



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

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Washington, D.C. 20036

FEB 3 0 2009

RE: MURs 5987, 5995 & 6015
Hillary Clinton for President
Senator Hillary Clinton

Dear Ms. Utrecht:

On April 9th 16th and May 28, 2008, the Federal Election Commission notified you on behalf of your clients of complaints alleging violations of certain sections of the Federal Election Campaign Act of 1971, as amended. On February 12, 2009, the Commission found, on the basis of the information in the complaint, that there is no reason to believe Hillary Clinton for President and Shelly Moskwa, in her official capacity as treasurer, Senator Hillary Clinton and Sir Elton John violated 2 U.S.C. § 441e. Accordingly, the Commission closed its files in these matters.

Documents related to the cases will be placed on the public record within 30 days. *See Statement of Policy Regarding Disclosure of Closed Enforcement and Related Files*, 68 Fed. Reg. 70,426 (Dec. 18, 2003). The Factual and Legal Analyses, which explain the Commission's findings, is enclosed for your information.

If you have any questions, please contact Kimberly Hart, the attorney assigned to this matter at (202) 694-1650.

Sincerely,

A handwritten signature in cursive script that reads "Sidney Rocke".

Sid Rocke
Assistant General Counsel

Enclosures
Factual and Legal Analyses

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3 **FEDERAL ELECTION COMMISSION**

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5 **FACTUAL AND LEGAL ANALYSIS**

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8 **MURs 5987, 5995 & 6015**

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11 **RESPONDENTS:** Hillary Clinton for President and Shelly Moskwa,
12 in her official capacity as treasurer, and
13 Senator Hillary Clinton
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16 **I. INTRODUCTION**

17 The complaints in these matters involve allegations that Hillary Clinton for
18 President and Shelly Moskwa, in her official capacity as treasurer, ("the Committee"),
19 and Senator Hillary Clinton accepted an in-kind contribution from a foreign national, Sir
20 Elton John, in violation of 2 U.S.C. § 441e. See MURs 5987, 5995 & 6015 Complaints.
21 The complaints further allege that Sir Elton John, through the Committee, sent out a mass
22 email announcing the concert and soliciting support for Senator Hillary Clinton's
23 presidential campaign in violation of 2 U.S.C. § 441e. *Id.*
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25 **II. FACTUAL AND LEGAL ANALYSIS**

26 On April 9, 2008, Sir Elton John performed at a solo concert on behalf of the
27 Committee at Radio City Music Hall in New York. See MUR 5995 Complaint,
28 Attachment 1. Before the event, the Committee drafted and sent out a mass electronic
29 mail, on behalf of Elton John, announcing the concert and soliciting support for the
30 Committee. *Id.* Ultimately, the concert raised more than \$2.5 million (from the sale of
31 5,000 tickets) for the Committee. See MUR 5995 Complaint, Attachment 3.
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1 As more fully discussed below, Elton John's artistic performance at the
2 Committee's fundraiser constitutes a volunteer service that is exempted from the
3 definition of "contribution" under the Act. Therefore, the Committee has not received an
4 in-kind contribution from a foreign national as alleged in the complaints. In addition,
5 there is no information to suggest that the electronic mail communication distributed by
6 the Committee, using Elton John's name and likeness, to announce the concert and solicit
7 support for Senator Clinton constitutes participation in the decision-making process of
8 the Committee on the part of Elton John in violation of 2 U.S.C. § 441e.

9 **A. Concert Performance**

10 It is unlawful for a foreign national, directly or indirectly, to make a contribution
11 or donation of money or other thing of value, or make an expenditure in connection with
12 a Federal, State, or local election. 2 U.S.C. § 441e. It is also unlawful for a person to
13 solicit, accept, or receive a contribution or donation from a foreign national. *Id.* A
14 "foreign national" is an individual who is not a citizen of the United States or a national
15 of the United States and who is not lawfully admitted for permanent residence. *Id.* The
16 term "individual" has been interpreted by the Commission to include foreign nationals.
17 *See Explanation and Justification for Contribution Limitations and Prohibitions*, 67 Fed.
18 *Reg.* 69946 (Nov. 19, 2002). The term "contribution" does not include the value of
19 services provided without compensation by any individual who volunteers on behalf of a
20 candidate or political committee. *See* 2 U.S.C. § 431(8)(B)(i); and 11 C.F.R. § 100.74
21 (the so-called "volunteer services exemption"). Because Elton John appears to have
22 provided uncompensated services to the Committee in a volunteer capacity, we conclude
23 that his concert performance meets the criteria for the volunteer services exemption and,

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1 therefore, does not constitute a contribution by a foreign national in violation of 2 U.S.C.
2 § 441e.

3 The complaints assert that Advisory Opinion 1981-51 (Metzenbaum) supports
4 the conclusion that Elton John's artistic performance does not meet the criteria for the
5 exemption and thus constitutes an in-kind contribution under the Act and a violation of
6 Section 441e. We agree with the responses to the complaints, however, that this advisory
7 opinion is distinguishable and that other advisory opinions support the conclusion that the
8 exemption applies here.

9 Advisory Opinion 1981-51 concerned a campaign committee that planned to have
10 an artist, who was a foreign national, create original artwork and allow the committee to
11 reproduce, at its own cost, a limited edition of the original artwork for fundraising
12 purposes. See Advisory Opinion 1981-51. The committee asked whether this proposed
13 activity would constitute a prohibited contribution or whether it would be permitted under
14 the volunteer services exemption, and the Commission concluded that the activity would
15 constitute a prohibited contribution. *Id.* In a brief opinion, the Commission explained
16 that, under Section 441e, a foreign national may not donate his volunteer services for
17 purposes of providing original artwork for the committee's use in fundraising and that,
18 because of this conclusion, the Commission did not reach the issue of whether the
19 volunteer services exemption applied to the proposed activity. *Id.*

20 A few years later, in Advisory Opinion 1987-25 (Otaola), the Commission
21 considered whether a foreign national could work, without any compensation, as a
22 volunteer for a 1988 presidential campaign and concluded that the proposed activity
23 would not violate Section 441e because it would fall within the volunteer services

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1 exemption and, therefore, would not constitute a contribution by the foreign national. In
2 effect, unlike in Advisory Opinion 1981-51, the Commission considered whether the
3 exemption applied before determining whether the activity would violate Section 441e.
4 In support of its conclusion that the exemption applied, the Commission cited similar
5 advisory opinions that did not involve foreign nationals but nevertheless concluded that
6 volunteering for campaigns is the type of uncompensated volunteer service that is
7 specifically exempted from the definition of "contribution." See Advisory Opinion
8 1987-25; see also Advisory Opinion 1984-43 (Brunswick) (donation of corporate
9 officer's volunteer services to appear in a campaign advertisement not considered a
10 contribution); Advisory Opinion 1982-31 (Koenig) (a student may volunteer
11 uncompensated services to a campaign without making a contribution). The opinion also
12 noted that the Commission considered the extent to which this conclusion conflicts with
13 Advisory Opinion 1981-51 and declined by a vote of 2-4 to supersede or overrule the
14 opinion. *Id.*

15 More recently, the Commission has cited to Advisory Opinion 1987-25 in
16 concluding in two subsequent advisory opinions that volunteer services by foreign
17 nationals would not constitute prohibited contributions, including one opinion that
18 contemplated fundraising by a foreign national. See Advisory Opinion 2004-26 (Weller)
19 (campaign-related activities by a foreign national without compensation, including
20 soliciting contributions and support for a federal candidate, would not constitute a
21 prohibited contribution); Advisory Opinion 2007-22 (Huryasz) (campaign-related
22 activities by foreign nationals, including "lit drops, door to door canvassing, handing out

1 literature at transit stations, telephone banking, and get out the vote" activities, would not
2 constitute prohibited contributions).

3 In addition, there is a distinguishing factor between the proposed activity in
4 Advisory Opinion 1981-51 and the proposed activities in the subsequent advisory
5 opinions in that the former concerned the donation of a tangible good (original artwork
6 and the right to reproduce it), whereas the latter concerned only donations of a service. In
7 the present matter, Elton John's uncompensated concert performance would constitute
8 the donation of service, not a tangible good, and is, therefore, significantly different from
9 the activity considered in Advisory Opinion 1981-51. Further, the conclusion that the
10 concert performance falls within the purview of the volunteer services exemption is
11 consistent with Advisory Opinion 2007-08 (King) in which the Commission recently
12 concluded that uncompensated performances by individuals in the entertainment industry
13 would be exempt from the definition of "contribution" as long as the performers provided
14 the services in their individual capacities and all costs associated with the performances
15 themselves would be paid for by the federal candidate committee or party committee.
16 See Advisory Opinion 2007-08. In this matter, Elton John appears to have donated his
17 own personal services to the Committee, and the Committee paid for all the costs
18 associated with the production of the concert event. See Committee Response,
19 Attachment A.

20 Specifically, with respect to the costs, the Committee paid \$275,695 of the total
21 \$278,328.70 in expenses submitted by Elton John prior to his concert performance on
22 April 9, 2008. See Committee Response, Attachment A. These payments (\$275,695)
23 were made by the Committee between March 17th and April 8, 2008, of which the

1 majority were for the deposit for the venue rental (\$50,000), and costs associated with the
2 actual concert including building services, stage labor, security, wardrobe, printing,
3 equipment, sound system and license fees, etc. (\$138,211.16). *Id.* The remaining
4 invoices, documented in the Committee's response, were paid on April 9th, April 24th,
5 and May 9, 2008, totaling \$8,528.00. *Id.*

6 The Committee submitted a letter, dated August 14, 2008, supplementing its
7 earlier response. *See* Supplemental Letter dated August 14, 2008. In the letter, the
8 Committee states that it paid two invoices, totaling \$48,207.25, not previously submitted
9 by Elton John in connection with the concert for expenses such as airline travel, hotel
10 incidentals, per diems and ground transportation. *Id.* The letter attaches a copy of the
11 two invoices and the payment check. *Id.* According to the documentation, the additional
12 expenses were submitted to the Committee on June 12, 2008, after the complaints were
13 filed and approximately 75 days after the concert. *Id.* Nevertheless, these expenses were
14 paid immediately, approximately 75 days after the concert, and the vast majority of the
15 expenses were paid before the concert.

16 Accordingly, the Commission concluded that the artistic performance donated by
17 Elton John, a foreign national, in connection with the Committee's fundraising concert
18 does not constitute an in-kind contribution to Senator Clinton or her Committee in
19 violation of 2 U.S.C. § 441e but rather is the type of volunteer activity specifically
20 exempted from the Act.

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1 **B. Alleged Participation in Decision-Making**

2 Commission regulations implementing 2 U.S.C. § 441e prohibit foreign nationals
3 from participating in the decisions of any person involving election-related activities. *See*
4 11 C.F.R. § 110.20(i). Such participation in decisions includes directing, dictating,
5 controlling, or directly or indirectly participating “in the decision-making process of any
6 person, such as a corporation, labor organization, political committee, or political
7 organization with regard to such person’s Federal or non-Federal election-related
8 activities, such as decisions concerning the making of contributions, donations,
9 expenditures, or disbursements in connection with elections for any Federal, State, or
10 local office or decisions concerning the administration of a political committee.” *Id.* This
11 broad prohibition encompasses foreign national involvement in the management of any
12 political committee, and its decisions regarding its receipts and disbursements in
13 connection with Federal and non-Federal elections. *See* Explanation and Justification for
14 Regulations on Contribution Limitations and Prohibitions, 67 Fed. Reg. 69946 (Nov. 19,
15 2002).

16 The Committee’s electronic mail is the only information that the complaints in
17 MURs 5987 and 5995 provide as support for the allegation that Elton John participated in
18 the decision-making process of the Committee in connection with the fundraising
19 concert. The Committee states that it was responsible for drafting the language contained
20 in the electronic mail as well as its mass distribution. *See* Committee Responses. Elton
21 John admits to being involved only by allowing the direct and indirect use of his likeness
22 and name with the Committee’s electronic mail but asserts that this does not amount to

1 the type of decision-making envisioned by the regulations. *See* Elton John Response at 2;
2 *see also* 11 C.F.R. § 110.20(i).

3 Elton John's limited participation in the direct and indirect use of his likeness and
4 name in the Committee's electronic mail does not constitute participation in the decision-
5 making process of the Committee. In fact, the pertinent regulation speaks of decisions
6 concerning the making of contributions, donations, expenditures, or disbursements in
7 connection with elections for any Federal, State, or local office or decisions concerning
8 the administration of a political committee. *See* 11 C.F.R. § 110.20(i). The Commission
9 considered the applicability of Section 110.20(i) of the regulations in Advisory Opinion
10 2004-26 (Weller). Weller involved the question of whether the foreign national fiancée
11 (Rios Sosa) of a candidate could engage in activities such as: attending committee events,
12 participating in said events by speaking or soliciting funds, participating in meetings
13 regarding events or political strategy or accompany the candidate to fundraising and
14 campaign events of other political committees. *See* Advisory Opinion 2004-26. The
15 Commission concluded that, based upon Section 110.20(i), Ms. Rios Sosa, as an
16 uncompensated volunteer, could attend committee events, solicit funds from persons who
17 are not foreign nationals, and give speeches at committee events. *Id.* at 3. However,
18 while it allowed Ms. Rios Sosa to attend committee meetings regarding committee events
19 or political strategy, the Commission concluded that she could not be involved in the
20 management of the committees. *Id.* at 3.

21 Advisory Opinion 2004-26 is consistent with our conclusion that Elton John, as a
22 foreign national, is allowed to provide uncompensated volunteer service to the
23 Committee, including soliciting contributions from those who are not foreign nationals as

1 long as he is not involved in the decision-making process of the Committee. *See also*
2 Explanation and Justification for Regulations on Contribution Limitations and
3 Prohibitions, 67 Fed. Reg. 69946 (Nov. 19, 2002). In the present matter, there is no
4 information to suggest that Elton John had any involvement in the decision-making
5 process of the Committee in connection with the making of contributions, donations,
6 expenditures, or disbursements, as envisioned by 11 C.F.R. § 110.20(i). Therefore, we
7 recommend that the Commission find no reason to believe that Elton John violated
8 2 U.S.C. § 441e by participating in the decision-making process of the Committee.

9 Accordingly, the Commission found no reason to believe that Senator Clinton and
10 Hillary Clinton for President and Shelly Moskwa, in her official capacity as treasurer,
11 violated 2 U.S.C. § 441e of the Act with respect to these matters.

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