



FEDERAL ELECTION COMMISSION
Washington, DC 20463

April 15, 1981

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

ADVISORY OPINION 1981-16

Ms. Carol C. Darr
Deputy Counsel
Carter/Mondale Presidential Committee, Inc.
2000 L Street, N.W.
Washington, D.C. 20036

Dear Ms. Darr:

This responds to your letter of March 9, 1981, requesting an advisory opinion concerning application of the Federal Election Campaign Act of 1971, as amended ("the Act") and Commission regulations to the establishment of a legal defense fund.

According to your letter, the Carter/Mondale Presidential Committee, Inc. ("the Committee") * desires to establish a Special Fund for Legal Matters ("Special Fund") to defray the costs of defending the Committee in any post-election litigation that may arise in connection with commercial disputes, compliance actions of the Federal Election Commission, or the Commission's audit of the Committee. You explain that all monies received by the Special Fund would be deposited into a separate bank account, and strict accounting procedures would be observed to ensure that no donations are commingled with regular Committee funds. The Special Fund would accept no donations from corporations, national banks, or labor organizations, and would limit donations from individuals, political committees or partnerships to \$5,000.

In addition you set forth the following conditions to which solicitations to the Special Fund would be subject:

Personal donations would be solicited by the Special Fund either in person or by mail;

* According to reports filed with the Commission this is the Carter/Mondale primary election committee.

All solicitations would be accompanied, or immediately followed, by a letter stating the purpose of the solicitation. The statement of purpose made during any solicitation would be as follows:

The purpose of this solicitation is to obtain donations for the Special Fund for Legal Matters to pay for legal costs of the Carter/Mondale Presidential Committee. Donations will not be used for the purpose of influencing any election.

Each donor will be requested to sign a card to be returned with the donation affirming the purpose of the gift. This card will provide as follows:

I, the undersigned, hereby donate \$ _____ to the Special Fund for Legal Matters. This donation is not given for the purpose of influencing any election.

Solicitations to the Special Fund will be conducted completely separately from any solicitations on behalf of the Committee.

Given these circumstances, the Committee seeks confirmation of their theory that donations from individuals, political committees or partnerships to a separate fund established to pay for post-election legal services would not be considered "contributions" or "expenditures" under the Act. The Committee specifically asks whether the proposed establishment and treatment of the Special Fund to defray the costs of defending the Committee in post-election litigation is appropriate.

The Commission disagrees with the Committee's theory regarding monies received and spent for legal services related to compliance with the Act. The Commission is of the opinion that while a Special Fund may be established to defray the costs of post-election defensive litigation in connection with compliance actions of the Commission and Commission audits, the Fund would be merely an arm of the Committee. Accordingly all its receipts and expenses would be subject to the Act and Commission regulations. Contributions made by a person or political committee would need to be added to any contribution previously made to the Committee by that person or political committee in determining whether the \$1,000 or \$5,000 contribution limit has been reached. A special fund could, however, be created to raise and spend funds exclusively for commercial litigation involving Committee contracts and other similar liabilities.

Under the Act, a "contribution" means a gift, subscription, loan, advance, or deposit of money, or anything of value made for the purpose of influencing the nomination or election of any person to Federal office. 2 U.S.C. 431(8). Similarly, the term "expenditure" is defined in an identical fashion as relating to payments made for the purpose of influencing a person's nomination or election to Federal office. 2 U.S.C. 431(9). However, an exception from the definition of "contribution" is:

any legal or accounting services rendered to or on behalf of an authorized committee of a candidate or any other political committee, if the person paying

for such services is the regular employer of the individual rendering such services and if such services are solely for the purpose of ensuring compliance with the Act or chapter 95 or chapter 96 of Title 26.

The definition of "expenditure" has a similar exemption. Moreover, Commission regulations, specifically 100.8(b)(15) provide that expenditures by a candidate certified to receive Primary Matching Funds under 11 CFR Part 9034 or certified to receive payments from the Presidential Election Campaign Fund under 11 CFR Part 9005 for these legal and accounting services do not count against such candidate's expenditure limitations under 11 CFR Part 9035 or 11 CFR 110.8. Thus, it is clear that both the Act and regulations contemplate expenses for legal services.

The donation of legal services solely to ensure compliance with the Act was specifically exempted from the definition of "contribution" and "expenditure." But whereas the regulations specifically exempt expenditures for legal services for compliance from expenditure limits, no exception from the definition of contribution was made for monies donated to defray the costs of legal services. See Advisory Opinion 1977-5, copy enclosed, where the Commission held that although a candidate's principal campaign committee could establish a separate fund for the purpose of defraying legal and accounting services to ensure compliance with the Act, contributions to that fund were subject to the contribution limits of the Act. The opinion stated "[t]he exemption from contribution limits does not apply where any person contributes funds to a candidate or another political committee for the purpose of defraying costs of legal and accounting services; such a contribution is subject to applicable prohibitions in 2 U.S.C. 441b, limits in 2 U.S.C. 441a(a), disclosure under 2 U.S.C. 434."

The fact that the present situation involves post-election litigation does not take it out from under the definition of "contribution" and "expenditure," nor remove the limits and prohibitions imposed thereon by the Act. Rather, the post-election litigation situation is analogous to a debt situation. The Commission, based on its regulations, has considered monies received by a political committee after an election to retire the election debt of that committee to be "contributions" subject to the limitations and prohibitions of the Act. Specifically, 11 CFR 110.1(g)(2), provides that contributions made to retire debts resulting from elections held after December 31, 1974, are subject to the limitations of Part 110. The present situation is similar. Monies received to defray the costs of post-election litigation which arises out of the election are treated the same as monies received to defray the costs of litigation during the election.

The Commission has on occasion addressed situations where it has determined that the establishment of a legal defense trust fund was beyond the purview of the Act and that donations to the trust would not be considered "contributions" under the Act. The Commission has also considered other situations where establishment of a transition trust and a proposed plan for personal fundraising were considered beyond the scope of the Act. These situations are, however, distinguishable from that which the Committee now presents.

Specifically, in Advisory Opinions 1981-13, 1980-4, and 1979-37, the Commission concluded that donations and disbursements made for the purpose of defending oneself in a lawsuit were not "contributions" or "expenditures". Thus activity to pay the cost of legal defense in those situations was outside the purview of the Act. None of these opinions, however, dealt

with facts such as presented by the subject request. Advisory Opinion 1981-13 concerned a legal defense to a charge of slander. Advisory Opinion 1980-4 concerned defense of a civil action alleging violations of the Appropriations Act, Hatch Act, and an infringement of constitutional rights. Advisory Opinion 1979-37 concerned the defense of a Congressman charged with both criminal conduct and violations of rules of the House of Representatives, with respect to his conduct while a Member of Congress. As distinguished from the proposed plan contemplated by this request, none of these three opinions involved the creation of a defense fund with respect to financing litigation related to compliance with the Act.

As for the two other advisory opinions cited in the request, one (Advisory Opinion 1980-97) involved a Presidential Transition Trust. There, considering the activity contemplated-- information gathering to effectuate a transition from one Administration to another -- the Commission concluded that donations made to the Trust were clearly not for the purpose of influencing a Federal election and, accordingly, the activity was beyond the purview of the Act. Advisory Opinion 1977-7 presented a situation where the facts related to the solicitation of funds by a Federal officeholder for personal use and to provide "financial security" for the officeholder. The situation was quite different from that presented in the Committee's request.

As described, the Committee would have a legal defense fund to defray the costs of post-election litigation which may arise in connection with commercial disputes, compliance actions of the Commission and Commission audits. As compared to the other situations, the compliance and audit matters, clearly emanate not only out of the election, but also from matters clearly within the scope of the Act. Moreover, it is clear from the definition of "contribution" and "expenditure" that Congress did not lightly consider legal services for compliance with the Act. Rather, certain exemptions were created, while those suggested in the Committee's request were not.

Thus, the Commission concludes that monies raised to defray the cost of litigation regarding compliance with the Act and chapter 95 and 96 of Title 26, which includes both enforcement and audit matters are contributions and must comply with all the limitations and prohibitions of the Act. On the other hand, however, monies raised to defray the costs of defending commercial litigation could be considered analogous to the opinions cited above.

Thus, in instances such as a contract dispute between a private party and the Committee, the proposed Special Fund could be used.

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

Sincerely,

(signed)

John Warren McGarry
Chairman for the
Federal Election Commission

Enclosures (AOs 1977-5, 1977-7, 1979-37, 1980-4, 1980-97, 1981-13)