



FEDERAL ELECTION COMMISSION
Washington, DC 20463

March 12, 1980

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

ADVISORY OPINION 1979-80

J. Curtis Herge
Sedam & Herge
7600 Old Springhouse Road
McLean, Virginia 22102

Dear Mr. Herge:

This responds to your letter of December 21, 1979 requesting an advisory opinion on behalf of the National Conservative Political Action Committee ("NCPAC"), a multicandidate political committee, concerning application of the Federal Election Campaign Act of 1971, as amended (the "Act") and Commission regulations to the utilization by NCPAC of consultants and vendors in making independent expenditures.

The request asks three general questions concerning NCPAC's ability to use certain vendors while making independent expenditures. The issues in the general questions are then presented through a number of factual situations which raise the further question of whether a certain activity results in an independent expenditure or a contribution in-kind. The general questions asked are:

1. Whether, in light of the independent expenditure regulations, NCPAC is prohibited from engaging a particular consultant or vendor of goods or services, in connection with making independent expenditures advocating defeat of a clearly identified candidate, if that consultant or vendor has also been separately engaged (1) by an opponent of that candidate, or (2) by a potential opponent of that candidate?
2. Does NCPAC have an affirmative duty to inquire of prospective consultants whether or not they have been so engaged?
3. Must NCPAC impose a contractual restriction on a consultant or vendor regarding for whom they may provide services or goods?

Since the request then presents a series of situations, each specific situation will be addressed separately in turn. However, an initial general discussion of the independence element of an independent expenditure is necessary to describe the overall context of the request.

As you are aware, an independent expenditure is defined both at 2 U.S.C. 431(17) and 11 CFR 109.1. Specifically:

"Independent expenditure" means an expenditure by a person for a communication expressly advocating the election or defeat of a clearly identified candidate which is 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 any agent or authorized committee of such candidate. 11 CFR 109.1(a)

For an expenditure to qualify as independent, each element in that definition must be satisfied.

It appears from the request that NCPAC is concerned about the last element in that definition: (i) particularly, whether a possible agency relationship between the vendor or consultant and candidate might jeopardize the independence of NCPAC's expenditure if NCPAC uses that same vendor or consultant; and (ii) generally, whether the engagement of such vendor or consultant by a candidate or potential candidate precludes NCPAC's use of the vendor or consultant to make independent expenditures.

Commission regulations at 11 CFR 109.1(b)(4) address the last element necessary for an independent expenditure and explain that the clause:

"Made with the cooperation or with the prior consent of, or in consultation with, or at the request or suggestion of, a candidate or any agent or authorized committee of the candidate" means:

(i) Any arrangement, coordination, or direction by the candidate or his or her agent prior to the publication, distribution, display, or broadcast of the communication.
An expenditure will be presumed to be so made when it is –

(A) Based on information about the candidate's plans, projects, or needs provided to the expending person by the candidate, or by the candidate's agents, with a view toward having an expenditure made;

(B) Made by or through any person who is, or has been, authorized to raise or expend funds, who is, or has been, an officer of an authorized committee, or who is, or has been, receiving any form of compensation or reimbursement from the candidate, the candidate's committee or agent;

The term "agent" is then defined in 11 CFR 109.1(b)(5), as follows:

"Agent" means any person who has actual oral or written authority, either express or implied, to make or to authorize the making of expenditures on behalf of a candidate, or means any person who has been placed in a position within the campaign organization where it would reasonably appear that in the ordinary course of campaign-related activities he or she may authorize expenditures.

It is clear from these regulations that use of an agent of a candidate or candidate's campaign committee by a political committee to make independent expenditures, either for or against that candidate or any opponent of that candidate, raises the presumption that the expenditure is made with the cooperation or prior consent of, or in consultation with, or at the request or suggestion of, a candidate or any agent or authorized committee of such candidate. Thus, use of an agent is presumed to destroy the independence of the expenditure and may result in an in-kind contribution. See 11 CFR 109.1(b)(5) and 109.1(c). However, as the regulations indicate, an agency relationship is not the only circumstance which affects the independence of an expenditure. According to Commission regulation 109.1(b)(4)(i)(A) and (B) quoted above, an expenditure is presumed not to be independent if it is based on information about the candidate's plans, projects or needs provided to the expending person by the candidate, or candidate's agents, with a view toward having an expenditure made, or if the expenditure is made by or through persons falling into specified categories.

Thus, if an agency relationship exists or existed, or the expenditure is based on information provided by the candidate or candidate's agent, or the expenditure is "made by or through" a person described in 109.1(b)(4)(i)(B), the presumption is that the expenditure is not independent and the result may be an in-kind contribution to the candidate by the person making the expenditure. The Commission notes that as regards the following specific situations, an expenditure which appears to be independent on the facts presented may not in fact be so if any of the above-mentioned indicia were indicated.

The nine specific situations and proposed answers are stated in sequence.

Situation 1. NCPAC proposes to engage an advertising firm for the purpose of designing the layout and text of print advertisements advocating the defeat of a candidate for the Democratic nomination for President. The firm would do all the research and creative work involved in designing the advertisements. The advertising firm has previously been engaged by the authorized campaign committee of a candidate for the Republican nomination for President. Is the advertising firm an "agent" as defined in 11 CFR 109.1(b)(5)? Would the response to that question be different if the same advertising firm renders a distinctly different type of service to the authorized campaign committee of the candidate for Republican nomination for Presidents e.g. operates and manages a telephone bank for the purpose of soliciting contributions to the committee?

Answer 1. The request does not present sufficient information for the Commission to determine whether the advertising firm is an agent, as defined in 11 CFR 109.1(b)(5), of the Republican candidate. Moreover, the situation presented concerns an advertising firm engaged to do work for what in 1980 are two separate, distinct races; that is, provide services for NCPAC to make independent expenditures advocating the defeat of a candidate for the Democratic nomination for President when the firm has previously provided services to the campaign committee of a candidate for the Republican nomination for President. Since these are two distinct races the Democratic candidate and the Republican candidate are not opponents at this point. Thus, the Commission concludes that it does not appear from these facts that the prior engagement by the Republican candidate's committee of the firm would preclude NCPAC from engaging the firm to make independent expenditures in opposition to the Democratic Candidate for nomination. If, however, this Republican candidate for nomination becomes the nominee, NCPAC would presumably be precluded from engaging the advertising firm to make independent expenditures during the general election. This same response applies to the activity raised in your request as an example of a different type of service.

Situation 2. NCPAC proposes to engage as a consultant, Mr. A, an employee of an individual who may become a candidate for the Republican nomination for election to the Senate. NCPAC is making independent expenditures advocating the defeat of a candidate for the Democratic nomination for election to the Senate in the same state and seeks the services of Mr. A for counsel on the political issues in the state. Is Mr. A an "agent" as defined in 11 CFR 109.1(b)(5)? If the employer of Mr. A becomes a candidate for the Republican nomination, will Mr. A then be precluded from working for his employer-candidate or for NCPAC?

Suppose Mrs. A. possesses the same political acumen as her husband and NCPAC wishes to engage her as a consultant rather than Mr. A. Is Mrs. A an "agent," as so defined, because of her marriage to Mr. A?

Answer 2. Since Mr. A's employer is not a candidate, but merely a potential candidate, Mr. A could not be an "agent" as defined in 11 CFR 109.1(b)(5). If the employer does become a candidate and Mr. A is employed by the candidate in some capacity as an agent, a political consultant, advisor, or campaign worker, the presumption of Commission regulations would preclude NCPAC from making independent expenditures in opposition to that candidate's opponent if NCPAC employed Mr. A. If Mr. A is not employed by the candidate in some capacity as an agent, a political consultant, advisor, or campaign worker, NCPAC could employ Mr. A to make independent expenditures as long as the other criteria for establishing and maintaining independence are met. (See 11 CFR 109.1(b)(4) and (5), and particularly 11 CFR 109.1(b)(4)(i)(A)).

In response to your question concerning Mrs. A, the Commission is of the opinion that Mrs. A would not be an "agent" merely due to her marriage to Mr. A. If, however, Mrs. A participates or assists in Mr. A's political consultant services or has a business relationship with Mr. A concerning his political services, NCPAC is under the same constraints in hiring her as it is in hiring Mr. A.

Situation 3. NCPAC proposes to engage a polling firm for the sole purpose of conducting a poll of voter opinions in a state in which it is making independent expenditures advocating the defeat of a candidate for the Democratic nomination for election to the Senate. The polling firm has been previously employed by the authorized campaign committee of a candidate for the Republican nomination for election as President. Is the polling firm an "agent" as defined in 11 CFR 109.1 (b)(5) which, because of NCPAC's independent expenditures in the Presidential campaign, may not be engaged by NCPAC?

Another polling firm which NCPAC proposes to engage has been previously employed by the authorized campaign committee of a candidate for the Republican nomination for election to the Senate in State A. NCPAC is making independent expenditures advocating the defeat of candidates for the Democratic nomination for election to the Senate in States A, B and C. May NCPAC engage that firm to conduct polls in connection with its independent expenditure program in all three states? May it engage that firm to conduct polls in States B and C, but not in State A? Would the response to those questions be different for the general election campaign?

Answer 3. The request does not provide sufficient information for a determination of whether or not the polling firm is an "agent", as defined in 11 CFR 109.1(b)(5), of the Republican Presidential candidate. However, the Commission does conclude that if the polling activity does not include any communication expressly advocating election or defeat of a clearly identified candidate, NCPAC may conduct its polling through the same polling firm that was used by the Republican candidate for nomination for President or the Senate candidate for nomination in State A. The cost of the polls to NCPAC is merely an operating expense. This answer applies to both the primary and general election campaigns. Even if the poll does contain an express advocacy communication, thereby causing the cost of the poll itself to be an independent expenditure, NCPAC's ability to use the polling firm in all three states during the Senate primary campaign would not be affected. If, however, the Republican Senate candidate who used the firm becomes the nominee in State A, NCPAC would presumptively be precluded from using the polling firm in its independent expenditure program for the general election in State A. NCPAC could use that firm in States B and C.

Situation 4. NCPAC proposes to engage a media time-buyer to purchase radio and television time to show commercials advocating the defeat of a candidate for the Democratic nomination for election to the Senate. The media time-buyer would have the authority to select the licensees and time segments. Following the selection of the Republican nominee for the election to the same office, the media time-buyer hopes to be engaged by that nominee. Must NCPAC impose a contractual obligation on the media time-buyer not to accept such employment? If not, is the media time-buyer free to accept employment by that nominee and continue to be employed by NCPAC? Suppose the media time-buyer, an individual, volunteers his or her professional services to the Republican nominee.

Answer 4. NCPAC need not impose a contractual obligation on the media time-buyer regarding other employment. However if the time-buyer does go to work for the Republican nominee, the time-buyer's continued work for NCPAC would compromise NCPAC's ability to make independent expenditures in opposition to the Democratic candidate. This results from Commission regulation 109.1(b)(4)(i)(B) and the time-buyer's authority to expend funds. If the time-buyer volunteers his or her professional service to buy media time, the result would be the same: NCPAC's ability to make independent expenditures would be compromised if the time-buyer works for NCPAC while simultaneously doing volunteer service for the Republican nominee.

Situation 5. NCPAC proposes to engage a direct-mail fund raising firm to assist in raising funds for use in its independent expenditure program. As part of its services, the direct-mail firm designs the solicitation letters and selects the mailing lists to be used in mailing the letters. Is NCPAC under an obligation to inquire, before engaging the firm, whether or not it has been previously engaged by potential or actual opponents of those candidates who are the subject of NCPAC's independent expenditure program?

Suppose NCPAC has a previously existing exclusive agency contract with a direct-mail firm and that firm subsequently accepts as a client a potential or actual opponent of a candidate who is the subject of NCPAC's independent expenditure program. May NCPAC continue to utilize the services of the firm?

Answer 5. If the solicitations designed and used by the direct-mail firm advocate the election or defeat of a clearly identified candidate, the presumption of Commission regulations would preclude NCPAC's use of the firm if it was previously engaged in the current campaign by opponents of those candidates who are the subject of NCPAC's independent expenditure program. Thus, NCPAC should inquire. If, however, the solicitations do not advocate election or defeat of the clearly identified candidate the cost of the direct-mail firm is an operating expenditure, not an independent expenditure, and inquiry is not necessary. The response to the second question is no. If the firm solicits by communications which advocate election or defeat of a clearly identified candidate, NCPAC would presumably be precluded from continuing to utilize the services of a firm once the firm accepts as a client an opponent of a candidate who is the subject of NCPAC's independent expenditure-program.

Situation 6. NCPAC proposes to rent mailing lists from a commercial list broker and to use those lists in mailing independent expenditure communications advocating the defeat of the Democratic nominee for election to the Senate in State A. The list broker also rents mailing lists to the Republican nominee for election to the Senate in State A. Is the list broker an "agent" as defined in 11 CFR 109.1(b)(5)? May NCPAC use that same list broker to trade or rent its mailing lists if it has knowledge that one of the other clients of the broker in the Republican nominee? Would the response to these questions be different for the general election campaign?

Answer 6. The information presented regarding this situation is insufficient to enable the Commission to make a determination as to whether the list broker is an agent of the Republican nominee for election to the Senate in State A. However, from the facts it appears unlikely that the list broker would come within the definition set forth in 11 CFR 109.1(b)(5). The Commission concludes that regardless of the identity of the broker's other clients, NCPAC could use the list broker without affecting NCPAC's ability to make independent expenditures, so long as the other criteria for independence are met. This is because the cost to NCPAC of the list broker is an operating expense. NCPAC is neither making any communication by renting the lists nor is it making an independent expenditure through the broker. The response to these questions would be the same for the general election campaign.

Situation 7. NCPAC proposes to hire an experienced political researcher and prepay his salary for the entire general election campaign period in the amount of \$5,000.00. Then, without any consultation or communication with candidate A and on the understanding that the researcher not have any communication with NCPAC during the general election campaign, send the researcher to work for candidate A at no cost to the candidate. Would such a transaction constitute an independent expenditure or an in-kind contribution to the candidate?

Suppose, as an alternative, NCPAC purchased \$5,000.00 of bumper stickers advocating the election of candidate A and - all without any communication with the candidate or his agents - mailed the bumper stickers to the candidate for such use as he may see fit. Would such a transaction constitute an independent expenditure or an in-kind contribution to the candidate?

Suppose, as a further alternative, NCPAC paid \$5,000.00 for a mass mailing advocating the election of candidate A, the letters containing a suggestion that, if the recipients agreed, a contribution should be mailed directly to candidate A. Would such a transaction constitute an independent expenditure or an in-kind contribution to the candidate if, at no time, there had been any communication between NCPAC and candidate A or his agents?

Answer 7. The Commission is of the opinion that NCPAC's plan to hire a political researcher and prepay his salary for the general election in the amount of \$5,000 and to then send the researcher to work for candidate A constitutes an in-kind contribution to candidate A by NCPAC. Donation to candidate A of \$5,000 worth of bumper stickers advocating the election of candidate A also results in an in-kind contribution. See the definition of "contribution" in 2 U.S.C. 431(8)(A).

The Commission further concludes that payment by NCPAC for a mass mailing advocating election of candidate A and containing a suggestion that a contribution be mailed to candidate A would be an independent expenditure assuming that no communication occurred between NCPAC and candidate A or his agents and that such payment otherwise satisfied the indicia in 11 CFR 109.1. See Advisory Opinion 1975-22 (copy enclosed).

Situation 8. NCPAC, as part of its independent expenditure program in opposition to the election of a candidate for the Democratic nomination for the Senate in State A, conducted a poll. Among other things, the poll results showed certain data relevant to a particular candidate for the Republican nomination for election to the Senate in State A. May NCPAC contribute the poll to the Republican candidate in accordance with 11 CFR 106.4(b)? May NCPAC engage in any communication with the Republican candidate or with the Republican party committee in State A?

Answer 8. The Commission is of the opinion that NCPAC may contribute poll results to a candidate for the Republican nomination for election to the Senate in State A if done in accordance with Commission regulation 106.4(b). This would, of course, constitute a contribution in-kind by NCPAC to the candidate's campaign committee. During the primary election period NCPAC may communicate with the Republican candidate or with the Republican party committee in State A. However, if the Republican candidate should become the nominee that communication could preclude NCPAC from making independent expenditures regarding the candidates in the general election in State A. Moreover, depending upon the communications NCPAC has with the Republican party committee in State A and the party committee's relationship with the Republican candidate, NCPAC could be precluded from then making independent expenditures in the general election in State A.

Situation 9. NCPAC is making independent expenditures in opposition to the election of a candidate for his party's nomination for election to the Senate. May NCPAC encourage another individual to seek the nomination of the same party for election to the Senate?

Answer 9. The situation presented is vague. Thus, the Commission can not give an answer as to whether or not NCPAC may "encourage" an individual to seek nomination of the same party as that of a candidate against whom NCPAC is making independent expenditures. It should be noted that activities of NCPAC on its own or in conjunction with the individual could trigger candidate status, see Commission regulation 100.2; avoidance by disavowal, 100.2(c); and, even impact on NCPAC's ability to make independent: expenditures in opposition to the present candidate. 11 CFR 109.1.

This response constitutes an advisory opinion concerning application of the Act, or regulations prescribed by the Commission, to the specific transaction or activity set forth in your request. See 2 U.S.C. 437f.

Sincerely yours,

(signed)

Robert O. Tiernan
Chairman for the
Federal Election Commission

Enclosure (AO 1975-22)