FEDERAL ELECTION COMMISSION
Washington, DC 20463

November 16, 1981

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

ADVISORY OPINION 1981-46

H. Lee Halterman
District Counsel
The Committee for Congressman Ronald V. Dellums
3126 Shattuck Avenue
Berkeley, California 94705

Dear Mr. Halterman:

This responds to your letter dated September 18, 1981, supplemented by your letters dated September 22 and 23, 1981, requesting an advisory opinion on behalf of the Committee for Congressman Ronald V. Dellums concerning application of the Federal Election Campaign Act of 1971, as amended, ("the Act"), and Commission regulations to certain aspects of the Committee's direct mail fundraising program.

You explain that the Committee has retained the firm of PARKER/DODD and Associates to do direct mail fundraising. PARKER/DODD has developed a direct mail program to raise funds for the Committee, and acts as a "custodian/broker" of the Committee's contributor list. In return, the firm is paid a "standard industry fee" by the Committee.

You indicate that a part of the service package offered by the fundraising firm involves the firm's negotiation with other organizations for the use of their mailing lists to increase the list of names from which the Committee may solicit contributions. Two commercially acceptable ways of "paying for" the use of another organization's mailing list are 1) for the user to pay the list owner a fee "determined by the market's view of the value of the list;" and 2) for the user to exchange names of corresponding value with the list owner. The exchange may be a direct exchange of the same number of names, a multiple use of a smaller number of names or some other variation which the parties believe is an exchange of equal value. Both payment methods, you indicate, are accepted in the industry as full consideration. The Commission responds to your specific questions about the described industry practices in the order in which they appear in your request.

You ask first whether the Committee's exchange of names from its contributor list for the use of names of corresponding value from the list of another political committee, non-profit organization, individual or corporation is considered by the Commission to be payment of the "usual and normal charge" for goods within the meaning of 11 CFR 100.7(a)(1)(iii) (B) and if so, whether the transaction is reportable under the Act.

As you know, the regulations provide that "the provision of any goods or services without charge or at a charge which is less than the usual and normal charge for such goods or services is a contribution." 11 CFR 100.7(a)(1)(iii)(A). A mailing list or a contributor list would fall within that provision. The regulations provide further that the "`usual and normal charge' for goods means the price of those goods in the market from which they ordinarily would have been purchased at the time of the contribution..." 11 CFR 100.7(a)(1)(iii)(B).

In response to your first question, the Commission concludes that if the exchange of names on a contributor list is an exchange of names of equal "value" according to accepted industry practice, the exchange would be considered full consideration for services rendered.* Thus, no contribution or expenditure would result and the transaction would not be reportable under the Act.

With regard to a situation where a corporation exchanges names with the Committee, the issue arises as to whether the equal exchange represents a "payment" which would constitute a corporate contribution prohibited by 2 U.S.C. 441b. The Commission again concludes that an exchange of this kind is not a prohibited corporate contribution but rather, a bargained-for exchange of consideration in a commercial transaction.

Your second question is whether a contribution would result if the Committee provides names to another "Federal political committee" or another kind of organization in exchange for a future use of a corresponding number of names belonging to that committee.

The Commission concludes, based on its response to your first question, that a current use of names in exchange for a future use of the names of another political committee does not result in a contribution within the definition of 2 U.S.C. 431(8) (A). Based on the assertion that this kind of exchange is an accepted practice in the field of direct mail fundraising, the Commission takes the position that when the Committee provides names to another political committee in exchange for its own future use of a corresponding number of names which are of equal value, that this constitutes an arms length business transaction between the committees and is not a reportable contribution under the Act. Of course, this conclusion assumes the fact that the future use will occur. If that future use does not occur for any reason a contribution may result depending on the circumstances of the particular situation and the status of any person who does not provide or obtain the promised future use.

The result is not altered if the Committee arranges for a future exchange with a "non-profit organization." The exchange would not be a contribution and would not be reportable.

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* The Commission adopted a similar approach with respect to direct mail fundraising practices in Advisory Opinion 1979-36, copy enclosed. There, the Commission based its conclusion that the proposed activity was permissible under the Act on the requestor's assertion that the proposed activity was consistent with "normal industry practice."

Similarly, if the non-profit organization is incorporated, an arrangement for the future use of names in exchange for a current use does not result in a contribution provided the value to be exchanged represents the "usual and normal charge." Nor would the 441b prohibition against corporate contributions apply. Thus, the transaction would be neither reportable nor subject to the limits of 2 U.S.C. 441a.

If a profit-making corporation provides names to the Committee in exchange for a future use of a corresponding number of names, no contribution would result assuming the exchange represents the "usual and normal charge" for the use of contributor lists. The transaction would only become a prohibited corporate contribution if the Committee exchanged names which were of lesser value than those names provided by the corporation for the Committee's future use. 2 U.S.C. 441b.

Your third question concerns the production costs connected with the brokering of contributor lists. You indicate that the production costs of printing address labels are understood in the direct mail fundraising field to be included in the amount that the owner of a list charges for the use of the names on the list. You ask whether the payment of such production costs is a contribution from the list owner to the list user. The Commission concludes that assuming it is an accepted business practice for the costs of label production to be part of the usual and normal charge for the use of a list, payment of such costs by the list owner is not a contribution to the list user or purchaser.

This conclusion is not altered when the Committee deals with a list owner which is incorporated. No prohibited corporate contribution results unless the corporation provides use of a list that is of greater value (with reference to "usual and normal" rate) than the value of names on the Committee's contributor list. Similarly, if the Committee deals with a list owner who is a state or local committee that receives contributions prohibited by the Act, no contribution would occur for purposes of the Act if the Committee "charged" the state or local committee the "usual and normal" rate for the use of its list. Such transactions are not reportable under the Act. The Commission, however, reaches no issue and expresses no opinion with respect to application of any State or local law in the situation where the Committee exchanges lists with a state or local committee that is not a political committee under the Act or Commission regulations.

To summarize, you have indicated in your request that an accepted method of payment for the use of a committee's contributor list in the direct mail fundraising industry is an exchange of names of corresponding value with another organization. The Commission takes the position that as long as the exchange is for names of equal value, that is, that the exchange represents, the "usual and normal" charge required by 11 CFR 100.7(a)(1)(iii)(B), no contribution results. The same conclusion is reached if the consideration for the bargain is the future use of names on the Committee's contributor list. Assuming the exchange of names, either current or future, represents the normal and usual charge for such use, it is permissible for the Committee to exchange names with an incorporated or an unincorporated non-profit organization, a corporation or a state or local political committee which receives corporate or union contributions. Such an exchange is not subject to the prohibitions of 2 U.S.C. 441b or the limitations of 2 U.S.C. 441a, and it is not a reportable transaction under the Act.

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,

(signed)

John Warren McGarry
Chairman for the
Federal Election Commission

Enclosure (AO 1979-36)