FEDERAL ELECTION COMMISSION
Washington, DC 20463

September 19, 1997

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

ADVISORY OPINION 1997-17

Kevin F. O'Malley
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Dear Mr. O'Malley:

This responds to your letter dated July 29, 1997, on behalf of Missouri Attorney General Jay Nixon, requesting an advisory opinion concerning the application of the Federal Election Campaign Act of 1971, as amended ("the Act"), and Commission regulations to contributions from limited liability companies.

You are counsel for Jay Nixon, a candidate for nomination as the Democratic candidate in 1998 for the United States Senate from Missouri. Mr. Nixon's principal campaign committee, the Nixon Campaign Fund ("the Committee"), filed its statement of organization with the Commission on March 12, 1997.

You ask whether the Committee may receive a contribution from a Missouri limited liability company ("LLC"). You note that the Commission has already concluded that LLCs in three jurisdictions may make contributions, and that Missouri law is similar to their laws.

Under the Act, the term "person" includes an individual, partnership, committee, association, corporation, labor organization, or any other organization or group of persons. 2 U.S.C. §431(11); 11 CFR 100.10. The Act prohibits corporations from making any contribution or expenditure in connection with a Federal election. 2 U.S.C. §441b(a); 11 CFR 114.2(b). Contributions by persons whose contributions are not

prohibited by the Act are subject to the limits set out in 2 U.S.C. §441a.[1] More particularly, contributions by partnerships are permitted, although limited by 2 U.S.C. §441a(a). Partnership contributions are also attributed proportionately against each contributing partner's limit for the same candidate and election. 11 CFR 110.1(e).[2]

As you indicate, the Commission has addressed the ability of LLCs in Virginia, the District of Columbia, and Pennsylvania to make contributions. Advisory Opinions 1997-4, 1996-13, and 1995-11. In those opinions, the Commission concluded that, in view of the fact that the requesting entities were LLCs and that the LLC was a type of business entity that was distinct from a corporation or partnership under the statutes of those jurisdictions, the requester fell instead within the language "any other organization or group of persons," which is part of the Act's definition of "person." Hence, as a person, but not a corporation, the company was subject to the Act's contribution limits rather than its prohibitions. In addition, contributions from the company's general operating accounts or treasury would not be attributed to any of its members. However, the Commission's allowance for contributions by LLCs has been premised on the assumption that none of the individual members of the requesting entity were corporations, Federal contractors or foreign nationals. The participation of corporations, Federal contractors, or foreign nationals as members in an LLC would raise the issue of unlawful contributions or expenditures which are prohibited by 2 U.S.C. §§441b, 441c, and 441e. Advisory Opinions 1997-4, 1996-13, n.6 and 1995-11, n.9.

In reviewing the statutes of those jurisdictions, the Commission specifically noted how the statutes classified the entities in definitional terms and selection of business name. It also considered whether the statutes for LLCs or the rules of an entity itself broadly reflected characteristics that were different from those of a corporation in some instances or a partnership in others. For example, the opinions reviewed statutory language defining LLCs or prohibiting the use of certain terms in an LLC name that might indicate another form of business. Moreover, the statutes reflected the corporate characteristic of limitation of liability for all the members of an LLC, along with the lack of other characteristics generally associated with corporations, i.e., free transferability of interest and continuity of life. The opinions also noted how the statutes distinguished LLCs from partnerships, referring to the personal liability of general partners and the fact that the laws of the jurisdictions recognized the LLC as a business form distinct from partnerships. Advisory Opinions 1997-4, 1996-13 and 1995-11. In its most recent opinion on contributions by an LLC, the Commission stated that even if flexibility in the particular State's law on LLCs and other business forms may allow that State's LLCs to have more common attributes with the corporations or partnerships in that State, the LLC was still a separate type of business entity with its own comprehensive statutory framework under State law. Advisory Opinion 1997-4.

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[1] The Act prohibits contributions by several entities: corporations, labor organizations, Federal contractors, and foreign nationals. 2 U.S.C. §§441b, 441c, and 441e; 11 CFR 114.2(b), 115.2, and 110.4(a).

[2] A corporate partner may not participate in a partnership contribution or accept any attribution of any portion of the contribution through a reduction of its share of partnership profits or an increase of its share of partnership losses. 11 CFR 110.1(e).

Under Missouri law, the LLC is a form of business that is distinct from the various forms of corporations and partnerships and which has its own comprehensive statutory framework (Mo. Stat. §§347.010 to 347.187) within Title XXIII, entitled "Corporations, Associations and Partnerships." See Mo. Stat. §347.015(7). The Missouri statute states that the name must contain the term "limited company" or "limited liability company," or the abbreviations, LC, LLC, L.C. or L.L.C., and may not contain the word "corporation," "incorporated," "limited partnership," "L.P.," or "Ltd.," or any abbreviation of such words. Mo. Stat. §347.020(1) and (2). Missouri law requires the LLC's articles of organization to state "the latest date or events, if any, on which the [LLC] is to dissolve" and requires dissolution upon a number of occurrences, including events specified in LLC's governing documents; the withdrawal of the sole remaining member; or the withdrawal of a member (unless otherwise provided in the operating agreement), if the majority of members agrees to dissolve. Mo. Stat. §§347.039.1(5), 347.123, and 347.137.[3] A Missouri LLC is given limited liability for all its members, even if they are managers, as is generally the case with corporations and generally distinguishable from partnerships. Mo. Stat. §347.057. Lastly, the statute provides for limitations on the transferability of interests. A member's assignment of his interest does not entitle the assignee to membership or the attendant management rights, just the right to receive distributions and profits, unless the other members provide unanimous written consent or there is a provision for such assignment in the operating agreement. Mo. Stat. §§347.113 and 347.115.

Based on the foregoing, the Commission concludes that Missouri LLCs are not corporations or partnerships, and may generally make contributions to the Committee within the limits of the Act and without dual attribution of the amounts to the LLC's members. See 2 U.S.C. §441a(a)(1)(A); 11 CFR 110.1(e). As indicated above, however, the LLC's ability to contribute is conditioned upon the assumption that none of the members were in the Act's prohibited categories. 2 U.S.C. §§441b, 441c, and 441e.

Commission regulations provide that a committee treasurer shall be responsible for examining all contributions for evidence of illegality. 11 CFR 103.3(b). Contributions that present genuine questions as to whether they were made by entities in the prohibited categories may be, within ten days of the treasurer's receipt, either deposited in the campaign depository or returned to the contributor. If the contribution is deposited, the treasurer must make his best efforts, as defined in the regulation, to determine the legality of the contribution. 11 CFR 103.3(b)(1). If the contribution cannot be determined to be legal, the treasurer must refund the contribution within 30 days of the receipt. *Id.*

Therefore, upon receipt of a contribution from a Missouri LLC, the Committee treasurer should ask the LLC, orally or in writing, whether any of its members fall within the prohibited categories. If the treasurer does not receive written or oral (memorialized

[3] Section 347.137 also provides for dissolution by unanimous written consent of the members, or by a judicial determination.

in writing) confirmation from the LLC that none of the LLC's members fall within those categories, the contribution must be returned in a timely manner under 11 CFR 103.3(b)(1). The Commission has specifically determined not to apply to LLCs the principle of dual attribution of the amounts of contributions that is applied to partnerships. Therefore, the LLC cannot provide for an attribution of the contribution to some of its members only (with a consequent reduction in their profits alone). Compare 11 CFR 110.1(e)(2).[4]

This response constitutes an advisory opinion concerning application of the Act, or regulations prescribed by the Commission, to the specific transaction or activity set forth in your request. See 2 U.S.C. §437f.

Sincerely,

(signed)

John Warren McGarry
Chairman

Enclosures (AOs 1997-4, 1996-13, and 1995-11)

[4] As an alternative to the attribution of a partnership contribution to each partner in proportion to his share of the partnership's profits, 11 CFR 110.1(e)(2) provides for attribution by agreement of the partners as long as only the profits of the partners to whom the contribution is attributed are reduced (or losses increased) and those partners' profits are reduced (or losses increased) by the amount attributed to each of them.