

AO DRAFT COMMENT PROCEDURES

The Commission permits the submission of written public comments on draft advisory opinions when on the agenda for a Commission meeting.

DRAFT ADVISORY OPINION 2009-32 is available for public comments under this procedure. It was requested by Dr. Richard L. Jorgensen.

Draft Advisory Opinion 2009-32 is scheduled to be on the Commission's agenda for its public meeting of Friday, January 29, 2010.

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 12:00pm noon (Eastern Time) on Thursday, January 28, 2010.

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: Judith Ingram (202) 694-1220

Deputy Commission Secretary: Darlene Harris (202) 694-1040

Other inquiries:

To obtain copies of documents related to AO 2009-32, contact the Public Records Office at (202) 694-1120 or (800) 424-9530 or visit the Commission's website at www.fec.gov.

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

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AGENDA ITEM

For Meeting of 1-29-10

MEMORANDUM

SUBMITTED LATE

TO: The Commission

FROM: Thomasenia P. Duncan *TJD*
General Counsel

Rosemary C. Smith *RCS*
Associate General Counsel

Robert M. Knop *RMK (RCS)*
Assistant General Counsel

Joanna S. Waldstreicher *JSW*
Attorney

Subject: Draft AO 2009-32 (Dr. Richard L. Jorgensen)

Attached is a proposed draft of the subject advisory opinion. We request that this draft be placed on the agenda for January 29, 2010.

Attachment

1 ADVISORY OPINION 2009-32

2 Dr. Richard L. Jorgensen
3 P.O. Box 455
4 Norwich, NY 13815

DRAFT

5 Dear Dr. Jorgensen:

6 We are responding to your advisory opinion request, concerning the application of
7 the Federal Election Campaign Act of 1971, as amended (“the Act”), and Commission
8 regulations to your proposed sale of fundraising items for political committees. The
9 Commission concludes that you may engage in your proposed sale of fundraising items
10 under the Act and Commission regulations.

11 ***Background***

12 The facts presented in this advisory opinion are based on your letter received on
13 December 18, 2009, your e-mails received on December 31, 2009 and January 22, 2010,
14 a telephone conversation with Commission attorneys on January 7, 2010, and your
15 commercial website.¹

16 You conduct a web-based business as a sole proprietor. Through the site, you
17 sell, among other things, prints of an artist’s drawings of President Obama, and President
18 Obama with Secretary of State Clinton. You currently offer these prints for sale for
19 \$49.95 plus \$5.00 shipping and handling. You propose to enter into agreements with
20 political committees to sell these prints as fundraising items.

21 For each political committee with which you enter into an agreement, you will
22 draft a solicitation e-mail promoting the artwork as a fundraiser for the committee. The

¹ The commercial website where you are currently selling the artwork you intend to offer as fundraising items is found at <http://store.mydestinies.com/paintings-by-minerva-diaz.html>, as accessed on January 21, 2010; this web address does not include the unique ID tag that will be assigned to each political committee, discussed below.

1 political committee may request changes to the e-mail to customize it. You will charge
2 the political committee a fee for providing the solicitation e-mail. The political
3 committee will disseminate the e-mail to its own distribution list.

4 The e-mail will contain images of the products offered for sale, and hyperlinks to
5 purchase the products from your website. The hyperlinks will contain an embedded ID
6 tag, unique to each political committee, so that purchases resulting from each
7 committee's fundraising efforts can be appropriately credited to that committee and
8 contributor information can be collected and forwarded to the political committee for
9 reporting purposes. You represent in your request that you will request and provide to
10 the committees information from contributors, including their names, addresses, and the
11 amount of their purchases and, for contributors whose purchases exceed \$200, their
12 occupations and employers.

13 You indicated in a telephone conversation and e-mail correspondence with
14 Commission attorneys that, for sales made through the proposed arrangements with
15 political committees, the price will be marked up by an amount that you and the political
16 committee agree upon, so that you and the artist receive the same dollar amounts you
17 would receive from sales to the public generally and not made through political
18 committees. When purchases are made from the website, payment will be collected via
19 PayPal Pro, and deposited on a weekly basis into separate bank accounts for each
20 political committee. From those accounts, funds will be sent to the artist for the print
21 plus her shipping costs, to PayPal Pro for transaction fees, and to you for commission.
22 The political committees will retain the remaining amount. The artist maintains an

1 inventory of prints for you and other outlets, and will ship the prints to contributors as
2 they are purchased.

3 You seek an advisory opinion regarding this proposal. In analyzing the proposal
4 under the Act and Commission regulations, the Commission considers first whether your
5 proposal to provide solicitation e-mails to political committees constitutes contributions
6 from you to the committees, and second whether the proposed sale of artwork as
7 fundraising items for those committees is permissible under the Act and Commission
8 regulations, including whether such goods and services are contributions.

9 ***Question Presented***

10 1) *May you provide solicitation e-mails to political committees without*
11 *having your provision of those e-mails constitute contributions to the committees?*

12 2) *May you sell artwork as fundraising items for political committees without*
13 *having your provision of the artwork constitute contributions to the committees?*

14 ***Legal Analysis and Conclusions***

15 1) *May you provide solicitation e-mails to political committees without*
16 *having your provision of those e-mails constitute contributions to the committees?*

17 Yes, you may provide the proposed solicitation e-mails to political committees.
18 Your provision of the e-mails will not constitute contributions to the political committees,
19 as long as the fee you receive is the usual and normal charge.

20 Under the Act, a contribution includes “any gift, subscription, loan, advance, or
21 deposit of money or anything of value made by any person for the purpose of influencing
22 any election for Federal office.” 2 U.S.C. 431(8)(A)(i); *see also* 11 CFR 100.52(a). The
23 term “anything of value” includes all in-kind contributions, and “the provision of any

1 goods or services without charge or at a charge that is less than the usual and normal
2 charge for such goods or services is a contribution.” 11 CFR 100.52(d)(1). The “usual
3 and normal charge” for goods means “the price of those goods in the market from which
4 they ordinarily would have been purchased at the time of the contribution,” and the
5 “usual and normal charge” for services means “the hourly or piecework charge for the
6 services at a commercially reasonable rate prevailing at the time the services were
7 rendered.” 11 CFR 100.52(d)(2).

8 You propose to charge a fee to draft a solicitation e-mail that each political
9 committee will be able to send to its supporters to raise contributions.² Assuming that
10 this drafting fee is at a commercially reasonable rate prevailing for such a service at the
11 time the service is rendered, it will constitute the “usual and normal charge” under 11
12 CFR 100.52(d)(1).³ As such, the value of your drafting services will not constitute a
13 contribution to the political committee.

14 2) *May you sell artwork as fundraising items for political committees without*
15 *having your provision of the artwork constitute contributions to the committees?*

16 Yes, you may sell artwork as fundraising items for political committees. Your
17 provision of the artwork will not constitute contributions to the political committees
18 because the commission you propose to receive is a usual and normal charge in a
19 commercially reasonable transaction.

² The political committees will bear the burden of ensuring that solicitation e-mails are not sent to prohibited sources, such as foreign nationals, corporations, labor organizations, or federal contractors, and that all required disclaimers are included in the text of the e-mails.

³ The fees charged by other vendors that provide similar services may provide a measure for the commercially reasonable rate for Dr. Jorgensen’s services.

1 You propose to sell the artwork for \$49.95, plus a markup to be agreed upon with
2 the political committee and \$5.00 for shipping and handling. Because you will receive
3 the same amount that you receive on sales that are not made through political
4 committees, and therefore will not relinquish any portion of your fee to the political
5 committee, you will receive a usual and normal charge and will not be making a
6 contribution to the political committee.⁴ 11 CFR 100.52(d). Moreover, because the
7 political committees will receive funds from individual customers, and not from your sole
8 proprietorship, the transactions will not result in your making any contributions under the
9 Act. *See, e.g.,* Advisory Opinion 2008-18 (Mid-Atlantic Benefits) at 4.

10 Political committees participating in this proposed plan will authorize you as their
11 agent to receive contributions (*see* 11 CFR 102.9), which imposes certain obligations
12 under the Act and Commission regulations. Because the sale proceeds are contributions
13 to the political committees, you must request and forward to the political committees the
14 information necessary to comply with the recordkeeping and reporting requirements of
15 the Act. This includes the name and address of any person contributing more than \$50,
16 together with the date and full amount of such contribution, as well as the occupation and
17 employer of any contributor whose contributions to the particular committee aggregate
18 over \$200. 2 U.S.C. 432(c); 11 CFR 102.9(a). As described in the proposal, you will
19 collect all such required information at the time of purchase and provide the information
20 to the participating political committees in a timely manner to allow them to report such

⁴ The commission you receive from your other sales of the artwork provide a measure for whether the commission you receive from the political committees is a usual and normal charge.

1 information.⁵

2 The Act and Commission regulations provide that all funds of a political
3 committee shall be segregated from and may not be commingled with the personal funds
4 of any individual. 2 U.S.C. 432(b)(3); 11 CFR 102.15. Further, all contributions
5 received for a political committee must be forwarded to the treasurer of the political
6 committee within a certain period of time, along with required contributor information.
7 For contributions received for an authorized candidate committee, the contribution and
8 contributor information must be forwarded to the treasurer of the political committee
9 within ten days of receipt. 2 U.S.C. 432(b)(1); 11 CFR 102.8(a). For contributions
10 received for other political committees, contributions of \$50 or less and their contributor
11 information must be forwarded to the treasurer within thirty days, while contributions in
12 excess of \$50 and their contributor information must be forwarded to the treasurer within
13 ten days. 2 U.S.C. 432(b)(2); 11 CFR 102.9(b). This proposal to establish an account for
14 each political committee, separate from your own personal and business accounts as well
15 as from those of other political committees, and to transfer funds to those accounts on a
16 weekly basis along with corresponding contributor information, will satisfy these
17 requirements.

18 This proposal is also similar in some aspects to the proposal considered by the
19 Commission in Advisory Opinion 1988-17 (ECI). In that advisory opinion, the

⁵ Contributions from foreign nationals, corporations, labor organizations, and federal contractors are prohibited. The political committee, not the vendor, is responsible for determining the legality of contributions, as well as determining whether contributions, when aggregated with other contributions from the same contributors, exceed the contribution limits. 11 CFR 103.3(b). Under Commission regulations, the entire amount paid as the purchase price for a fundraising item sold by a political committee is a contribution. 11 CFR 100.53. Here, the entire purchase price of the artwork, not just the amount forwarded to the political committees, will be a contribution from the purchaser, and the contributor information that you forward to each political committee should reflect that amount.

1 Commission considered a plan by Election Concepts, Inc. ("ECI") to provide medallions
2 to Federal candidates' campaigns for fundraising purposes. ECI, a corporation, proposed
3 to contract with political committees for the sale and marketing of commemorative
4 medallions. Each committee would pay ECI for the design and casting of the medallion,
5 and ECI would in turn pay the mint for the artwork and the die for the medallion. ECI
6 would also charge the political committees a fee for the work it did on their behalf, and
7 the price of the medallions themselves would be determined by the "spot market" price
8 for the precious metals used. The Commission concluded that, assuming that the
9 amounts charged were usual and normal charges and that ECI followed its ordinary
10 course of business, ECI's proposal was permissible under the Act and Commission
11 regulations. Similarly, you propose following your ordinary course of business, whereby
12 the artist maintains an inventory of prints and ships them as they are ordered, with a
13 portion of the purchase price going to the artist and a portion going to you as
14 commission.⁶ The Commission concludes that nothing in the Act or Commission
15 regulations prohibits anything in this proposal.

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 requester may not rely on that
21 conclusion as support for its proposed activity. Any person involved in any specific

⁶ This proposal is distinguishable from the proposal considered by the Commission in Advisory Opinion 1989-21 (Create-a-Craft) where the artist's proposal included an advance to a participating political committee, which the committee would retain, even if no goods were ever sold.

1 transaction or activity which is indistinguishable in all its material aspects from the
2 transaction or activity with respect to which this advisory opinion is rendered may rely on
3 this advisory opinion. *See* 2 U.S.C. 437f(c)(1)(B). Please note that the analysis or
4 conclusions in this advisory opinion may be affected by subsequent developments in the
5 law including, but not limited to, statutes, regulations, advisory opinions and case law.

6 The cited advisory opinions are available on the Commission's website at
7 <http://saos.nictusa.com/saos/searchao>.

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On behalf of the Commission,

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Matthew S. Petersen
Chairman