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VIA FACSIMILE AND U.S. MAIL
Mary Dove
Commission Secretary
Federal Election Commission
999 E Street, NW
Washington, DC 20463

RE: Draft Advisory Opinion 2004-3, Dooley for the Valley

Dear Ms. Dove:

On behalf of Dooley for the Valley, we submit these comments on the draft advisory opinion referenced above in response to the Commission's request. We appreciate the opportunity to offer these comments to the Commission as it considers the draft opinion. While we support the draft's conclusion that the committee may maintain its multi-candidate status, we do not support the other conclusions reached by the draft opinion regarding the committee's expenditure of its funds, and we generally stand on the reasoning and arguments presented in our original request as grounds for that opposition. We write here to take issue with one particular conclusion of the draft that was not addressed in our request, and which we believe is not supported by the Federal Election Campaign Act, as amended, nor by a fair reading of the Commission's Part 113 regulations and accompanying Explanation and Justification.

Contributions by committees of retiring officeholders to state or local candidates or committees

In the draft opinion, the Office of General Counsel concludes that:

> [d]onations by the committee, after the September 30, 2003, conversion, to non-Federal candidates and other non-party committees for State and local elections from funds its [sic] received as a principal campaign committee are not permissible under 2 U.S.C. 439a. In the Explanation and Justification for the regulations at 11 CFR Part 113, the Commission explained that such donations are permissible "[i]n furtherance of a Federal candidate's election." 67 Fed. Reg. at 76975. Representative Dooley, however, was no longer a candidate for re-election to office after the conversion date, and such uses would not fit into any of the categories of permitted uses in 2 U.S.C. 439a(a).

Draft AO 2004-3 at 6. However, the draft itself earlier explains that "[n]othing in 2 U.S.C. 439a(a) bars principal campaign committees from contributing up to $1,000 per election" to other federal candidates. Draft AO 2004-3 at 4-5. We wholeheartedly agree with that conclusion, and we note that nothing in that section bars principal campaign committees from contributing to non-Federal recipients either.

In fact, these two discordant conclusions (that contributions of the committee's pre-conversion funds to other Federal candidates would be permissible while contributions to non-Federal candidates and committees would not) are very difficult to reconcile. Contributions of pre-conversion funds to non-Federal recipients are deemed to be impermissible since those disbursements "would not fit into any of the categories of permitted uses in 2 U.S.C. 439a(a)." Id. Yet, the same could be said of contributions to other Federal candidates, especially in light of 432(e)(3)(B). The $1,000 limit on "support" to other authorized committees, offers no additional authorization of committee activity to supplement 439a(a). To the contrary, it places a special limitation on the exercise of those permitted uses when making contributions to other federal candidates.

In fact, other than a peculiar reading of the Part 113 Explanation and Justification which turns the prefatory "[i]n furtherance of a Federal candidate's election" language into a mandatory precondition, there is not even a suggestion in the Part 113 regulations or the accompanying Explanation and Justification that contributions to non-Federal recipients should need to be justified with a special showing of campaign purpose that evidently need not be shown for contributions to other Federal recipients.

For these reasons, we suggest that it is a far more predictable and more equitable result to allow the committee to make both Federal and non-Federal contributions from its pre-conversion fund balance, subject to the special limits of 432(e)(3)(B) and the prohibitions on personal use at 11 CFR 113.1(g) and 2 U.S.C. 439a(b)(2).

The unsettling effect of the draft's approach on future retirement decisions

Finally, we would draw the Commission's attention to the very significant real world consequences of the approach suggested in the draft. These conclusions, if adopted by the Commission, will pose very powerful disincentives for retiring Senators or Members of Congress to announce their retirement intentions other than at the last possible minute. This draft would leave principal campaign committees of active candidates with vastly broader freedom to make disbursements than post-retirement non-authorized committees. It would therefore do great damage to an officeholder's political interests if he or she announced a retirement earlier than legally necessary under applicable ballot access law, and accordingly had to forgo so many of the disbursement options that would remain available to those who prolonged their candidate status.

Political parties need time to recruit candidates, the candidates themselves need time to consider their viability and put together campaign operations, and political supporters such as volunteers, endorsers, and donors need time to consider their options and make decisions on whom to support. The approach established in the draft is simply bad public policy since it would

needlessly and counterproductively pit the interests of the officeholder considering retirement directly against the interests of all these other political participants.

Conclusion

As we explained in our original request, it is arbitrary and unfair to make such deeply significant changes in the regulation and limitation of candidates, officeholders, and their campaign committees -- not by a self-evident change of the governing rules themselves (i.e., in the multicandidate committee rulemaking or with an overt discussion of these repercussions in the prohibited and permitted uses rulemaking), but sub silentio through the implication of the Part 113 amendments and a strained, selective, and in one regard, facially contradictory reading of the accompanying Explanation and Justification.[1]

We urge the Commission not to adopt the draft advisory opinion, and in particular not to so profoundly unsettle the circumstances faced by an officeholder when considering his or her possible retirement and by other potential candidates when considering a run for what may or may not be an open seat.

Very truly yours,

Stephen J. Kaufman
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Attorneys for Dooley for the Valley

cc: Lawrence H. Norton, General Counsel
Via Fax: (202) 219-3923

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1 The sentence which immediately precedes the draft's quotation of the "in furtherance of" language from the Part 113 Explanation and Justification (which, we note, is not addressed in the draft) indicates the completely opposite result on other disbursements:

> Authorized committees may make contributions to organizations other than those described in section 170(c) of the Internal Revenue Code of 1986 and other authorized committees (subject to the $1,000 limit) unless those contributions are in connection with the campaign for Federal office of the authorizing candidate.

(Emphasis added.) It could be argued, despite the plainly evident meaning of this sentence as written, that it would better capture the context of that paragraph if it read "may not make contributions...." Obviously, however, that is not what was written. Given this facial contradiction, it would be particularly inappropriate for the Commission to use selective language from this paragraph of the E&J as the sole justification for placing non-federal contributions under a special prohibition that would not apply to federal contributions.