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REGULATIONS

FEC SEEKS COMMENTS ON TESTING-THE-WATERS REGULATIONS

On July 31, 1984, the Commission published a notice of proposed rulemaking* in the Federal Register, which seeks comments on possible revisions to FEC Regulations on "testing the waters," i.e., activities undertaken by an individual to test the feasibility of a potential candidacy (49 Fed. Reg. 30509). See 11 CFR 100.7(b)(1), 100.8(b)(1) and 101.3. For a summary of current testing-the-waters regulations and related advisory opinions, see the March 1984 Record, p. 3.

Comments or questions on the proposed revisions should be submitted to Ms. Susan E. Propper, Assistant General Counsel, by October 1, 1984. Ms. Propper may be contacted at 202/523-4143 or by writing to the Commission at 1325 K Street, N.W., Washington, D.C. 20463.

Proposed Regulations

The Commission seeks comments on three major areas of proposed revisions to the current regulations.

Scope of Permissible Activities. Concerns have been expressed that the agency's interpretation of the testing-the-waters provisions has included activities beyond those originally intended. Furthermore, certain legitimate testing-the-waters activities (e.g., polling and travel) could also be considered campaign activities, depending on the circumstances under which they are conducted. To clarify the scope of testing-the-waters activities, the Commission's proposed rules include factors that the Commission might consider in determining on a case-by-case basis whether certain activities are permissible under the exemption. Under the proposed rules, the Commission could consider not only the type of activity being conducted, but also such factors as:

- The extent to which an individual conducted these activities;

- The timing of the activities vis-a-vis an election or the individual's announcement of his/her candidacy;
- The duration of the activities; and
- The amount of money raised or spent for the activities.

The revised rules include new examples of activities that would indicate an individual had decided to become a candidate and was no longer testing the waters. For example, an individual would be considered a candidate if:

- The individual made, or authorized, written or oral statements that referred to him/her as a candidate for a particular office; or
- The individual conducted activities shortly before an election or over a protracted period of time.

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*The Commission had published an advance notice of proposed rulemaking on January 17, 1984. See 49 Fed. Reg. 1995.

The revised rules also incorporate two examples of activity indicating candidacy which are contained in the current rules: i.e., the use of public political advertising to publicize the individual's campaign and the amassing of funds to be used after candidacy is established.

The Commission welcomes suggestions for other factors that could be used to determine whether an individual was merely testing the waters or was actively campaigning.

Application of Contribution Limits and Prohibitions for Testing-the-Waters Activities. The current regulations provide that funds received or expended for testing the waters become reportable contributions and expenditures if the individual becomes a candidate. While the regulations are not explicit about the application of contribution limits and prohibitions, the Commission has interpreted the law to mean that donations for testing the waters may be subject to such restrictions retroactively. In AO 1982-19, the Commission determined that an individual could accept donations to test the waters which would be considered excessive or prohibited contributions under the Act. If the individual became a candidate, however, he or she had 10 days to refund any unlawful contributions received during the testing-the-waters period.

Some concerns have been raised that the use of impermissible funds for testing-the-waters activities could increase the potential for circumvention of the Act's limits and prohibitions on contributions. **Under the proposed rules, therefore, the contribution limits and prohibitions of the Act would apply to funds used for testing the waters.**

Minor Technical Amendments. The proposed rules make clear that the provision governing the contribution exemption (100.7(b)(1)) applies only to "funds received" for testing the waters and that the provision governing the expenditure exemption (100.8(b)(1)) applies only to "payments made" for testing the waters. Both provisions cross reference the reporting requirements for individuals who subsequently become candidates. (See 11 CFR 101.3.)

Alternative Proposals

The Commission welcomes comments on whether the testing-the-waters concept should be

retained in the current regulations. The Commission also welcomes comments on alternative approaches to the issues raised in its rulemaking notice. For example:

- Should individuals who test the waters be considered "candidates" once they raise or spend more than \$5,000 for testing-the-waters activities?
- Should funds received and spent for testing-the-waters activities be exempt from reporting until the individual decides to become a candidate, even if they are otherwise considered "contributions" and "expenditures" subject to the election law?

THREE SETS OF PROPOSED RULES SENT TO CONGRESS

During July and August 1984, the Commission transmitted to Congress three sets of proposed rules. The rules governing repayments by publicly funded Presidential candidates and access to FEC information may be prescribed 30 legislative days after their transmittal to Congress. The rules governing handicapped persons' access to FEC programs may be prescribed 30 calendar days after their submission. The final versions of the proposed rules were published in the Federal Register. (See citations below.) Copies are available upon request from the Public Communications Office. Call 202/523-4068 or, toll free, 800/424-9530.

Repayments by Publicly Funded Presidential Candidates

On August 17, 1984, the Commission submitted to Congress revised rules governing the repayment of public funds used by publicly funded Presidential candidates for nonqualified campaign expenses. 11 CFR Parts 9007 and 9038. (For a summary of these proposed rules, see page 1 of the August 1984 Record.) The proposed rules will make the FEC's repayment formula consistent with recent decisions by the U.S. Court of Appeals for the D.C. Circuit in Kennedy for President v. FEC and Reagan for President v. FEC. (See page 4, for a summary of the court's rulings.) Rather than requiring full repayment of nonqualified expenses, the revised repayment formula will be based on the ratio of federal funds to total funds received by the candidate (both private and federal funds). The revised rules were published in the Federal Register on August 22, 1984. (49 Fed. Reg. 33225)

The Record is published by the Federal Election Commission, 1325 K Street, N.W., Washington, D.C. 20463. Commissioners are: Lee Ann Elliott, Chairman; Thomas E. Harris, Vice Chairman; Joan D. Aikens; Danny Lee McDonald; John Warren McGarry; Frank P. Reiche; William F. Hildenbrand, Secretary of the Senate, Ex Officio; Benjamin J. Guthrie, Clerk of the House of Representatives, Ex Officio. For more information, call 202/523-4068 or toll-free 800/424-9530.

Handicapped Persons' Access to FEC Programs

On August 17, 1984, the agency also submitted to Congress regulations which will implement and enforce section 504 of the Rehabilitation Act of 1973, as amended. 11 CFR Part 6. The proposed rules prohibit discrimination on the basis of handicap in FEC programs and activities. (For a summary of these rules, see page 2 of the August 1984 Record.) They were published in the Federal Register on August 22, 1984. (49 Fed. Reg. 33206)

Access to FEC Information

On July 26, 1984, the Commission transmitted to Congress revised regulations governing information made available to the public by the FEC's Public Records Office or through the Freedom of Information Act (FOIA). 11 CFR Parts 4 and 5. (For a summary of these regulations, see page 1 of the July 1984 Record.) The revised regulations update current fee schedules, change the billing procedure for microfilm and computer tape requests, and clarify that the FEC does not charge for staff time devoted to duplicating information made available under the FOIA. They were published in the Federal Register on July 31, 1984 (49 Fed. Reg. 30458).

Although the rules implementing the FOIA do not have to be submitted to Congress, the Commission will prescribe both sets of rules at the same time to maintain uniform fee schedules for all FEC documents.

PRESIDENTIAL ELECTIONS

FEC CERTIFIES GENERAL ELECTION FUNDS TO DEMOCRATIC TICKET

On July 26, 1984, the Commission approved payment of \$40,400,000 in federal funds for the general election campaign of Democratic Presidential nominee Walter F. Mondale and his Vice Presidential running mate, Geraldine A. Ferraro. A \$40,400,000 grant will also be made available upon request to the Republican Presidential ticket, following the Republican national convention in August.

Mr. Mondale and Ms. Ferraro had requested the funding in a July 18th letter to the Commission. In that letter, the candidates agreed to abide by the overall spending limit, to use only public funds for the campaign and to comply with other legal requirements.

By law, the Presidential nominee of each major party is entitled to full public financing of the

general election campaign (\$20 million plus a cost-of-living adjustment). Major party candidates accepting public financing for their general election campaigns are subject to a spending limit of \$40,400,000 (the amount of the grant). In addition, the use of the nominee's personal funds is limited to \$50,000. Private funds, subject to contribution limits, may be raised and spent for legal and accounting costs incurred solely to ensure compliance with the Act.

MAJOR PARTY CONVENTION FUNDING INCREASED

On July 26, 1984, the Commission approved technical amendments to its regulations governing the public financing of Presidential nominating conventions. 11 CFR Parts 9008.1(a) and 9008.3 (a). The revised rules follow recent amendments to 26 U.S.C. §9008, which:

- Increase the convention entitlement available to each major party convention committee from \$3 million, plus a cost-of-living adjustment (COLA), to \$4 million, plus COLA; and
- Limit spending by publicly funded major and minor party convention committees to the amount of the increased grant.

Under the new amendments, the actual entitlement available to each major party convention committee is \$8,080,000. On July 12, 1984, one day after the amended law became effective, the Commission certified an additional \$2,020,000 to the Republican and Democratic convention committees. The Commission had already certified \$6,060,000 to each major party by February 29, 1984.

Since the conforming amendments to the regulations were not a substantive rule representing an FEC policy decision, they were not published for public comment but became effective upon publication in the Federal Register on July 31, 1984 (49 Fed. Reg. 30461). Copies of the Federal Register notice may be obtained from the Federal Election Commission.

PRIMARY MATCHING FUND PAYMENTS TO THIRD PARTY CANDIDATE

On July 26, 1984, Ms. Sonia Johnson became the first third-party Presidential candidate eligible to receive primary matching funds since the FEC began administering the public funding program in 1976. On the same day, the Commission certified \$140,186 in matching fund payments for Ms. Johnson.

During August, the Commission also certified additional primary matching fund payments for Ms. Johnson and other eligible Presidential candidates,

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bringing total funds certified to the 11 Presidential primary candidates to \$32,069,823.15.

The summary chart below provides cumulative information on certifications of primary matching funds made between January 1 and August 22, 1984.

Primary Matching Fund Certification Activity

Name of Candidate	Number of Requests*	Total Funds Certified
Askew, Reubin (D)	9	\$ 922,642.71
Cranston, Alan (D)	15	1,846,230.95
Glenn, John (D)	13	3,052,090.59
Hart, Gary (D)	17	4,478,698.92
Hollings, Ernest (D)	9	821,599.85
Jackson, Jesse (D)	12	2,270,733.99
Johnson, Sonia (CP**)	3	185,789.15
LaRouche, Lyndon (D)	6	496,468.27
McGovern, George (D)	8	570,076.71
Mondale, Walter (D)	20	7,587,756.68
Reagan, Ronald (R)	7	10,100,000.00

FIRST PRESIDENTIAL PRIMARY AUDIT RELEASED

On August 2, 1984, the Commission released the first audit report for the 1984 Presidential primary campaigns, a report on the publicly funded Askew for President Committee. The Commission expects to issue audit reports for all the publicly funded 1984 Presidential primary campaigns by early 1985. In addition to audit findings and recommendations, each report will include any initial repayment determinations made by the FEC. The FEC will also issue addenda to the audit reports as circumstances warrant and as additional information on the campaigns becomes available. Addenda may include, for example, information based on follow-up fieldwork or on FEC repayment determinations which are appealed by the campaigns.

The Commission noted no material problems with the campaign records of the Askew for President Committee, the principal campaign committee for former Florida Governor Reubin Askew's 1984

*Includes requests made after the candidate's initial request for matching fund eligibility.

**Ms. Johnson is seeking the Presidential nominations of the Citizens Party, the California Peace and Freedom Party and various independent parties.

Presidential primary campaign. The report covered the period from the Askew committee's inception on August 6, 1981, through February 29, 1984, when Governor Askew withdrew his bid for the Democratic Party's Presidential nomination. (The Askew campaign became ineligible for public funds on March 1, 1984.)

An analysis of the Askew campaign's records showed net outstanding campaign obligations of \$152,900.70. Under FEC Regulations, the Askew campaign may continue raising private contributions to be matched with federal funds, provided the contributions are received and deposited before December 31, 1984. The campaign may use these additional matching funds to help retire its debts and to wind down the campaign.

Copies of the Askew campaign's audit report are available at 5 cents per page from the Commission's Office of Public Records, 1325 K Street, N.W., Washington, D.C. 20463.

FEC REASSESSES 1980 REPAYMENT DETERMINATIONS

On July 12, 1984, in response to recent decisions by the U.S. Court of Appeals for the District of Columbia Circuit in Kennedy for President v. FEC and Reagan for President v. FEC,* the Commission approved a recommendation by the General Counsel to revise FEC repayment determinations made with regard to nonqualified campaign expenses incurred by the Reagan and Kennedy campaigns during the 1980 primaries. (Both campaigns had received primary matching funds for their 1980 primary campaigns.) In a second action, the Commission decided not to reconsider repayments it had required of five other publicly funded Presidential campaigns active in 1980 primaries.

In its rulings on the Kennedy and Reagan suits, the appeals court had determined that, instead of requiring full repayments of nonqualified campaign expenses by the campaigns, the Commission could only require a repayment of the portion of federal funds used for the nonqualified expenses.

To make its regulations consistent with the court's decisions, the Commission revised the rules governing repayment of public funds (11 CFR Parts 9007 and 9038) and submitted them to Congress on August 22, 1984. (See page 2.)

*For summaries of the Kennedy suit (CA No. 83-1521) and the Reagan suit (CA No. 83-1666), see p. 6 of the July 1984 Record.

Reagan and Kennedy 1980 Campaigns

Using the repayment formula specified in its proposed regulations, the Commission will recalculate repayments required of the Reagan and Kennedy 1980 campaigns. By applying the proposed formula to the committees' repayments before the amended regulations are prescribed, rather than waiting until after they are prescribed, the Commission will allow the committees to resolve repayment issues, make any remaining repayments and terminate as quickly as possible.

Other Publicly Funded 1980 Campaigns

The five other publicly funded campaigns that were required to make repayments for non-qualified expenses in 1980 primaries made full repayments. They were the principal campaign committees for John Anderson, Jerry Brown, Robert Dole, Lyndon H. LaRouche and former President Carter. (The LaRouche and Carter campaigns had unsuccessfully challenged FEC repayment determinations in a federal appeals court.)*

Based on the General Counsel's recommendation, the Commission decided not to reconsider repayment determinations it had made with regard to the five campaigns. In support of the finality of these determinations, the General Counsel cited the legal principle of claim preclusion: "It is a long-standing legal principle that a party who has had a chance to litigate a claim before a proper tribunal ought not to have another chance to do so." Moreover, with regard to the two campaigns that had challenged the FEC's repayment determinations, the Commission noted that "there is a substantial question as to whether the Commission is free to alter the decision[s] reached by the Court of Appeals." Finally, the General Counsel pointed out that, since several campaigns had terminated, any refunds resulting from readjustments of their repayments would be impractical.

Of the five campaigns, only the LaRouche and Carter campaigns have sought reconsiderations of the FEC's repayment determinations in light of the court's rulings on the Kennedy and Reagan suits.

*For the appeals court's rulings, see *Carter/Mondale Presidential Comm. v. FEC*, 711 F.2d 279 (D.C. Cir. 1982), and *Citizens for LaRouche v. FEC*, No. 83-0373 (D.C. Cir., Jan. 31, 1984).



800 LINE

SUPPORT FOR PUBLICLY FUNDED PRESIDENTIAL CANDIDATES

The Office of Public Communications has received many inquiries about how individuals, political parties, corporations and unions may support Presidential candidates who accept public financing for their general election campaigns. The following information responds to some of these questions.

What may an individual do to support the Presidential nominee of his or her choice?

Individuals may not make direct contributions to major party candidates who accept public funding for the general election. An individual may, however, support the major party Presidential candidate of his or her choice by contributing up to \$1,000 to the candidate's compliance fund.* In addition, an individual may make direct contributions of up to \$1,000 to any other type of Presidential candidate, including a minor or new party candidate who accepts partial or retroactive public funding.

May an individual volunteer his or her services (not compensated by anyone) to the candidate's campaign or to the candidate's political party?

Yes. 11 CFR 100.7(b)(3).

What other types of volunteer activities are permissible?

An individual may:

- Conduct a campaign activity on behalf of the nominee in his/her home, or in a church or community room used on a regular basis by members of the community for noncommercial purposes. Costs of invitations, food and beverages provided by the volunteer may not, however, exceed \$1,000. 11 CFR 100.7(b)(5) and (6), 100.8(b)(6) and (7).
- Travel on behalf of the candidate, provided the costs for travel do not exceed \$1,000. 11 CFR 100.7(b)(8).

What else may an individual do to support the Presidential nominee of his or her choice?

An individual may make his or her own independent expenditures to advocate the candidate's election (or to oppose the election of another

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*A publicly funded Presidential candidate may establish a separate Legal and Accounting Compliance Fund to pay costs of complying with the Act. Contributions to the fund are subject to the limits and prohibitions of the Act. See 11 CFR 9003.3(a).

Presidential candidate), provided the expenditures are not made "with the cooperation or with the prior consent of, or in consultation with, or at the request or suggestion of, a candidate or agent or authorized committee of such candidate." 11 CFR 109.1(a). The individual making independent expenditures must report them when they exceed \$250 per calendar year. 11 CFR 109.2(a).

May an individual contribute to the Presidential nominee's party?

Yes. He or she may contribute up to \$5,000 to a state or local party committee and up to \$20,000 to the national committee of the candidate's political party.*

What role may a Presidential candidate's political party play in supporting the candidate if he or she accepts public funding?

A national party committee or its agents may make special "coordinated party expenditures" to promote the election of its Presidential nominee in the general election. These expenditures are subject to a spending limit based on the national voting age population (\$6,924,082.40 in 1984). Although these expenditures may be made in cooperation with the candidate, the party committee -- not the candidate -- must actually make and report them. 11 CFR 110.7.

State and local party committees may engage in certain activities using volunteers that also benefit the Presidential nominee. They may, for example, produce certain campaign materials (e.g., pins and bumper stickers) which are used in connection with volunteer activities. They may also distribute a sample ballot identifying the nominee and a minimum of two other candidates. The committees may also conduct voter registration and get-out-the-vote drives on behalf of the nominee. All such activities are subject to specific provisions of the Act and FEC Regulations. 11 CFR 100.7(b)(9), (15) and (17).

May corporations and labor organizations sponsor communications pertaining to Presidential candidates in the general election?

Yes. Corporations and labor organizations may sponsor certain partisan and nonpartisan communication activities which pertain to Presidential candidates -- regardless of whether the candidates accept public funding for their general election campaigns. These activities are subject to the specific requirements of Commission Regulations. (See 11 CFR Part 114.)

Partisan Communications. Corporations and labor organizations may support, endorse or oppose

Presidential candidates, for example, by publishing printed materials or setting up a phone bank on behalf of a candidate. In the case of a corporation, these communications must be limited to the corporation's stockholders, executive and administrative personnel and their families. In the case of labor organizations, partisan communications must be limited to the labor organization's membership, executive and administrative personnel and the families of both groups. 11 CFR 114.3. Moreover, expenditures for these internal communications may be reportable. 11 CFR 100.8(b)(4).

Nonpartisan Communications. Corporations and labor organizations may also sponsor certain nonpartisan communications made to the general public, provided these communications do not favor or oppose any candidate or political party and otherwise meet the requirements of Commission Regulations. 11 CFR 114.4. For example, following FEC rules, a corporation or labor organization might publish voting records and voter guides, distribute official voting information, pay for voter registration ads, or sponsor voter drives and candidate debates.

May corporations or labor organizations pay for legal and accounting services rendered to a Presidential campaign?

Yes. Corporations and labor organizations (as well as partnerships) may pay for legal and accounting services rendered by their employees to Presidential candidate committees, provided the services are rendered solely to ensure compliance with the Act. Costs incurred by the regular employer for these services must be reported by the committee in accordance with 11 CFR 104.3(h). 11 CFR 100.7(b)(14).

How can I get more information?

Should you have any questions or wish to order the FEC's free publication, Public Funding and Presidential Elections, contact the Public Communications Office, 1325 K Street, N.W., Washington, D.C. 20463. In Washington, call 523-4068; out-of-town, call toll free 800/424-9530.

*Total contributions by individuals in connection with federal elections may not exceed \$25,000 per year.

OPINIONS

ADVISORY OPINION REQUESTS

The following chart lists recent requests for advisory opinions (AORs). The full text of each AOR is available to the public in the Commission's Office of Public Records.

AOR Subject

- 1984-32 Contribution check dated before but received after primary: application of limits; definition of debt. (Date made public: July 3, 1984; Length: 2 pages)
- 1984-33 Fundraiser for trade association PAC paid by the association's allied members. (Date made public: July 11, 1984; Length: 2 pages, plus 77-page supplement)
- 1984-34 Contribution ceiling(s) applied to contributions made by 1980 candidate and by his principal campaign committee to 1984 candidate. (Date made public: July 17, 1984; Length: 1 page, plus 2-page supplement)
- 1984-35 Contributions to candidate who switches campaign from House to Senate to House. (Date made public: July 17, 1984; Length: 1 page)
- 1984-36 Corporation's solicitation of solicitable personnel of two companies (and the subsidiaries of one) in which the corporation has ownership and controlling interests. (Date made public: July 18, 1984; Length: 3 pages)
- 1984-37 Employee services obtained by PAC through advance payments to parent organization or dual employment plan. (Date made public: August 2, 1984; Length: 6 pages)
- 1984-38 Ceiling(s) on contributions by PACs to candidate who switches campaign from House to Senate to House. (Date made public: August 3, 1984; Length: 2 pages)
- 1984-39 Congressman's use of interest group's mailing list to clarify his position on legislative issue. (Date made public: August 9, 1984; Length: 3 pages, plus 10-page supplement)

AOR Subject

- 1984-40 Spending by national party committee for t.v. ad promoting the party's political message. (Date made public: August 13, 1984; Length: 8 pages, plus 4-page supplement)

ALTERNATE DISPOSITION OF ADVISORY OPINION REQUEST

- **AOR 1984-35** (See above.) In a letter issued on July 24, 1984, the General Counsel informed the requester that his request did not qualify for advisory opinion consideration because it did not propose a specific activity by the requester or by the candidate and committee he represents. See 2 U.S.C. §437f and 11 CFR 112.1(b).

ADVISORY OPINIONS: SUMMARIES

An Advisory Opinion (AO) issued by the Commission provides guidance with regard to the specific situation described in the AOR. Any qualified person who has requested an AO and acts in accordance with the opinion will not be subject to any sanctions under the Act. 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 1984-24: PAC's Purchase of Goods and Services from Parent Corporation

The Sierra Club Committee on Political Education (SCCOPE) is the separate segregated fund of the Sierra Club (the Club), a tax-exempt, nonprofit corporation that advocates environmental issues. SCCOPE may not use the staff and the facilities of the Club for election-related activities, even if SCCOPE reimburses the Club at a fair market value.

SCCOPE planned to make in-kind contributions to approximately 70 Congressional candidates in 1984 elections by purchasing from the Club and providing to the candidates: a) the services of approximately 20 Club employees, and b) the use of Club facilities incidental to the employees' services. (The Club's employees would provide the candidates with expertise on environmental issues and perform other campaign services.) Neither of the alternative methods proposed by SCCOPE to reimburse the Club for the employees' services and for Club facilities is permissible under the Act and FEC Regulations. Although, under the

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proposed plans, SCCOPE would ultimately pay for the services, the Club's initial financing of the services would result in prohibited corporate contributions to the candidates.

Under both a reimbursement payment plan and an advance payment plan proposed by SCCOPE, the Club would initially compensate employees for campaign-related services and pay the costs of Club facilities used for the services. Subsequently, the Club would determine the usual and normal charge for: a) the portion of an employee's compensation attributable to the political work, and b) the incidental use of Club facilities for the work. The Club would transfer that amount (plus a 7.5 percent surcharge) from its separate segregated fund to its general treasury fund.

Under the reimbursement plan, SCCOPE would keep a log of employee services and Club facilities used for campaign-related activities. SCCOPE would then reimburse the Club for these services and goods within 30 days of their provision.

Under the advance payment plan, the Club would establish a special escrow account. SCCOPE would pay the Club for campaign-related services and goods by periodically forwarding funds from its political account to the Club. The Club would then place the funds in the escrow account and withdraw them monthly to pay for the campaign-related goods and services. The amount of funds maintained in the escrow account would be sufficient to cover the cost of SCCOPE's estimated use of the Club's employees and facilities.

Under the Act and FEC Regulations, an incorporated organization may pay the costs of establishing, administering and soliciting contributions to a separate segregated fund which, in turn, may disburse these contributions for federal election-related activities. On the other hand, the incorporated organization may not use its general treasury funds to make in-kind contributions to federal candidates (i.e., provide services and goods to candidates at no charge or at less than the usual charge). Commission Regulations define such prohibited contributions to include: services provided by employees who are compensated by their organization; the use of corporate facilities incidental to the employees' services; other services and goods provided by the corporation at less than the usual charge and advances made by the corporation to a political committee or candidate. 2 U.S.C. §441b; 11 CFR 100.7(a)(1)(iii) and (a)(3); AOs 1975-14, 1975-94, 1976-70, 1978-34 and 1978-45.

Since each of SCCOPE's proposed payment plans involves an initial disbursement of the Club's treasury funds to pay for goods and services

rendered to the candidates, these advances would result in prohibited contributions from the Club to the candidates and to SCCOPE, regardless of whether SCCOPE reimbursed the Club.

The Commission noted that Sections 114.9 and 114.10 of FEC Regulations did not authorize either proposed payment plan. Specifically, Section 114.9 governs only the use of corporate (and labor) facilities and applies to stockholders and employees volunteering their time and to other persons using the facilities, such as candidates. It does not apply to corporate employees receiving compensation for their election-related services. Section 114.10, concerning the extension of credit and debt settlement, applies exclusively to commercial transactions undertaken by corporations in their ordinary course of business. It is not applicable here.

Since the Commission concluded that neither payment plan was permissible, it did not address three questions concerning the advance payment plan: 1) the reporting and recordkeeping requirements of the plan, 2) the level of funding required for the plan's escrow account and 3) the transfer of excess funds in the account back to SCCOPE.

The Commission did not comment on the permissibility of an alternative payment plan under which SCCOPE would become a dual employer of Club employees working in campaigns. Questions with regard to the plan were not set forth in the Club's advisory opinion request. Chairman Lee Ann Elliott filed a dissenting opinion. (Date issued: July 13, 1984; Length: 10 pages, including dissent)

AO 1984-27: Presidential Primary Campaign's Conversion of Credit Card Contributions to Matchable Contributions

The LaRouche Campaign, Mr. Lyndon H. LaRouche's principal campaign committee for his publicly funded Presidential primary campaign, may convert nonmatchable contributions made by credit card to matchable contributions (i.e., contributions made by individuals that may be matched for primary matching funds), provided:

- The campaign follows all the conversion procedures set forth in its advisory opinion request, including the submission to the FEC of: a) all the proposed information from contributors verifying the conversion of their contributions to matchable contributions, and b) copies of checks that have been refunded to contributors.
- The campaign includes in verification forms sent to contributors language specified by the Commission which would make clear the donors' intent to support Mr. LaRouche's primary campaign.

-- The campaign meets all other requirements of the Primary Matching Payment Account Act.

Under the Primary Matching Payment Account Act and FEC Regulations, Presidential primary campaigns that qualify for primary matching funds may submit up to \$250 of the matchable contribution(s) received from each contributor. Contributions submitted by a campaign must be in the form of a "written instrument": i.e., a check written on the contributor's personal, escrow or trust account; a money order; or any similar negotiable instrument. 11 CFR 9034.2(b). Moreover, the contribution must be made with the intent to support the candidate's primary campaign. 11 CFR 9034.3(i).

Since the LaRouche Campaign's credit card contributions did not meet these requirements, the campaign proposed special procedures for refunding \$250 of each donor's credit card contribution and for accepting comparable contributions, re-submitted in matchable form by the same donors. The LaRouche Campaign would handle these transactions in one of two ways, depending primarily on whether the donor had already contributed up to or close to the \$1,000 limit.

Category I Donors

These contributors would receive a refund of \$250 of their credit card contributions before making an additional, matchable contribution because: a) they had already reached their \$1,000 contribution limit, b) they might exceed the limit if they made additional contributions before receiving a refund, or c) they had specifically requested that the transaction be handled in this way.

At the time the campaign resubmitted matchable contributions to the FEC it would include a verification form from each donor providing detailed information about the contribution and verifying the receipt of the refund.

The LaRouche Campaign would segregate the converted contributions in this category from all the other contributions submitted for matching funds.

Category II Donors

The contributors in category II consisted of: a) individuals who could make written contributions before receiving refunds of their credit card contributions without exceeding their \$1,000 limit, or b) donors who were willing to make written contributions of up to \$250, provided they immediately received refunds of their credit card contributions, equal to their written contributions.

Along with the converted contributions, the campaign would provide the FEC with verification forms stating, among other things, the donor would receive a refund immediately following the campaign's receipt of his or her matchable contribution. (Date issued: July 13, 1984; Length: 4 pages)

AO 1984-28: Coattail Support--Endorsement of President Included in House Candidate's Brochures

Costs incurred by Mr. Alton H. Starling's House campaign (the campaign) for campaign brochures that include endorsements of President Reagan would not be considered contributions to, or expenditures on behalf of, the President. Under a special "coattail exception" contained in the Act and FEC Regulations, costs incurred by a candidate's campaign for campaign materials that include information on, or any reference to, another candidate for federal office, are not considered contributions or expenditures, provided:

- The campaign materials are used in connection with volunteer activities;
- No public political advertising is used; and
- Materials are not distributed by direct mail. In this context, a "direct mailing" means "any mailing(s) by commercial vendors or mailings made from lists which are not developed by the candidate." 2 U.S.C. §431(8)(B)(xi); 11 CFR 100.7(b)(16) and 100.8(b)(17).

The campaign brochures prepared and distributed by the Starling campaign would meet these requirements. Volunteer campaign workers will distribute the brochures to the public by, for example, passing them out door to door. Moreover, the campaign will use a mailing list it has developed and will not use the services of a commercial vendor. Commissioners Joan D. Aikens and Lee Ann Elliott filed a joint concurring opinion. Commissioner Thomas E. Harris filed a separate concurring opinion. (Date issued: August 3, 1984; Length: 8 pages, including concurring opinions)

AO 1984-29: Honorarium's Travel and Subsistence Exemption Extended to Senator's Family

If Senator Ted Stevens' older daughter accompanies him on a speaking engagement as a staff aide, her travel and subsistence expenses may be paid by the sponsoring organization and excluded from the honorarium paid to Sen. Stevens. On the other hand, if Sen. Stevens' wife and younger daughter (two and one-half years old) accompany him, only his wife's expenses may be excluded from the honorarium; payment by the sponsoring organization for his younger daughter's expenses would be counted as part of the honorarium.

continued

Under the Act and FEC Regulations, a federal officeholder may accept an honorarium of up to \$2,000 for a speech or appearance. 2 U.S.C. §441i; 11 CFR 110.12(a) and (b). The sponsoring organization may also pay for, and exclude from the honorarium, those travel and subsistence expenses incurred by the officeholder, his or her spouse or a staff aide. In this case, Sen. Stevens' older daughter would qualify for the exemption because she would be acting as a staff aide. His younger daughter would not, however, be covered under the exemption. (Date issued: July 13, 1984; Length: 2 pages)

AO 1984-30: Affiliated Committees' Independent Expenditures on Behalf of General Election Candidates to Whom They Have Made In-Kind Contributions in Primaries

Freeze Voter '84, a nonconnected, multicandidate political committee, and its 15 affiliated committees may not make independent expenditures in the general election on behalf of candidates to whom they have already made in-kind contributions in the primaries. The committees' support in the primaries (e.g., donation of paid staff for campaign activities) would compromise the independence of their proposed general election spending. The expenditures would instead be considered reportable, in-kind contributions, subject to the election law's contribution limits. 2 U.S.C. §441a; 11 CFR 109.1(c).

The Act and FEC Regulations define an independent expenditure as an expenditure by a person expressly advocating the election or defeat of a clearly identified candidate which is made without cooperation or consultation with the candidate or any authorized committee or agent of his/her campaign. 2 U.S.C. §431(17); 11 CFR 100.16. Commission Regulations specify that spending is not considered independent if it is based on "information about the candidate's plans, projects or needs provided...by the candidate, or by the candidate's agents, with a view toward having an expenditure made." 11 CFR 109.1(b)(4)(i)(A). Moreover, in determining whether an expenditure is independent, the Commission has declined to treat a primary and a general election as distinct events when they are held for the same office in the same election cycle. AO 1979-80. In this case, spending in the general election would stem from prior arrangements and information about the candidates' plans, projects or needs. Accordingly, the in-kind contributions made in the primary elections raise the presumption that the committees' general election expenditures would not be independent. Instead, they would be in-kind contributions. (Date issued: August 6, 1984; Length: 4 pages)

COURT CASES

THE SIERRA CLUB v. FEC

On August 11, 1984, the U.S. District Court for the District of Columbia issued an order dismissing a suit filed by the Sierra Club against the FEC on July 31, 1984. (The Sierra Club v. FEC; CA No. 84-2354) The court ruled that the case was not ripe for its consideration and that the Club had not exhausted the administrative remedies available to it before filing suit.

In the suit, the Sierra Club and its separate segregated fund, the Sierra Club Committee on Political Education (SCCOPE), had challenged the FEC's construction and application of 2 U.S.C. §441b in an advisory opinion the agency had issued to the Sierra Club on July 13, 1984. In the opinion, AO 1984-24, the Commission rejected the two financing methods proposed by the Club for selling its goods and services to SCCOPE as part of SCCOPE's in-kind contribution program for federal candidates. (For a summary of AO 1984-24, see p. 7.)

The Sierra Club had asked the court to declare that:

- The election law permits the Club to provide goods and services to SCCOPE for use in SCCOPE's in-kind contribution program, provided: a) SCCOPE makes payments in advance to an escrow account or reimburses the Club within a commercially reasonable time, and b) the goods and services are purchased at fair market value.
- Section 441b, both on its face and as applied to plaintiff's activities, violates the First Amendment by abridging plaintiff's freedom of association and by being unconstitutionally vague.
- Advisory Opinion 1984-24 is contrary to law and to the First and Fifth Amendments.

Plaintiff had also asked the court to enjoin the FEC from commencing or continuing any enforcement proceedings designed to prevent SCCOPE from using Sierra Club goods and services for its in-kind contribution program.

HOLTON v. FEC

On July 16, 1984, the U.S. District Court for the District of Columbia dismissed of its own accord a complaint filed by Samuel Pearce Holton, II, against the Commission (Holton v. FEC; CA No. 84-2011). The court found the complaint to be "completely devoid of merit." In his complaint, Mr. Holton had asked the court to enjoin the FEC from validating any votes cast in the November 1984 Presidential general election by registered voters in Ohio.

NATIONAL RIFLE ASSOC. v. FEC

On July 31, 1984, the U.S. District Court for the District of Columbia granted the FEC's request to dismiss as moot a suit filed by the National Rifle Association (NRA) on June 19, 1984. (NRA v. FEC; CA No. 84-1878) In the suit, NRA had asked the court to declare that the FEC's failure to act, within 120 days, on an administrative complaint NRA had filed on December 1, 1983, was arbitrary, capricious, an abuse of power and contrary to law. (See 2 U.S.C. §437g(a)(8)(A).) The FEC had petitioned the court to dismiss the suit as moot because, on July 31, 1984, the Commission had entered into a conciliation agreement with the respondents named in the NRA's complaint, thereby resolving NRA's claims.

In its complaint, NRA had alleged that Handgun Control, Inc. (HCI), a nonprofit corporation without members, and its separate segregated fund, Handgun Control, Inc. Political Action Committee (HCI-PAC), had unlawfully solicited contributions from individuals beyond HCI's solicitable class (i.e., its executive and administrative employees and their families). See 2 U.S.C. §441b(4)(A).

HETTINGA v. FEC

Pursuant to 2 U.S.C. §437g(a)(8), on July 12, 1984, Mr. Ralph M. Hettinga sought injunctive relief against the FEC for failing to act on his administrative complaint within 120 days. The suit was filed in the U.S. District Court for the District of Columbia. (CA No. 84-2082) In the complaint filed with the FEC on March 6, 1984, Mr. Hettinga had alleged that eight unions had violated 2 U.S.C. §441b by making prohibited in-kind contributions to the Mondale Presidential campaign. The unions had allegedly provided telephone services and equipment and office space to the Mondale campaign at less than fair market value.

On July 24, 1984, the court issued an order requiring the FEC to submit information on its handling of Mr. Hettinga's complaint (i.e., a chronology of events with regard to the FEC's processing of the complaint). This submission, as well as all future submissions, is subject to a protective order issued by the court. By the terms of the protective order, plaintiff and defendant agreed that:

- Plaintiff's counsel would share information or documents concerning the administrative complaint only with the plaintiff and his legal staff;
- Plaintiff's counsel would explain the terms of the protective order to anyone with access to the information; and
- All court filings pertaining to the complaint would be filed under seal with the court.

Stating that it could not determine whether plaintiff had met the burden for injunctive relief until after the court had examined the FEC documents, the court denied plaintiff's motion for injunction, without prejudice.

HOPFMANN v. FEC

On July 10, 1984, the U.S. Court of Appeals for the District of Columbia Circuit issued an order denying appellant Alwin E. Hopfmann's petition for the court's expedited, *en banc* consideration of a suit he had originally filed with the U.S. District Court for the District of Columbia in December 1982. (Hopfmann v. FEC; CA No. 82-3667)

Mr. Hopfmann had petitioned the district court to declare contrary to law the FEC's dismissal of an administrative complaint which he had filed in September 1982 against Senator Edward M. Kennedy (D-Mass.) and the Committee to ReElect Senator Kennedy. See 2 U.S.C. §437g(a)(8)(A). Mr. Hopfmann had also asked the district court to certify to the appeals court certain constitutional questions involving FEC actions and the election law. See 2 U.S.C. §437h. (For a summary of the district court's opinion denying Mr. Hopfmann's requested relief, see p. 8 of the May 1984 Record.)

The appeals court concluded that Mr. Hopfmann had not demonstrated that the district court had erred in refusing to certify Mr. Hopfmann's constitutional challenges to the appeals court because they were frivolous. Similarly, the appeals court found that appellant's motions for a writ of prohibition and/or mandamus lacked merit. Finally, the court noted that it was denying Mr. Hopfmann's petition for an expedited appeal "without prejudice to the merits of any argument appellant may propound" in his unexpedited appeal, which is currently pending before the court.

NEW LITIGATION**FEC v. Kirk Walsh for Congress Committee**

The FEC filed a complaint asking the district court to declare that the Kirk Walsh for Congress Committee, Mr. Walsh's principal campaign committee for his 1980 House campaign, violated 2 U.S.C. §434(a) by failing to file a 30 day post-general election report for 1980 and mid-year and year-end reports for 1981, 1982 and 1983.

The FEC further asks the court to order the Walsh committee to file these reports and all other required reports as they become due.

U.S. District Court for the Eastern District of Michigan, Southern Division, Civil Action No. 84-CV-9802-PH, July 20, 1984.

INFORMATION**NEW TELEPHONE DEVICE FOR THE HEARING IMPAIRED**

Hearing-impaired individuals can now communicate directly with the Federal Election Commission. A telecommunications device for the deaf (TDD), located in the Information Division, enables FEC staff to answer questions posed by hearing-impaired individuals. Operating with a universal receiver, the device permits individuals with any type of telecommunications device to call the Commission. The caller and FEC staff member type their communications; a printer displays the incoming messages.

Individuals with a TDD may contact the Commission by calling 202/523-5955. A caller may contact any division by leaving a message and a staff person from that division will return the call. If calling long distance, the caller may reverse the charges.

Enhancing the Commission's outreach effort, the new device was installed in August as part of the agency's compliance with the Rehabilitation Act and the Commission's new regulations for handicapped persons (11 CFR Part 6). (On August 17, 1984, the FEC transmitted these rules to Congress. See story on p. 3.)

CLEARINGHOUSE**NEW EDITION OF STATE CAMPAIGN FINANCE LAWS**

During July, the Commission published an updated, comprehensive summary of state campaign finance laws entitled Campaign Finance Law 84. Part One of the publication contains quick reference charts on: campaign finance reporting requirements, contribution and solicitation limits and states with special tax and public financing provisions. Part Two contains detailed summaries of individual state laws.

Prepared under contract by the FEC's National Clearinghouse on Election Administration, the 1984 edition marks the first revision of the publication since 1981. The Commission plans to revise and update the publication biennially, with research conducted during odd years and publication, during even years.

Campaign Finance Law 84 is available to the public through the Government Printing Office at \$9.50 per copy. Anyone wishing to order copies may do so by writing the Superintendent of Documents, Government Printing Office, Washington, D.C. 20402, making reference to Campaign Finance Law 84, No. 052-006-00030-9.

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