



FEDERAL ELECTION COMMISSION
Washington, DC 20463

January 18, 1991

CERTIFIED MAIL,
RETURN RECEIPT REQUESTED

ADVISORY OPINION 1990-26

Margaret Clark, Treasurer
Committee to Re-Elect Virginia Smith to Congress
Box 508
Chappell, NE 69129

Dear Ms. Clark:

This responds to your letter dated November 27, 1990, requesting an advisory opinion on behalf of the Committee to Re-Elect Virginia Smith to Congress ("the Smith Committee") concerning application of the Federal Election Campaign Act of 1971, as amended ("the Act"), and Commission regulations to the disposition of a computer owned by the Committee.

The Smith Committee is the principal campaign committee of Representative Virginia Smith of Nebraska. Mrs. Smith did not run for re-election in 1990 and retired from Congress at the end of 1990. She began her service in the House of Representatives on January 3, 1975. Your request indicates your belief that because Mrs. Smith was a member of Congress on January 8, 1980, her committee may "dispose of cash funds which were on hand as of November 30, 1989."

You state that, in the summer of 1984, the Smith Committee purchased an IBM personal computer for use by Mrs. Smith and her staff for election purposes. It is your understanding that the computer "is valued at between \$500 and \$600 on the retail market." The Smith Committee seeks an opinion as to how it may dispose of the computer, and what may be done with the sale proceeds if it is permitted to sell the computer.

Generally, the Commission has viewed the sale or commercial use of committee assets by a principal campaign committee or other political committee to be fundraising for political purposes, resulting in contributions subject to the limitations and prohibitions of the Act. Advisory Opinions 1989-4 and 1988-12. The Commission has reached this conclusion particularly with respect to proposed sales of campaign fundraising items, or unique political campaign materials without a genuinely independent market value. Advisory Opinions 1980-70,

1980-34, and 1979-76. See Advisory Opinion 1990-3. In addition, the Commission has considered the use of committee assets to generate income through ongoing business or commercial ventures to be fundraising. See Advisory Opinions 1988-12 and 1983-2.

The Commission has specifically concluded that contributions do not result, however, in cases of isolated sales of political committee assets when the assets had been purchased or developed for the committee's own particular use, rather than for fundraising, and had ascertainable market value. See Advisory Opinions 1989-4, 1986-14, and 1981-53. In addition, principal campaign committees with valuable campaign equipment and leftover campaign supplies that wished to terminate their operations have been permitted to liquidate such assets for debt retirement purposes, or in contemplation of prompt dissolution of the committee, without contributions resulting. Advisory Opinion 1985-1. See Advisory Opinion 1979-24. The Commission has emphasized in these opinions, however, that a contribution would result in such situations if the price paid to the committee exceeded the usual and normal charge as set forth in Commission regulations at 11 CFR 100.7(a)(1)(iii). Id.

The Smith Committee intends to dispose of an asset that it purchased for its own campaign use. The asset has an ascertainable market value. In addition, Mrs. Smith's retirement from Congress, along with your question as to the disposition of excess funds, indicates that the Smith Committee is contemplating termination. Under these circumstances, the Commission concludes that the Smith Committee may sell the computer without a resultant contribution from the purchaser. However, the price paid for the computer may not exceed the usual and normal charge for the computer on the retail market at the time of the sale. See 11 CFR 100.7(a)(1)(iii)(B).

If the Smith Committee sells the computer for its usual and normal charge which would exceed \$200, it should report the name and address of the purchaser on Schedule A (Itemized Receipts) and, if the purchaser is an individual, the purchaser's occupation and name of employer must also be itemized. 2 U.S.C. 431(13) and 434(b)(3)(G); 11 CFR 100.12 and 104.3(a)(4)(vi). The receipt of such funds will be an "Other Receipt," to be included in the totals for such category on the Detailed Summary Page. 2 U.S.C. 434(b)(2)(J); 11 CFR 104.3(a)(3)(x). When the computer sale proceeds are distributed as part of the disposition of excess funds, no separate reporting for the disbursement of those proceeds is necessary. Such funds should be included in the entries which disclose the final disbursements from the remaining excess funds. See 2 U.S.C. 434(b)(5) and (6); 11 CFR 104.3(b)(4).

In the event that the Smith Committee sells the computer, you wish to know how it may dispose of the resulting funds. Specifically, you pose the question whether the funds received from the sale of the computer may be added to the unobligated cash on hand amount for November 30, 1989.

Prior to the enactment of the Ethics Reform Act of 1989, the Act (at 2 U.S.C. 439a) provided as follows:

Amounts received by a candidate as contributions that are in excess of any amount necessary to defray his expenditures, and any other amounts contributed to an individual for the purpose of supporting his or her activities as a holder of

Federal office, may be used by such candidate or individual, as the case may be, to defray any ordinary and necessary expenses incurred in connection with his or her duties as a holder of Federal office, may be contributed to any organization described in section 170(c) of title 26, or may be used for any other lawful purpose, including transfers without limitation to any national, State, or local committee of any political party; except that, with respect to any individual who is not a Senator or Representative in, or Delegate or Resident Commissioner to, the Congress on January 8, 1980, no such amounts may be converted by any person to any personal use, other than to defray any ordinary and necessary expenses incurred in connection with his or her duties as a holder of Federal office.

See also 11 CFR 113.2, which restates the requirements of section 439a and refers to the contributions in excess of the amount necessary to defray campaign expenditures as "excess campaign funds."

In November 1989, Congress amended this provision by repealing the language that had made an exception to the ban on personal use of excess campaign funds for individuals who were members of Congress on January 8, 1980, i.e., the "grandfather clause." The amendment provides that for individuals who serve in the 102nd Congress [i.e., from January 3, 1991, to January 3, 1993], or who served in an earlier Congress, the personal use ban shall apply "to the use of excess amounts totaling more than the amount equal to the unobligated balance on hand on the date of the enactment of this Act." The Ethics Reform Act was enacted on November 30, 1989. The amendment also provided that for individuals serving after the 102nd Congress, the prohibition applies "to the use of any excess amount on or after the first day of such service," regardless of whether the amount used exceeds the November 30, 1989, balance.

Your request raises the issue of whether the unobligated balance on hand should be construed as including the value of unliquidated assets owned by the Committee. In past advisory opinions discussing the application of 2 U.S.C. 439a, the Commission has concluded that the terms "contributions" and "excess campaign funds" are not limited solely to cash and may include anything of value. Advisory Opinions 1984-50 and 1981-11. Relying on the grandfather clause, the Commission has specifically permitted a retired Senator to convert a car owned by his principal campaign committee to his personal use. Advisory Opinion 1982-33.

It appears from the Senate debate on the above-stated amendment to 2 U.S.C. 439a that the participants were not thinking specifically of assets as being included or excluded from excess campaign funds; Senators used such terms as "funds," "money," "contributions," or "dollars." See 135 Cong. Rec. S15,966-71 (daily ed. November 17, 1989). The debate was focused on the ability to use excess funds, rather than on what constituted excess funds. During the debate, the purpose of the amendment was expressed as follows:

Many of us have wanted to end this grandfather clause and to repeal it. The package repeals it.

What it does as part of the compromise is to delay that repeal until the 102d Congress. That was a compromise. But another part of the compromise is you

cannot add funds to the excess funds that you have in your possession during this period. You cannot improve your position during this period.

135 Cong. Rec. S15970 (daily ed. November 17, 1989) (statement of Sen. Levin).

The amendment accomplished the stated purpose by establishing a ceiling for excess funds that may be converted to personal use, i.e, the unobligated balance on hand on November 30, 1989. Consistent with Advisory Opinion 1982-33 and with the need for ascertaining the unobligated balance on November 30, 1989, the Commission offers two permissible options that take into account committee assets and that result in a definite dollar amount as a ceiling.

METHOD A

The first method involves construing the balance to be the cash on hand on November 30, 1989, as defined in 11 CFR 104.3(a)(1), minus the debts and obligations owed by the committee. The amount of excess campaign funds available for the officeholder's personal use may not exceed that ceiling, no matter how much the committee's unobligated balance increases from the November 30, 1989, amount. Consistent with the inclusion of assets within the concept of excess funds as set out in prior advisory opinions, the Commission concludes that such assets may be liquidated to bring the committee's balance back up to its November 30, 1989, total but any amount exceeding that total may not be converted by the officeholder for personal use.

Based on the Smith Committee's 1989 year end report, the Smith Committee's unobligated balance on November 30, 1989, under method A, was \$32,775, its net cash on hand amount.^{1/} If the Smith Committee's unobligated balance has fallen below this figure, the funds received from the sale of the computer may be added on to bring the excess funds available for personal use back to the November 30, 1989, amount. The value of the computer, however, may not be used to increase the November 30, 1989, amount.

The Commission also notes that, under this method, unliquidated assets of a committee, which are not part of the committee's cash on hand, may not be converted to the officeholder's personal use to the extent that the assets' value, when combined with the committee's net cash on hand, would exceed the November 30, 1989, amount. Such a conversion would contravene the intent stated in the floor debate cited above to bar augmentation of that amount. For example, if on February 10, 1991, the Smith Committee owned a car valued at \$5,000 that Mrs. Smith wished to convert to her personal use and also had \$35,000 net cash on hand on that date, Mrs. Smith could only convert up to \$27,775 plus the car to her personal use (for a total of \$32,775).

Additionally, the Commission notes that, consistent with the stated intent, any personal use of the committee funds after November 30, 1989, would count as a drawdown on the ceiling in the amount converted. Therefore, if the Smith Committee had, for example, converted \$2,000 to personal use on January 7, 1991, the unused ceiling balance would become \$30,775.

METHOD B

The second method available permits inclusion of the value of unliquidated committee assets in addition to the net cash on hand amount. The figure added would be the value on November 30, 1989, of assets held by the committee on that date. This would include noncash assets previously purchased by the committee such as cars, computers, and office equipment. It would also include other assets received as in-kind contributions on or before November 30, 1989, but not liquidated until a later reporting period, e.g., contributions of stocks, bonds, and art objects. See 11 CFR 104.13(b). The Commission would recognize the addition of these assets, however, only if a separate Memo Entry Schedule A is filed as an amendment to the 1989 year end report (covering July 1 through December 31, 1989); this Schedule A should itemize each such asset, giving the date of acquisition, the fair market value as of November 30, 1989, and a brief narrative description explaining the basis on which the asset's value was ascertained. In addition, the committee would have to disclose the disposition made of each such asset, including its fair market value at the date of sale or other disposition. This would be disclosed on the committee's termination report unless the asset had been sold or distributed during an earlier period and included in the report covering that period. Any proceeds from the sale of an asset that exceed its fair market value on the date of sale may not be used by a committee to bring its excess funds back up to the November 30, 1989, ceiling. See also the discussion of sale of committee assets above.

By using method B, certain committee receivables could also be treated as other assets and be included in the unobligated balance. Given the need to ascertain a definite amount, these receivables may only include those debts and loans reported as owed to the committee as of November 30, 1989, and itemized on the committee's year end report for 1989, and provided also that such receivables are actually collected by the committee prior to its termination. In addition, committee receivables in the form of credits or deposit refunds payable to the committee by vendors may be included in calculating its unobligated balance. These types of receivables must be itemized on Schedule C or D of the committee's 1989 year end report or in an amendment thereto, in order to be included.

As stated above with respect to method A, any personal use of the committee funds, including noncash assets, after November 30, 1989, would count as a drawdown on the ceiling in the amount converted.

The application of method B in the situation presented by the Smith Committee is illustrated by the following discussion and example. The 1989 year end report of the Smith Committee discloses no debts or obligations owed to the committee. If the computer was the only noncash asset held by the committee on November 30, 1989, and is listed on its Memo Entry Schedule A filed as an amendment to the 1989 year end report, or if the computer is the only such asset listed on that Memo Entry, then the fair market value of the computer on November 30, 1989, may be added to the net cash on hand balance of that date to arrive at the appropriate ceiling. Assuming that the computer's value on November 30, 1989, was \$700, the unobligated balance will be \$33,475. Therefore, the combined total of funds and unliquidated assets (valued at the date of conversion to personal use) that is convertible to personal use may not exceed \$33,475 (\$32,775, in cash, plus \$700).

As provided in section 439a, the Smith Committee may make other uses of its excess funds and remaining assets. Such funds and assets may be used to defray any ordinary or necessary expenses incurred in connection with Mrs. Smith's duties as a Federal officeholder, may be contributed to an organization described in 26 U.S.C. 170(c), or may be used for "any other lawful purpose," including unlimited transfers to any national, State, or local party committee. The Commission expresses no opinion as to any tax ramifications, as such issues are outside its jurisdiction.

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)

John Warren McGarry
Chairman for the Federal Election Commission

Enclosures (AOs 1990-3, 1989-4, 1988-12, 1986-14, 1985-1, 1984-50, 1983-2, 1982-33, 1981-53, 1981-11, 1980-70, 1980-34, 1979-76, and 1979-24)

1. This figure was derived by determining the net cash on hand at the end of 1989 (cash on hand of \$32,551.52 minus \$0.00 in debts and obligations owed by the committee), subtracting the receipts for the month of December 1989 (\$230.13), and adding the disbursements made in December 1989 (\$453.84). The year end report, which covers activity from July to December 1989, did not indicate any unitemized receipts or disbursements. In addition, the committee's 1990 mid-year report did not indicate that there was any debt or obligation owed by the committee of \$500 or less that went unreported during the last 60 days of 1989. See 11 CFR 104.11(b).