FEDERAL ELECTION COMMISSION
Washington, DC 20463

August 14, 2003

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

ADVISORY OPINION 2003-15

G. Scott Rafshoon, Esq.
McKenna, Long & Aldrige, LLP
303 Peachtree Street, NE
Suite 5300
Atlanta, GA 30308

Dear Mr. Rafshoon:

This responds to your letters of April 14 and April 25, 2003, requesting an advisory opinion on behalf of United States Representative Denise Majette and the Committee to Re-Elect Congresswoman Denise Majette, her principal campaign committee ("the Committee"), concerning the application of the Federal Election Campaign Act of 1971, as amended ("the Act"), and Commission regulations, to the solicitation and use of donations to a legal expense trust fund established by Representative Majette ("the Fund").

Background

You state that following Representative Majette's victory in the 2002 Democratic primary in Georgia's 4th U.S. Congressional District, five supporters of the defeated incumbent filed suit in federal court challenging Georgia's open primary election system. You also state that the initial complaint asked the court to enjoin Georgia officials from conducting the general election, and after her victory in the general election, the complaint was amended to seek a special primary and a special general election for the seat now held by Representative Majette. You explain that the plaintiffs initially named Representative Majette as a defendant, but later amended their complaint to exclude her as a defendant. She incurred legal expenses seeking her dismissal, and she continues to incur legal fees related to monitoring the ongoing litigation, which now exceed $90,000. You also explain that another amendment to the complaint remains possible. Therefore,

Representative Majette believes it may be necessary to raise funds to meet this contingency.[1]

Representative Majette wishes to establish a legal expense trust fund to raise money to defray these legal expenses. You state that the Fund will be established in accordance with the Legal Expense Fund Regulations promulgated by the Committee on Standards of Official Conduct of the U.S. House of Representatives. As required, the Fund will be established as a Georgia trust, administered by an independent trustee who will oversee fundraising. Under your proposal, the Fund would accept no more than $5,000 per year from any individual or organization. Trust funds will be used only for legal expenses, including expenses incurred in soliciting for and administering the Fund.

You also state that the Fund will solicit funds from individuals, labor organizations and corporations. All solicitations will be made in person or by mail and will be accompanied by a letter stating the purpose of the Fund. You explain that the "Statement of Purpose" included in any solicitation will be substantially as follows: "The purpose of this solicitation is to obtain personal funds to defray the cost of certain litigation against Representative Majette. Funds obtained by this solicitation will not be used . . . in any way to promote or maintain the official activities of any officeholder." In addition, donors will be requested to sign a card to be returned with the donation affirming the purpose of the gift. You explain that the card will read substantially as follows: "I, the undersigned, hereby, confirm the donation of $_____ to the Trust for the purpose of funding certain litigation defense-related activity. This donation is not given for the purpose of influencing any election or as a campaign contribution or for the purpose of promoting or maintaining the official activities of any officeholder." Solicitations for the Fund will be conducted completely separate from any solicitations for, or on behalf of, the Committee.

Question Presented

Are the amounts raised and spent by Representative Majette to defray certain legal defense expenses "contributions" or "expenditures" or otherwise subject to the provisions of the Act?

Legal Analysis and Conclusions

They are not, for the reasons discussed below. On November 6, 2002, the Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 (2002)

---

[1] Copies of the relevant court documents were submitted in a supplementary letter dated April 28, 2003, and consist of the following pleadings: (1) October 4, 2002 complaint; (2) December 5, 2002 defendant Denise Majette's motion to dismiss; (3) December 5, 2002 memorandum of law in support of her motion to dismiss; (4) December 20, 2002 notice of voluntary dismissal of defendant Denise Majette; and (5) January 8, 2003 amended complaint.

("BCRA"), took effect. *See* BCRA, § 402(a)(1), 116 Stat. 81, at 112 (2002).[2] As amended by BCRA, the Act regulates certain activities of Federal candidates and officeholders, their agents, and entities directly or indirectly established, financed, maintained, or controlled by them. Relevant to this request, 2 U.S.C. § 441i(e)(1)(A) prohibits these persons from soliciting, receiving, directing, transferring, or spending "funds in connection with an election for Federal office, including funds for any Federal election activity, unless the funds are subject to the limitations, prohibitions, and reporting requirements of this Act." *See also* 11 CFR 300.61.

The question under 2 U.S.C. § 441i(e)(1)(A) is whether amounts received and spent by the Fund to defray Representative Majette's legal expenses as a defendant in this lawsuit are funds "in connection with an election for Federal office." FECA's corporate and labor organization prohibition, 2 U.S.C. § 441b, employs a related concept of "payment, distribution, loan, advance, deposit, or gift of money, . . . or anything of value . . . to any candidate [or] campaign committee . . . in connection with a [Federal] election." 2 U.S.C. § 441b(b)(2).

In prior advisory opinions, the Commission has concluded that the limits and prohibitions of the Act do not apply to monies given to a candidate's legal defense fund.[3] *See* Advisory Opinions 1996-39, 1983-21 and 1981-13. Advisory Opinion 1996-39 is of particular relevance to this situation because it concerned expenses for a lawsuit challenging the legality of a Federal election ballot. The Commission addressed whether monies raised and spent to defend against that litigation were subject to the corporate and labor organization prohibition of 2 U.S.C. § 441b(b)(2). Specifically, the Commission considered whether a candidate may establish a separate account to pay legal expenses related to a pre-election challenge before State ballot officials and subsequent State court litigation concerning the sufficiency of the candidate's nominating petitions to qualify for a primary election ballot. The Commission determined that funds received and spent to pay these litigation expenses would not be treated as contributions or expenditures for purpose of the FECA, provided they are raised and spent by an entity other than a political committee. Because the funds were not considered contributions, they were not subject to the limitation of 2 U.S.C. § 441a(a). The Commission also concluded that: "As a result, corporate funds may be accepted by another entity for this purpose." Advisory Opinion 1996-39. The Commission has reached the same conclusion in earlier advisory opinions concerning legal expense funds that were established to defend or

---

[2] BCRA's effective date provision includes a specific exception for runoff elections, recounts, or election contests resulting from elections held prior to November 6, 2002. This exception only applies to he provisions listed in section 402(a)(4), and the provision of BCRA related to Federal candidates, FECA section 323(e), codified at 2 U.S.C. § 441i(e), is not listed. BCRA, § 402(a)(4), 116 Stat. at 112.

[3] This longstanding policy is consistent with Commission regulations that explicitly recognize the role of legal expense funds. These personal use regulations at 11 CFR 113.1(g)(6)(i) provide that a donation to a legal expense trust fund established in accordance with the rules of the United States Senate or the United States House of Representatives is not considered a contribution by a third party to pay an expense that might otherwise be considered to be personal use of campaign funds.

undertake legal challenges to party rules (Advisory Opinions 1983-37 and 1982-35) and state constitutional provisions (Advisory Opinions 1983-30) that impacted the elections in question. In each of these advisory opinions, the Commission concluded that to the extent the legal expenses were used exclusively for the purposes of defraying legal costs, donations to, and disbursements, from the fund would not constitute contributions or expenditures.

The litigation involving Representative Majette is substantially similar to the litigation considered in Advisory Opinion 1996-39 in that both lawsuits challenge the lawfulness of the conduct of the election. Consequently, this lawsuit is no more "in connection with a Federal election" than the primary ballot challenge at issue in Advisory Opinion 1996-39 was in connection with that election. Therefore, donations to, and disbursements by, the Fund for the sole purpose of defending against this lawsuit are not subject to the limitations or prohibitions of 2 U.S.C. §§ 441a or 441b. Nor are they subject to reporting requirements under 2 U.S.C. § 434 if they will not be deposited in Representative Majette's campaign depository.

The Commission concludes that 2 U.S.C. § 441i(e)(1)(A) does not change this result. There is no indication in the legislative history of BCRA that Congress intended section 441i(e)(1)(A) to change an area that is both well-familiar to members of Congress and subject of longstanding interpretation through statements of Congressional policy and \Commission Advisory Opinions. Furthermore, after it enacted BCRA, the U.S. House of Representatives adopted House Rule XXV(5)(a)(3)(E) which permits Members to accept contributions for their legal expense funds subject to certain restrictions. H.R. Res. 5, 108th Cong. (2003). This supports the conclusion that Congress did not intend 2 U.S.C. § 441i(e)(1)(A) to bar Federal officeholders from accepting non-Federal funds for their legal expense funds.

Because this lawsuit is not "in connection with" a Federal election for purposes of section 441b, it should not be considered "in connection with" a Federal election for purposes of 2 U.S.C. § 441i(e)(1)(A). Therefore, donations to, and disbursements by, the Fund for the sole purpose of defending against this lawsuit are not subject to the restrictions of 2 U.S.C. § 441i(e)(1)(A). [4]

The solicitation methods and separate account described in your request are sufficient because they are similar to those approved in Advisory Opinion 1996-39.

The Commission expresses no opinion regarding the possible applicability of any other Federal or State tax laws or other laws, or the rules of the House of Representatives,

[4] The Commission notes that legal expense funds established by national committees of political parties or related entities are subject to a different legal standard under 2 U.S.C. § 441i(a). *See* Explanation and Justification for Prohibited and Excessive Contributions: Non-Federal Funds or Soft Money, 67 *Fed. Reg*. 49064, 49088-89 (July 29, 2002).

to the matters presented in your request, because these issues are not within its jurisdiction.

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

The Commission notes that this advisory opinion analyzes the Act, as amended by BCRA, and Commission regulations, including those promulgated to implement the BCRA amendments, as they pertain to your proposed activities. On May 2, 2003, a three-judge panel of the United States District Court for the District of Columbia ruled that a number of BCRA provisions are unconstitutional and issued an order enjoining the enforcement, execution, or other application of those provisions. *McConnell v. FEC,* 251 F.Supp. 2d 176 (D.D.C. 2003); *prob. juris. noted,* 123 S.Ct. 2268 (U.S. 2003). Subsequently, the district court stayed its order and injunction in *McConnell v. FEC,* 253 F. Supp. 2d 18 (D.D.C. 2003). The Commission has determined that your request for advice is not affected by the district court's ruling. The Commission cautions that the legal analysis in this advisory opinion may be affected by the eventual decision of the Supreme Court.

Sincerely,

(signed)

Ellen L. Weintraub
Chair

Enclosures (AOs 1996-39, 1983-37, 1983-30, 1983-21, 1982-35 and 1981-13)