



FEDERAL ELECTION COMMISSION
Washington, DC 20463

September 30, 1988

CERTIFIED MAIL,
RETURN RECEIPT REQUESTED

ADVISORY OPINION 1988-40

Ronald J. Brown
Grogan, Graffam, McGinley & Lucchino, P.C.
Three Gateway Center
22nd Floor
Pittsburgh, Pennsylvania 15222

Dear Mr. Brown:

This is in reply to your letters dated August 26 and 30, 1988, in which you request an advisory opinion on behalf of the Doug Walgren for Congress Committee ("the Committee") concerning the application of the Federal Election Campaign Act of 1971, as amended ("the Act"), and Commission regulations to the Committee's preparation and mailing of post cards to certain persons in Mr. Walgren's Congressional District.

You explain that Congressman Walgren is a candidate for re-election from the 18th District of Pennsylvania in the November 8, 1988, general election. The Committee is Mr. Walgren's authorized campaign committee. The Committee intends to prepare, as part of its campaign materials, post cards that feature on the front a photograph of Mr. Walgren with Governor Michael Dukakis, the Democratic nominee for president in the 1988 presidential election. The back of the post cards will bear a written statement that includes "information on or a reference to" Governor Dukakis. The Committee will use the joint photograph and will refer to Governor Dukakis without the cooperation or prior consent of Mr. Dukakis, his authorized political committees, or his agents.

The Committee proposes to select the persons to whom it will mail the post cards from a list of eligible voters provided by the Allegheny County Department of Elections. The Department makes such voter street lists available free to the public as public information. You point out that the Committee will not obtain "computer-adaptable tapes of voter street lists or any pre-selected form of voter data from the Allegheny County Department of Elections for this...project." The Committee will rely on several factors in selecting possible recipients from among the

individuals who are included in the lists and who reside in the 18th Congressional District. First, with the aim of identifying "desirable groups of recipients...by electoral behavior," the Committee will analyze past election returns. Second, the Committee will take into account the party affiliation of individuals. Third, the Committee will make "political judgments...as to which individuals or groups of individuals would be most desirable from the Committee's standpoint to receive the post cards." The Committee will retain for future use the edited and modified lists that it develops by this process. Volunteers from the Committee will hand transcribe onto the post cards the names and addresses of the individuals selected and will then mail the cards.

The Committee seeks an opinion whether the intended distribution of the post cards would result in the Committee's making an in-kind contribution to or an expenditure on behalf of candidate Dukakis. More particularly, the Committee wishes to know whether its proposed activity would constitute "direct mail" for purposes of the so-called "coattail" exception.

In recognition of the practical aspects of political campaigning, Congress in 1979 amended the Act to include a provision (the "coattail" exception) that allows a candidate to refer to another candidate in certain types of campaign materials without attributing part of the cost of such materials as a contribution to, or an expenditure on behalf of, the candidate to whom reference is made.¹ Thus, the costs of "campaign materials which include information on or reference to any other candidate and which are used in connection with volunteer activities (including...handbills, brochures, posters,... but not including the use of...direct mail or similar types of general public communication or political advertising.)..." are excluded from the definition of "contribution" and of "expenditure " 2 U.S.C. 431(8)(B)(xi); 11 CFR 100.7(b)(16) and 100.8(b)(17).² In this context, "direct mail" means "any mailing(s) by commercial vendors or mailing(s) made from lists which were not developed by the candidate." 11 CFR 100.7(b)(16) and 100.8(b)(17).

The Committee's proposal, as described, satisfies the requirements, including those associated with "direct mail," for the "coattail" exception to the definition of "contribution" and "expenditure." By paying the costs of the post cards, the Committee, therefore, will not be making a contribution to nor an expenditure on behalf of the Dukakis candidacy.³ The Committee will use volunteers, not a commercial entity, to do the mailings of the card that the Committee is preparing. The Committee will send the post cards to individuals whom it will have selected from an official list of eligible voters provided by a county department of elections.⁴ See Advisory Opinions 1986-29 and 1984-28.

The Commission notes that the Committee is required to report its disbursements for the described post card mailing as "operating expenditures." 11 CFR 104.3(b)(I), (b)(4)(1); see Advisory Opinion 1986-29. In addition, because the described post cards are not distributed "through any broadcasting station, newspaper, magazine, outdoor advertising facility, poster, yard sign, direct mailing, or any other form of general public political advertising," the post cards will not require a disclaimer under 2 U.S.C. 441d and 11 CFR 110.11. To the extent that Advisory Opinion 1986-29 may suggest a view inconsistent with this conclusion, it is hereby clarified and modified.

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)

Thomas J. Josefiak
Chairman for the Federal Election Commission

Enclosures (AOs 1986-29 and 1984-28)

1/ When the House bill which contains the language now found at 2 U.S.C. 431(8)(B)(xi) was introduced for House floor debate, Congressman Frenzel stated that the provision "will go a long way to encourage candidates to run with other candidates as a 'team.'" 125 Cong. Rec. H7628 (daily ed. Sept. 10, 1979) (remarks of Rep. Frenzel), reprinted in FEC, Legislative History of Federal Election Campaign Act Amendments of 1979, at 446 (1983).

2/ The Act defines "contribution" as "any gift, subscription, loan, advance, or deposit of money or anything of value made by any person for the purpose of influencing any election for Federal office." 2 U.S.C. 431(8)(A)(i). An "expenditure" is "any purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value, made by any person for the purpose of influencing any election to Federal office." 2 U.S.C. 431(9)(A)(i).

3/ Your letter of August 28th states that the costs allocable to Governor Dukakis as a candidate for President will be made from contributions subject to the limitations and prohibitions of the Act. Because Mr. Walgren is a Federal candidate, the Commission notes the requirements of 11 CFR 100.7(b)(16): "The payment of the portion of the cost of such materials allocable to Federal candidates shall be made from contributions subject to the limitations and prohibitions of the Act." (Emphasis added.) See also 11 CFR 100.8(b)(17).

4/ This use of an official voter list is consistent with the requirements for the statutory exemption. See the Explanation and Justification for the state and local political party exemption at 11 CFR 100.7(b)(15)(i), a provision somewhat similar to 11 CFR 100.7(b)(16), the subsection directly applicable here:

[M]ailings by a commercial vendor or from commercial lists would not be included under this exemption. The term "commercial lists" refers generally to lists that were not developed by the State or local party committee, that is, to lists developed by a commercial vendor or lists purchased or obtained by such committee, except where the lists are obtained from a public office, such as voter registration lists obtained from a Secretary of State.

45 Fed. Reg. 15081 (March 7, 1980) (emphasis added).