 100.79 (unreimbursed payment for transportation and subsistence expenses); *see also* 2 U.S.C. 431(8)(B)(ii) and 11 CFR 100.75 (use of volunteer's real or personal property), 11 CFR 100.76 (use of church or community room), and 11 CFR 100.77 (invitations, food, and beverages).

1 The Commission concludes that Mr. King's proposed charitable donations would
2 not constitute the payment of compensation to the performers or a contribution by Mr.
3 King to a Federal candidate or political committee. Under the Act and Commission
4 regulations, "the payment by any person of compensation for the personal services of
5 another person which are rendered to a political committee without charge for any
6 purpose" is a contribution. *See* 2 U.S.C. 431(8)(A)(ii); 11 CFR 100.54. Mr. King
7 proposes to make donations directly to charitable organizations, not to the performers
8 who are rendering these services. Furthermore, the performers would not receive any
9 financial, tax, or other tangible benefit from Mr. King, the Foundation, or the recipient
10 charitable organizations. Accordingly, Mr. King's donations to charities would not
11 constitute "compensation" to the performers, and in turn, the donations would not render
12 the performers ineligible for the volunteer exception.

13 The Commission's conclusion that the charitable donations would not constitute
14 compensation to the performers is consistent with the Commission's previous guidance
15 regarding donations to charitable organizations in other contexts. In one series of
16 advisory opinions, the Commission reviewed the permissibility of "matching" programs
17 proposed by corporations to encourage contributions to their separate segregated funds
18 ("SSFs"). *See* Advisory Opinions 2003-04 (Freeport-McMoRan), 1994-07 (GEON
19 PAC), 1994-06 (Coors PAC), 1994-03 (EnviroSource), 1990-06 (Pacific Power & Light),
20 1989-09 (General Dynamics), 1989-07 (New Jersey Bell), 1988-48 (Grocers), 1987-18
21 (Texas Industries PAC), and 1986-44 (EdPAC). Under these programs, a corporation
22 would agree to match otherwise permissible contributions to its SSF with donations of

1 corporate treasury funds to charitable organizations.[3] In each instance, the Commission
2 concluded that the corporation's matching donations would not be prohibited
3 compensation to the SSF contributor, so long as the contributor did not receive any
4 financial, tax, or other tangible benefit from either the corporation or the recipient charity.
5 *See, e.g.,* Advisory Opinion 1994-07 (GEON PAC) ("Central to this conclusion is that the
6 individual contributor to the separate segregated fund would not receive a financial, tax,
7 or other tangible benefit from either the corporation or the recipient charitable
8 organizations, thus avoiding an exchange of corporate treasury monies for voluntary
9 contributions.").

10 Similarly, in advisory opinions relating to honoraria provided to Federal officials,
11 the Commission recognized that donations to charitable organizations in honor of Federal
12 officials speaking at events are not "accepted" by those Federal officials.[4] *See* Advisory
13 Opinions 1982-09 (Dole) ("Under the Act, an honorarium is not accepted by a Federal
14 officeholder if that officeholder makes a suggestion that the honorarium be given instead
15 to a charitable organization which is selected by the person paying the honorarium from a
16 list of five or more charitable organizations provided by the officeholder."), 1978-96
17 (Brown), and 1978-73 (Rostenkowski).

18 Thus, under the conditions described in the request, neither the provision of Mr.
19 King's own personal services nor his donations to charities would be a contribution to a

[3] Because all contributions to an SSF must be voluntary and made from personal funds, corporations are prohibited from providing any compensation to the individual contributors or otherwise exchanging corporate treasury funds for contributions to the SSF. *See* 11 CFR 114.5(b)(1).
[4] Prior to 1991, the Commission was responsible for enforcing certain limitations and prohibitions on the acceptance of honoraria by Federal officials. These restrictions, which were then set forth at 2 U.S.C. 441i, were repealed effective August 14, 1991. *See* the Legislative Branch Appropriations Act, 1992, Pub. L. No. 102-90, sec. 6(d), 105 Stat. 447, 451 (1991).

1 Federal candidate or political committee, nor would they be compensation to the
2 performers.

3 B. Expenditures

4 Under the Act and Commission regulations, an "expenditure" includes "any
5 purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of
6 value, made by any person for the purpose of influencing any election for Federal office."
7 2 U.S.C. 431(9)(A)(i); 11 CFR 100.111(a). The purpose of these donations is to motivate
8 musicians, performers, and other types of talent to volunteer on behalf of Federal
9 campaigns. The donations do not act as an incentive to any person to vote for or against
10 any Federal candidate. Nor do the donations act as an incentive to any person to make a
11 contribution to or expenditure on behalf of a Federal candidate or committee.[5]

12 The only connection the proposed donations have to a Federal election is that they
13 encourage volunteer activity on behalf of Federal candidates. But volunteer activity on
14 behalf of candidates is explicitly exempt from regulation by the Act so long as it is
15 "without compensation," as is the case here. 2 U.S.C 431(8)(B)(i). Thus the connection
16 between these donations and a Federal election is limited to activities that Congress
17 explicitly left unregulated. The Commission therefore concludes that the charitable
18 donations described here are not for the purpose of influencing an election, and therefore
19 do not warrant treatment as expenditures under the Act and Commission regulations.
20 Mr. King may choose to make at least some donations to the 501(c)(3) charitable
21 organizations regardless of whether the performers appear at any campaign events, and at

[5] If charitable donations were used to motivate contributions to a Federal candidate or committee, they would qualify as expenditures. *See* AO 1986-44 (stating that a corporation's charitable donations matching contributions to its separate segregated fund would be prohibited corporate expenditures but for the "establishment, administration, and solicitation" costs exemption).

1 least some of the performers would choose to volunteer their services to candidates
2 regardless of whether Mr. King makes any donation to any 501(c)(3) charitable
3 organizations. In addition, each performer would select the campaign events at which he
4 or she would perform, while Mr. King would choose the charitable organizations. The
5 request does not indicate that any performer's appearance would depend on Mr. King
6 making a donation.
7
8 *2. May the Foundation make the proposed donations to the section 501(c)(3)*
9 *charitable organizations described in the request?*
10 Yes, the Foundation may make the proposed donations to the charitable
11 organizations described in the request.
12 The Act prohibits corporations, including corporations organized under section
13 501(c)(3) of the Internal Revenue Code, from using corporate treasury funds to make
14 contributions or expenditures in connection with any election for Federal office. *See* 2
15 U.S.C. 441b(a); 11 CFR 114.2(b). The request does not state whether the Foundation
16 would be incorporated. Even assuming that it would be, however, the proposed
17 charitable donations would permissible. For the reasons explained above, the donations
18 would not be contributions and would not warrant treatment as expenditures under the
19 Act and Commission regulations.
20
21 *3. May Mr. King and the Foundation publicize their activities through*
22 *communications other than "public communications" under 2 U.S.C. 431(22) and 11*
23 *CFR 100.26?*

1 Yes, Mr. King and the Foundation may publicize their activities as described in
2 the request, provided the Foundation is not incorporated and making communications that
3 constitute endorsements or independent expenditures to individuals outside its restricted
4 class. The provisions in the Act and Commission regulations regarding coordinated
5 communications and "disclaimer" requirements would not apply. Those provisions apply
6 only to a "public communication" under 2 U.S.C. 431(22) and 11 CFR 100.26, and you
7 have stated that none of the communications by Mr. King would be "public
8 communications" within the meaning of 2 U.S.C. 431(22) and 11 CFR 100.26. *See* 11
9 CFR 109.21 and 110.11.

10 Mr. King's communications to the public through his own website would not be
11 "public communications," and they would not be "contributions" or "expenditures"
12 because they would be exempt as individual Internet activity.[6] The communications by
13 the Foundation on its own website would likewise not be "public communications," and
14 the Foundation would not make an expenditure or contribution merely by engaging in the
15 website activity proposed in the request: listing the work done by the charity, the
16 volunteers, and committees for which they volunteered, and the charitable donations
17 made on their behalf.

18 If the Foundation is an incorporated entity, however, it would be generally
19 prohibited from making endorsements beyond its restricted class and prohibited from

[6] The term "public communication" does not include communications over the Internet, except for communications placed for a fee on another person's Web site. *See* 11 CFR 100.26. Moreover, uncompensated Internet activities by individuals and groups of individuals, which includes creating, maintaining or hosting a Web site, is exempted from both the definitions of "contribution" and "expenditure." *See* 11 CFR 100.94 and 100.155.

1 making independent expenditures beyond its restricted class.[7] See 2 U.S.C. 431(17) and
2 441b, 11 CFR 100.16 and 114.2(b); see also 11 CFR 114.4(b)(6) and Advisory Opinion
3 1997-16 (ONRC Action).
4
5 *4. May Mr. King solicit the authorized committees of Federal candidates for*
6 *donations to the section 501(c)(3) charitable organizations described in the request?*
7 Yes, Mr. King may solicit the authorized committees of Federal candidates for
8 donations to the charitable organizations described in the request. Although agents of
9 any political party committee are prohibited from soliciting funds on behalf of tax-
10 exempt organizations that make disbursements in connection with any Federal election,
11 there is no indication that Mr. King would make such solicitations as an agent of a
12 political party committee. *See* 2 U.S.C. 441i(d) and (e), 11 CFR 300.37 and 300.50-
13 300.52. Moreover, you have informed us that all of the potential recipient charitable
14 organizations described in the request would be screened to ensure that they do not
15 conduct any activities in connection with any Federal or State election.
16 In addition, Federal candidates may donate contributions they receive to 501(c)(3)
17 organizations. *See* 2 U.S.C. 439a(a)(3), 11 CFR 113.2(b); *see also* Advisory Opinions
18 2005-06 (McInnis), 2005-05 (LaHood), and 2003-32 (Tenenbaum). Accordingly, Mr.
19 King's solicitation of donations from Federal candidate committees to the charitable

[7] The request does not indicate whether Mr. King or the Foundation will make any communication that would expressly advocate the election or defeat of a clearly identified candidate for Federal office such that it would qualify as an "independent expenditure" under 2 U.S.C. 431(17) and 11 CFR 100.16. Mr. King and the Foundation, if not incorporated, would incur reporting obligations for independent expenditures aggregating in excess of $250 with respect to a given election within a calendar year. *See* 2 U.S.C. 434(c); 11 CFR 104.4 and 109.10.

1 organizations described in the request would be consistent with 2 U.S.C. 439a(a) and
2 permissible under the Act and Commission regulations.

3 The Commission expresses no opinion regarding any tax ramifications of the
4 proposed activities because those issues are not within the Commission's jurisdiction.

5 This response constitutes an advisory opinion concerning the application of the
6 Act and Commission regulations to the specific transaction or activity set forth in your
7 request. *See* 2 U.S.C. 437f. The Commission emphasizes that, if there is a change in any
8 of the facts or assumptions presented, and such facts or assumptions are material to a
9 conclusion presented in this advisory opinion, then the requestor may not rely on that
10 conclusion as support for its proposed activity. The advisory opinions cited herein may
11 be found on the Commission's website at www.fec.gov.

12 Sincerely,
13
14
15
16 Robert D. Lenhard
17 Chairman