



FEDERAL ELECTION COMMISSION  
Washington, DC 20463

November 17, 1989

CERTIFIED MAIL  
RETURN RECEIPT REQUESTED

ADVISORY OPINION 1989-21

Elaine Sandra Abramson  
State Artist Nominee  
P.O. Box 330008  
Fort Worth, Texas 76163-0008

Dear Ms. Abramson:

This responds to your letters dated August 22, 1989, and September 14, 1989, requesting an advisory opinion concerning the application of the Federal Election Campaign Act of 1971, as amended ("the Act"), and Commission regulations to the production of items by you in order to raise funds for Federal candidate committees and party committees.

You state that you are a free-lance artist doing business as "Create-a-Craft," a sole proprietorship. You are proposing to candidates and committees, including Federal candidates and party committees supporting Federal candidates, that their campaigns use merchandise designed by you for the purpose of raising funds. Such merchandise would include t-shirts, sweatshirts, posters, post cards, mugs, and similar items which would display cartoon-like characters drawn by you, known as "THOSE CHARACTERS FROM COWTOWN." You state that each piece of merchandise would include a design with one of the characters "and/or a likeness of the candidate next to the character along with a small notation as to which office the candidate is [seeking]." From the sample designs submitted by you, it appears that these characters will be portrayed as advocating a vote for a particular candidate.

You wish to offer a fundraising plan whereby you would customize designs for each campaign that used them, hire the manufacturer to manufacture and ship the order to each person ordering a shirt, create the solicitation flyer, take all the orders, and send ten percent of the retail price to the committee. Out of the remaining ninety percent, you would cover the costs of the project, including payment to the manufacturer, and you would make a small profit. In the sample proposal letter to campaign managers and fundraisers enclosed by you, you state that the

committee should include in its print advertising an order blank which the purchaser would mail to Create-a-Craft, and that the committee should provide a mail order phone number in its television advertising.

You state that you will be charging the usual and normal charge for the merchandise sold to the public. You also state that you have suggested that candidates, their staff members, and volunteers wear the attire at political functions, and you anticipate that the committees will use postcards and mugs as "campaign giveaways." Such merchandise will be sold to the committees at reduced prices, and "no donation would be given to the campaign" on such a sale.

You ask whether the Act and regulations permit implementation of your proposed plan, and whether the merchandise purchasers or you would be making contributions under the described plan. You also ask what difference there would be if you decided to incorporate your business or to trademark your characters.<sup>1</sup>

The term "contribution" includes "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). See also 11 CFR 100.7(a)(1). It appears that you will be providing some goods and services, and perhaps funds, before receiving payment from those purchasing the items. This would include materials and time used in creating the designs and solicitation fliers, and funds to the extent that the manufacturer will require a deposit or a minimum purchase. As such you will be advancing or, in effect, loaning funds to assist the participating committees in fundraising. Such funds are contributions to the committee that benefits, and remain contributions to the extent that you remain unpaid. 11 CFR 100.7(a)(1)(i)(B). Accordingly, you must keep records as to the amounts expended by you for each committee and ensure that such amounts do not exceed the limits of 2 U.S.C. 441a. In addition, for recordkeeping and reporting purposes, you must inform the committees of your outlays in time for the committees to file timely reports in accordance with 2 U.S.C. 434(a) and 11 CFR 104.5.

Your proposal is distinguishable from the proposals considered by the Commission in three prior advisory opinions. Advisory Opinion 1988-17 involved a plan by Election Concepts, Inc. ("ECI") to provide medallions to Federal candidates' campaigns which would display the names and likenesses of the candidates and be used for fundraising. Under that proposal, each individual campaign would, upon signing a contract with ECI, provide ECI with funds for the design and casting of the die and ECI would then pay the mint for the artwork and the die. In your proposal, you, and not the campaigns, would be forwarding or putting up funds for the production of the fundraising items. Advisory Opinion 1976-50 involved a plan whereby a corporation would produce and market T-shirts at its own expense for a political committee, receive payment from individual purchasers, and send a portion of the purchase price on to the committee. The Commission concluded that the plan could not be implemented because it involved advances by the corporation. As a sole proprietor, you are subject to the limitations of 2 U.S.C. 441a, rather than the prohibition set out at 2 U.S.C 441b.

Advisory Opinion 1979-36 involved an agreement between a direct mail fundraising company and a principal campaign committee whereby the company would use direct-mail fundraising techniques to obtain contributions for the committee. Under the agreement, three-quarters of the

proceeds would be deposited in the committee's account and designated to cover the company's cost and profits on a monthly basis. One-quarter of the contribution proceeds would be available for other committee uses. The company would incur initial expenses in the earliest mailings of the fundraising materials. If, during the initial testing period, the company determined that the program was less successful than anticipated, all the funds raised would be available only to the company. The Commission concluded that, since, within the direct mail industry, the proposed agreement represented an ordinary mode of operation, the amounts expended by the company would not be contributions.

Similarly to your proposal, the company was making the initial outlays; the committee was not putting up funds. Nevertheless, even if some contributions were successfully solicited by the direct mail company, the company might retain all of the funds and the committee might not benefit. In your proposal, even if not enough contributions are received to make the program a success, the committee is guaranteed the retention of the contribution proceeds to be forwarded by you and, thus, will receive something of value from your advances.

In addition, the ordinary course of business of a direct mail firm is fundraising and, in Advisory Opinion 1979-36, advances were being made as part of a standard fundraising program with safeguards for the company. You are not ordinarily in the business of fundraising, and advances by you for a committee that would forego almost nothing, regardless of the degree of the success of your fundraising efforts, would constitute contributions.

Under the Commission's regulations, the entire amount paid as the purchase price for a fundraising item sold by a political committee is a contribution. 11 CFR 100.7(a)(2). In the proposed situation, you will be authorized by the individual committees to receive payment for the items you produce. Therefore, the amount paid by a purchaser, not just the portion that you will forward to the committee, will be a contribution by the purchaser subject to the limitations and prohibitions of the Act. See Advisory Opinions 1988-27, 1982-24, and 1977-22.

Based on the facts of your request, committees participating in your fundraising plan would authorize you as their "agent... to receive contributions and make expenditures" (see 11 CFR 102.9), an action which imposes particular obligations upon you under the Act. First, any solicitation created by you or by a particular committee for the sale of the items must contain a disclaimer stating the name of the committee authorizing the activity and the person paying for the solicitation. 2 U.S.C. 441d(a); 11 CFR 110.11(a)(1). In addition, since the proceeds of the sales are considered contributions to the committees, you must obtain and forward to the respective committees the information necessary to comply with the recordkeeping and reporting requirements of the Act. This includes the name and address of any person contributing in excess of \$50, together with the date and full amount of such contribution, and the same information along with the occupation and employer for contributors whose contributions to the particular committee aggregate over \$200. 2 U.S.C. 432(c)(2) and (3) and 434(b)(3)(A); 11 CFR 102.9(a)(1) and (2), and 104.3(a)(4)(i).<sup>2</sup> See Advisory Opinion 1980-99 with respect to recordkeeping for contributions of \$50 or less. In addition, you will need to inform the committee of the amounts used by you from proceeds to defray your costs. Such amounts are repayments by the committee of goods, services, or funds you have advanced for fundraising purposes and are, therefore, operating expenditures of the committee reportable under the Act. 2

U.S.C. 432(c)(5) and 434(b)(5)(A); 11 C 102.9(b) and 104.3(b)(3) and (4). Such information as to contributions and proceeds must be forwarded in a timely manner to ensure the committees' compliance with 2 U.S.C. 434(a) and 11 CFR 104.5.

It appears that those purchasing items will be sending their money in the form of check, money order, or currency to your business, Create-a-Craft. According to your proposal, it appears that checks and money orders will be made out to Create-a-Craft and deposited into the account of Create-a-Craft.<sup>3</sup> You will then send one-tenth of that amount to the appropriate committee. The Act and regulations, however, provide that all funds of a political committee shall be segregated from and may not be commingled with the personal funds of any individual. 2 U.S.C. 432(b)(3); 11 CFR 102.15. Therefore, none of the contributions received by you on behalf of the committees may be deposited in any of your existing accounts or the present accounts of Create-a-Craft. You will need to establish a separate bank account with respect to each committee at a bank or depository institution designated by the committee. 2 U.S.C. 432(h)(1); 11 CFR 103.2. See Advisory Opinion 1980-42. All contributions received by you must be deposited in the appropriate designated account, i.e., the account of the committee benefiting, within 10 days of your receipt. 11 CFR 103.3(a). Disbursements to pay for the costs of the merchandise and for any advances by you should come from the appropriate designated account as expenditures of the committee after proceeds from the sales have been received. If funds from your existing personal accounts or those of Create-a-Craft are used for these disbursements, they will count as contributions to the committee as discussed above.

Absent your adherence to these requirements as a fundraising agent of the political committees, receipts given to the committees from the sale of merchandise for which the committees had no obligation to pay a "usual and normal charge" could, among other consequences, constitute contributions to the committees from the vendor/seller and would be subject to the applicable limitation for your individual contributions of \$1,000 per candidate, per election, under 2 U.S.C. 441a(a).

Also, as a practical matter, the Commission recognizes that entrepreneurial activity involving candidate-related merchandise is commonplace. Under the Act, such vendor activity would not necessarily constitute an "expenditure" or "contributions" by the purchasers. The Commission would consider such factors as whether the sales did not involve any fundraising activity or solicitations for political contributions, the activity was engaged in by the vendor for genuinely commercial purpose, the items were sold at the vendor's usual and normal charge, and the purchases were made by individuals for their personal use in political expression.

Finally, you state that you plan to sell merchandise at reduced prices to the committees to be worn by candidates and campaign staffers and volunteers at functions or to be used as campaign giveaways. Commission regulations state that if goods and services are provided at less than the usual and normal charge, the difference between the usual and normal charge and the amount actually charged to the political committee constitutes an in-kind contribution from the seller. 11 CFR 100.7(a)(1)(iii)(A). In past advisory opinions addressing the sale of goods or services by a vendor to a political committee, the Commission has determined that, if the charges assessed by the vendor that involve a discount or a rebate are usual and normal charges offered to its non-political customers in the ordinary course of business, a contribution would not result. Advisory

Opinions 1985-28 and 1982-30. See also Advisory Opinion 1978-45. You have given no indication that such a discount is a usual and normal charge offered to your non-political clients in the ordinary course of business. Based on the information submitted by you, the amount of any discount would be a contribution by you which, along with the above-discussed contributions, would be subject to the limits of 2 U.S.C. 441a.

Although you ask how the Commission's interpretation would differ if you incorporate your business, you state that your attorney and accountant have advised you against doing so. It appears that incorporation is a step that you are merely considering at the moment. Commission regulations state that a request posing a hypothetical situation does not qualify as an advisory opinion request. See 11 CFR 112.1(b). As such, the Commission declines to address this specific part of the request.

It appears that if you were to trademark your characters, you would, under your proposed plan, retain the rights to the trademark and not transfer such rights to the committees. It appears, therefore, that a decision to trademark would not alter the responses provided by the Commission.

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)

Danny L. McDonald  
Chairman for the Federal Election Commission

Enclosures (AOs 1988-27, 1988-17, 1985-28, 1982-30, 1982-24, 1980-99, 1980-42, 1979-36, 1978-45, 1977-22, and 1976-50)

- 1/ The Commission's opinion is limited to the proposed implementation of your plan for Federal candidates and for party committees that qualify as political committees under the Act.
- 2/ The Commission notes that the order blank that you have enclosed with your sample proposal letter to campaign managers does not request information as to the employer or occupation of the contributor.
- 3/ Because, according to the list of potential clients listed by you, there are no Presidential candidates (who may receive public financing), the Commission does not address the issue of whether checks for the purchase of items must be made out to the particular committees, rather than to Create-a-Craft. See 11 CFR 9034.2(c).