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FEDERAL ELECTION COMMISSION
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2007 MAR 16 P 2:29

March 16, 2007

MEMORANDUM

AGENDA ITEM
For Meeting of: 03-22-07

TO: The Commission

FROM: Thomasenia P. Duncan *TJD*
Acting General Counsel

Rosemary C. Smith *RCS*
Associate General Counsel

J. Duane Pugh *JDP*
Acting Assistant General Counsel

Stacey J. Shin *SJS*
Law Clerk

Subject: Draft AO 2007-01

SUBMITTED LATE

Attached is a proposed draft of the subject advisory opinion. We request that this draft be placed on the agenda for March 22, 2007.

Attachment

1 ADVISORY OPINION 2007-01

2

3 Mr. Marc E. Elias, Esq.

4 Ms. Caroline P. Goodson, Esq.

5 Perkins Coie LLP

6 607 Fourteenth Street, N.W.

7 Washington, D.C. 20005-2011

8

9 Dear Mr. Elias and Ms. Goodson:

DRAFT

10 We are responding to your advisory opinion request on behalf of Senator Claire
11 McCaskill and McCaskill for Auditor (the "Committee"), concerning the application of
12 the Federal Election Campaign Act of 1971, as amended (the "Act"), and Commission
13 regulations to the soliciting, receiving, and spending of funds for the sole purpose of
14 retiring the Committee's debt remaining from previous State campaigns.

15 For the reasons set forth below, the Committee and its agents may solicit, receive,
16 and spend funds that are in excess of the amount limits contained in the Act and from
17 sources prohibited by the Act to retire debts from Senator McCaskill's previous
18 campaigns for State offices, if their activities refer only to Senator McCaskill or other
19 candidates for the State offices she sought, and the amounts and sources of the funds are
20 consistent with State law. The Commission also concludes that solicitations referring to
21 "Senator McCaskill" are permissible under the Act and Commission regulations, so long
22 as they meet certain conditions set forth below.

23 ***Background***

24 The facts presented in this advisory opinion are based on your letter received on
25 December 27, 2006 and your email communication received on January 9, 2007.

1 Senator McCaskill is a United States Senator from Missouri and is a candidate for
2 re-election to the United States Senate in 2012.¹ Prior to her election to the United States
3 Senate, she was a candidate for Governor in 2004 and State Auditor for Missouri in 1998
4 and 2002.

5 The Committee was established under Missouri law in preparation for Senator
6 McCaskill's re-election campaign for State Auditor. Debts previously owed by Friends
7 of McCaskill, the non-Federal committee for Senator McCaskill's candidacies for
8 Governor and State Auditor, were transferred to the Committee. The Committee and its
9 agents, including Senator McCaskill, wish to raise funds in accordance with Missouri
10 State law for the sole purpose of retiring the Committee's debt, including debt owed to
11 Senator McCaskill, remaining from these State campaigns.

12 *Questions Presented*

- 13 1. *May the Committee and its agents, including Senator McCaskill, solicit, receive, and*
14 *spend funds in accordance with Missouri State law for the sole purpose of retiring the*
15 *Committee's debts that remain from her previous candidacies for State offices?*
16
- 17 2. *In the alternative, may McCaskill for Auditor and its agents raise funds from*
18 *federally permissible sources in amounts of up to \$2,100?*
19
- 20 3. *What restrictions apply to the content of solicitations for the Committee's debt*
21 *retirement?*
22
- 23 a. *Would solicitations that refer to "Senator McCaskill" meet the requirements*
24 *of 2 U.S.C. 441i(e)(2), provided that they do not refer to her as a Federal*
25 *candidate?*
26
- 27 b. *Would the solicitations be subject to 2 U.S.C. 441i(f)'s restrictions on*
28 *promoting or supporting Senator McCaskill? If so, would references to*
29 *Senator McCaskill's successful candidacy for State Auditor be permissible,*
30 *provided no references to her Federal candidacy will be made in the*
31 *solicitations?*
32

¹ On January 8, 2007, Senator McCaskill filed a Statement of Candidacy for re-election to the United States Senate.

1 c. *Would the solicitations be exempt from the definition of “coordinated*
2 *communication” under the safe harbor for certain solicitations by Federal*
3 *candidates set forth in 11 CFR 109.21(g)(2)?*

4
5 d. *What other restrictions, if any, would apply to the way that the solicitations*
6 *refer to Senator McCaskill?*

7
8 ***Legal Analysis and Conclusions***

9 *Question 1. May the Committee and its agents, including Senator McCaskill,*
10 *solicit, receive, and spend funds in accordance with Missouri State law for the sole*
11 *purpose of retiring the Committee’s debts that remain from her previous candidacies for*
12 *State offices?*

13 Yes, the Committee may solicit, receive, and spend funds in accordance with
14 Missouri State law for the sole purpose of retiring the Committee’s debts that remain
15 from Senator McCaskill’s previous candidacies for State offices.

16 Under the Act, as amended by the Bipartisan Campaign Reform Act of 2002,²
17 Federal candidates and officeholders may not raise or spend funds in connection with an
18 election for Federal office, unless the funds are subject to the limitations, prohibitions,
19 and reporting requirements of the Act. *See* 2 U.S.C. 441i(e)(1)(A); 11 CFR 300.61.
20 Additionally, Federal candidates and officeholders may not raise or spend funds in
21 connection with an election other than an election for Federal office, unless the funds do
22 not exceed the amounts permitted with respect to contributions to candidates and political
23 committees under 2 U.S.C. 441a(a)(1), (2), and (3), and do not come from sources
24 prohibited under the Act. *See* 2 U.S.C. 441i(e)(1)(B); 11 CFR 300.62. With respect to
25 non-Federal elections, Commission regulations also require that such funds be in amounts
26 and from sources that are consistent with State law. 11 CFR 300.62.

² Pub. L. No. 107-155, 116 Stat. 81 (Mar. 27, 2002).

1 The Act provides a limited exception for Federal candidates and officeholders
2 who also seek State or local office. Specifically, the restrictions of 2 U.S.C. 441i(e)(1) do
3 not apply to any Federal candidate or officeholder who is or was also a candidate for a
4 State or local office so long as the solicitation, receipt or spending of funds: (1) is solely
5 in connection with his or her State or local campaign; (2) refers only to him or her, to
6 other candidates for that same State or local office, or both; and (3) is permitted under
7 State law. 2 U.S.C. 441i(e)(2); 11 CFR 300.63; *see also* Advisory Opinions 2005-12
8 (Fattah), 2005-5 (LaHood), 2005-2 (Corzine), and 2003-32 (Tenenbaum).³

9 Senator McCaskill is both a Federal candidate and officeholder, and the
10 Committee is an entity that is directly established, financed, maintained, and controlled
11 by her. Thus, both Senator McCaskill and the Committee are subject to the restrictions of
12 2 U.S.C. 441i(e)(1). However, soliciting, receiving and spending funds solely to retire
13 Committee debts outstanding from Senator McCaskill's previous candidacies for
14 Governor and State Auditor are actions that are solely in connection with those elections
15 to State offices. *Cf. FEC v. Ted Haley Congressional Comm.*, 852 F.2d 1111, 1115 (9th
16 Cir. 1988) (stating with respect to Federal elections, "funds raised after an election to
17 retire election campaign debts are just as much ... in connection with the election as are
18 those contributions received before the election," quoting AO 1983-2 (Citizens for Emery
19 Committee)). Therefore, the proposed activities will satisfy the first criterion of the
20 limited exception set forth in section 441i(e)(2). If the proposed activities refer only to
21 Senator McCaskill, to other candidates for the same State offices, or both, they will

³ Although the exception in 2 U.S.C. 441i(e)(2) permits Federal candidates and officeholders who are also candidates for State or local office to raise and spend funds outside the restrictions of 2 U.S.C. 441i(e)(1), these candidates are still prohibited from soliciting or receiving funds from national banks, corporations organized by authority of Congress, and foreign nationals. 2 U.S.C. 441b and 441e.

1 satisfy the second criterion. To the extent the proposed activities will comply with
2 Missouri law,⁴ they will satisfy the third criterion and therefore come within the
3 exception set forth in section 441i(e)(2).⁵

4 Accordingly, under these circumstances, Senator McCaskill and the Committee
5 may solicit, receive, and spend funds in excess of the amount limits contained in the Act
6 and from sources prohibited by the Act, to retire Committee debts outstanding from her
7 previous candidacies for Governor and State Auditor.

8 *Question 2: In the alternative, may McCaskill for Auditor and its agents raise*
9 *funds from federally permissible sources in amounts of up to \$2,100?*

10 Yes, in the alternative, Senator McCaskill and her agents may raise funds from
11 federally permissible sources in amounts of up to \$2,100.

12 *Question 3. What restrictions apply to the content of solicitations for the*
13 *Committee's debt retirement?*

14 *a. Would solicitations that refer to "Senator McCaskill" meet the requirements*
15 *of 2 U.S.C. 441i(e)(2), provided that they do not refer to her as a Federal candidate?*

16 Yes, solicitations to retire the Committee's debt that refer to "Senator McCaskill,"
17 without mentioning her current status as a Federal candidate, would meet the

⁴ Currently, Missouri law does not limit the amount that may be donated to candidates for Governor or State Auditor.

⁵ Although neither 2 U.S.C. 441i(e)(2) nor 11 CFR 300.63 contains an express allowance for soliciting, receiving, or spending by a committee established by a Federal officeholder or candidate, the Commission has previously concluded that the exception described in 2 U.S.C. 441i(e)(2) and 11 CFR 300.63 applies to all individuals described in 2 U.S.C. 441i(e)(1) and 11 CFR 300.60, and hence applies to the activities of agents and to entities established, financed, maintained, or controlled by, or acting on behalf of, the Federal officeholder or candidate. See Advisory Opinions 2005-12 (Fattah) and 2005-02 (Corzine).

1 requirements of the exception in 2 U.S.C. 441i(e)(2) under the circumstances presented
2 here.⁶

3 For the same reasons and under the same conditions discussed in the answer to
4 question 1 above, solicitations that seek funds solely to satisfy debts from State
5 candidacies, that comply with Missouri law, and that refer to Senator McCaskill only as a
6 former State candidate without mentioning her current status as a Federal candidate,
7 would qualify for the section 441i(e)(2) exception. Referring to Senator McCaskill as
8 “Senator” serves only to identify her.

9 *b. Would the solicitations be subject to 2 U.S.C. 441i(f)’s restrictions on*
10 *promoting or supporting Senator McCaskill? If so, would references to Senator*
11 *McCaskill’s successful candidacy for State Auditor be permissible, provided that no*
12 *references to her Federal candidacy will be made in the solicitations?*

13 No. The restrictions in 2 U.S.C. 441i(f) are not applicable in circumstances where
14 the more specific provisions of 2 U.S.C. 441i(e) apply. Section 441i(e) (headed “Federal
15 candidates”) specifically permits a Federal candidate or officeholder to raise and spend
16 funds in connection with a non-Federal election in which the Federal officeholder is or
17 was a candidate, as permitted under State law. 2 U.S.C. 441i(e)(2).

18 The provisions of section 441i(f) (headed “State candidates”) prohibit State
19 candidates from paying for public communications that promote, support, attack or
20 oppose Federal candidates with funds not subject to Federal limits and reporting
21 requirements. This serves as an anti-circumvention measure analogous to the identical

⁶ Although your request inquired about solicitations referring to “Senator-Elect McCaskill” and “Senator McCaskill,” this advisory opinion only addresses references to “Senator McCaskill.” While the advisory opinion request was pending, Senator McCaskill was sworn in as a United States Senator, and the Commission assumes that any solicitations made by the Committee and its agents after the issuance of this advisory opinion would refer to “Senator McCaskill” rather than “Senator-Elect McCaskill.”

1 funding restrictions placed on State party committees. The limited exception found at
2 section 441i(f)(2) is necessary to ensure that an individual running for State office against
3 a current Federal officeholder is subject to the same funding rules as the Federal
4 officeholder herself. The conduct of the Federal officeholder who is or was a State
5 candidate, however, is governed by the more specific provisions of section 441i(e)(2),
6 and not section 441i(f). *See, e.g., Fourco Glass Co. v. Transmirra Prod. Corp.*, 353 U.S.
7 222, 228 (1957) (stating: “However inclusive may be the general language of a statute, it
8 will not be held to apply to a matter specifically dealt with in another part of the same
9 enactment”).

10 *c. Would the solicitations be exempt from the definition of “coordinated*
11 *communication” under the safe harbor for certain solicitations by Federal candidates set*
12 *forth in 11 CFR 109.21(g)(2)?*

13 Commission regulations set forth a three-prong test to determine whether a
14 payment for a communication becomes an in-kind contribution as a result of coordination
15 between the person making the payment and a candidate. *See* 11 CFR 109.21(a)(1)-(3).
16 Under the first prong of the “coordinated communication” definition, a communication is
17 only subject to the regulations if it “is paid for by a person other than that candidate, an
18 authorized committee, political party committee, or agent of any of the foregoing.”
19 11 CFR 109.21(a)(1). In these circumstances, the candidate and her agents are paying for
20 these communications, so the payment prong is not met and the “coordinated
21 communication” definition is not applicable.

1 *d. What other restrictions, if any, would apply to the way that the solicitations*
 2 *refer to Senator McCaskill?*

3 Other than the restrictions already discussed above, the Commission concludes
 4 that the Act and Commission regulations place no additional restrictions on the way that
 5 the solicitations refer to Senator McCaskill.

6 This response constitutes an advisory opinion concerning the application of the
 7 Act and Commission regulations to the specific transaction or activity set forth in your
 8 request. *See* 2 U.S.C. 437f. The Commission emphasizes that, if there is a change in any
 9 of the facts or assumptions presented, and such facts or assumptions are material to a
 10 conclusion presented in this advisory opinion, then the requestor may not rely on that
 11 conclusion as support for its proposed activity. All cited advisory opinions are available
 12 on the Commission's website at www.fec.gov.

13 Sincerely,

14
 15
 16
 17 Robert D. Lenhard
 18 Chairman