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FEDERAL ELECTION COMMISSION

1325 K STREET N.W.  
WASHINGTON, D.C. 20463

July 19, 1979

Honorable Toby Moffett  
United States House of Representatives  
Washington, D.C. 20515

Re: Advisory Opinion Request  
1978-62

Dear Mr. Moffett:

This is in response to your letter of August 15, 1978, as supplemented by your letter and enclosures of November 3, 1978, requesting an advisory opinion concerning application of the Federal Election Campaign Act of 1971, as amended ("the Act"), to certain activities of Public Citizen, Inc.

Your letter describes Public Citizen, Inc. as a non-profit, tax exempt corporation without stock or members, that is established to promote and publicize issues of importance and interest to consumers. It engages in litigation, lobbying and education projects all of which are "limited to the advocacy of its views on specific consumer issues." You explain that the purpose behind Public Citizen is to promote and publicize issues of importance and interest to consumers. According to your letter, Public Citizen, Inc. does not have a PAC, does not endorse any particular candidate, and does not advocate the election or defeat of any candidate.

You further state that Public Citizen proposes to undertake certain activities in order to draw public and media attention to consumer issues and stimulate discussion on those issues, as well as inform the public of various positions regarding consumer issues. Specifically, Congress Watch, a division of Public Citizen, proposes to compile and distribute to the public a voting chart covering votes of all Members of Congress on specific issues of interest to Public Citizen and compare their vote with Public Citizen's position; to prepare and distribute profiles of twelve Members of Congress involved in issues of interest to Public Citizen, and to distribute and publicize results of a questionnaire sent to Congressional and Senatorial candidates regarding consumer issues. According to your letter none of these materials, nor the press releases issued in conjunction with them, when distributed will

contain any statement expressly advocating the election or defeat of any candidate. The focus of each activity is consumer issues which Public Citizen was established to promote. In your letter you ask (i) whether or not the Act requires Public Citizen "to report any of these activities as independent political 'expenditures' under 2 U.S.C. §434(e)." and (ii) whether the Act prohibits these activities as corporate "expenditures" under 2 U.S.C. §441b.

Your letter of November 3, 1978, with enclosures establishes that Public Citizen's voting chart involves you among others: your voting record as a Member of the 95th Congress is presented and Public Citizen's chart was distributed within the 6th Congressional District of Connecticut which you represent at a time when you were a candidate for re-election. However, the Commission has concluded that the facts presented in your request, as supplemented, do not indicate sufficiently substantial involvement by you (or others authorized by you) in Public Citizen's described activities so as to permit you to request and receive an advisory opinion under 2 U.S.C. §437f. The cited section authorizes you, as either a holder of elective Federal office or a candidate for Federal office, to request and receive an advisory opinion on a specific transaction or activity which opinion you may then act and rely upon "in good faith" without being "subject to any sanction provided by" the Act. 2 U.S.C. §437f(b); also see 11 CFR 112.1, 112.5. This "good faith" reliance protection means that persons requesting an opinion must establish some potential jeopardy of committing a violation themselves in order to satisfy the standing requirement.

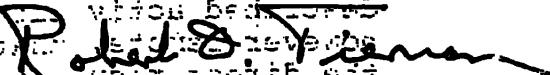
On its face your request states that you are asking for an advisory opinion concerning activities of Public Citizen "as a Member of Congress at the request of Public Citizen and solely to satisfy the standing requirement of [2 U.S.C. §437f]." The cited section specifically limits the class of persons who may request and receive an advisory opinion. Public Citizen is not within the enumerated class since it is not a candidate for or a holder of elective Federal office, nor a national committee of a political party, nor an acknowledged political committee. You do not set forth any facts or make any other representation establishing a basis for the Commission to conclude that by virtue of the described activities of Public Citizen there is any possibility, however remote, that you may be in violation of the Act as the direct result of Public Citizen's activity and thus could properly obtain an advisory opinion concerning application of the Act or Commission regulations to you in that factual situation.

The issue of reporting obligations for Public Citizen under 2 U.S.C. §434(e) by virtue of the described activities is not a matter in which you could be implicated based on the facts as presented since, by definition, reporting duties under §434(e) only attach to the person who makes "contributions or independent expenditures expressly advocating the election or defeat of a clearly identified candidate, other than by contribution to a political committee or candidate, in an aggregate amount in excess of \$100 during a calendar year...". 2 U.S.C. §434(e) (1); see also 2 U.S.C. §§431(p), 441a(a) (7) and Commission regulations at 11 CFR 109 et seq. By contrast, your reporting obligations and/or those of your principal campaign committee arise under the Act and regulations with respect to contributions received and expenditures made by you and/or your committee. See 2 U.S.C. §§431(e), 431(f) and 434.

Similarly, the application of 2 U.S.C. §441b to expenditures by Public Citizen incident to its described activities could only implicate you, and thus give you standing for an advisory opinion, if there was some indication that those expenditures were contributions in kind to you as a candidate or to your campaign committee. Under 2 U.S.C. §441b(a) it is unlawful "for any candidate, political committee, or other person knowingly to accept or receive any contribution prohibited by [§441b(a)]." Your request, as supplemented, does not disclose any facts which present a basis for concluding that any of Public Citizen's described activities and their financing would constitute prohibited contributions to you under 2 U.S.C. §441b. See Advisory Opinions 1978-18 and 1978-52, copies enclosed.

The Commission appreciates the difficulty faced by organizations like Public Citizen and others who though subject to penalties under the Act are not permitted to receive advisory opinions because they are not one of the persons enumerated in 2 U.S.C. §437f; nevertheless the Commission is bound by the clear language of the statute. The Commission has recommended to the Congress that §437f be amended to allow any person subject to the Act to request an advisory opinion. FEC Annual Report 1978, page 44.

Sincerely yours,

  
Robert O. Tiernan  
Chairman for the  
Federal Election Commission

Enclosures