

AOR 2013-03

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April 22, 2013

Anthony Herman, Esq.  
General Counsel  
Federal Election Commission  
999 E Street N.W.  
Washington, D.C. 20463

**Re: Advisory Opinion Request**

Dear Mr. Herman:

Pursuant to 2 U.S.C. § 437f, we seek an advisory opinion on behalf of Erin Bilbray-Kohn. Ms. Bilbray-Kohn is currently exploring whether she will become a candidate for the United States House of Representatives. She seeks confirmation that she may serve as a paid consultant to a section 527 organization, without soliciting, receiving, directing, transferring, spending, or disbursing funds outside federal limits and restrictions, after becoming a candidate.

## I. FACTUAL BACKGROUND

Emerge Nevada is an organization described under section 527 of the Internal Revenue Code.<sup>1</sup> The organization was founded in 2006 by Ms. Bilbray-Kohn.<sup>2</sup> Emerge Nevada raises and spends funds outside of the federal contribution limits and source restrictions, and is not registered with the FEC.

Emerge Nevada's mission is to help elect more Democratic women to state and local office in Nevada.<sup>3</sup> It advances this goal by recruiting women candidates to run for these nonfederal

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<sup>1</sup> 26 U.S.C. § 527.

<sup>2</sup> Emerge Nevada Form 8871, *available at* [www.irs.gov](http://www.irs.gov).

<sup>3</sup> See About Emerge, at <http://www.emergenv.org/content/about-emerge> (last visited Apr. 12, 2013).

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offices and conducting periodic training programs for them.<sup>4</sup> The program trains participants in all aspects of running a political campaign, and includes sessions on public speaking and communications, fundraising, media and messaging, networking, campaign strategy, field operations, technology and new media, diversity and cultural competency, and ethical leadership.<sup>5</sup>

Ms. Bilbray-Kohn is currently exploring whether she will become a candidate for the United States Congress in Nevada's Third Congressional District for the 2014 election. She has not raised contributions or made expenditures aggregating in excess of \$5,000.

Until recently, Ms. Bilbray-Kohn was employed as the Executive Director of Emerge Nevada, and served as a member of the organization's Board of Directors. In her role as Executive Director, she raised funds for the organization, directed its operations, organized the training program, and conducted most of the program's training sessions. In anticipation of her potential candidacy, in order to avoid any implication that she was not complying with the Act's soft money provisions, she resigned both positions. Emerge Nevada has since retained her as a paid consultant to the organization in a diminished role.

In her new role, her work for the organization is limited to organizing Emerge Nevada's training program and conducting candidate training sessions, tasks she had previously performed when she was an employee of the organization.<sup>6</sup> In her new position, she does not solicit or direct funds for the organization,<sup>7</sup> nor does she receive donations for the organization. She does not have authority to make decisions regarding Emerge Nevada's expenditures, or otherwise exercise any control over the organization. And she has not used Emerge Nevada resources to support her own testing-the-waters or campaign-related activities. Should she become a candidate, she would continue to follow these guidelines

Emerge Nevada has retained Ms. Bilbray-Kohn because of her past experience developing and running the organization's training program, her expertise with Nevada politics, and the difficulty in otherwise obtaining these services in the short-term from third parties. All compensation paid to her is exclusively in consideration for the services she is rendering to the organization.

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<sup>4</sup> See Emerge Nevada Form 8871; The Emerge Difference, at <http://www.emergenv.org/about/difference> (last visited Apr. 12, 2013); Training: The Emerge Program, at <http://www.emergenv.org/training> (last visited Apr. 12, 2013).

<sup>5</sup> *Id.*

<sup>6</sup> As a part of her consultancy, Ms. Bilbray-Kohn may, from time to time, advise individual candidates for state and local office on fundraising matters. She will not, however, solicit, direct, or receive donations for the individual campaigns that are outside of the federal contribution limits and source restrictions.

<sup>7</sup> 11 C.F.R. § 300.2(m), (n).

Emerge Nevada's board determined the value of her services to be \$5,000 per month and, following arm's-length negotiation, has agreed to pay her this amount. As a full-time employee working 40 hours a week, Ms. Bilbray-Kohn was paid a monthly salary of \$9,000. As an outside consultant, the organization expects that Ms. Bilbray-Kohn will have to work 20 hours a week to perform the services required by the consultancy. However, as a consultant, Ms. Bilbray-Kohn is responsible for paying the full amount of her payroll taxes and business expenses. Thus, the organization's board and Ms. Bilbray-Kohn agreed that her services should be compensated at half of her former salary, plus an additional \$500 a month to account for a portion of the extra costs that she bears because she is performing services as a consultant.<sup>8</sup>

On a projected hourly basis, Ms. Bilbray-Kohn is paid substantially less than the organization's two other consultants. The organization currently engages a communications consultant to conduct an annual five-hour communications training for candidates. The communications consultant is paid a fee of \$2,500 to conduct the single training. The organization also retains a fundraising consultant, who is compensated at a rate of \$3,000 per month, and performs services for approximately 4 hours a week.

## II. LEGAL DISCUSSION

Ms. Bilbray-Kohn seeks confirmation that, should she become a candidate, she would be able to continue to serve as a paid consultant to EmERGE Nevada under the conditions outlined in this request.

The Federal Election Campaign Act of 1971, as amended by the Bipartisan Campaign Reform Act of 2002 (the "Act"), prohibits federal candidates, officeholders and their agents from soliciting, receiving, directing, transferring or spending funds in connection with a federal election that are outside of the federal source restrictions and limits, and reporting requirements.<sup>9</sup> And it prohibits federal candidates, officeholders and their agents from soliciting, receiving, directing, transferring or spending funds in connection with a nonfederal election that are outside of the federal source restrictions and limits.<sup>10</sup>

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<sup>8</sup> As a consultant, Ms. Bilbray-Kohn incurs approximately \$1,035 per month for business expenses, such as rent, telephone service, supplies, and related costs. In addition, her estimated FICA tax obligations are \$606 per month. If she were acting as an employee of the organization, the organization would pay half of her FICA obligation.

<sup>9</sup> 2 U.S.C. § 441i(e)(1)(A); 11 C.F.R. § 300.61.

<sup>10</sup> 2 U.S.C. § 441i(e)(1)(B); 11 C.F.R. § 300.62.

While the law prohibits federal candidates from soliciting and spending nonfederal funds in connection with an election, the law does not otherwise prohibit a federal candidate from receiving compensation from an organization that engages in activities in connection with an election. To the contrary, the Commission has recognized that candidates may interact with entities that raise and spend nonfederal funds, provided that those interactions do not trigger any of the Act's enumerated prohibitions. For example, federal candidates may consult with nonfederal candidates and committees to help them plan how to raise and spend nonfederal funds, provided that they do not actually solicit, receive, direct, transfer, spend, or disburse nonfederal funds.<sup>11</sup>

Thus, after triggering candidacy, Ms. Bilbray-Kohn would be permitted to serve as a paid consultant to Emerge Nevada under the conditions outlined above. In the past, the Commission has assumed that the activities of a section 527 organization are "in connection with an election."<sup>12</sup> Even so, Ms. Bilbray-Kohn would not engage in any of the activities specifically prohibited by the Act. She would not "solicit," "direct" or "receive" any funds for the organization. She would not have the authority to make expenditures for the organization and she would not "transfer" or "spend" any nonfederal funds. Her role would be limited to providing training and advice to women candidates for state and local office in Nevada -- activities that the Commission has elsewhere approved.<sup>13</sup>

Moreover, Ms. Bilbray-Kohn's engagement with Emerge Nevada would not result in an in-kind contribution to her campaign. Under Commission rules, payments of compensation made to a candidate are not considered to be a contribution provided that

(A) The compensation results from bona fide employment that is genuinely independent of the candidacy; (B) The compensation is exclusively in consideration for services provided by the employee as part of this employment; and (C) The compensation does not exceed the amount of compensation which would be paid to any other similarly qualified person for the same work over the same period of time.<sup>14</sup>

As the person who developed Emerge Nevada's training program, Ms. Bilbray-Kohn has been retained by Emerge Nevada because of this expertise and because of the difficulty of finding someone else to perform these services in the short term. Thus, she would be providing bona

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<sup>11</sup> Advisory Opinion 2005-02 (citing *McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 160 (2003)).

<sup>12</sup> Advisory Opinion 2003-36.

<sup>13</sup> *See id.*

<sup>14</sup> 11 C.F.R. § 113.1(g)(6)(iii).

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vide services to the organization that would not relate in any way to her federal candidacy. In addition, she is being paid exclusively for the services that she rendered to the organization.

Lastly, Ms. Bilbray-Kohn's compensation would not exceed the amount that would be paid to other similarly qualified individuals to perform the same work. In the past, the Commission has approved of a candidate's continued engagement by an employer where the compensation is reduced in some manner to reflect the hours actually worked by the candidate.<sup>15</sup> A similar methodology was used here. The amount of Ms. Bilbray-Kohn's compensation was determined in arm's-length negotiation between her and the organization's board. The amount of her compensation was based in the first instance on the hourly rate at which she was paid to perform many of the same services she performed when she was a full-time Emerge Nevada employee. This amount was supplemented by an additional \$500 per month to account for the fact that as a consultant, she will be required to bear her own expenses and to pay the full amount of her payroll taxes. However, this amount will only cover a fraction of her actual expenses – Ms. Bilbray-Kohn estimates that her total estimated expenses that would otherwise be paid for by an employer are \$1,338 a month. Thus, if anything, Ms. Bilbray-Kohn's net income would be *less* on a per-hour basis than it was when she performed these services for the organization as a full-time employee.

Moreover, she would be paid substantially less, on a projected hourly basis, than the organization's other two consultants: Ms. Bilbray-Kohn would be paid approximately \$62.50 an hour for her services, whereas the organization's fundraising consultant is paid three times that amount (\$187.50 an hour), and the organization's communications consultant is paid \$500 an hour.

Ms. Bilbray-Kohn's continued engagement with Emerge Nevada would be irrespective of her candidacy. She is being retained as a consultant because of her experience with the organization's programs and she is being paid no more than what would be paid to another similarly qualified individual to perform the same services. Thus, the compensation paid to Ms. Bilbray-Kohn under the consultancy would result in a "contribution" under the Act or Commission rules.

### III. CONCLUSION

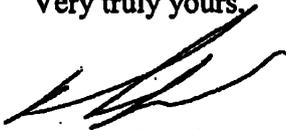
Ms. Bilbray-Kohn seeks confirmation that she may serve as a paid consultant to Emerge Nevada after becoming a candidate for federal office, provided that her engagement follows the parameters described in this request. We ask that the Commission expedite this request and provide an answer as soon as it is able.

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<sup>15</sup> See Advisory Opinion 1978-06.

Anthony Herman, Esq.  
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Very truly yours,

A handwritten signature in black ink, appearing to read "Marc Erik Elias". The signature is stylized with several overlapping strokes.

Marc Erik Elias  
Andrew H. Werbrock  
Counsel to Erin Bilbray-Kohn

From: "Werbrock, Andrew H. (Perkins Coie)" <AWerbrock@perkinscoie.com>  
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Cc: "ARothstein@fec.gov" <ARothstein@fec.gov>, "Elias, Marc (Perkins Coie)" <MElias@perkinscoie.com>  
Date: 04/26/2013 05:48 PM  
Subject: RE: Bilbray-Kohn AOR

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Persuant to our conversation earlier today, here are the answers to your questions:

- 1) Emerge Nevada is a non-profit corporation incorporated under Nevada law.
- 2) The Emerge Nevada finance consultant raises money for the organization, but does not conduct a training session at the organization's candidate training program.
- 3) The rate that Emerge Nevada is paying Ms. Bilbray-Kohn is the same rate it would expect to pay any other training consultant who has Ms. Bilbray-Kohn's knowledge and experience.

Let me know if you have any additional questions.

Very truly yours,

**Andrew H. Werbrock | Perkins Coie LLP**  
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**Cc:** [ARothstein@fec.gov](mailto:ARothstein@fec.gov); Elias, Marc (Perkins Coie)  
**Subject:** Bilbray-Kohn AOR

Attached, please find a new advisory opinion request for our client, Erin Bilbray-Kohn. A copy is also being sent by messenger. Thank you.

**Andrew H. Werbrock | Perkins Coie LLP**  
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