



FEDERAL ELECTION COMMISSION
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October 26, 1994

SUBMITTED LATE

AGENDA ITEM

For Meeting of: OCT 27 1994

MEMORANDUM

TO: The Commission

FR: Lee Ann Elliott *JM*
Commissioner

RE: Alternative Draft for Advisory Opinion 1994-30

Attached is an alternative draft for Advisory Opinion 1994-30. The draft makes several deletions to the General Counsel's draft in Agenda Document #94-114-A.

The deletions I am suggesting remove references to this activity being judged as an independent expenditure. I have re-read all the opinions cited in OGC's draft and none of them made any reference to independent expenditures, so I don't see why it is necessary here.

When you think about it, the draft mixes apples and oranges when it talks about "commercial activity" and the presence of coordination preventing it from being an independent expenditure. In my opinion, this activity cannot be an independent expenditure in any case because corporations like this can't make independent expenditures.

I believe OGC states the correct analysis on page 11, lines 18-28 where it says that if you apply the factors of Advisory Opinion 1989-21, the result is that this is commercial rather than political activity. The draft goes on to note that if the opposite result was reached, it would be a contribution to the benefiting candidate.

This is true, but not because it was an independent expenditure that failed with the presence of coordination. Rather, because it is a corporate expenditure for the purpose of influencing an election. The level of coordination is not the right inquiry: the focus should be on whether the corporation is acting within its ordinary course of business or for the purpose of influencing an election. That is how I read all the prior opinions in this area. If "coordination" were the key, I imagine we would have reached some different conclusions in them.

I have also made some minor deletions of language that I find a little speculative or unnecessary.

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DRAFT

ADVISORY OPINION 1994-30

Edward D. Feigenbaum
Attorney at Law
P.O. Box 383
Noblesville, IN 46060-0383

Dear Mr. Feigenbaum:

This responds to your letter dated August 3, 1994, as supplemented by your letter dated August 31, 1994, requesting an advisory opinion on behalf of Conservative Concepts, Inc. and Michael R. Pence concerning the application of the Federal Election Campaign Act of 1971, as amended ("the Act"), and Commission regulations to ads for the sale of T-shirts bearing campaign messages.

Your request centers around two types of business ventures to be conducted by Conservative Concepts, Inc. ("CCI") entailing the manufacture, advertising and sale of T-shirts containing logos advocating the election of candidates, e.g., "X for Congress" or "Y for Senate," and perhaps including the phrases, "Vote Republican" or "Vote Democratic," as appropriate. One venture would involve advertising of T-shirts on a syndicated talk show known as The Mike Pence Show and the other would involve the sale of the T-shirts at events such as rallies, joint candidate appearances, and debates.

CCI is an Indiana company, incorporated in late 1993 by Ray Hilbert and Berry Payton, whose principal business is the manufacture for sale of assorted paraphernalia (e.g., T-shirts, lapel and bumper stickers, mugs, and hats) with

3 logos on them, principally logos with political messages.
4 The company markets its products at events such as outdoor
5 festivals, flea markets, and conventions, and in wholesale
6 sales to retail outlets. The company intends to focus its
7 activities on candidates who have a conservative ideology,
8 without regard to their party affiliation.

9 As an alternative to the sale by CCI, Raymar Incentives,
10 a sole proprietorship formed by Mr. Hilbert in late 1992,
11 would market and advertise the shirts. Raymar is a specialty
12 advertising agency offering such products and services as the
13 wholesale and retail of clothing, corporate gifts, incentive
14 programs, consumer marketing, and private franchising to a
15 principally non-political market. You state that, to the
16 best of your knowledge, Mr. Hilbert and Mr. Payton have not
17 engaged in activities supporting candidates or political
18 parties during the current election cycle, nor do they
19 anticipate engaging in such activities during this cycle.

20 The Mike Pence Show is a daily syndicated radio talk
21 show hosted by Indianapolis attorney Michael R. Pence. It is
22 syndicated by Network Indiana, which is a division of Wabash
23 Valley Broadcasting Corporation and includes 80 radio
24 stations among its affiliates. The show is a joint venture
25 between Network Indiana and Mr. Pence's Hoosier Conservative,
26 Inc. (established in 1993). You describe the show as
27 "Indiana's only conservative talk show dedicated exclusively
28 to politics and popular culture in Indiana." It can be heard
29 on 14 Network Indiana affiliate stations. You state that,

4 although it promotes itself as a "conservative" show, it is a
5 non-partisan public affairs radio program. The three-hour
6 format includes two hours of talk and telephone calls from
7 statewide listeners based on topical news and a third hour
8 focusing on a guest who appears in the studio or by
9 telephone. These guests have included Federal and state
10 candidates from both major parties, and there have been some
11 joint appearances by candidates for the same office.

12 The first venture would involve the purchase by CCI of
13 advertising time on the Pence Show for the sale of T-shirts
14 using the following type of language:

15 Listeners, if you live in the [D.C. Metro] area and
16 wish to show your support for [Trevor Potter], call
17 [this telephone number] and you can buy a [Potter
for Congress]-imprinted t-shirt for just [\$15.95
plus tax and shipping costs]. This offer is not
affiliated with, or authorized or paid for by any
candidate or political party.

18 Another advertisement featuring the name of more than
19 one candidate might be aired as follows:

20 Listeners, if you live in the [D.C. Metro] area and
21 wish to support [Trevor Potter], or if you live in
22 the [greater northern Virginia] area and wish to
23 show your support for [Danny McDonald], call [this
telephone number] and you can buy a [Potter for
Congress or McDonald for Senate]-imprinted t-shirt
24 for just [\$15.95 plus tax and shipping costs].
This offer is not affiliated with, or authorized or
paid for by any candidate or political party.

25 CCI would use other language at the advice of the
26 Commission.

27 You present the possibility of "packaging the
28 advertisement as part of the radio show." You explain that
29 the Mike Pence Show is marketed on a barter basis to Network
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3 Indiana affiliates. Stations that decide to carry the show
4 do so by yielding eight minutes of advertising time per hour
5 to Network Indiana (part owner of the show), and these eight
6 minutes are broadcast along with the program to the 14
7 affiliates airing it. CCI plans to purchase a portion of
8 those eight minutes per hour from Network Indiana. Thus,
9 when the show is bartered to a station, the CCI ads will be
10 already part of the package that the station receives. This
11 also means that CCI will not have to purchase advertising
12 time from each station.

13 CCI has not made any contact with any campaigns pending
14 the outcome of this opinion. If CCI determines that it is
15 permissible to market a product with a candidate's name
16 without the candidate's permission, the company will make no
17 contact, except perhaps for a letter to the candidate "simply
18 indicating that the company is undertaking the activity."

19 The second situation, i.e., the sale of the same
20 T-shirts at events such as rallies, joint appearances, and
21 debates that the candidate would be attending, is not
22 connected with any advertising. As with the above
23 arrangement, no funds would go to the candidate's campaign.
24 Periodically, CCI will request a list of appearances from the
25 campaign, perhaps accompanied by a message to the candidate
26 simply indicating that the company is undertaking the vending
27 activity.

28 Neither one of the proposed activities will entail
29 payments or contributions from CCI to the candidates'
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4 campaigns from the sale of the T-shirts. You assert that
5 your client's interest is strictly profit-oriented and not
6 for the purpose of influencing a Federal election. You note
7 that CCI has no control over the use of the shirts after they
8 are purchased and that there is no way to determine whether
9 the purchaser is merely a collector or a supporter of the
10 candidate who will wear the shirt in an attempt to convey his
11 or her support.

12 You ask a number of questions pertaining to the
13 above-described transactions. You wish to know if radio
14 advertising for the retail sale of the shirts constitutes a
15 contribution if the candidate(s) are named, and whether the
16 result would differ if the ad suggests that if the listener
17 backs the candidate's candidacy, the listener might wish to
18 buy the T-shirt. You also ask whether either one of these
19 types of radio ads constitutes an independent expenditure.
20 Additionally, you ask whether, if the company seeks the
21 approval of a candidate to use the candidate's name on a
22 T-shirt, this would "change the relationship between the
23 advertiser and the candidate so as to constitute an
impermissible independent expenditure..."

24 Furthermore, you ask whether, if the company's ad is
25 "packaged" as part of the syndicated radio show," would the
26 Commission impute a contribution to the radio network
27 responsible for distribution of the show. Finally, you ask
28 whether the Commission's determination in any of the above
29 questions would change if the company limited itself to

4 producing shirts for only certain candidates or if it only
5 featured one candidate in a given advertising spot.

6 With respect to the second venture, you wish to know
7 whether a prohibited corporate contribution or expenditure
8 would result and whether the Commission's conclusion would be
9 affected by periodic requests from the company to the
10 campaign for a list of scheduled appearances.

11 Analysis

12 I. First Situation

13 The Commission has considered situations involving
14 business ventures by corporations and other entities
15 involving candidate or party-related merchandise. If outlays
16 of funds, goods, or services are made by a business entity
17 selling items and these outlays are not paid for by the
18 campaigns benefiting, referred to, or affected, the question
19 arises as to whether such outlays are contributions or
20 expenditures subject to the Act's limits under 2 U.S.C. §441a
21 or prohibited by 2 U.S.C. §441b(a), or whether they are
22 merely entrepreneurial or commercial activity unlimited by the
23 Act. See 2 U.S.C. §§431(8)(A)(i) and 441b(b)(2); 11 CFR
24 100.7(a)(1) and 114.1(a)(1). The same questions arise as to
25 the purchases of the merchandise.

26 ~~The above questions often arise in the context of~~
27 ~~coordination or arrangements between vendors and campaigns.~~
28 ~~If a vendor acts without such coordination or arrangement,~~
29 ~~and the vendor is incorporated, the activity will still be~~
30 ~~prohibited if it constitutes an independent expenditure,~~

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7 e.g., a communication which expressly advocates the election
8 or defeat of a clearly identified candidate and which is not
9 made with the cooperation or prior consent of, or in
10 consultation with, or at the request or suggestion of, any
11 candidate or authorized committee or agent of a candidate.
12 ~~2 U.S.C. §441b(a), 11 CFR 109.1(a) and 114.2(b).~~ See also
13 ~~2 U.S.C. §431(17) and 11 CFR 100.16 and 109.1(b).~~

14
15 In Advisory Opinion 1976-50, a corporation planned to
16 produce and market T-shirts at its own expense for a
17 principal campaign committee, receive payment from individual
18 purchasers, and send a portion of the purchase price to the
19 committee. The Commission concluded that this amounted to
20 the advance of corporate funds to assist the committee in a
21 fundraising effort and was therefore impermissible. In
22 Advisory Opinion 1989-21, the Commission considered an
23 unincorporated free-lance artist's proposal to market
24 merchandise embellished with "cartoon characters" and the
25 likenesses of political candidates as a means of raising
26 funds for Federal candidates and party committees. Under the
27 plan, the artist would pay all the costs associated with
28 producing the fundraising items and would send 10% of the
29 retail price to the committees. The Commission held that the
30 individual's advance outlays to produce and market the items
would be considered loans to the candidates and that the
entire amount paid for the fundraising items, not just the
10%, would be considered contributions by purchasers. The
Commission also stated that because the individual would be

3 acting as the committee's "agent . . . to receive
4 contributions and make expenditures," she would have to
5 include disclaimers with her solicitations and conform with
6 the recordkeeping and reporting requirements of the Act.

7 In reaching this conclusion, however, the Commission
8 also stated that "as a practical matter, [it] recognizes that
9 entrepreneurial activity involving candidate-related
10 merchandise is commonplace." Stating that the commercial
11 sale of candidate-related merchandise "would not necessarily
12 constitute an 'expenditure' or 'contribution' by the
13 purchasers," the Commission identified certain factors that
14 it would consider in determining the nature of such
15 entrepreneurial activity: whether the sales involve
16 fundraising activity or solicitations for political
17 contributions; whether the activity is engaged in by the
18 vendor for genuinely commercial purposes; whether the items
19 are sold at the vendor's usual and normal charge; and whether
20 the purchases are made by individuals for their personal use
21 in political expression. Advisory Opinion 1989-21.

22 Examples of [] entrepreneurial activity may be found
23 in Advisory Opinion 1988-17, which addressed several proposed
24 transactions by a company, whose principal purpose was the
25 production of commemorative medallions. Pursuant to
26 contracts with congressional and presidential campaigns, the
27 company planned to produce medallions containing the likeness
28 of the particular presidential or congressional candidate.
29 The campaigns would provide the upfront production expenses

3 to the company and bear all the expenses for marketing, and
4 pay a fee to the company. Checks for the purchase of the
5 medallions would be sent to and payable to the respective
6 campaigns. The Commission, in approving this arrangement,
7 contrasted this situation with Advisory Opinion 1976-50 and
8 other situations where the corporation forwarded "royalty"
9 money or assumed costs without full compensation.

10 The Commission also considered other sales of the
11 medallions. The company planned to market and sell the
12 medallions to separate segregated funds and non-connected
13 PACs which in turn would provide the medallions as gifts and
14 souvenirs to their contributors. The Commission stated that
15 the proposal appeared to entail "profit-making, arm's length
16 commercial transactions in which the corporation offers to
17 sell products that may be useful to political organizations"
18 and that such transactions would not be precluded by the Act
19 if the purchase price was usual and normal, and that the
20 company's marketing activity to PACs will be conducted on a
21 strictly commercial basis without an attempt to influence the
22 election of a candidate. Another proposal entailed the
23 company producing and marketing the medallions at its own
24 expense and selling them to the general public only after the
25 candidate's election, loss, or withdrawal, and after
26 completion of the candidate's debt retirement. Without
27 stating whether this proposal had to be conducted only after
28 election day and debt retirement, the Commission asserted
29 that the plan was permissible so long as the company
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4
5 "pursue[d] this venture on a commercial basis for the purpose
6 of making a profit."

7
8 Your proposal for the radio advertising of T-shirts
9 without the variations discussed below^{1/} does not appear to
10 entail any arrangements with campaigns, other than a possible
11 letter informing the candidate that CCI is undertaking these
12 ads, that would suggest an election influencing purpose
13 instead of one that is merely commercial. For example, there
14 is no arrangement whereby CCI would lay out funds for
15 advertising expenses in coordination with a committee and no
16 arrangements whereby a portion of the sales proceeds will be
17 retained by or remitted to the committee of the referenced
18 candidate. In addition, with reference to what may
19 constitute coordination compromising the nature of an
20 independent expenditure, the request does not appear to
21 envisage any arrangements whereby information as to the
22 amounts of sales, location, and other aspects of CCI's sales
23 plan are communicated to any candidate's campaign, or whereby
24 information as to any campaign's plans are communicated to
25 CCI, thus affecting CCI's spending. See 11 CFR
26 109.1(b)(4)(ii).^{2/} Thus, it appears that no prohibited

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28 i/ See discussion in footnote 2 and discussion as to seeking
29 approval of the candidate's campaign.

30
31 1/ 2/ A simple statement that CCI is airing such ads (referred
32 to above) would most likely not, by itself, constitute change ^{THE MERE}
33 coordination ~~or an arrangement with a campaign. Discussion~~ ^{"COMMERCIAL}
34 as to when or how often the ads would air, or the volume of ^{NATURE OF}
35 shirts to be sold, may lead to a different conclusion. ^{THE ACTIVITY}
36 Seeking and receiving consent from a campaign may also be a
37 factor. See below.

4 corporate contribution by CCI, or contribution subject to the
5 limits by Raymar Incentives, is implicated.

6 ~~if the company's activities constitute independent~~
7 ~~expenditures, however, then such activity by CCI would be~~
8 ~~prohibited and such activity by Raymar would be reportable.~~
9 ~~2 U.S.C. § 3434(c) and 44ib(a), 11 CFR 104.4(b), 104.5(g),~~
10 ~~109.2, and 114.2(b).~~ The T-shirts being sold to the general
11 public undoubtedly display messages that "expressly advocate"
12 the election or defeat of a candidate. See Buckley v. Valeo,
13 424 U.S. 1, 44, FEC v. Massachusetts Citizens for Life
14 ("MCFL"), 479 U.S. 238, 249-250 (1986). Nevertheless, in the
15 absence of coordination or consultation with political
16 committees resulting in contributions by the vendors, the
17 Commission has still permitted an alternative to treating
18 such activity as political activity resulting in independent
19 expenditures. An application of the factors cited in
20 Advisory Opinion 1989-21 may permit your activity to fall
21 within the category of commercial, rather than political,
22 activity. For example, you assert that CCI's interest is
23 strictly profit-oriented and the activity is not undertaken
24 for the purpose of influencing an election. You note that
25 purchasers may respond to your ads for any number of reasons,
26 e.g., as a political memorabilia collector's item or as a
27 supporter of a given candidate. In addition, your activity
28 does not entail any fund-raising or solicitation for a
29 campaign.

30 You have stated that CCI intends to focus on candidates

3 who have a conservative ideology. Companies often determine
4 to direct their business activities toward one type of
5 political orientation. Such a focus may require a careful
6 scrutiny of the amounts charged by the company, the contacts
7 the company may have with a campaign (as opposed to other
8 vendors that may have reason to contact a campaign), the
9 scheduling of business activities, and other business
10 practices. See Advisory Opinion 1991-32. Nevertheless, it
11 does not, by itself, negate the merely commercial nature of
12 an activity.

13 As indicated in your questions, one aspect of your
14 proposed message, however, would compromise the merely
15 commercial nature of your activity. ~~and bring it under the~~
16 ~~category of independent expenditure.~~ In addition to
17 manufacturing and offering a shirt with a message of express
18 advocacy, you propose to gear the motivation for making a
19 purchase to those who wish to support or express support for
20 a particular candidate. Moreover, you target the geographic
21 area of the purchaser, i.e., to persons who are likely voters
22 in the area in which the referenced candidate is running. A
23 message that is merely commercial would make no mention of
24 the motivation of the purchaser as being the support of a
25 candidate. In order to avoid a message expressly inviting
26 support for a candidate, i.e., express advocacy, the
27 advertisement should omit the phrases "if you wish to
28 support" or "wish to show your support" and the reference to
29 where the purchaser lives. In the context of the language
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4
5 you have suggested, quoted above, the Commission advises you
6 to state that the T-shirts are being offered for sale, state
7 what is on the shirt or otherwise describe the shirt, and
8 then provide the information as how to purchase the shirt.
9 The restatement of the message printed on the shirt would
10 not, by itself, constitute express advocacy if done as just
11 described.^{3/}

12 You posit the situation where the company seeks the
13 approval of the candidate to use the candidate's name on the
14 T-shirt, and ask whether this would change the relationship
15 between the company and the candidate so as to constitute an
16 in-kind corporate contribution. The response to this
17 question depends upon the nature of the communication and the
18 surrounding circumstances. If CCI calls the campaign only in
19 order to avoid a legal conflict over trademark or other trade
20 usage, the relationship between the company and the campaign
21 is not changed. In contrast, the seeking of approval to
22 proceed with the advertising ~~on-a-basis-related-to-the~~
23 ~~election-of-the-candidate (e.g., the campaign is pleased to~~
24 ~~know that shirts with the candidate's name or likeness are~~
25 ~~being offered to the public), outside-of-a-vendor-vendee~~
26 ~~business arrangement with a campaign, may change the nature~~
27 ~~of your activity from merely commercial. This would entail~~
28 ~~"prior consent" by the candidate for activity which would~~

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^{3/} The Commission's conclusion does not address a situation
of a T-shirt advertisement that mentions opposing candidates
who seek the same office.

4 affect his campaign. See 11 CFR 109.1(a).

5 You ask whether the packaging of the company's ad as
6 part of the syndicated radio show would, by itself, result in
7 a conclusion that the network responsible for the show's
8 distribution had made a contribution or expenditure, assuming
9 the ad was determined to be a contribution or expenditure.
10 Without any further information indicating otherwise, the
11 Mike Pence Show and its syndicator appear to be utilizing the
12 kind of broadcast facilities that would fall within the news
13 story exception to the definitions of "expenditure" and
14 "contribution" at 2 U.S.C. 431(9)(B)(i), and 11 CFR
15 100.8(b)(2) and 100.7(b)(2).^{4/} Network Indiana's sale of the
16 advertising time to CCI and subsequent inclusion of the ad in
17 its barter package to its affiliates would not result in a
18 contribution or expenditure if such transactions involve the
19 usual and normal charges and are in the ordinary course of
20 business (i.e., Network Indiana packages other non-political
21 ads as part of the Pence Show). See Advisory Opinions
22 1990-19 and 1979-36.^{5/}

23
24 ^{4/} Michael R. Pence was a Republican Congressional
25 candidate in 1988 and 1990, but is not, at present, a
26 candidate. There is no indication from the materials you
have presented that Network Indiana, Hoosier Conservative, or
the Wabash Valley Broadcasting Corporation is owned or
controlled by a political party, political committee, or
candidate.

27
28 ^{5/} Network Indiana's involvement may raise a concern in
another respect if it sells advertising both to CCI and to
the campaign of a candidate whose name appears on a shirt
ad placed by CCI. The concern would arise if, in selling the
time and placing these ads at certain points in the package,
Network Indiana informs both CCI and the campaign as to the

Finally, with respect to the radio broadcasts, you wish to know whether the Commission's conclusions would change should CCI decide to limit itself to shirts for only certain candidates or only feature one candidate in a given spot. As alluded to above, a decision by CCI to limit itself to certain candidates is a factor relevant to determining whether a business enterprise's activities are merely commercial, rather than political, particularly in view of its intent to focus on candidates of a particular ideology. Nevertheless, there is nothing in the Act requiring a business entity to target its business toward clients or individuals that represent all parties or ideologies. The decision to feature a t-shirt for one candidate only in a given advertising spot does not, by itself, constitute an expenditure for that candidate. The normal business and advertising practices of the company, as well as any deviation from them, and how such business and advertising is usually conducted by businesses not attached to a campaign would have to be examined in order to reach any definitive conclusion.

II. Second Situation

Your second situation entails the sale of the T-shirts

(Footnote 5 continued from previous page)
~~other's plans with a view toward affecting how much time the campaign might purchase (e.g., for purposes of name recognition). Since this scenario was not explicitly presented, the Commission does not state an opinion as to this situation. Nevertheless, the situation does have implications under 11 CFR Part 109 (Independent Expenditures).~~

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5 at rallies, joint appearances, and debates that the candidate
6 would be attending. The Commission understands the business
7 advantage to be gained by selling the T-shirts at such
8 events. ~~If this involves no coordination or arrangements~~
9 ~~with the candidate or his or her campaign, no contribution~~
10 ~~would result and your activity could be classified as~~
11 ~~merely commercial.~~ Receiving a list of scheduled
12 appearances, without any other communication between the
13 company and the campaign as to the plans of the campaign or
14 the company's plans to sell T-shirts featuring the candidate,
15 would not change the Commission's conclusion.

16
17 If the campaign and the company communicate in order to
18 make a determination as to the events at which CCI would sell
19 and where (during the event) the company would place its
20 booth or stand for the sale of shirts, the conclusion may
21 differ. If a decision is made based on a discussion between
22 the company and the campaign of how the campaign may benefit
23 or otherwise be affected (e.g., whether this would conflict
24 with the campaign's sales of its own shirts or augment the
25 event's impact, what location for the company would
26 be beneficial for the campaign), such coordination may result in
27 an in-kind contribution by the company. See Advisory Opinion
28 1993-18. ~~This letter situation may occur particularly with~~
29 ~~respect to closed spaces such as auditoriums (or large~~
30 ~~meeting rooms in hotels) and their outer halls or the~~
~~enclosed exhibit areas of an outdoor fair where campaign~~
~~officials may have control over the company's access to such~~

3 ~~space. In contrast, where the vendor would need only the~~
4 ~~permission of local authorities to perform its sales activity~~
5 ~~in outdoor locations near the site of a campaign rally, the~~
6 ~~possibility of a contribution in kind is greatly diminished.~~

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

11 For the Commission,

13 Trevor Potter
14 Chairman

15 Enclosures (AOs 1993-18, 1991-32, 1990-19, 1989-21, 1988-17,
16 1979-36, and 1976-50)