



FEDERAL ELECTION COMMISSION
Washington, DC 20463

July 16, 1979

CERTIFIED MAIL,
RETURN RECEIPT REQUESTED

ADVISORY OPINION 1979-17

Republican National Committee
310 First Street, S.E.
Washington, D.C. 20003

Attention: James T. Lynn
General Counsel

Gentlemen:

This refers to a letter dated April 23, 1979, and submitted by James T. Lynn on behalf of the Republican National Committee ("RNC"), which requests an advisory opinion concerning application of the Federal Election Campaign Act of 1971, as amended ("the Act"), to a "credit card program" under consideration by the RNC.

The letter describes the background of the RNC proposal as arising from a new development in the credit card industry known as the "affinity group" concept. The concept involves a relationship between a bank that issues credit cards such as the VISA card, and an organization (e.g. fraternal, charitable, religious, or professional) which endorses or sponsors the bank's credit card among its membership. The request explains that under the proposed program the RNC as a sponsoring organization, i.e. affinity group, would provide:

the prestige of its name, the loyalty of its members, the endorsement of its leadership and the use of its membership lists or other lists which it compiles or maintains. As a result, the issuing bank is able to expand its card holder base and is therefore prepared to compensate the organization for its assistance.

The request sets forth a description of the plan which is being considered by the RNC and several banks, both national banks and state chartered. For purposes of this opinion the Commission understands that the State chartered banks are corporations under State law since the particular focus of the request is the applicability of 2 U.S.C. 441b which prohibits political contributions or expenditures by national banks, corporations and labor organizations in

connection with any Federal election unless made by a "separate segregated fund" of one of the specified entities. The plan is described, in pertinent part, as follows:

Each Republican meeting the credit approval criteria would receive a letter signed by the Chairman of the Republican National Committee inviting that person to accept a Republican sponsored credit card. An acceptance form provided with the letter must be signed by the person requesting the credit card and returned to a post office box maintained by the bank. This mailing would be paid for by the card-issuing bank in accordance with normal commercial procedures in establishing a new credit card program.

* * *

The Republican National Committee has been in contact with several potential issuing banks and a number of proposals have been advanced. All proposals have contained essentially the same basic administrative provisions, but differ with respect to compensation arrangements. The compensation options fall into the three general categories set forth below:

Option A: In return for the use of the Republican National Committee's name, prestige, endorsement and lists, the bank will provide no compensation beyond the benefit of increased member identification and, periodically, the exclusive use of the monthly statement as a vehicle for mailing RNC educational/promotional materials to RNC credit card holders. This mailing right is described in more detail in paragraph 11 below.

Option B: For each card issued by the bank as a result of the initial solicitation, the Republican National Committee would receive a one-time payment of \$2.50. For accounts which have never been active, and would therefore ordinarily not be reissued by the bank, the Republican National Committee may fund a separate mailing; this mailing would be at the option of the bank and under the bank's control. Accounts activated as a result of this mailing would result in a one-time payment to the Republican National Committee of \$2.50. Finally, the Republican National Committee would have the right to make periodic use of the monthly billing statement as in Option A.

Option C: The bank would remit to the Committee, on a monthly basis, a negotiated fee representing either a percentage of total card holder sales volume, or a percentage of the finance charge balance on Republican National Committee credit card accounts. This type of fee is paid to non-political groups under similar programs. This option would also include the right to make periodic use of the monthly billing statement as in Option A.

* * *

Should a card holder elect to make a contribution to the Republican National Committee through the use of Republican National Committee credit card, the issuing bank would charge the Republican National Committee a negotiated fee to compensate the bank for the processing of that contribution.

As indicated above the Republican National Committee would have the exclusive right, upon a minimum of three months notice to the bank, to include Republican National Committee educational/promotional materials with the regular monthly statements sent by the bank to Republican sponsored credit card holders having outstanding credit card balances. The Republican National Committee would bear all expenses incurred with the preparation of such materials and would supply those materials to the bank for inclusion in the monthly statement. The bank would assume all costs of mailing these materials as part of the regular monthly statements to card holders.

If, as appears to be the case, any income from this program would be classified as "non-exempt functions income" under the provisions of 26 U.S.C. 527, the Republican National Committee will pay any taxes that may be due on these amount and deposit the balance in the Republican National Committee-Expenditures account.

After describing the plan, Mr. Lynn states that the terms of the agreement "would be arrived at after considerable negotiation and would represent a bargain struck at arm's-length by the parties." It is asserted by counsel that consideration and benefits flow back and forth between the bank and RNC. The fees paid to the RNC and the right to include RNC "educational/promotional materials" in the regular monthly statements sent by the banks to persons holding RNC sponsored credit cards would, counsel says, constitute compensation for services provided by the RNC to acquire new credit card customers for the banks. The banks would expect to increase their "card holder base", and the RNC would expect "to increase its identity with its members" as well as increase its "fundraising potential."

An advisory opinion is requested whether the described plan "complies with" the Act. The RNC requests specific treatment of the question whether the card issuing banks would be viewed as making "contributions", as defined in the Act, to the RNC by virtue of the proposed compensation options.

Whether or not political contributions occur as a result of the credit card program raises the specific issue of the applicability of 2 U.S.C. 441b since the banks making payments to the RNC, and permitting their monthly credit card statements sent at bank expense to include RNC political materials, are either national banks or corporations under State law. As provided in

441b(a), national banks¹ are prohibited from making a "contribution or expenditure in connection with any election [including a primary, convention, or caucus] to any political office." Commission regulations at 11 CFR 114.2(a) explain that any political office includes any local, State or Federal office. Corporations chartered under State law are prohibited from making any "contribution or expenditure" in connection with any Federal election. 2 U.S.C. 441b(a); also see 11 CFR 114.2(b) and Advisory Opinion 1978-102 (copy enclosed). The phrase "contribution or expenditure" is defined for purposes of 441b to include:

any direct or indirect payment, distribution, loan, advance, deposit, or gift of money, or any services, or anything of value (except a loan of money by a national or State bank made in accordance with the applicable banking laws and regulations and in the ordinary course of business) to any candidate, campaign committee, or political party or organization, in connection with any election to any of the offices referred to in this section.

Certain exceptions are contained in 441b(b)(2) through (b)(4), but are not relevant to this request.² Significantly, the quoted language from 441b(b)(2) has a narrow exception for loans made by national or State banks in accordance with banking laws and in the ordinary course of business.³ There is no other explicit exception from 441b(a) that would permit a political party organization to view payments from a corporation (or national bank) as consideration for services rendered rather than as prohibited contributions.

However, the Commission in its regulations has recognized that funds of a political committee could be invested and earn income which would not be considered a "contribution" by the payor, although such income would be reportable as a miscellaneous receipt. See 11 CFR 103.3(a) and 104.2(b)(7). Income that a political committee might produce using tangible assets--cash--because it perceives itself as under a quasi-fiduciary obligation to its contributors to manage contributed funds in a prudent manner, is quite distinguishable from the use of the political organization's goodwill and the reputation of its national leadership to promote a commercial enterprise in exchange for a share of the income realized or anticipated by the commercial enterprise. The situation presented here is also materially different from the sale or lease of the RNC's contributor list⁴ at normal and usual charge for such lists. Compare Advisory Opinion 1979-18, copy enclosed.

¹ Corporations organized by authority of Congress are treated the same as national banks.

² Other exceptions in the Act are relevant and are discussed below.

³ The fact that loans to political parties in connection with Federal elections by corporations (other than national or State banks) are not excluded from the 441b definition of "contribution or expenditure" is significant since it is conceivable, if not likely, that loan transactions could be negotiated at arms length with bargained for consideration provided by persons other than national or State banks.

⁴ The opinion request letter of April 23, 1979, states that the lists which will be used for soliciting persons to accept a Republican VISA card, are registered voter lists (published and available to the general public in many states), "membership lists, and other lists secured and/or maintained by the RNC." In testimony of January 9, 1979, before the Senate Banking Committee, William E. Brock, Chairman of the RNC, stated that the list to be used in New York State was a registered voters list which is a public list "available to anybody [for purchase]." Hearings on VISA card plan by Republican and Democratic parties before Senate Committee on Banking, Housing, and Urban Affairs, 95th Cong., 2d Sess. 5 (1979) (statement of William E. Brock).

The Commission has previously considered the participation of corporations in fundraising activities of political committees. In Advisory Opinion 1976-50, a corporation was authorized to produce and market a shirt bearing a candidate's name. The corporation would pay all expenses to produce and sell the shirts and would remit \$1 of the \$7.95 purchase price as a political contribution by the purchaser to the candidate's campaign. The Commission concluded that the proposed commercial arrangement was prohibited by 2 U.S.C. 441b in that the corporation was advancing funds to produce and market campaign materials with a portion of the proceeds paid over to the candidate. Prior to AO 1976-50, the Commission in considering a political fundraising device having commercial aspects, recognized that the fact a person (contributor) received something of value in exchange for a political contribution did not change the character of the activity from a political contribution into a commercial sale/purchase transaction. Advisory Opinion 1975-15; see also the Commission's response to Advisory Opinion Request 1976-22, copies enclosed. Furthermore, after analyzing the question of whether amounts paid by corporate advertisers in convention programs⁵ and other publications of a political party could be treated as commercial transactions, rather than political contributions, the Commission held that such proceeds were contributions and prohibited under 2 U.S.C. 441b, although they could be placed in a separate bank account of a non-Federal political party committee for use only in State and local elections if permitted by State law. Advisory Opinion 1978-46, copy enclosed.

Based on the foregoing the Commission concludes that any payments made and valuable services (e.g. use of monthly statements to credit card holders for sending RNC political materials) provided by card issuing banks, whether national banks or incorporated State banks, to the RNC would constitute contributions and thus be prohibited by 2 U.S.C. 441b except as discussed hereafter. The Commission does not view the RNC proposal as presenting the possibility of characterizing the amounts received by the RNC, and the valuable services rendered by the banks to the RNC, as bargained for consideration rather than political contributions.

The Act does, however, provide that certain receipts, (which would otherwise be contributions) are not treated as contributions. Therefore, if and to the extent that amounts received by the RNC under Options A, B or C of the proposal are separately accounted for, segregated, and deposited in bank accounts opened and used only for the excepted activity, they would not be prohibited contributions or expenditures under 2 U.S.C. 441b. One exception is donations (and other specified receipts) to a national committee of a political party "specially designated for the purpose of defraying" costs incurred for "construction or purchase of any office facility" not acquired to influence "the election of any candidate in any particular election for Federal office." These receipts are, however, reportable. 2 U.S.C. 431(e)(5)(H). These payments may be accepted by the RNC from national banks and corporations pursuant to any of

⁵ The Commission considered and rejected a proposed regulation that would have permitted corporations to place advertisements in convention programs of political parties. Federal Election Regulations, Communication from the Chairman, FEC, House Document No. 95-44, page 102. In the very limited context of national nominating conventions of political parties, the Commission in its regulations has permitted certain specified corporate donations and expenditures but these regulations are inapposite to this opinion request. See 11 CFR 121.4 through 121.9.

the options since they are exempt from the prohibitions of 2 U.S.C. 441b. See 11 CFR 114.1(a)(2)(ix).

In addition, the Commission has recognized in numerous advisory opinions that political party organizations on the State and local level may raise and spend funds that are not to influence, or in connection with, Federal elections. Advisory Opinions 1978-10, 1978-28, 1970-46, 1978-50 and 1978-91 (copies enclosed). Commission regulations at 11 CFR 102.6 prescribe the method for separating Federal election funding from the financing of State and local elections. Section 102.6(a)(2) by its terms refers to "[a]ny political committee" and thus would permit the RNC to establish and administer separate, segregated bank accounts through an auxiliary organization of the national party which accounts could be used for the deposit and disbursement of funds designated specifically and exclusively to finance national party activity limited to influencing the nomination or election of candidates for public office other than elective "Federal office." See 2 U.S.C. 431(c). Such a fund would not be subject to the Act in any respect except that contributions could not be received into it from national banks, corporations chartered by Congress, and foreign nationals. The prohibitions on those entities and persons extend to any election for any political office. 2 U.S.C. 441b(a), 441e(a); also see 11 CFR 114.2(a) and 110.4(a). Accordingly, the RNC could accept and spend proceeds from incorporated State banks, but not from National banks, under any of the three described options, for the exclusive and limited purpose of influencing the nomination or election of candidates for nonfederal office. This activity may, however, be subject to relevant State law.

The possibility that compensation option A of the proposal might be used by itself, and not in combination with options B or C, warrants further comment. Option A would give the RNC an "exclusive right" to include RNC "educational/promotional materials with the regular monthly statements sent by the bank to Republican sponsored credit card holders having outstanding credit card balances." The bank would insert the RNC materials in the monthly statements to RNC card holders and pay all costs of mailing the "materials as part of the regular monthly statements to card holders." These costs would apparently exceed those ordinarily incurred by the bank for mailing monthly credit card statements since bank personnel or equipment (or both) would be used to place the RNC materials in envelopes. Larger envelopes as well as additional postage may also be needed thereby increasing bank costs as a result of including the RNC materials. The term "contribution" as defined in both 2 U.S.C. 431(a) and 441b(b)(2) includes anything of value, whether goods or services. Commission regulations provide that "anything of value" includes facilities, equipment, supplies, personnel, and advertising provided without charge or at a charge below the usual and normal charge. 11 CFR 100.4(a)(1)(iii); also see 11 CFR 114.1(a)(1).

It has been concluded previously that the described proposal may not be generally viewed as a commercial, contractual undertaking between the RNC and the card issuing banks. Accordingly, the mailing of RNC materials at the expense of the card issuing banks is as much a political contribution, albeit in different form, as are the payments described in options B and C of the RNC proposal. However, since the 441b prohibition on corporate contributions applies to those made in connection with elections to Federal office as distinguished from State and local office, the Act would not apply to the mailing of RNC materials, at the expense of incorporated State banks but not National banks, pertaining specifically and exclusively to influencing the

nomination or election of persons to nonfederal office. National banks, as discussed above, are subject to 441b(a) prohibitions with respect to contributions in any election and thus may not finance RNC mailings limited to nonfederal elections.

The foregoing conclusions regarding RNC mailings in monthly statements sent by card issuing banks to RNC cardholders also applies to expenses incurred by the banks to solicit, using letters signed by RNC Chairman Brock, persons "to accept a Republican sponsored credit card." These expenses would be contributions in kind to the RNC unless⁶ the RNC proposal was structured and administered in a manner that would otherwise avoid the occurrence of prohibited national bank or corporate contributions.

It should be apparent that the issues in this opinion arise because of the payments and services which are proposed to be made and provided by card issuing banks to the RNC. Banks are not precluded by the Act or Commission regulations from soliciting any category of persons to accept their credit card in circumstances that would not otherwise involve political contributions or expenditures under the Act. Furthermore, the use of a credit card to make a political contribution has been permitted, subject to certain conditions, by the Commission in Advisory Opinion 1978-68, copy enclosed.⁷

The Commission expresses no opinion concerning application of the Internal Revenue Code to the described plan since, except for Chapters 95 and 96 which are not relevant to this request, the Commission has no jurisdiction or authority with respect to the tax code. Nor may the Commission express any opinion regarding application of any State law in the event the RNC proceeds with the credit card program to raise funds for nonfederal candidates.

This response constitutes an advisory opinion concerning the 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)

Robert O. Tiernan
Chairman for the
Federal Election Commission

Enclosures

⁶ See previous discussion of circumstances wherein contributions would not result.

⁷ Commission regulations regarding the matchability of contributions to presidential candidates seeking nomination provide that contributions by credit card transaction are not matchable, 9034.3(c) at 44 Fed. Reg. 20345 (April 4, 1979).