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MEMORANDUM

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September 19, 2001

TO: Commissioners

AGENDA ITEM

From: Commissioner David M. Mason *DM*

For Meeting of: 9-20-01

Re: Draft AO 2001-12

SUBMITTED LATE

Citing AOs 2001-01 (architect fees, construction management expenses and building-specific fundraising costs covered by "building fund" exemption) and 1998-7, the blue draft (page 7, line 19ff) links the scope of the FECA's so-called "building fund" exemption to Internal Revenue Code classifications: "Drawing a parallel to the description and treatment of capital expenditures in the Internal Revenue Code and related IRS regulations, the Commission also has concluded that *capital expenditures* may be paid from a building fund." (Emphasis added.) "Capital expenses" under the IRC (which must be capitalized, not deducted) is a broad concept that includes expenditures for going into business, business assets and improvements as opposed to ongoing operating/maintenance expenses. The requestor in 2001-01, Democratic Party of Wisconsin, has now indicated that it intends to use its "building fund" to purchase "office machinery, equipment, furniture and fixtures and similar property." It has also indicated, citing an inapplicable AO (1998-12), that will not use its "building fund" for "office equipment expenses," presumably meaning the maintenance thereof.

I was initially concerned that tying the "building fund" exemption to IRS classifications, while perhaps preferable from a policy perspective, might do injury to the statutory language under certain scenarios. A further look at the language convinces me that it would permit a reading so as to include such goods as telephones and computers. The exemption provides that a "contribution" does not include anything of value specifically designated to defray "any cost for construction or purchase of any *office facility*." 2 U.S.C. s 431(8)(B)(viii) (emphasis added). "[O]ffice facility" is not defined in the FECA or our regs¹ and, therefore, its "ordinary or natural meaning" must be applied, *see FDIC v. Meyer*, 510 U.S. 471, 476 (1994), and a dictionary is typically employed. *See, e.g., id.*

"Facility" is defined in both legal and layman's dictionaries in a similarly broad and utilitarian manner: "That which promotes the ease of any action, operation, transaction or course of conduct. The term normally denotes inanimate means rather than human agencies, though it may also include animate beings such as person, people and groups thereof." BLACK'S LAW DICTIONARY 591 (6th ed. 1990); "[1] Ease in moving, acting or doing; aptitude . . . [3] something that facilitates an action or a process." THE AMERICAN HERITAGE COLLEGE DICTIONARY 489 (3d ed. 1993).

¹ The legislative history is also unhelpful.

In other federal statutory contexts, the term "facility" is given a broad meaning. See, e.g., *U.S. v. Goodner Bros. Aircraft, Inc.*, 966 F.2d 380, 387 (8th Cir. 1992) (because statutory definition of "facility" includes storage containers, barrels from which paint waste was dumped were "storage containers" under CERCLA); *Epps v. St. Mary's Hosp. of Athens, Inc.*, 802 F.2d 412 (11th Cir. 1986) ("ringdown line," which connected emergency medical services dispatch hospital and substation, was merely one extension on telephone provided by common carrier; thus entire telephone, not just extension, was a "facility" under wiretap statute); *U.S. v. Villano*, 529 F.2d 1046 (10th Cir. 1976) (term "facility" in Travel Act covers interstate use of telephones); *Menendez v. U.S.*, 393 F.2d 312 (5th Cir. 1968) (telephone is a "facility" within statute condemning the use of any "facility" in interstate commerce with intent to carry out unlawful activity).

Obviously, then, while it may be reflexive to some to limit the reach of the term "facility" to buildings and the fixtures therein, the word encompasses more. For FECA purposes, the ordinary and natural understanding of the term "office facility" would seem to extend the reach of the "building fund" exemption to the purchase of anything that promotes the ease of actions, operations, transactions or course of conduct, in an office, whether real or personal property. I can see no reason why a "building fund" can be used to pay for the computer and telephone wiring in a building's walls during the construction phase but not the computers and telephones as well at any time. Why allow the purchase and installation of electric wiring but nothing to plug into the outlets?

That brings us back, however, to the question of whether "capital expenses" might still be too broad of a classification in some cases. While it could be with respect to candidate committees, I don't foresee any problems concerning party committees. Nonetheless, the qualifier to "facility" -- "office" -- would certainly preclude any type of "going into business" capital expenses such as advertising and wages for training employees. "Business assets" and "improvements" would seem to be the most appropriate "capital expense" categories to which to tie the "building fund" exemption, excluding, of course, non-office facilities such as vehicles.