



FEDERAL ELECTION COMMISSION
Washington, DC 20463

May 27, 1988

CERTIFIED MAIL,
RETURN RECEIPT REQUESTED

ADVISORY OPINION 1988-12

John R. Hall, Esquire
Muldoon, Murphy & Faucette
5101 Wisconsin Avenue, N.W.
Washington, D.C. 20016

Dear Mr. Hall:

This refers to your February 26, 1988 letter requesting an advisory opinion concerning application of the Federal Election Campaign Act of 1971, as amended ("the Act"), on behalf of your client, Empire of America Federal Savings Bank, Buffalo, New York ("Empire"). We also have your April 14, 1988 letter which supplements your request.

Your letters state that Empire is a federally chartered savings bank. Empire currently is negotiating with the Erie County [New York] Democratic Committee, a local party committee, to engage in an affinity group credit card program.¹ If Empire receives approval from the Commission to enter into that program with the committee, you state that the party committee will provide Empire with its "membership lists," which consist of the names and addresses of registered Democrats who have voted in the last four general elections ("prime voters"), and will authorize Empire to use the committee's name and "goodwill" to solicit the persons on those lists to apply for affinity group credit cards from Empire. The committee will also provide certain "marketing support" for Empire's affinity group credit card program. You state that the committee, for example, will place containers of credit card applications at committee events and committee headquarters, and will "mention" its endorsement and support of Empire's affinity group card at committee functions.

Under the proposal described in your request, Empire will "reimburse" the committee for its services by depositing into a special bank account established for the committee an unspecified portion of the annual membership fee on each credit card issued to an affinity group member.² Assuming that the funds in this account are separately segregated and are not used to directly influence the nomination or election of any candidate to any political office, you ask whether the

funds in the account may be used by the committee, which has no plans to acquire or construct an office facility, for the following purposes:

- (1) to pay rent and building maintenance on the offices the committee currently uses;
- (2) to pay rent, building maintenance, utilities and office equipment expenses; or
- (3) to pay rent, building maintenance, utilities, office equipment and certain other administrative expenses (e.g., office supplies and secretarial services).

The Act prohibits national banks and corporations organized by authority of Congress from making a "contribution or expenditure in connection with any election [including a primary, convention or caucus] to any political office." 2 U.S.C. 441b(a). The Commission's regulations make clear that this prohibition extends to Federal, state or local elections. 11 CFR 114.2(a). For purposes of section 441b(a), the term "contribution or expenditure" is defined to include:

any direct or indirect payment, distribution, loan, advance, deposit, or gift of money or any services, or anything of value (except a loan of money by a national or State bank made in accordance with the applicable banking laws and regulations and in the ordinary course of business) to any candidate, campaign committee, or political party or organization in connection with any election to any of the offices referred to in [section 441b(a)].

2 U.S.C. 441b(b)(2). See also 11 CFR 114.1(a)(1).

In your request, you acknowledge that Federal savings banks, like Empire, are subject to the local, state and Federal prohibition of section 441b(a),³ but suggest that the proposed payments to the local party committee should not be treated as contributions prohibited by that provision because the funds will be separately segregated and will "not be used, directly or indirectly, in connection with any election or nominating procedure for any political office."⁴ Before the Commission can reach that issue, however, a threshold question is whether Empire's payments to the committee are something of value that would constitute a contribution.

In past advisory opinions, the Commission has considered a variety of factual situations where principal campaign committees and other political committees have proposed to sell, or otherwise use in a business of commercial venture, some form of committee asset. The Commission generally has viewed such ventures by on-going committees simply as another form of fundraising for political purposes which still results in contributions subject to the Act. Advisory Opinions 1983-2, 1981-7, 1980-70, 1980-34, 1980-19, 1979-76, and 1979-17. The Commission has recognized a narrow, limited exception, however, where the asset involved was a political committee's mailing or contributor list which had a unique quality and was developed by the political committee in the normal course of its operations primarily for its own use, rather than as an item to be sold to others as part of a campaign fundraising activity. Advisory Opinions 1982-41, 1981-53, 1981-46, and 1979-18. These latter opinions have also reiterated the requirement set forth in the Commission's regulations that, to avoid causing a contribution, the

"compensation" given to the political committee in return for its unique list may not exceed the "usual and normal charge." 11 CFR 100.7(a)(iii).⁵

In one previous opinion, the Commission specifically addressed whether a political party committee may enter into an affinity group credit card program with state and national banks. Advisory Opinion 1979-17. There, the Commission held that the services and payments which were to be provided to the Republican National Committee ("RNC") by the card issuing banks in return for the RNC's assistance in the program constituted contributions, not bargained for consideration in a commercial transaction. Thus, unless those services and payments fell within some exemption, they would have been prohibited by section 441b. Under the circumstances presented in your request, the same conclusion applies here.

Initially, unlike the typical situation where a political committee sells or exchanges its contributor or mailing list for a specific predetermined amount of compensation, the Erie County Democratic Committee will provide its lists to Empire in return for a portion of the future proceeds from Empire's use thereof. Under this proposal, there is no limit on the total amount of those payments. Instead, the committee will receive a negotiated portion of the annual membership fee on each credit card issued to an affinity group member for an indefinite period of time in the future. Thus, the payments are not determined only with reference to the present value of the committee's lists.

Moreover, according to your April 14, 1988 letter, the same information on the committee's lists is available to Empire from public sources, presumably at nominal cost. See also Advisory Opinion 1979-17 at n.4. Although the information available from those other sources would not be in precisely the same format, the membership lists here are not sufficiently unique to qualify for the mailing list exception. Compare Advisory Opinion 1981-53 (sale of computerized mailing list compiled from public voter registration lists for an amount slightly less than the actual costs incurred by the committee to obtain and place the information on magnetic tape not a contribution by the purchaser).

Finally, the fact that part of the consideration for the payments by Empire to the party committee is the committee's authorization to use its name and "goodwill" in solicitations for the credit card program materially distinguishes the proposed activity from the ordinary sale or lease of lists. See Advisory Opinion 1979-17. Similarly, the committee's agreement to provide "marketing support" for the program sets the proposal apart from previous situations where the Commission has approved transactions involving mailing lists.

For the foregoing reasons, the proposed payments by Empire therefore would constitute something of value to the committee within the meaning of 2 U.S.C. 441b(b)(2). As you note in your request, however, the Act does provide that certain receipts which otherwise would be contributions are not prohibited by section 441b(a) if they are separately segregated and used only for specifically exempt purposes. For example, donations to a national or state committee of a political party that are specifically designated to defray the costs of the construction or purchase of an office facility are not considered to be contributions or expenditures, provided that the facility is not acquired for the purpose of influencing the election of any candidate in any particular election for Federal office. 2 U.S.C. 431(8)(B)(viii); 11 CFR 100.7(b)(12),

100.8(b)(13), and 114.1(a)(2)(ix). But this so-called "building fund" exemption, the only exemption which might cover the specific uses for the funds proposed by Empire, is inapplicable here since the Erie County Democratic Committee is a local, rather than a state or national committee.^{6/} In addition, that exemption does not cover expenditures for operating or administrative costs. See Advisory Opinion 1983-8.

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

Sincerely yours,

(signed)

Thomas J. Josefiak
Chairman of the Federal Election Commission

Enclosures (AO's 1986-14, 1985-1, 1983-8, 1983-2, 1982-41, 1981-53, 1981-46, 1981-7, 1980-70, 1980-34, 1980-19, 1979-76, 1979-24, 1979-18, 1979-17)

P.S. Commissioners Josefiak and Aikens voted to approve this opinion and may file concurring opinions at a later date.

1/ In an affinity group program, a financial institution solicits members of an organization (the "affinity group") to apply for credit cards, and the organization endorses or sponsors those credit cards among its membership. See generally Advisory Opinion 1979-17.

2/ According to your letters, Empire's communications with the individuals on the political committee's lists will not contain any direct or indirect political references other than: (i) the name of the political committee; and (ii) statements that the political committee provided its membership lists to Empire, that the political committee authorized Empire to solicit its members to join the affinity group credit card program, and that the political committee will receive a portion of the annual membership fee on credit cards issued to affinity group members. Furthermore, following the solicitations, the only "advertising of the political committee's affiliation with Empire would be the logo that the group requests be put on the credit card itself."

3/ Advisory Opinion Request ("AOR") at 3. Federal savings banks are covered by this prohibition as entities organized by the authority of a Federal statute, 12 U.S.C. 1464, which become corporations when they receive charters from the Federal Home Loan Bank Board. See 12 CFR 543 and 544. Cf. Advisory Opinion 1981-33 (Federal savings and loan associations).

4/ AOR at 4 (quoting Advisory Opinion 1981-33).

5/ The Commission has also recognized a narrow exception for principal campaign committees with outstanding debts and leftover campaign equipment or supplies that wish to terminate their operations and liquidate those assets for debt retirement purposes, or in contemplation of prompt

dissolution of the committee after liquidation. In those situations, the same "usual and normal charge" requirement applies. Advisory Opinions 1985-1 and 1979-24. The sale of obsolete or depreciated equipment has also been held by the Commission not to be a contribution. Advisory Opinion 1986-14.

6/ The term "State committee" is defined by the Act to mean "the organization which, by virtue of the by-laws of a political party, is responsible for the day-to-day operation of such political party at the State level, as defined by the Commission." 2 U.S.C. 431(15).