THE FEDERAL ELECTION COMMISSION

RECORD

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OPINIONS

ADVISORY OPINIONS: SUMMARIES

An Advisory Opinion (AO) issued by the Commission provides guidance with regard to the specific situation described in the AOR. Under the 1979 amendments to the Act, any person may request an AO on a specific activity which the person intends to undertake. The requester will not be subject to any sanctions under the Act if he/she acts in accordance with the opinion. Other persons may rely on the opinion if they are involved in a specific activity which is indistinguishable in all material aspects from the activity discussed in the AO. Those seeking guidance for their own activity, however, should consult the full text of an AO and not rely only on the summary given here.

AO 1981-32: Testing-the-Waters Activities by Potential Presidential Candidate

Fourteen activities proposed by former Florida Governor Reubin Askew to test the waters for a potential Presidential candidacy in 1984 would be exempted by Commission Regulations from the definitions of "contribution" and "expenditure," so long as the purpose of the activities was to decide whether he should become a candidate rather than to affirm a decision he had already made to be a candidate. If Governor Askew decided to become a candidate, any monetary or in-kind donations he received to help him test the waters would become "contributions" subject to the provisions of the Act. Records of all donations (i.e., funds, goods or services) should therefore be kept during the testing-the-waters period. Moreover, any donations of funds or in-kind donations collected for testing-the-waters activities could be transferred to Governor Askew's principal campaign committee during the first reporting period after he became a candidate. 11 CFR 101.2 and 101.3. These funds would also be treated as "contributions" to Governor Askew's campaign.

Under Commission Regulations, Governor Askew could finance a variety of activities (listed below) to test the feasibility of a potential candidacy for federal office. 11 CFR 100.7(b)(1) and (8)(b)(1). As long as these activities did not entail public political advertising or represent the establishment of a campaign organization, they would not constitute campaign contributions or expenditures and would not cause Governor Askew to become a candidate under the Act.

This means, for example, that statements by the Governor and the name selected for the testing-the-waters effort would have to avoid referring to Governor Askew as a Presidential candidate. Moreover, if circumstances indicated that Governor Askew had moved beyond the process of deciding whether or not to become a candidate and into the process of planning activities to heighten his political appeal, he would become a candidate. In this regard, the timing of the activities would be relevant. Activities conducted over a protracted period of time would suggest, for example, campaign activity rather than testing-the-waters activity. These considerations would be particularly rele-

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REPORTS

SPECIAL ELECTION IN CONNECTICUT

Connecticut will hold special conventions and a special general election in its First Congressional District to fill the seat formerly held by the late Congressman William A. Cotter. The Republican and Democratic nominating conventions are scheduled for November 23, 1981. If a special primary election is necessary, it will be held on December 15, 1981. The special general election will take place on January 12, 1982. The principal campaign committees of candidates participating in the special conventions or running in the special primary or general election must file the appropriate pre- and post-election reports in addition to their year-end report. All other political committees which support candidates in the special conventions or in the special election(s) (and which do not report on a monthly basis) must also follow this reporting schedule.

The FEC has sent notices on reporting requirements and filing dates to individuals known to be actively pursuing their party's nomination. All other committees supporting candidates in the Connecticut special conventions or election(s) should contact the Commission for more information on required reports. Call 202/523-4068 or toll-free 800/424-9530.

vant with regard to items 12, 13 and 14 (listed below) because each of these activities would involve substantial contact with the public and thus have the potential for promoting Governor Askew as a qualified candidate rather than merely ascertaining whether he would be so perceived by the public.

Permissible Testing-the-Waters Activities

1. Travel for the purpose of speaking to groups on public issues and determining, through meetings with opinion-makers, whether support exists for his candidacy.
2. Employment of political consultants to advise him on establishing a national campaign organization.
3. Rental of office space.
4. Rental and purchase of office equipment to help compile names and addresses of individuals interested in organizing a national campaign.
5. Supplemental salary for a personal secretary who would assist with testing-the-waters activities.
6. Reimbursement of Governor Askew's law firm for assistance provided by an associate of the firm.
7. Reimbursement of the firm for incidental expenses incurred for testing-the-waters activities.
8. Travel by Governor Askew for the purpose of being briefed on public issues, including travel reimbursement for those who brief Governor Askew on issues.
9. Employment of a specialist to conduct polls.
10. Employment of an assistant to coordinate travel arrangements and travel with Governor Askew.
11. Solicitation of donations for testing-the-waters activities. (These funds would not be raised for a future campaign.)
12. Employment of a public relations consultant to arrange and coordinate speaking engagements for Governor Askew, disseminate copies of his speeches and arrange for the publication of articles by him in newspapers and periodicals.
13. Preparation and use of letterhead stationery for correspondence with persons who have indicated an interest in Governor Askew's campaign.
14. Preparation and printing of a biographical brochure and photographs of Governor Askew to be used in connection with his speaking engagements.

Note: None of the materials prepared for these testing-the-waters activities would be distributed to the general public.

Since the testing-the-waters exemption does not cover activities designed to promote a candidacy, any funds amassed by Governor Askew or his aides for a future candidacy or any funds used for general public political advertising would be considered contributions or expenditures subject to the provisions of the Act. Accordingly, these funds would count toward Governor Askew's $5,000 threshold for candidate status, unless they were returned to the donors within 15 days of their receipt. 11 CFR 100.3 and 101.1. Moreover, once Governor Askew became a candidate, all donations and payments made to test the waters would have to be reported as contributions and expenditures subject to the provisions of the Act and Commission Regulations. 11 CFR 100.7(b)(1) and (8)(1); 101.3. (Date issued: October 2, 1981; Length: 8 pages)

AO 1981-33: Fundraising Items Donated to Political Clubs by Savings and Loan Association

The Astoria Federal Savings and Loan Association (Astoria) may not donate table favors or raffle prizes to, or pay for ads in the journals of, local political clubs affiliated with the Democratic and Republican parties. These donations and expenditures would constitute in-kind contributions prohibited by 2 U.S.C. §441b(a).

Although Astoria's donations would be used primarily for local political activities rather than federal campaigns, the transactions would still be impermissible because the Act specifically prohibits federally chartered corporations from making contributions in connection with **any** election or nominating procedure for **any** political office. 2 U.S.C. §441b(a); 11 CFR 114.2(a). Astoria could, however, donate favors to political party clubs and purchase ads in their journals if the items and proceeds were not used in connection with any election or nominating procedure for any political office. (Date issued: September 21, 1981; Length: 3 pages)

AO 1981-35: Committee Formed by Congressmen to Influence Reapportionment

A committee formed by several Republican Congressmen to "finance activities related solely to the Congressional reapportionment process in California" (the Committee) is **not** considered a "political committee" subject to the Act's registration and reporting requirements or to the Act's ban on corporate contributions. Contributors to the Committee are not subject to the contribution limitations and reporting requirements of the Act.

The Committee's efforts to influence reapportionment decisions made by the California state legislature are not subject to the requirements of the Act because they are **not** considered election-influencing activity. Since each state that loses or gains Congressional seats must make the necessary decisions with regard to reapportionment, the reapportionment process is a state activity separate and distinct from the election process by which individuals are selected for federal office. Similarly, litigation participated in by the Committee as a result of the state legislature's reapportionment decisions would **not** be considered election-influencing activity subject to the Act's prohibition on

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corporate or labor organization contributions or other requirements.

The Commission noted that the Committee would be subject to the requirements of the Act and FEC Regulations if it engaged in activities that could be construed as election advocacy. For example, the Committee would have to register and report if it donated services or computer data to a federal candidate or a political committee. Moreover, funds donated to the Committee by corporations and other impermissible sources could not be transferred to a political committee account or otherwise be used in connection with a federal election. Commissioner Robert O. Tiernan filed a statement explaining reconsideration of his original vote. Vice Chairman Frank P. Reiche filed a concurring opinion and supplement. (Date issued: September 28, 1981; Length: 11 pages, including statement of reconsideration and concurring opinion)

AO 1981-39: Unions' Payments to Corporation for Administrative Costs of Payroll Deduction Plan

Unions representing employees of the Square D Company (the Company) may enter into an agreement with the Company through collective bargaining that would, in effect, represent advance payment for costs the Company will incur in administering a payroll deduction plan for the unions. The payroll deduction plan will be used to collect contributions to the unions' separate segregated funds from employees who are members of the unions. The estimated cost of the plan will be included in the settlement the unions are currently negotiating with the Company.

Under the Act and Commission Regulations, a corporation must permit a labor organization to use whatever plan the corporation uses for collecting contributions to its own separate segregated fund. The labor organization would then reimburse the corporation for administrative costs of the plan. 2 U.S.C. §441b(b)(6), 11 CFR 114.5(k). In this instance, the arrangement is permissible because both the Company and the unions agree that the unions will bear the administrative costs. (Date issued: October 5, 1981; Length: 3 pages)

AO 1981-40: Mementos Offered by a Corporation to PAC Contributors

Bache Halsey Stuart Shields, Inc. (Bache) may use corporate treasury funds to purchase mementos for executive employees who contribute to its separate segregated fund. Under Commission Regulations, a corporation or labor organization may offer such prizes to raise funds, provided the prizes are not disproportionately valuable to the contributions generated. The Regulations provide that a "reasonable practice to follow is for the separate segregated fund to reimburse the corporation or labor organization for costs which exceed one-third of the money contributed." 11 CFR 114.5(b)(2). See also AOs 1979-72 and 1981-7. Bache's plan for distributing mementos complies with this regulation because the value of the prizes is not disproportional to the amount of money contributed by an employee. A memento costing $50, for example, is given for a $1,000 contribution. (Date issued: October 6, 1981; Length: 2 pages)

ADVISORY OPINION REQUESTS

Advisory Opinion Requests (AORs) pose questions on the application of the Act or Commission Regulations to specific factual situations described in the AOR. The following chart lists recent AORs with a brief description of the subject matter, the date the requests were made public and the number of pages of each request. The full text of each AOR is available to the public in the Commission's Office of Public Records.

AOR	Subject	Date Made Public	No. of Pages
1981-44	Multicandidate committee's expenditures advocating candidate's defeat.	9/16/81	16
1981-45	Proposed methods for transferring joint fundraising proceeds.	9/22/81	8
1981-46	Exchange of mailing lists between political committee and other organization.	9/28/81	14
1981-47	Union payroll deduction plan facilitating earmarked contributions.	10/1/81	2
1981-48	Local party organization's recordkeeping and reporting requirements for bingo fundraisers.	10/8/81	2

ALTERNATE DISPOSITION OF ADVISORY OPINION REQUEST

— **AOR 1981-45** (see above) was withdrawn by its requester on September 22, 1981.

THE LAW IN THE COURTS

FEC v. NRWC; NRWC v. FEC

On September 4, 1981, the U.S. Court of Appeals for the District of Columbia Circuit issued an opinion reversing an earlier decision by the U.S. District Court for the District of Columbia in the consolidated cases of *National Right to Work Committee, Inc.* (NRWC) v. *FEC* and *FEC* v. *NRWC* (Civil Action Nos. 78-0315 and 77-2175). The appeals court found that the term "member" as used in Section 441b(b)(4)(C) embraced ". . . at least those individuals whom NRWC describes as its active and supporting members. . . ." i.e., ". . . those individuals solicited by NRWC for contributions to its separate segregated fund."

Complaints

In November 1977, the FEC filed suit against NRWC, a nonprofit corporation without capital stock, which advocates voluntary unionism through disseminating information to its members and the general public. (*FEC* v. *NRWC*) In its suit, the FEC claimed that, since both NRWC's bylaws and the articles of incorporation it had filed with Virginia stated that NRWC had no members, NRWC had violated Section 441b(b)(4)(C) of the Act by soliciting funds to its separate segregated fund from persons other than members. (Under this provision, corporations without capital stock may pay the costs of soliciting contributions from their members to their separate segregated funds.) NRWC contended, on the other hand, that its solicitations were permissible since those persons solicited were "members" of NRWC, within the meaning of the Act and FEC Regulations.* After receiving notice of the FEC's intent to file a civil action, NRWC had filed suit in October 1977 (*NRWC* v. *FEC*), seeking injunctive and declaratory relief and challenging the constitutionality of Sections 441b(b)(4)(A) and (C) of the Act, which, together, prohibit nonstock corporations from soliciting persons other than their "members." Among its constitutional claims, NRWC asserted that Section 441b(b)(4)(C) was unconstitutionally vague and infringed on the First Amendment rights of free speech and association of those persons solicited by NRWC. In February 1978, the cases were consolidated for argument before the U.S. District Court for the District of Columbia.

District Court Ruling

Referring to NRWC's articles of incorporation and bylaws, the district court found that NRWC was organized without members. The court held that NRWC had violated Section 441b(b)(4)(C) by soliciting contributions to its separate segregated fund from persons who were not members of NRWC. The court found that the legislative history of the Section 441b membership exception required a limited definition of "members." The court defined "members" as those ". . .persons who have interests and rights in an organization similar to those of a shareholder in a corporation and a union member in a labor organization. To read the exception more broadly would be to upset the symmetry of the statutory scheme." [501 F. Supp. 422, 432 (D.D.C. 1980)] The court noted that no class of persons solicited by NRWC had been given any such participation rights in NRWC.

Appeals Court Ruling

Reversing the district court's ruling, the appeals court held that the term "member" set forth at Section 441b(b)(4)(C) ". . .necessarily includes those individuals solicited by NRWC. . . ." The appeals court concluded that the district court's definition of "member" was ". . .so narrow that it infringes on associational rights." The court noted that two identifiable public interests served by the Act (i.e., to eliminate the appearance or actuality of corruption in federal elections and to prevent coercive contributions) were not ". . .served by restricting the solicitation activities of a nonstock corporation organized solely for political purposes." The court found that, "as to the first interest, we believe that solicitation [alone] will neither corrupt officials nor distort elections." As to the second interest, the court found that ". . .the individuals from whom NRWC solicits contributions, unlike employees of a corporation or members of a labor union, clearly are not subject to coercion." In the court's opinion, "the NRWC operation. . .ensures that NRWC accurately identifies and solicits only those individuals who share a similar political philosophy and who have evidenced a willingness to promote that philosophy through support of the Committee." On October 19, 1981, the Commission filed a petition with the appeals court for a rehearing of the case and a suggestion for an *en banc* rehearing.

* As defined by 11 CFR 114.1(e), "'Members' mean all persons who are currently satisfying the requirements for membership. . . .A person is not considered a member. . .if the only requirement for membership is a contribution to a separate segregated fund."

JON EPSTEIN v. FEC

On September 23, 1981, the U.S. District Court for the District of Columbia issued an order in *Jon Epstein* v. *FEC* (Civil Action No. 81-0336) upholding the Commission's determination in an administrative complaint that plaintiff had brought against the Reader's Digest Assoc., Inc. in March 1981.

Plaintiff's Claim

Plaintiff's suit sought review of the FEC's dismissal of his complaint (Matter Under Review [MUR] 1283), pursuant to 2 U.S.C. §437g. In the complaint, he alleged that an ad Reader's Digest had placed in the August 27, 1980, edition of the *Washington Post* constituted illegal corporate contributions to the campaigns of the Democratic and Republican Congressmen whose excerpted articles had appeared in the ad (in violation of 2 U.S.C. §441b). Introductory and concluding copy in the ad had also promoted Reader's Digest as a "forum for ideas." Plaintiff claimed the FEC's dismissal of his complaint was contrary to law.

The court found that the standard used by the FEC in dismissing the complaint was not arbitrary or otherwise contrary to law. The court held that the ". . . Commission may reasonably determine that expenditures on publicity that have a **purpose other than assistance of political candidates** . . . were not intended by Congress to be" regulated by the Act. This is particularly true, the court said, when the "major purpose" of the publicity is "not to advocate the election of candidates, but to promote the organization paying for the publicity." The court further noted that, in making this determination, the FEC had "relied upon a growing body of decisions . . . that remove advertisements and other forms of publicity from the Act's prohibition" on corporate expenditures, even though the advertisements "may have political aspects."

Moreover, the court found no merit in plaintiff's argument that the General Counsel's Report did not explain the Commission's decision to dismiss the complaint. "The General Counsel's Memorandum alone, if it is complete enough to have provided a basis for the Commission decision to accept the General Counsel's recommendation, will be adequate for judicial review under section 437g(a)(8)." Nor did the court find merit in plaintiff's contention that

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the ad was partisan because it offered commentary only by representatives of the two major parties. The court held that the issue was not "the narrowness, or diversity, of the political views" represented in the ad but rather whether the ad served a "partisan purpose."

FEC v. HALL-TYNER ELECTION CAMPAIGN COMMITTEE

On September 22, 1981, the U.S. District Court for the Southern District of New York issued an order in *FEC v. Hall-Tyner Election Campaign Committee* (the Committee) granting the defendant's motion for summary judgment in the suit (Civil Action No. 78 Civ. 3508). The Committee was the principal campaign committee for the 1976 Presidential nominees* of the Communist Party, U.S.A. The district court ruled that the recordkeeping and disclosure requirements of the Act, as applied to the Committee, would abridge First Amendment rights of the Committee's supporters.

FEC's Claim

The FEC's suit arose from the Committee's failure to disclose on its reports the names and addresses of 424 contributors who had each made contributions of $100 or more. Instead, the Committee listed the contributors as "anonymous" (in violation of 2 U.S.C. §434(b)(2)). Moreover, the Committee's treasurer failed to keep records of contributions exceeding $50 from individuals who had elected to remain anonymous (in violation of 2 U.S.C. §432(c)). After attempting to resolve this matter through informal methods of conciliation, the Commission filed suit with the district court on August 1, 1978.

District Court's Ruling

In ruling that the Committee did not have to comply with the Act's disclosure requirements, the district court noted that the Supreme Court had **not** created a blanket exemption for minor parties from the Act's disclosure requirements in its *Buckley* v. *Valeo* decision. The Supreme Court did conclude, however, that minor parties might not have to comply with the disclosure provisions when they had a chilling effect on contributors' rights of free association. *Buckley* v. *Valeo*, 424 U.S. at 72-74.

In order to exempt contributors from the disclosure requirements, the Court said that a minor party would have to demonstrate a "reasonable probability" that compelled disclosure of the names of contributors would "subject them to threats, harassment, or reprisals from either Government officials or private parties." *Id.* at 74. Under these circumstances, disclosure could ". . .instill sufficient fear in potential supporters of the organization to deter them from engaging in protected associational activity." *Id.* at 71. On examining the evidence presented by the Committee, the district court found that "the record plainly reflects an extensive history of governmental harassment and public hostility directed at the Party and its members and supporters." The district court concluded that "the substantial infringement of First Amendment rights demonstrated in the record cannot be justified by the governmental interests furthered by applying the FECA disclosure requirements to the defendants." Moreover, the court noted that "the governmental interest served in disclosing the source and amount of contributions is less substantial" in the case of a minor party. The district court cited the Supreme Court's holding in *Buckley* that "the undue influence of large contributions on officeholders" is reduced in the case of minor parties since their candidates are less likely to win an election. *Id.* at 70.

Similarly, the district court found that the Act's recordkeeping requirements also infringed on the contributors' free association rights, even though information recorded would not be publicly disclosed. The court cited an ongoing governmental investigation as evidence that records of contributors' names would subject them to undue harassment. The district court cited 12 affidavits submitted by anonymous individuals providing evidence of harassment. The district court found that the main governmental interest served by the recordkeeping requirements (i.e., effective monitoring and enforcement of the contribution limits) did not justify infringement of the contributors' First Amendment rights.

* In 1976, Gus Hall and Jarvis Tyner were, respectively, the Presidential and Vice Presidential candidates of the Communist Party, U.S.A.

The list below identifies all FEC documents that appeared in the *Federal Register* between September 30 and October 2, 1981. Copies of these notices are **not** available from the FEC.

Notice	Title	Federal Register Publication Date	Citation
1981-9	11 CFR, Part 102 Transfers, Collecting Agents and Joint Fundraising (Notice of Proposed Rulemaking)	9/30/81	46 *Fed. Reg.* 48074
1981-10	11 CFR, Part 114 Communications by Corporations and Labor Organizations (Announcement of Public Hearing on October 26, 1981)	9/30/81	46 *Fed. Reg.* 47800
1981-11	Filing Dates for Connecticut Special Elections	10/2/81	46 *Fed. Reg.* 48759

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