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AGENDA ITEM

MEMORANDUM

TO: The Commission

FROM: Christopher Hughey *pch*
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Subject: Draft AO 2011-02 (Brown) – Draft C

For Meeting of 2-17-11

SUBMITTED LATE

Attached is a proposed draft of the subject advisory opinion. We have been asked to place this draft on the Open Meeting agenda for February 17, 2011.

Attachment

1 ADVISORY OPINION 2011-02

2
3 Daniel B. Winslow, Esq.
4 Proskauer Rose LLP
5 One International Place
6 Boston, MA 02110

DRAFT C

7
8
9 Dear Mr. Winslow:

10 We are responding to your advisory opinion request on behalf of Senator Scott
11 Brown and the Scott Brown for U.S. Senate Committee (the "Committee") concurring
12 the application of the Federal Election Campaign Act of 1971, as amended (the "Act"), to
13 several proposed activities relating to the upcoming publication and promotion of Senator
14 Brown's autobiography (the "book").

15 The Commission concludes that Senator Brown and the Committee may engage
16 in some of the proposed activities. The Committee's proposal to use campaign funds to
17 purchase copies of the book from the book's publisher at the fair market price, and to
18 have the publisher donate to charity Senator Brown's royalties from sales of the book to
19 the Committee, is permissible. Consistent with prior Commission precedents discussed
20 below, the Committee also may post a *de minimis* amount of material promoting the book
21 on its website and social media sites. Furthermore, Senator Brown's proposal to
22 personally reimburse the Committee for the fair market value of the rental of its lists to
23 promote the book is permissible. The Commission could not approve a response on
24 whether Senator Brown may host fundraising events in cities where the publisher pays
25 his travel costs to promote the book, or whether the Committee may collect email
26 addresses of people who attend the Senator's book signing and promotional events for the
27 purpose of soliciting contributions in the future.

1 ***Background***

2 The facts presented in this advisory opinion are based on your letter received on
3 January 14, 2011, as supplemented by your emails received on January 24, January 28,
4 and February 4, 2011.

5 The Committee is Senator Brown's principal campaign committee for his re-
6 election to the United States Senate.¹ Senator Brown's autobiography, *Against All Odds*,
7 will be published by Harper Collins (the "Publisher"), on or about February 20, 2011.
8 Following the publication of the book, Senator Brown will promote the book in a national
9 book tour during the Senate's February recess (the week of February 20, 2011).

10 Senator Brown's agreement with the Publisher was reviewed by the Senate Select
11 Committee on Ethics, which determined that the agreement adheres to the traditional
12 standards and practices in the publishing industry. The agreement provides for the
13 Publisher's payment of advances as well as royalties to Senator Brown. The royalties
14 will be determined as a percentage of net sales revenue.

15 The Committee proposes to purchase several thousand copies of the book, though
16 not more than the number needed, for campaign-related activities. The Committee plans
17 to use the book to influence Senator Brown's election, such as by distributing books as
18 "thank you" gifts to campaign contributors and political supporters. The Committee will
19 purchase these books at either (a) a bulk rate that is a standard fair market price that the
20 Publisher, under normal industry practice, makes available on equal terms to other large
21 purchasers that are not political organizations or committees, or (b) at the usual retail

¹The Committee filed its first Statement of Organization with the Commission on September 17, 2009. On January 26, 2010, Senator Brown filed with the Commission a Statement of Candidacy for the 2012 Senate election.

1 price of the book, if the bulk rate is unavailable. Senator Brown proposes to donate the
2 royalties from the Committee's bulk purchase of the book to a charitable organization
3 described in section 501(c)(3) of the Internal Revenue Code or under chapter 12, section
4 8, of the Massachusetts General Laws governing charitable organizations. Alternatively,
5 the Publisher is willing to donate Senator Brown's royalties for sales of the book to the
6 Committee to a charitable organization.

7 The Committee proposes to promote Senator Brown's book by posting
8 information on its website about the book and the book tour. The Committee's website,
9 www.scottbrown.com, includes pages grouped by tabs that divide website content into
10 categories, such as News, Events, Issues, and Contribute. The Committee updates its
11 website daily. The Committee would like to post information on its website home page,
12 and this information will consume no more than 25 percent of the home page, with a link
13 to another page with more information, including how to purchase the book and where to
14 meet Senator Brown on the book tour. The Committee's website also includes links to
15 the Committee's social media sites on Facebook and Twitter.

16 The Committee proposes to post similar information on its Facebook fan page,
17 Twitter feed, and LinkedIn site.

- 18 • Facebook. The Committee proposes to post book promotional information on its
19 Facebook Wall² or "Info" page. These posts would consume no more than 25
20 percent of the Facebook page on which they are posted.

² A Facebook "Wall" is "a place to post and share content with your friends." Facebook Help Center:
Using Facebook, <http://www.facebook.com/help/?faq=13153> (last visited Feb. 2, 2011). The Committee

- 1 • Twitter. The Committee would like to tweet³ about Senator Brown's activities on
2 the book promotional tour. For example, a tweet might state: "I'm at the
3 bookstore in LA, come see me and say hello" and include a link to the website
4 page with information about the book. The tweets about the book would
5 comprise less than 10 percent of the Committee's Twitter page.
- 6 • LinkedIn. Senator Brown's LinkedIn page similarly contains information about
7 him and links to his website. The Committee's proposed posts on Senator
8 Brown's LinkedIn page would link to the Committee's website page containing
9 information about the book, would be small compared to other content, and be no
10 more than 25 percent of a page.

11 The Committee also proposes to promote the book to individuals on the
12 Committee's email and mailing lists. The Committee's email and mailing address
13 database includes contact information for thousands of persons who have contributed to
14 the Committee.

15 The Publisher will pay the travel and other costs of the book tour and promotional
16 appearances. Travel will be on commercial carriers at ordinary commercial rates.

17 Although the principal reason for Senator Brown's travel is to promote the book,
18 Senator Brown, while on the book tour, also wishes to host fundraising events for the
19 Committee in the cities to which he will travel. Senator Brown's attendance at these

characterizes Senator Brown's Facebook Wall as "essentially a bulletin board where fans and friends can post notes."

³A "tweet" is a "message posted via Twitter containing 140 characters or fewer." Twitter Help Center: The Twitter Glossary, <http://support.twitter.com/articles/166337-the-twitter-glossary> (last visited Feb. 2, 2011). As a verb, to "tweet" is to post a message on Twitter. *Id.*

1 fundraisers would be ancillary to his presence in those areas to promote his book. The
2 Committee assumes that Senator Brown's participation in fundraising would add no
3 additional travel costs to those to be paid by the Publisher.

4 Finally, the Committee proposes to have a campaign staffer collect email
5 addresses from people who attend Senator Brown's book signing events on the book tour.
6 The Committee does not propose to rely on the Publisher in collecting this data. The
7 Committee plans to use the email addresses that it collects to apprise people of
8 Committee news and activities and for future solicitations of contributions.

9 ***Questions Presented***

- 10
11 1. *May the Committee use campaign funds to purchase copies of the book at the fair*
12 *market price, and, if so, may Senator Brown donate to charity the royalties from*
13 *bulk sales of the book to the Committee, or must he forego those royalties*
14 *entirely?*
15
16 2. *May the Committee post material promoting the book on its website and social*
17 *media sites?*
18
19 3. *If Senator Brown personally reimburses the Committee for the fair market value*
20 *of its email and mailing lists, based on an independent list appraisal, may Senator*
21 *Brown use the lists to promote the sale of his book?*⁴
22
23 4. *May Senator Brown host fundraising events in cities where the book Publisher*
24 *pays his travel costs to promote the book?*
25
26 5. *May the Committee collect email addresses of people who attend the Senator's*
27 *book signing and promotional events, for the purpose of soliciting contributions*
28 *in the future?*
29
30

⁴ The advisory opinion request included two alternative questions, if the Commission does not give an affirmative response to Question 3. The Commission is not addressing these alternative questions because it concludes that the Committee may engage in the activity discussed in Question 3.

1 ***Legal Analysis and Conclusions***

2
3 ***Question 1. May the Committee use campaign funds to purchase copies of the book at***
4 ***the fair market price, and, if so, may Senator Brown donate to charity the royalties from***
5 ***bulk sales of the book to the Committee, or must he forego those royalties entirely?***
6

7 Yes, the Committee may use campaign funds to purchase copies of the book from
8 the publisher at the fair market price, and the publisher may donate to charity the amount
9 that Senator Brown would have otherwise earned as royalties from bulk sales of the
10 book to the Committee.

11 Under the Act and Commission regulations, a candidate and his authorized
12 committee have wide discretion in making expenditures to influence the candidate's
13 election. 2 U.S.C. 439a(a); 11 CFR 113.2. There are six categories of permissible uses
14 of contributions received by a Federal candidate, including for otherwise authorized
15 expenditures in connection with the candidate's campaign for Federal office and for any
16 other lawful purpose. 2 U.S.C. 439a(a); 11 CFR 113.1(g) and 113.2(a). Such uses must
17 not, however, result in the conversion of campaign funds to the personal use of the
18 candidate or any other person. 2 U.S.C. 439a(b); 11 CFR 113.1(g) and 113.2(c)(5).

19 The Act provides that "a contribution or a donation shall be considered to be
20 converted to personal use if the contribution or amount is used to fulfill any
21 commitment, obligation or expense of a person that would exist irrespective of the
22 candidate's election campaign or individual's duties as a holder of Federal office." 2
23 U.S.C. 439a(b)(2); *see also* 11 CFR 113.1(g). The Act and Commission regulations
24 provide a non-exhaustive list of uses of campaign funds that are *per se* personal use.

25 2 U.S.C. 439a(b)(2); 11 CFR 113.1(g)(1)(i). For uses of campaign funds not on this list,

1 the Commission determines, on a case-by-case basis, whether a use of campaign funds
2 would fall within the definition of “personal use.” 11 CFR 113.1(g)(1)(ii).

3 In several prior advisory opinions, the Commission has considered whether the
4 purchase by an authorized committee of its candidate’s book is personal use. *See, e.g.,*
5 Advisory Opinions 2006-18 (Granger), 2004-18 (Lieberman), 2001-08 (Specter), 1995-
6 46 (D’Amato), and 1993-20 (Nighthorse Campbell). The facts presented in this request
7 are particularly similar to those presented in Advisory Opinion 2001-08 (Specter). In that
8 advisory opinion, the Commission determined that the use of the authorized committee’s
9 campaign funds to purchase its candidate’s book would defray an expense that would not
10 exist irrespective of the campaign and would not be an impermissible personal use. The
11 Commission’s conclusion was based on several facts: the authorized committee’s funds
12 would be used to purchase the book solely for distribution to the committee’s
13 contributors and supporters, and thus would be used by the committee only for the
14 purpose of influencing its candidate’s election to Federal office; the quantity purchased
15 would not exceed the number needed for this described purpose; all royalties attributable
16 to the committee’s purchase would be paid by the publisher to charity; and the
17 committee’s purchase would be removed by the publisher from the royalty calculation.⁵

⁵ Advisory Opinion 2001-08 (Specter) also addressed whether the Committee’s bulk purchase of the book at a discounted rate would result in an in-kind contribution by the publisher. *See* 2 U.S.C. 441b(a); 11 CFR 114.2(b). The Commission concluded that no in-kind contribution would result, because the discounted items were made available in the ordinary course of business and on the same terms and conditions to the vendor’s other customers that were not political committees. Advisory Opinion 2001-08 (Specter); *see also* Advisory Opinion 2004-18 (Lieberman). As in Advisory Opinion 2001-08 (Specter), the Committee here indicates that the bulk rate it would pay is a standard fair market price that the publisher, under normal industry practice, makes available on equal terms to other large purchasers that are not political organizations or committees. Accordingly, although not explicitly asked in the instant advisory opinion

1 Similarly, here, the Committee's funds would be used to purchase the book solely
2 for distribution as gifts to the Committee's financial contributors and political supporters,
3 and thus would be used by the Committee only for the purpose of influencing Senator
4 Brown's election to Federal office; the quantity purchased would not exceed the number
5 needed for this described purpose. As in Advisory Opinion 2001-08 (Specter), here, the
6 Publisher is willing to donate Senator Brown's royalties for sales of the book to the
7 Committee to a charitable organization and not escalate the royalty calculation that would
8 inure to Senator Brown personally.

9 The Act provides that "[a] contribution accepted by a candidate" may be used for,
10 among other things, "contributions to an organization described in section 170(c) of the
11 Internal Revenue Code of 1986." 2 U.S.C. 439a(a); *see* 11 CFR 113.1(g)(2). However,
12 the Act limits such contributions by providing that "[a] contribution or donation
13 described in subsection (a) shall not be converted by any person to personal use."
14 2 U.S.C. 439a(b)(1). Thus, Senator Brown may not personally accept royalties for sales
15 of the book to the Committee, even if he then makes charitable contributions equal to that
16 amount. Senator Brown must also not receive any personal benefit, tangible or
17 intangible, for the royalties the Publisher donates to charity for the sales of the book to
18 the Committee.⁶

request, the Commission similarly concludes here that the Committee's payment of this discounted bulk rate would not result in an impermissible in-kind corporate contribution from the publisher.

⁶ Pursuant to Advisory Opinion 2006-18 (Granger), Senator Brown may designate the charitable organization to which the Publisher donates royalties from the sale of the book to the Committee. *See also* Advisory Opinion 1995-46 (D'Amato).

1 Accordingly, as in Advisory Opinion 2001-08 (Specter), the use of Committee
2 funds to purchase the book will defray an expense that would not exist irrespective of
3 Senator Brown's campaign and would not be an impermissible personal use of campaign
4 funds if all royalties for the committee's purchase are paid by the Publisher to charity
5 with no personal benefit to Senator Brown.

6 *Question 2. May the Committee post material promoting the book on its website*
7 *and social media sites?*

8

9 Yes, the Committee may post a *de minimis* amount of material promoting the
10 book on its website and social media sites at *de minimis* cost without violating the
11 restriction on personal use of campaign funds, as described below.

12 As noted above, the Act specifies that conversion to personal use occurs when a
13 "contribution or amount is used to fulfill any commitment, obligation, or expense of a
14 person that would exist irrespective of the candidate's election campaign or individual's
15 duties as a holder of Federal office." 2 U.S.C. 439a(b)(2); *see also* 11 CFR 113.1(g).
16 Here, Senator Brown's expenses as an author in marketing the book exist irrespective of
17 his campaign. The Commission has previously determined that the expenses associated
18 with marketing a book that a commercial publisher publishes and for which it pays
19 royalties to the candidate are expenses that would exist irrespective of the candidate's
20 election campaign or duties as a holder of Federal office. *See* Advisory Opinion 2006-07
21 (Hayworth) (candidate received royalties); *see also* Advisory Opinion 2006-18 (Granger)
22 (candidate donated royalties to charitable organizations). Therefore, the use of an
23 authorized committee's asset, such as the Committee's website, to promote the

1 candidate's book would ordinarily constitute a prohibited personal use. *See* Advisory
2 Opinions 2006-18 (Granger) and 2006-07 (Hayworth).

3 Nonetheless, in Advisory Opinion 2006-07 (Hayworth), the Commission
4 determined that the addition of a single sentence, or, at most, two sentences of
5 promotional material about a candidate's book to an authorized committee's substantial
6 website did not constitute a prohibited personal use of campaign funds, since both the
7 amount of promotional material and the cost to the committee were *de minimis*. The
8 addition of the material did not generate any revenue for the candidate or authorized
9 committee beyond the usual royalties arising from book sales. *See* Advisory Opinion
10 2006-07 (Hayworth) (citing 11 CFR 113.1(g)(1)(ii)(D) (permitting *de minimis* vehicle
11 expenses for personal activities)).

12 The Committee here proposes to post material promoting Senator Brown's book
13 comprising up to 25 percent of the Committee website's homepage, 25 percent of the
14 Committee's Facebook page, 10 percent of the Committee's Twitter page, and 25 percent
15 of Senator Brown's LinkedIn page. Unlike in Advisory Opinion 2006-07 (Hayworth),
16 this proposal does not appear to represent a *de minimis* amount of material. *Cf.* Advisory
17 Opinion 2002-05 (Hutchinson) (finding that 25% of a trip spent on campaign related
18 activity was not an "incidental" amount of time). The Committee may, however,
19 consistent with Advisory Opinion 2006-07 (Hayworth), post a *de minimis* amount of
20 material on an otherwise substantial website and social media sites.

1 *Question 3. If Senator Brown personally reimburses the Committee for the fair market*
2 *value of its email and mailing lists, based on an independent list appraisal, may Senator*
3 *Brown use the lists to promote the sale of his book?*

4 Yes. If Senator Brown personally reimburses the Committee for the fair market
5 value of the rental of its email and mailing lists, based on an independent list appraisal, he
6 may use the email and mailing lists to promote the sale of his book.

7 As noted above, the Act and Commission regulations provide that a candidate and
8 the candidate's authorized committees have wide discretion in making expenditures to
9 influence the candidate's election, but may not convert excess campaign funds to
10 personal use. 2 U.S.C. 439a; 11 CFR 113.1(g) and 113.2; *see also* Advisory Opinions
11 2006-18 (Granger), 2006-07 (Hayworth), and 2001-08 (Specter). Additionally,
12 Commission regulations provide that "the transfer of a campaign committee asset is not
13 personal use so long as the transfer is for fair market value." 11 CFR 113.1(g)(3).

14 The Commission has long recognized that a political committee's mailing lists are
15 assets that have value and that are frequently sold, rented, or exchanged in a market. *See,*
16 *e.g.,* Advisory Opinions 2002-14 (Libertarian National Committee), 1982-41 (Dellums),
17 and 1981-46 (Dellums). In Advisory Opinion 2006-18 (Granger), the Commission
18 permitted a candidate's authorized committee to use the committee's mailing list to
19 promote the candidate's book, without requiring that the candidate reimburse the
20 committee for the fair market value of the use of the list. In that advisory opinion,
21 however, the candidate was not receiving any royalties from the sale of the book.
22 Therefore, the Commission found that "she will not personally gain from the use of
23 Committee funds or assets for the contemplated activities." *Id.* The Commission
24 determined that "in light of the absence of any such personal benefit from the proposed

1 activities . . . the proposed activities do not constitute a prohibited personal use of
2 campaign funds.” *Id.*

3 In this case, by contrast, Senator Brown *will* receive royalties from the sale of the
4 book. Thus, the use of the Committee’s email and mailing lists are subject to the
5 personal use regulations. 11 CFR 113.1(g). However, Senator Brown proposes to
6 reimburse the Committee for the fair market value of the lists, as determined by an
7 independent list broker. This proposed course of conduct will not result in a prohibited
8 personal use of campaign funds.

9 *Question 4. May Senator Brown host fundraising events in cities where the book*
10 *Publisher pays his travel costs to promote the book?*

11
12 The Commission was unable to approve a response to this question by the
13 required four affirmative votes.

14 *Question 5. May the Committee collect email addresses of people who attend the*
15 *Senator’s book signing and promotional events, for the purpose of soliciting*
16 *contributions in the future?*

17
18 The Commission was unable to approve a response to this question by the
19 required four affirmative votes.

20 The Commission expresses no opinion regarding the application of the rules of
21 the United States Senate or any tax law ramifications of the proposed activities, because
22 those are not within the Commission’s jurisdiction.

23 This response constitutes an advisory opinion concerning the application of the
24 Act and Commission regulations to the specific transaction or activity set forth in your
25 request. *See* 2 U.S.C. 437f. The Commission emphasizes that, if there is a change in any
26 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://saos.nictusa.com/saos/searchao>.

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On behalf of the Commission,

Cynthia L. Bauerly
Chair