



FEDERAL ELECTION COMMISSION
Washington, DC 20463

June 25, 1980

CERTIFIED MAIL,
RETURN RECEIPT REQUESTED

ADVISORY OPINION 1980-46

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

Dear Mr. Herge:

This responds to your letter dated April 18, 1980, requesting an advisory opinion on behalf of the National Conservative Political Action Committee ("NCPAC") with regard to application of the Federal Election Campaign Act of 1971, as amended, ("the Act") and Commission regulations to a proposed mass mailing by NCPAC.

You state that NCPAC is a multicandidate political committee which as part of its activities makes independent expenditures expressly advocating the election of certain clearly identified candidates. NCPAC proposes to pay the expenses associated with a mass mailing advocating the election of a clearly identified candidate. The contemplated mailing would contain a suggestion that a contribution, presumably in the form of a check drawn to the order of the candidate's campaign committee, be mailed to NCPAC. Upon receiving such contributions, NCPAC proposes to compile a list of names and addresses of the contributors and then forward the contributions to the candidate's principal campaign committee as required by 11 CFR 102.8, as amended at 45 Fed. Reg. 15106 (March 7, 1980), effective April 1, 1980.

Specifically, you ask:

- (1) Whether, assuming that no communication occurred between NCPAC and the candidate or his agents and that all other indicia of 11 CFR 109.1 were satisfied, the proposed activity constitutes an independent expenditure by NCPAC?

(2) Is NCPAC required to report the proposed activity in accordance with 11 CFR 110.6(c)?

(3) Are the provisions of 11 CFR 110.6(d)(1) or 11 CFR 110.6(d)(2) applicable to the proposed activity by NCPAC?

As you are aware, the Act defines the term "independent expenditure" as "an expenditure by a person expressly advocating the election or defeat of a clearly identified candidate which is made without cooperation or consultation with any candidate, or any authorized committee or agent of such candidate, and which is not made in concert with, or at the request or suggestion of, any candidate, or any authorized committee or agent of such candidate." 2 U.S.C. 431(17); see also 11 CFR 109.1, *id.* at 15118. For an expenditure to be independent, each element of the definition must be satisfied. With respect to your first question, the Commission concludes that expenditures made by NCPAC to pay the expenses of the described mass mailing would not constitute independent expenditures, but rather would constitute in-kind contributions to the candidates. Because NCPAC's proposed solicitation, while directing that the contributions be made in the form of checks payable to the candidates, specifically asks that the checks be forwarded to NCPAC for gathering and transmittal to the candidates, the acceptance of the checks by the candidate constitutes acceptance of the costs incurred by NCPAC in connection with the solicitation. This situation is analogous, for example, to the printing of campaign materials by an individual or multicandidate committee advocating the election or defeat of a candidate.¹ If those materials are distributed by the multicandidate committee, no in-kind contribution results. On the other hand, if the multicandidate committee provides the materials to the campaign committee, acceptance of the materials constitutes an in-kind contribution in the amount of the costs of their production.

The plan as outlined by NCPAC is distinguishable from the situation, under 11 CFR 110.6(c) and (d), in which a conduit or intermediary receives a contribution which has been earmarked for a specific candidate and merely passes on that contribution. Under those circumstances, there is no cost on the part of the conduit for a specific solicitation directing that checks be transmitted to the conduit, and, therefore, no in-kind contribution results. In the situation which you have described, the costs of NCPAC's solicitation would be an in-kind contribution limited to \$5,000, and reportable as such. 2 U.S.C. 434; 11 CFR Part 104. However, for purposes of transmittal of the checks once NCPAC receives them, NCPAC would be a conduit or intermediary. Thus, the individual contributor's check would not count against NCPAC's \$5,000 contribution limitation.

Your second question concerns NCPAC's potential reporting requirements under the provisions of 11 CFR 110.6(c).² As an intermediary or conduit with respect to contributions, earmarked for a specific candidate, NCPAC would be required to report the original source and intended recipient of the contributions to the Commission in accordance with 11 CFR 110.6(c).

¹ An additional analogy is contained in the Commission's regulations on Allocation of polling expenses at 11 CFR 106.4. See in particular 106.4(b).

² Portions of this regulation were amended at 45 Fed. Reg. 15119.

That section provides that if the contributions were passed on in the form of the contributor's check, which appears to be the factual situation presented here, the conduit or intermediary must disclose each contribution on a separate schedule attached to the conduit's next report required to be filed after receipt of the contribution. 11 CFR 110.6(c)(1)(ii). Further, the conduit is required by 11 CFR 110.6(c)(2) to report each contribution to the intended recipient candidate when the contribution is passed on to the intended recipient.³ The conduit's reports to the Commission and to the intended recipient with respect to each earmarked contribution must contain all information contained in 11 CFR 110.6(c)(4)(i), (ii), and (iii).

With regard to your final question concerning the applicability of 11 CFR 110.6(d)(1) and/or 110.6(d)(2) to the proposed activity, the Commission concludes that the cited sections of the regulations do not apply to the factual situation presented by your request. The general rule with regard to the receipt of earmarked contributions by a conduit provides that a conduit's contribution limits are not affected by passing on earmarked contributions, except where the conduit exercises any direction or control over the choice of the recipient candidate. 11 CFR 110.6(d)(1); also see Advisory Opinion 1975-10 and the Commission's Response to Advisory Opinion Request 1976-92⁴ (copies enclosed). If the conduit exercises any direction or control over the choice of the recipient candidate, the contribution is considered a contribution by both the original contributor and by the conduit. Moreover, the conduit is required to report each contribution as required by 11 CFR 110.6(d)(2).

It appears that although the proposed mailing contains a clear suggestion that the individual receiving the communication make a contribution to a specific candidate through NCPAC as an intermediary, the individual contributor, not NCPAC, makes the choice whether to make a contribution to the specified candidate. The fact that a potential contributor may decide against making a contribution indicates lack of control over the choice of the recipient candidate by NCPAC. Nor does NCPAC have any significant control over the time when the contributions are forwarded to the candidates, see footnote 3 above. Moreover, it appears that NCPAC would have no control over the amount of the contribution nor the intended recipient of the contribution, since the request contemplates the receipt by NCPAC of contributions in the form of personal checks drawn to the order of the candidate or the candidate's principal campaign committee. Since the factual situation as described does not indicate "direction or control" by NCPAC within the meaning of 11 CFR 110.6(d), contributions (in the form of checks made payable by the original donor to a specific candidate or principal campaign committee thereof) received by NCPAC as a result of the proposed solicitation, and subsequently transmitted to the campaign committee of the intended recipient, would not be considered contributions by NCPAC to the identified candidate; nor would they count against NCPAC's contribution limitations under 2 U.S.C. 441a(a)(2) and 11 CFR 110.2. Such contributions would only count against the contribution limitations of those persons making their contributions through NCPAC as an intermediary. 2 U.S.C. 441a(a) and 11 CFR 110.1.

³ The Commission notes that under its recently amended regulations, 102.8(c) at id. 15106, NCPAC would be under a duty as a conduit to forward earmarked contributions for an authorized candidate committee no later than 10 days after receipt.

⁴ A significant difference in Re: AOR 1976-92 is that the contribution plan there discussed was treated as the separate segregated fund of a corporation. NCPAC is not a separate segregated fund.

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)

Max L. Frierersdorf
Chairman for the
Federal Election Commission

Enclosures (AO 1975-10, Re: AOR 1976-92)