State of Arkansas
Bureau of
Legislative Research

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**EXHIBIT C-2**

# MEMORANDUM

**TO:** Rep. Stephanie Malone

**FROM:** Jillian Thayer, BLR Legal Counsel to the Director

**DATE:** January 24, 2014

**SUBJECT:** House Rule 108 – Time Restrictions on Campaign Contributions

*House Rule 108: It shall be a violation of the Rules of the House for any member of the House to accept a campaign contribution during the period beginning thirty (30) days before and ending thirty (30) days after any regular session of the General Assembly. If there is an extended recess of the General Assembly, the period shall end thirty (30) days after the beginning of the recess. It shall also be a violation of the Rules of the House for any member of the House to accept a campaign contribution during any extended session of the General Assembly or during any special session or fiscal session of the General Assembly.*

## History and Previous Interpretations of House Rule 108

*Arkansas Law:*

The language in House Rule 108 is derived from a previous version of Arkansas Code § 7-6-203(g), which was repealed by Act 1839 of 2001. That code section read as follows:

> (g)(1) It shall be unlawful for the Governor, Lieutenant Governor, Secretary of State, Treasurer of State, Auditor of State, Attorney General, Commissioner of State Lands, and members of the General Assembly to accept a contribution:
>
> (A) During the period beginning thirty (30) days before and ending thirty (30) days after any regular session of the General Assembly. However, if there is an extended recess of the General Assembly, the period shall end thirty (30) days after the beginning of the recess;
>
> (B) During any extended session of the General Assembly; or
>
> (C) During any special session of the General Assembly.
>
> (2) During such periods of time, it shall be unlawful for any person to promise a contribution to the aforementioned elected officials.

This provision was found to be unconstitutional by the United States District Court for the Western District of Arkansas in December 1998, in the case of *Arkansas Right to Life State Political Action Committee v. Butler,* 29 F.Supp.2d 540 at 553 (W.D. Ark. 1998). In that case, the plaintiffs contended that the blackout period for campaign contributions unconstitutionally infringed on their First Amendment rights to free speech. The court agreed and stated that "[w]hen a law burdens political speech, we must apply strict scrutiny, and uphold the restriction only if it is narrowly tailored to serve a compelling state interest." *Id.* at 551.

The court stated that the Arkansas law was not narrowly tailored in that it did not "take into account the fact that corruption can occur at any time, and that only large contributions pose a threat of corruption." *Id.* at 553. As such, the court held the blackout period provision to be unconstitutional and enjoined the enforcement of the law. Subsequently, the law was repealed in the 2001 regular legislative session.

Subsequent to this decision, the House adopted Rule 108, which imposes a similar blackout period for incumbent representatives with regard to accepting campaign contributions in a time period beginning thirty (30) days prior to a legislative session, during a legislative session, and thirty (30) days after.

*2003 House Rules Committee Interpretation:*

The House Rules Committee has been asked twice to interpret the application of Rule 108. In 2003, Representative Jan Judy, who was running for U.S. Congress, asked the House Rules Committee for clarification of the effect of the blackout period during a special session. In that instance the Committee stated that it was their opinion that ***"it is permissible to receive funds during a potential special session"*** and that the rule ***"applies to House members running for a House seat."*** (emphasis added)

*2010 House Rules Committee Interpretation:*

During the Fiscal Session in 2010, the House Rules Committee met once again to take up the issue of interpretation of then House Rule 106 (current Rule 108). In that instance, the Committee unanimously concluded that ***"the rule applied to any member of the House for any election"***, and that ***"no member of the House may accept a campaign contribution for any race."*** (emphasis added).

## Senate Rule

The Arkansas Senate has a similar rule – Senate Rule 26. However, their rule specifically states that it does not apply to a "special election for United States Representative". The Senate rule also does not apply during a fiscal session.

Rep. Malone
01/24/2014

**Representative Westerman's Request for Interpretation**

As you are aware, on January 15, 2014, Representative Bruce Westerman submitted a request to you, as chair of the House Rules Committee, that the Committee make a determination as to "whether House Rule 108 of the Rules of the House of Representatives of the 89th General Assembly – specifically the prohibition of Members taking contributions during a fiscal session – is applicable to Members running for either Federal office or State Constitutional office."

Accompanying Rep. Westerman's request is Advisory Opinion 1995-48 of the Federal Election Commission ("FEC"), in which the FEC found that a Georgia law that prohibited a member of the General Assembly and his or her campaign committee from receiving campaign contributions during a legislative session, was preempted by the Federal Election Campaign Act of 1971 ("FECA") 2 U.S.C. § 431, *et seq.* In so finding, the FEC stated that the Georgia law attempted to place "restrictions on the time period when contributions may be made to Federal candidates, an area to be regulated solely by Federal law." The FEC goes on to state that "only Federal law could limit the time during which a contribution may be made to the Federal election campaign of a State legislator."

FECA specifically states that "the provisions of this Act, and of rules prescribed under this Act, supersede and preempt any provision of State law with respect to election to Federal office." *2 U.S.C. § 453(a).* The stated intent of this law, according to the House committee that drafted this provision, is that with respect to election to Federal office, "the Federal law will be the sole authority under which elections will be regulated." H.R. Rep. No. 93-1239, 93rd Cong., 2d Sess. 10 (1974).

FEC Advisory Opinions do not carry the weight of law and are merely advisory. FECA at §437f.(c) sets forth who is entitled to rely upon advisory opinions, and this includes any person involved in the specific transaction discussed in the Advisory Opinion and any person "involved in any specific transaction or activity which is indistinguishable in all its material aspects from the transaction or activity with respect to which such advisory opinion is rendered." *2 U.S.C. § 437f.(c).* It is not possible to say whether the fact scenario presented by Representative Westerman would be considered by the FEC to be indistinguishable from the Georgia matter that AO 1995-48 was based upon.

With respect to the same Georgia law, the United States District Court in Georgia also barred enforcement of the Georgia statute "as it relates to federal elections" that same year. That ruling was upheld by the United States Court of Appeals for the Eleventh Circuit, which found that the Georgia statute prohibiting any member of the General Assembly from accepting contributions for political campaigns while the General Assembly is in session was preempted by the Federal Election Campaign Act to the extent the state law applied to contributions for a candidate for federal office. See *Teper v. Miller,* 82 F.3d 989 (11th Cir. Ga. 1996).

Given the language of FECA with regard to preemption of state laws, as well as the FEC Advisory Opinion and the Eleventh Circuit Court decision regarding the Georgia law, an argument can be made that a State may not place any restrictions on the campaign of a candidate for federal office.

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Further, with regard to the previous law on which House Rule 108 was based and the finding by the District Court in Arkansas that the law was an unconstitutional violation of the First Amendment, it could also be argued that House Rule 108 is improper with regard to candidates for State offices as well.

However, it is within the power of the House Rules Committee to interpret the House Rules and to make determinations regarding their applicability to members of the House of Representatives.

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