



FEDERAL ELECTION COMMISSION
Washington, DC 20463

March 1, 1988

CERTIFIED MAIL,
RETURN RECEIPT REQUESTED

ADVISORY OPINION 1988-6

Donald J. Simon
Sonosky, Chambers & Sachse
Suite 1000
1250 Eye Street, N.W.
Washington, D.C. 20005

Dear Mr. Simon:

This responds to your letter dated February 10, 1988, requesting an advisory opinion on behalf of the Albert Gore, Jr. for President Committee, Inc. ("the Committee"), regarding application of the Federal Election Campaign Act of 1971, as amended ("the Act"), and Commission regulations to broadcast media time buys that the Committee proposes to make in connection with Senator Gore's 1988 presidential campaign.

Your letter initially explains that you are requesting an expedited advisory opinion within 20 days because the proposed media campaign is scheduled to run in advance of the Colorado caucuses of April 4, 1988, and the Illinois and Connecticut presidential primaries on March 15 and 29, 1988, respectively. These caucuses and primary elections are scheduled to occur within 60 days from the date of the Committee's request, and the described Committee activity is directly connected to them. Accordingly, the Commission agrees that the request qualifies for an expedited opinion under 2 U.S.C. 437f(a)(2) and 11 CFR 112.4(b).

Your letter describes the media advertisement time-buy which is proposed in connection with Senator Gore's campaign prior to the Colorado Democratic caucuses to be held on April 4, 1988.

As part of his campaign in that caucus, the Committee intends to purchase air time to run a television advertisement both for the purpose of garnering political support and for the purpose of campaign fundraising. The Committee intends to run the advertisement prior to March 7, 1988, or more than 28 days prior to the Colorado caucus.

The advertisement which the Committee intends to run in Colorado will be a 60 second spot. The first approximately 57 seconds of the advertisement will consist of visuals and audio devoted to a discussion of trade policy or a related issue. This portion of the advertisement will discuss the issue and Senator Gore's perspective on the issue, as well as his intentions as to what action he will take on the issue as President.

The last approximately three seconds of the advertisement will consist of a visual listing the words "Vote - Volunteer -Contribute" on a black background, and then a second visual consisting of the name of the candidate. While these visuals are running, an announcer's voice will say the same words as appear on the screen.

By letter dated February 17, 1988, you further stated that during the final three seconds a telephone number for the Gore campaign will appear on the screen "for those who wish to volunteer as well as those who wish to contribute." The announcer will not repeat the telephone number.

On the basis of this described activity you request an advisory opinion responding to four questions.

1. May the Committee treat some portion of the costs of broadcasting the advertisement described above as an exempt fundraising expense pursuant to 11 CFR 100.8(b)(21), and thus exclude that amount from the state and overall spending ceilings?
2. If the answer to Question 1 is yes, is a 50 percent allocation of such costs as an exempt fundraising expense a reasonable allocation and may 50 percent of the costs of the above-described advertisement be excluded from the state and overall spending ceilings?
3. If the answer to Question 2 is no, what percentage of the costs of airing the advertisement may be treated as an exempt fundraising expense and excluded from the state and national ceilings?
4. For purposes of applying the 28-day rule set forth in 11 CFR 110.8(c), is the critical date the date that the Committee makes the expenditure for the broadcast of an advertisement, or the date that the advertisement is actually broadcast? In other words, if the Committee makes an expenditure to buy time for an advertisement 29 days prior to the Colorado caucus, but the advertisement is not scheduled to run until two days later, or the 27th day prior to the caucus, may the Committee still exclude a portion of the costs of airing the advertisement as an exempt fundraising expense, assuming that the ad would otherwise qualify for the exclusion?

Subject to the discussion below and for the reasons set forth therein, the Commission concludes in response to questions one and two, that (1) the Committee may allocate some of its broadcast time costs for the described advertisement to its national 20 percent fundraising exclusion and (2) an allocation of 50 percent of the costs to the national exclusion is reasonable based on the facts presented. In response to question four, and subject to the discussion and reasons set forth below, the Commission concludes that the date(s) on which the broadcast advertisement runs would determine whether the 28 day rule in Commission regulations, 11 CFR 110.8(c), bars allocation of any broadcast time costs to the fundraising exclusion.

The Act provides that a presidential candidate who becomes eligible for matching payments to finance a campaign for the presidential nomination of a political party is subject to expenditure limits. 2 U.S.C. 441a(b), 26 U.S.C. 9035. These limits include both an overall or national limit, set at \$23,050,000 for the 1988 presidential election cycle, as well as sublimits for each state based on its voting age population. 2 U.S.C. 441a(b)(1)(A).

The Act also contains several exceptions, exemptions, and exclusions to the expenditure limits. See generally 2 U.S.C. 431(9)(2). Of particular relevance here is the exclusion from the limits for "any costs incurred by... [a presidential candidate who accepts Federal matching payments] in connection with the solicitation of contributions on behalf of" the presidential candidate. 2 U.S.C. 431(9)(B)(vi). This statutory exclusion is, however, limited to 20 percent of the national expenditure limit. (The fundraising exclusion for the 1988 presidential election cycle is \$4,610,000 which, when added to the base limit, results in a combined expenditure limit for 1988 of \$27,660,000.) Because this exclusion is based on the national limit which, in turn, is prescribed by the Act without regard to voting age population, the Commission has long held that fundraising expenditures are not counted against either the national limit or any state limit provided they are within the 20 percent exclusion. 11 CFR 100.8(b)(21), Advisory Opinion 1975-33.¹

Given the foregoing provisions of the Act and regulations, the first issue presented is whether expenditures, to broadcast an advertisement that mentions contributions are allocable on any reasonable basis to the fundraising exclusion.

By their terms, the regulations define the fundraising exclusion to mean "any cost reasonably related to" or "associated with" solicitation of contributions. Costs of airtime for fundraising advertisements are expressly included. 11 CFR 100.8(b)(21)(ii), 106.2(c)(5)(ii). In the context of allocation generally, the regulations provide that an expenditure on behalf of several candidates is allocable to each candidate who is "reasonably expected" to derive some benefit from the joint expenditure. 11 CFR 106.1(a). In addition, certain expenditures by political committees, including their fundraising expenditures, that influence both Federal and State (or local) elections are required to be allocated to their separate accounts on a "reasonable basis." 11 CFR 106.1(c), 106.1(e). The general allocation method used for multi-state expenditures by presidential campaigns requires that allocation among states be made on a "reasonable and uniformly applied basis." 11 CFR 106.2(b)(1). Because these provisions recognize that expenditures within the purview of the Act may, be made for multiple purposes, the Commission believes that expenditures for broadcast time to run an advertisement which includes a fundraising solicitation

may be allocated on a "reasonable basis" to the fundraising exclusion for presidential candidates who accept matching Federal payments.

The issue then raised by questions two and three is determining a "reasonable basis" for an allocation of some portion of the expenditures in question to the fundraising exclusion. In previous advisory opinions applying the cited allocation regulations, the Commission has looked to a variety of factors to determine what would be a reasonable allocation. For example, in the case of political party organizations that published newsletters relating to both Federal and other elections, the Commission indicated that a reasonable allocation basis would be the percentage of column inches (or space) in the newsletter which pertained to Federal elections or candidates for Federal office. Advisory Opinions 1981-3 and 1978-46. Similarly, with respect to a national conference held by a political party organization that included an agenda with both Federal election and other matters, the Commission stated that a reasonable allocation method could be based upon the ratio of time in the agenda for activities pertaining to Federal elections in relation to total time for all conference activities. Advisory Opinion 1982-5.

The cited advisory opinions, however, focused on how little could be reasonably attributed to federal activity, not how much. Thus, although those opinions would support attributing a relatively small portion of the expenditures in question as a fundraising expense based on the time used for the solicitation should you so desire, they also do not foreclose the reasonableness of a different allocation method in the situation presented here.

The Commission concludes that the Committee's expenditures for the advertisements you propose may be allocated on a 50-50 basis. The Commission reaches this conclusion based upon its determination that the advertisement includes a solicitation for contributions to the Committee. The video message in the final three seconds asks for contributions and a voice-over announcement repeats that request. In addition, a Committee telephone number presented simultaneously on the screen conveys to the viewer a reinforcing message suggesting a responsive telephone call to the Committee if the viewer wants to make a contribution. As discussed in response to question four, this conclusion assumes that the advertisements are not broadcast within the period covered by the 28 day rule.

Question four presents the issue whether expenditures for apparent fundraising activities, which occur within 28 days before a caucus or primary election, can nonetheless be excluded from the state limit if the expenditure itself is made before the 25 day period begins. The so-called 28 day rule, as set forth in the regulations, precludes reliance on the 20 percent fundraising exclusion to cover expenditures for "fundraising activities targeted at a particular state and occurring within 28 days before that state's primary election, convention, or caucus... ." 11 CFR 110.8(c)(2). Thus, the 28 day rule is an exception to the 20 percent fundraising exclusion.

The rule requires that, notwithstanding the fundraising exclusion, expenditures for fundraising activity aimed at a particular state and taking place within 28 days before a primary election, convention, or caucus in that state, must be allocated to the state limit. 11 CFR 100.8(b)(21)(iii), 110.8(c)(2); see, 11 CFR 106.2(c)(5). The focus of the rule is on the activity itself, not the timing of the expenditures made to defray the costs of the activity. As the Commission indicated in Advisory Opinion 1975-33, a fundraising effort or activity aimed at a particular state just prior to

an election (or caucus) in that state may not qualify for the fundraising exclusion, regardless of when the related expenditures are made. See also the dissenting opinion to Advisory Opinion 1975-33 which refers to the 28 day period that was subsequently prescribed in the regulations.

In the specific situation presented by question four, the Commission concludes that the date(s) when the Committee's proposed broadcast advertisement will actually be carried determines whether expenditures for the broadcast time must be allocated to the state limit pursuant to the 28 day rule; the 20 percent fundraising exclusion may not be used to the extent the advertisement is broadcast within the 28 day period.

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)

Thomas J. Josefiak
Chairman for the Federal Election Commission

Enclosures (1982-5, 1981-3, 1978-46 and 1975-33)

1/ See the discussion below with regard to application of the so-called 28 day rule which may preclude use of the fundraising exclusion for spending targeted to a particular state.