

January 15, 2008

**AO DRAFT COMMENT PROCEDURES**

The Commission permits the submission of written public comments on draft advisory opinions when on the agenda for a Commission meeting.

DRAFT ADVISORY OPINION 2007-36 is available for public comments under this procedure. It was requested by Donald F. McGahn II, Esq., on behalf of People for Pete Domenici.

Draft Advisory Opinion 2007-36 is scheduled to be on the Commission's agenda for its public meeting of Thursday, January 24, 2008.

Please note the following requirements for submitting comments:

1) Comments must be submitted in writing to the Commission Secretary with a duplicate copy to the Office of General Counsel. Comments in legible and complete form may be submitted by fax machine to the Secretary at (202) 208-3333 and to OGC at (202) 219-3923.

2) The deadline for the submission of comments is 12:00pm noon (Eastern Time) on January 23, 2008.

3) No comments will be accepted or considered if received after the deadline. Late comments will be rejected and returned to the commenter. 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.

4) All timely received comments will be distributed to the Commission and the Office of General Counsel. They will also be made available to the public at the Commission's Public Records Office.

**CONTACTS**

Press inquiries: Robert Biersack (202) 694-1220

Commission Secretary: Mary Dove (202) 694-1040

Other inquiries:

To obtain copies of documents related to AO 2007-36, contact the Public Records Office at (202) 694-1120 or (800) 424-9530 or visit the Commission's website at [www.fec.gov](http://www.fec.gov).

For questions about comment submission procedures, contact Rosemary C. Smith, Associate General Counsel, at (202) 694-1650.

**MAILING ADDRESSES**

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FEDERAL ELECTION COMMISSION  
Washington, DC 20463

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January 15, 2008

## AGENDA ITEM

For Meeting of: 01-24-08

### MEMORANDUM

TO: The Commission

FROM: Thomasenia P. Duncan *JPD*  
General Counsel

Rosemary C. Smith *RCS*  
Associate General Counsel

Amy L. Rothstein *AR*  
Assistant General Counsel

Stacey Shin *SSS*  
Attorney

Subject: Draft AO 2007-36

Attached is a proposed draft of the subject advisory opinion. We request that this draft be placed on the agenda for January 24, 2008.

Attachment

1    **ADVISORY OPINION 2007-36**

2

3    **Mr. Donald F. McGahn II, Esq.**

4    **McGahn & Associates PLLC**

5    **509 7<sup>th</sup> Street, NW**

6    **Washington, DC 20004**

7

8    **Dear Mr. McGahn:**

**DRAFT**

9           **We are responding to your advisory opinion request on behalf of People for Pete**

10    **Domenici (the “Committee”), concerning the application of the Federal Election**

11    **Campaign Act of 1971, as amended (the “Act”), and Commission regulations to the use**

12    **of campaign funds for the payment of certain legal expenses incurred by Senator Pete**

13    **Domenici and members of his Senate staff in connection with a preliminary inquiry by**

14    **the U.S. Senate Select Committee on Ethics (the “Senate Ethics Committee”).**

15           **The Commission concludes that these legal expenses are for ordinary and**

16    **necessary expenses incurred in connection with the duties of Senator Domenici as a**

17    **holder of Federal office, and the payment of these expenses using campaign funds would**

18    **not constitute “personal use.” Thus, the Committee may use campaign funds to pay for**

19    **legal expenses incurred by Senator Domenici and members of his Senate staff in**

20    **responding to the Senate Ethics Committee’s preliminary inquiry.**

21    ***Background***

22           **The facts presented in this advisory opinion are based on your letter received on**

23    **November 23, 2007, and your telephone conversation with Commission staff on**

24    **December 6, 2007.**

25           **The Committee is the principal campaign committee of Senator Pete Domenici of**

26    **New Mexico. Senator Domenici plans to retire from the U.S. Senate in 2008, and he will**

27    **not be a candidate for any Federal office.**

1           On March 5, 2007, Citizens for Responsibility and Ethics in Washington  
2   ("CREW") filed a complaint against Senator Domenici with the Senate Ethics  
3   Committee. The complaint alleged that Senator Domenici violated Rule 43 of the  
4   Senate's Code of Conduct by telephoning David Iglesias, who was then the United States  
5   Attorney for the District of New Mexico. The complaint also alleged that Senator  
6   Domenici engaged in improper conduct under the Code of Conduct when he denied Mr.  
7   Iglesias' allegation that Senator Domenici attempted to pressure him to file charges in a  
8   corruption case before the November 2006 election.

9           You represent that, while the inquiry by the Senate Ethics Committee is  
10   confidential, it is "clearly and directly related to Senator Domenici's conduct as a  
11   member of the United States Senate." You state that Senator Domenici telephoned Mr.  
12   Iglesias "to obtain information regarding the status of a widely-reported public corruption  
13   investigation of concern to the Senator's constituents," and that the Senate Ethics  
14   Committee's inquiry "is focused on alleged violations of the Senate Ethics Rules."

15           In addition, members of Senator Domenici's Senate office staff have incurred  
16   legal expenses in preparing for and defending depositions authorized and conducted by  
17   the Senate Ethics Committee as part of its investigation into Senator Domenici's conduct.

18   ***Questions Presented***

- 19   1. *May the Committee use campaign funds to pay for legal expenses incurred by Senator*  
20    *Domenici in connection with the Senate Ethics Committee's preliminary inquiry?*  
21  
22   2. *May the Committee use campaign funds to pay for legal expenses incurred by*  
23    *members of Senator Domenici's staff in connection with the Senate Ethics*  
24    *Committee's preliminary inquiry?*  
25

1 ***Legal Analysis and Conclusions***

2 ***Question 1. May the Committee use campaign funds to pay for legal expenses***  
3 ***incurred by Senator Domenici in connection with the Senate Ethics Committee's***  
4 ***preliminary inquiry?***

5 **Yes, the Committee may use campaign funds to pay for legal expenses incurred**  
6 **by Senator Domenici in connection with the Senate Ethics Committee's preliminary**  
7 **inquiry.**

8 **The Act identifies six permissible uses of contributions accepted by a Federal**  
9 **candidate, including "for ordinary and necessary expenses incurred in connection with**  
10 **duties of the individual as a holder of Federal office." See 2 U.S.C. 439a(a)(2);**  
11 **11 CFR 113.2(a). Contributions accepted by a candidate may not be converted to**  
12 **"personal use" by any person. 2 U.S.C. 439a(b)(1); 11 CFR 113.2(a). "Personal use" is**  
13 **"any use of funds in a campaign account of a present or former candidate to fulfill a**  
14 **commitment, obligation or expense of any person that would exist irrespective of the**  
15 **candidate's campaign or duties as a Federal officeholder." 11 CFR 113.1(g); see also**  
16 **2 U.S.C. 439a(b)(2). The Commission has long recognized that "candidates have wide**  
17 **discretion over the use of campaign funds." Final Rule and Explanation and Justification,**  
18 **Personal Use of Campaign Funds, 60 Fed. Reg. 7,862 (Feb. 9, 1995) ("1995 Personal Use**  
19 **E&J").**

20 **The Commission analyzes whether the payment of legal fees and expenses**  
21 **constitutes personal use on a case-by-case basis. See 11 CFR 113.1(g)(1)(ii)(A). "If the**  
22 **candidate can reasonably show that the expenses at issue resulted from campaign or**  
23 **officeholder activities, the Commission will not consider the use to be personal use."**

1 1995 Personal Use E&J at 7,867. The Commission has found in a number of instances  
2 that the use of campaign funds to pay legal fees and expenses incurred in legal  
3 proceedings involving allegations concerning an individual's duties as a Federal  
4 officeholder would not constitute personal use, because the fees and expenses would not  
5 exist irrespective of the individual's duties as a Federal officeholder. *See* Advisory  
6 Opinions 2006-35 (Kolbe), 2005-11 (Cunningham), 1998-01 (Hilliard), 1997-12  
7 (Costello), 1996-24 (Cooley), and 1995-23 (Shays).

8       Here, although the Senate Ethics Committee's investigation of Senator Domenici  
9 is confidential, "[a]ny review or investigation by the [Senate] Ethics Committee of Mr.  
10 [Domenici] and his efforts to respond to that investigation would be directly related to his  
11 duties as a Federal officeholder." *See* Advisory Opinion 1998-01 (Hilliard) (Member of  
12 the U.S. House of Representatives may use campaign funds to pay legal fees incurred in  
13 responding to any review or investigation by the House Ethics Committee of his  
14 activities, even if the allegations concern activities and transactions that occurred before  
15 the Member was a candidate for office or do not relate directly to the campaign or the  
16 duties of a Federal officeholder). Moreover, legal expenses incurred by Senator  
17 Domenici in responding to the Senate Ethics Committee's investigation are ordinary and  
18 necessary expenses incurred in connection with his duties as a U.S. Senator. Nor would  
19 the payment of the legal expenses using campaign funds be a conversion to personal use,  
20 because these legal expenses would not exist irrespective of Senator Domenici's duties as  
21 a U.S. Senator. Therefore, the Commission concludes that the Committee may use  
22 campaign funds to pay legal expenses incurred by Senator Domenici in connection with  
23 the Senate Ethics Committee's preliminary inquiry.

1            *Question 2. May the Committee use campaign funds to pay for legal expenses*  
2 *incurred by members of Senator Domenici's staff in connection with the Senate Ethics*  
3 *Committee's preliminary inquiry?*

4            Yes, the Committee may use campaign funds to pay for legal expenses incurred  
5 by members of Senator Domenici's staff in connection with the Senate Ethics  
6 Committee's preliminary inquiry.

7            As discussed above, a current or former Federal candidate may use campaign  
8 contributions "for ordinary and necessary expenses incurred in connection with duties of  
9 the individual as a holder of Federal office." 2 U.S.C. 439a(a)(2); 11 CFR 113.2(a). The  
10 contributions may not be converted to "personal use" by any person.

11 2 U.S.C. 439a(b)(1); 11 CFR 113.2.

12            Here, you represent that members of Senator Domenici's Senate office staff have  
13 incurred legal expenses in preparing for and defending depositions authorized and  
14 conducted by the Senate Ethics Committee as part of its investigation into whether  
15 Senator Domenici violated the Senate's Code of Conduct. Such legal expenses are  
16 ordinary and necessary expenses incurred in connection with the duties of Senator  
17 Domenici as a holder of Federal office. The payment of these legal expenses would not  
18 constitute a conversion of campaign contributions by any person to "personal use,"  
19 because Senator Domenici's staff would not have incurred the legal expenses in question  
20 "irrespective of" Senator Domenici's duties as a Federal officeholder. *See*

1 2 U.S.C. 439a(a)(1) and 439a(b)(1); *see also* 11 CFR 113.2. Thus, the Committee may  
2 use campaign funds to pay the legal expenses incurred by Senator Domenici's staff in  
3 connection with the Senate Ethics Committee's preliminary inquiry.<sup>1</sup>

4 The Committee must maintain appropriate documentation of any disbursements  
5 made to pay legal expenses in connection with the inquiry of the Senate Ethics  
6 Committee. *See* 2 U.S.C. 432(c)(5); *see also* 11 CFR 102.9(b) and 104.11. In addition,  
7 the Committee must report all funds disbursed for such legal expenses as operating  
8 expenses, with the purpose noted. *See* 11 CFR 104.3(b)(2) and 104.3(b)(4)(i).

9 The Commission expresses no opinion regarding the application of Federal tax  
10 law, other law, or the rules of the U.S. Senate to the proposed activities, because those  
11 questions are not within the Commission's jurisdiction.

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

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<sup>1</sup> The Commission has previously permitted the use of campaign contributions to pay legal expenses incurred by an individual other than a Federal candidate or Federal officeholder. *See* Advisory Opinion 1996-24 (Cooley) (authorizing the use of campaign funds to pay certain legal expenses incurred by a Federal candidate's spouse to refute press allegations during a campaign).

1 conclusion as support for its proposed activity. All cited advisory opinions are available  
2 on the Commission's website at <http://saos.nictusa.com/saos/searchao>.

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Sincerely,

David M. Mason  
Chairman