



FEDERAL ELECTION COMMISSION
Washington, DC 20463

September 26, 1984

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

ADVISORY OPINION 1984-37

Michael A. Nemeroff, Esq.
Sidley & Austin
1722 Eye Street, N.W.
Washington, D.C. 20006

Dear Mr. Nemeroff:

This responds to your letter of August 2, 1984, requesting an advisory opinion on behalf of the American Medical Association ("AMA") and its separate segregated fund, American Medical Association Political Action Committee ("AMPAC"), concerning application of the Federal Election Campaign Act of 1971, as amended ("the Act"), and Commission regulations to AMPAC's proposed purchase of the services of AMA employees.

You state that AMA is an Illinois not-for-profit corporation and the connected organization, as defined by 2 U.S.C. 431(7), of AMPAC. AMPAC is registered with the Commission as a multi-candidate political committee. You propose two alternative methods by which AMPAC would purchase the services of AMA employees: (1) an advance payment method; and (2) a dual employment method.

With regard to the advance payment method, you state that AMPAC proposes to enter into a written contract with AMA to obtain the consulting services of AMA employees, which AMPAC would then make available to Federal candidates for the House and Senate, and to compensate the AMA for the services of these employees at a rate equal to the usual and normal charge for similarly skilled and experienced political consultants. You state that the services provided to candidates would include organizing and operating telephone banks and recruiting and training volunteers. You also state that AMPAC frequently hires independent political consultants and would base the value of the services of AMA employees on the rates charged by similarly skilled independent political consultants providing similar services. You note that this rate may be as high as \$750 per day but that lower daily rates may apply when the employee's

experience, the type of services, and the rate charged by other consultants in the same state or congressional district are considered.¹

Under the proposed contract, AMPAC will determine the number of hours or days each employee is expected to work for each candidate and will pay AMA for these services, all in advance of when such services are provided to each candidate and the employee is compensated for such services. You state that if the number of hours or days of services to be provided to a candidate would exceed the advance payment, AMA and AMPAC will estimate the remaining work, and AMPAC will make an additional payment before the work is provided. You state that if the number of hours or days worked for a candidate is less than the amount estimated when the payment was made, any excess payment will be applied against future services obtained from AMA employees. Expenses such as meals, lodging, and airfare will be paid either by the employee and reimbursed by AMPAC or paid by AMPAC directly to vendors.² You state that AMA's office equipment and facilities will not be used in providing these services to candidates. If any office supplies and services are required, AMPAC will obtain them from independent contractors who regularly provide such services to nonpolitical customers. You state that all payments made by AMPAC will come from voluntary contributions to AMPAC and will be reported on AMPAC's reports filed with the Commission. Finally, you state that AMA will continue to pay these employees their regular salary and fringe benefits, which you note will be substantially below the charges that AMPAC will pay AMA for these employees' services.

With regard to the dual employment method, you state that AMPAC would enter into an employment contract with AMA and AMA employees whereby the employees would take a leave of absence without pay from AMA to work on campaigns. During the leave of absences, AMPAC would pay these employees a salary at the same rate as they receive from AMA. AMPAC would reimburse AMA for the employer's share of all fringe benefit costs (attributable to the leave of absence period) pursuant to 11 CFR 114.12(c).

You ask whether either this advance payment method or dual employment method for AMPAC's purchase of the services of AMA employees is permissible under the Act.

¹ You note that AMA frequently enters into contracts to provide the services of its employees to non-political organizations unconnected to AMA. Although the charges may vary from one contract to another they are generally based on the type of services and the skill and experience of the employees or on the salary and benefits paid to the employees plus a surcharge.

² If an employee pays for such expenses from his or her own funds, technically such employee has made a contribution in-kind to the candidate involved. This is because an advance of funds for services rendered to a candidate with an expectation of repayment, like a loan, is a contribution. 2 U.S.C. 431(8)(A)(i). An exception exists for the extension of credit in the ordinary course of business for a length of time that is normal in the business or trade, see 11 CFR 114.10 and 100.7(a)(4), but that exception would not apply to persons working for Federal candidates at the direction of a political committee such as AMPAC. Just as a loan by any person other than a recognized lending institution is a contribution, see 2 U.S.C. 431(8)(A), (B)(vii), an extension of credit by any person other than a business acting in its ordinary course of operation is a contribution. Accordingly, employees who pay for expenses from their own pocket must be sure that their outstanding advances on behalf of the candidates involved, when aggregated with any other contributions they may have made, do not exceed \$1,000 per election. See 2 U.S.C. 441a(a)(1)(A). Of course, when AMPAC reimburses an employee for expenses incurred, the employee's advance is extinguished to that extent. For reporting purposes, AMPAC should report the value of an outstanding obligation owed to an employee according to the rules of 11 CFR 104.11(b) and should identify any such obligation or payment made as an in-kind contribution to the candidate involved. See pages 5 and 6, *infra*.

The Act makes it unlawful for a corporation to make a contribution or expenditure in connection with a Federal election. 2 U.S.C. 441b. This prohibition applies to not-for-profit corporations such as AMA. See *FEC v. National Right to Work Committee*, ___ U.S. ___, 103 S.Ct. 552, 74 L.Ed.2d 364, 371 (1982). The Act defines "contribution" or "expenditure" to include "any direct or indirect payment, distribution, loan, advance, deposit, or gift of money, or any services, or anything of value...to any candidate, campaign committee, or political party or organization, in connection with..." any Federal election. 2 U.S.C. 441b(b)(2). A corporation's payment of compensation to a person who renders services to a campaign committee or candidate would constitute a gift of services as well as an indirect payment or a gift of something of value to the committee or candidate. See 11 CFR 100.7(a)(3); Advisory Opinions 1978-6 and 1976-70. The Act excludes from its definition of "contribution" or "expenditure", however, the "establishment, administration and solicitation of contributions to a separate segregated fund to be utilized for political purposes by a corporation, labor organization, membership organization, cooperative, or corporation without capital stock." 2 U.S.C. 441b(b)(2)(C).

Commission regulations give a connected organization, such as a corporation, the right to control its separate segregated fund, see 11 CFR 114.5(d), but the connected organization may not use the establishment, administration, and solicitation process as a means of exchanging treasury monies for voluntary contributions, see 11 CFR 114.5(b). Commission regulations also prohibit a corporation from continuing to pay the employer's share of the cost of fringe benefits for an employee who has taken an unpaid leave of absence to volunteer his or her services to a Federal candidate or campaign but permit the corporation's separate segregated fund to pay this cost. See 11 CFR 114.12(c). Thus, except for certain activities not presented in this request, the Act requires that a corporation direct and finance its political activities solely through the use of the voluntary contributions in its separate segregated fund and not through the use of general treasury funds. See 117 Cong. Rec. 43381 (Remarks of Rep. Hansen).

The advance payment method proposed by AMA and AMPAC is factually and legally distinguishable from that presented in Advisory Opinion 1984-24. Under the advance payment method presented in Advisory Opinion 1984-24, the corporation would pay its employees their regular salary and fringe benefits. It would then determine the amount of an employee's total compensation allocable to providing services to candidates for Federal offices. (The basis for allocation would be the portion of compensated employee time devoted to providing such services.) The corporation then would draw this amount from an escrow account into which the corporation's separate segregated fund had made an advance payment based on an estimated need. The Commission concluded that this method was impermissible under the Act because the initial disbursement of corporate treasury funds to compensate employees for services to Federal candidates constituted a loan, advance, or something of value. See Advisory Opinion 1984-24.

Under the advance payment method proposed by AMA and AMPAC in this request, AMA will receive payments from AMPAC for the services AMA employees will render to Federal candidates prior to the rendering of those services and prior to compensating the employees for such services. Thus, there is no initial disbursement of corporate treasury funds that constitutes either a loan, advance, or anything of value to either the candidate or AMPAC. Because AMPAC will pay the usual and normal charge for the consulting services of AMA

employees based on the charges of independent political consultants of similar experience and ability, AMPAC will not receive anything of value from its dealings with AMA. Therefore, this advanced payment method is not prohibited by 2 U.S.C. 441b(a). AMPAC's payment of an employee's travel expenses either directly to the independent vendor or to the employee as a reimbursement also does not involve any corporate contributions or expenditures and is, thus, not prohibited by 2 U.S.C. 441b(a). Similarly, the dual employment method proposed by AMA and AMPAC does not include the disbursement or use of corporate funds and is, thus, also not prohibited by 2 U.S.C. 441b(a). AMPAC's proposed plan to pay AMA for the employer's share of an employee's fringe benefits comports with the requirements of 11 CFR 114.12(c).

All payments made by AMPAC under either the advance payment method or the dual employment method in connection with providing consulting services to Federal candidates would constitute in-kind contributions to such candidates. See 11 CFR 100.7(a)(1)(iii) and (a)(3). They are required to be recorded and reported as such by AMPAC. See 11 CFR 102.9, 104.3, 104.10, 104.13, and 106.1(a).³ As contributions, these payments are also subject to the contribution limitations of 2 U.S.C. 441a.

With respect to the reporting requirements under the advance payment method, the Commission notes your representation that the contract between AMA and AMPAC will require AMPAC to "determine the number of hours or days the employee is expected to work for each candidate" before the advance payment is made. You further state that if this estimate is inadequate, "AMA and AMPAC will estimate the remaining work" and an additional advance payment will be made. If the amount of work performed proves to be less than that estimated, the excess payment will be applied against future services. Therefore, AMPAC should (1) report each advance payment as an expenditure for the reporting period in which it is made and (2) provide the allocation of such expenditure (as a contribution in kind) per candidate through the use of the memo entry procedure⁴ on Schedule B of FEC Form 3X. 11 CFR 104.10 and 106.1(a). This memo entry itemization will disclose the name and address of the recipient authorized committee, the date and amount of the contribution, the candidate's name, and the office sought by such candidate. 11 CFR 104.3(b)(3)(v). For purposes of reporting by the recipient authorized committee, the date of the contribution is the date or dates on which the services are performed for that candidate. See 11 CFR 100.7(a)(1)(iii) and 104.13(a)(1). AMPAC should report any changes in the memo entries by filing an amended report for the appropriate reporting period.⁵

The Commission expresses no opinion whether the described activities would have any effect on the tax exempt status of AMA since that issue is not within the Commission's jurisdiction.

³ The candidates would also incur reporting obligations. See 11 CFR 104.13.

⁴ An example of the type of memo entry referred to in this opinion may be found on page 35 of the FEC Campaign Guide for Nonconnected Committees (August 1983) (copy enclosed).

⁵ The Commission notes that the foregoing discussion also applies generally with respect to reporting AMPAC's payment of travel expenses for the employees who perform the described services, since payments for these expenses are also contributions in kind by AMPAC. See 11 CFR 100.7(a)(1), 104.3(b)(3)(v), 104.13(a), and 106.1.

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

Sincerely yours,

(signed)

Lee Ann Elliott
Chairman for the
Federal Election Commission

Enclosures (AOs 1984-24, 1978-6 and 1976-70; FEC Campaign Guide for Nonconnected Committees (August 1983))