



FEDERAL ELECTION COMMISSION
Washington, DC 20463

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By Office of the Commission Secretary at 3:57 pm, Oct 17, 2018

AGENDA DOCUMENT NO. 18-45-A
AGENDA ITEM
For meeting of October 25, 2018

October 17, 2018

MEMORANDUM

TO: The Commission

FROM: Lisa J. Stevenson *LJS by NFS*
Acting General Counsel

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Acting Associate General Counsel

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Acting Assistant General Counsel

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Attorney

Subject: AO 2018-14 (Oldenburg) Draft A

Attached is a proposed draft of the subject advisory opinion.

Members of the public may submit written comments on the draft advisory opinion. We are making this draft available for comment until 9:00 am (Eastern Time) on October 24, 2018.

Members of the public may also attend the Commission meeting at which the draft will be considered. The advisory opinion requestor may appear before the Commission at this meeting to answer questions.

For more information about how to submit comments or attend the Commission meeting, go to <https://www.fec.gov/legal-resources/advisory-opinions-process/>

Attachment

1 ADVISORY OPINION 2018-14

2
3 Mr. John Oldenburg
4 1101 Rivermead Ln.
5 Wake Forest, NC 27597
6

DRAFT A

7 Dear Mr. Oldenburg:

8 We are responding to your advisory opinion request concerning the application of the
9 Federal Election Campaign Act, 52 U.S.C. §§ 30101-45 (the “Act”), and Commission
10 regulations as to whether an individual holding a personal services contract with the United
11 States Postal Service (the “USPS”) is a federal contractor under the Act. The Commission
12 concludes that you are a federal contractor because your personal services contract with the
13 USPS is a contract with the United States and the performance of your contract is paid in part
14 with funds appropriated by Congress. As a federal contractor, you are prohibited from making
15 contributions to federal candidates, political parties, and political committees.

16 ***Background***

17 The facts presented in this advisory opinion are based on your letter received on
18 September 13, 2018 and publicly available information.

19 You have a personal services contract with the USPS that will continue in effect through
20 the 2018 federal election cycle. Advisory Opinion Request at AOR001. The performance of
21 your contract is paid for by the USPS, which has received congressional appropriation in 2018.
22 AOR002-003; *see also* Consolidated Appropriations Act of 2018, Pub. L. No. 115-141, Div. E,
23 Title V, 132 Stat. 348, 581 (2018). You wish to make contributions to “federal campaign[s] and
24 [political action committee][s]” and ask whether you may do so given your contract with the
25 USPS. AOR001.

Question Presented

Does the prohibition on contributions by federal contractors at 52 U.S.C. § 30119 apply to you as a contractor with the USPS?

Legal Analysis and Conclusion

Yes. Because you hold a personal services contract with the United States and are paid for performance of that contract in part with funds appropriated by Congress, you are a federal contractor under the Act and thus prohibited from making contributions.

The Act prohibits federal contractors from making contributions to any political party, committee, or candidate for public office or to any person for any political purpose or use. 52 U.S.C. § 30119(a)(1) (emphasis added); *see also* 11 C.F.R. Part 115. For purposes of the Act and Commission regulations, a federal contractor is any person “[w]ho enters into any contract with the United States *or* any department *or* agency thereof . . . for the rendition of personal services. . . to the United States or any department or agency thereof . . . if payment for the performance of such contract . . . is to be made in whole or in part from funds appropriated by the Congress . . .” 52 U.S.C. § 30119(a)(1) (emphasis added); *see also* 11 C.F.R. § 115.1(a).

The Commission has long held that a person holding a contract with the USPS is a federal contractor under the Act and Commission regulations. *See* Advisory Opinion 1980-37 (Stenholm) (determining that a sole proprietor holding a contract with USPS is a federal contractor under the Act and thus prohibited from making contributions). You contend, however, that Advisory Opinion 1980-37 (Stenholm) was wrongly decided because, in your view, the USPS is not an agency or department of the United States. Moreover, you contend that the funds appropriated by Congress are a *de minimis* amount of USPS’s revenues in 2018 (you

1 state that for each \$1,000 paid to you for services under the contract, 8.25 cents would be from
2 appropriated funds). The Commission addresses each of these arguments in turn.

3 Although the Act and Commission regulations do not define the terms “department” or
4 “agency” for purposes of the Act, nor do they specify the scope of “United States” as it is used in
5 52 U.S.C. § 30119, Congress has made clear that the USPS is part of the United States
6 government. The USPS has a long history dating back to the Articles of Confederation and the
7 United States Constitution, which empowered Congress to provide and regulate the postal
8 services. Article of Confederation IX, U.S. Const., Art. I, § 8. For almost 100 years, beginning
9 in 1872, the USPS existed as a Cabinet-level department (then called the Post Office
10 Department). *See U.S. Postal Serv. v. Flamingo Indus.*, 540 U.S. 736, 740-741, (2004) (citing G.
11 Cullinan, *The United States Postal Service* 26 (1973)). Congress reorganized the USPS under
12 the Postal Reorganization Act of 1970, 39 U.S.C. §§ 101 *et. seq.* (the “PRA”) as “an independent
13 establishment of the executive branch of the Government of the United States,” 39 U.S.C. §
14 201.¹

15 In holding that the USPS is part of the United States government for purposes of antitrust
16 laws, the Supreme Court explained that, under the PRA, the USPS “retains the obligation to
17 provide universal service to all parts of the country . . . has the power of eminent domain . . . the
18 power to make postal regulations, and the power to enter international postal agreements subject

¹ As you note, section 105 of Title 5 of the U.S. Code (Government Organization and Employees) defines “Executive agency” to include an “independent establishment,” which, in turn, is defined in section 104 of that title to exclude the USPS. You argue that this points to Congress’s intent not to treat the USPS as an executive agency or department. At least one court, however, has rejected this argument. *See Silver v. U.S. Postal Serv.*, 951 F.2d 1033, 1035-1036 (9th Cir. 1991) (in holding that the USPS is part of the executive branch, the court explained that “[i]t is only because the [USPS] is ‘an establishment of the executive branch’ as that term is generally understood that the drafters of section 104 found it necessary to make an exception for the [USPS] for certain definitional purposes under Title 5”). Moreover, both of those definitions explicitly apply only to Title 5, and, therefore, do not apply to the Act. 5 U.S.C. §§ 104, 105.

1 to the supervision of the Secretary of State.” *Flamingo*, 540 U.S. at 741, 748. And in holding
2 that the USPS is part of the executive branch, the United States Court of Appeals for the Ninth
3 Circuit explained that “Congress [in PRA] could not have made its intent more clear that the
4 Postal Service was to remain a part of the U.S. Government and to perform executive branch
5 functions within that government.” *Silver v. U.S. Postal Serv.*, 951 F.2d 1033, 1035 (9th Cir.
6 1991). As that court noted, “[t]he mere fact that the [USPS] is not designated a department or
7 government corporation . . . does not mean it is not a part of the executive branch.” *Id.*

8 The language of the PRA and the determinations by the courts make it clear that the
9 USPS is a part of the executive branch of the United States government. Therefore, consistent
10 with the Commission’s determination in Advisory Opinion 1980-37 (Stenholm), a contract with
11 the USPS is a contract with the United States for the purpose of 52 U.S.C. § 30119.

12 You further contend that the federal contractor prohibition at 52 U.S.C. § 30119 does not
13 apply to your circumstances because the congressional appropriation for USPS pays only a *de*
14 *minimis* portion of your contract. AOR002. However, the federal contractor prohibition applies
15 even if the payment for the performance of a contract was made only “*in part* from funds
16 appropriated by the Congress.” 52 U.S.C. § 30119(a)(1) (emphasis added); *see also* MUR 6403
17 (Alaskans Standing Together), Factual and Legal Analysis at 7-8 (concluding that several entities
18 with “relatively small” contracts were federal contractors under the Act, but dismissing the
19 matter on grounds of prosecutorial discretion). As you acknowledge, the USPS is funded in part
20 by congressional appropriation. AOR002-003. Neither the Act nor Commission regulations
21 provide for a *de minimis* exception to the federal contractor prohibition, and the Commission has
22 no authority to create such an exception here. Accordingly, because you hold a contract with the

1 United States and are paid for the performance of that contract in part with funds appropriated by
2 Congress, the Commission concludes that you are a federal contractor and thus prohibited from
3 making contributions to federal candidates, political parties, and political committees.

4 This response constitutes an advisory opinion concerning the application of the Act and
5 Commission regulations to the specific transaction or activity set forth in your request. *See*
6 52 U.S.C. § 30108. The Commission emphasizes that, if there is a change in any of the facts or
7 assumptions presented, and such facts or assumptions are material to a conclusion presented in
8 this advisory opinion, then you may not rely on that conclusion as support for its proposed
9 activity. Any person involved in any specific transaction or activity which is indistinguishable in
10 all its material aspects from the transaction or activity with respect to which this advisory
11 opinion is rendered may rely on this advisory opinion. *See* 52 U.S.C. § 30108(c)(1)(B). Please
12 note that the analysis or conclusions in this advisory opinion may be affected by subsequent
13 developments in the law including, but not limited to, statutes, regulations, advisory opinions,
14 and case law. The advisory opinion cited herein is available on the Commission's website.

15
16 On behalf of the Commission,

17
18
19 Caroline C. Hunter,

20 Chair