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By Commission Secretary's Office at 3:32 pm, Jun 17, 2016



FEDERAL ELECTION COMMISSION
Washington, DC 20463

AGENDA DOCUMENT NO. 16-22-B
AGENDA ITEM
For meeting of June 30, 2016

June 17, 2016

MEMORANDUM

TO: The Commission

FROM: Daniel A. Petalas *DAP*
Acting General Counsel

Adav Noti *AN*
Acting Associate General Counsel

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Acting Assistant General Counsel

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Attorney

Subject: AO 2016-05 (Huckabee for President) Draft B

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 12:00 pm (Eastern Time) on June 29, 2016.

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 <http://www.fec.gov/law/draftaos.shtml>.

Attachment

1 ADVISORY OPINION 2016-05
2
3 Douglas Chalmers, Jr., Esq.
4 Chalmers Pak Burch & Adams, LLC
5 1300 Pennsylvania Ave NW #190-612
6 Washington, DC 20004
7

DRAFT B

8 Dear Mr. Chalmers:

9 We are responding to your advisory opinion request on behalf of Huckabee for President,
10 Inc. (the “Committee”) concerning the application of the Federal Election Campaign Act,
11 52 U.S.C. §§ 30101-46 (the “Act”), and Commission regulations to the proposed use of a legal
12 defense fund (the “Fund”) to pay a settlement arising out of a copyright infringement lawsuit.
13 The Commission concludes that the proposal is not permissible.

14 ***Background***

15 The facts presented in this advisory opinion are based on your letter received on May 9
16 and your email received on May 13, 2016.

17 The Committee is the principal campaign committee of former Arkansas Governor Mike
18 Huckabee, a candidate for President in 2016. On November 18, 2015, Rude Music, Inc. filed a
19 copyright infringement lawsuit against the Committee in the U.S. District Court for the Northern
20 District of Illinois. The complaint, seeking injunctive relief and monetary damages, alleged that
21 the Committee had violated federal copyright law by playing the song “Eye of the Tiger” at a
22 campaign event on September 8, 2015. The Committee incurred attorneys’ fees and other
23 expenses in defending itself in that litigation, which the parties eventually settled for an
24 undisclosed amount. The amount owed is “personally guaranteed by Governor Huckabee.”
25 Advisory Opinion Request at AOR002.

26 The Fund will be used to pay the Committee’s attorneys’ fees and expenses and a portion
27 of the settlement amount. The Fund will be established and administered in accordance with the

1 Commission’s previous advisory opinions, including Advisory Opinion 2011-01 (Robin
2 Carnahan for Senate), in which the proposed legal defense fund was established and
3 administered entirely separately from the campaign committee, solicitations for the legal defense
4 fund were conducted separately from any solicitation for the campaign committee, and all
5 amounts received by the legal defense fund were held separately from the campaign committee’s
6 funds. *Id.* at 3-4. No amounts will be paid from the Fund to the Committee.

7 ***Question Presented***

8 *If the Fund is established pursuant to the requirements set out in previous Commission*
9 *advisory opinions, including Advisory Opinion 2011-01, may the Fund be used to pay the cost of*
10 *a portion of the settlement of the copyright infringement lawsuit against the Committee?*

11 ***Legal Analysis and Conclusion***

12 No, the Fund may not be used as described in the request to pay the Committee’s legal
13 fees or settlement obligation arising out of the copyright infringement lawsuit.

14 The Act provides that “a candidate . . . , [or] agent of a candidate . . . shall not . . . receive,
15 direct, transfer, or spend . . . funds in connection with an election for Federal office . . . unless the
16 funds are subject to the limitations, prohibitions, and reporting requirements of this Act.” 52
17 U.S.C. § 30125(e)(1)(A); 11 CFR § 300.61.

18 Here, the Fund proposes to pay a settlement obligation that Governor Huckabee has
19 personally guaranteed. Paying Governor Huckabee’s debt on his behalf is functionally and
20 legally indistinguishable from making a disbursement to Governor Huckabee himself. *See*
21 *Advisory Opinion 1985-29 (John Breaux Committee)* (third-party payment of interest owed by
22 campaign committee “would be viewed as a contribution since it defrays an obligation of the
23 Committee”); *Advisory Opinion 1981-42 (Consulting Associates)* (consulting firm’s payment of

1 disputed debt owed by it or campaign committee to third party would be contribution to
2 committee if consulting firm was not required to pay it); *cf.* 11 C.F.R. § 100.54 (providing that
3 third-party payments for services rendered to committee are contributions to committee).
4 Furthermore, to fulfill Governor Huckabee’s settlement obligation, the Fund’s payments would
5 necessarily be disbursed at the direction of Governor Huckabee’s counsel or other agents acting
6 on behalf of him in the litigation. *See* 11 C.F.R. § 300.60(c). Accordingly, because the amounts
7 received and spent by the Fund to pay the expenses and obligations incurred in the copyright
8 lawsuit would be “receive[d]” by Governor Huckabee and “direct[ed]” by his agents, the
9 restrictions of section 30125(e) would apply if those payments are “in connection with an
10 election for Federal office.” 52 U.S.C. § 30125(e)(1)(A).

11 The Commission concludes that the proposed payments would be in connection with
12 Governor Huckabee’s presidential election campaign. The litigation at issue turns on the
13 activities of Governor Huckabee’s campaign committee, which are inherently in connection with
14 an election. *See Buckley v. Valeo*, 424 U.S. 1, 79 (1976) (“Expenditures of candidates and of
15 [political committees that are under the control of a candidate] . . . are, by definition, campaign
16 related.”). Indeed, the particular expenses at issue here arose directly out of quintessential
17 campaign activity: The plaintiff sued the Committee over its use of a copyrighted song *at a*
18 *campaign rally*. The resulting attorneys’ fees and settlement payment therefore would not have
19 existed irrespective of the campaign, as the Commission has noted in many prior advisory
20 opinions regarding litigation arising from campaign activity. *See, e.g.*, Advisory Opinion 2009-
21 10 (Visclosky for Congress I) (legal expenses related to federal investigation of campaign
22 contributions); Advisory Opinion 1993-15 (The Tsongas Committee) (legal costs associated with
23 federal investigation and indictment of fundraising consultant for misappropriation of

1 contributions); Advisory Opinion 1995-23 (Shays) (costs to defend lawsuit alleging campaign
2 took down opponent’s signs). Thus, the costs and obligations arising from the litigation at issue
3 here are in connection with an election. The Fund therefore may not receive or spend funds that
4 do not comply with the source prohibitions, amount limitations, and reporting requirements of
5 the Act.

6 Advisory Opinion 2003-15 (Majette) reached a contrary conclusion, relying on several
7 earlier advisory opinions that had concluded that receipts and disbursements by certain legal
8 defense funds were not “contributions” or “expenditures” under the Act. *See* Advisory Opinion
9 2003-15 (Majette) at 3-4 (relying on Advisory Opinion 1996-39 (Heintz for Congress); Advisory
10 Opinion 1983-21 (Studds); and Advisory Opinion 1981-13 (Moss)). However, all of those
11 earlier opinions pre-dated Congress’s enactment of section 30125,¹ and therefore they did not
12 even address — much less analyze — the prohibitions of that section. Furthermore, while
13 Advisory Opinion 2003-15 (Majette) stated that there was “no indication in the legislative
14 history” of section 30125 that Congress intended to overrule the prior advisory opinions, there
15 would have been no reason for Congress to give such an indication, as section 30125 did not
16 modify the statutes under which those prior opinions had been decided (*i.e.*, the definitions of
17 “contribution” or “expenditure”). In any event, the text of section 30125 is clear on its face and
18 cannot be disregarded on the basis of legislative history or the absence thereof. *See, e.g.*,
19 *Dewsnup v. Timm*, 502 U.S. 410, 419-20 (1992) (“[W]here the language is unambiguous, silence

¹ Bipartisan Campaign Reform Act, Pub. L. No. 107-155, 116 Stat. 81, 84.

1 in the legislative history cannot be controlling.”). Thus, Advisory Opinion 2003-15 (Majette) is
2 superseded to the extent that it conflicts with the Commission’s conclusion here.²

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

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16 On behalf of the Commission,

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Matthew S. Petersen
Chairman

² Because 52 U.S.C. § 30125(e) prohibits the Fund from receiving or spending money outside the source prohibitions, amount limitations, and reporting requirements of the Act to pay the legal costs or settlement at issue, the Commission need not determine whether these receipts and disbursements would constitute contributions or expenditures. *See* Advisory Opinion 2011-01 (Robin Carnahan for Senate).