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FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

May 4, 1993

MEMORANDUM

**SUBMITTED LATE
AGENDA ITEM**

For Meeting of: MAY 6 1993

TO: The Commission *OS*

THROUGH: John C. Surina
Staff Director

FROM: Lawrence M. Noble
General Counsel *LN*

N. Bradley Litchfield
Associate General Counsel *NBL*

Rita A. Reimer
Attorney *RR/MS*

SUBJECT: Revised Draft AO 1993-6

The Office of General Counsel has redrafted this Advisory Opinion to reflect the Commission's discussion of April 22, 1993, and subsequent conversations with several Commissioners.

This office reviewed several proposals or suggestions mentioned in the April 22 meeting. One suggestion was that the Commission authorize Federal officeholders who do not meet the FECA definition to nevertheless pay incidental office expenses out of excess campaign funds, under the "other lawful purpose" standard. The Office of General Counsel believes that this would run counter to the language in §439a, which provides that the only office expenses exception to the prohibition on conversion to personal use is "defraying any ordinary and necessary expenses incurred in connection with his or her duties as a holder of Federal office," as that term is defined in the FECA. Advisory Opinion 1980-113 is expressly superseded (in footnote 3 of the revised draft) since it erroneously extended the Federal officeholder expense exemption to an elected State officeholder who had been a 1980 Federal candidate with excess funds remaining from his campaign.

Another suggestion was that the Commission provide a 60- or 90-day "winding down" period for former Members of Congress who assumed "high Federal office," defined perhaps

to include those positions which require Senate confirmation, during which virtually all "transition expenses" could be paid for with campaign funds. The revised draft addresses the time period presented by question (4), which pertains to preparing the committee's 1993 midyear FECA report, and concludes that the expenses incurred in connection with winding down both the campaign and the congressional office may be paid out of campaign funds at least until June 30, 1993. Further proposals for winding down or other committee expenses would need to be presented in a future advisory opinion request. The Office of General Counsel believes that any decision to prescribe a time period for either type of expense in the case of someone who left Congress for an Executive Branch position is clearly beyond the scope of the advisory opinion process and may require amending the FECA.

Another suggestion was that the Office of General Counsel distinguish between "campaign funds" and "excess campaign funds" for this purpose; that is, require that campaign expenses and expenses incidental to Mr. Panetta's congressional service be paid for with campaign funds and the other allowed expenditures be paid from excess funds. However, for purposes of this request, this is a difference in nomenclature without any legal or practical significance. (In order to advise the committee as to the reporting treatment for all the proposed disbursements, the draft does note the appropriate categories as set out in the regulations.) Mr. Panetta is not currently a candidate for Federal office in the 1994 or any future Federal election cycle, and his campaign committee has a substantial cash balance. Under these circumstances, the Office of General Counsel believes the terms can be used interchangeably. See discussion in fn. 1.

Finally, the draft opinion does not elaborate on the Federal income tax consequences (it does have the usual FEC tax disclaimer sentence) which appear to be significant and may require that the committee terminate its activities in the near future if it wishes to avoid or minimize certain Federal tax obligations. The Internal Revenue Code provides that certain uses of campaign funds are not treated as diverted for the personal use of a candidate or any other person; any other use would be deemed personal by the IRS. The exempted uses are transfers within a reasonable period of time to another qualified political organization, contributions to a public charity, or transfers to the general fund of the U.S. Treasury or of any State or local government. 26 U.S.C. §527(d). IRS regulations also provide that funds may be held in reasonable anticipation of use by the political organization for future exempt functions. IRS Reg. 1.527-5(c)(1).

A current IRS training manual, provided to the Commission in September 1992, addresses several issues arising under 26 U.S.C. §527. One of them is relevant here. At pages 469, 470 the manual states in part:

A principal campaign committee is not required to terminate immediately following an election. It may remain in existence for a reasonable period of time in order to wind up the affairs of the campaign without losing its status as a political organization. Similarly, a candidate may have the political campaign committee continue in existence between election cycles for use in a reelection effort. During those periods, the political organization will continue to qualify as a principal campaign committee under IRC 527(h). However, once a candidate indicates an intention not to seek reelection, the political campaign committee may retain its status as a principal campaign committee only for the period of time reasonably necessary to wind up the affairs of the campaign. If the committee remains in existence longer than is reasonably necessary, or is converted to another use, then its status as a principal campaign committee will be terminated, even if it still qualifies as a political organization. The determination of whether the committee has remained in existence longer than reasonably necessary or has been converted to another use is based on the facts and circumstances of the situation. Some factors to be considered are whether the candidate has taken any steps towards seeking election for a different office, whether the political expenditures of the committee are primarily in support of the candidate's campaign activities (either past or future), and whether the committee makes substantial non-political expenditures.

This office requests that the attached revised draft be considered by the Commission on its agenda for May 6, 1993.

Attachment

1
2
3 **ADVISORY OPINION 1993-6**

4 **J. Breck Tostevin, Treasurer**
5 **Citizens for Congressman Panetta**
6 **Post Office Box 2703**
7 **Monterey, CA 93940**

DRAFT

8 **Dear Mr. Tostevin:**

9 **This responds to your letters dated March 15 and 25,**
10 **1993, that request an advisory opinion concerning application**
11 **of the Federal Election Campaign Act of 1971, as amended**
12 **("FECA" or "the Act"), to certain uses of campaign funds by**
13 **Citizens for Congressman Panetta ("the committee"), the**
14 **authorized campaign committee of Leon E. Panetta.**

15 **You are the treasurer of the committee, which was**
16 **designated as Mr. Panetta's principal campaign committee for**
17 **the 1992 election cycle. Mr. Panetta served as a Member of**
18 **Congress from January 1977 (the 95th Congress) through**
19 **January 21, 1993 (a portion of the 103d Congress). He is**
20 **currently Director of the Office of Management and Budget**
21 **("OMB").**

22 **You ask whether excess campaign funds held by the**
23 **committee may lawfully be used for certain purposes.1/ These**

24 **1/ The Advisory Opinion Request uses the term "campaign**
25 **funds," while the pertinent statute, 2 U.S.C. §439a, and**
26 **Commission regulations at 11 CFR 113.2, refer to "excess**
27 **campaign funds." In this situation the terms may be used**
28 **interchangeably, since the committee has more cash on hand**
29 **than unpaid bills from the 1992 campaign, and Mr. Panetta is**
30 **not a candidate for 1994 or any future Federal election cycle**
at this time. The committee's most recent report includes
activity through December 31, 1992 and indicates that it has
\$100,773 in cash on hand and \$2930 in outstanding debts and
obligations.

3
4 include: (1) hotel lodging in Washington, D.C., for two
5 weeks surrounding President Clinton's inauguration on January
6 20, 1993; (2) transportation to and from political party
7 events in Mr. Panetta's former congressional district; (3)
8 certain payments to non-profit tax exempt organizations; (4)
9 salaries of those hired to prepare and file committee reports
10 with the Commission; and (5) expenses incurred to maintain
11 committee archives and for the storage of papers. These
12 proposed expenditures will be considered in turn.

13 (1) Your letters state that, during the month of Janu-
14 ary, 1993, Mr. Panetta stayed with his family at a Washing-
15 ton, D.C. hotel for two weeks during the presidential inau-
16 gural period. (His family does not reside in the Washington,
17 D.C. area.) On January 21, 1993, Mr. Panetta resigned from
18 the office of U.S. Representative in order to be sworn in to
19 his current position. The swearing in occurred on January
20 22, 1993. He remained with his family at the same hotel
21 until January 29, 1993.

22 You explain that, prior to his being sworn in as
23 Director of OMB, Mr. Panetta shared a rented townhouse with
24 three other Members of Congress. Because the OMB legal
25 counsel advised Mr. Panetta that a conflict of interest would
26 arise if he were to continue to reside with members of the
27 legislative branch, Mr. and Mrs. Panetta immediately began to
28 look for other permanent living arrangements for him. Mr.
29 Panetta was able to move to new housing on January 29, 1993,
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3 when he vacated his lodging at the hotel.

4 You further explain that Mr. Panetta was required to
5 vacate his office in the House of Representatives when he was
6 sworn in as Director of OMB, that is, on January 22, 1993.
7 He was not provided with transitional office space either by
8 President Clinton's transition office or by OMB before his
9 nomination as Director of OMB was confirmed.

10 The hotel space where Mr. Panetta stayed afforded him
11 office space during the transition in order to hold necessary
12 meetings, as well as to have space in which to work during
13 the transition period. This work included both OMB work,
14 final elements of work from his congressional office, and
15 work on the logistics of the move from the congressional
16 office to OMB. Since Mrs. Panetta, as the unpaid district
17 administrator for Mr. Panetta for 16 years, was quite
18 familiar with his office files and systems, she worked with
19 him "on the closure of the congressional office" and on his
20 transition to OMB. The hotel space was also used to
21 entertain and meet with residents of the 17th Congressional
22 District of California who visited Washington, D.C. during
23 this two week time-frame.

24 You ask whether the committee may pay the costs of the
25 hotel space for the second week of use, i.e., from January 22
26 through January 29, 1993. As of January 22, Mr. Panetta no
27 longer qualified as a holder of or candidate for Federal
28 office. However, the space was used in part to wind down
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3 congressional business and to entertain constituents from Mr.
4 Panetta's congressional district.

5 The applicable provision of the Act, 2 U.S.C. §439a,
6 "Use of contributed amounts for certain purposes," states:

7 Amounts received by a candidate as contribu-
8 tions that are in excess of any amount necessary to
9 defray his expenditures, and any other amounts con-
10 tributed to an individual for the purpose of sup-
11 porting his or her activities as a holder of
12 Federal office, may be used by such candidate or
13 individual, as the case may be, to defray any ordi-
14 nary and necessary expenses incurred in connection
15 with his or her duties as a holder of Federal
office, may be contributed to any organization
described in section 170(c) of title 26, or may be
used for any other lawful purpose, including trans-
fers without limitation to any national, State, or
local committee of any political party; except that
no such amounts may be converted by any person to
any personal use, other than to defray any ordinary
and necessary expenses incurred in connection with
his or her duties as a holder of Federal office.

17 Under this language, a narrow exception to the "personal use"
18 prohibition is carved out for "defray[ing] any ordinary and
19 necessary expenses incurred in connection with . . . duties
20 as a holder of Federal office." However, "Federal office"
21 for purposes of the FECA is defined as "the office of
22 President or Vice President, or of Senator or Representative
23 in, or Delegate or Resident Commissioner to, the Congress."
24 2 U.S.C. §431(3), 11 CFR 100.4. Thus Mr. Panetta's current
25 position, Director of OMB, is not considered a "Federal
26 office" for purposes of 2 U.S.C. §439a.

27 "Excess campaign funds" are defined in Commission regu-
28 lations as "amounts received by a candidate as contributions
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3 which he or she determines are in excess of any amount neces-
4 sary to defray his or her campaign expenditures." 11 CFR
5 113.1(e). The Commission has issued numerous advisory opin-
6 ions that emphasize the wide discretion candidates and their
7 agents may exercise in making expenditures for the purpose of
8 influencing the candidate's nomination or election. Where
9 the opinions involved Members of Congress, the reasoning was
10 based on such Member's continuing candidacy in future elec-
11 tion cycles, rather than on status as a Member of Congress.
12 See Advisory Opinion 1988-13 and opinions cited therein.

13 The Commission notes that Mr. Panetta was a Member of
14 Congress on January 8, 1980. Had he not served in the 103d
15 Congress, he would have qualified as a "grandfathered" Member
16 and thus been eligible to convert excess campaign funds to
17 personal use.^{2/} His service in the 103d Congress means that
18 he no longer qualifies under the "grandfather" provision and
19 therefore may not convert any campaign funds to personal use.
20 The question thus becomes which of the proposed expenditures
21 are permissible under 2 U.S.C. §439a, and which would
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24 ^{2/} The Federal Election Campaign Act Amendments of 1979, Pub.
25 L. 96-187, amended 2 U.S.C. §439a to prohibit any candidate
26 or Member of Congress not in office on January 8, 1980 from
27 converting any excess campaign funds to personal use, but
28 allowed uses of such funds for the purposes set out in the
29 statute. The Ethics Reform Act of 1989, Pub. L. 101-104,
30 further amended this section to prohibit any Member of
Congress who serves in the 103d or a later Congress from
converting excess campaign funds to personal use as of the
first date of such service. Mr. Panetta was sworn in as a
Member of the 103d Congress on January 5, 1993.

constitute a prohibited personal use.

4 If the use of funds in question does not constitute a
5 "personal use" and is not otherwise "unlawful," it is
6 permissible under the statute. The Commission has indicated
7 that some payments by a principal campaign committee would
8 constitute a prohibited personal use.

9 In Advisory Opinion 1980-138 the Commission concluded
10 that payment of living expenses of a senator-elect and his
11 family would be impermissible because those expenses would
12 have existed whether or not the senator-elect had been
13 elected and such expenses were not merely "incidental" to his
14 election. In Advisory Opinion 1983-27 the Commission
15 indicated that a defeated House candidate could donate excess
16 campaign funds to an educational foundation, but he "would
17 not be permitted to receive any funds from [the foundation],
18 including, but not limited to, any compensation, loans,
19 awards, grants, or fellowships, until such time as [the
20 foundation] has expended, for purposes unrelated to [his]
21 personal benefit, the entire amount so donated." Only
22 ordinary and necessary expenses incurred on behalf of the
23 foundation as chairman of the board of directors could be
24 reimbursed to the former candidate. Similarly, in Advisory
25 Opinion 1986-39, the Commission concluded that a defeated
26 candidate's donation of excess campaign funds to a trust for
27 a child would not be a prohibited personal use because it
28 would "not benefit [him] in any apparent financial respect."
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3 Some latitude has been given to persons to use excess
4 campaign funds for what could be termed "campaign related"
5 purposes such as: (1) winding down a campaign headquarters
6 (Advisory Opinion 1980-138); (2) sending holiday greeting
7 cards to thank former campaign staff (Advisory Opinion
8 1980-123); and (3) establishing a fund for a possible future
9 campaign for Federal or non-Federal office (Advisory Opinion
10 1980-113).^{3/} Furthermore, in Advisory Opinion 1981-2, the
11 Commission concluded that a Member of Congress could pay from
12 campaign funds the costs of a reception held for constituents
13 on the day of the Member's swearing-in to office. The
14 standard applied was whether the described activity had "an
15 election influencing purpose, either retrospective or
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17 ^{3/} Advisory Opinion 1980-113 also considered other uses of
18 excess campaign funds. It involved an elected State
19 officeholder who was concurrently a Federal candidate in the
20 1980 Federal election cycle and proposed to use excess
21 campaign funds "in carrying out his official State duties."
22 The Commission viewed this use as a "lawful purpose" under
23 the Act, and in doing so implicitly recognized that its
24 regulations define an "office account" to include those
25 established for an individual who was both a candidate for
26 Federal office and who held an elected public office at the
27 State level, or for one who held a Federal office as defined
28 by the Act. 11 CFR 113.1(b), 113.1(d). Such office accounts
29 are no longer permitted for Members of either house of Con-
30 gress, and since its issuance 12 1/2 years ago the Commission
has never relied on this opinion for the proposition that
excess campaign funds can be used for the expenses of holding
any public office such as an appointed office in the
Executive Branch of the Federal Government. Accordingly, the
Commission expressly concludes here that Advisory Opinion
1980-113 is superseded to the extent it held that 2 U.S.C.
§439a permits a former candidate for Federal office to spend
campaign funds for expenses related to that person's position
as a holder of State office or any office which is not a
Federal office as defined in the Act.

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4 prospective." Also, in Advisory Opinion 1978-43, the
5 Commission held that a former Member of Congress who had not
6 sought re-election could use excess campaign funds to employ
7 staff and pay "incidental expenses" for duties which were
8 imposed by virtue of her having been a Member of Congress.

9 In Mr. Panetta's case, the space at issue was also used
10 to provide lodging for his family, and for start-up activi-
11 ties in connection with his new position at OMB. In Advisory
12 Opinion 1980-138, the Commission held that a non-grand-
13 fathered Senator-elect could not use campaign funds to pay
14 personal living expenses incurred during the period between
15 the election and the date he would assume his Senate office.
16 Such expenses were considered as not "incidental" to the
17 election since they would exist regardless of the outcome.

18 Applying these precedents, the Commission concludes that
19 the committee may use excess campaign funds to pay for some
20 portion of the cost of the hotel space used by Mr. and Mrs.
21 Panetta for the period January 22-29, 1993. This conclusion
22 reflects the use of this space by Mr. Panetta, and by Mrs.
23 Panetta to the extent she assisted in this activity, to wind
24 down Mr. Panetta's congressional duties. The percentage
25 chosen should reflect the amount of time and hotel space
26 devoted to these congressional duties, compared to that
27 devoted to OMB duties and personal activities.

28 The Commission notes that these same precedents control
29 disbursements from excess funds to pay for the initial week's
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3 cost, when the space was similarly used to lodge Mr. Panetta
4 and his family, as well as to entertain constituents and for
5 transition work on both congressional and OMB matters. Thus,
6 the committee may use excess funds to pay the percentage of
7 Mr. Panetta's total hotel expenses for that week that re-
8 flects the amount of time and hotel space devoted by him and
9 Mrs. Panetta to his congressional duties during this period.

10 (2) Your second question involves certain costs of
11 travel by Mr. Panetta. You ask whether committee funds may
12 be used to cover the costs of Mr. Panetta's travel to and
13 from events such as a Democratic party event held in his
14 former district to honor him for his past congressional
15 service.

16 The Act allows unlimited contributions or transfers of
17 excess campaign funds to any national, State, or local com-
18 mittee of any political party. See 11 CFR 113.2(c). The
19 Commission notes that the political party events at which Mr.
20 Panetta is the honored guest (or speaker) may also be
21 fundraisers for the party organization that invites him.
22 Expenses incurred in connection with his attendance at such
23 events would qualify as contributions or donations to the
24 appropriate party committee(s), and may appropriately be paid
25 from excess campaign funds.

26 There may be other situations, however, where Mr.
27 Panetta's appearance is either not as an invited honoree or
28 speaker at a political party event, or where he combines
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4 attendance at the party event and personal activity on the
5 same trip. Based on the particular circumstances involved,
6 expenses incurred for these trips could be characterized as
7 personal or mixed use.

8 The Commission notes, however, that if a party committee
9 chooses to pay for Mr. Panetta's transportation to and from a
10 a qualified party-sponsored event (as described above), the
11 campaign committee could reimburse the party for the cost of
12 the transportation by making a contribution of that amount to
13 the party under the "unlimited political party transfer"
14 provision of §439a. The Commission therefore concludes that
15 the committee may use campaign funds to pay Mr. Panetta's
16 direct transportation costs incurred for this purpose.

17 If the trip is for mixed purposes, however, campaign
18 funds may be used to pay no more than the transportation
19 costs to and from the event, and any related lodging or per
20 diem costs (generally no more than one day and/or one night
21 per event). Expenses for the days Mr. Panetta spends on
22 personal or other non-party activity cannot be paid out of
23 campaign funds, because this would be a prohibited personal
24 use of these funds.4/

25 4/ The Commission notes that its campaign travel allocation
26 regulations would not govern the situation you pose since Mr.
27 Panetta is not a candidate for Federal office and since the
28 described travel by him would not appear to be on behalf of
29 any Federal candidate. See 11 CFR 106.3. Furthermore, the
30 exemption for travel expenses on behalf of a political party
committee is not implicated here since Mr. Panetta's expenses
would be reimbursed by the committee and not paid from his

3 (3) Your third question involves providing money to
4 charitable non-profit organizations that are tax exempt under
5 26 U.S.C. §501(c)(3). You state the money would be used for
6 such things as fundraising events, drives and membership
7 fees.

8 The Act at 2 U.S.C. §439a specifically states that
9 excess campaign funds may be contributed to any organization
10 described in §170(c) of title 26. Since §170(c) includes tax
11 exempt §501(c)(3) organizations, excess campaign funds may be
12 freely donated to such organizations.5/

13 The Commission concludes, however, that charitable
14 contributions, as referred to in 2 U.S.C. §439a, does not
15 include the payment of dues or other membership fees on
16 behalf of a person who is not a Federal candidate or office-
17 holder. Paying these dues or membership fees on behalf of
18 Mr. Panetta, who is not a Federal candidate or officeholder
19 under the FECA, would benefit him in an apparent financial
20 respect and would be a personal use of committee funds in
21 contravention of the Act. See Advisory Opinions 1986-39 and
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23 (Footnote 4 continued from previous page)
24 personal funds. See 2 U.S.C. §431(8)(B)(iv), 11 CFR
100.7(b)(8).

25 5/ The Commission notes that some of your proposed recipients
26 e.g., chambers of commerce, may not qualify as §501(c)(3)
27 organizations. Donations to such other recipients may still
28 qualify as transfers to §170(c) organizations, while others
29 would be are permissible under the "any other lawful purpose"
30 clause of §439a. However, tax treatment of such contribu-
tions may differ from that accorded donations to §501(c)(3)
organizations.

1983-27.

4 (4) You next ask whether, since the "campaign remains
5 intact," committee funds can be used to hire individuals to
6 compile and complete the 1993 midyear report required under
7 the Act. In its Informational Letter responding to Advisory
8 Opinion Request 1976-101, the Commission specifically
9 authorized the use of excess campaign funds to pay the costs
10 incurred for "staff, headquarters, and supplies in order to
11 file Federal Election Commission reports." The Commission
12 here reiterates that it is appropriate to use campaign funds
13 for this purpose. However, since you have not proposed or
14 described any winding down or other committee activity beyond
15 June 30, 1993, the closing date for the midyear report,
16 the Commission does not reach any issues that may be raised
17 if the committee's financial activity continues beyond that
18 date.

19 (5) Your final question involves committee expenses
20 incurred in maintaining campaign archiving and storage of
21 papers, files and other materials, along with the telephone
22 and clerical costs of winding down previous campaign
23 activity.

24 As already noted, the Commission concluded in Advisory
25 Opinion 1978-43 that a former Member of Congress who had not
26 sought re-election could use excess campaign funds to employ
27 staff and pay "incidental expenses" for duties which were
28 imposed by virtue of her having been a Member of Congress.

3 While that opinion did not elaborate on what constitutes
4 "incidental expenses" for this purpose, other Advisory Opin-
5 ions, issued to Members who were making the transition into
6 (rather than out of) office, provide some guidance in this
7 area. These costs have been held to include such things as
8 staff salaries, office supplies, rent, postage, telephone,
9 and telegraph expenses. See Re: Advisory Opinion Request
10 1976-101, and Advisory Opinions 1980-138 and 1982-57. The
11 circumstances raised in your request are comparable to those
12 addressed in these opinions, and the Commission concludes
13 that you may similarly use campaign funds to pay these costs
14 at least until June 30, 1993. The Commission would need to
15 review the facts and circumstances pertaining to committee
16 activity after June 30 in order to consider whether
17 further disbursements for similar purposes are permitted
18 under 2 U.S.C. §439a. Another advisory opinion request may
19 be submitted to present any factual situation which arises at
20 that time.

21 The Commission notes that all committee payments for
22 those purposes allowed by this opinion are required to be
23 reported by the committee as either other disbursements (for
24 payments covered in questions one, two, and three), or as
25 operating expenditures (for payments covered by questions
26 four and five). 11 CFR 104.3(b)(2), 104.3(b)(4)(i),
27 104.3(b)(4)(vi).

28 The Commission expresses no opinion as to the possible
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4 state and Federal tax ramifications presented by this request
5 since those issues are not within its jurisdiction. For the
6 same reason the Commission expresses no views as to the
7 possible application of other Federal statutes or regulations
8 to the proposed activity.

9 This response constitutes an advisory opinion concerning
10 application of the Act, or regulations prescribed by the Com-
11 mission, to the specific transaction or activity set forth in
12 your request. See 2 U.S.C. §437f.

13 Sincerely,

14 Scott E. Thomas
15 Chairman

16 Enclosures (RE: AOR 1976-101 and AO's 1978-43, 1980-113,
17 1980-123, 1980-138, 1981-2, 1982-57, 1983-27, 1986-39,
18 1988-13)
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