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FEDERAL ELECTION COMMISSION  
Washington, D.C. 20463

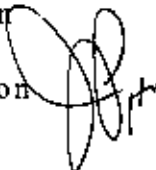
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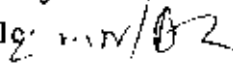
May 4, 2000


**AGENDA ITEM**  
For Meeting of: 5-11-00


*MEMORANDUM*

TO: The Commission

THROUGH: James A. Pehrkon   
Staff Director

FROM: Lawrence M. Noble   
General Counsel

N. Bradley Litchfield   
Associate General Counsel

Jonathan M. Levin   
Senior Attorney

SUBJECT: Revised Alternative Drafts Advisory Opinion 2000-05

Attached are two alternative revised drafts of the subject opinion for the Commission's approval on the May 11 agenda.

Alternative A is the same as Agenda Document 00-48 from the April 27 agenda, except it includes the corrections and revisions OGC proposed at that meeting. It also includes a "no FEC jurisdiction" paragraph on the Indian gaming act that was proposed by Commissioner Mason and prompted by the ex parte letter from Senators Bryan and Reid.

Alternative B has the same corrections and revisions noted above for Alternative A. However, it also has new language explaining why the Commission is not expressing an opinion here on the sources of contributed funds issue. The approach taken relies upon letters submitted by the requester, including counsel's April 26 comment letter as to the sources of funds the Nation would use for its contributions.

In both alternatives the new or revised language is flagged with *underlined italics*.

Attachment

1 ADVISORY OPINION 2000-05

ALTERNATIVE A

2  
3 Markham C. Erickson  
4 McGuiness & Holch  
5 400 North Capitol Street, N.W.  
6 Suite 585  
7 Washington, D.C. 20001

8  
9 Dear Mr. Erickson:

10 This responds to your letter dated March 30, 2000, on behalf of the Oneida Nation  
11 of New York ("the Nation"), requesting an advisory opinion concerning the application of  
12 the Federal Election Campaign Act of 1971, as amended ("the Act"), and Commission  
13 regulations to contributions by the Nation totaling more than \$25,000 annually.

14 The Nation is a Federally-recognized Indian tribe located in central New York  
15 State. It is a non-corporate entity which has been recognized by the United States on a  
16 government-to-government basis. *See* 65 FR 13298, 13300 (March 13, 2000).<sup>1</sup> The  
17 Nation has previously contributed to Federal candidates, following the \$1,000 limit at 2  
18 U.S.C. §441a(a)(1)(A) for contributions by a person to the authorized committees of a  
19 Federal candidate. The Nation has also voluntarily limited the total of its contributions to  
20 Federal political committees during a calendar year to \$25,000, which is the limit  
21 prescribed at 2 U.S.C. §441a(a)(3).

22 You state that, because 2 U.S.C. §441a(a)(3) applies only to "individuals," the  
23 Nation is considering making contributions this year that would total in excess of  
24 \$25,000. You ask the Commission to confirm that this \$25,000 limitation does not apply  
25 to the Nation.

26 The Act defines the term "person" as including an "individual, partnership,  
27 committee, association, corporation, labor organization, or any other organization or  
28 group of persons, but such term does not include the Federal Government or any authority  
29 of the Federal Government." 2 U.S.C. §431(11); *see also* 11 CFR 100.10. The Act also

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<sup>1</sup> This *Federal Register* document is from the U.S. Bureau of Indian Affairs ("BIA") and lists the Nation, along with numerous other Indian entities, that are "recognized and eligible for funding and services from [BIA] by virtue of their status as Indian tribes." 65 FR at 13298. The "listed entities are acknowledged to have the immunities and privileges available to other federally acknowledged Indian tribes by virtue of their government-to-government relationship with the United States as well as the responsibilities, powers, limitations and obligations of such tribes." 65 FR at 13299.

1 provides that no "person" may contribute in excess of \$1,000 to any Federal candidate  
2 and his authorized political committees with respect to any election. 2 U.S.C.  
3 §441a(a)(1)(A). In addressing annual contribution totals, however, the Act and  
4 Commission regulations provide that no "individual" may make contributions  
5 aggregating more than \$25,000 per calendar year. 2 U.S.C. §441a(a)(3); 11 CFR  
6 110.5(b).<sup>2</sup>

7 As you indicate, the Commission has long interpreted the Act's definition of  
8 "person" to include unincorporated Indian tribes, and thus their contributions to Federal  
9 candidates were subject to the \$1,000 per election, per candidate limits.<sup>3</sup> Advisory  
10 Opinion 1978-51; *see also* Advisory Opinions 1999-32 and 1993-12 (where the  
11 Commission stated that, as "persons," unincorporated Indian tribes were subject to the  
12 prohibition on contributions by persons with Federal contracts if they are engaged in such  
13 contracts). Although the Nation is a person under the Act, it is not an individual and is  
14 therefore not subject to the \$25,000 limit on its annual total of contributions.<sup>4</sup> The Nation  
15 may make contributions subject to the discussion below.

16 The Nation's contributions would presumably be made from its general treasury  
17 funds that are apparently comprised of revenues and profits derived from the Nation's  
18 various business ventures. A review of the Nation's website, as well as other websites,  
19 indicates that *some of these* ventures are operated or owned by corporations. As you  
20 know, the Act prohibits a corporation from making any contribution in

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<sup>2</sup> The Act and Commission regulations clarify this restriction by adding that, for the purposes of this limit, any contribution made in a non-election year to a candidate or his authorized committee with respect to a particular election shall be considered as made during the calendar year in which such election is held. 2 U.S.C. §441a(a)(3); 11 CFR 110.5(c)(2); *see also* 11 CFR 110.5(c) (3) and (d).

<sup>3</sup> The status of an Indian tribe or community as a "government" making a contribution has not been explicitly addressed in previous advisory opinions. As indicated by the language of 2 U.S.C. §431(11), the only government that is specifically construed not to be a person, and therefore not subject to the limitations and prohibitions of the Act, is the Federal Government. For example, the Commission has made clear that State governments and municipal corporations are persons under the Act and are subject to its contribution provisions. Advisory Opinions 1999-7, 1982-26, and 1977-32.

<sup>4</sup> As indicated in Advisory Opinion 1999-32, the Nation would more precisely fall into the category of "any other organization or group of persons."

1 connection with or for the purpose of influencing any Federal election. 2 U.S.C.  
2 §441b(a). The term contribution as used in this general prohibition includes “any *direct*  
3 *or indirect payment, distribution, loan, advance, . . . or gift of money, . . . to any candidate,*  
4 *campaign committee, or political party or organization, in connection with any election*  
5 *to” Federal office. 2 U.S.C. §441b(b)(2) (emphasis added); see 11 CFR 114.1(a)(1)*  
6 *[contribution shall include any direct or indirect payment or distribution to any candidate,*  
7 *committee, organization or any other person in connection with any election to Federal*  
8 *office].<sup>5</sup> Notwithstanding the broad scope of this prohibition, Commission regulations*  
9 *prescribe procedures and conditions under which some organizations, like the Nation,*  
10 *may make lawful contributions. 11 CFR 102.5(b).*

11 In general, section 102.5(b) applies to organizations that are not “political  
12 committees” under the Act and that propose to make contributions to influence Federal  
13 elections. Such an organization is required to comply with either one of two procedures  
14 specified in the regulations: (i) establish a separate account to which only funds subject  
15 to the prohibitions and limits of the Act shall be deposited and from which its  
16 contributions shall be made, or (ii) demonstrate through “a reasonable accounting  
17 method” that, whenever the organization makes a contribution, it has received “sufficient  
18 funds subject to the limitations and prohibitions of the Act” to make the contribution. 11  
19 CFR 102.5(b)(1)(i) and (b)(1)(ii). Under alternative (i), the organization is required to  
20 keep records of deposits to and disbursements from the account used to make its  
21 contributions, and under alternative (ii) it is required to keep records of amounts received  
22 or expended under section 102.5(b)(1); upon request, the organization shall make these  
23 records available to the Commission. *Id.* The Nation’s contributions must comply with

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<sup>5</sup> Alluding to the broad prohibition on direct or indirect corporate contributions, the Commission concluded in Advisory Opinion 1978-51 that, while the Act permitted a tribal entity to make limited contributions to a Federal candidate, such contributions could only be made “if its general funds do not include monies from entities or persons that could not make contributions directly under the Act.” Very recently, the Commission explained in Advisory Opinion 1999-32 that if an Indian nation received a distribution of revenues from a semi-autonomous utility authority, which operated within the nation’s reservation and held contracts with the Federal Government, such revenues could not be used to make contributions in Federal elections. (Persons with Government contracts are, like corporations, barred from making any contributions in Federal elections, pursuant to 2 U.S.C. §441c.) See, Advisory Opinion 1998-11 concluding that the source of funds for contributions by a parent limited liability company, which owned two subsidiary companies that were Government contractors, “must be revenue other than that resulting from the operations of [its Government contractor subsidiaries].”

1 these regulations, and the records described therein must be made available to the  
2 Commission, if requested.

3 *The Commission does not express any views concerning the possible application*  
4 *of other statutes, including the Indian Gaming Regulatory Act, to political contributions*  
5 *made by the Nation, since those issues, if any, are not within the Commission's*  
6 *jurisdiction.*

7 This response constitutes an advisory opinion concerning the application of the  
8 Act and Commission regulations to the specific transaction or activity set forth in your  
9 request. See 2 U.S.C. §437f.

10 Sincerely,

11  
12  
13 Darryl R. Wold  
14 Chairman

15  
16 Enclosures (AOs 1999-32, 1999-7, 1998-11, 1993-12, 1982-26, 1978-51, and 1977-32)

1 ADVISORY OPINION 2000-05

ALTERNATIVE B

2  
3 Markham C. Erickson  
4 McGuiness & Holch  
5 400 North Capitol Street, N.W.  
6 Suite 585  
7 Washington, D.C. 20001

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9 Dear Mr. Erickson:

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11 of New York ("the Nation"), requesting an advisory opinion concerning the application of  
12 the Federal Election Campaign Act of 1971, as amended ("the Act"), and Commission  
13 regulations to contributions by the Nation totaling more than \$25,000 annually.

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15 State. It is a non-corporate entity which has been recognized by the United States on a  
16 government-to-government basis. *See* 65 FR 13298, 13300 (March 13, 2000).<sup>1</sup> The  
17 Nation has previously contributed to Federal candidates, following the \$1,000 limit at 2  
18 U.S.C. §441a(a)(1)(A) for contributions by a person to the authorized committees of a  
19 Federal candidate. The Nation has also voluntarily limited the total of its contributions to  
20 Federal political committees during a calendar year to \$25,000, which is the limit  
21 prescribed at 2 U.S.C. §441a(a)(3).

22 You state that, because 2 U.S.C. §441a(a)(3) applies only to "individuals," the  
23 Nation is considering making contributions this year that would total in excess of  
24 \$25,000. You ask the Commission to confirm that this \$25,000 limitation does not apply  
25 to the Nation.

26 The Act defines the term "person" as including an "individual, partnership,  
27 committee, association, corporation, labor organization, or any other organization or  
28 group of persons, but such term does not include the Federal Government or any authority  
29 of the Federal Government." 2 U.S.C. §431(11); *see also* 11 CFR 100.10. The Act also

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2 and his authorized political committees with respect to any election. 2 U.S.C.  
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4 Commission regulations provide that no "individual" may make contributions  
5 aggregating more than \$25,000 per calendar year. 2 U.S.C. §441a(a)(3); 11 CFR  
6 110.5(b).<sup>2</sup>

7 As you indicate, the Commission has long interpreted the Act's definition of  
8 "person" to include unincorporated Indian tribes, and thus their contributions to Federal  
9 candidates were subject to the \$1,000 per election, per candidate limits.<sup>3</sup> Advisory  
10 Opinion 1978-51; *see also* Advisory Opinions 1999-32 and 1993-12 (where the  
11 Commission stated that, as "persons," unincorporated Indian tribes were subject to the  
12 prohibition on contributions by persons with Federal contracts if they are engaged in such  
13 contracts). Although the Nation is a person under the Act, it is not an individual and is  
14 therefore not subject to the \$25,000 limit on its annual total of contributions.<sup>4</sup> *The Nation*  
15 *may make contributions that are otherwise lawful under the Act and Commission*  
16 *regulations.*

17 *The Commission notes your citation to Advisory Opinion 1978-51 and your letter*  
18 *of April 26, 2000, commenting on the General Counsel's proposed draft of this opinion,*  
19 *Agenda Document No. 00-48. The 1978 opinion included language stating, in part, that*  
20 *while the Act permitted a tribal entity to make limited contributions to a Federal*  
21 *candidate, such contributions could only be made "if its general funds do not include*  
22 *monies from entities or persons that could not make contributions directly under the*  
23 *Act."* Your April 26 letter explains that "the Nation's political contributions are made

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<sup>2</sup> The Act and Commission regulations clarify this restriction by adding that, for the purposes of this limit, any contribution made in a non-election year to a candidate or his authorized committee with respect to a particular election shall be considered as made during the calendar year in which such election is held. 2 U.S.C. §441a(a)(3); 11 CFR 110.5(c)(2); *see also* 11 CFR 110.5(c) (3) and (d).

<sup>3</sup> The status of an Indian tribe or community as a "government" making a contribution has not been explicitly addressed in previous advisory opinions. As indicated by the language of 2 U.S.C. §431(11), the only government that is specifically construed not to be a person, and therefore not subject to the limitations and prohibitions of the Act, is the Federal Government. For example, the Commission has made clear that State governments and municipal corporations are persons under the Act and are subject to its contribution provisions. Advisory Opinions 1999-7, 1982-26, and 1977-32.

<sup>4</sup> As indicated in Advisory Opinion 1999-32, the Nation would more precisely fall into the category of "any other organization or group of persons."

1 from its general treasury funds . . . [and] are not made, either directly or indirectly, from  
2 any incorporated entity." The letter further states: "While the Nation does own several  
3 incorporated businesses, it has sufficient funds in its general treasury to make all of its  
4 political contributions, subject, of course, to the limitations and prohibitions of the Act."  
5 In view of these statements and since you have not expressly requested an advisory  
6 opinion on the sources of funds that may be lawfully used by the Nation in making its  
7 contributions in Federal elections, the Commission does not issue an opinion at this time  
8 on that issue. For the Nation's further guidance, see Advisory Opinions 1999-32 and  
9 1998-11; see also 11 CFR 102.5(b).

10 The Commission does not express any views concerning the possible application  
11 of other statutes, including the Indian Gaming Regulatory Act, to political contributions  
12 made by the Nation, since those issues, if any, are not within the Commission's  
13 jurisdiction.

14 This response constitutes an advisory opinion concerning the application of the  
15 Act and Commission regulations to the specific transaction or activity set forth in your  
16 request. See 2 U.S.C. §437f.

17 Sincerely,

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20 Darryl R. Wold  
21 Chairman  
22

23 Enclosures (AOs 1999-32, 1999-7, 1998-11, 1993-12, 1982-26, 1978-51, and 1977-32)