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FEDERAL ELECTION COMMISSION

Washington, DC 20463

September 24, 1997

AGENDA ITEM

For Meeting of: 10-1-97

MEMORANDUM

TO: The Commission

THROUGH: John C. Surina *Chu for JCS*
Staff Director

FROM: Lawrence M. Noble *[Signature]*
General Counsel

N. Bradley Litchfield *[Signature]*
Associate General Counsel

Jonathan M. Levin *JL*
Senior Attorney

Subject: Draft AO 1997-20

Attached is a proposed draft of the subject advisory opinion. We request that this draft be placed on the agenda for October 1, 1997.

Attachment

1 **ADVISORY OPINION 1997-20**

DRAFT

2
3 **Rita Copeland**
4 **River City Business Services**
5 **5435 Madison Avenue**
6 **Sacramento, CA 95841**

7
8 **Dear Ms. Copeland:**

9
10 **This responds to your letters dated May 15 and August 18, 1997, on behalf of**
11 **Friends of McCarthy ("the Committee"), requesting an advisory opinion concerning the**
12 **application of the Federal Election Campaign Act of 1971, as amended ("the Act"), and**
13 **Commission regulations to contributions by the Committee to Federal candidates.**

14 **You are the treasurer of the Committee, which is a California non-Federal**
15 **committee. It is the "controlled committee" used by former Lieutenant Governor Leo T.**
16 **McCarthy for his re-election campaign in 1990, and qualified as a state committee on**
17 **May 11, 1989.¹ You state that the Committee is in the process of terminating its**
18 **existence and would like to use its remaining funds on hand to make contributions to**
19 **several Federal candidates. As May 15, 1997, the Committee had approximately \$3,500**
20 **in cash on hand. The Committee subsequently contributed \$2,000 to a Federal principal**
21 **campaign committee, Nancy Pelosi for Congress on June 3, 1997.² According to the**
22 **Committee's Semi Annual Statement filed with the California Fair Political Practices**
23 **Commission ("FPPC") covering activity in the first half of 1997, the Committee had a**
24 **cash balance of \$1,227.**

25 **You note your awareness of the Committee's need to file a statement of**
26 **organization with the Commission and report as a Federal political committee. However,**
27 **you are not sure that the funds in the Committee's account at the time of the contribution**

¹ Under California State law, a "controlled committee" is defined as:
a committee which is controlled directly or indirectly or indirectly by a candidate or state
measure proponent or which acts jointly with a candidate, controlled committee or state
measure proponent in connection with the making of expenditures. A candidate or state
measure proponent controls a committee if he, his agent or any other committee he
controls has a significant influence on the actions or decisions of the committee.

California Government Code §82016.

² Nancy Pelosi for Congress reported this contribution as two \$1,000 contributions received on June 9; one
was reported as a 1998 primary election contribution and the other as made for the general election.

1 to the Pelosi Committee or at the time of future Federal contributions are permissible
2 funds under the Act.

3 Between 1995 and 1997, the Committee received refunds totaling \$6,841.01 from
4 various radio and television stations for media buys made during the 1990 election.
5 These refunds and the dates they were received are as follows: (a) \$1,373.68 on January
6 9, 1995; (b) \$1,264.32 on February 28, 1995; (c) \$1,752.68 on August 25, 1995; and (d)
7 \$2,450.33 on May 1, 1997. The refunds were made as the result of legal action taken
8 against various stations and in settlement of Committee claims that it was not charged the
9 lowest unit rate for the time purchased. The refunds constitute the most recent receipts
10 of the Committee and are at a higher amount than the Committee's present balance, or the
11 cash on hand at the time of its contribution to the Pelosi Committee. There have been no
12 other receipts since October 1, 1994.

13 During its years of operation, the Committee received a combination of funds,
14 some lawful and some unlawful under the Act, but permissible under California law.
15 You state that the media refunds are a return of funds that were originally contributions
16 received by the Committee, and thus may consist of permissible funds, subject to a
17 reasonable accounting method for tracking the funds. You propose an accounting method
18 for determining whether some or all of the Committee's balance consists of permissible
19 funds and whether the funds determined to be permissible under that method may be
20 contributed to Federal political committees.³ You describe the method as follows:

21 Accumulate all cash receipts and disbursements by the committee from
22 inception using two categories. One for permissible funds and one for
23 prohibited federal funds. We would track chronologically by these two
24 categories to arrive at the amount of funds available by category at the
25 time of each media buy. By demonstrating that there were sufficient
26 permissible funds available when making the media buy to offset the
27 refund amounts we would demonstrate that the amounts refunded were
28 permissible funds.
29

³ Two authorized committees from Mr. McCarthy's Federal campaigns (1988 and 1992) are still in existence. You state that none of the funds would be contributed to those committees. See 11 CFR 110.3(d) (which prohibits transfers of funds or assets from a candidate's nonfederal campaign committee to his or her Federal authorized committees).

1 According to the Act, a committee that receives contributions aggregating in
2 excess of \$1,000 during a calendar year or makes expenditures aggregating in excess of
3 \$1,000 in a calendar year, is a political committee. 2 U.S.C. §431(4); 11 CFR 100.5(a).
4 The terms "contribution" and "expenditure" include any gift, advance, or deposit of
5 money or anything of value made for the purpose of influencing any election for Federal
6 office. 2 U.S.C. §431(8)(A)(i) and (9)(A)(i); 11 CFR 100.7(a)(1) and 100.8(a)(1).

7 By contributing \$2,000 to a Federal candidate, the Committee has become a
8 political committee. It was required to file a statement of organization with the
9 Commission within ten days of making the contribution and file the next report due, i.e.,
10 the mid-year report. 2 U.S.C. §§433(a) and 434(a)(4); 11 CFR 102.1(d) and 104.5(c).

11 Commission regulations at 11 CFR 104.12 prescribe a procedure for political
12 committees that have cash on hand at the time of registration, and this procedure has been
13 applied to non-Federal committees that become political committees by making transfers
14 or contributions to Federal committees. But for the situation that you present, the
15 Commission would require the use of this method, as described in a number of Advisory
16 Opinions, in determining the contents of the beginning cash on hand and the
17 permissibility of contributions by the Committee to Federal political committees. See
18 Advisory Opinions 1990-16 and 1985-18.

19 The uniqueness of the Committee's situation, however, allows for an alternative
20 option that takes into account the media refunds, as you suggest. The Committee has had
21 no receipts other than the media refunds in the last three years. The refunds consist of the
22 return of funds that originated with contributions to the Committee, and the Committee
23 had sought such refunds through legal action begun over five years ago. Moreover, the
24 Committee will not raise any funds and will discontinue its activities as soon as it
25 disposes of the amounts from the refunds. Thus, the Commission concludes that the
26 Committee may use either the traditionally required method under 11 CFR 104.12
27 (Option A) or the alternative described by the Commission (Option B).

28 **Option A**

29 On its first report, the Committee should disclose the sources of the funds in its
30 account at the time it became a political committee. The cash on hand is presumed to be

1 composed of those contributions most recently received by the Committee. 11 CFR
2 104.12. Thus, the cash on hand would not consist of the media refunds, but would
3 instead consist of the most recent contributions to the Committee, which were received
4 before the refunds. The Committee would have to exclude, from the funds that may be
5 used, those contributions not permissible under the Act's prohibitions or limitations. *Id.*
6 Thus, the amounts comprised of donations from corporations, labor organizations, and
7 Federal contractors must be subtracted from the cash on hand amount.⁴ 2 U.S.C.
8 §§441b(a) and 441c. Because the \$5,000 limit of 2 U.S.C. §441a(a)(1)(C) applicable to
9 contributions to the Committee exceeds the cash on hand, no exclusion for excessive
10 contributions is necessary.⁵ Advisory Opinion 1990-16.

11 Therefore, to arrive at the amount that could have been used for the contribution
12 to the Pelosi Committee, the Committee should subtract from the \$3,500 cash on hand
13 figure (at the time of that contribution) the amounts, within the most recently received
14 \$3,500 in donations, that are not permissible as described above. That amount should be
15 reported as the Committee's cash on hand in its new status as a Federal political
16 committee and the remainder of the \$3,500 should have been transferred out of the
17 Committee's bank account within ten days of the contribution to the Pelosi Committee.
18 See 11 CFR 103.3. In addition, since the funds of the beginning cash on hand, although
19 originally donated for state campaign purposes will now be used for Federal activity, the
20 persons who contributed those funds should be notified that their contributions will be
21 subject to the limitations and prohibitions of the Act. See 11 CFR 102.5(a)(2). Advisory
22 Opinion 1990-16. If such notification is not given for contributions comprising the
23 beginning cash on hand, those funds must also be subtracted and transferred out. The

⁴ Presumably, the Committee, regardless of its present non-Federal status has not received contributions from national banks, corporations organized by any law of Congress, or foreign nationals. Such entities are forbidden to make both Federal and non-Federal contributions. 2 U.S.C. §§441b(a) and 441e.

⁵ For the permissibility of including funds from non-Federal committees that contributed to the Committee and that may themselves have impermissible funds, see the portion of Advisory Opinion 1983-34 describing the receipt of contributions from state political action committees. If such a committee is not able to demonstrate through the procedures set out in that opinion, that its donation was made with permissible funds, then the full amount of that contribution must be subtracted from the cash on hand amount. See 11 CFR 102.5(b)(1). In view of the likely dates of these contributions, the Commission considers it highly doubtful that such contributions are permissible.

1 contributions comprising the cash on hand must be itemized in accordance with the
2 requirements of 2 U.S.C. §434(b) and listed as the beginning cash on hand for the first
3 report. For an illustration of this process, see Advisory Opinion 1990-16.

4 **Option B**

5 The Committee may use the media refunds as a basis for determining whether the
6 \$3,500 in cash on hand consisted of contributions that were permissible under the Act. In
7 an analogy to a situation where an organization that is not a political committee makes a
8 contribution that does not trigger political committee status, the Committee may
9 demonstrate through a reasonable accounting method that it has received sufficient funds
10 subject to the limitations and prohibitions of the Act to make the contribution. See 11
11 CFR 102.5(b)(1)(ii). The Committee is still obligated to register and report, but the cash
12 on hand would be considered as originating from the contributions that were used to
13 make the media disbursements that resulted in the refunds, rather than resulting from the
14 most recent contributions received by the Committee. The method to be used is as
15 follows:

16 First, the Committee must identify the media vendors that were the source of the
17 most recent \$3,500 in refunds. With respect to each vendor, the Committee should
18 ascertain the dates of the payments to the stations for which those recent refunds were
19 made. If the Committee is unable to tie the refunds from a station to particular payments
20 to that station, then the refunds should be tied to the most recent payments made to that
21 station. This may be done by using the percentage that the refunds from that station bears
22 to the amounts paid to that station and ascribing that refund to the most recent payments
23 to that station, i.e., using the refunds as a numerator and the original payment as the
24 denominator.

25 For each of the dates of the payments considered under this method, the
26 Committee must do a cash receipt analysis. The Commission assumes that the
27 Committee will not be able to ascertain the time of day that a payment was made to a
28 station or the time of other disbursements or receipts on that day. So the Committee
29 should identify every donation it took in that day and construe the payment to come from
30 a total of the donations received that day plus the donations comprising the cash on hand

1 at the beginning of the day. In the specific circumstances you present, the Commission
2 will permit the Committee to construe the media payments as made after the receipts for
3 that day, but before the Committee's other disbursements for that day. If the available
4 cash on hand computed this way is, for some reason, still in a negative balance, no part of
5 the media payments may be construed as coming from permissible funds.

6 Upon determining the total of the cash on hand available, the Committee must
7 review the most recent donations comprising that total. Using the criteria described
8 above with respect to the method under 11 CFR 104.12,⁶ the Committee must determine
9 the ratio of permissible donations to the total of donations comprising the cash on hand.⁷
10 The disbursement to a specific station that day will be construed as being comprised of
11 the corresponding percentage of permissible and impermissible funds. If there was more
12 than one relevant media buy that day (i.e., a disbursement for which a part of the most
13 recent \$3,500 in media refunds was made) or relevant buys from more than one station,
14 each disbursement will be construed as being comprised of the same percentage of
15 permissible funds.

16 An illustration of this method is as follows: Assume that at the beginning of the
17 day on which relevant media payments were made, the Committee has \$3,000 in cash on
18 hand, and that it receives another \$2,000 that day. So, the Committee will be construed
19 as having \$5,000 available for making media payments that day. Assume further that, of
20 this \$5,000, the Committee received \$2,500, or 50 percent, from permissible sources.
21 The Committee made relevant media buys from two stations that day, one for \$2,000 and
22 another for \$1,000. The refunds from each station were 20 percent of the amounts of the
23 Committee's buys from that station, that is, \$400 and \$200 (\$600 total). Half of that
24 amount (\$300) is construed to be from permissible sources.⁸

25 If, after applying this method to the most recent refunds, the total of permissible
26 funds available for contribution by the Committee is less than the amount contributed to

⁶ See footnote 5 with respect to contributions from non-Federal committees.

⁷ The earliest donation may be partially outside the total. The Committee has the option of including or not including this donation for percentage purposes.

⁸ If the earliest refund in the \$3,500 total is partially outside the total, the Committee should apply the appropriate percentage to that portion of the refund that is inside the total.

1 the Pelosi campaign, the McCarthy Committee must ask the Pelosi campaign for a refund
2 of the impermissible amount. Moreover, the Committee may make no further Federal
3 contributions. If there are remaining permissible funds to be contributed after the
4 contribution to the Pelosi campaign (and assuming no further receipts since then), the
5 Committee may contribute those remaining funds to Federal campaigns.

6 The use of this alternative method does not negate the Committee's obligation to
7 register and file a 1997 mid-year report with the Commission. Under either accounting
8 option, the Committee must file a statement of organization within ten days of its receipt
9 of this opinion. The Committee must file the mid-year report within thirty days of its
10 receipt of this opinion. The Committee may terminate its Federal registration upon the
11 contribution of its remaining permissible funds to Federal campaigns, or the return of the
12 funds from the Pelosi committee as described above. These actions must also be reported
13 before termination. If any part of the Pelosi contribution must be refunded, the Pelosi
14 campaign must refund that amount to the Committee within thirty days of being informed
15 by the Committee. See 11 CFR 103.3(b)(2). If the Committee does not dispose of its
16 remaining permissible funds within thirty days of its receipt of this opinion and thus
17 continues its activity beyond that point, it must disburse its impermissible funds to a
18 separate bank account that cannot be used for Federal election purposes, by that date. See
19 11 CFR 102.5(a)(1) and 103.2.

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

23 Sincerely,

24
25
26 John Warren McGarry
27 Chairman
28

29 Enclosures (AOs 1990-16, 1985-18, and 1983-34)

30
31