FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

OFFICE OF THE CHAIRMAN

ADVISORY OPINION 1999-11

Concurring Opinion of

Chairman Scott E. Thomas
Commissioner Danny Lee McDonald

While we agree with the result in Advisory Opinion 1999-11, we write separately to express our disagreement with certain approaches suggested by our colleagues in the course of approving the text of the opinion. First, the apparent effort to disavow a previous advisory opinion by declining to cite it in this opinion seems ill-advised. Second, the suggestion that our advisory opinions are not binding legal precedent is ill-founded.

I.

Certain of our colleagues seem to dislike the "campaign-related" test that has emerged over the years as a way of determining whether activity is regulable under the Federal Election Campaign Act of 1971, as amended (FECA). This test was articulated fairly recently in Advisory Opinion 1996-11, 2 Fed. Elec. Camp. Fin. Guide (CCH) ¶ 6194. There, officials who happened to be candidates were invited to a conference of an ideological group to make speeches. The opinion noted:

> The Commission has frequently considered whether particular activities involving the participation of a Federal candidate are ***campaign-related***, and thus result in a contribution or expenditure on behalf of such candidate under the Act. The Commission has determined that financing such activities will result in a contribution to or expenditure on behalf of a candidate if the activities involve (i) the solicitation, making or acceptance of contributions to the candidate's campaign, or (ii) communications expressly advocating the nomination, election or defeat of any candidate. *See* Advisory opinions 1994-15, 1992-6, 1988-27 [Fed. Elec. Camp. Fin. Guide (CCH), ¶¶ 6118, 6043 and 5934] and opinions cited therein. . . . The Commission has indicated that the absence of solicitations for

contributions or express advocacy regarding candidates will not preclude a determination that an activity is ***campaign-related***.

Id. (emphasis added).

There is no reason to fear the "campaign-related" test. It is simply a shorthand reference to the statutory tests governing different persons: the "for the purpose of influencing" test that applies to individuals, partnerships, PACs, and parties (*see*, e.g., 2 U.S.C. § 431(8)(A)(i)), and the "in connection with" test that applies to corporations, unions, national banks, and national corporations (*see*, e.g., 2 U.S.C. § 441b(a)).

If our colleagues do not agree with the statutory tests, and instead want to apply some sort of "express advocacy" test even in situations where coordination with a candidate is evident, they should try to get the statute changed. They do not achieve that goal by simply deleting reference to a majority-passed advisory opinion applying the existing statute. Moreover, by leaving in Advisory Opinion 1999-11 several citations to other advisory opinions that use the "campaign-related" test (e.g. Advisory Opinion 1994-15), our colleagues seem to have approved that standard anyway.[1]

By omitting the most recent articulation of the Commission's analysis of the statute's reach, Advisory Opinion 1996-11, our colleagues invite confusion on the part of the regulated community. Why omit reference to that opinion but include reference to several others that seem to set forth the same approach? Is there some subtle difference between the conference dealt with in Advisory Opinion 1996-11 and the appearance dealt with in Advisory Opinion 1994-15 that warrants a different legal analysis? Questions such as these would have been avoided by going with the General Counsel's draft that cited the most recent authority as well as the others.

II.

Turning to our second point, we do not agree with our colleagues' suggestion that majority-approved advisory opinions do not have the force of binding precedent. The statute makes clear that the requestor, as well as any other person undertaking materially indistinguishable activity, is not to be subject to sanctions if relying in good faith on an advisory opinion. 2 U.S.C. § 437f(c). The courts have indicated they will rely on the FEC's advisory opinions as a valid

[1] The substitute draft favored by our colleagues seemed to draw the line between regulable activity and non-regulable activity according to whether there was "any campaign activity" at the event in question. This doesn't suggest a compelling need to alter the General Counsel's draft that used the often-approved "campaign related" test.

interpretation of the law. For example, in *FEC v. Ted Haley Congressional Committee*, 852 F.2d 1111, 1115 (9th Cir. 1988)("*Haley*"), where the FEC's application of the law to post-election contributions was upheld, the court said, "[I]nterpretation of FECA by the FEC through its regulations ***and advisory opinions*** is entitled to due deference and is to be accepted by the court unless demonstrably irrational or clearly contrary to the plain meaning of the statute. [emphasis added]"

Where appropriate, the Commission has superseded prior opinions.[2] Having not been overruled, Advisory Opinion 1996-11 is still a valid legal

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[2] *See, e.g.*, Advisory Opinion 1978-10; Fed. Elec. Camp. Fin. Guide (CCH) ¶ 5340 (superseding Re Advisory Opinion Requests 1976-72 and 1976-83 at Fed. Elec. Camp. Fin. Guide (CCH) ¶¶ 6934 and 6936, respectively); Advisory Opinion 1978-30, Fed. Elec. Camp. Fin. Guide (CCH) ¶ 5325 (superseding Advisory Opinion 1975-54, Fed. Elec. Camp. Fin. Guide (CCH) ¶ 5165); Advisory Opinion 1978-46, Fed. Elec. Camp. Fin. Guide (CCH) ¶ 5348 (superseding Advisory Opinion Request 1976-65, Fed. Elec. Camp. Fin. Guide (CCH) ¶ 6929); Advisory Opinion 1980-38, Fed. Elec. Camp. Fin. Guide (CCH) ¶ 5489 (superseding Advisory Opinion 1976-110 and 1978-67 at Fed. Elec. Camp. Fin. Guide (CCH) ¶¶ 5234 and 5356 respectively); Advisory Opinion 1980-89, Fed. Elec. Camp. Fin. Guide (CCH) ¶ 5537 (superseding Advisory Opinion 1975-14, Fed. Elec. Camp. Fin. Guide (CCH) ¶¶ 5107 and OC 1975-125); Advisory Opinion 1981-37, Fed. Elec. Camp. Fin. Guide (CCH) ¶ 5623 (superseding Advisory Opinion 1975-8, 1975-13, 1975-20 and 1975-108 at Fed. Elec. Camp. Fin. Guide (CCH) ¶¶ 5112, 5113, 5121 and 5190, respectively); Advisory Opinion 1981-41, Fed. Elec. Camp. Fin. Guide (CCH) ¶ 5626 (superseding original version of opinion or recommendation); Advisory Opinion 1982-60, Fed. Elec. Camp. Fin. Guide (CCH) ¶ 5699 (superseding OC 1975-63); Advisory Opinion 1983-16, Fed. Elec. Camp. Fin. Guide (CCH) ¶ 5717 (superseding OC 1976-7); Advisory Opinion 1986-17, Fed. Elec. Camp. Fin. Guide (CCH) ¶ 5857 (superseding Advisory Opinion 1982-49, Fed. Elec. Camp. Fin. Guide (CCH) ¶ 5693); Advisory Opinion 1986-21, Fed. Elec. Camp. Fin. Guide (CCH) ¶ 5859 (superseding Advisory Opinion 1978-41 and 1978-65, Fed. Elec. Camp. Fin. Guide (CCH) ¶¶ 5331 and 5360 respectively); Advisory Opinion 1987-7, Fed. Elec. Camp. Fin. Guide (CCH) ¶ 5889 (superseding Advisory Opinion 1983-43 and 1984-14 at Fed. Elec. Camp. Fin. Guide (CCH) ¶¶ 5746 and 5761 respectively); Advisory Opinion 1989-8, Fed. Elec. Camp. Fin. Guide (CCH) ¶ 5959 (superseding Advisory Opinion 1979-77, Fed. Elec. Camp. Fin. Guide (CCH) ¶ 5454); Advisory Opinion 1990-4, Fed. Elec. Camp. Fin. Guide (CCH) ¶ 5983 (superseding Advisory Opinion 1978-68, Fed. Elec. Camp. Fin. Guide (CCH) ¶ 5357); Advisory Opinion 1992-17, Fed. Elec. Camp. Fin. Guide (CCH) ¶ 6060 (superseding Advisory Opinion 1981-56 and 1981-54 at Fed. Elec. Camp. Fin. Guide (CCH) ¶¶ 5646 and 5644, respectively); Advisory Opinion 1992-44, Fed. Elec. Camp. Fin. Guide (CCH) ¶ 6085 (superseding Advisory Opinion 1980-3, Fed. Elec. Camp. Fin. Guide (CCH) ¶ 5463); Advisory Opinion 1993-6, Fed. Elec. Camp. Fin. Guide (CCH) ¶ 6087 (superseding Advisory Opinion 1980-113, Fed. Elec. Camp. Fin. Guide (CCH) ¶ 5562); Advisory Opinion 1995-11, Fed. Elec. Camp. Fin. Guide (CCH) ¶ 6148 (superseding 1978-51, Fed. Elec. Camp. Fin. Guide (CCH) ¶ 5343; Advisory Opinion 1996-5, Fed. Elec. Camp. Fin. Guide (CCH) ¶ 6185 (superseding Advisory Opinions 1989-5 and 1984-52 at Fed. Elec. Camp. Fin Guide (CCH) ¶¶ 5956 and 5797, respectively); Advisory Opinion 1997-5, Fed. Elec. Camp. Fin. Guide (CCH) ¶ 6235 (superseding Advisory Opinions 1988-39 and 1987-31, Fed. Elec. Camp. Fin. Guide (CCH) at ¶¶ 5941 and 5909 respectively); Advisory Opinion 1997-13, Fed. Elec. Camp. Fin. Guide (CCH) ¶ 6241 (superseding Advisory Opinion 1996-49, Fed. Elec. Camp. Fin. Guide (CCH) ¶ 6227); and Advisory Opinion 1998-23, Fed. Elec. Camp. Fin. Guide (CCH) ¶ 6278 noting that Advisory Opinion 1996-51, Fed. Elec. Camp. Fin. Guide (CCH) ¶ 6229 had superseded Advisory

precedent. Absent judicial interpretation to the contrary, the approach articulated there must be presumed neither "demonstrably irrational" nor "clearly contrary to the plain meaning of the statute." *Haley*, *id.*

We see no reason for FEC commissioners to argue for weakening the legal value of FEC-approved advisory opinions. It is one thing to try to overrule prior opinions with a new four-vote majority. That is fair game. It is hardly helpful to the agency and to the legal process, however, to merely muddle the precedents on the books.

Congress intended advisory opinions to serve a valuable interpretive function. Recently, this was underscored by a request from the Committee on House Administration for prompt action to make such opinions more accessible on the Internet. Rather than downplay their significance, commissioners should cite them when appropriate and use them to educate the regulated community and encourage compliance with the law passed by Congress.

6/24/99
Date

Scott E. Thomas
Chairman

6/24/99
Date

Danny Lee McDonald
Commissioner

Opinions 1976-95, 1992-30, 1995-49, 1996-27, and 1996-43 at Fed. Elec. Camp. Fin. Guide (CCH) ¶¶ 5232, 6070, 6187, 6209, and 6221 respectively).