

October 13, 2005

AO DRAFT COMMENT PROCEDURES

The Commission permits the submission of written public comments on draft advisory opinions when proposed by the Office of General Counsel and scheduled for a future Commission agenda.

Today, DRAFT ADVISORY OPINION 2005-13 is available for public comments under this procedure. It was requested by Robert F. Bauer and Judith L. Corley, on behalf of EMILY's List.

Proposed Advisory Opinion 2005-13 is scheduled to be on the Commission's agenda for its public meeting of Wednesday, October 19, 2005.

Please note the following requirements for submitting comments:

1) Comments must be submitted in writing to the Commission Secretary with a duplicate copy to the Office of General Counsel. Comments in legible and complete form may be submitted by fax machine to the Secretary at (202) 208-3333 and to OGC at (202) 219-3923.

2) The deadline for the submission of comments is 12:00 noon (Eastern Time) on October 18, 2005.

3) No comments will be accepted or considered if received after the deadline. Late comments will be rejected and returned to the commenter. Requests to extend the comment period are discouraged and unwelcome. An extension request will be considered only if received before the comment deadline and then only on a case-by-case basis in special circumstances.

4) All timely received comments will be distributed to the Commission and the Office of General Counsel. They will also be made available to the public at the Commission's Public Records Office.

CONTACTS

Press inquiries: Robert Biersack (202) 694-1220

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Other inquiries:

To obtain copies of documents related to AO 2005-13, contact the Public Records Office at (202) 694-1120 or (800) 424-9530.

For questions about comment submission procedures, contact Rosemary C. Smith, Associate General Counsel, at (202) 694-1650.

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October 13, 2005

MEMORANDUM

TO: The Commission

THROUGH: Robert J. Costa *AK*
Acting Staff Director

FROM: Lawrence H. Norton *LHN*
General Counsel

Rosemary C. Smith *RCS*
Associate General Counsel

Mai T. Dinh *MTD*
Assistant General Counsel

J. Duane Pugh Jr. *JDP*
Senior Attorney

Subject: Draft AO 2005-13

AGENDA ITEM
For Meeting of: 10-19-05

Attached is a proposed draft of the subject advisory opinion. We request that this draft be placed on the agenda for October 19, 2005.

Attachment

1 **ADVISORY OPINION 2005-13**

2 Robert F. Bauer, Esq.
3 Judith L. Corley, Esq.
4 Perkins Coie
5 607 Fourteenth Street, N.W.
6 Washington, D.C. 20005-2011

DRAFT

7 Dear Mr. Bauer and Ms. Corley:

8 We are responding to your advisory opinion request on behalf of EMILY's List,
9 concerning the application of the Federal Election Campaign Act of 1971, as amended (the
10 "Act"), and Commission regulations to the treatment of proceeds generated by various
11 fundraising communications, the type of funds that may be used to pay the costs of those
12 communications, and the allocation of administrative and generic voter drive expenses.

13 The Commission concludes that EMILY's List, a nonconnected Federal political
14 committee, must pay for communications that refer to a clearly identified Federal candidate
15 with 100 percent Federal funds. 11 CFR 106.6. EMILY's List must pay for communications
16 that refer to a political party, as well as administrative and generic voter drive expenses, with a
17 minimum of 50 percent Federal funds. *Id.* Finally, EMILY's List must treat as contributions
18 the proceeds of any communication that indicates a portion of the proceeds will be used to
19 support the election of a clearly identified Federal candidate. 11 CFR 100.57.

20 ***Background***

21 The facts of this request are presented in your letter received August 18, 2005, and in
22 your e-mails received August 26 and September 7, 2005.

23 EMILY's List is a nonconnected political committee active in both Federal and
24 nonfederal elections. For the period from now up to the November 2006 Federal elections,
25 EMILY's List is considering devoting 65% of its "candidate budget" to spending on behalf of

1 non-Federal candidates. EMILY's List anticipates that this portion of its budget will be used to
2 make donations, including in-kind donations, to non-Federal candidates, and to make
3 disbursements for activities such as research, polling, get-out-the-vote programs, fundraising,
4 staffing, mailing, phone messaging and broadcast communications.

5 EMILY's List also contemplates making two types of public communications. One
6 public communication, in support of EMILY's List's efforts on behalf of state legislative
7 candidates, will refer to Senator Debbie Stabenow, who represents Michigan in the United
8 States Senate. Senator Stabenow is also a candidate for re-election in 2006 and a holder of
9 Federal office under the Act and Commission regulations. See 2 U.S.C. 431(2) and (3); 11
10 CFR 100.3, 100.4, and 300.2(o). EMILY's List's other type of public communication, which
11 supports state legislative initiatives and referenda, will refer to "Democrats." This second type
12 of communication will not refer to any Federal or non-Federal candidates. None of the public
13 communications will be broadcast on television or radio.

14 ***Questions Presented***

- 15 1. *Must EMILY's List pay at least half of its administrative expenses and generic voter*
16 *drive expenses with Federal funds?*
- 17 2. *Must EMILY's List pay the costs of a public communication that refers to a clearly*
18 *identified Federal candidate with entirely Federal funds?*
- 19 3. *Must EMILY's List pay at least half of the costs of public communications that refer to*
20 *"Democrats" with Federal funds?*
- 21 4. *Do three specific public communications indicate that the funds received in response*
22 *will be used to support the election of a clearly identified Federal candidate?*

Legal Analysis and Conclusions

1. Must EMILY's List pay at least half of its administrative expenses and generic voter drive expenses with Federal funds?

Yes, because EMILY's List is a nonconnected Federal political committee, it must pay its administrative and generic voter drive expenses with a minimum of 50 percent Federal funds in accordance with 11 CFR 106.6(b)(1)(i), (b)(1)(iii), and (c).¹ The Commission's regulations require a minimum allocation of 50 percent Federal funds without regard to how much a Federal political committee may choose to spend on non-Federal elections.² As the Commission noted in the *Explanation and Justification* for the new allocation rules at 11 CFR 106.6:

Neither FECA nor any court decision dictates how the Commission should determine appropriate allocation ratios. In fact, at least one court has recognized that the Commission has the discretion to establish the Federal funds percentage it deems best for administrative and generic voter drive expenses. *See Common Cause v. FEC*, 692 F. Supp. 1391, 1396 (D.D.C. 1987).

A flat 50% allocation minimum recognizes that SSFs and nonconnected committees can be "dual purpose" in that they engage in both Federal and non-Federal election activities. These committees have registered as *Federal* political committees with the FEC; consistent with that status, political committees should not be permitted to pay for administrative expenses, generic voter drives and public communications that refer to a political party with a greater amount of non-Federal funds than Federal funds.

Political Committee Status, Definition of Contribution, and Allocation for Separate Segregated Funds and Nonconnected Committees, Final Rules, 69 Fed. Reg. 68056, 68062 (Nov. 23,

¹ Generic voter drives include voter identification, voter registration, and get-out-the-vote drives or any other activities that urge the general public to register, vote or support candidates of a particular party or associated with a particular issue, without mentioning a specific candidate. 11 CFR 106.6(b)(1)(iii). Administrative expenses are also defined in 11 CFR 106.6(b)(1)(i).

² "Federal funds" are funds subject to the limitations, prohibitions, and reporting requirements of the Act. See 11 CFR 300.2(g). "Non-Federal funds" are funds not subject to the limitations and prohibitions of the Act. See 11 CFR 300.2(k).

2004) ("*Final Rules*"). Thus, as a political committee that makes expenditures and disbursements in connection with both Federal and non-Federal elections, the particular budget that EMILY's List adopts for expenses focusing on specific Federal and non-Federal candidates does not affect the required minimum Federal allocation it must use for administrative and generic voter drive expenses.

2. *Must EMILY's List pay the costs of a public communication that refers to a clearly identified Federal candidate with entirely Federal funds?*

Yes, because EMILY's List is a nonconnected Federal political committee, it must pay the costs of a public communication that refers to a clearly identified Federal candidate, but does not refer to any clearly identified non-Federal candidates, with 100 percent Federal funds, regardless of whether the communication refers to a political party, in accordance with 11 CFR 106.6(b)(2)(iii) and (f)(1)(i).

Your advisory opinion request describes a public communication in support of efforts on behalf of state legislative candidates that will refer to United States Senator Debbie Stabenow, but will not refer to any clearly identified non-Federal candidates. Reflecting EMILY's List's purpose of stressing the importance of successes for women in State elective office, the communication will feature a discussion of Senator Stabenow's experiences, earlier in her career, as a candidate for State office. The communication will not be distributed in the Senator's home state of Michigan, will not reference the Senator's candidacy for re-election, and will not solicit funds for her campaign. Regardless of its context, the reference to Senator Stabenow in EMILY's List's public communication is a reference to a clearly identified Federal

1 candidate in a Federal political committee's public communication.³ Section 106.6(b)(2)(iii)
2 and (f)(1)(i) apply to nonconnected Federal political committee's public communications that
3 refer to a clearly identified Federal candidate, and require the Federal political committee to pay
4 the costs of such communication with 100 percent Federal funds. Therefore, EMILY's List
5 must pay for the public communication that clearly identifies Senator Stabenow with 100
6 percent Federal funds.

7 This analysis does not change if a candidate for election in a year other than 2006 were
8 to be substituted for Senator Stabenow in EMILY's List's public communication, as your
9 request asks. Under the Act, the term "candidate" means an individual who seeks nomination
10 for election, or election, to Federal office. 2 U.S.C. 431(2). An individual is deemed to seek
11 nomination for election, or election, if he or she has received contributions aggregating in
12 excess of \$5,000 or has made expenditures aggregating in excess of \$5,000.
13 2 U.S.C. 431(2)(A); 11 CFR 100.3(a)(1). Neither the Act nor Commission regulations
14 distinguish between candidates based on election date.

15 3. *Must EMILY's List pay at least half of the costs of public communications that refer to*
16 *"Democrats" with Federal funds?*

17 Yes, EMILY's List must pay the costs of public communications that refer to
18 "Democrats," but do not refer to any clearly identified Federal or non-Federal candidates, with
19 at least 50 percent Federal funds under 11 CFR 106.6(b)(1)(iv) and (c). EMILY's List asks
20 about public communications in support of its efforts related to state legislative initiatives and
21 referenda. These communications will not refer to any Federal or non-Federal candidates, but

³ Communications that expressly advocate the election or defeat of a clearly identified Federal candidate have long been considered for the purpose of influencing Federal elections, without regard to any targeting requirement. See, e.g., *Buckley v. Valeo*, 424 U.S. 1, 79-80 (1976).

1 will refer to "Democrats," which constitutes a reference to a political party in a Federal political
2 committee's public communication. Section 106.6(b)(1)(iv) and (c) apply to nonconnected
3 Federal political committee's public communications that refer to a political party, but do not
4 refer to any candidates, and require Federal political committees to pay the costs of such
5 communications with at least 50 percent Federal funds. As the Commission noted in the

6 *Explanation and Justification* for these regulations:

7 Like the administrative expenses and generic voter drives (which may refer to a
8 political party), which are also allocated under section 106.6(c), these references
9 solely to a political party inherently influence both Federal and non-Federal
10 elections. Therefore, the 50% Federal funds requirement reflects the dual nature
11 of the communication.

12
13 *Final Rules*, 69 Fed. Reg. at 68062. A discussion of a State legislative initiative or referendum
14 does not alter the application of these rules. Thus, EMILY's List must pay for these public
15 communications with at least 50 percent Federal funds. The Commission notes that if the
16 references to "Democrats" were to be removed from the public communications, EMILY's List
17 would be permitted to pay for the revised communications with 100 percent non-Federal funds,
18 because they would not refer to any clearly identified Federal candidates or political parties.

19 Your request also asks if the answer depends on whether EMILY's List otherwise
20 supports only non-Federal candidates in that State during the current election cycle. The
21 analysis that EMILY's List must pay the costs of public communications that refer to a political
22 party with at least 50 percent Federal funds does not change based on the activities of EMILY's
23 List in the particular State. Commission regulations at 11 CFR 106.6(b)(1)(iv) and (c) apply to
24 public communications based on the content of the communications, without regard to other
25 activities of the person making the communications.

1 **4. *Do three specific public communications indicate that the funds received in response***
2 ***will be used to support the election of a clearly identified Federal candidate?***

3 A gift of money made by any person for the purpose of influencing any election for
4 Federal office is a "contribution" under the Act. 2 U.S.C. 431(8)(A)(i). Commission
5 regulations specify one way in which the definition of "contribution" is met. 11 CFR 100.57.
6 This regulation provides that a gift of money made by any person in response to any
7 communication is a contribution to the person making the communication if the communication
8 indicates that any portion of the funds received will be used to support or oppose the election of
9 a clearly identified Federal candidate. 11 CFR 100.57(a)(1). Thus, in these circumstances,
10 whether EMILY's List must treat receipts in response to a communication as Federal
11 contributions depends on whether its communication indicates that any of the funds received in
12 response will be used to support or oppose the election of a clearly identified Federal
13 candidate.⁴

14 Your advisory opinion request sets out three examples of portions of letters in which a
15 Federal candidate, Senator Stabenow, would raise funds for EMILY's List. The Commission
16 notes that a draft of the entire communication is not yet prepared, so the conclusions in this
17 Advisory Opinion about the application of 11 CFR 100.57 are limited to the text of the
18 following three examples. The Commission emphasizes that any additional content in the
19 communication could affect the analysis of whether the communication indicates that any of the
20 funds received in response will be used to support or oppose the election of a clearly identified
21 Federal candidate.

⁴ If the communication satisfies section 100.57, a disclaimer that Federal contributions are not being solicited would not negate the application of section 100.57. See *Final Rules*, 69 Fed. Reg. at 68057; see also *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 249 (1986).

1 (a) "We are asking for your support, so that EMILY's List can support
2 candidates, who, like me, could never succeed as women in politics
3 without the combined commitment of all [of] us."

4 (b) "EMILY's List's support over the years for candidates like me has made
5 an enormous difference to the progress of women toward equality in the
6 pursuit of political office. But we have a long way to go. That's why I
7 need your help."

8 (c) "EMILY's List has always supported me [Senator Stabenow] when I most
9 needed it. And that is why I am asking you to support EMILY's List
10 today, so that it can continue the work on behalf of women who, by
11 seeking state office today, will be ready to claim national leadership
12 tomorrow."

13 All three communications indicate that the funds EMILY's List receives in response will be
14 used to support candidates and implicitly to support their election to office. The only question
15 is whether these communications indicate that Senator Stabenow is among those candidates.

16 Example (a) states that EMILY's List will use funds received in response to the
17 communications to "support candidates who, like me, could never succeed as women in
18 politics." Senator Stabenow is a candidate for re-election to Federal office, and this statement
19 indicates that she is among the candidates EMILY's List will support. In this way, the
20 communication in example (a) indicates that a portion of the funds received in response would
21 be used to support Senator Stabenow's re-election, which satisfies 11 CFR 100.57(a)(1).⁵
22 Consequently, all of the funds received in response to the communication would be
23 contributions under 11 CFR 100.57. These funds must comply with the amount limitations,
24 source prohibitions, and reporting requirements of the Act. See 11 CFR 103.3.

⁵ Because the communications will not refer to any non-Federal candidates, they will not satisfy 11 CFR 100.57(b)(2), which would have permitted EMILY's List to consider up to 50 percent of the proceeds to be donations to its non-Federal account.

1 Like example (a), example (b) also emphasizes "EMILY's List's support over the years
2 for candidates like me." Additionally, with the language, "I [Senator Stabenow] need your
3 help," Senator Stabenow is also appealing on her own behalf. With these words, example (b)
4 indicates that some of the funds raised will be used to support Senator Stabenow's re-election,
5 which satisfies 11 CFR 100.57(a)(1). As with example (a), all of the funds received in
6 response to the communication would be contributions that must comply with the Act, as
7 described above.

8 In contrast, example (c) also features a clearly identified Federal candidate raising funds
9 for EMILY's List, but it indicates those funds will be used on behalf of women seeking State
10 office. Example (c) makes this clear when Senator Stabenow states that she seeks funds for
11 EMILY's List to use to "continue the work on behalf of women who, by *seeking state office*
12 *today*, will be ready to claim national leadership tomorrow" (emphasis added). Even though
13 Senator Stabenow is a clearly identified Federal candidate, the communication does not indicate
14 that any portion of the funds received will be used to support her re-election. Therefore,
15 example (c) does not trigger section 100.57, and EMILY's List may consider any funds
16 received in response to be donations to its non-Federal account.⁶ The Commission emphasizes
17 that this conclusion is limited to the text of example (c). Any additional text in the
18 communication, including particularly any references to a clearly identified Federal candidate,
19 could affect the analysis of whether section 100.57 is satisfied if the communication, considered

⁶ As a Federal candidate and officeholder, Senator Stabenow is subject to 2 U.S.C. 441i(e). Accordingly, she may not solicit funds in connection with an election other than an election for Federal office, unless the funds do not exceed the amounts permitted with respect to contributions to candidates and political committees under 2 U.S.C. 441a(a)(1), (2), and (3), and do not come from sources prohibited under the Act. See 2 U.S.C. 441i(e)(1)(B); 11 CFR 300.62.

This response constitutes an advisory opinion concerning the application of the Act and Commission regulations to the specific transaction or activity set forth in your request. See 2 U.S.C. 437f. The Commission emphasizes that, if there is a change in any of the facts or assumptions presented, and such facts or assumptions are material to a conclusion presented in this advisory opinion, then the requestor may not rely on that conclusion as support for its proposed activity.

Scott E. Thomas
Chairman