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FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

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August 12, 1993

MEMORANDUM

TO: The Commission

THROUGH: John C. Surina
Staff Director *[Signature]*

FROM: Lawrence M. Noble *[Signature]*
General Counsel

N. Bradley Litchfield *[Signature]*
Associate General Counsel

Jonathan M. Levin *[Signature]*
Senior Attorney

SUBJECT: Draft AO 1993-15

Attached is a proposed draft of the subject advisory opinion.

We request that this draft be placed on the agenda for August 17, 1993

**SUBMITTED LATE
AGENDA ITEM**
For Meeting of: AUG 17, 1993

Attachment

1
2
3 ADVISORY OPINION 1993-15

4 L. Anthony Sutin
5 Hogan & Hartson
6 Columbia Square
7 555 Thirteenth Street, N.W.
8 Washington, D.C. 20004-1109

DRAFT

9 Dear Mr. Sutin:

10 This responds to your letters dated June 30 and July 9,
11 1993, on behalf of The Tsongas Committee, Inc. ("the
12 Committee") concerning application of the Federal Election
13 Campaign Act of 1971, as amended ("the Act"), and Commission
14 regulations to the acceptance of contributions by the
15 Committee to pay legal fees.

16 The Committee is an authorized campaign committee of
17 former Senator Paul E. Tsongas' 1992 Presidential candidacy.
18 Since Senator Tsongas' withdrawal from the 1992 campaign, the
19 Committee has been engaged in debt retirement and the
20 Commission's audit process. Your firm, Hogan & Hartson, has
21 been representing the Committee before the Commission.

22 Information provided by the Committee may indicate that
23 its principal fundraising consultant misappropriated a large
24 amount of contributions intended for the Committee and may
25 have engaged in other activities that may be violations of
26 the Act. As your request indicates, the Commission commenced
27 an investigation of these circumstances, with the Committee's
28 cooperation, as an adjunct to the ongoing audit process.

29 The Department of Justice and the Internal Revenue
30 Service also began an investigation ("the DOJ investigation")
into the same activities of the fundraising consultant, as

3 well as other actions having no relationship to the Tsongas
4 campaign. You state that the Committee "sought to cooperate
5 fully with the DOJ investigation, making a number of
6 Committee personnel and Committee records available at the
7 request of federal investigators." Although the Committee
8 was never notified that it was a target of the DOJ
9 investigation, the Committee retained the law firm of Foley,
10 Hoag & Eliot ("the law firm"), to advise the Committee and
11 its personnel during the course of the DOJ investigation.
12 The fundraising consultant has been indicted by a Federal
13 grand jury on 47 counts relating to mail fraud, financial
14 transactions with proceeds of illegal activity, bank fraud,
15 making false statements to the Commission, and violating the
1 Act.

17 The law firm's services to the Committee are primarily
18 related to the DOJ investigation. You state that, "although
19 the underlying facts of the fundraising consultant's
20 activities are material to matters raised in the FEC audit
21 process," separate counsel (Hogan & Hartson) has been
22 handling those matters as they relate to compliance and audit
23 issues before the Commission. You note that the Foley law
24 firm has undertaken representation of certain Committee
25 personnel who are witnesses in connection with a compliance
26 matter before the Commission, but that it will maintain
27 separate billing records for that representation and the DOJ
28 investigation.

29 The law firm has billed the Committee for its services
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in connection with the DOJ investigation. The Committee seeks an advisory opinion as to whether funds raised to defray legal expenses in connection with the DOJ investigation would be considered contributions under the Act and, therefore, subject to the Act's limitations and prohibitions.

Under the Act, a "contribution" is a gift, subscription, loan, advance, or deposit of money or anything of value made for the purpose of influencing any election for Federal office. 2 U.S.C. §431(8)(A)(i); 11 CFR 100.7(a)(1). The term "expenditure" is defined in an identical manner with respect to payments made for the purpose of influencing an election. Excepted from both terms are:

any legal or accounting services rendered to or on behalf of--

(II) an authorized committee of a candidate or any other political committee, if the person paying for such services is the regular employer of the individual rendering such services and if such services are solely for the purpose of ensuring compliance with this Act or chapter 95 or 96 of title 26.

2 U.S.C. §431(8)(B)(ix) and 431(9)(B)(vii). See also 11 CFR 100.7(b)(14) and 100.8(b)(15).

Although the donation of legal services solely to ensure compliance with the Act would be exempt from the definition of contribution, i.e., where the regular employer of the person rendering such services donates that person's time to the committee, the Act and regulations provide no exception for the donation of money to defray the costs of such services. Advisory Opinions 1990-17, 1981-16 and 1977-5. In

3 past opinions, the Commission concluded that the costs of
4 legal representation with respect to post-election audit and
5 compliance matters relating to that election emanate from
6 activities clearly within the scope of the Act. Donations to
7 defray such costs, therefore, were treated as contributions
8 subject to the limits and prohibitions of the Act. Advisory
9 Opinions 1990-17 and 1981-16. See also Advisory Opinion
10 1989-10. Even though such costs and the donations for such
11 costs occurred after the election, they were still considered
12 to be expenditures and contributions. The Commission
13 considered the situation to be analogous to a debt situation;
14 if the committee did not have sufficient cash on hand to pay
15 for the legal costs, the committee could accept further
1 contributions, designated by the contributors for the
17 relevant election, to pay for the new costs arising from that
18 election. Advisory Opinion 1990-17. See Advisory Opinion
19 1981-16.

20 The Commission has also determined that donations and
21 disbursements made for the purpose of defending a Federal
22 officeholder with respect to activities unrelated to
23 compliance with the Act were not contributions or
24 expenditures. See Advisory Opinions 1983-21, 1981-16,
25 1981-13, and 1979-37. Similarly, the Commission has also
26 determined that money or in-kind donations to a principal
27 campaign committee of a presidential candidate, or a fund
28 established by it, were not contributions if donated for
29 purposes such as defending against violations of the Hatch
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3 Act, the Appropriations Act, or constitutional rights, or
4 pursuing commercial litigation such as a contract dispute.
5 See Advisory Opinions 1981-16 and 1980-4.

6 Unlike the opinions referred to directly above, your
7 situation relates to activities directly implicating the
8 provisions of the Act. Even though your request pertains to
9 costs for representation before the Justice Department and
10 the IRS, the Justice Department has criminal enforcement
11 authority with respect to the Act and has other bases within
12 Title 18 for proceeding against activities that fall within
13 the purview of the Act. As alluded to above, some of the
14 indictment counts explicitly refer to violations of 2 U.S.C.
15 §441a(a)(1)(A) with respect to causing 16 excessive loans to
16 be made payable to the Committee. Other counts refer to mail
17 fraud as a result of causing the loans, fraudulently billing
18 the Committee, diverting loan and direct contribution funds
19 from the Committee, using the funds for personal use, and
20 concealing such activities from the Committee. The
21 indictment's description of those mail fraud counts refers to
22 the violations of the Act and regulations that resulted from
23 such activity, including 2 U.S.C. §§432(a)(3), 432(b),
24 432(c), 432(h), 434(b), and 11 CFR 102.8, 102.9, 102.15,
25 103.3, and 104.3-104.11. The count relating to financial
26 transactions with the proceeds of illegal activity refers to
27 the activity covered under mail fraud. Ten of the counts
28 with respect to filing false statements refer to causing
29 false Committee reports to be filed with the Commission, and
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3 two of the false statement counts refer to the defendant's
4 statements to the Commission. Ten of 47 counts refer to
5 charges of bank fraud and mail fraud which do not pertain to
6 the Committee or Committee funding.

7 The Commission concludes that donations raised to defray
8 the legal expenses in connection with the DOJ investigation
9 must be treated as contributions to the Committee subject to
10 the Act's limitations, prohibitions, and disclosure
11 requirements.^{1/} The activities being investigated "emanate
12 not only out of the election, but also from matters clearly
13 within the scope of the Act." Advisory Opinion 1981-16. As
14 contributions, these donations must be aggregated with a
15 contributor's previous contributions to the Tsongas
16 presidential primary campaign to determine compliance with
17 the contribution limits of 2 U.S.C. §441a. Advisory Opinions
18 1990-17 and 1981-16. The payments of the described legal
19 expenses, however, do not count toward the presidential
20 primary expenditure limits set out at 2 U.S.C. §441a(b)(1)(A)
21 and 441a(c), and 26 U.S.C. §9035(a). 11 CFR 100.8(b)(15).

22 This response constitutes an advisory opinion concerning
23 application of the Act, or regulations prescribed by the
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25
26 ¹ This conclusion does not apply to any legal expenses
27 incurred in connection with any investigated activity that
28 does not pertain to the Committee or its activities. For
29 example, the activities described in ten of the counts do
30 not, on their face, relate to the Committee ~~and~~ or Committee
funding. Without further information, donations toward
expenses for the law firm's work pertaining to these charges
and not pertaining in any way to the Committee, would appear
not to be contributions to the Committee.

3 Commission, to the specific transaction or activity set forth
4 in your request. See 2 U.S.C. §437f.

5 Sincerely,

6
7 Scott E. Thomas
8 Chairman

9 Enclosures (AOs 1990-17, 1989-10, 1983-21, 1981-16, 1981-13,
10 1980-4, 1979-37, and 1977-5)
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