

AGENDA DOCUMENT NO. 11-55



FEDERAL ELECTION COMMISSION
Washington, DC 20463

SECTION
DATE
3: 43

September 15, 2011

AGENDA ITEM

MEMORANDUM

For Meeting of 9-22-11

TO: The Commission

FROM: Christopher Hughey *pch*
Acting General Counsel

Rosemary C. Smith *PCS*
Associate General Counsel

Amy L. Rothstein *ALR*
Assistant General Counsel

Esther D. Heiden *EDH*
Attorney

Subject: Draft AO 2011-16 (Dimension4 Inc., PAC) – Drafts A and B

Attached are two proposed drafts of the subject advisory opinion (Drafts A and B). We have been asked to place these drafts on the Open Meeting agenda for September 22, 2011.

Attachment

1 ADVISORY OPINION 2011-16

2

3 Ms. Deborah D'Angelo

4 Treasurer

5 Dimension4, Inc. PAC

6 423 Pacific Avenue

7 Bremerton, WA 98337

8

9 Dear Ms. D'Angelo:

DRAFT A

10 We are responding to your advisory opinion request on behalf of Dimension4,
11 Inc. PAC (the "Committee"), concerning the application of the Federal Election
12 Campaign Act of 1971, as amended (the "Act"), and Commission regulations to the
13 repayment of a loan made by the Committee to its connected organization, Dimension4,
14 Inc. (the "Corporation").

15 The Commission concludes that the D4 Senior Management Fund (the "Fund")
16 may repay the loan made by the Committee and be subsequently reimbursed by the
17 Corporation. Alternatively, given the special circumstances presented in your request,
18 the Commission further concludes that the Committee also may obtain the return of its
19 loan to the Corporation within five days after the receipt of this opinion.

20 ***Background***

21 The facts presented in this advisory opinion are based on your letter received on
22 July 26, 2011.

23 The Corporation provides intelligent graphic conversion services to the
24 government and private commercial entities. The Corporation is for profit and privately
25 held, and is incorporated in Washington State. The Committee is the separate segregated
26 fund ("SSF") of the Corporation.

1 The Fund is a non-interest bearing joint checking account established in 2006 by
2 several officers of the Corporation for the purpose of making charitable donations. The
3 Fund is not a legal entity for tax purposes. The Fund is not under the auspices of the
4 Corporation and is not governed by the Corporation's by-laws, articles of incorporation,
5 or any other corporate governing document. The Fund is open to any employee who
6 wishes to join and donate money, but the Corporation does not advertise or publicize the
7 Fund to its employees. Currently, seven officers are listed as account holders for the
8 Fund. The assets in the Fund come solely from these seven officers. The Corporation
9 has never given money to the Fund. None of the seven officers is a foreign national.
10 There is no writing memorializing the purpose of the Fund or how decisions as to the use
11 of the Fund's assets are to be made. Instead, any officer whose name is on the account
12 may withdraw money from the account at any time.

13 In the summer of 2010, the Corporation faced a temporary cash flow problem and
14 wished to borrow money from the Committee. The Committee indicates that, prior to
15 making the loan, its treasurer contacted the Commission's general information number to
16 ask if the Committee could legally lend money to the Corporation and was told that the
17 Committee may do anything with its funds that is "legally permissible by law";
18 repayment of the loan was not discussed with Commission staff.

19 In August 2010, the Committee loaned the Corporation \$26,000. Although there
20 was no formal written agreement or other writing memorializing the loan, the Committee
21 states that the parties intended that the loan would be repaid by the end of the calendar
22 year.

1 On December 22, 2010, the Committee received a letter from the Reports
2 Analysis Division of the Commission. The letter referred to the outstanding loan to the
3 Corporation and stated, in relevant part, that “while repayment of the principal amount of
4 such loan is not considered a contribution by the debtor to the lender Committee, such
5 repayments must be comprised of permissible funds subject to the prohibitions of 11 CFR
6 Section 110.4(a) and Part 114.” Letter from Nicole Della Rocca, Senior Campaign
7 Finance Analyst, Reports Analysis Division, Federal Election Commission, to Deborah
8 D’Angelo, Treasurer, Dimension4, Inc. PAC (Dec. 22, 2010) (appended to advisory
9 opinion request).

10 The Corporation is awaiting the Commission’s response to this advisory opinion
11 request before repaying the loan. As an alternative to the Corporation repaying the loan,
12 the Committee proposes that the Fund repay the loan, and then be subsequently
13 reimbursed by the Corporation. The Committee is requesting only that the Fund repay
14 the principal of the loan and does not ask about interest.

15 ***Questions Presented***

- 16 1. *May the Fund repay the loan made by the Committee to the Corporation and be*
17 *subsequently reimbursed by the Corporation?*
18 2. *Alternatively, may the Corporation refund the Committee for the loan?*

19 ***Legal Analysis and Conclusions***

- 20 1. *May the Fund repay the loan made by the Committee to the Corporation and be*
21 *subsequently reimbursed by the Corporation?*
-

1 Yes, the Fund may repay the loan made by the Committee to the Corporation and
2 be subsequently reimbursed by the Corporation as proposed, provided that the
3 Corporation may legally assign its debt to the Fund under State law.

4 Corporations are prohibited from making contributions or repaying loans made by
5 political committees. 2 U.S.C. 441b(a); 11 CFR 100.52(b)(5) and 114.2(b)(1).¹ The term
6 “contribution” includes “any direct or indirect payment, distributions, loan, advance,
7 deposit, or gift of money . . . in connection with any election to [Federal office].”
8 2 U.S.C. 441b(b)(2); 11 CFR 114.1(a)(1); *see also* 2 U.S.C. 431(8)(A)(i); 11 CFR
9 100.52(a). The repayment by a debtor of the principal amount of a loan made by a
10 political committee is not a contribution. 11 CFR 100.52(b)(5). Nonetheless, the
11 repayment of such a loan may not be made using funds provided by foreign nationals or
12 corporate or labor organization treasury funds. *Id.*

13 Here, the Corporation is the debtor to the Committee. If the Corporation assigns
14 the debt to the Fund, however, then the Fund will become the debtor. As such, the Fund
15 may repay the principal of the loan to the Committee, provided that it does not use
16 prohibited funds. Because the Fund consists entirely of the personal funds of the seven
17 officers, each of whom is an individual and none of whom is a foreign national, the
18 repayment of the principal of the loan by the Fund would be permissible under the Act
19 and Commission regulations.

¹ Independent expenditure-only committees are permitted to accept unlimited corporate contributions. *See SpeechNow.org v. FEC*, 599 F.3d 686 (D.C. Cir. 2010); Advisory Opinion 2010-09 (Club for Growth); Advisory Opinion 2010-11 (Commonsense Ten). Moreover, political committees that establish a separate bank account for independent political spending also may accept unlimited corporate contributions to that account. *Carey v. FEC*, Civ. No. 11-259-RMC (D. D.C. filed Jan. 31, 2011), Stipulated Order and Consent Judgment, *available at* http://www.fec.gov/law/litigation/carey_dc_stip_order_consent_judg.pdf. Here, however, the Committee is a separate segregated fund that has made direct contributions to Federal candidates and has not established an independent spending account; therefore, it is not permitted to accept corporate contributions.

1 Moreover, the Corporation may donate money to the Fund after the Fund repays
2 the Committee. In the past, the Commission has narrowly construed the prohibition on
3 the use of corporate funds to repay loans made by political committees. In Advisory
4 Opinion 1980-130 (Fazio), the Commission concluded that a non-Federal campaign
5 committee could repay a loan made to it by a Federal campaign committee, even though
6 “the [non-Federal] campaign committee may have received corporate or union funds.”
7 The Commission analogized to a regulation permitting organizations that are not political
8 committees under the Act to make contributions and expenditures, and determined that
9 the non-Federal committee could repay the loan, so long as the non-Federal committee
10 was able to show, using a reasonable accounting method, that the non-Federal committee
11 had “sufficient funds” that were not received from corporations, labor organizations, or
12 foreign nationals “when the loan [was] repaid.” *Id.*; *see also* 11 CFR 102.5(b)(2)(ii).

13 The Commission emphasizes that its conclusion here is limited to loan principal
14 repayments by debtors to political committees, which Commission regulations explicitly
15 exempt from the definition of “contribution.” 11 CFR 100.52(b)(5); *see also* 2 U.S.C.
16 441a(a)(1)(C); 11 CFR 110.1(d). Because the repayment is not a contribution, the
17 prohibition on contributions made in the name of another does not apply. *See* 2 U.S.C.
18 441f; 11 CFR 110.4(b). If the payment of the loan by the Fund did not constitute a
19 repayment, but instead, was a contribution, then the Committee’s proposal to have the
20 Corporation reimburse the Fund would be prohibited. *Id.*

21 2. *Alternatively, may the Corporation refund the Committee for the loan?*

22 Yes, the Corporation may refund the money to the Committee within five days
23 after receiving this advisory opinion.

1 The Commission has previously permitted corporate treasury funds to be used to
2 refund money loaned by a political committee. In Advisory Opinion 1992-28 (Leahy), a
3 political committee loaned \$50,000 to a non-profit corporation, with an agreement that
4 the money would be repaid within one year or earlier upon request. Although the parties
5 agreed that “final execution” of the transaction was contingent upon Commission
6 approval, the advisory opinion request was submitted to the Commission only *after* the
7 money had been transferred to the corporation. In its response, the Commission did not
8 approve the loan because the eventual repayment of the loan would be made from
9 corporate treasury funds and was therefore prohibited by Commission regulations. In
10 light of the “special circumstances presented in [the] request,” however, the Commission
11 permitted the political committee to “obtain the return” of its money within five days
12 after receiving of the advisory opinion.

13 The Commission finds special circumstances to be presented here, as well.
14 Accordingly, the requestor may obtain the return of its money from the Corporation
15 within five days after receiving this advisory opinion.

16 This response constitutes an advisory opinion concerning the application of the
17 Act and Commission regulations to the specific transaction or activity set forth in your
18 request. *See* 2 U.S.C. 437f. The Commission emphasizes that, if there is a change in any
19 of the facts or assumptions presented, and such facts or assumptions are material to a
20 conclusion presented in this advisory opinion, then the requestor may not rely on that
21 conclusion as support for its proposed activity. Any person involved in any specific
22 transaction or activity which is indistinguishable in all its material aspects from the
23 transaction or activity with respect to which this advisory opinion is rendered may rely on

1 this advisory opinion. *See* 2 U.S.C. 437f(c)(1)(B). Please note that the analysis or
2 conclusions in this advisory opinion may be affected by subsequent developments in the
3 law including, but not limited to, statutes, regulations, advisory opinions, and case law.
4 The cited advisory opinions are available on the Commission's website, www.fec.gov, or
5 directly from the Commission's Advisory Opinion searchable database at
6 <http://www.fec.gov/searchao>.

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On behalf of the Commission,

Cynthia L. Bauerly
Chair
Federal Election Commission

1 ADVISORY OPINION 2011-16

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3 Ms. Deborah D'Angelo

4 Treasurer

5 Dimension4, Inc. PAC

6 423 Pacific Avenue

7 Bremerton, WA 98337

8

9 Dear Ms. D'Angelo:

DRAFT B

10 We are responding to your advisory opinion request on behalf of Dimension4,
11 Inc. PAC (the "Committee"), concerning the application of the Federal Election
12 Campaign Act of 1971, as amended (the "Act"), and Commission regulations to the
13 repayment of a loan made by the Committee to its connected organization, Dimension4,
14 Inc. (the "Corporation").

15 The Commission concludes that the D4 Senior Management Fund (the "Fund")
16 may not repay the loan made by the Committee if it is subsequently reimbursed by the
17 Corporation. The seven corporate officers listed as joint account holders for the Fund
18 may nonetheless make contributions to the Committee through the Fund, subject to the
19 source prohibitions, amount limitations, and reporting requirements in the Act and
20 Commission regulations.

21 ***Background***

22 The facts presented in this advisory opinion are based on your letter received on
23 July 26, 2011.

24 The Corporation provides intelligent graphic conversion services to the
25 government and private commercial entities. The Corporation is for profit and privately
26 held, and is incorporated in Washington State. The Committee is the separate segregated
27 fund ("SSF") of the Corporation.

1 The Fund is not a legal entity for tax purposes. The Fund is a non-interest bearing
2 joint checking account established in 2006 by several officers of the Corporation for the
3 purpose of making charitable donations. Currently, the joint account holders consist of
4 seven corporate officers. The assets in the Fund come solely from these seven officers.
5 The Fund is not under the auspices of the Corporation and is not governed by the
6 Corporation's by-laws, articles of incorporation, or any other corporate governing
7 document. The Fund is open to any employee who wishes to join and donate money, but
8 the Corporation does not advertise or publicize the Fund to its employees. The Fund has
9 never contained any money from the Corporation. None of the seven officers is a foreign
10 national. There is no writing memorializing the purpose of the Fund or how decisions as
11 to the use of the Fund's assets are to be made. Instead, any corporate officer whose name
12 is on the account may withdraw money from the joint account or write checks drawn on
13 the account at any time.

14 In the summer of 2010, the Corporation faced a temporary cash flow problem and
15 wished to borrow money from the Committee. The Committee indicates that, before
16 making the loan, its treasurer contacted the Commission's general information number to
17 ask if the Committee could legally lend money to the Corporation and was told that the
18 Committee may do anything with its funds that is "legally permissible by law";
19 repayment of the loan was not discussed with Commission staff.

20 In August 2010, the Committee loaned the Corporation \$26,000. Although there
21 was no formal written agreement or other writing memorializing the loan, the Committee
22 states that the parties intended that the loan would be repaid by the end of the calendar
23 year.

1 On December 22, 2010, the Committee received a letter from the Commission’s
2 Reports Analysis Division. The letter referred to the outstanding loan to the Corporation
3 and stated, in relevant part, that “while repayment of the principal amount of such loan is
4 not considered a contribution by the debtor to the lender Committee, such repayments
5 must be comprised of permissible funds subject to the prohibitions of 11 CFR Section
6 110.4(a) and Part 114.” Letter from Nicole Della Rocca, Senior Campaign Finance
7 Analyst, Reports Analysis Division, Federal Election Commission, to Deborah
8 D’Angelo, Treasurer, Dimension4, Inc. PAC (Dec. 22, 2010) (appended to advisory
9 opinion request).

10 The Corporation is awaiting the Commission’s response to this advisory opinion
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12 the Committee proposes that the Fund repay the loan, and then be subsequently
13 reimbursed by the Corporation. The Committee is requesting only that the Fund repay
14 the principal of the loan and does not ask about interest.

15 ***Questions Presented***

- 16 1. *May the Fund repay the loan made by the Committee to the Corporation and be*
17 *subsequently reimbursed by the Corporation?*
- 18 2. *If the Fund may not repay the loan, how may the Committee be repaid for the*
19 *loan?*

20

1 ***Legal Analysis and Conclusions***

2 1. *May the Fund repay the loan made by the Committee to the Corporation and be*
3 *subsequently reimbursed by the Corporation?*

4 No, the Fund may not repay the loan made by the Committee if it is subsequently
5 reimbursed by the Corporation.

6 Corporations are prohibited from making contributions or repaying loans made by
7 political committees. 2 U.S.C. 441b(a); 11 CFR 100.52(b)(5) and 114.2(b)(1). The term
8 “contribution” includes “any direct or indirect payment, distributions, loan, advance,
9 deposit, or gift of money . . . in connection with any election to [Federal office].”
10 2 U.S.C. 441b(b)(2); 11 CFR 114.1(a)(1); *see also* 2 U.S.C. 431(8)(A)(i); 11 CFR
11 100.52(a). Although the repayment by a debtor of the principal amount of a loan made
12 by a political committee is not a contribution, the repayment may not be made using
13 funds provided by foreign nationals or corporate or labor organization treasury funds.¹
14 11 CFR 100.52(b)(5).

15 The requestor here proposes to have the Fund repay the Committee for the loan
16 that the Committee made to the Corporation, and then to have the Corporation
17 subsequently reimburse the Fund for that amount. The Commission concludes that this
18 proposal is impermissible because it would circumvent the prohibition on the use of
19 corporate funds to repay loans made by political committees.² As the Commission has

¹ The Commission notes that 11 CFR 100.52(b)(5) does not prohibit the use of funds provided by Federal contractors, unlike the statutory and regulatory prohibitions on contributions. 2 U.S.C. 441c(a)(1); 11 CFR 115.2(a).

² The facts here differ materially from those presented in Advisory Opinions 1980-130 (Fazio) and 1992-28 (Leahy). In Advisory Opinion 1980-130 (Fazio), the loan in question was made to a State political committee. In Advisory Opinion 1992-28 (Leahy), the final execution of the loan between the parties was contingent upon approval of the proposed loan by the Commission through the advisory opinion process.

1 previously determined, an SSF and its connected organization may not do through
2 another that which the SSF and its connected organization could not do directly.
3 Advisory Opinion 2007-27 (ActBlue).

4 2. *If the Fund may not repay the loan, how may the Committee be repaid for the*
5 *loan?*

6 Even though the Fund may not repay the loan to the Committee and be
7 reimbursed by the Corporation, the seven individual corporate officers who own the
8 Fund's joint bank account may nonetheless use the Fund's joint checking account to
9 make contributions to the Committee, subject to the source prohibitions, contribution
10 limitations, and reporting requirements of the Act and Commission regulations.

11 Any payment by the Fund to the Committee would be a contribution by one or
12 more of these individuals to the Committee. The exemption from the definition of
13 "contribution" for the repayment by a debtor of the principal amount of a loan made by a
14 political committee is limited on its face to the repayment of a loan by the debtor.
15 11 CFR 100.52(b)(5). Given that the loan here was made to the Corporation and not to
16 the Fund, the Fund is not the debtor, and the Fund's payment of the loan amount to the
17 Committee would not be a repayment of the loan under 11 CFR 100.52(b).³

18 The individuals who are joint account holders in the Fund may nonetheless use
19 the Fund to make contributions to the Committee, subject to applicable contribution

Therefore, Advisory Opinion 1992-28 (Leahy) did not involve the repayment of a loan, but rather the refund of monies paid in a pending transaction.

³ The requestor here has indicated that the Fund would pay the loan amount to the Committee solely to avoid the regulatory prohibition on the Corporation itself repaying the loan. Thus, the Commission need not and does not consider whether an entity to which a debt that has been assigned in the ordinary course of business may stand in the shoes of the original debtor and repay a loan under 11 CFR 100.52(b)(5).

1 limitations, source prohibitions, and reporting requirements. *See* 11 CFR 110.1(k) (joint
2 contributions and reattributions); Advisory Opinion 2007-17 (DSCC) (contributions
3 made by online check from joint accounts). Each contribution from the Fund by an
4 individual account holder will be aggregated with any other contributions to the
5 Committee by that individual for purposes of the contribution limitations in the Act and
6 Commission regulations. 2 U.S.C. 441a(a)(1)(C); 11 CFR 110.1(d). Any contributions
7 made by more than one person shall include the signature of each contributor on the
8 check or other negotiable instrument or in a separate writing. 11 CFR 110.1(k)(1). If
9 more than one person contributes money using the same check or instrument, the
10 contributors may indicate how the amount is to be attributed to each contributor. 11 CFR
11 110.1(k)(2). If the contribution does not indicate how the amount is to be attributed, the
12 contribution will be attributed equally to each contributor. *Id.* Any excessive portion of
13 a contribution by one account holder may be reattributed to other account holders, under
14 certain circumstances. 11 CFR 110.1(k)(3)(ii)(B). The Committee must report any
15 contributions made by the individual account holders in accordance with the Act and
16 Commission regulations. 2 U.S.C. 434(a); 11 CFR 104.8. The regulations governing the
17 making of contributions through joint checking accounts and the attribution and
18 reattribution of contributions between contributors using joint checking accounts are
19 contained at 11 CFR 110.1(k).

20 This response constitutes an advisory opinion concerning the application of the
21 Act and Commission regulations to the specific transaction or activity set forth in your
22 request. *See* 2 U.S.C. 437f. The Commission emphasizes that, if there is a change in any
23 of the facts or assumptions presented, and such facts or assumptions are material to a

1 conclusion presented in this advisory opinion, then the requestor may not rely on that
2 conclusion as support for its proposed activity. Any person involved in any specific
3 transaction or activity which is indistinguishable in all its material aspects from the
4 transaction or activity with respect to which this advisory opinion is rendered may rely on
5 this advisory opinion. *See* 2 U.S.C. 437f(c)(1)(B). Please note that the analysis or
6 conclusions in this advisory opinion may be affected by subsequent developments in the
7 law including, but not limited to, statutes, regulations, advisory opinions, and case law.
8 The cited advisory opinions are available on the Commission's website, www.fec.gov, or
9 directly from the Commission's Advisory Opinion searchable database at
10 <http://www.fec.gov/searchao>.

11
12 On behalf of the Commission,
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16 Cynthia L. Bauerly
17 Chair
18 Federal Election Commission
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