



FEDERAL ELECTION COMMISSION
Washington, DC 20463

July 12, 1991

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

ADVISORY OPINION 1991-18

Gerard E. Harper
Counsel and Law Chair
New York State Democratic Committee
60 East 42nd Street
New York, New York 10165

Dear Mr. Harper:

This responds to your letters dated January 14 and May 16, 1991, requesting an advisory opinion on behalf of the New York State Democratic Committee ("the Committee") concerning application of the Federal Election Campaign Act of 1971, as amended ("the Act"), and Commission regulations to an agreement between the Committee and a telemarketing company for fundraising services.

You state that the Committee has entered into an agreement with Gordon and Schwenkmeyer, Inc. ("GSI"), a telemarketing company incorporated in California, whereby GSI uses lists provided by the Committee to conduct two types of telephone solicitation programs on behalf of the Committee.¹ The Committee has been registered as a political committee since July 1981, and it appears from the agreement that the activity will be conducted for the benefit of the Committee's Federal accounts. One type of program, the Current Donor Program, involves GSI's use of the Committee's list of current donors. The other, known as the Prospecting Program, entails the use of lists of active party members and lists of registered Democratic voters.

Under the agreement, GSI prepares materials (subject to the Committee's approval) to be used by phone solicitors in contacting potential contributors and billing for the pledges; verifies the accuracy of potential contributor information provided by the Committee; arranges for the printing of necessary materials; arranges for telephone service for the phone bank; hires, trains, and supervises phone bank and billing personnel; and supervises the solicitation programs on a daily basis. GSI collects the contributions, verifies the permissibility of contributions under the Act (e.g., through use of the pledge card generated at the time of the solicitation), and deposits

"eligible" contributions into a custodial account set up by GSI in the Committee's name at a depository institution.² In addition, GSI provides the Committee with the information necessary to comply with the Act, including the identity of all donors, the full amounts contributed, the date of the contribution, and the amounts deducted from the account as compensation for GSI. GSI will provide such information in monthly reports to the Committee and will also provide the Committee with a complete report of receipts and disbursements for a reporting period within seven business days prior to the date on which the Committee is required to file with the Commission.

The agreement provides that it may be terminated by either party for any reason upon delivery of 30 days written notice.

The Current Donor Program

The amount and timing of GSI's compensation depends upon the type of program. Under the Current Donor Program, GSI is paid by telephone cycle, or each full round of calls made from the list. There will be three such cycles in a non-election year and four during an election year. For each cycle, the actual telephone solicitation lasts approximately three weeks and the collection process lasts approximately six to eight weeks. All permissible receipts are placed in the custodial account and at the end of each month, GSI remits a portion of the receipts to the Committee and pays itself the compensation due. GSI's compensation for each cycle is determined by a specific rate for each hour spent phoning (not to exceed \$28) plus a fixed amount for each pledge (not to exceed \$1.50).

You state that the amount paid to GSI for any one month may vary from the amount due for that month, depending upon the amount remitted to the Committee. You explain that, before each cycle begins, GSI, drawing on its past experience with the Committee's list and others like it, prepares estimates of the total amounts to be raised, the commissions it will earn in raising those amounts, the net revenue to the Committee, and the time when the revenues will be raised. The amount remitted to the Committee at the end of each month is based on these projections.

You acknowledge that, in some months the revenue remitted to the Committee may exceed the actual difference between the amounts raised and the commissions earned by GSI and thus, at times, the Committee is paid before GSI pays itself fully. In other months, when the difference exceeds the amount remitted to the Committee, GSI will keep that excess money in the custodial account until the month it earns commissions to equal that retained amount. In the final month of the cycle, however, the necessary adjustments are made to ensure that GSI receives all earned commissions. You state that there is no circumstance in which the Committee would receive funds in excess of the contributions received,³ and that GSI will receive full compensation for each cycle, regardless of whether sufficient funds are raised in the cycle to cover that compensation. You further state that, in the "improbable event" of a shortfall for a cycle which leaves GSI unpaid for that cycle, the amount of unpaid commissions would become a debt "immediately due and owing" at the end of the cycle. You note that the telemarketing program is not the Committee's only source of funds, and the Committee could satisfy the debt by raising funds from other sources.⁴

The Prospecting Program

Under the Prospecting Program, GSI earns commissions based on a specific rate for each hour spent phoning prospects and new donors already obtained through the program (not to exceed \$24) plus a fixed amount for each pledge (not to exceed \$1.50). This program does not appear to operate on a relatively short-term cycle basis. You state that the initial telephone contacts (solicitations) with prospects were conducted beginning in the Fall of 1989 and concluded in the Spring of 1990 and that the first resolicitation of newly created donors occurred that Spring. The Agreement provides that the new donors shall be contacted three times each non-election year and four times each election year.

You state that, by its nature, the start-up of the Prospecting Program is inherently speculative, because the calls are made to prospects whose propensity to contribute is unknown. In the early stages of the program, the amount of commissions earned by GSI will exceed total contributions. You assert, however, that, eventually, as the new donor list is developed and solicited, contributions will exceed commissions and provide a margin to cover the commissions earned during the start-up phases. You state that, as in the Current Donor Program, there is no circumstance in which the Committee would receive funds in excess of the contributions received. GSI also receives compensation in the form of half ownership of the new donor list which it may use on behalf of clients other than the Committee, provided that GSI receives consent from the Committee if it proposes to solicit those names in a contested, non-presidential primary in New York State. For all other solicitations using the new donor list, GSI must inform the Committee in writing. You state that the remittal to the Committee of a portion of the contributions before GSI is fully paid for commissions earned is in consideration for this half-ownership interest.

Under the Prospecting Program, GSI will be entitled to commissions only to the extent that it raises money through the program. If the program fails to yield sufficient contributions to fully cover GSI's commissions (i.e., GSI has not fully withheld its compensation), GSI does not have recourse to the Committee. Under the agreement, GSI may continue, for a period no longer than five years after the termination of the agreement, to solicit donations in the name of the Committee and may retain funds obtained from such solicitations until it has recovered in full for its services.⁵

During the first year of the program, GSI remitted to the Committee the net revenues attributable to the first round of resolicitation of new donors, even though GSI had not yet been fully paid for commissions earned during the donor "acquisition" or start-up solicitations. You state that this was done because GSI's projections indicate that the unpaid commissions will be paid by the next round of calls.

Further Recordkeeping and Reporting

In addition to the information described above, GSI will also provide the Committee with a monthly activities report detailing the costs and results of the solicitation programs. The report will set out the gross income generated by the programs; number of attempts to reach, number of contacts with, and number of pledges from potential contributors; average amount of each

pledge; total net income; total cost of collections; total number of hours spent soliciting; the names of Membership Prospects; the names of Voting List Prospects and new donors; costs associated to new number purchase; and fees "offsettable" by GSI under each of the solicitation programs.

Questions Presented

You seek an opinion on whether GSI's compensation and commissions conform with the Act. Specifically, you wish to know:

- a. May the Committee continue to report the compensation to GSI as an expense in the reporting period in which the expense is "actually experienced," i.e., when GSI actually deducts the same from the contributions it raises or, in the case of a deficit for a particular telephone cycle, when the Committee pays the compensation to GSI?
- b. Assuming the Committee receives funds solely out of contributions raised, is there any circumstance under the described arrangements in which GSI's remittance of contributions to the Committee may constitute "a loan or financing which must be reported as such"? For example, if, in the Prospecting Program, GSI remits funds to the Committee at a time when there remain earned, but unpaid, commissions, does that remittance constitute a loan or financing until GSI is fully paid?
- c. If the answer to question b is "other than an unqualified no," must the Committee pay interest to GSI? Is a non-payment of interest a contribution to the Committee?
- d. If the answer to b is an unqualified no, is GSI's compensation arrangement nevertheless a contribution? If so, is the contribution to be reported as returned once GSI is fully compensated out of the funds raised?

The Commission's Response

1. Permissibility of the Programs

The Commission's response to your questions must be premised upon an analysis of whether the proposed solicitation programs are permissible under the Act, i.e., a response to question d. The Act prohibits a corporation from making 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 services at less than the usual and normal charge, i.e., 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 and where the vendor was

compensated by the receipt of funds directly from contributors. See Advisory Opinions 1990-1, 1989-21, 1979-36, and 1976-50. In these situations, the Commission was concerned that regardless of the degree of success of the effort to raise funds, the committee would retain contribution proceeds while giving up little, or the committee would assume little or no risk with the vendor bearing all, or nearly all, the risk. Other Commission concerns with respect to the provision of fundraising services have been to ensure that the committee would pay the costs of the program at the usual and normal charge in the ordinary course of business. See Advisory Opinions 1990-19, 1989-21, and 1979-36.

In Advisory Opinion 1979-36, the Commission considered 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, the contribution proceeds would be deposited directly into the committee's account and three-quarters would be designated for return to the company to cover the company's costs and profits on a monthly basis. One quarter of the proceeds would be available for other committee uses. The company would incur initial expenses in preparing and mailing the earliest fundraising materials and these expenses would be billed to the committee. If, during the initial testing period, the company determined that the program was less successful than anticipated, all the funds raised would be available to the company and none would be available to the committee until the vendor's costs and fees were paid. The Commission concluded that the amounts expended by the company would not be contributions, on the assumptions that the proposed agreement represented an ordinary mode of operation within the direct mail industry and that the company's charges were normal for the services rendered. Subsequent opinions by the Commission have been more explicit as to the need, in fundraising situations, for the committee to pay for all of the costs of the program. See Advisory Opinions 1990-14, 1990-1, and 1989-21.

Subject to certain conditions meeting the Commission's concerns, the Current Donor program may be implemented without resulting in a prohibited corporate contribution. The Commission notes the outlay of funds by GSI at the beginning of the program and at the beginning of each cycle and notes that there may be months in which the amount of funds remitted to the Committee will exceed the difference between the amount collected and the amount owed to GSI. Nevertheless, this initial outlay of funds and the temporary withholding of payment to GSI, like the initial incurring of expenses by the direct mail company in Advisory Opinion 1979-36, does not necessarily amount to an advance of corporate funds or services. The Current Donor Program involves short, specifically delineated periods in which the Committee is obligated to make full payment to the vendor by the end of the period. In the final month of a cycle, which lasts approximately two and one-half months, the necessary adjustments are made to ensure that GSI receives all earned commissions. You state that GSI will receive full compensation, even if sufficient funds are not raised in that cycle, indicating that payment will come from the Committee's other funds on hand.

The Committee and GSI must also ensure that the distribution of contribution proceeds to the Committee prior to the last month of each cycle is based on good faith projections of the expected contributions and earned commissions for that cycle. The projections and the

distributions should not be altered to accommodate the Committee's need for an additional amount of funds at any given point, e.g., close to a general election.

The Commission further conditions its approval on the basis that the commissions retained by GSI fully cover all of its expenses plus reasonable profit for its services to the Committee. Advisory Opinions 1990-19 and 1990-1. Any shortfall, as evidenced by GSI's monthly activities reports to the Committee, must also be paid for at the end of the cycle or immediately be due and owing by the Committee.⁶

In addition, you characterize the programs at issue as novel or innovative and, other than the fact that these programs for the Committee have begun, there is no indication that the extensions of credit in these programs are in GSI's ordinary course of business and on terms substantially similar to extensions of credit to nonpolitical debtors that are of similar risk and size of obligation. See 11 CFR 116.3(b) and (c). In approving the Current Donor Program, the Commission assumes GSI will make available similar programs on a non-discriminatory basis to all of its customers. See Advisory Opinions 1990-19, 1986-23, and 1979-36.

Unlike the Current Donor Program, the Prospecting Program does not involve short, defined periods in which the Committee is obligated to make full payment to the vendor by the end of the period. Under the agreement, if the program fails to yield sufficient contributions to fully cover GSI's commissions, GSI does not have recourse to the Committee. It appears that full payment of commissions is tied to long-range contingencies, despite the intention that the Prospecting Program will yield full compensation for GSI.

You acknowledge the inherently speculative nature of the start-up of the program and it appears that a period of a year or longer could pass before enough funds are received to pay commissions earned during the previous year. During that time, funds will have been made available for the Committee's use with minimal or inadequate payment to the vendor. Even after a period in which the revenues may be sufficient to cover both the commissions earned and the amounts forwarded to the Committee's other Federal accounts, further prospecting may create further long-term shortfalls. Moreover, the value of ownership of the list for clients other than the Committee and its adequacy as compensation for GSI's services may be speculative. Finally, the return on continued solicitation for a period of five years after termination in order to make up for shortfalls may continue to be as inadequate as it was before termination.

Because of the speculative nature of the program as distinguished from the Current Donor Program, and the consequent possibilities of shortfall, the Commission cannot give its approval to the Prospecting Program in the absence of a record by GSI or similar companies of the implementation of a program of similar structure and size in the ordinary course of business. In the absence of such a record, the Committee may remedy this problem by making a substantial payment in advance of the program (or the remainder of the program) adequate to cover the expenses of GSI's operations for the program and to ensure against nonpayment of commissions. Alternatively, the Committee and GSI may alter the program to provide for short, defined periods in which full payment is made by the period's end to GSI for the commissions earned. In addition, the conditions applied above to the Current Donor program must be satisfied.

2. Responses to the Questions

In the programs presented by you, the custodial account set up by GSI is an account of the Committee. It must be established at a state bank or a Federally chartered or insured depository designated by the Committee, and the depository is to be disclosed on the Committee's amended statement of organization. 2 U.S.C 432(h)(1) and 433(b)(6); 11 CFR 103.2 and 102.2(a)(vi). Each contribution is considered received by the Committee when GSI receives it, and GSI must deposit the proceeds in the account within 10 days of the receipt. 11 CFR 103.3(a). All disbursements by a political committee shall be made by check or similar draft drawn on the accounts of the committee. 11 CFR 102.10. Withdrawals by GSI from the custodial account or payments by the Committee from its other accounts are operating expenditures by the Committee at the time the withdrawals or payments occur and are reportable on Schedule B for the reporting period when made. 2 U.S.C. 434(b)(5)(A).

Under your proposal, however, the commissions owed to GSI will have to be reported as outstanding debts or obligations under certain circumstances. Under the Current Donor Program, although some cycles will fit within a reporting period, others, particularly during an election year, will not. Therefore, GSI may have already earned commissions, as indicated in the monthly records, that have not been paid for out of the custodial account (because receipts have fallen short of projections). With respect to question a, the amount of such commissions should be reported as an outstanding debt or obligation owed by the Committee to GSI on Schedule D, Debts and Obligations Excluding Loans.⁷ Under the Prospecting Program, the commissions earned without concurrent or short-term payment to GSI for such commissions, or the implementation of the remedies described above, would represent an unlawful advance by GSI. Because the situation should not arise, the Commission does not address any reporting of the corresponding debt that would be owed.

The answer to question a thus answers question b with respect to the Prospecting Program, absent the remedies described above. An unlawful loan or contribution in the Current Donor program will occur if the conditions set out above are not met and if the program is continued with the knowledge that the Committee cannot pay for the services provided.

The response to question c depends upon GSI's ordinary course of business with all types of clients or customers. If GSI ordinarily charges interest on unpaid balances when it extends credit, then a corporate contribution would result if GSI is not paid the usual interest. 11 CFR 116.3(b) and (c).

The response to question d has been given in the analysis of the permissibility of the programs. Depending upon the program and adherence to the conditions or remedies discussed above, full compensation to GSI out of the funds raised will either constitute a payment of a debt or obligation owed by the Committee, or the late return of a prohibited 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)

John Warren McGarry
Chairman for the Federal Election Commission

Enclosures (AOs 1990-19, 1990-14, 1990-1, 1989-21, 1986-23, 1979-36, and 1976-50)

1/ A copy of the agreement is included with your May 16 letter.

2/ Upon receipt of a contribution, GSI "will use its best efforts" to determine the lawfulness of the contribution. If GSI determines that the contribution is not lawful, it will, within five days of the receipt, either return the contribution to the donor with a solicitation for an "eligible" contribution or deliver the contribution to the Committee for deposit in a nonfederal account. If GSI determines that the contribution is lawful, it will deposit the funds in the custodial account.

3/ The Commission construes this to mean that all funds remitted to the Committee shall come from the lawful contributions accepted into the custodial account and the Committee shall receive no advances from GSI's corporate funds.

4/ The Committee's last report filed, the 1990 year end report, discloses cash on hand of \$205,577 and no debts or obligations owed by the Committee.

5/ In doing so, GSI may add to the amount of its compensation any expenses or costs incurred by it for the continued solicitation.

6/ The Commission notes that the agreement provides that GSI, "at GSI's expense," may employ such assistants as it deems necessary to perform the services required. The Commission assumes that, in keeping with the requirement that the Committee pay all costs of the program at the usual and normal charge, the payment for such assistants will be covered in the commissions received by GSI or in further payments made by the Committee.

7/ The same reporting procedure would apply to the unpaid commissions owed by the Committee with respect to the Prospecting Program if the remedies and conditions discussed above are satisfied.