

STATE OF COLORADO

Department of State

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Donetta Davidson

Secretary of State

William A. Hobbs

Deputy Secretary of State

COPY

October 9, 2002

Shayne M. Madsen, Esq.
Attorney at Law
Friedlob Sanderson Paulson & Tourtillott, LLC
1775 Sherman Street, Twenty-First Floor
Denver, Colorado 80203

Re: Request for Advisory Opinion concerning Fair Campaign Practices Act
(Contribution limits for officeholders who change elective office sought)

Dear Ms. Madsen:

I am writing in response to your inquiry dated August 16, 2002, in which you requested "an interpretation of the Fair Campaign Practices Act [FCPA] with respect to the narrow issue of the applicable limits under § 1-45-105.3 for the current state office holders who are declared candidates for another state office in the 2002 general election where such office holders received contributions in 2001 in connection with their current office". Please be advised that this opinion is advisory only, and that it is limited to the facts presented.

Your inquiry essentially asks whether the contribution limits of the FCPA are tied to the individual candidate or to the office sought. For the reasons discussed below, it is my opinion that the contribution limits relate to the office sought.

Under the Fair Campaign Practices Act (FCPA), a state officeholder who receives campaign contributions and makes campaign expenditures is either a declared or undeclared candidate. (Definition of "candidate" and "candidate committee" in section 1-45-103 (1.5) and (2), C.R.S.)

If the officeholder is an undeclared candidate, then the officeholder is subject to the contribution limits for the office currently held. Section 1-45-105.3 (11), C.R.S.

If the officeholder is a declared candidate, then the officeholder must register a candidate committee for the office sought before accepting any contributions. Sections 1-45-103 (1.5) and (2) and 1-45-108 (3), C.R.S. The contribution limits of section 1-45-105.3, C.R.S., then apply to contributions made to such candidate committee for the office sought.

In the particular situation where a state officeholder becomes a declared candidate for a state office different than the office held, then the officeholder must register a candidate

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committee that reflects the new office sought. Sections 1-45-103 (1.5) and (2) and 1-45-108 (3), C.R.S. There are two ways to comply with this requirement to reflect the change in office sought: (1) amend the registration for the existing candidate committee to reflect the change in office sought, or (2) register a new candidate committee for the new office. However, the officeholder cannot register a new candidate committee without closing the candidate committee for the current office, because section 1-45-103 (2), C.R.S., prohibits a candidate from having more than one candidate committee at one time.

Of the two methods of reflecting the new office sought, this office recommends following the second method, namely, closing the candidate committee for the office held and registering a candidate committee for the new office sought. For the reasons that follow, this method must be used if the officeholder intends to use unexpended contributions received for the office held to support his or her candidacy for a different office.

Section 1-45-106 (1) (a) (I) (B), C.R.S., expressly allows the officeholder to transfer unexpended funds of the candidate committee for the current office to the candidate committee for the new office sought, as follows:

1-45-106. Unexpended campaign contributions. (1) (a) (I) Unexpended campaign contributions to a candidate committee may be:

* * * *

(B) Contributed to a candidate committee established by the same candidate for a different public office, subject to the limitations set forth in section 1-45-105.3 (4) (b) and (c), if the candidate committee making such a contribution is affirmatively closed by the candidate no later than ten days after the date such a contribution is made;

Thus, if the officeholder intends to use unexpended funds contributed for the prior office to support his or her candidacy for the new office, the officeholder must close the prior candidate committee, and the amount transferred from the prior candidate committee to the new candidate committee is limited by section 1-45-105.3 (4) (b), which provides,

1-45-105.3. Contribution limits. (4) (b) Except as provided in paragraph (c) of this subsection (4), no candidate committee shall accept a combined total of contributions and contributions in kind in excess of twenty-five thousand dollars during such candidate committee's election cycle from a candidate committee of the same candidate that was established for a different public office.

The conditions required for closing a candidate committee are specified in Rule 23.3, as follows:

23.3 A committee may terminate if the following conditions are met: the candidate or committee no longer intends to receive contributions or make expenditures; a zero balance is achieved by having no cash on hand and no outstanding debts or obligations; and the candidate or committee files a termination statement of contributions and expenditures. A termination statement may be filed at any time. [1-45-103 (2) and 1-45-106]

Thus, the officeholder may not close the prior candidate committee unless its closing fund balance has been brought down to zero. This may be accomplished by contributing the remaining balance of funds to the new candidate committee, subject to the \$25,000 limit

stated in section 1-45-105.3 (4) (b). Any fund balance over the \$25,000 limit would have to be donated, contributed, expended, or returned in accordance with the provisions governing unexpended campaign contributions in section 1-45-106.

When the officeholder establishes a new candidate committee, the new candidate committee is subject to the contribution limits for the office sought pursuant to section 1-45-105.3, C.R.S.

This result is expressed in Rule 22.4 of the Rules Concerning Fair Campaign Practices Act (8 CCR 1505-6), which provides

22.4 The purpose or nature of interest of the committee or party shall be included. A candidate committee that is registered with a generic purpose, i.e. "support John Doe for public office", and that changes to a specific office, and a candidate committee that changes elective office sought, shall file an amended statement not later than 5 days after such change. If the new elective office is for a state candidate, then all contributions received shall be applicable to contribution limits and restrictions set forth in 1-45-105.3 for the new office. Any contributions received in excess of contribution limits shall be remitted to the contributor within ten business days in accordance with section 1-45-105.3 (6). (Emphasis added.)

Although not specifically raised, your inquiry leads to a question of how to apply the contribution limits applicable to the new office sought to a contributor who made a contribution to the candidate committee of the office currently held.

Your inquiry refers to the example of a current state House member who is a declared candidate for a state Senate seat. In this case, a contributor might have contributed the maximum \$1,000 contribution to the officeholder's House candidate committee before the officeholder declared as a candidate for the Senate. Since the maximum contribution to a Senate candidate committee is \$1,500, the question arises whether the same contributor can contribute an additional \$1,500 to the officeholder's new Senate candidate committee, or the contributor is limited to making an additional contribution of \$500, bringing the total contribution to the officeholder to \$1,500 (the Senate maximum).

In my opinion, the same contributor that made a \$1,000 contribution to the officeholder's former House candidate committee may make an additional contribution of \$1,500 to the officeholder's new Senate candidate committee during the same election cycle. This conclusion follows logically from the principle that the contribution limits follow the office, not the individual candidate. The first contribution was to support the officeholder's candidacy for the House, and the second contribution is to support the officeholder's candidacy for a different office, the Senate.

This conclusion is also supported by the fact that the FCPA has an express limitation that applies in this circumstance, the \$25,000 limit in section 1-45-105.3 (4) (b) on funds transferred from the old candidate committee to the new candidate committee. This \$25,000 limit addresses the possible concern that candidates could practically double the contribution limits from individual contributors by collecting contributions from them for one office up the maximum for that office, and then collect contributions again from the

same individuals by changing the office sought. The \$25,000 limitation ensures that, no matter how much the officeholder had raised from contributors to his or her previous candidate committee, he or she will only be able to transfer \$25,000 to the candidate committee for the new office sought.

This conclusion is also supported by considering the reverse situation, where a current state Senator becomes a candidate for the state House. In this situation, the Senator may have received total contributions from a single individual in the amount of \$1,500 prior to declaring his or her candidacy for the state House. However, when the Senator establishes a candidate committee for the state House, he or she becomes subject to a contribution limit of \$1,000 from any individual. If the contribution limits followed the individual candidate instead of the office sought, it could be argued that the officeholder would have to refund \$500 of the \$1,500 contribution made by an individual when the officeholder was a candidate for the Senate. This would have the anomalous result of applying contribution limits retrospectively. In other words, a \$1,500 contribution that was lawful at the time made, would become a violation of the FCPA, simply because the officeholder subsequently became a candidate for a different office with lower contribution limits.

In this reverse situation, therefore, it is my opinion that a contributor who made a \$1,500 contribution to the officeholder's former Senate candidate committee may make an additional contribution of \$1,000 to the officeholder's new House candidate committee during the same election cycle. The contribution limits of section 1-45-105.3 are imposed prospectively, and they apply to each office, not to the individual candidate. However, in my view, contribution limits (including Rule 22.4 quoted above) apply prospectively only. As stated in section 2-4-202, C.R.S., statutes are presumed to operative prospectively.

For the reasons stated above, it is my opinion that the contribution limits of section 1-45-105.3, C.R.S., apply to the office and the applicable candidate committee, not to the individual candidate.

I hope that this response is helpful. If we can be of further assistance, please do not hesitate to contact this office.

Sincerely,



Donetta Davidson
Secretary of State



**FOLEY
HOAG** LLP
ATTORNEYS AT LAW

RECEIVED

August 12, 2002

AUG 15 2002

Kevin Conroy
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ELECTIONS / LICENSING
SECRETARY OF STATE

Donnetta Davidson
Secretary of State
Office of the Secretary of State
1560 Broadway, Suite 200
Denver, CO 80202

Re: Request for an Advisory Opinion

Dear Ms. Davidson:

I am writing to request an advisory opinion regarding the Fair Campaign Practices Act's regulation of a national non-profit organization's (the "Organization") donations to a Colorado statewide issue committee.

The Organization is registered as a 501(c)(4) with the Internal Revenue Service and is involved in activities throughout the country. The Organization plans to organize a statewide issue committee in Colorado (the "Issue Committee"). I am writing to request an advisory opinion on the following three scenarios:

1. A 501(c)(3) organization wants to make a donation to the Issue Committee that is in the process of organizing. The 501(c)(3) organization makes a donation to the Organization, and specifically notes that the funds should be contributed to the Issue Committee once it is organized. The Organization then contributes the funds to the Issue Committee once it is organized. The Issue Committee would report that the 501(c)(3) organization made the donation via the Organization.

2. A corporation gives a large donation to the Organization with specific instructions that the Organization give these funds to state ballot question committees around the country that are supporting Issue X. The Organization identifies ballot questions throughout the country which are supporting Issue X including the Issue Committee. With the advice and consent of the corporation, the Organization makes a contribution to the Issue Committee out of the funds that were donated by the corporation. The Issue Committee would report that the corporation made the donation via the Organization.

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3. A donor wants to make a donation of stock to the Issue Committee, but the Issue Committee does not have a brokerage account that can receive and sell stock. The donor donates the stock to the Organization with the instruction that the stock be cashed and the proceeds be donated to the Issue Committee. Following the donor's wishes, the Organization accepts the stock, sells it and donates the proceeds to the Issue Committee. The Issue Committee would report that the donor made the donation via the Organization.

I am requesting answers to the following questions:

- (1) Would the transactions above violate the Fair Campaign Practices Act?
- (2) Would the Organization be required to register as a political committee in Colorado if it participated in any one of these transactions?

Thank you for your prompt attention to this matter. Please feel free to contact me at (617) 832-1164 if you have any questions regarding my request. I look forward to hearing from you soon.

Sincerely,



Kevin Conroy