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FEDERAL ELECTION COMMISSION  
Washington, DC 20463

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January 23, 2009

MEMORANDUM

AGENDA ITEM  
For Meeting of: 1-29-09

TO: The Commission

FROM: Thomasenia P. Duncan *JPD*  
General Counsel

Rosemary C. Smith *RCS*  
Associate General Counsel

Robert M. Knop *RMK*  
Assistant General Counsel

Neven F. Stipanovic *NFS*  
Attorney

Subject: Draft AO 2008-20

**SUBMITTED LATE**

Attached is a proposed draft of the subject advisory opinion. We request that this draft be placed on the agenda for January 29, 2009.

Attachment

1 ADVISORY OPINION 2008-20

2

3 James Bopp, Jr., Esq.

4 Richard E. Coleson, Esq.

5 Clayton J. Callen, Esq.

6 Bopp, Coleson & Bostrom

**DRAFT**

7 Attorneys at Law

8 1 South Sixth Street

9 Terre Haute, IN 47807-3510

10

11 Dear Messrs. Bopp, Coleson, and Callen:

12 We are responding to your advisory opinion request on behalf of National Right  
13 to Life Committee, Inc. (“NRLC”), concerning the application of the Federal Election  
14 Campaign Act of 1971, as amended (the “Act”), and Commission regulations to NRLC’s  
15 request to reimburse its separate segregated fund, the National Right to Life Political  
16 Action Committee (“NRLCPAC”).

17 The Commission concludes that NRLC may reimburse NRLCPAC for the costs  
18 of broadcasting a radio advertisement that the Commission allowed NRLC to finance  
19 from general treasury funds in Advisory Opinion 2008-15 (National Right to Life  
20 Committee).

21 ***Background***

22 The facts presented in this advisory opinion are based on your letter received on  
23 December 1, 2008, and Advisory Opinion 2008-15, which is related to your present  
24 request.

25 NRLC is a non-stock, not-for-profit corporation, exempt from Federal taxes  
26 under 26 U.S.C. 501(c)(4). In Advisory Opinion 2008-15, the Commission considered  
27 whether NRLC could finance the broadcast of two sixty-second radio advertisements  
28 with general treasury funds. On November 24, 2008, the Commission concluded NRLC

1 could use general treasury funds to finance the broadcast of one of the two  
2 advertisements, entitled “Waiting for Obama’s Apology #1” (“Apology #1”). Advisory  
3 Opinion 2008-15. The Commission did not approve a response for the other  
4 advertisement, entitled “Waiting for Obama’s Apology #2,” and the requestor does not  
5 raise any issues here relating to that advertisement.<sup>1</sup>

6 On October 28, 2008, NRLC’s separate segregated fund, NRLCPAC, began  
7 broadcasting the radio advertisement Apology #1. NRLC states that NRLCPAC financed  
8 the broadcast out of legal precaution while NRLC awaited the Commission’s decision in  
9 Advisory Opinion 2008-15. NRLCPAC spent \$69,271.56 broadcasting the advertisement  
10 between October 28 and November 24, the date the Commission issued Advisory  
11 Opinion 2008-15. NRLC now wants to reimburse NRLCPAC for the funds it spent  
12 broadcasting the advertisement Apology #1 between October 28 and November 24.<sup>2</sup>

13 ***Question Presented***

14 *May NRLC reimburse NRLPAC for the costs involved in broadcasting the radio*  
15 *advertisement that the Commission concluded in Advisory Opinion 2008-15 NRLC could*  
16 *finance with general treasury funds?*

17 ***Legal Analysis and Conclusions***

18 Yes, NRLC may reimburse NRLPAC for the costs involved in broadcasting the  
19 radio advertisement Apology #1 between October 28, 2008, and November 24, 2008.

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<sup>1</sup> The Commission described the content of NRLC’s proposed advertisements in Advisory Opinion 2008-15 and will not repeat it here.

<sup>2</sup> The Commission notes that the attachment to NRLC’s advisory opinion request, which NRLC claims to transcribe the Commission’s October 23, 2008, public meeting, is not an official transcript of the meeting. Thus, the Commission does not vouch for the accuracy of the attachment, nor does the Commission rely on any part of the attachment in this advisory opinion.

1           The Act prohibits a corporation from making contributions or expenditures in  
2 connection with any Federal election. 2 U.S.C. 441b(a). The term “contribution and  
3 expenditure” is defined to include “any direct or indirect payment, distribution, loan,  
4 advance, deposit, or gift of money, or any services, or anything of value . . . to any  
5 candidate, campaign committee, or political party or organization” in connection with  
6 any Federal election. 2 U.S.C. 441b(b)(2); 11 CFR 114.1(a)(i).

7           The Commission concluded in Advisory Opinion 2008-15 that NRLC could  
8 finance the broadcasting of Apology #1 from general treasury funds. NRLC, therefore, is  
9 asking to reimburse NRLCPAC for costs that NRLC was permitted to pay directly under  
10 the Act.

11           The Commission previously has allowed a reimbursement in an analogous  
12 situation. In Advisory Opinion 1979-33 (District 1199-C), a separate segregated fund  
13 (“SSF”) of a labor organization paid for a banquet that the labor organization mistakenly  
14 believed to constitute political campaign activity. The money, instead, was to be used for  
15 non-partisan get-out-the-vote activities, and thus was exempt from the Act’s definition of  
16 a “contribution or expenditure” in 2 U.S.C. 441b. The Commission allowed the labor  
17 organization to reimburse the SSF because the labor organization could have financed the  
18 dinner directly without violating the Act. Although the SSF, under a mistaken belief,  
19 initially paid for the dinner, the Commission concluded that it did not change the  
20 characterization of the money as a payment for an exempt activity under 441b. In this  
21 case, NRLC, like the labor organization in Advisory Opinion 1979-33, could have  
22 financed the activity with general treasury funds without violating the Act. The fact that  
23 NRLCPAC initially paid for the advertisement broadcast, while NRLC awaited the

1 Commission's advisory opinion, does not change the characterization of the cost as one  
2 that NRLC was permitted to pay directly.

3 Similarly, the Commission has allowed a state party committee to transfer funds  
4 from a non-federal account to a federal account when the transfer would have been lawful  
5 if deposited directly into the federal account. In Advisory Opinion 1990-27 (Connecticut  
6 Republican Party), a campaign committee transferred excess campaign funds to a state  
7 party, which mistakenly deposited the funds into a state account instead of a federal  
8 account in violation of state law. Under a conciliation agreement with a state  
9 commission, the funds were moved to an escrow account and the state party then asked  
10 the Commission whether those escrowed funds could be transferred to its federal account.  
11 The Commission noted that transfers from a state account to a federal account were  
12 prohibited by 11 CFR 102.5(a)(1)(i). The Commission, however, allowed the transfer in  
13 that particular case because the funds at issue were excess campaign funds of a candidate  
14 that could be lawfully transferred to any federal political party committee, so the transfer  
15 itself was lawful. Significantly, the funds could have been deposited into the federal  
16 account at the time of the transfer.

17 The NRLC could have financed the advertisement broadcast at the time when, out  
18 of legal precaution, it decided to use NRLCPAC funds to finance the broadcast. The  
19 underlying act, therefore, as in Advisory Opinion 1990-27, would have been lawful. *See*  
20 *also*, Advisory Opinion 1990-29 (Joseph E. Seagram & Sons., Inc.) (explaining that the  
21 "decision to allow the transfer of non-Federal election funds to a Federal account in  
22 specific situations is premised largely on the legality, under the Act, of the transferred

1 funds”); Advisory Opinion 2002-08 (David Vitter for Congress Committee) (allowing a  
2 transfer of funds from non-Federal account to Federal account).

3         The Commission’s conclusion in this advisory opinion also is consistent with its  
4 statement in a recent public court filing. In a legal memorandum to the D.C. District  
5 Court, the Commission noted that a corporation could use its separate segregated fund to  
6 finance a disputed communication and then seek permission to reimburse the fund should  
7 the corporation prevail in the litigation. *See* Federal Election Commission’s  
8 Memorandum in Opposition to Plaintiff’s Second Motion for Preliminary Injunction at  
9 24, *Citizens United v. FEC*, 2008 WL 2788753, No. 1:07-cv-2240-RCL (D.D.C. July 18,  
10 2008). The Commission reasoned that this situation was similar to a litigant placing  
11 disputed funds into escrow during the pendency of litigation from which they could be  
12 paid if they succeeded on the merits.<sup>3</sup>

13         The NRLC used its separate segregated fund, NRCLPAC, as a precaution against  
14 legal liability. To ensure compliance with the Commission’s regulations, NRCLPAC  
15 financed the broadcast during the pendency of the advisory opinion process. NRLC is  
16 now asking for permission to reimburse costs NRCLPAC spent on the broadcast while  
17 NRLC awaited the Commission’s decision in Advisory Opinion 2008-15. The  
18 Commission believes NRLC should not be penalized for taking these precautionary  
19 measures to comply with the law.

20         For the foregoing reasons, the Commission concludes that, in the unique  
21 circumstances presented in this advisory opinion, NRLC may reimburse NRCLPAC for

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<sup>3</sup> *See e.g., National Treasury Employees Union v. United States*, 927 F.2d 1253, 1256 (D.C. Cir. 1991) (denying injunction in part because the plaintiffs could have placed funds into escrow during the pendency of the litigation).

1 the costs involved in broadcasting the radio advertisement Apology #1 between  
2 October 28, 2008, and November 24, 2008.

3 This response constitutes an advisory opinion concerning the application of the  
4 Act and Commission regulations to the specific transaction or activity set forth in your  
5 request. *See* 2 U.S.C. § 437f. The Commission emphasizes that, if there is a change in  
6 any of the facts or assumptions presented, and such facts or assumptions are material to a  
7 conclusion presented in this advisory opinion, then the requester may not rely on that  
8 conclusion as support for its proposed activity. Any person involved in any specific  
9 transaction or activity which is indistinguishable in all its material respects from the  
10 transaction or activity with respect to which this advisory opinion is rendered may rely on  
11 this advisory opinion. *See* 2 U.S.C. 437f(c)(1)(B). Please note the analysis or  
12 conclusions in this advisory opinion may be affected by subsequent developments in the  
13 law, including, but not limited to, statutes, regulations, advisory opinions and case law.  
14 The cited advisory opinions are available on the Commission's Web site at  
15 <http://saos.nictusa.com/saos/searchao>.

16 On behalf of the Commission,  
17  
18

19  
20 Steven T. Walther  
21 Chairman  
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