



FEDERAL ELECTION COMMISSION
Washington, DC 20463

August 6, 1984

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

ADVISORY OPINION 1984-30

Ms. Leslie J. Kerman
Epstein Becker Borsody & Green, P.C.
1140 19th Street, N.W.
Washington, D.C. 20036

Dear Ms. Kerman:

This responds to your letter of May 22, 1984, as supplemented by your letter of June 20, 1984, requesting an advisory opinion on behalf of Freeze Voter '84, concerning application of the Federal Election Campaign Act of 1971, as amended ("the Act"), and Commission regulations to Freeze Voter '84's plan to make independent expenditures with respect to the 1984 general election.

You indicate that Freeze Voter '84 is a nonconnected, multi-candidate political committee. It has recently affiliated with fifteen other political committees.¹ You state that Freeze Voter '84 and its affiliates have made, or will make, monetary and in-kind contributions and independent expenditures on behalf of a number of Federal candidates for both the 1984 primary elections and the 1984 general election.² You state that in-kind contributions with respect to the primary election have been made, or will be made, to several Federal candidates who have strong opposition for their party's nomination. To date, these contributions have been in the form of in-kind contributions of the time of Freeze Voter '84's paid staff. In one instance, Freeze Voter '84 made an in-kind contribution by the purchase of political consulting services for a senatorial candidate in the 1984 Illinois primary. You state that this in-kind contribution was made in consultation with the candidate and his campaign staff and included discussions of

¹ These committees are: Colorado Freeze Voter, Connecticut Freeze Voter, Freeze Voter '84 (Washington state), Georgia Freeze Voter '84, Maine Freeze Voter, Maryland Freeze Voter, Minnesota Freeze Voter '84, New Jersey Freeze Voter, New Mexico Freeze Voter, Northern California Freeze Voter, Pennsylvania Freeze Voter, Southern California Freeze Voter '84, Southern Indiana Freeze Voter, Texas Freeze Voter, and Upstate New York Freeze Voter. References to Freeze Voter '84 in the advisory opinion also include these affiliates.

² The Commission notes that to date your in-kind contributions have been made only to congressional and senatorial candidates with none to presidential candidates. Therefore, the Commission does not view your request as presenting any question concerning 26 U.S.C. 9012(f). See Advisory Opinions 1983-20, 1983-11, and 1983-10.

campaign strategy for the primary election and the organization of specific primary campaign activities. You add that with regard to any future in-kind contributions in the 1984 primary elections, any contact with the candidates and their committees will be limited to primary election strategy and activities.

You note that the policy of Freeze Voter '84 is to become involved only in what it regards as "hotly-contested" primary elections. For this reason, you state that the campaign strategy discussed with candidates or their committees for the primary elections would be different from the strategy for the general election. You state that Freeze Voter '84 has not made any monetary or in-kind contributions with respect to the 1984 general election. You further state that Freeze Voter '84 has not discussed, coordinated, or communicated with these candidates or their committees regarding their campaign strategy or needs for the 1984 general election and that these candidates or their committees have not requested any assistance from Freeze Voter '84 and its affiliates for the general election.

You ask whether Freeze Voter '84 and its affiliates may make independent expenditures with respect to the 1984 general election on behalf of Federal candidates to whom they have made, or will make, in-kind contributions with respect to the 1984 primary elections. You contend that a primary election and a general election for the same office in the same election cycle are two distinct elections with different campaign strategies and needs, especially where the primary election is contested.

The Act defines an 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). It also requires special reporting and notice requirements for such expenditures. 2 U.S.C. 434(b)(6)(B)(iii) and 441d(a)(3); 11 CFR 104.3(b)(3)(vii), 104.4, 109.3 and 110.11(a). The Act does not limit the dollar amount of an independent expenditure as it does contributions. See 2 U.S.C. 441a. Commission regulations give further definition of cooperation, consent, consultation, or request by providing that it means:

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.

11 CFR 109.1(b)(4)(i). The regulations also provide, however, that an "expenditure not qualifying under this section as an independent expenditure shall be a contribution in-kind to the candidate and an expenditure by the candidate, unless otherwise exempted." 11 CFR 109.1(c).

The Commission notes that it has previously declined to treat a primary election and a general election for the same office in the same election cycle as distinct events with respect to meeting the requirements of an independent expenditure. In Situation 8 of Advisory Opinion 1979-80, the Commission took the position that the donation of poll results by a political committee to a candidate for a senatorial nomination in the primary election could preclude the committee's making of independent expenditures on behalf of that candidate or in opposition to that candidate's opponent in the general election.³ The Commission also notes that you acknowledge that Freeze Voter '84 has cooperated, consulted, and communicated with the candidates and their committees on campaign strategy and needs with respect to the 1984 primary elections and Freeze Voter '84's in-kind contributions. These in-kind contributions have primarily been the donation of the time of Freeze Voter '84's paid staff. In one instance, the in-kind contribution was the provision of political consulting services by a third party. Freeze Voter '84 apparently intends to make in-kind contributions in future 1984 primary elections, some of which may be held only a few weeks prior to the 1984 general election. Although the recipient candidates may have different campaign strategies and needs regarding the 1984 general election than they had for the 1984 primary elections, the Commission views the nature of Freeze Voter '84's contacts regarding its in-kind contributions as raising the presumption that its expenditures with respect to the 1984 general election would stem from a prior arrangement and would be "based on information about the candidate's plans, projects, or needs."⁴

Accordingly, such expenditures would not qualify as independent expenditures. They would instead be reportable as contributions in-kind and subject to the contribution limitations of 2 U.S.C. 441a.

³ See also General Counsel's Report in MUR 321 (a person's fundraising and campaign activity while associated with a candidate's committee raised the presumption that expenditures by that person after severance of his association with the candidate's committee were contributions in-kind rather than independent expenditures).

⁴ This presumption, however, may be rebutted by the actual facts in a specific situation.

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

Sincerely yours,

(signed)

Lee Ann Elliott
Chairman for the
Federal Election Commission

Enclosures (AOs 1983-20, 1983-11, 1983-10, and 1979-80).