



FEDERAL ELECTION COMMISSION
Washington, DC 20463

November 15, 1990

CERTIFIED MAIL,
RETURN RECEIPT REQUESTED

ADVISORY OPINION 1990-19

Gordon M. Strauss
Thompson, Hine & Flory
2900 DuBois Tower
511 Walnut Street
Cincinnati, OH 45201-5717

Dear Mr. Strauss:

This responds to your letters dated August 22 and June 7, 1990, as supplemented by your letter dated October 18, 1990, requesting an advisory opinion on behalf of the Suarez Corporation concerning application of the Federal Election Campaign Act of 1971, as amended ("the Act"), and Commission regulations to the sale of items to a political committee to be used for retiring the committee's campaign debts.

Suarez is engaged in direct marketing sales and has a division known as Campaign Services which provides advice to political candidates. Suarez and the principal campaign committee of a Republican House candidate in 1990 entered into a contract on March 21, 1990, whereby Suarez was to provide goods and services, including expertise, to assist the candidate's primary effort. The candidate lost a primary run-off. Presently, the committee owes Suarez approximately \$82,000. The committee needs to retire this debt before terminating and has requested the assistance of Suarez in order to do so.^{1/}

Suarez, through Campaign Services, will enter into a contract with the committee whereby Suarez will sell to the committee a variety of merchandise including "commemorative general merchandise such as jewelry, coins, medals, and other comparable materials." Suarez normally sells by direct marketing methods to consumers. You state that Suarez will purchase the items initially from its suppliers at the fair market cost for these items. Suarez will purchase more items from its suppliers than it will actually sell to the committee. Those items which it sells to the committee will be sold at a price higher than Suarez's costs to purchase them. The markup will include the "administrative cost of purchasing the items and then sending them to the

[c]ommittee," and a profit for Suarez. This sum will be paid in advance by the political committee. The political committee will sell the items for an amount in excess of the amount paid by it and will use the funds from that markup to repay its debts. Suarez would repurchase any items not sold by the committee, within a specified and commercially reasonable time, at the price first paid by the committee to purchase the items. Suarez would market these items itself, immediately upon repurchasing them.

The items that are not sold to the committee will be sold by Suarez to retail customers "in its ordinary course of business." The items will also be sold to other political committees engaging in the same type of sale-for-resale arrangement proposed herein. You state that "[w]hile Suarez will not go out of its way to compete directly with the [c]ommittee in this process, the two entities will be engaging in the same activities and might, in fact, find themselves competing with one another in certain markets."

With respect to items repurchased from the committee, you indicate that "Suarez will make its usual and normal profit on the sales to the general public." As with the items not first sold to the committee, some of the items will be sold to other political committees engaging in the proposed sale-for-resale arrangement.

You state that there will be a profit for Suarez on each of the component transactions. Suarez will make a profit on the initial sale to the political committee. It "further anticipates benefiting from the political committee's subsequent sale of the items to the extent that the proceeds from that sale are used to retire the debt to Campaign Services." Additionally, you state that, in the event that Suarez must repurchase the items from the committee, Suarez will make a profit by reselling them and will not apply this profit to the committee's debts.

Suarez will have no control over the use of the materials after they are purchased by the committee, until such time as Suarez is obligated to repurchase them. The committee expects to market the items by direct mail solicitation using its own mailing lists and others it may purchase or rent. The precise marketing techniques will be left to the committee's discretion "though it is understood that the committee will in all cases make representations to the effect that all proceeds from the sale of the items will benefit the committee." Suarez does not intend to be involved in the marketing of these items "unless it is engaged to do so."

Suarez's normal business activity consists of direct mail marketing of similar items to individual buyers responding from a private residence. Suarez "does not, as a regular part of its business activities, sell to entities which resell." You assert that, if the Commission approves your proposal, Suarez will seek to establish similar relationships with other political committees in accordance with the conditions approved by the Commission, regardless of whether such committees are clients. You state that the most analogous prior transaction engaged in by Suarez was a royalty arrangement whereby an unaffiliated company purchased cosmetics from Suarez and sold them in Europe, with Suarez receiving a royalty on the sales.

You ask whether the proposed transaction is permissible under the Act.

Under the Act, corporations may not make contributions or expenditures in connection with a Federal election. 2 U.S.C. 441b(a); 11 CFR 114.2(b). 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 ... to any candidate, campaign committee, or political party or organization in connection with any [Federal] election." 2 U.S.C. 441b(b)(2); 11 CFR 114.1(a)(1). "Anything of value" includes the provision of goods and services provided at less than the usual and normal charge, i.e., less than the price of the goods in the market from which they ordinarily would have been purchased at the time of the contribution, or less than a commercially reasonable hourly or piecework charge for the services prevailing at the time the services were rendered. 11 CFR 100.7(a)(1)(iii)(B).

The Commission has considered a number of arrangements in which vendors have provided political committees with goods or services to assist in raising funds. See Advisory Opinions 1990-1, 1989-21, 1988-17, 1982-30, 1979-36, and 1976-50. In most of those situations, the vendor was being compensated by the receipt of funds directly from contributors. One of the concerns expressed by the Commission has been that, regardless of the success of the effort to raise funds, the committee would retain contribution proceeds while foregoing little, or the committee would assume little or no risk with the vendor bearing all, or nearly all, the risk. Advisory Opinions 1990-1 and 1989-21. See also Advisory Opinions 1988-17, 1979-36, and 1976-50. Your proposal meets these concerns in part because the committee will be paying in advance for the goods that it will market to raise funds and will exercise complete control over those goods, including the assumption of the costs for marketing the merchandise. The repurchase provision, however, would still present a problem along these lines unless two other conditions are met. First, Suarez may not pay the committee the price that the committee paid Suarez if the repurchase price is higher than the usual and normal charge then prevailing for such items. See Advisory Opinion 1989-4. Second, any repurchase price paid by Suarez should also be reduced by the "administrative costs" incurred by Suarez in selling to the committee and in taking back the items, costs that Suarez will not recapture from the committee. Failure to comply with these two conditions will result in an in-kind contribution by Suarez to the committee. 11 CFR 100.7(a)(1)(iii)(B).

Your request presents another problem, however, with respect to the charges and business practices involved. In approving committee-vendor relationships, the Commission has required that the amounts charged are the usual and normal charges offered to its non-political customers in the ordinary course of business. Advisory Opinions 1989-14, 1985-28, 1982-30, and 1978-45. Suarez intends to establish arrangements with other political committees similar to the one being proposed. Suarez is a direct marketer of jewelry and similar merchandise, which does not sell its merchandise for resale but instead retails the items directly to the consumer. Based upon the facts presented in this request, if Suarez offers the proposed plan to nonpolitical customers and makes this plan available to such customers on a basis equal with that of its political customers, the Commission will view this plan to be in compliance with the Act. See Advisory Opinions 1989-14, 1985-28, and 1978-45. This applies to all of the features of the plan including the wholesale price levels and the repurchase provisions. In addition, the Commission conditions any approval of such a plan on whether this plan is of a type which is normal industry practice for companies engaged in volume sales of jewelry and similar merchandise. See Advisory Opinion 1979-36. Failure to comply with the conditions set out will result in an in-kind corporate contribution.

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)

Lee Ann Elliott
Chairman for the Federal Election Commission

Enclosures (AOs 1990-1, 1989-21, 1989-14, 1989-4, 1988-17, 1985-28, 1982-30, 1979-36, 1978-45, and 1976-50)

1/ The Commission notes that this opinion only addresses the prospective activity of Suarez, i.e., forming a contract with the committee for the sale of campaign fundraising items. This opinion does not reach any issues concerning the underlying debts and obligations for campaign services previously provided by Suarez to the committee. Those issues relate only to past conduct, rather than to prospective activity. The advisory opinion process contemplates only future proposed transactions, or activity that is already under way and may continue in the future. The Commission also does not address all aspects of the prospective conduct of the committee, as the committee is not a requester. 11 CFR 112.1(b).