

August 6, 2003

NOTICE AO DRAFT COMMENT PROCEDURES

The Commission has approved a revision in its advisory opinion procedures that permits the submission of written public comments on draft advisory opinions when proposed by the Office of General Counsel and scheduled for a future Commission agenda.

Today, DRAFT ADVISORY OPINION 2003-19 is available for public comments under this procedure. It was requested by counsel Judith Corley and Brian Svoboda on behalf of The Democratic Congressional Campaign Committee. The draft may be obtained from the Public Disclosure Division of the Commission.

Proposed Advisory Opinion 2003-19 will be on the Commission's agenda for its public meeting of Thursday August 14, 2003.

Please note the following requirements for submitting comments:

1) Comments must be submitted in writing to the Commission Secretary with a duplicate copy to the Office of General Counsel. Comments in legible and complete form may be submitted by fax machine to the Secretary at (202) 208-3333 and to OGC at (202) 219-3923.

2) The deadline for the submission of comments is 12:00 noon (EDT) on August 13, 2003.

3) No comments will be accepted or considered if received after the deadline. Late comments will be rejected and returned to the commenter. Requests to extend the comment period are discouraged and unwelcome. An extension request will be considered only if received before the comment deadline and then only on a case by case basis in special circumstances.

4) All comments timely received will be distributed to the Commission and the Office of General Counsel. They will also be made available to the public at the Commission's Public Disclosure Division.



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Washington, DC 20463

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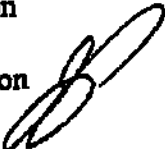
AGENDA ITEM


For Meeting of: 08-14-03


August 6, 2003


MEMORANDUM


TO: The Commission


THROUGH: James A. Pehrkon 
Staff Director


FROM: Lawrence H. Norton 
General Counsel

James Kahl 
Deputy General Counsel

Rosemary C. Smith 
Acting Associate General Counsel

Mai Dinh 
Acting Assistant General Counsel

Dawn Odrowski 
Staff Attorney

Alex Demots 
Intern

Subject: Draft AO 2003-19

Attached is a proposed draft of the subject advisory opinion. We request that this draft be placed on the agenda for August 14, 2003.

Attachment

DRAFT

1 ADVISORY OPINION 2003-19

2
3 Judith L. Corley, Esq.
4 Brian G. Svoboda, Esq.
5 Perkins Coie LLP
6 607 Fourteenth Street, N.W.
7 Washington, D.C. 20005-2011
8

9 Dear Ms. Corley and Mr. Svoboda:

10 This responds to your letter dated June 24, 2003, requesting an advisory opinion on
11 behalf of the Democratic Congressional Campaign Committee, Inc. ("DCCC"), concerning the
12 application of the Federal Election Campaign Act of 1971, as amended, and the Bipartisan
13 Campaign Reform Act of 2002 ("BCRA")(collectively, "the Act"), and Commission regulations
14 to the DCCC's proposed sale of used office equipment and furniture.

15 ***Background***

16 The DCCC is a "national congressional campaign committee" under the Act. See 2
17 U.S.C. § 441i(a); 11 CFR 110.2(c)(2); 11 CFR 300.10(a). In 2002, the DCCC agreed to
18 participate in the renovations of the Democratic Party headquarters building that began shortly
19 after the 2002 general election. You state that, as a result of the renovations, the DCCC
20 anticipates that much of its office equipment and furniture will be incompatible with the new
21 space and with future plans. The DCCC would like to sell these items in arm's length
22 transactions "at a price most closely approximating fair market value." You state that a fair
23 market price will be easily determinable because similar used items are routinely bought and
24 sold. The DCCC intends to make the used furniture and equipment available for sale to a wide
25 array of potential purchasers, which may include corporations, labor organizations or other

1 sources prohibited from making contributions or donations to national party committees under
2 the Act.

3 ***Question Presented***

4 *Under BCRA, may the DCCC accept proceeds from the sale of used office equipment and*
5 *furniture, without regard to the source or amount of those proceeds?*

6 ***Legal Analysis and Conclusion***

7 Yes, it may, under certain conditions. Before BCRA, national party committees were
8 able to raise and spend non-Federal funds (i.e., funds not subject to the limitations, prohibitions
9 and reporting requirements of the Act) using separate non-Federal accounts. Under BCRA,
10 however, national party committees may not "solicit, receive, or direct to another person a
11 contribution, donation, or transfer of funds or any other thing of value, or spend any funds, that
12 are not subject to the limitations, prohibitions and reporting requirements of this Act." 2 U.S.C.
13 § 441i(a); 11 CFR 300.10(a). As a national congressional campaign committee, the DCCC is
14 considered a "national committee" of a political party for the purposes of section 441i(a) of the
15 Act. 11 CFR 300.10(a). As such, the DCCC is prohibited from receiving any contributions or
16 donations that are not subject to the limitations, prohibitions, and reporting requirements of the
17 Act. 2 U.S.C.

18 § 441i(a). The term "contribution" is defined in the Act to include "any gift, loan, advance, or
19 deposit of money or anything of value made by any person for the purpose of influencing any
20 election for Federal office." 2 U.S.C. § 431(8)(A). In the specific context of contributions by
21 corporations or labor organizations, the term "contribution" is also defined to include "any direct
22 or indirect payment, distribution, loan, advance, deposit, or gift of money... to any candidate,
23 campaign committee, or political party or organization, in connection with any election to"

1 Federal office. 2 U.S.C. § 441b(b)(2). A "donation" means "a payment, gift, subscription, loan,
2 advance, deposit, or anything of value given to a person, but does not include contributions." 11
3 CFR 300.2(e).

4 The Commission recently addressed transactions involving political committee assets
5 under BCRA. In Advisory Opinion 2002-14, the Commission concluded, in pertinent part, that
6 payments received by a national party committee for the leasing of its mailing list would not be
7 viewed as a "contribution, donation or transfer of any funds or any other thing of value . . .
8 subject to the Act's limits and prohibitions" based on how the list was developed and used, and
9 on the nature of the lease transaction at issue in that opinion. Specifically, the Commission
10 concluded that the national party committee could lease its mailing list to persons, including
11 corporations and labor organizations, where: 1) the list had been developed by the committee in
12 the course of its political activities over a period of time and primarily for its own political or
13 campaign purposes rather than for sale or lease to others; 2) the leasing of the list constituted
14 only a small percentage of the committee's use of the list; 3) the list, or the leased portion
15 thereof, had an ascertainable fair market value; and 4) the list was leased at the usual and normal
16 charge in a *bona fide*, arm's length transaction and was used in a commercially reasonable
17 manner consistent with an arm's length agreement. The Commission further concluded that the
18 rental payments would be considered Federal funds usable for any purpose permitted under the
19 Act and the regulations and should be reported in the Committee's reports as "Other Receipts."¹

20

¹ The conclusion in Advisory Opinion 2002-14 is generally in accord with the pre-BCRA treatment of proceeds resulting from the sale of certain committee assets under similar circumstances. See e.g., Advisory Opinions 1992-24, 1990-26, 1989-4, and 1986-14. The conclusion is also consistent with the purpose of the section 441(a) ban on a national party's receipt of non-Federal funds because, even before BCRA, such proceeds were never viewed as non-Federal funds required to be deposited in a separate account or prohibited from being used to finance Federal elections.

1 The office equipment and furniture that the DCCC proposes to sell was purchased for use
2 in everyday business operations, and not as a means of raising funds. Moreover, used office
3 equipment and furniture generally has an ascertainable market value. The Commission also
4 notes that this transaction, like the sale of a campaign's unusable van sanctioned in Advisory
5 Opinion 1986-14, would result in the isolated disposal of unwanted and depreciated committee
6 assets, and is thus not inherently susceptible to use for political fundraising. Therefore the
7 Commission concludes that the proceeds from the sale of the used office equipment and furniture
8 will not be considered a "contribution, donation, or transfer of funds or any other thing of value"
9 subject to the Act's limitations and prohibitions if the DCCC sells these assets in a *bona-fide*
10 arm's length transaction at a price that does not exceed the usual and normal charge for used
11 office equipment and furniture at the time of the sale. *See* Advisory Opinion 2002-14.

12 To ensure that the assets are sold in a *bona fide* arm's length transaction, the sale of the
13 assets must not be advertised in any political announcement or in any contribution solicitation.
14 *See e.g.*, Advisory Opinion 1986-14. Payments received from transactions meeting these
15 conditions will not be subject to the Act's contribution limits, and may come from corporations,
16 labor organizations or other sources that are prohibited from making contributions or donations
17 to the DCCC. The payments will be considered to be Federal funds usable by the DCCC for
18 Federal election purposes and for any other purposes permitted under the Act and the
19 Commission's regulations. Such payments would be reported in the category of "Other
20 Receipts." *See* Advisory Opinion 2002-14.

21 The Commission expresses no opinion regarding any tax ramifications of the proposed
22 activities because those issues are not within its jurisdiction.

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

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

18 Sincerely,

19
20 Bradley A. Smith
21 Vice-Chairman
22
23

24 Enclosures (AOs 2002-14, 1992-24, 1990-26, 1989-4, and 1986-14)