



FEDERAL ELECTION COMMISSION
Washington, DC 20463

June 29, 1990

CERTIFIED MAIL,
RETURN RECEIPT REQUESTED

ADVISORY OPINION 1990-11

Mr. Stephen D. Alfers
370 17th Street
Suite 4700
Denver, Colorado 80201

Dear Mr. Alfers:

This responds to your letter of May 14, 1990 requesting an advisory opinion concerning application of the Federal Election Campaign Act of 1971, as amended ("the Act"), the Presidential Primary Matching Payment Act ("the Matching Payment Act") and the Commission's regulations, to the donation of belt buckles to charitable organizations and former campaign staff of the Friends of Gary Hart -- 1988, Inc., ("FOGH" or "Committee").

You state that the Committee received a contribution of 50 silver belt buckles which were to be used for fundraising purposes.^{1/} You further state that as part of the Committee's winding down efforts, the Committee desires to liquidate the belt buckles. You have proposed the following transaction.

FOGH will obtain an appraisal of the belt buckles from a qualified, independent broker. The Committee proposes to donate 40 belt buckles to qualified, charitable, non-political organizations, who will be required to use the buckles as fundraising items. You state that the Committee will provide the appropriate documentation of its donation to the Commission. You also state that FOGH will donate 9 buckles to key campaign personnel. Finally, you state that FOGH desires to use a portion of its excess funds for charitable purposes as soon as possible.

The threshold issue raised by your request is the appraisal of the belt buckles. As the publicly financed principal campaign committee of former Senator Gary Hart, the Committee was required to undergo an audit conducted by the Commission pursuant to 26 U.S.C. 9038(a). See also 11 CFR 9033.1(a)(6) and Part 9038. The Commission approved the Final Audit Report on the Committee on January 25, 1990. The Commission also made an initial repayment

determination that the Committee repay to the United States Treasury \$35,789.37 representing the pro-rata portion of public funds in the Committee's surplus; interest earned on the public funds in the Committee's surplus; and the amount of public funds received in excess of the candidate's entitlement. The Commission's repayment determination became final on April 4, 1990.

Included in the Commission's Final Audit Report was a review of the Committee's Statement of Net Outstanding Obligations ("NOCO Statement"). Within 15 days of the candidate's date of ineligibility, a candidate must submit a NOCO Statement which contains, among other items, the total for all outstanding obligations for qualified campaign expenses and an estimate of necessary winding down costs, less the total of cash on hand, the fair market value of capital assets and other assets on hand, and the amounts owed to the committee. 11 CFR 9034.5(a). "Other assets" is defined as any property acquired by the campaign for use in raising funds or as collateral for campaign loans. 11 CFR 9034.5(c)(2). The value of "other assets" must be included on a candidate's NOCO Statement if the aggregate value of such assets exceeds \$5,000. *Id.* The NOCO Statement is used by the Commission to determine a candidate's continued eligibility to receive federal matching funds to retire a candidate's outstanding campaign obligations. See 11 CFR 9034.5(g)(3).

The Committee's NOCO Statement, on the candidate's date of ineligibility, revealed that FOGH was in a surplus position. The Committee was required to make a pro-rata repayment pursuant to 26 U.S.C. 9038(b)(3) and 11 CFR 9038.3(c)(1). However, the NOCO Statement did not include a value for any assets because at the time of the audit fieldwork, no valuation for the belt buckles had been obtained. Subsequent to the audit, and prior to receiving your request, a Committee representative indicated informally to the Office of General Counsel, that the belt buckles would likely have a value between \$10,000 to \$40,000.

Therefore, the Commission concludes that the fair market value of the belt buckles obtained from the independent, qualified appraiser should be included on the Committee's NOCO Statement as "other assets" as defined by the Commission's regulations at 11 CFR 9034.5(c)(2). The Commission's Audit staff will continue to monitor the Committee's NOCO Statement and will make adjustments as necessary through addenda to the Final Audit Report. 11 CFR 9038.1(b)(3) and 9038.1(e)(4). A subsequent review of the Committee's financial activity may result in further repayment obligations. 11 CFR 9038.2(f).

The second issue concerns the disposition of the belt buckles themselves. As noted in your request, because FOGH is in a surplus position, the Committee is not permitted to sell the belt buckles without regard to the limitations and prohibitions of the Act and the Commission's regulations. 11 CFR 9034.9(a).

The Act and Commission's regulations provide that excess campaign funds may be used for several purposes, and expressly permits donations to any qualified charitable organization described in 26 U.S.C. 170(c). 2 U.S.C. 439a; 11 CFR 113.2(b). "Excess campaign funds" are defined as amounts received by a candidate which he or she determines are in excess of any amount necessary to defray his or her campaign expenditures. 11 CFR 113.1(e). *See also* Advisory Opinions 1990-2 and 1987-11. The Commission has stated previously that the term

"contributions" includes anything of value and is not limited solely to cash. Accordingly, the Commission concludes that the belt buckles, viewed as campaign assets, would qualify as excess campaign funds. See Advisory Opinion 1984-50.

The donation of the nine belt buckles to those individuals whom you described as "key campaign personnel" would be considered a lawful purpose under 2 U.S.C. 439a and would not be considered a personal use of such funds. Advisory Opinions 1980-123 and 1986-39. The donation of the remaining 40 belt buckles and excess campaign funds to charitable organizations is an explicit permissible use of excess funds pursuant to 2 U.S.C. 439a.

However, the Commission notes that any donation of excess funds would be contingent upon a determination that the Committee would have sufficient funds with which to make any repayment obligations to the Commission or civil penalties assessed on the 1988 committee.

Previously, in Advisory Opinion 1988-5, the Commission informed FOGH that it could not use Federal matching funds received for the 1988 presidential election cycle to retire the debt of Senator Hart's 1984 principal campaign committee. However, the Commission stated that once FOGH had satisfied its repayment obligations or possible penalty payments, the Committee could retain remaining funds in its accounts and use them to retire 1984 campaign debts. After repayments and penalty payments are made, and only then, FOGH would be permitted to treat its remaining cash balance as excess funds under 2 U.S.C. 439a and apply it to the 1984 debt. Advisory Opinion 1988-5. Moreover, the Commission stated that before the audit process was concluded and repayment or possible penalty obligations are satisfied, FOGH was not permitted to rely on 2 U.S.C. 439a and related regulations because those provisions do not supplant or supersede the requirements and conditions placed on presidential campaign funds pursuant to Chapter 96 of Title 26. Id.

In this instance, the Committee cannot avail itself of 2 U.S.C. 439a until repayment obligations stemming from the appraisal have been satisfied by the Committee. Then and only then, will the Committee be permitted to donate the remaining belt buckles and excess campaign funds to the campaign personnel and the charitable institutions. At that time, the Committee would be required to report all disbursements of its excess campaign funds. 2 U.S.C. 434(b)(4), (b)(5) and 11 CFR 104.3(b).

It should be noted that the Commission has recently approved new regulations with regard to debt settlements of political committees. With respect to authorized committees, the new regulations would not permit the 1984 principal campaign committee to settle a debt if FOGH had assets on hand which could be used to defray those prior debts. Moreover, FOGH would not be permitted to terminate if it has funds or assets to pay the outstanding debts of another authorized committee that cannot meet its own obligations.^{2/}

Although the Commission has concluded that the proposed donations of the belt buckles and excess campaign funds would be permissible transactions under the Act, it should be noted that this opinion would not affect any remedies available to creditors of the 1984 campaign committee with regard to these assets of FOGH. In general, debt claims and liabilities are subject

to relevant state law and a committee's responsibility for satisfying the obligations would be determined with reference to these laws. See Advisory Opinion 1989-2.^{3/}

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)

John Warren McGarry
Vice Chairman for the Federal Election Commission

Enclosures (AOs 1990-2, 1989-2, 1988-5, 1987-11, 1986-39, 1984-50, 1980-123)

1/ It is the Commission's understanding that although the Committee received 50 belt buckles, this request concerns only 49 belt buckles and that one belt buckle is missing.

2/ These new regulations will be codified at 11 CFR 116.2. The Commission approved these regulations on May 8 and June 21, 1990. See Agenda Document #90-59. However, at this time, the regulations have not been before the Congress for 30 legislative days and, thus, have not yet been prescribed by the Commission. 2 U.S.C. 438(d)(2).

3/ In Americans with Hart, Inc. v. Semper-Moser Assoc. Inc., #87-J17, (December 31, 1987), a Federal magistrate ruled that FOGH was not legally obligated to pay the debts of Mr. Hart's 1984 campaign committee because the organizations were distinct corporate and legal entities.