

## **PUBLIC COMMENTS ON DRAFT ADVISORY OPINIONS**

Members of the public may submit written comments on draft advisory opinions.

DRAFTS A and B of ADVISORY OPINION 2011-27 are now available for comment. They were requested by Sara Berger, Esq., on behalf of New Mexico Voices for Children, and are scheduled to be considered by the Commission at its public meeting on January 19, 2012.

If you wish to comment on DRAFTS A and B of ADVISORY OPINION 2011-27, please note the following requirements:

- 1) Comments must be in writing, and they must be both legible and complete.
- 2) Comments must be submitted to the Office of the Commission Secretary by hand delivery or fax ((202) 208-3333), with a duplicate copy submitted to the Office of General Counsel by hand delivery or fax ((202) 219-3923).
- 3) Comments must be received by noon (Eastern Time) on January 18, 2012.
- 4) The Commission will generally not accept comments received after the deadline. 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.
- 5) All timely received comments will be made available to the public at the Commission's Public Records Office and will be posted on the Commission's website at <http://saos.nictusa.com/saos/searchao>.

## **REQUESTOR APPEARANCES BEFORE THE COMMISSION**

The Commission has implemented a pilot program to allow advisory opinion requestors, or their counsel, to appear before the Commission to answer questions at the open meeting at which the Commission considers the draft advisory opinion. This program took effect on July 7, 2009.

**Under the program:**

- 1) A requestor has an automatic right to appear before the Commission if any public draft of the advisory opinion is made available to the requestor or requestor's counsel less than one week before the public meeting at which the advisory opinion request will be considered. Under these circumstances, no advance written notice of intent to appear is required. This one-week period is shortened to three days for advisory opinions under the expedited twenty-day procedure in 2 U.S.C. 437f(a)(2).**
- 2) A requestor must provide written notice of intent to appear before the Commission if all public drafts of the advisory opinion are made available to requestor or requestor's counsel at least one week before the public meeting at which the Commission will consider the advisory opinion request. This one-week period is shortened to three days for advisory opinions under the expedited twenty-day procedure in 2 U.S.C. 437f(a)(2). The notice of intent to appear must be received by the Office of the Commission Secretary by hand delivery, email ([Secretary@fec.gov](mailto:Secretary@fec.gov)), or fax ((202) 208-3333), no later than 48 hours before the scheduled public meeting. Requestors are responsible for ensuring that the Office of the Commission Secretary receives timely notice.**
- 3) Requestors or their counsel unable to appear physically at a public meeting may participate by telephone, subject to the Commission's technical capabilities.**
- 4) Requestors or their counsel who appear before the Commission may do so only for the limited purpose of addressing questions raised by the Commission at the public meeting. Their appearance does not guarantee that any questions will be asked.**

**FOR FURTHER INFORMATION**

Press inquiries: Judith Ingram  
Press Officer  
(202) 694-1220

Commission Secretary: Shawn Woodhead Werth  
(202) 694-1040

Comment Submission Procedure: Kevin Deeley  
Acting Associate General Counsel  
(202) 694-1650

Other inquiries:

To obtain copies of documents related to Drafts A and B of Advisory Opinion 2011-27, contact the Public Records Office at (202) 694-1120 or (800) 424-9530, or visit the Commission's website at <http://saos.nictusa.com/saos/searchao>.

**ADDRESSES**

Office of the Commission Secretary  
Federal Election Commission  
999 E Street, NW  
Washington, DC 20463

Office of General Counsel  
ATTN: Kevin Deeley, Esq.  
Federal Election Commission  
999 E Street, NW  
Washington, DC 20463

**AGENDA DOCUMENT NO. 12-05**



FEDERAL ELECTION COMMISSION  
Washington, DC 20463

**AGENDA ITEM**

For Meeting of 1-19-12

**SUBMITTED LATE**

January 13, 2012

**MEMORANDUM**

TO: The Commission

FROM: Anthony Herman *AH*  
General Counsel

Kevin Deeley *KB*  
Acting Associate General Counsel

Amy L. Rothstein *AR*  
Assistant General Counsel

Esther Heiden *EH*  
Attorney

Subject: Drafts A and B of AO 2011-27 (New Mexico Voices for Children)

Attached are two alternative drafts of the subject advisory opinion. We have been asked to have these drafts placed on the Open Session agenda for January 19, 2012.

Attachment

RECEIVED  
FEDERAL ELECTION  
COMMISSION  
SECRETARIAT  
2012 JAN 13 P 4:01

1  
2 ADVISORY OPINION 2011-27

3  
4 Sara Berger, Esq.  
5 Freedman Boyd Hollander Goldberg Ives & Duncan P.A.  
6 20 First Plaza, Suite 700  
7 Albuquerque, NM 87102

DRAFT A

8  
9  
10 Dear Ms. Berger:

11 We are responding to your advisory opinion request on behalf of New Mexico  
12 Voices for Children (“NM Voices”), concerning the application of the Federal Election  
13 Campaign Act of 1971, as amended (the “Act”), and Commission regulations to NM  
14 Voices’ proposed severance payment to its former Executive Director who is currently a  
15 candidate for the U.S. House of Representatives.

16 The Commission concludes that NM Voices’ proposed severance payment to its  
17 former Executive Director will not result in a contribution under the Act or Commission  
18 regulations.

19 ***Background***

20 The facts presented in this advisory opinion are based on your letter received on  
21 December 6, 2011.

22 NM Voices is a non-profit corporation under section 501(c)(3) of the Internal  
23 Revenue Code.<sup>1</sup> Established in 1987 “to create systems-level sustainable change to  
24 improve the lives of New Mexico’s children,” it currently has thirteen employees.

---

<sup>1</sup> Section 501(c)(3) of the Internal Revenue Code exempts from taxation corporations organized and operated exclusively for religious, charitable, or educational purposes (among others) that do not “participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of any candidate for public office.” 26 U.S.C. 501(c)(3).

1 Eric Griego served for four years as NM Voices' Executive Director at an annual  
2 salary of \$96,400. He did not have a written employment contract. Mr. Griego left NM  
3 Voices on October 17, 2011, and is currently a candidate for the U.S. House of  
4 Representatives.

5 The requestor states that Mr. Griego wished to continue his employment with NM  
6 Voices while he campaigned, either by taking a leave of absence or by reducing his work  
7 schedule. NM Voices' Board of Directors ("the Board"), however, believed that it was in  
8 NM Voices' best interest if Mr. Griego resigned. Given its 501(c)(3) status, NM Voices  
9 wanted to avoid any appearance that it could influence Mr. Griego's "campaign  
10 messaging or platform." Mr. Griego "agreed to resign prematurely to protect" NM  
11 Voices' interests. "Consistent with its prior practices," the Board voted to approve a  
12 severance payment to Mr. Griego amounting to three months of his salary – contingent  
13 upon the Commission's determination that the payment will not result in a contribution  
14 from NM Voices to Mr. Griego's campaign.

15 NM Voices maintains a "written policy manual for its employees regarding their  
16 employment," but "the manual does not address severance packages." The Board has  
17 discretion to decide whether a departing employee will receive a severance package.  
18 Before 2007, NM Voices had occasionally provided severance payments to departing  
19 employees, but not as a regular practice. Starting when Mr. Griego joined NM Voices as  
20 an Executive Director in 2007, NM Voices instituted an unwritten policy of providing  
21 severance to departing employees in certain circumstances.

22 Under this unwritten policy, NM Voices provided severance packages to  
23 employees who were asked to leave the organization involuntarily because the separation

1 was deemed to be in NM Voices' best interest. For example, departing employees  
2 received severance payments when their employment was terminated due to a  
3 reorganization or other factors deemed to be outside the employee's control. If, however,  
4 employees departed voluntarily, or if their employment was terminated for cause, they  
5 did not receive severance. Nor did employees receive severance packages when their  
6 positions were terminated because of lost grant funding; NM Voices considers such  
7 circumstances to be beyond its control. In determining the amount of the severance  
8 package, NM Voices historically took into account the departing employee's length of  
9 service, past performance, and the expected length of time the employee would need to  
10 find comparable employment.

11 Since 2007, twenty-seven employees have left NM Voices: seventeen resigned  
12 voluntarily; two were fired for cause; three were terminated when their positions were  
13 eliminated because of lost grant funding; one junior employee left in 2007 but NM  
14 Voices' records do not indicate why; and four were asked to leave because their positions  
15 were eliminated following a reorganization. Only the four employees terminated as a  
16 result of reorganizations received severance packages. Three of these four employees  
17 were senior managers, and each of them received severance payments equal to three  
18 months of pay. The fourth, a junior staff member, received two weeks of salary.

19

1 ***Question Presented***

2 *May NM Voices make a severance payment to its former Executive Director equal*  
3 *to three months of his salary without violating the Act's prohibition on contributions by*  
4 *corporations to candidates?*

5 ***Legal Analysis and Conclusions***

6  
7 Yes, NM Voices may make a severance payment to its former Executive Director  
8 equal to three months of his salary without violating the Act's prohibition on  
9 contributions by corporations to candidates, because the severance payment would be  
10 made irrespective of his candidacy for Congress.

11 Corporations, including non-profits, are prohibited from making contributions to  
12 Federal candidates or their authorized committees. 2 U.S.C. 441b(a); 11 CFR 114.2(a)  
13 and (b)(1). Under 2 U.S.C. 441b, the term "contribution" includes "any gift, loan,  
14 advance, or deposit of money or anything of value made by any person for the purpose of  
15 influencing any election for Federal office," and "any direct or indirect payment,  
16 distribution, loan, advance, deposit, or gift of money, or any services, or anything of  
17 value . . . to any candidate, campaign committee, or political party or organization," in  
18 connection with any election to any Federal office. 2 U.S.C. 441b(b)(2); 11 CFR  
19 114.2(b)(1).

20 Under Commission regulations implementing the Act's prohibition on the  
21 "personal use" of campaign funds, 2 U.S.C. 439a, a third party's payment of a  
22 candidate's expenses that would otherwise be deemed a "personal use" under 2 U.S.C.  
23 439a(b)(2) is considered a contribution by the third party unless the payment would have  
24 been made "irrespective of the candidacy." 11 CFR 113.1(g)(6). The Commission's



1 regulations provide that certain types of employment-related compensation are  
2 considered to be payments made “irrespective of the candidacy.” Payments that are  
3 compensation shall be considered contributions unless –

4 (A) The compensation results from *bona fide* employment that is  
5 genuinely independent of the candidacy;

6 (B) The compensation is exclusively in consideration of services  
7 provided by the employee as part of this employment; and

8 (C) The compensation does not exceed the amount of  
9 compensation which would be paid to any other similarly  
10 qualified person for the same work over the same period of  
11 time.

12 11 CFR 113.1(g)(6)(iii).

13 Here, the proposed severance payment will be made “irrespective of the  
14 candidacy” and will not constitute a contribution. NM Voices’ proposed severance  
15 payment is based on Mr. Griego’s past “*bona fide* employment,” would be made  
16 “exclusively in consideration of” his past employment, and would be in line with  
17 severance packages provided by NM Voices to “similarly qualified employees for the  
18 same work over the same period of time.”

19 Further, the facts presented here are very similar to the facts considered by the  
20 Commission in a prior advisory opinion, Advisory Opinion 2004-08 (American Sugar  
21 Cane League), in which the Commission determined that a non-profit corporation’s  
22 proposed severance payment to a congressional candidate who resigned to seek Federal  
23 office was not a prohibited contribution. The Commission determined that the proposed  
24 severance payment would be made irrespective of the candidacy where the former  
25 employer had a regular, although unwritten, practice of providing severance packages to  
26 its departing employees; the employer used objective factors in determining which

1 departing employees received severance pay; and the severance package was comparable  
2 to past severance packages offered by the employer. *See id.*

3 NM Voices has a regular, although unwritten, practice of providing severance  
4 packages to departing employees who were asked to leave because it was in the best  
5 interest of the organization.<sup>2</sup> NM Voices' severance payment to Mr. Griego would be  
6 consistent with the organization's past practice; he was asked to leave NM Voices  
7 because of concerns about the effect of his candidacy on NM Voices' tax-exempt status  
8 under section 501(c)(3) of the Internal Revenue Code. Thus, because the severance  
9 payment to Mr. Griego would result from his *bona fide* employment with NM Voices that  
10 is genuinely independent of his candidacy and the payment would be made exclusively in  
11 consideration of services provided by Mr. Griego as part of his employment, the first two  
12 criteria of 11 CFR 113.1(g)(6)(iii) are satisfied. 11 CFR 113.1(g)(6)(iii)(A) and (B).

13 Moreover, Mr. Griego's severance package is comparable to prior severance  
14 packages provided by NM Voices to its departing employees. Mr. Griego, as a former  
15 Executive Director, would receive the same three-month severance package that all other  
16 departing senior managers have received from NM Voices for the past several years. The  
17 severance provided to Mr. Griego would therefore "not exceed the amount of  
18 compensation which would be paid to any other similarly qualified person for the same  
19 work over the same period of time." 11 CFR 113.1(g)(6)(iii)(C).

20 In sum, because the severance payment would be made exclusively in  
21 consideration of services provided by Mr. Griego as part of his *bona fide* employment

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<sup>2</sup> The Commission concluded in Advisory Opinion 2004-08 (American Sugar Cane League) that "the lack of a written severance policy . . . [is] not fatal to the conclusion that the proposed severance package is compensation 'irrespective of the candidacy'" given the nature of small organizations. American Sugar Cane League employed five individuals; NM Voices is of comparable size, with only thirteen employees.

1 and would be comparable to compensation provided to similarly qualified former  
2 employees, the proposed severance meets the requirements of 11 CFR 113.1(g)(6)(iii).  
3 Accordingly, the Commission concludes that NM Voices' proposed severance payment  
4 to Mr. Griego would not be a contribution under the Act and the Commission regulations.

5 This response constitutes an advisory opinion concerning the application of the  
6 Act and Commission regulations to the specific transaction or activity set forth in your  
7 request. *See* 2 U.S.C. 437f. The Commission emphasizes that, if there is a change in any  
8 of the facts or assumptions presented, and such facts or assumptions are material to a  
9 conclusion presented in this advisory opinion, then the requestors may not rely on that  
10 conclusion as support for its proposed activity. Any person involved in any specific  
11 transaction or activity which is indistinguishable in all its material aspects from the  
12 transaction or activity with respect to which this advisory opinion is rendered may rely on  
13 this advisory opinion. *See* 2 U.S.C. 437f(c)(1)(B). Please note the analysis or  
14 conclusions in this advisory opinion may be affected by subsequent developments in the  
15 law including, but not limited to, statutes, regulations, advisory opinions, and case law.  
16 The cited advisory opinion is available on the Commission's Web site at, [www.fec.gov](http://www.fec.gov),  
17 or directly from the Commission's Advisory Opinion searchable database at  
18 <http://www.fec.gov/searchao>.

19  
20 On behalf of the Commission,  
21

22  
23  
24 Caroline C. Hunter  
25 Chair

1  
2 **ADVISORY OPINION 2011-27**

3  
4 Sara Berger, Esq.  
5 Freedman Boyd Hollander Goldberg Ives & Duncan P.A.  
6 20 First Plaza, Suite 700  
7 Albuquerque, NM 87102

**DRAFT B**

8  
9  
10 Dear Ms. Berger:

11 We are responding to your advisory opinion request on behalf of New Mexico  
12 Voices for Children (“NM Voices”), concerning the application of the Federal Election  
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24 improve the lives of New Mexico’s children,” it currently has thirteen employees.

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2 salary of \$96,400. He did not have a written employment contract. Mr. Griego left NM  
3 Voices on October 17, 2011, and is currently a candidate for the U.S. House of  
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5 The requestor states that Mr. Griego wished to continue his employment with NM  
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7 schedule. NM Voices' Board of Directors ("the Board"), however, believed that it was in  
8 NM Voices' best interest if Mr. Griego resigned. Given its 501(c)(3) status, NM Voices  
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16 employment," but "the manual does not address severance packages." The Board has  
17 discretion to decide whether a departing employee will receive a severance package.  
18 Before 2007, NM Voices had occasionally provided severance payments to departing  
19 employees, but not as a regular practice. Starting when Mr. Griego joined NM Voices as  
20 an Executive Director in 2007, NM Voices instituted an unwritten policy of providing  
21 severance to departing employees in certain circumstances.

22 Under this unwritten policy, NM Voices provided severance packages to  
23 employees who were asked to leave the organization involuntarily because the separation

1 was deemed to be in NM Voices' best interest. For example, departing employees  
2 received severance payments when their employment was terminated due to a  
3 reorganization or other factors deemed to be outside the employee's control. If, however,  
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6 positions were terminated because of lost grant funding; NM Voices considers such  
7 circumstances to be beyond its control. In determining the amount of the severance  
8 package, NM Voices historically took into account the departing employee's length of  
9 service, past performance, and the expected length of time the employee would need to  
10 find comparable employment.

11 Since 2007, twenty-seven employees have left NM Voices: seventeen resigned  
12 voluntarily; two were fired for cause; three were terminated when their positions were  
13 eliminated because of lost grant funding; one junior employee left in 2007 but NM  
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16 result of reorganizations received severance packages. Three of these four employees  
17 were senior managers, and each of them received severance payments equal to three  
18 months of pay. The fourth, a junior staff member, received two weeks of salary.

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1 ***Question Presented***

2 *May NM Voices make a severance payment to its former Executive Director equal*  
3 *to three months of his salary without violating the Act's prohibition on contributions by*  
4 *corporations to candidates?*

5 ***Legal Analysis and Conclusions***

6

7 No, NM Voices may not make a severance payment to its former Executive

8 Director equal to three months of his salary without violating the Act's prohibition on

9 contributions by corporations to candidates, because the Commission cannot conclude

10 that the severance payment would be made irrespective of his candidacy for Congress.

11 Corporations, including non-profits, are prohibited from making contributions to

12 Federal candidates or their authorized committees. 2 U.S.C. 441b(a); 11 CFR 114.2(a)

13 and (b)(1). Under 2 U.S.C. 441b, the term "contribution" includes "any gift, loan,

14 advance, or deposit of money or anything of value made by any person for the purpose of

15 influencing any election for Federal office," and "any direct or indirect payment,

16 distribution, loan, advance, deposit, or gift of money, or any services, or anything of

17 value . . . to any candidate, campaign committee, or political party or organization," in

18 connection with any election to any Federal office. 2 U.S.C. 441b(b)(2); 11 CFR

19 114.2(b)(1).

20 Under Commission regulations implementing the Act's prohibition on the

21 "personal use" of campaign funds, 2 U.S.C. 439a, a third party's payment of a

22 candidate's expenses that would otherwise be deemed a "personal use" under 2 U.S.C.

23 439a(b)(2) is considered a contribution by the third party unless the payment would have

24 been made "irrespective of the candidacy." 11 CFR 113.1(g)(6). The Commission's

1 regulations provide that certain types of employment-related compensation are  
2 considered to be payments made “irrespective of the candidacy.” Payments that are  
3 compensation shall be considered contributions unless –

4 (A) The compensation results from *bona fide* employment that is  
5 genuinely independent of the candidacy;

6  
7 (B) The compensation is exclusively in consideration of services  
8 provided by the employee as part of this employment; and

9  
10 (C) The compensation does not exceed the amount of  
11 compensation which would be paid to any other similarly  
12 qualified person for the same work over the same period of  
13 time.

14  
15 11 CFR 113.1(g)(6)(iii).

16 In determining whether a candidate’s compensation, including severance, meets  
17 the criteria of 11 CFR 113.1(g)(6)(iii), the Commission considers whether the  
18 compensation was provided according to the organization’s existing policy or practice.  
19 Advisory Opinion 2006-13 (Spivack) (compensation is not a contribution because it was  
20 in accordance with the organization’s twenty-year-old compensation plan); Advisory  
21 Opinion 2004-08 (American Sugar Cane League) (severance payment not a contribution  
22 because the payment was provided according to organization’s seventeen-year-old  
23 practice); Advisory Opinion 2000-1 (Tavares) (discretionary paid leave not reflecting  
24 vacation or other earned leave time was a contribution); *see also* Matter Under Review  
25 6023 (*The Loeffler Group, LLP, et al.*), Factual and Legal Analysis (finding no reason to  
26 believe the Act was violated where a severance payment to a former employee working  
27 for a candidate was consistent with the organization’s “pre-existing severance policy and  
28 practices”).



1           NM Voices states that it has an unwritten policy of providing severance payments  
2 to employees whose positions were terminated because it was in the best interest of the  
3 organization. Of the twenty-seven employees who left NM Voices between 2007 and  
4 2010, however, only four employees received severance, and in each of these four  
5 instances the employee's position with NM Voices was terminated as a result of a  
6 reorganization. NM Voices did not provide severance to an employee who –  
7 like Mr. Griego –voluntarily placed himself in the position that led to his being asked to  
8 leave NM Voices.

9           Because the severance payment to Mr. Griego would not be made according to  
10 NM Voices' written policy or its past practice, the Commission cannot conclude that the  
11 proposed severance payment would result from Mr. Griego's *bona fide* employment with  
12 NM Voices that is genuinely independent of his candidacy, would be made exclusively in  
13 consideration of services provided by Mr. Griego as part of his employment, or does not  
14 exceed the amount of compensation which would be paid to any other similarly qualified  
15 person for the same work over the same period of time. 11 CFR 113.1(g)(6)(iii)(A) and  
16 (B). Accordingly, the severance payment would constitute a contribution under the  
17 Commission's regulations at 11 CFR 113.1(g)(6)(iii)(A) and (B).

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

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 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 Web site at,  
7 [www.fec.gov](http://www.fec.gov), or directly from the Commission's Advisory Opinion searchable database  
8 at <http://www.fec.gov/searchao>.

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On behalf of the Commission,

Caroline C. Hunter  
Chair