



FEDERAL ELECTION COMMISSION
Washington, DC 20463

July 15, 2004

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

ADVISORY OPINION 2004-18

Cassandra Lentchner, Esq.
Perkins Coie, LLP
607 Fourteenth Street, NW
Washington, DC 20005-2011

Dear Ms. Lentchner:

This refers to your letters dated May 13, 2004, and June 2, 2004, on behalf of Friends of Joe Lieberman (the “Committee”) requesting an advisory opinion concerning the application of the Federal Election Campaign Act of 1971, as amended (the “Act,”) and Commission regulations to the Committee’s purchase of remainder copies of Senator Lieberman’s book, *In Praise of Public Life: The Honor and Purpose of Political Science*.

Background

The Committee is Senator Joseph Lieberman’s principal campaign committee for his re-election in 2006 to the United States Senate. In 1999 Senator Lieberman contracted with Simon and Schuster (“Publisher,”) a major publisher, to write a book entitled, *In Praise of Public Life: The Honor and Purpose of Political Science*. You indicate that the Senator’s book was published “pursuant to a publishing agreement through which Senator Lieberman received a royalty advance” and that the Publisher would not be required to make royalty payments to the Senator until “royalty earning sales” exceeded a certain threshold.

You also indicate that the publishing contract provides that the Publisher may determine that copies of the Senator's book "are not readily saleable at regular prices within a reasonable time," and that the Publisher can then sell copies of the book as "remainder copies" at a steep discount or can "dispose of the copies as surplus at the best obtainable price." However, the book contract provides that the "Publisher shall make no remainder sale without first offering copies to the [Senator] at the estimated remainder price." You state that the provision concerning "remainders" is "customary in the publishing industry."

Senator Lieberman's book has been in publication for several years and has been sold in hardcover, paperback and e-book formats. You state that the Publisher has now notified Senator Lieberman that "it has determined that the book is no longer readily saleable and that it intends to dispose of its remaining inventory." You state that the Publisher has offered the Senator the opportunity to purchase copies at the remainder price of \$3.40 per copy. You further state that the Publisher intends to (but has yet to) offer the book to other potential purchasers at that remainder price.

You state that the Publisher has "thousands of additional copies" of Senator Lieberman's book, of which the Committee intends to purchase a "few hundred copies" at the remainder price to "be used solely for distribution to campaign supporters and contributors and will not be either sold or promoted by the campaign." Further, you state that "quantities purchased would not exceed the number needed for those campaign purposes."

Your letter of May 13, 2004, indicates that "[n]o royalties would accrue to Senator Lieberman" from the sale of books to the Committee. Your letter of June 2, 2004, further clarifies that the Senator will contract with the Publisher "to waive any potential royalties or royalty credit."

Question Presented

Under the facts and circumstances presented in the request, may the Committee purchase remainder copies of Senator Lieberman's book for \$3.40, to use as gifts to campaign supporters and contributors?

Legal Analysis and Conclusions

Yes. Under the facts and circumstances presented, the Committee may make the proposed purchase of copies of Senator Lieberman's books as an authorized expenditure in connection with the Senator's campaign for Federal office.

In-Kind Contributions

The Committee's purchase of the books at a discounted rate raises the issue of whether the Publisher is making an in-kind corporate contribution in connection with a Federal election. *See* 2 U.S.C. 441b(a); 11 CFR 114.2(b). The term "contribution" includes giving "anything of value" for the purpose of influencing an election. 2 U.S.C. 431(8)(A)(i) and 441b(b)(2); 11 CFR 100.52(a) and 114.1(a)(1). The term "anything of value" includes the provision of goods or services at less than the usual and normal charge. 11 CFR 100.52(d)(1). The "usual and normal charge" for goods means the price of those goods in the market from which they ordinarily would have been purchased at the time of the contribution. 11 CFR 100.52(d)(2). In the past, the Commission has concluded that the purchase of goods or services at a discount does not result in a contribution when the discounted items are made available in the ordinary course of business and on the same terms and conditions to the vendor's other customers that are not political committees. *See* Advisory Opinions 2001-08, 1996-02, 1995-46, and 1994-10.

In your request, you state that the practice of discounting books when they are no longer saleable at the regular price is standard in the publishing industry. Additionally, you state that the Publisher set the remainder price for Senator Lieberman's book in the ordinary course of its business based on its estimation of the fair market value of the book as a remainder. Further, you state that the Publisher intends to offer the book to all other potential purchasers at the same remainder price. Accordingly, based on the facts contained in your request, the Committee will pay the usual and normal charge for this type of remainder inventory purchase and therefore would not receive an impermissible in-kind corporate contribution from the Publisher.

Personal Use

Under the Act, as amended by the Bipartisan Campaign Reform Act of 2002 ("BCRA") Pub. L. No. 107-155, 116 Stat. 81 (2002), there are four categories of permissible uses of contributions received by a Federal candidate: (1) otherwise authorized expenditures in connection with the candidate's campaign for Federal office; (2) ordinary and necessary expenses incurred in connection with the duties of the individual as a holder of Federal office; (3) contributions to organizations described in 26 U.S.C. 170(c); and (4) transfers, without limitation, to national, State or local political party committees. 2 U.S.C. 439a(a); *see also* 11 CFR 113.2(a), (b), and (c). Such uses must not, however, result in the conversion of campaign funds to "personal use" by any person. 2 U.S.C. 439a(b)(1). Commission regulations define "personal use" as "any use of funds in a campaign account of a present or former candidate to fulfill a commitment, obligation or expense of any person that would exist irrespective of

the candidate's campaign or duties as a Federal officeholder." 11 CFR 113.1(g); *see* 2 U.S.C. 439a(b)(2); *see also* Advisory Opinions 2004-03, 2003-30, and 2003-26.

Although the facts presented in your request indicate that Committee funds will be used as an otherwise authorized expense in connection with the candidate's campaign for Federal office, in accordance with 2 U.S.C. 439a(a)(1) and 11 CFR 113.2, the Commission must also determine whether this use of Committee funds would exist irrespective of the candidate's campaign and thereby constitute a prohibited personal use. 11 CFR 113.1(g)(1)(ii).

The facts, as presented in your request, indicate that the Committee's funds will be used to defray an expense that would not exist irrespective of Senator Lieberman's campaign. The Commission bases its conclusion on several key facts. The books purchased by the Committee will be used solely for distribution to the Committee's contributors and supporters and thus will be used by the Committee only for the purpose of influencing Senator Lieberman's re-election to Federal office. In addition, the quantity of books that the Committee intends to purchase will not exceed the number needed for the described distribution.¹ Further, Senator Lieberman will not receive any royalties or royalty credits as a result of the sale of these books to the Committee, and the sale will not increase the Senator's opportunity to receive future royalties. Although the regulations on personal use permit a candidate to rent space, equipment, or other items to his principal campaign committee at the usual and normal charge, Senator Lieberman's waiver of royalties and royalty credits that would otherwise result from the sale of copies of his book to the Committee precludes the use of the sale as a device to use the Committee to benefit him financially.² *See* 11 CFR 113.1(g)(1)(i)(E); *see also* Advisory Opinions 2001-08 and 1995-46.³

Based on the foregoing analysis, the proposed activity is permissible under the Act and Commission regulations. The amounts spent by the Committee for the purchase of copies of Senator Lieberman's book should be reported as operating expenditures for the 2006 election cycle. 2 U.S.C. 434(b)(4)(A) and (5)(A); 11 CFR 104.3(b)(2)(i) and (b)(4)(i).

¹ Any books that are surplus to the Committee's current needs must be treated as Committee assets, which cannot be converted to a personal use.

² Although the Senator's waiver of royalties and royalty credits will provide a benefit to the Publisher, this benefit comes directly from Senator Lieberman's personal funds and not from Committee expenditures. The Publisher is receiving only the usual and normal charge for the books from the Committee. Accordingly, the waiver of royalties would not constitute a personal use by the Publisher of the Committee's funds.

³ We note that in these Advisory Opinions, the candidates arranged for any royalties resulting from sales of their books to their campaign committees to be paid directly to charity.

The Commission expresses no opinion regarding the application of any rules of the United States Senate or any tax law ramifications of the proposed activity because those issues are not within its jurisdiction.

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

Sincerely,

(signed)

Ellen L. Weintraub
Vice Chair

Enclosures (AOs 2004-03, 2003-30, 2003-26, 2001-08, 1996-02, 1995-46,
1994-10)