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3 **ADVISORY OPINION 1991-9**

4 **Robert F. Bauer**
5 **Judith L. Corley**
6 **607 Fourteenth Street, N.W.**
7 **Suite 800**
8 **Washington, D.C. 20005-2011**

DRAFT

9 **Dear Mr. Bauer and Ms. Corley:**

10 **This responds to your letter dated March 25, 1991,**
11 **requesting an advisory opinion on behalf of Congressman Peter**
12 **Hoagland and the Hoagland for Congress Committee ("the**
13 **Hoagland Committee" or "the Committee") concerning**
14 **application of the Federal Election Campaign Act of 1971, as**
15 **amended ("the Act"), and Commission regulations to the**
16 **payment of interest by the Hoagland Committee on loans**
17 **received from Congressman Hoagland.**

18 **Congressman Hoagland was first elected to the House of**
19 **Representatives in 1988 and the Hoagland for Congress**
20 **Committee was his principal campaign committee for that**
21 **election. From August 1987 to July 1989, Mr. Hoagland made a**
22 **series of loans from his personal funds to the Committee. In**
23 **addition, Mr. Hoagland obtained \$50,000 in bank loans from**
24 **Norwest Bank in Omaha and loaned the proceeds to the**
25 **Committee. You state that the loans have been continuously**
26 **reported by the Hoagland Committee as loans of the**
27 **candidate's personal funds. Funds obtained from bank loans**
28 **have been disclosed as loans from the original source,**
29 **Norwest Bank.**

30 **Although the outstanding balance varied at different**
times during this period, the total amount loaned was

3 \$290,000. You state that, as of December 31, 1990,
4 \$155,430.93 had been repaid on these loans, and some of the
5 loans had been repaid in full. There is still a current
6 balance of \$134,569.07. None of the loans were memorialized
7 by any written instrument until July 1990. You assert that
8 there was, however, the understanding that the loans, along
9 with the interest, would be repaid to Mr. Hoagland in full if
10 funds were available.^{1/}

11 On July 23, 1990, when approximately \$170,000 of the
12 loans remained outstanding, the Committee executed a
13 promissory note for the repayment of loans to Mr. Hoagland.^{2/}
14 Under the agreement, the Committee is obligated to repay the
15 remaining outstanding balance on all of the loans with
16 interest. In addition, subject to the approval of the
17 Commission, the Committee is required to pay interest on the
18 loans retroactive to the date each loan was made. For the
19 loans obtained from Norwest Bank, the interest to be paid to
20 Mr. Hoagland is the amount charged by the bank, i.e., 11.5
21 percent. For all other loans, the interest is the
22 "applicable federal rate published by the Internal Revenue
23 Service around the time of the execution of the note." That
24 figure is 8.47 percent per annum. The note also provides

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26 ^{1/} In reports filed for the periods prior to the 1990
27 October quarterly report, the Committee wrote in "NA" in the
28 spaces on Schedule C for disclosing the interest rates of the
non-bank loans.

29 ^{2/} You state that the note was executed after the time
30 pressures of the original campaign had abated and after the
first eighteen months in office.

3 that for each repayment made, the Committee must identify the
4 loan being repaid, the amount to be considered payment of
5 principal, and the amount to be considered payment of
6 interest.

7 Attached to the note are three schedules, one for loans
8 that were outstanding and unpaid (Schedule 1), one for loans
9 that have been completely repaid (Schedule 2), and one for
10 the bank loans (Schedule 3). Schedule 1 consists of 12 loans
11 totaling \$159,500. Schedule 2 consists of 16 repaid loans
12 totaling \$80,500. Schedule 3 discloses that \$50,000 in bank
13 loans were obtained by the candidate, and loaned to the
14 Committee in four increments, with repayment to the candidate
15 on all but \$10,500.

16 The note specifically provides that, for loans on
17 Schedule 1, the Committee promises to repay the entire
18 principal that remained outstanding as of the date of the
19 note; the interest on the unpaid principal calculated as of
20 the date of the note until the principal is repaid in full;
21 and the interest on the unpaid principal as of the date each
22 loan was made until the date of the note. For loans on
23 Schedule 2, the note provides for repayment of the interest
24 calculated from the date each loan was made until each loan
25 was repaid. For loans on Schedule 3, the Committee promises
26 to repay the entire principal outstanding as of the date of
27 the note; interest on the unpaid principal at the rate of
28 interest charged by the bank calculated as of the date of the
29 note until the principal is repaid in full; and the interest
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3 on the principal of each loan, whether paid or unpaid as of
4 the date of the note, at the rate of interest charged by the
5 bank to be calculated as of the date of the candidate's loan
6 to the campaign until the earlier of the date the candidate
7 is repaid or the date of the note.

8 You ask whether the Committee may make interest payments
9 on a loan from the candidate retroactive to the date of the
10 original loan and whether interest payments may be made on
11 loans that have been repaid. You also request that the
12 Commission clarify the reporting requirements related to such
13 interest payments.

14 Commission regulations permit a candidate (other than
15 one who receives public funding) to make unlimited
16 expenditures from his personal funds for campaign purposes.
17 11 CFR 110.10(a). The candidate may thus make loans from his
18 personal funds to his authorized committees without
19 limitation. See 11 CFR 100.7(a)(1). With respect to the
20 repayment of such loans to the candidate, the Act and
21 Commission regulations prohibit individuals who were not in
22 Congress on January 8, 1980, from converting excess campaign
23 funds to personal use, but those regulations specifically
24 except the repayment to the candidate of "any loan the
25 proceeds of which were used in connection with his or her
26 campaign." 11 CFR 113.2(d); see also 2 U.S.C. 439a. In
27 addition, the regulations include within the definition of
28 expenditure the payment of any interest on an obligation. 11
29 CFR 100.8(a)(1)(i). The regulations thus contemplate that
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3 the repayment of a loan would include an accompanying payment
4 of interest which would be treated as an expenditure or
5 operating expense. As stated in Advisory Opinion 1986-45,
6 since the Commission regulations specifically make lawful the
7 repayment of loans the candidate has made to the committee,
8 it would follow that the payment of interest on such loans,
9 to the extent the interest charged does not exceed a
10 commercially reasonable rate, would also be lawful and not a
11 personal use.

12 Unlike the candidate in the situation presented in
13 Advisory Opinion 1986-45, however, you seek to have interest
14 paid to the candidate on loans or portions of loans that were
15 already repaid prior to the time the candidate and his
16 committee entered into a written agreement establishing
17 interest rates for repayment by the committee. In addition,
18 prior to the July 1990 instrument signed by the Hoagland
19 Committee, the Committee reports disclosed that there was no
20 interest rate applicable to the loans not originating with
21 the bank. The two reports filed since then, i.e., the
22 October 1990 report and the 1990 year end report, have
23 reported an 8.47 percent interest rate for the non-bank
24 loans.^{3/}

25 In discussing the payment of interest by the Committee,
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27 ^{3/} The Hoagland Committee's year end report discloses no
28 interest rate for four loans totaling \$19,500 although the
29 October report disclosed an interest rate for those loans and
30 both reports disclose interest rates for all other
outstanding loans. The Commission assumes that these
omissions from the year end report were inadvertent.

3 the Commission assigns the loans to categories similar to
4 those on the schedules attached to the note. With respect to
5 loans already repaid in full at the time of the note's
6 execution, the Commission concludes that Mr. Hoagland may not
7 receive any interest. The Commission has held that
8 permitting a committee to change a gift by a candidate of his
9 personal funds to a loan a number of years after it was made,
10 thus enabling the disclosure of such "loan" as a current debt
11 of the committee, was impermissible. Such a change would
12 "contravene the obvious intent of 2 U.S.C. §434(b)(12) [now
13 restated at §434(b)(8)] that debts and obligations be
14 initially disclosed in a timely manner and be continuously
15 reported thereafter until extinguished." Advisory Opinion
16 1977-58. Similarly, the failure to disclose any interest
17 rate for the loans and the indication that interest was not
18 even applicable would foreclose the retroactive application
19 of interest for such loans. Such retroactive interest
20 payments would represent a conversion of excess funds to
21 personal use in violation of 2 U.S.C. §439a and 11 CFR
22 113.2(d).

23 For similar reasons, the Committee may not pay the
24 interest that would accrue on the unpaid principal as a
25 result of a calculation of interest from the date the loan
26 was made to the date of the note. With respect to that
27 portion of the principal still outstanding, the Committee
28 may pay the interest that would accrue on the unpaid
29 principal between the date of the note until the principal is
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3 repaid in full. Advisory Opinion 1986-45. The making of the
4 note and the reporting of the interest rates in subsequent
5 reporting periods is similar to a renegotiation of the loans.
6 The payment of interest accruing after such a renegotiation
7 is not an imposition of a retroactive obligation.

8 With respect to the loans originating from the bank, it
9 appears that the Committee has reported complete repayment to
10 the bank as of the end of the reporting period covered by the
11 1989 year end report, i.e., July 1, 1989, to December 31,
12 1989. No payments to the bank were disclosed during this
13 period and Schedule 3 attached to the note indicates that
14 \$10,500 was still owed to Mr. Hoagland for the bank loans as
15 of July 1990. (It appears from Schedule 3 that payments to
16 Mr. Hoagland listed on the 1989 year end report were in
17 repayment of other loans made by him.) The Commission
18 assumes that repayment to the bank was made directly by Mr.
19 Hoagland. It appears that the Committee is now reporting the
20 amounts owed to Mr. Hoagland as a result of the bank loans as
21 part of the other group of loans found in Schedule 1. Hence,
22 the interest for these outstanding amounts is being reported
23 as 8.47 percent rather than 11.5 percent.

24 Based on principles set out above, the Committee would
25 have been able to pay Mr. Hoagland the interest accrued
26 before the agreement if there had been proper reporting of
27 the payment of the loan interest. See 11 CFR
28 104.3(b)(4)(iv). It appears, however, that Mr. Hoagland's
29 payments of interest to the bank were not reported by the
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3 Committee as new loans from Mr. Hoagland or as debts owed to
4 him by the Committee, thus negating his ability to recover
5 such interest payments. On the principal still owed by the
6 Committee to Mr. Hoagland at the time of the note (\$10,500)
7 which has been included in the recent reports as part of the
8 group of loans not originating with the bank, Mr. Hoagland
9 may recover the interest that accrued from the time of the
10 note until its repayment in November 1990, at the 8.47
11 percent rate.

12 The payments of interest by the Committee to Mr.
13 Hoagland are to be reported on Schedule B as an operating
14 expenditure of the Committee. See 11 CFR 100.8(a)(1)(i).
15 Each interest payment should be itemized separately. See 11
16 CFR 104.3(b)(4)(i) and (iii). See Advisory Opinion 1986-45,
17 note 4.

18 This response constitutes an advisory opinion concerning
19 application of the Act, or regulations prescribed by the
20 Commission, to the specific transaction or activity set forth
21 in your request.

22 Sincerely,

23
24 John Warren McGarry
25 Chairman for the
26 Federal Election Commission

27 Enclosures (AOs 1986-45 and 1977-58)
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