FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

MEMORANDUM

TO: THE COMMISSION
STAFF DIRECTOR
GENERAL COUNSEL
FEC PRESS OFFICE
FEC PUBLIC RECORDS

From: Mary W. Dove
Acting Secretary of the Commission

DATE: April 26, 2000

SUBJECT: COMMENT: PROPOSED AO 2000-05

Transmitted herewith is a timely submitted comment by Steven R. Ross/Janis M. Crum on behalf of The Oneida Nation of New York

Proposed Advisory Opinion 2000-05 is on the agenda for Thursday, April 27, 2000.

Attachment:

5 pages

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NASH – IN AFFILIATION WITH THE LAW OFFICE OF ABDULLAH H. FAHAD

April 26, 2000

Ms. Mary Dove, Commission Secretary
Federal Election Commission, 9th Floor
999 E Street, N.W.
Washington, D.C. 20463

Re: Comment to Advisory Opinion 2000-5

Dear Mr. Litchfield:

Pursuant to 2 U.S.C. § 437f (d), we respectfully submit this comment as part of the record for Advisory Opinion 2000-5 on behalf of our client, the Gila River Indian Community.

The Gila River Indian Community is a federally-recognized Indian tribe located in Arizona. Like the Oneida Nation requester, the Community participates in Federal elections by making contributions to Federal candidates, political parties and PACs. While the Community itself is not a corporation, it has authorized the creation of economic enterprises pursuant to tribal law, similar to the establishment of corporations organized under the laws of a State. Economic entities may be formed as profit-making ventures or for other purposes, such as the construction of hospitals and the development of infrastructure for the health and welfare of Community members. In addition, the Community has formed partnerships with "outside" corporations, and may invest in various business ventures.

Our comment focuses on the draft opinion's interpretation of the Federal Election Campaign Act's ("FECA") corporate contribution prohibition and its application to Indian tribes and economic entities formed pursuant to tribal law. We encourage the Commission to refrain from adopting the General Counsel's analysis, which introduces presumptive facts not presented by the requester, then applies the corporate contribution prohibition to those hypothetical facts. Specifically, the Commission should amend the opinion by striking any language that includes

an interpretation or analysis of the corporate contribution prohibition as applied to the Oneida Nation, and excise the accounting requirements of 11 C.F.R. § 102.5(b).[1]

Alternatively, if the Commission includes the speculative language relating to tribal business ventures, it should refer back to its analysis in A.O. 1999-32. In that opinion, the Commission recognized that "the general relationships between tribal governments and their commercial ventures are unique and differ from usual relationships . . . regarding entities that may be affiliated with each other." FEC Agenda Doc. No. 00-48 at 4. Tribal entities are also unique because of their complex legal relationship with the Federal government.

Our concerns are set forth in more detail below.

I. Advisory Opinion 2000-5: Background

On March 30, 2000, the Oneida Nation requested an advisory opinion that posed a "pure" question of law. The legal issue presented to the Commission was whether the Act's annual aggregate contribution limit applies solely to individual persons, or whether it also applies to Indian tribes like the Nation. *See*, Oneida Nation Advisory Opinion Request at 2 (http.www.fec.gov/aos/aor00-05req.pdf). This was the one and only question for which the Nation requested an answer.

In its brief four-page opinion, the General Counsel first concludes that the $25,000 limit does not apply to the Oneida Nation because the statute specifically applies the limit only to "individuals."[2] *See*, FEC Agenda Doc. No. 00-48 at 2, lines 7-14; 2 U.S.C. § 441a(a)(3).

The opinion then introduces presumptions regarding the source of the Nation's contributions and the status of tribal economic enterprises and investments, based on a review of public information from the Nation's web site. The draft states that "[t]he Nation's contributions would *presumably* be made from its general treasury funds that are *apparently* comprised of revenues and profits derived from the Nation's business ventures. [The web site] indicates that many, if not all, of these ventures are *operated or owned* by corporations." *Id.* at 3.

Next, the opinion applies the Act's prohibition on corporate contributions to these hypothetical facts (without explicitly stating that the prohibition applies to the tribe itself), and adds an additional accounting requirement. "Notwithstanding the broad scope of this prohibition, Commission regulations prescribe procedures and conditions under which some organizations, like the Nation, may make lawful contributions." *Id.*, *citing* 11 C.F.R. § 102.5(b). The opinion requires the Nation to either establish a separate bank account for contributions from

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[1] Specifically, we request that the Commission strike the sentence on page 2, line 14, beginning with "The Nation..." and the following paragraphs, through page 4, line 2.

[2] We agree with the General Counsel's interpretation.

sources not prohibited by the Act, or alternatively, demonstrate by a reasonable accounting method that the Nation's contributions are sufficiently funded from legal sources. *See*, 11 C.F.R. § 102.5(b).

II. Comments to the General Counsel's Draft

1. The General Counsel Presumes Facts Not Presented By the Requester

In the advisory opinion context, a requester is required to ask for guidance related to "a specific transaction or activity." 2 U.S.C. § 437f(a)(1). The statute prevents the Commission from interpreting or applying regulations in hypothetical situations by limiting the scope of the Commission's response to the transaction in question, and by prohibiting opinions "of an advisory nature." 2 U.S.C. § 437f(b). In previous advisory opinions, the Commission has rejected the General Counsel's draft opinions based on this reasoning. *See, e.g.*, A.O. 1999-17.

As noted above, the Nation's only question was whether the annual aggregate $25,000 contribution limit applies to Indian tribes. Once that legal question is answered, the Commission has fulfilled its statutory obligation. Application of other statutory and regulatory provisions to facts not presented by the requester are "opinions of an advisory nature" prohibited by the Act. 2 U.S.C. § 437f(b).

Thus, we ask the Commission to refrain from engaging in hypothetical exercises not presented by the requester and to conclude Advisory Opinion 2000-5 at page 2, line 14.

2. By Introducing Speculative Facts, the Opinion Mischaracterizes the Status of the Tribe and its Economic Enterprises as "Corporations" for FECA Purposes.

The unnecessary introduction of factual presumptions with respect to tribal economic ventures leads to an interpretation of the Act's prohibition on corporate contributions that is contrary to the plain language of the statute, the Commission's own definition of a corporation and the analysis used in previous advisory opinions.

While we fully recognize that the Act prohibits direct and indirect corporate contributions, the opinion suggests that the prohibition on corporate contributions would apply to an Indian tribe that is an *unincorporated* entity. The application of the Act's corporate contribution ban to an *unincorporated* entity is clearly contrary to the plain language of the statute, which prohibits a *corporation* from making contributions or expenditures in connection with a Federal election. *See*, 2 U.S.C. § 441b(a).[3]

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[3] As the Commission noted in A.O. 1999-32, the Indian Reorganization Act permits a tribe to incorporate after meeting certain requirements and submitting a request to the Secretary of the Interior. *See*, FEC A.O. 1999-32, *citing*, *White Apache Tribe v Williams*, 810 F.2d 844, 866 (9th

The opinion's application of the prohibition on *indirect* corporate contributions similarly relies on factual presumptions, then misstates the law. The opinion holds that the Nation may be a source of prohibited contributions *if* the funds for the contributions are derived from "revenues and profits" from its "business ventures" that may be "operated or owned" by corporations.

The Act certainly does not prohibit contributions by non-corporate persons derived from "profits" of a business that is "owned or operated" by a corporation. Such an overly broad application of the law would prohibit an individual shareholder from making a contribution from an account that also includes funds received from corporate dividends. There is no statute, regulation or court precedent to support such an expansive interpretation of 2 U.S.C. § 441b.

Further, the Commission defines "corporation" by referring to the organizational status of a business entity under State law. *See, e.g.*, H.R. Rept. 1438 (Conf.) 93d Cong., 2d Sess. 68-69 (1974); 64 Fed. Reg. 37399 (July 12, 1999). As the Commission found in A.O. 1999-32, many tribal economic enterprises are not corporations organized under the laws of any State. *See*, FEC A.O. 1999-32 at 1.

In fact, where an economic enterprise incorporates pursuant to tribal law, the Federal courts look beyond a tribe's organizational status, or the status of its subordinate units, to determine whether or not it is acting in a business capacity. *See*, A.O. 1999-32 at 5, *citing*, *Mescalero Apache Tribe v. Jones*, 411 U.S. 145,157-58, n.13 (1973). "Case law suggests that to determine whether a tribe is acting in its business or in some other capacity, courts look beyond whether the tribe or one of its units has incorporated itself. The courts instead look to the conduct in question and the powers actually granted to the tribe, or the enterprise, under their governing documents." A.O. 1999-32 at 5.

Thus, even if the source of funds for a contribution came directly from a tribal economic entity, that entity may not meet the definition of a corporation for purposes of the FECA.

3. *The Opinion Applies the Account Segregation Provision By Presuming Facts Not Presented By the Requester*

The application of 11 CFR § 102.5(b) is similarly based on presumed (and unconfirmed) facts. The opinion states that this section applies to "organizations that are not political committees" and "that propose to make contributions to influence Federal elections." FEC Agenda Doc. No. 00-48 at 3. This is incorrect. The title of this section and the explanation and justification clearly indicate that 11 C.F.R. § 102.5(b) applies to organizations that fund "both *Federal and non-Federal political activities* other than through transfers and joint fundraisers." 11 C.F.R. § 102.5; 45 Fed. Reg. 15083, 15084 (Mar. 7, 1980) ("Subsection (b) deals with organizations which finance both federal and non-federal election activity...").

Cir. 1987). As evidenced by the Oneida Nation, the Gila River Indian Community and the Tohono O'Odham Nation in A.O. 1999-32, not all tribes seek incorporation under Federal law.

The Oneida Nation did not ask the Commission to determine whether section 102.5(b) applies, nor did it present any facts that would indicate that it is engaged in non-federal political activity. Thus, the Commission should excise this language from the opinion.

III. Conclusion

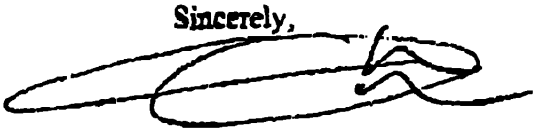
We ask the Commission to refrain from introducing factual presumptions that were not presented by the requester. As we have discussed, the only issue presented was the application of the $25,000 aggregate annual limit on all Federal contributions by Indian tribes.

Neither the Act nor Commission regulations have addressed the status of tribal economic enterprises. Determining the status of these entities under the FECA presents a complex legal question that cannot be resolved by simple analogy to corporations organized under State law. We believe that it would be imprudent for the Commission to address this issue of first impression, *sua sponte*, in an advisory opinion.

If the Commission believes it is prudent to address these complex legal issues, it should do so by utilizing one of the two methods appropriate for promulgating rules of general applicability – either through annual legislative recommendations to Congress or a rulemaking subject to the provisions of the Administrative Procedure Act, 5 U.S.C. § 551, *et. seq.* These methods would provide notice and elicit comments from interested parties and the public in a manner that does not fully occur in the truncated advisory opinion process.

Thank you for the opportunity to submit this comment. Please feel free to contact us with any further comments or questions.

Sincerely,



Steven R. Ross
Janis M. Crum

cc: N. Bradley Litchfield, Associate General Counsel