



FEDERAL ELECTION COMMISSION
Washington, DC 20463

March 13, 1992

CERTIFIED MAIL,
RETURN RECEIPT REQUESTED

ADVISORY OPINION 1991-32

Michael G. Massey
Massey, Showalter & Marsh, P.C.
1100 The Denver Club Building
518 17th Street
Denver, CO 80202

Dear Mr. Massey:

This responds to your letters dated September 20 and August 1, 1991, as supplemented by your letters dated February 18 and January 15, 1992, requesting an advisory opinion concerning application of the Federal Election Campaign Act of 1971, as amended ("the Act"), and Commission regulations to the proposed activities of CEC, Inc. ("CEC" or "the company"), a newly formed campaign fundraising and consulting group.

You state that CEC, a for-profit corporation, was formed to provide a new approach to campaign fundraising and to focus on grass roots political organization. CEC plans to market its services to and possibly enter into contracts with a limited number of Congressional candidates (the "Selected Candidates") who meet its candidate selection criteria.

CEC intends to develop a list (the "Donor List") of persons (the "Potential Contributors") whom the company's management believes have an interest in the political process, share a conservative view on certain political issues, and have the financial resources to make substantial contributions to a number of Selected Candidates who are conservative. CEC intends to reduce the high cost of fundraising by increasing the rate of return per fundraising letter with a smaller number of letters and providing a greater percentage of fundraising proceeds to a candidate, as well as by reducing overhead costs. The company wishes to use a portion of additional available funds from the increased return to effect a well-organized grass roots campaign for its campaign committee clients who will be willing to pay for the use of the list and services provided by the company. Company services to campaign clients will include solicitations of contributions from the Donor List and campaign workshops.

The company's sole owner and president is Mr. Edgar Prince. The company has six directors, including Mr. Prince. One of the directors is vice president-secretary and another is treasurer. None of the directors receive a salary or fee for their services as directors but services provided by some officers or directors (other than as directors) will be compensated on an hourly basis and directors will be reimbursed for any expenses incurred on behalf of the company. The company employs a full time office manager-research assistant, a part time fundraising coordinator, and a part time computer programmer. The company anticipates that, "as the election cycle intensifies and clients are acquired," additional employees will be hired; if there are 20 candidate-clients, there will be approximately 10 full or part time employees.

Mr. Prince owns three other entities ("the Prince Entities") that may provide services to the company. These are Lumir Corporation which owns and manages real estate, Prince Management Corporation which provides management services to other Prince companies, and Wingspan Leasing which leases aircraft.

The company intends to send an initial mailing, known as an Informational Solicitation, to several hundred persons, asking permission to include their names on the Donor List with additional mailings as more names become available. CEC anticipates that, ultimately, such initial mailings will be sent to 3,000 prospective donors. The names will be derived primarily from three sources. These are membership lists and other lists from organizations to which the company's officers and directors belong; lists of names purchased or otherwise acquired from various chambers of commerce and other business organizations; and lists purchased or otherwise acquired from organizations whose members would be likely to hold conservative views. In addition, officers and directors of CEC have business and political contacts who will be asked informally for names and addresses of prospective donors.¹ You state that there will be no general solicitation to employees of the Prince Entities but that some Prince senior management will be solicited because of their appearance in directories. To the extent possible, CEC employees will attempt to ensure that those initially contacted meet CEC's guidelines as to political compatibility and as to substantial financial resources. The company anticipates that ultimately 1,000 to 2,000 people will consent to being included on the Donor List.

The above-described Informational Solicitation "will consist of written correspondence and, to the extent necessary, oral communication between [CEC] and a prospective donor." You have enclosed a draft Informational Solicitation letter from Mr. Prince and a brochure to be sent to prospective donors. In the letter, Mr. Prince expresses frustration with Congress and the high rate of re-election of incumbents and states that he has formed CEC to work with conservative non-incumbents to help in fundraising and political organization. He explains that he is developing a list of persons willing to make large contributions to a number of conservative candidates, that he would like the reader's permission to place his or her name on the list, and that, when CEC identified a good candidate, it would send a letter soliciting contributions on behalf of that candidate. The letter closes as follows:

If we're ever going to make a change in Washington, we need to return to traditional values and the candidates who support them. By permitting us to add your name to our donor list, you will be helping to bring about that change.

Remember, being on the list does not obligate you to make a contribution. Just complete the enclosed form and return it in the pre-addressed envelope. Or if you want more information, give us a call.

The brochure attached to the letter explains what CEC does, why it works with non-incumbents, what is unique about CEC's fundraising, why CEC emphasizes grassroots organization, how CEC gets paid, and the fact that CEC's services supplement those of parties, PACs, and other firms. The brochure sets out the prohibition on corporate contributions and certain limits on individual contributions. The brochure clarifies the expected group of clients by stating that "CEC represents primarily non-incumbent Republican candidates" for the House who may be candidates in open seat districts or against incumbents.

The brochure contains a signature line whereby the reader gives permission for his name to be on the Donor List and to receive future solicitations by CEC on behalf of specific candidates. The reader may also request more information before committing himself to inclusion on the list. Those who sign have the option of stating an aggregate dollar amount that they would be willing to contribute to House candidates. You have also indicated in your request that mailing recipients may also be asked to provide the number of Selected Candidates the recipient might support with future contributions. The company will use such information to determine the number of Potential Contributors to be solicited for each candidate-client and the frequency of future solicitations.

The company, using "both internal and external resources" will attempt to identify suitable candidates. Company personnel have researched extensively a number of target Congressional districts, i.e., districts which, after redistricting, may not have an incumbent or may have a vulnerable incumbent. This research will include demographic analyses, issue identification and tracking, and incumbent voting history. This research is accomplished through the use of information that is publicly available from political research books and periodicals,² and the data compiled is stored in the company computer. The company will try to identify candidates in those districts whose interests match the opinions of the voters in those districts and whose views are compatible with those of the Potential Contributors.

To identify and evaluate potential candidates, the company's management may contact announced candidates, and will review local newspapers for the names of persons believed to be interested in becoming a candidate. The company will also ask for names of candidates or potential candidates from its informal advisers, i.e., business and community leaders, political consultants and activists, and Republican and other organizations sharing the company's views. From time to time, the advisers may be asked to evaluate, and perhaps interview, potential candidates and provide the company with background information, and their recommendations will be given substantial consideration by the company's Board of Directors in making final candidate selections. These informal advisers will not be affiliated with the company but the company will reimburse any expenses incurred and "will offer compensation for any material amounts of time expended."

When the Board of Directors has decided upon Selected Candidates, the company and the informal advisers will market company services to the Selected Candidates' committees via

direct mail, telephone, and personal contact. You assert that the company will not recruit people to become candidates but will market its services to persons who are candidates or who are believed to be interested in becoming candidates. Mr. Prince will send letters to potential clients briefly describing the purposes of the company, the development of the Donor List, the workshops, and the method by which the campaigns would be charged. Company employees or informal advisers will attempt to meet with the potential client and describe the use of the Donor List and outline the subjects of the workshop, but will not make available the research and other materials compiled by the company at that time. If the marketing efforts succeed, the company will enter into an arms length agreement with the campaign, involving services for compensation (the "Candidate Contract").

The compensation paid by a campaign committee will consist of two types. There will be an Advance Fee, possibly in the range of \$5,000 to \$10,000, payable upon execution of the contract, to pay out-of-pocket costs related to Candidate Solicitation Letters (letters to potential contributors on behalf of a candidate-client), including letterhead, printing, and postage; and the costs of transportation, lodging, meals, materials, supplies and equipment rental for the company's campaign workshop. You state that CEC's management has intentionally established a "relatively high Advance Fee" so that a committee would pay all direct expenses and assume "significant fundraising risk." The Advance Fee is not refundable and is considered additional compensation to CEC if it exceeds the Direct Expenses; the excess would be used for operating expenses, working capital, and profit.

In addition to the Advance Fee, the campaign will pay the Percentage, which will cover operating expenses (such as rent, salaries, and consulting fees, utilities, telephone, advertising expenses, legal and accounting fees and similar charges for day-to-day operations), working capital, and profit. The percentage is estimated at between 5-7 percent of the campaign contribution total received by a committee from Potential Contributors solicited by CEC on behalf of a Selected Candidate. The committee-client will calculate the amount and will give the company an accounting setting forth the names of Potential Contributors solicited by the company and the amounts received by the campaign from such contributors. A campaign will pay the Percentage semi-monthly.

The compensation is designed to ensure that the committee does not receive any services for which the company remains uncompensated and that, excluding certain start-up expenses, CEC's revenues would exceed expenses.³ Once established the same Advance Fee and Percentage will be charged to each client, but these charges may be adjusted from year to year. You state that such compensation will constitute committee expenditures and that the company contemplates such expenditures will be reported as made to the company "without further itemization" consistent with Advisory Opinion 1983-25.

The company will begin its fundraising activities once the contract is executed. CEC believes it will solicit between 250 and 500 Potential Contributors for each candidate, but offers no assurance that such a range will be maintained in a campaign cycle. In addition to such factors as the number of Selected Candidates and the number of names on the Donor List, the number of persons solicited for each candidate will be determined by such variables as geography, the number of contributions made by a Potential Contributor, the Selected Candidate's campaign

plan, and contribution limits. You state that CEC does not contemplate any geographic restrictions with respect to Potential Contributors or clients.

The company's fundraising efforts will consist of mailing Candidate Solicitation Letters on behalf of a candidate to persons on the Donor List, and, to the extent necessary, telephone and personal contacts with such persons. The letter will be on company letterhead and will be signed by a company officer or director. It will explain that the Selected Candidate's political perspective is similar to that of the Potential Contributor; will describe the candidate's personal background and issue positions, and the Congressional district; and will include a disclaimer. It will explain that if the reader desires to contribute to the candidate, he or she should send a contribution, along with information required by the Act, directly to the candidate's committee, and not to the company. (CEC will not be a conduit for campaign contributions.) The reader will also be asked, on an optional basis, to provide the company with the name of any Selected Candidate to whom a contribution is made and the amount of the contribution.

The company's organizational efforts will include developing and conducting a campaign school for "organizational directors," working with the committee-client to develop an overall "organizational plan," and providing periodic organizational assistance.

The committee will be required to employ an organizational director who will attend a CEC campaign school. This is a four day workshop that will consist of two days of teaching grassroots, volunteer-reliant campaign strategies and techniques and two days of developing "a comprehensive, customized grassroots campaign plan," known as "the organizational plan," for each committee in attendance.⁴ The company will also require that a specified percentage of the funds raised by the company on behalf of a candidate be used specifically for organizational activities, such as door-to-door distribution of literature.⁵ In addition, the company will communicate with each committee on a regular basis and occasionally make on-site visits to monitor the organizational activities. Further services not included in the Candidate Contract may be provided by the company but there will be a separate charge for them. After the election, CEC will conduct follow-up research and analysis.

You state that CEC will always retain "control over and access to" the Donor List and the committee will be provided with the list solely for accounting purposes. Company personnel will be responsible for all aspects of the company's fundraising activities.⁶

You state that CEC has entered or will enter into oral or written contracts with the three Prince Entities listed above. There is an oral lease between Lumir and CEC entailing usual and normal monthly rental payments by CEC and normal landlord services provided by Lumir. From time to time, employees of Prince Management may provide CEC with assistance in bookkeeping, taxes, and budgeting. CEC will be invoiced for such "contract services" at rates calculated on the basis of the contract employees' salaries and fringe benefits, with payment due within 30 days. To the extent the company uses aircraft, Wingspan will invoice it at a charter rate comparable to rates charged by non-affiliated rental carriers and payable within 30 days. From time to time, the companies combine business trips and CEC will reimburse the affiliated corporation for its allocable share at the usual and normal charge.⁷

Lumir and Prince Management and their employees will not provide political services either to CEC or to specific candidates who are CEC clients. Wingspan may provide transportation for CEC representatives to meetings with candidates who are or may become CEC clients.

You state that, to the extent reasonably possible, the company intends "to take advantage of economies of scale," offering its services to more candidates at a lower cost per candidate, and to minimize overhead. In addition, the company believes that a small number of solicitations directed to the persons on the Donor's List will generate considerable revenues for each Selected Candidate. As a result of such factors, the company hopes to charge fees "materially lower" than those charged by consultants who offer similar services but who rely on large scale mailings which generate smaller contributions. The company thereby expects to gain a competitive edge.

You state that, as a practical matter, CEC's management does not anticipate that overall profits will be generated during the next few years. Indeed, they believe it is likely that start-up expenses such as the hiring of full and part-time employees, the purchase of equipment and furniture (computers, software, video), the leasing of office space, utilities, legal fees, and initial marketing costs such as the costs related to the development of the Donor List will result in corporate losses during the initial years. To recoup the start-up sums, CEC intends to amortize such expenses over a period of years, and a portion of such costs has been included in the company's budget projections for the next several years. The compensation charged to committee-clients is based on such projections. If the budgetary assumptions are not realized and the projected portion of start-up expenses is not recouped, CEC will increase its fees.

In the event that the company incurs an operating loss and additional working capital is required, at least one of the company's officers may make additional contributions to the company's capital or loan funds for operating expenses. In addition, at least one of the officers and directors intends to waive any salary or other remuneration. If such funds are not available, CEC will terminate its operations.

You ask questions on a number of issues related to CEC's proposed activities. There are six question areas: (1) activities related to the creation of the Donor List; (2) client recruitment and utilization of political advisers; (3) CEC's candidate solicitation activities; (4) compensation to CEC; (5) funding of CEC's operations; and (6) CEC's arrangements with the Prince Entities.

1. Activities related to the creation of the Donor List.

You ask whether CEC, in developing the Donor List, may communicate by letter, telephone, or in person, or through any combination thereof, with prospective donors that are in agreement as to certain issues, explaining the purposes of the company and asking permission to include their names on the Donor List, if the communications are not made on behalf of a specific candidate. You also ask whether such communications may request, on an optional basis, that a prospective donor provide information as to the approximate amount of aggregate contributions he or she might make, the number of candidates he or she might support, or similar contribution information, assuming the communications are not made on behalf of any specific candidate and CEC does not act as a conduit for campaign funds.

The Act prohibits a corporation from making a contribution or expenditure in connection with a Federal election. 2 U.S.C. 441b(a); 11 CFR 114.2(b). Commission regulations permit a corporation to make any communication, including partisan communications, to its stockholders, and executive and administrative personnel, on any subject. 11 CFR 114.1(a)(2)(i), 11 CFR 114.3(a)(1). The communications by CEC, however, will be made outside this class to persons selected on entirely different bases. In order to respond to your question, it must be determined whether the company's payments for these messages are corporate expenditures prohibited by the Act.

Courts have held that an expenditure for a corporate communication is prohibited by section 441b only if the message expressly advocates the election or defeat of a clearly identified candidate. Federal Election Commission v. Massachusetts Citizens for Life ("MCFL"), 479 U.S. 238, 249 (1986). See Faucher v. Federal Election Commission, 928 F.2d 468, 470 (1st Cir. 1991), cert. denied, ___ U.S. ___, 112 S.Ct. 79 (1991). The courts expressed the need for this standard in order to distinguish between discussion of issues that by their nature raise the names of certain candidates and advocacy of the election or defeat of candidates. MCFL, 479 U.S. at 249; Buckley v. Valeo, 424 U.S. 1, 42 (1976). Courts have given examples of words of express advocacy, including "vote for," "elect," "support," "defeat," and "reject." Buckley, at 44, n. 52. Express advocacy, however, is not strictly limited to communications using certain key phrases and the list in Buckley "does not exhaust the capacity of the English language to expressly advocate the election or defeat of a candidate." Federal Election Commission v. Furgatch, 807 F.2d 857, 863 (9th Cir.), cert. denied, 484 U.S. 850 (1987). Comments must not be considered in isolation; speech must be considered as a whole, and with limited reference to external events. Id. at 863, 864.

The initial communications with prospective donors (i.e., those not yet on the Donor List) avoid use of words or phrases such as "vote for" or "support" or "reject." They will, however, ask that the recipient submit written permission agreeing to accept and consider future contribution solicitations on behalf of specific candidates who will be conservative Republican non-incumbent House candidates. Although not asking the reader to vote or contribute to such a candidate, the communication may be subject to the interpretation that it is designed to promote an electoral result and asks the reader to take just as palpable and unambiguous an action of electoral support.

Nevertheless, it is not necessary for the Commission to resolve this issue in order to reach a conclusion that CEC's payments for these communications will not be prohibited by 2 U.S.C. 441b. The production and mailing of CEC's donor list solicitation, even before it has obtained candidate-clients, will be paid for by the clients when they enter into a contract. CEC proposes to enter the political campaign consulting business on a for profit basis. Accordingly, you state that CEC intends to amortize the costs of the informational solicitation as start-up expenses, to include such costs in budget projections, and to base its charges to the clients on such projections. Presumably, each client's fees will include a portion of the expense of producing and mailing the letters and making other related communications. Rather than being an attempt by the committee to spend corporate funds to advocate the support or defeat of candidates, this donor list solicitation activity is being done as part of a commercial venture in an attempt to charge less to its future candidate-clients while realizing a greater return.

2. Client recruitment and utilization of political advisers.

You ask whether CEC's representatives or informal political advisers may recruit or help recruit potential candidates to become clients of the company. You wish to know whether funds expended by CEC in connection with such activities should be deemed corporate contributions under 2 U.S.C. 441b(a) or whether they should be deemed expenditures under section 431(9)(A).

The Commission concludes, from the information presented by you, that CEC's efforts to recruit clients will not result in contributions or expenditures by the company, prohibited by 2 U.S.C. 441b, if the potential client has decided to become a candidate and is no longer in the process of determining whether to become a candidate. You have made it clear that no candidate will be shown research or other materials compiled by the company until after the candidate becomes a client of the company, and that, until that point, the company will disclose only a description of its services, such as the use of the Donor List and the workshops, company references, and similar marketing information. Information on the candidate's district or opponent, research on issue identification and tracking, or the like, will only be disclosed to a candidate pursuant to an already existing contractual relationship between the candidate's committee and CEC where the committee will pay for such information or expertise. Compare Advisory Opinion 1990-12. Therefore, nothing of value will be communicated to the candidate during the recruitment process.

Although you have also asserted that the company will not recruit people to become candidates, the company will be recruiting, as clients, persons who are believed to be interested in becoming candidates. Recruiting such a person to become a client may inevitably include communications that entail persuasion of that person to become a candidate. If such a person is still "testing the waters," or is in a pre-exploratory phase, the issue arises, therefore, as to whether any corporate funds are being used to determine whether an individual should become a candidate. See 11 CFR 100.7(b)(1) and 100.8(b)(1). Without further information as to the written or oral communications taking place in the recruitment process, the Commission does not express any opinion whether corporate funds would be used to determine whether an individual should become a candidate, in violation of 11 CFR 100.7(b)(1) or 100.8(b)(1).⁸

You note that the company's informal advisers may serve without full compensation. You ask whether "any recruitment and evaluation activities" undertaken on behalf of the company would be deemed contributions to the Selected Candidates and subject to the Act's limitations. You have described the pre-recruitment evaluation activities as consisting of providing the company with background information and recommendations as to selection of candidates. This may entail interviewing candidates or potential candidates. These evaluation activities are conducted with respect to specific campaigns. Nevertheless, these are activities aimed at the solicitation of business for the company, rather than activities for the purpose of influencing a campaign. Although undercompensation or the lack of compensation for these activities may have the effect of lowering the operating costs of the company and may call into question whether the company is in fact being paid the usual and normal charge by all of its clients paying an allocable part of such costs, the evaluation activities as defined above would not be deemed as in-kind contributions by the informal advisers. See 11 CFR 100.7(a)(1)(iii)(B). This conclusion would

differ, however, if the interview of a potential candidate entails persuasion of the interviewee to become a candidate.

If, during the actual client recruitment stage, the uncompensated informal adviser engages in activity that entails persuading the potential candidate to become a candidate, then the usual and normal charge for the testing the waters activity that is not compensated for by CEC will result in an "in-kind contribution" by the individual to the candidate subject to the limits of the Act. See 2 U.S.C. 441a(a)(1)(A); 11 CFR 100.7(b)(1). Otherwise, the recruitment activities you describe are aimed at the solicitation of business for the company, not activity for the purpose of influencing an election to Federal office.

You also ask whether the reimbursement of expenses to the informal political advisers for evaluation and recruitment would be corporate contributions to the Selected Candidates or corporate expenditures on their behalf. For the reasons stated directly above, such reimbursement would not, for the most part, constitute corporate contributions or expenditures. The exception would be for those activities that entail persuading a person to become a candidate.

3. CEC's candidate solicitation activities.

Based on the assumptions that (a) the Advance Fee is sufficient to pay CEC's Direct Expenses, (b) that campaign contributions are sent directly to the campaign committee of a Selected Candidate, and (c) that CEC does not act as a conduit for campaign funds, you ask whether CEC may print candidate solicitation letters on company letterhead signed by a company officer and director and may otherwise solicit campaign funds for Selected Candidates without violating 2 U.S.C. 441b(a) and without the costs being deemed expenditures under 2 U.S.C. 431(9)(A).

The use of company letterhead for soliciting contributions to a Selected Candidate may be construed as a thing of value for that candidate. See Advisory Opinion 1984-12. However, the letterhead will be used and the solicitation letters on behalf of specific Selected Candidates will be sent as part of a commercial relationship between the candidate's committee and CEC, and you indicate that the costs for these activities, as well as other solicitation activities on behalf of specific candidates, will be fully paid for in the Advance Fee.⁹ It appears, therefore, that with respect to the particular activities discussed in this question, CEC will avoid a corporate contribution. This conclusion, however, is qualified by and subject to the discussion below as to whether the overall compensation received by CEC from a campaign is the usual and normal charge for the services provided.¹⁰

You also wish to know whether a disclaimer is required on the candidate solicitation letters. The Act and Commission regulations require the display of a disclaimer when a person makes an expenditure that solicits a contribution through the medium of direct mailing. 2 U.S.C. 441d(a); 11 CFR 110.11(a)(1). Direct mail is defined in the regulations to include mailing by a commercial vendor or any mailing made from commercial lists. 11 CFR 100.7(b)(15) and (17); 100.8(b)(16) and (18). Since the letters to the Selected Donors for each candidate are mailings by CEC as a commercial vendor, a disclaimer is required. This disclaimer should state that the communication has been paid for by the Selected Candidate's committee.

4 - 5. Compensation to CEC and funding of CEC's operations.

In question 4, you ask whether the company's compensation arrangement, "i.e., the Advance Fee (which includes [CEC's] Direct Expenses and the costs of the campaign school but does not include all of [CEC's] operational costs) and the Percentage," violate any provisions of the Act.

In question 5, you ask whether an officer, director, or shareholder declining remuneration from the company would be deemed to have made a contribution to one or more of the Selected Candidates or whether such declined salary would constitute a corporate contribution by CEC. You also ask whether additional funds made available to the company by an officer, director, shareholder, or other person in the form of debt or equity capital would be deemed contributions to the Selected Candidates; you also inquire as to whether debt capital would have a different consequence than equity capital.

Further in question 5, you ask whether, in the event CEC sustains a loss during any year (particularly in the initial years of operation), the company will be determined to have charged less than the usual and normal charge for its services and thereby to have contributed something of value to a Selected Candidate.

Finally in question 5, you ask whether, if the company generates a net profit before taxes (except in the initial years of operation) but charges fees which are materially less than fees charged by other consultants providing similar services, will the company be determined to have contributed something of value to a Selected Candidate.

The Commission is treating these questions together because, in essence, they pose the same question: Is the company providing candidate fundraising and consulting services at the usual and normal charge in the ordinary course of business?

You state that CEC does not have information as to the salaries, waivers of salaries or infusions of capital in other consulting businesses. You have made clear, however, that the Advance Fee and the Percentage will ensure that CEC will be compensated for the services provided to its clients and that, excluding start-up costs, revenues will exceed expenses. Because of these start-up costs, the company will most likely operate at a loss for the first few years, and these costs will be amortized over that period, i.e., gradually paid for by the company from the revenues it receives. You state that amortizing such costs and operating at a loss during the initial years is typical for start-up businesses. You also state that the infusion of new capital and the possibility that one of the officers might waive all or some of his or her salary are "endemic" to the status of a start-up business.

If a person waives his or her salary or gives funds as equity capital (presumably in return for shares) or loans funds as debt capital, a contribution by that person to a Selected Candidate may result if the action is taken with respect to a specific campaign or small group of specified campaigns (i.e., to subsidize activities with respect to those campaigns). If this is not the case and an individual waives salary or infuses funds into the company because it is operating at a loss, these circumstances merely reiterate the question of whether the Selected Candidates are being charged the usual and normal charge. See Advisory Opinion 1990-19. The issue requires even

greater scrutiny when the fees charged by the company are "materially less" than the fees charged by other consultants for similar services.

Commission regulations define "usual and normal charge" for goods as the price of those goods in the market from which they would ordinarily have been purchased and "usual and normal charge" for services as the hourly or piecework charge for the services at a prevailing commercially reasonable rate. 11 CFR 100.7(a)(1)(iii)(B). Consistent with this regulation, the Commission has conditionally approved novel methods of compensation for fundraising services based on whether the plan will entail the usual and normal charges and has applied the standard of normal industry practice. See Advisory Opinions 1990-19 and 1979-36.

Without information explaining normal industry practice as to charges for certain services or how to determine those charges, the Commission cannot make a definitive determination as to whether the company will be charging the selected candidates the usual and normal charges. The Commission is aware of the bases on which materially lower fees will be charged. One of these bases is that CEC can afford to charge a lower percentage because the return on the use of the Donor List for each campaign will be much higher than the return from a normal mailing list. The percentage proposed (five to seven percent) may result in payment by the campaign to CEC that is just as high or higher than fees paid by campaigns in other list situations because of the nature of the Donor List. It may also be considered, however, that the percentage of proceeds paid to the company may be less than one-tenth the percentage charged by other direct mail organizations (see Advisory Opinion 1979-36) and that the company's projections may not be achieved. The other basis is the lowering of overhead or costs in general by using outside consultants who may be paid considerably less than the value of their services, the use of temporary employees, the waiver of remuneration by directors and officers, and the infusion of debt or equity capital at crucial points to keep the company alive. Your request also indicates that if budgetary assumptions are not realized and a projected portion of start-up expenses is not recouped, fees will have to be increased for the next election cycle.

The company has stated a policy of charging fees materially lower than consultants offering similar services. Accordingly, operations at a loss (particularly long term ones), waivers of salaries, or infusions of debt or equity capital to compensate for loss, or any combination of the three, would raise a rebuttable presumption that the company is not charging the usual and normal charge and would therefore be making contributions to its candidate-clients that are prohibited by 2 U.S.C. 441b(a). See, by analogy, Advisory Opinion 1991-18. The company should ensure that there are commercially reasonable charges for the services and time provided by the company and its employees for each committee-client, and that amortization of start-up costs is done properly and on a reasonable basis.

6. CEC's arrangements with the Prince Entities

You ask whether the provision by employees of Prince Management of limited financial services to CEC, with reimbursement by CEC for the cost of such services "pursuant to an arrangement not negotiated at arm's length," would violate the Act.

The Commission assumes that the description of the arrangement as not negotiated at arm's length refers to the closely connected nature of the corporations due to common ownership. You have indicated that CEC will be invoiced at rates calculated on the basis of the employees' salaries and fringe benefits with payment due in thirty days. You indicate that Prince will not provide political services either to CEC or to specific candidates. Departures from the usual and normal charge or from invoicing and payment within a commercially reasonable time will not necessarily result in a contribution unless they occur with respect to a specific campaign or small group of campaigns. Payment below the usual and normal charge and delayed billing and payment by CEC, however, might be a further indicator that CEC is not being compensated by campaigns at the usual and normal charge. For example, if the other Prince Entities are provided with such services by Prince Management's contract employees on a higher hourly fee rate, rather than on the basis of salary and fringe benefits, this may be an indicator that CEC is not charging campaigns the usual and normal charge.

You also seek confirmation that if Lumir and Wingspan charge CEC the "usual and normal" fee for office space and the use of aircraft respectively, then no contribution or expenditure by CEC or the Prince Entities will result. Your assumption is correct, assuming invoicing and payment within a reasonable time. (See analysis as to Prince Management above.)¹¹

Finally, you ask whether CEC and Prince Entities may combine business trips in connection with the use of a Wingspan aircraft without a contribution or expenditure resulting from either CEC or the Prince Entity, assuming that CEC pays a "usual and normal" fee for any use of the aircraft attributable to CEC. The Commission answers this in the affirmative, subject to the conditions discussed in response to the remainder of question 6.

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)

Joan D. Aikens
Chairman for the Federal Election Commission

Enclosures (1991-18, 1990-19, 1990-12, 1984-12, and 1979-36)

ENDNOTES

1/These contacts include former and current Republican officeholders and committeepersons, a former Presidential aide, CEOs, and trade association leaders.

2/You list such publications as Politics in America, The Almanac of American Politics, National Journal, Congressional Quarterly, Time, Newsweek, and various RNC reports.

3/You state that CEC management developed the fees based on assumptions as to: the number of candidate-clients CEC was likely to have during an election cycle; the number of persons on the Donor List that would have to be solicited for each candidate; the amount that could be raised for each candidate; the estimated expenses for the workshop; the estimated amount of start-up fees that would have to be amortized over a period of time; the number of full and part-time employees; and other fixed and variable costs.

4/The sample Candidate Contract enclosed by you requires the committee to make its general campaign plan available to CEC so that the organizational plan is complementary to the general plan.

5/The sample contract requires that the committee allocate 25 percent of the net funds received from the solicited names to implementation of the organizational plan. The compensation paid to CEC and the salary of the organizational director may be included in this percentage.

6/ The sample contract includes a clause stating that CEC may terminate the agreement upon written notice to the other parties that the candidate no longer shares the political perspectives of the Political Contributors. CEC will then be able to notify the solicited names of the termination and the committee, upon written request received from a solicited name after the termination date, shall refund any contribution received after the termination date from such person.

7/You state that the services and office space from Lumir and Prince Management will be provided and paid for pursuant to agreements "not negotiated at arms length."

8/This response does not address the question of whether an individual testing the waters should be deemed to have accepted any in-kind "contribution" from CEC.

9/In addition, although your question correctly indicates that a corporation may not act as a conduit, Commission Regulations provide that commercial fundraising firms retained by a candidate are not conduits, even if they receive and forward contributions. 11 CFR 110.6(b)(2)(ii) and (b)(2)(i)(D).

10/The amounts paid by the candidate committee for the services provided would be an expenditure under 2 U.S.C. §431(9)(A), more specifically an operating expenditure.

11/The Commission notes that Wingspan is a corporation that is in the business of providing commercial services for travel. In addition, Wingspan will provide transportation for representatives of the company to meet with candidates who are or may become clients of CEC; Wingspan will not be providing services to CEC employees acting in a candidate agent capacity. See 11 CFR 114.9(e)(1).