ADVISORY OPINION 1975-33

Interpretation of Spending Limit
Exemption for Fund-raising Costs

The Federal Election Commission renders this advisory opinion under 2 U.S.C. § 437f in response to a request submitted by the Bentsen in '76 Committee, a political committee supporting the candidacy of Senator Lloyd Bentsen for nomination for election to the office of President of the United States. The request was made public by the Commission and published in the Federal Register on August 20, 1975 (40 FR 36533). Interested parties were given an opportunity to submit comments relating to the request. No comments were received.

The Bentsen in '76 Committee seeks an advisory opinion concerning the proper interpretation of the fund-raising exception to the definition of the term "expenditure," found in 18 U.S.C. § 591(f)(4)(H). The question posed is whether the prohibition in 18 U.S.C. § 608(c)(1)(A), which forbids a candidate for nomination to the office of President of the United States from spending more than twice the amount which a candidate for nomination to the office of Senator from that state may spend, requires that the twenty percent fundraising exception [18 U.S.C. § 591(f)(4)(H)] be prorated, state by state, with the effect that no candidate seeking the presidential nomination could spend, in any one state, an amount in excess of twice the Senatorial limit including the fund-raising exception.

Under 18 U.S.C. § 591(f)(4)(H) costs incurred by a candidate in soliciting contributions are excluded from the definition of "expenditures" until they exceed twenty percent of the candidate's §608(c) limitations, at which point they count against that limit. 18 U.S.C. §608(c)(1)(A) imposes a ten million dollar spending limit (plus a cost of living adjustment to be determined in 1976) on a candidate seeking presidential nomination. That section further stipulates that the aggregate of expenditures in any one state may not exceed twice the spending limit applicable in that state to a candidate seeking senatorial nomination.

It is the Commission's opinion that the latter limit on spending in a particular state is not an alternative overall limit, since if computed for all fifty states the total would far exceed the ten million dollar national limit. Rather, the statute prescribes one limit for candidates seeking presidential nomination and further requires that within that limit such candidates may not spend in any state more than twice the limit for a Senate candidate seeking nomination in such state.

Since the language of 18 U.S.C. § 591(f)(4)(H) refers specifically to "the expenditure limitation applicable to such candidate under [18 U.S.C. § 608(c)]," it is the Commission's opinion that such exemption is applicable only to the nationwide ten million dollar limit on candidates for the presidential nomination and need not be

prorated state by state under the formula of "twice the expenditure limitation applicable in such State to a candidate for nomination" to the Senate. 18 U.S.C. §608(c)(1)(A) and (C). Thus, a candidate for the presidential nomination may spend up to two million dollars for fundraising in any state or combination of states subject, of course, to the qualification that these expenses are attributable to fundraising and not to other campaign related expenses.

More specifically, it is the Commission's opinion that fundraising efforts which are not targeted for particular states and/or which do not occur within close proximity of the primary elections in the states where the solicitations are made are not required to be prorated and attributed on a state by state basis. As long as the funds are being raised for the candidate's overall, national campaign and are not made for the purpose of directly influencing particular state primaries, presidential candidates and committees need not allocate such efforts, even though they might incidentally affect the outcome of primaries in particular states.

However, in those instances where the fundraising efforts are aimed at particular states and are undertaken in those states within close proximity of upcoming primary elections, the presumption is made that those efforts must be prorated and attributed to the candidate's primary efforts in those particular states. Allocation of such costs is necessary in order to maintain the integrity of the state by state expenditure limitations.

The above discussion notwithstanding, the Commission is of the opinion that the absence of a parallel exemption for fundraising expenses under the definition of contribution in 18 U.S.C. SS 591(e) precludes an individual or political committee from absorbing any candidate's fundraising expenses under the guise of the fundraising exemption. Any such payment will be subject to the limitations set out in 18 U.S.C. § 608(a) and (b) and to the prohibitions on national banks, corporations, labor organizations, and government contractors set out in 18 U.S.C. §§610 and 611. The Commission notes further that since there is also no parallel exemption for disclosure purposes [2 U.S.C.§431(e) and (f)], all amounts expended by a candidate or his/her authorized committee(s) for fundraising must be reported under 2 U.S.C.§434 even though they may not necessarily be counted against the candidate's limit in 18 U.S.C.§608(c).

This advisory opinion is issued on an interim basis pending promulgation by the Commission of rules and regulations or policy statements of general applicability.

Note: The foregoing opinion was adopted by the Commission by a 5 to 1 vote with Commissioner Tiernan voting against adoption. The dissenting opinion of Commissioner Tiernan is published as follows: