



FEDERAL ELECTION COMMISSION
Washington, DC 20463

August 6, 1993

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

ADVISORY OPINION 1993-11

Daniel A. Taylor
Hill & Barlow
One International Place
Boston, MA 02110-2607

Dear Mr. Taylor:

This responds to your letter dated June 25, 1993, requesting an advisory opinion on behalf of the Dukakis-Bentsen Committee ("the Committee") and its 1988 General Election Legal and Accounting Compliance Fund ("the GELAC fund") concerning application of the Federal Election Campaign Act of 1971, as amended ("the Act"), and Commission regulations to a transfer between the Dukakis Gubernatorial Committee ("the State Committee") and the GELAC fund.

In accordance with Advisory Opinion 1987-16, the State Committee, in 1987, transferred certain assets plus \$380,000 to the Dukakis for President Committee to launch Governor Dukakis' presidential primary campaign. In winding down its activities, the Committee transferred \$380,000 from its GELAC fund to the State Committee in 1989. You state that this transfer was made in anticipation of a surplus in the GELAC fund pursuant to 11 CFR 9003.3(a)(2) which, by reference to 2 U.S.C. 439a and 11 CFR 113.2, allows GELAC funds remaining after payment of all expenses related to the general election to be used "for any lawful purpose."

As a result of the Commission audit process and enforcement actions that may arise with respect to the Committee, the Committee has incurred and will incur unanticipated legal costs. You state that, in light of these developments, the GELAC fund may have transferred too large a sum to the State Committee in 1989. The State Committee re-transferred \$50,000 back to the GELAC fund in June 1993.

Unlike the general election campaign committee of a publicly-funded major party presidential candidate, the campaign's GELAC fund, which is not publicly-funded, is subject to the contribution limitations and prohibitions of political committees. Expenditures by a GELAC fund for legal and accounting services provided solely to ensure compliance under the Act are not subject to an expenditure limit. 11 CFR 9002.11(b)(5). Commission regulations, however, specify the purposes for which the GELAC fund may normally be used; some of these purposes are not for legal and accounting compliance. See 11 CFR 9003.3(a)(2)(i).

Your concern is whether the GELAC fund may retain the \$50,000 in view of a Commission regulation which became effective on July 1, 1993. This regulation states, in pertinent part, "Transfers of funds or assets from a candidate's campaign committee or account for a nonfederal election to his or her principal campaign committee or other authorized committee for a federal election are prohibited." 11 CFR 110.3(d).^{1/}

The Federal Register notice of April 7, 1993, announcing the effective date of the regulation, explains how the rule is to be applied during the 1994 election cycle. It states that campaign committees that transfer funds before the effective date and use those funds for special elections held before that date are not affected by the rule. Those transfers would be governed by the Commission's prior regulation at 11 CFR 110.3(c)(6) which permitted the transfers under certain conditions pertaining to the total amount that may be transferred, the application of the Act's limits and prohibitions, the timing of the transfer, and the registration of the transferor committee. 58 Fed. Reg. 17967, at 17968 (April 7, 1993).

The notice proceeded to state that committees transferring funds before July 1 in anticipation of an election held after that date had not violated the rule. It further stated: "However, in order to prevent active commingling of federal and nonfederal campaign funds in the candidate's federal campaign account, any funds or assets transferred from a nonfederal committee that remain in the federal campaign account on July 1, 1993 must be removed from that account before July 31, 1993." *Id.* To determine which non-Federal funds were still in the Federal account and thus had to be removed, committees should use the identification method described in 11 CFR 110.3(c)(5)(ii). *Id.*^{2/}

Pending the receipt of an advisory opinion, the \$50,000 has been placed in a special account at the GELAC's normal depository. The Committee intends that the funds be spent exclusively "in connection with the expenditures permitted to the Fund on account of the 1988 election." If the Commission denies your request, you alternatively ask that the Commission give the Committee 60 days from the date of the opinion to "remove" the funds by paying "otherwise validly incurred GELAC expenditures" or by transferring \$50,000 back to the State Committee.

The Commission concludes that, under the conditions set out in your request, the \$50,000 re-transferred to the GELAC account does not have to be returned to the State Committee by July 31, 1993, and may be retained in the GELAC account for the uses you propose.

The new regulation is meant to prevent the use of funds from non-Federal accounts in connection with elections held after July 1, 1993. The exemption of "special elections" held before July 1, 1993, was not meant to exclude funds transferred and expended in connection with a 1988

regularly scheduled election from the same treatment. For these purposes, there is no regulatory distinction between a 1988 regular election and a 1988 special election. The reference to special elections was to exempt funds transferred and used for those elections that might be held during the period between the rule's approval and the effective date of the regulation. No regular elections were scheduled for that period. Furthermore, the re-transfer of funds from the State Committee to the GELAC fund occurred before July 1, 1993. Hence, the requirement to remove the transferred funds from the Federal account (i.e., the GELAC fund) does not apply in the circumstances presented.

In giving its approval to your proposal, the Commission makes two assumptions. The first is that the \$50,000 re-transferred to the GELAC fund consisted of permissible funds. Massachusetts State law differs slightly from the Act's limitations and prohibitions, particularly with respect to labor union contributions, which, although subject to limits, are permissible under State law. Between the time of the 1989 transfer from the GELAC fund to the State Committee and the re-transfer in June 1993, other funds may have been contributed to the State Committee. The Commission assumes that the GELAC fund applied the standards of former 11 CFR 110.3(c)(6)(i), the predecessor to the new 11 CFR 110.3(d), and that the \$50,000 is comprised only of funds permissible under the Act's limitations and prohibitions.^{3/}

The second assumption is that no funds that may remain in the future from the \$50,000 re-transfer may be transferred from the GELAC fund to another authorized Federal committee of the same candidate. The Commission notes your representation that these funds are being used only in connection with the 1988 presidential elections.

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)

Scott E. Thomas
Chairman

ENDNOTES

1/ The regulation goes on to say:

However, at the option of the nonfederal committee, the nonfederal committee may refund contributions, and may coordinate arrangements with the candidate's principal campaign committee or other authorized committee for a solicitation by such committee(s) to the same contributors. The full cost of this solicitation shall be paid by the Federal committee.

2/ This subsection is applicable insofar as it provides that the cash on hand is considered to consist of the funds most recently received by the committee that will be making the transfer.

3/ Under that regulation, the cash on hand of the transferor committee was considered to consist of the funds it most recently received. The transferor committee had to be able to demonstrate that such cash on hand contained sufficient funds at the time of the transfer that complied with the Act's limitations and prohibitions to cover the amount transferred. A contribution was to be excluded from the amount transferred if the making or acceptance of it in connection with a Federal election was prohibited by the Act. In addition, the amount transferred per contributor could not exceed the limitations of 11 CFR 110.1 or 110.2.