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AOR 1991-39
SUPPLEMENT

Mr. N. Bradley Litchfield
Associate General Counsel
Office of the General Counsel
Federal Election Commission
999 E Street, N.W.
Washington, D.C. 20463

Dear Mr. Litchfield:

This letter is in response to your February 3rd request for additional information.

As you know, I attended the Commission meeting on January 30th at which Advisory Opinion 1991-39, Robert S. Royer on behalf of Friends of Senator D'Amato, was discussed.

Let me state at the outset that we are pleased that the Commission agrees that the Committee took the proper action in immediately segregating the funds in question. Also, we agree with those Commission Members who believe that a criminal indictment "provides a sufficient basis to question the lawfulness of contributions." It is for this reason that we moved immediately to segregate the funds relating to the contributions in question. We do not, however, believe that there has been a discovery of illegality as articulated in 11 C.F.R. § 103.3(b)(2) which would enable us to identify the true contributor. 11 C.F.R. § 103.3(b)(2) states:

> If the treasurer in exercising his or her responsibilities under 11 CFR 103.3(b) determined that at the time a contribution was received and deposited, it did not appear to be made by a corporation, labor organization, foreign national or Federal contractor, or made in the name of another, but later discovers that it is illegal based on new evidence not available to the political committee at the time of receipt and deposit, the treasurer shall refund the contribution to the contributor within thirty days of the date on which the illegality is discovered...(Emphasis added)

Because this section is based on the discovery that a contribution is illegal, rather than the discovery that a contribution may be illegal, we believe that the evidence needed would be either a guilty plea or a conviction in order to establish the identity of "the contributor." Our problem lies in identifying the true contributor.

We believe that our situation is unique in that previous Advisory Opinions in which conduits were used to make contributions dealt with situations in which guilty pleas were entered by the contributor and/or the conduit(s), establishing that the contribution was illegal and making clear who the true contributor was. In our situation, the individual accused of using conduits to make contributions has asserted that he is innocent of the charges; leaving us without a finding of illegality as articulated in 11 C.F.R. § 103.3(b)(2) and without knowing the identity of the true contributor to whom the monies should be refunded.

(Immediately upon receipt of the Department of Justice's November 5, 1991 letter, we determined that there was a basis for the appearance of illegality and immediately segregated the funds in question.* Our legal counsel in New York contacted the accused's attorney in an attempt to determine whether the contributions were indeed illegal. We were informed that the accused asserts that he is innocent of the charges being made against him by the Justice Department. At that time, it was determined that further contact would be inappropriate given the nature of the criminal proceeding.)

Notwithstanding the above, we, like the Commission, are seeking to protect the integrity of the political process, and are prepared to refund the monies in question. The delimma we face is, I feel, the same delimma the Commission was faced with during its discussion of the AOR. That is, to whom the monies should be refunded and when.

This would have been a simple decision if the Justice Department had merely informed the Committee that the contributions were illegal, without implicating a third party. In that case, the monies would simply be refunded to the

*/ Notwithstanding our belief, and we feel the Commission's belief, that the alleged violation falls within § 103.3(b)(2) which requires the discovery that a contributions is illegal, we moved to segregate the funds as required in § 103.3(b)(4) (which on its face does not apply to § 103.3(b)(2)) based on the appearance of illegality as articulated in § 103.3(b)(5) (which on its face does not apply to § 103.3(b)(2)).

contributors of record. The decision as to whom to refund the monies would have also be made more simple if the accused were to have pled, or have been found, guilty as to the charges. In that case, the monies would simply be refunded to the accused in accordance with Advisory Opinions 1984-5 and 1989-5. Such is not the case, however, since the accused professes that he is innocent.

During the January 30, 1992, discussion of the AOR, the Commission directed the General Counsel to draft an Advisory Opinion which would allow the Committee to retain the monies in a segregated account until the Treasurer can determine to whom the monies should be refunded. The Committee will pursue any course of action recommended by the Commission, including continuing to maintain the monies in a segregated account; however, under the present circumstances, making a determination as to whom to refund the monies would require the Treasurer, we believe, to make a determination as to whether the contributions <u>are</u> illegal. Counsel believes that, as a legal matter, the Treasurer must abide by the doctrine that a person is innocent until proven guilty. Therefore, the Treasurer would not be in a position to make a determination as to whom to refund the monies until the accused has had the benefit of due process. If it is the Commission's belief that the monies should be refunded before that time, we would need clear guidance as to whom the monies should be refunded and when.

We again want to emphasize that the Committee takes absolutely no position as to whom the monies should be refunded and when but is merely seeking guidance as to how to proceed given the unique circumstances within which it finds itself.

Very truly yours,

Robert S. Royer

Robert S. Royer