FEDERAL ELECTION COMMISSION
Washington, DC 20463

August 28, 1978

AO 1978-37

Roger H. Kimmel
540 Madison Avenue
New York, New York 10022

Dear Mr. Kimmel:

This responds to your letter of June 15, 1978, which requests an advisory opinion on behalf of the Committee to Reelect Congressman Bruce Caputo ("1978 Committee") regarding the proposed use of contributions received by the 1978 Committee to extinguish debts incurred by the Caputo for Congress Committee ("1976 Committee") in connection with Mr. Caputo's 1976 general election campaign.

In your letter you request an opinion regarding application of the Federal Election Campaign Act of 1971, as amended ("the Act"), to three questions. Specifically, you ask:

> (1) As Mr. Caputo has been designated as his party's nominee (1978) for Lieutenant Governor of the State of New York, and will not seek reelection to Congress in the 1978 elections, can the excess campaign funds remaining from the 1978 Committee be used to liquidate debts incurred by the 1976 Committee?
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> (2) The 1978 Committee can identify those contributors who gave the maximum lawful contributions to the 1976 Committee's general election account. If the transfer from the 1978 Committee to the 1976 Committee is permissible, may the 1978 Committee treat contributions received from individuals giving the maximum allowable contributions to the 1976 Committee as having been used for 1978 Committee expenses, thereby permitting the transfer of the balance of 1978 Committee funds to the 1976 Committee? Is the consent of contributors required for this proposed designation and transfer?
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> (3) In the event that the transfer of funds from the 1978 Committee to the 1976 Committee for the purpose of liquidating debts is not permissible, the 1978 Committee will consider a transfer to Mr. Caputo's campaign for State office. You ask whether this alternative is permissible and whether the consent of the contributors would be required.

Regarding your first question, 2 U.S.C. 439a and Commission regulations at 11 CFR 113.2(c) permit the use of excess campaign funds for any lawful purpose. Further, the Commission's regulations do not limit the transfer of funds between a candidate's current principal campaign committee and a previous campaign committee of the same candidate. See 11 CFR 110.3(a)(2)(iv). Thus it is permissible for campaign funds, in excess of those the candidate decides are needed to defray expenditures (see 11 CFR 113.1(e)), remaining from the 1978 Committee to be transferred to the 1976 Committee and used for the purpose of retiring debts and obligations of that Committee. But see the following response to question (2).

Your second question, regarding the manner which transferred contributions must be accounted for, raises the question of whether funds of the 1978 Committee, if transferred to the 1976 Committee, must be counted against the 1976 general election limits imposed by 2 U.S.C. 441a. The Act and Commission regulations provide that contributions made to retire debts from an election held prior to the date of the contribution may not exceed, in the aggregate, the allowable contribution limits for that election. See 2 U.S.C. 441a and 11 CFR 110.1(g)(2). However, the transfer of residual contributions made to a candidate in 1978 would not constitute a contribution to the 1976 Committee so long as the contributions were originally made to influence Mr. Caputo's 1978 election to Federal office and were received before the date on which Mr. Caputo ceased to be a candidate for Federal office in 1978 and had sufficient funds to retire 1978 campaign debts.

In a previous opinion the Commission determined that excess funds of a 1976 campaign committee could be transferred forward to the 1978 campaign committee of the same individual without application to those funds of the 1978 limits so long as all funds transferred were received prior to the date of the 1976 general election, the date on which that individual ceased to be a candidate for Federal office in 1976. See AO 1977-24, copy enclosed. The Commission believes that similar restrictions would apply to the transfer of excess funds from the 1978 Committee to the 1976 Committee. Thus the transfer of excess campaign funds from the 1978 Committee, following the retirement of its debts and obligations, to the 1976 committee would not necessitate any designation of particular contributions as being used for particular 1978 Committee expenses, since those contributions comprising the amount transferred to the 1976 Committee would not be subject to the contribution limits of 2 U.S.C. 441a with respect to the 1976 general election.

However, contributions to the 1978 Committee received after the date on which Mr. Caputo ceased to be a candidate for Federal office in 1978 (and had sufficient funds on hand to retire 1978 campaign debts) may not be regarded as made with respect to his 1978 candidacy for Federal office. Rather, they should be treated as contributions made for the purpose of retiring the debts of the 1976 Committee to the extent such debts are outstanding. They would therefore be subject to the contribution limits of 2 U.S.C. 441a with respect to the 1976 general election. Depending on circumstances evincing the contributor's intent, they may alternatively be treated as contributions for a non-Federal purpose, e.g. his campaign for State office. But see response to question (3). In addition, the Commission does not interpret the Act or its regulations as imposing any requirement on the 1978 Committee to obtain the permission of its contributors for the transfer of funds. See 2 U.S.C. 439a and Commission regulations at 11 CFR 113.1(e) and

113.2. Note also Advisory Opinion 1977-41 (copy enclosed) where the Commission allowed the use of excess campaign funds from a 1976 election to retire debts from a 1969 special congressional election without mention of any duty to obtain permission of contributors.

In response to your third question, it is the opinion of the Commission that the possible transfer of funds from the 1978 Committee to Mr. Caputo's campaign for State office is not prohibited or limited by the Act. Again, 2 U.S.C. 439a and 11 CFR 113.2(c) permit the use of excess Campaign funds for any lawful purpose. Also, the Commission has previously determined that excess campaign funds of a committee supporting a candidate for Federal office may be used to retire debts incurred in a previous gubernatorial campaign of that candidate in the absence of any applicable State or Federal law outside the jurisdiction of the Commission which would make this unlawful. See Advisory Opinion 1977-48 (copy enclosed). The situation you present in your third question is indistinguishable in all material aspects from that treated in the cited opinion.

The Commission emphasizes that State regulation of funds received by a campaign for State office from a campaign for Federal office may not be avoided by relying on the Federal preemption provisions of 2 U.S.C. 453 and Commission regulations. 11 CFR 108.7. As previously stated the Commission does not view the Act or its regulations as imposing any requirement on the 1978 Committee to obtain the permission of its contributors for the transfer of funds to Mr. Caputo's campaign for State office. However, the application of any State law requiring contributor permission in this situation would not be superceded or preempted by the Act or regulations of the Commission.

All transfers of funds in the factual situations presented herein would, of course, require the appropriate reports to be filed under 2 U.S.C. 434 and Part 104 of the commission's regulations by both the 1976 and 1978 Committees. The Commission expresses no opinion as to any State or Federal tax ramifications of the described transactions or the application of any State election laws since those issues are not within its jurisdiction. In addition, the Commission expresses no opinion as to possible application of rules of the House of Representatives to the described transactions.

This response constitutes an advisory opinion concerning application of a general rule of law stated in the Act, or prescribed as a Commission regulation, to the specific factual situation set forth in your request. See 2 U.S.C. 437f.

Sincerely yours,

(signed)
Joan D. Aikens
Chairman for the
Federal Election Commission

Enclosures