



FEDERAL ELECTION COMMISSION
Washington, DC 20463

January 17, 1992

CERTIFIED MAIL,
RETURN RECEIPT REQUESTED

ADVISORY OPINION 1991-37

Linda Michelsen, Treasurer
Democratic Election Reporting Education Fund
P.O. Box 25243
Alexandria, VA 22313

Dear Ms. Michelsen:

This responds to your letter dated November 24, 1991, requesting an advisory opinion concerning the application of the Federal Election Campaign Act of 1971, as amended ("the Act"), and Commission regulations to the operations of the Democratic Election Reporting Education Fund ("DEREF").

DEREF is a newly established, nonconnected political action committee that intends to offer in-kind accounting and FEC compliance services to Federal committees or candidates.¹ It was organized by you and four other individuals. You are a certified public accountant and the president of an incorporated accounting and financial firm, Campaign Financial Consultants ("CFC"), which advises campaigns and other political committees on accounting systems and Federal election compliance. The other individuals are not employed by nor do they have a financial interest in the firm; you state that they "are only associated with the PAC due to their interest in and concern for accurate reporting and the need for assistance to campaign organizations and [their] volunteers."²

The initial costs of organizing DEREf will be paid by the individual organizers, and each such payment will be reported as an in-kind contribution from the particular individual. You state that, other than such costs as a post office box and incorporation fees, there should be minimum organization costs. After that, all of DEREf's operational expenses will be paid from contributions it receives. You assert that CFC will not provide "any direct or indirect influence, financial or other support for the operation or establishment of DEREf." You state that DEREf will provide for the election of a board of directors by contributors to the political committee, and this board will determine which candidates or committees will receive assistance.

DEREF plans to maintain an office in one of two ways. DEREf will maintain either a separate office with its own phone system and other facilities, or an office which is also shared by CFC. In the second alternative, all expenses such as rent, phone charges, "and other administrative charges" will be paid from DEREf's funds at the actual costs of those expenses. Charges such as photocopying charges will be based on either a set "cents per page" charge or an allocation of the monthly charge based also on pages copied. If DEREf and CFC share phone lines, telephone charges will be based on a combination of the actual long distance charges and the base monthly charge allocated on the basis of staff time. For example, if the staff has worked for DEREf 60 percent of the time for a particular month, the base charges would be allocated in the same percentage. Other charges that are not specifically identifiable would be allocated in the same way.

You propose two alternative ways by which DEREf would provide in-kind services to committees, i.e., the purchase of services from CFC and the employment of individuals by both DEREf and CFC.

In the first method, DEREf would purchase the services of CFC at a "normal and usual" or "commercially reasonable" hourly rate charged by the firm for "its other nonpolitical clients." The rate would be based on the skill and experience of the employees.

Under this first alternative, you consider CFC to be a third party vendor which can bill and receive payment in due course. You state that, if there is any question that such an arrangement would be prohibited under 2 U.S.C. 441b(b)(2), the payments by DEREf would be made in advance. DEREf will determine the number of hours or days each employee is expected to work for each candidate and will pay CFC for these services in advance of when the services are provided to the committee and payment is made to the employee. If the number of hours or days of services exceed the advance payment, DEREf and CFC would estimate the remaining work and DEREf would make an additional payment before the work was done. Any excess payment would be applied against future services provided by CFC. Expenses such as meals, lodging, and airfare will be either paid by the employee and reimbursed by DEREf or paid to the vendor directly by DEREf.

Valuation under the second alternative, the dual employment status method, is based on the hours or time worked for each entity. Any fringe benefits would either be paid directly from each entity or one entity would reimburse the other for the fringe benefit costs pursuant to 11 CFR 114.12(c). Under the first alternative, as stated above, DEREf would purchase the services from CFC at the hourly rate charged to nonpolitical clients, and that amount is the basis for the in-kind contribution. Under the second alternative, you note that the employee salary rate per hour would be much lower, but you would prefer to base the value of the in-kind contributions on the hourly rate charged by the firm.

Finally, you state that DEREf would like to establish an honorary advisory board consisting of Senators, Congressmen, and other dignitaries. Their names would appear on DEREf's letterhead or other printed material but these persons would not have influence or control over determining which candidates or committees would receive DEREf's services.

You ask seven questions pertaining to the establishment and operations of DEREf.

1. DEREF as a Nonconnected Committee

You ask whether DEREf will be considered a "nonconnected political committee." The Act and Commission regulations provide that a corporation may make payments for the establishment, administration, or solicitation of contributions to a separate segregated fund to be utilized for political purposes by that organization without such payments resulting in a contribution or expenditure to that fund. 2 U.S.C. 441b(b)(2)(C); 11 CFR 114.1(a)(2)(iii). An organization such as a corporation which is not itself a political committee, but which directly or indirectly establishes, administers, or financially supports a political committee, is a "connected organization" of that political committee. 2 U.S.C. 431(7); 11 CFR 100.6(a). The connected organization and its separate segregated fund are subject to restrictions as to the category of persons who may be solicited for contributions to the committee. 2 U.S.C. 441b(b)(4)(A); 11 CFR 114.5(g)(1). By contrast, a political committee without a connected organization may solicit any individual or person for otherwise lawful contributions.

The Act and regulations "do not prescribe qualifications on the individuals who may establish, organize, and direct a nonconnected political committee; nor do they necessarily prohibit individuals who have some association with a corporation, labor organization, or trade association from such activity." Advisory Opinion 1984-12. The Commission has permitted the formation of a nonconnected political committee that is organized by individuals associated with one entity and that receives and pays for services furnished by that entity, or by the same company that services that entity. Advisory Opinions 1984-12 and 1982-63. You make clear that DEREf will not be financially supported by CFC; instead DEREf proposes to pay its own operating expenses, including its in-kind contributions to candidates. Moreover, although DEREf's maintenance and its in-kind contributions to other committees may be provided through facilities that otherwise support one company, CFC, four of the five committee founders and providers of initial financial support are not associated with CFC. Based on the foregoing analysis, the Commission concludes that DEREf may be considered a nonconnected political committee.

2. Alternatives for Maintaining an Office

You ask whether either alternative for maintaining an office would violate any provisions of the Act or regulations. Corporations may not make contributions or expenditures in connection with a Federal election. 2 U.S.C. 441b(a); 11 CFR 114.2(b). The Act defines the term "contribution" or "expenditure" 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). See 2 U.S.C. 431(8)(A)(i); 11 CFR 114.1(a)(1) and 100.7(a)(1). Anything of value includes the provision of goods or services at less than the usual and normal charge, i.e., less than the price of the goods in the market from which they ordinarily would have purchased at the time, or less than a commercially reasonable hourly or piecework charge for the services prevailing at the time the services were rendered. 11 CFR 100.7(a)(1)(iii)(B).

The question of a corporate contribution by CFC is not raised if DEREf maintains a separate office with separate phone and other facilities with payment for such office and facilities made by the committee. Your proposal to have DEREf and CFC share an office is consistent with prior opinions issued by the Commission permitting principal campaign committees to share facilities with companies as long as the committees paid a reasonable allocable cost. Advisory Opinions 1978-48 and 1977-12. In Advisory Opinion 1977-12, the campaign's allocable amount of office telephone charges was based on a proportionate share of the monthly base charge plus long distance toll charges incurred by the campaign. The Commission stated that a reasonable method of determining what portion of general office overhead expenses, including telephone, utilities, and rental of space, should be allocated to the campaign would be to apply the percentage of time spent in campaign activities to the total amount of time spent for business and campaign purposes. The Commission approves your proposal for photocopying and telephone charges and your allocations for charges for the use of other facilities.

A failure to have DEREf make full payment for its share of the rent and the other facilities would result in CFC financially maintaining the committee. Moreover, if DEREf makes payment by reimbursing CFC, such payment must occur within a commercially reasonable time. See 11 CFR 114.9(d). In view of the relationship between the company and the committee, insufficient or late payments could lead to the conclusion that CFC is the connected organization of DEREf and that DEREf is an SSF with the attendant consequences for DEREf's solicitable class. See 11 CFR 114.5(g)(1). See Advisory Opinion 1984-12.

3. and 4. CFC as Third Party Vendor

You ask whether the accounting firm services provided with respect to candidates or campaign committees may be considered as services performed by a third party vendor and thus allow the firm to bill and receive payment "in its due course of business" without such services being considered an advance of corporate funds. You also ask whether, if the previous question is answered in the negative, either of the alternatives for providing services will comply with the Act.

You present the alternatives of having DEREf pay CFC in advance for services provided to campaign committees or a dual employment method whereby individuals would be employed by both CFC and DEREf according to the hours worked for each.

You appear to have premised these proposals on the situation present in Advisory Opinion 1984-37. In that opinion, the Commission approved proposals presented by an incorporated membership organization and its separate segregated fund for the provision of services by the corporation's employees to Federal candidates. In justifying the need to avoid an initial disbursement of corporate treasury funds, the Commission focused on the unique relationship of the corporation and its SSF. The Commission, referring to 11 CFR 114.5(b), stated that a corporation may not use the establishment, administration, and solicitation process as a means of exchanging treasury monies for voluntary contributions. The Commission explained that the Act requires that a corporation direct and finance its political activities solely through the use of the

voluntary contributions in its SSF, and not through its treasury funds. Advisory Opinion 1984-37.

As stated above, CFC is not the connected organization of DEREf. Under your plan, CFC will not financially maintain DEREf but, instead, will either share the expenses of jointly held facilities or maintain separate facilities. Given your proposal, CFC will function as a third party vendor of services; DEREf, upon purchasing those services, contributes them as its in-kind contribution to a campaign committee of its choice.

Commission regulations provide that a corporation in its capacity as a commercial vendor may extend credit to a political committee provided that the credit is extended in the ordinary course of the corporation's business and the terms are substantially similar to extensions of credit to nonpolitical debtors that are of similar risk and size of obligation. 11 CFR 116.3(b), 11 CFR 100.7(a)(4).³ As a third party vendor, CFC may extend credit to DEREf for DEREf's in-kind contributions and will avoid making a prohibited corporate contribution as long as CFC receives payment in its ordinary course of business and at CFC's usual and normal charge for such services. 11 CFR 100.7(a)(1)(iii)(A). Advance payments by DEREf to CFC, or a dual employment system, are not required if the extension of credit by CFC complies with the regulations cited above.

5. Charges for expenses such as meals and travel

You ask whether a donee campaign committee may be charged by DEREf or the accounting firm for expenses such as meals, lodging, and travel, and still receive the accounting and other consultation services as an in-kind contribution from DEREf. The Commission concludes that payments by the campaign committee for travel related expenses incurred by DEREf's personnel would not preclude DEREf from providing the described accounting services to the committee. Such services are, of course, reportable as in-kind contributions and are subject to the limits of 2 U.S.C. 441a.⁴

The Commission notes that one of the possibilities you suggest is the payment by the employee for the described expenses with reimbursement by DEREf. In the absence of specificity as to the circumstances under which the employee would pay for such expenses initially, the Commission does not express an opinion on whether such initial payment would constitute an in-kind contribution by that employee. See 11 CFR 112.1(c).

6. Hourly Rate as the In-Kind Contribution

You ask whether DEREf may "assign" an hourly rate equivalent to the hourly rate charged by the accounting firm as the in-kind contribution rather than the employee's actual salary rate.

In providing services to the committees under an arrangement wherein DEREf would reimburse CFC, CFC would be acting as a third party vendor to DEREf. As such, CFC would be obligated to charge the usual and normal charge for its services to avoid making a corporate contribution to DEREf. As defined above, the usual and normal charge would be the hourly or piecework charge for the services or the prevailing charge for the goods in the market in which they are

sold. 11 CFR 100.7(a)(1)(iii)(B). Consistent with these definitions, DEREf should be charged the hourly rate that CFC charges its customers, rather than a pro rata share of the employee's salary.

If DEREf is providing services to a campaign committee under the dual employment method, DEREf is not operating as a vendor to the recipient candidate or his committee. Although DEREf may value its services in accordance with the hourly rate, it need not do so. In determining the value of the in-kind contribution to the campaign committee, DEREf may use the hourly salary rate as long as it is the usual salary rate received by the employee for such services. DEREf must also include in its valuation of the in-kind contribution the pro rata share of fringe benefits received by the employee for the time worked as well as an appropriate charge for the facilities used for the particular campaign. See Advisory Opinion 1984-37 and 11 CFR 114.9(d).

7. The Honorary Advisory Board

You ask whether the existence of an honorary advisory board for DEREf consisting of Senators, Congressmen, and other dignitaries would violate any provisions of the Act or regulations. The principal concern as to the composition and function of such a board is whether the presence of a candidate's name on the board, or its appearance on DEREf's letterhead or literature, would result in a contribution by DEREf to that person's re-election efforts. Another concern would be whether the presence of the name might constitute a contribution by that person's campaign to DEREf or to any of the recipients of DEREf's in-kind contributions. The use of a candidate's name in connection with an organization, particularly a political committee, may result in a contribution depending upon the circumstances involved. See Advisory Opinions 1985-38 and 1983-12. You have stated that these persons would have no influence or control over determining which political candidates or campaign committees would receive the in-kind services of DEREf. Other factors tending to negate any conclusion that DEREf's activities would involve contributions to or from such "members" of the board would be a lack of any reference to their candidacies and lack of involvement by their campaigns in the operations of DEREf. See Advisory Opinion 1985-38.

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 (AOs 1985-38, 1984-37, 1984-12, 1983-12, 1982-63, 1978-48, and 1977-12)

ENDNOTES

1/ DEREf's statement of organization was received by the Commission on October 10, 1991.

2/ The other individuals include an attorney from California who has run for Congress twice; an individual who holds an accounting degree, is obtaining a graduate degree in public policy, and is involved in politics in Illinois; a New Jersey attorney with a lifelong involvement in Democratic politics; and an individual who is politically involved and "is connected with a labor organization and its connected political committee."

3/ In determining whether credit is being extended in the ordinary course of business, the Commission will consider whether the commercial vendor is following its established procedures and past practice in approving the extension of credit, whether the commercial vendor received prompt and full payment if it previously extended credit to the same candidate or committee, and whether the extension of credit conforms to the usual and normal practice in the vendors trade or industry. 11 CFR 116.3(c)(1)-(3)

4/ The applicable limit on the in-kind contributions will be \$1,000 per election until DEREf qualifies as a multicandidate committee and the limit increases to \$5,000 per election. 2 U. S. C. 441a(a)(1)(A) and 441a(a)(2)(A).