

RECEIVED  
FEDERAL ELECTION  
COMMISSION  
SECRETARIA

*E. Elliott Johnson*

SEP 11 11 12 AM '97



FEDERAL ELECTION COMMISSION  
Washington, DC 20463

*OK*

September 11, 1997

**AGENDA ITEM**  
For Meeting of: 9-18-97

**MEMORANDUM**

TO: The Commission

THROUGH: John C. Surina  
Staff Director

FROM: Lawrence M. Noble  
General Counsel

N. Bradley Litchfield  
Associate General Counsel

Jonathan M. Levin *JL*  
Senior Attorney

Subject: Draft AO 1997-17

Attached is a proposed draft of the subject advisory opinion. We request that this draft be placed on the agenda for September 18, 1997.

Attachment

1 ADVISORY OPINION 1997-17

2  
3 Kevin F. O'Malley  
4 The O'Malley Law Firm  
5 10 South Brentwood, Suite 102  
6 P.O. Box 16124  
7 St. Louis, MO 63105-0824

**DRAFT**

8  
9 Dear Mr. O'Malley:

10  
11 This responds to your letter dated July 29, 1997, on behalf of Missouri Attorney  
12 General Jay Nixon, requesting an advisory opinion concerning the application of the  
13 Federal Election Campaign Act of 1971, as amended ("the Act"), and Commission  
14 regulations to contributions from limited liability companies.

15 You are counsel for Jay Nixon, a candidate for nomination as the Democratic  
16 candidate in 1998 for the United States Senate from Missouri. Mr. Nixon's principal  
17 campaign committee, the Nixon Campaign Fund ("the Committee"), filed its statement of  
18 organization with the Commission on March 12, 1997.

19 You ask whether the Committee may receive a contribution from a Missouri  
20 limited liability company ("LLC"). You note that the Commission has already concluded  
21 that LLCs in three jurisdictions may make contributions, and that Missouri law is similar  
22 to their laws.

23 Under the Act, the term "person" includes an individual, partnership, committee,  
24 association, corporation, labor organization, or any other organization or group of  
25 persons. 2 U.S.C. §431(11); 11 CFR 100.10. The Act prohibits corporations from  
26 making any contribution or expenditure in connection with a Federal election. 2 U.S.C.  
27 §441b(a); 11 CFR 114.2(b). Contributions by persons whose contributions are not  
28 prohibited by the Act are subject to the limits set out in 2 U.S.C. §441a.<sup>1</sup> More  
29 particularly, contributions by partnerships are permitted, although limited by 2 U.S.C.

---

<sup>1</sup> The Act prohibits contributions by several entities: corporations, labor organizations, Federal contractors, and foreign nationals. 2 U.S.C. §§441b, 441c, and 441e; 11 CFR 114.2(b), 115.2, and 110.4(a).

1 §441a(a). Partnership contributions are also attributed proportionately against each  
2 contributing partner's limit for the same candidate and election. 11 CFR 110.1(e).<sup>2</sup>

3 As you indicate, the Commission has addressed the ability of LLCs in Virginia,  
4 the District of Columbia, and Pennsylvania to make contributions. Advisory Opinions  
5 1997-4, 1996-13, and 1995-11. In those opinions, the Commission concluded that, in  
6 view of the fact that the requesting entities were LLCs and that the LLC was a type of  
7 business entity that was distinct from a corporation or partnership under the statutes of  
8 those jurisdictions, the requester fell instead within the language "any other organization  
9 or group of persons," which is part of the Act's definition of "person." Hence, as a  
10 person, but not a corporation, the company was subject to the Act's contribution limits  
11 rather than its prohibitions. In addition, contributions from the company's general  
12 operating accounts or treasury would not be attributed to any of its members. However,  
13 the Commission's allowance for contributions by LLCs has been premised on the  
14 assumption that none of the individual members of the requesting entity were  
15 corporations, Federal contractors or foreign nationals. The participation of corporations,  
16 Federal contractors, or foreign nationals as members in an LLC would raise the issue of  
17 unlawful contributions or expenditures which are prohibited by 2 U.S.C. §§441b, 441c,  
18 and 441e. Advisory Opinions 1997-4, 1996-13, n.6 and 1995-11, n.9.

19 In reviewing the statutes of those jurisdictions, the Commission specifically noted  
20 how the statutes classified the entities in definitional terms and selection of business  
21 name. It also considered whether the statutes for LLCs or the rules of an entity itself  
22 broadly reflected characteristics that were different from those of a corporation in some  
23 instances or a partnership in others. For example, the opinions reviewed statutory  
24 language defining LLCs or prohibiting the use of certain terms in an LLC name that  
25 might indicate another form of business. Moreover, the statutes reflected the corporate  
26 characteristic of limitation of liability for all the members of an LLC, along with the lack  
27 of other characteristics generally associated with corporations, i.e., free transferability of

---

<sup>2</sup> A corporate partner may not participate in a partnership contribution or accept any attribution of any portion of the contribution through a reduction of its share of partnership profits or an increase of its share of partnership losses. 11 CFR 110.1(e).

1 interest and continuity of life. The opinions also noted how the statutes distinguished  
2 LLCs from partnerships, referring to the personal liability of general partners and the fact  
3 that the laws of the jurisdictions recognized the LLC as a business form distinct from  
4 partnerships. Advisory Opinions 1997-4, 1996-13 and 1995-11. In its most recent  
5 opinion on contributions by an LLC, the Commission stated that even if flexibility in the  
6 particular State's law on LLC and other business forms may allow that State's LLCs to  
7 have more common attributes with the corporations or partnerships in that State, the LLC  
8 was still a separate type of business entity with its own comprehensive statutory  
9 framework under State law. Advisory Opinion 1997-4.

10 Under Missouri law, the LLC is a form of business that is distinct from the  
11 various forms of corporations and partnerships and which has its own comprehensive  
12 statutory framework (Mo. Stat. §§347.010 to 347.187) within Title XXIII, entitled  
13 "Corporations, Associations and Partnerships." See Mo. Stat. §347.015(7). The Missouri  
14 statute states that the name must contain the term "limited company" or "limited liability  
15 company," or the abbreviations, LC, LLC, L.C. or L.L.C., and may not contain the word  
16 "association," "corporation," "incorporated," "limited partnership," "L.P.," or "Ltd.," or  
17 any abbreviation of such words. Mo. Stat. §347.020(1) and (2). Missouri law requires  
18 the LLC's articles of organization to state "the latest date or events, if any, on which the  
19 [LLC] will dissolve" and requires dissolution upon a number of occurrences, including  
20 events specified in LLC's governing documents; the withdrawal of the sole remaining  
21 member; or the withdrawal of a member (unless otherwise provided in the operating  
22 agreement), if the majority of members agrees to dissolve. Mo. Stat. §§347.039.1(5),  
23 347.123, and 347.137.<sup>3</sup> A Missouri LLC is given limited liability for all its members,  
24 even if they are managers, as is generally the case with corporations and generally  
25 distinguishable from partnerships. Mo. Stat. §347.057. Lastly, the statute provides for  
26 limitations on the transferability of interests. A member's assignment of his interest does  
27 not entitle the assignee to membership or the attendant management rights, just the right  
28 to receive distributions and profits, unless the other members provide unanimous written

---

<sup>3</sup> Section 347.137 also provides for dissolution by unanimous written consent of the members, or by a judicial determination.

1 consent or there is a provision for such assignment in the operating agreement. Mo. Stat.  
2 §§347.113 and 347.115.

3 Based on the foregoing, the Commission concludes that Missouri LLCs are not  
4 corporations or partnerships, and may generally make contributions to the Committee  
5 within the limits of the Act and without dual attribution of the amounts to the LLC's  
6 members. See 2 U.S.C. §441a(a)(1)(A); 11 CFR 110.1(e). As indicated above, however,  
7 the LLC's ability to contribute is conditioned upon the assumption that none of the  
8 members were in the Act's prohibited categories. 2 U.S.C. §§441b, 441c, and 441e.

9 Commission regulations provide that a committee treasurer shall be responsible  
10 for examining all contributions for evidence of illegality. 11 CFR 103.3(b).  
11 Contributions that present genuine questions as to whether they were made by entities in  
12 the prohibited categories may be, within ten days of the treasurer's receipt, either  
13 deposited in the campaign depository or returned to the contributor. If the contribution is  
14 deposited, the treasurer must make his best efforts, as defined in the regulation, to  
15 determine the legality of the contribution. 11 CFR 103.3(b)(1). If the contribution  
16 cannot be determined to be legal, the treasurer must refund the contribution within 30  
17 days of the receipt. *Id.*

18 Therefore, upon receipt of a contribution from a Missouri LLC, the Committee  
19 treasurer should ask the LLC, orally or in writing, whether any of its members fall within  
20 the prohibited categories. If the treasurer does not receive written or oral (memorialized  
21 in writing) confirmation from the LLC that none of the LLC's members fall within those  
22 categories, the contribution must be returned in a timely manner under 11 CFR  
23 103.3(b)(1). The Commission has specifically determined not to apply to LLCs the  
24 principle of dual attribution of the amounts of contributions that is applied to  
25 partnerships. Therefore, the LLC cannot provide for an attribution of the contribution to  
26 some of its members only (with a consequent reduction in their profits alone). Compare  
27 11 CFR 110.1(e)(2).<sup>4</sup>

---

<sup>4</sup> As an alternative to the attribution of a partnership contribution to each partner in proportion to his share of the partnership's profits, 11 CFR 110.1(e)(2) provides for attribution by agreement of the partners as long as only the profits of the partners to whom the contribution is attributed are reduced (or losses

