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FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

Oct 13 1 55 PM '94

October 13, 1994

MEMORANDUM

TO: The Commission

THROUGH: John C. Surina
Staff Director

FROM: Lawrence M. Noble
General Counsel

N. Bradley Litchfield
Associate General Counsel

Jonathan M. Levin
Senior Attorney

SUBJECT: Revised Draft AO 1994-30

AGENDA ITEM

For Meeting of: OCT 20 1994

On October 6, 1994, the Commission considered Draft Advisory Opinion 1994-30 (Agenda Document #94-114). After considerable discussion of the draft, with no motion for approval or disapproval, the Commission voted to continue discussion at its meeting on October 20. No specific suggestions for amendments to the draft were adopted at the October 6 meeting.

After reflecting on the discussion, however, this office has made a few changes for purposes of clarity and more precise phrasing. We request that this revised draft be placed on the October 20 agenda, instead of Agenda Document #94-114.

Each change appears on the attached document and is emphasized by underlining and bolding. Nearly all the changes are described on this listing:

- 1) The phrase "merely commercial" inserted to replace the phrase "principally entrepreneurial" on pages 10, 12, 13, 15, and 16.
- 2) Cites to 2 U.S.C. §441b and 11 CFR 114.2 added to pages 7 and 11.
- 3) New footnote on page 10 and revised footnotes on pages 13 and 14.

Attachment

DRAFT

1
2
3 ADVISORY OPINION 1994-30

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

8 Dear Mr. Feigenbaum:

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

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

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

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

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

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

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

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

Listeners, if you live in the [D.C. Metro] area and wish to show your support for [Trevor Potter], call [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.

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

Listeners, if you live in the [D.C. Metro] area and wish to support [Trevor Potter], or if you live in the [greater northern Virginia] area and wish to 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 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.

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

You present the possibility of "packaging the advertisement as part of the radio show." You explain that the Mike Pence Show is marketed on a barter basis to Network

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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3 campaigns from the sale of the T-shirts. You assert that
4 your client's interest is strictly profit-oriented and not
5 for the purpose of influencing a Federal election. You note
6 that CCI has no control over the use of the shirts after they
7 are purchased and that there is no way to determine whether
8 the purchaser is merely a collector or a supporter of the
9 candidate who will wear the shirt in an attempt to convey his
10 or her support.

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

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

10 Analysis

11 I. First Situation

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

25 The above questions often arise in the context of
26 coordination or arrangements between vendors and campaigns.
27 If a vendor acts without such coordination or arrangement,
28 and the vendor is incorporated, the activity will still be
29 prohibited if it constitutes an independent expenditure,
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3 e.g., a communication which expressly advocates the election
4 or defeat of a clearly identified candidate and which is not
5 made with the cooperation or prior consent of, or in
6 consultation with, or at the request or suggestion of, any
7 candidate or authorized committee or agent of a candidate.
8 2 U.S.C. §441b(a); 11 CFR 109.1(a) and 114.2(b). See also
9 2 U.S.C. §431(17) and 11 CFR 100.16 and 109.1(b).

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

3 "pursue[d] this venture on a commercial basis for the purpose
4 of making a profit."

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

27 2/ A simple statement that CCI is airing such ads (referred
28 to above) would most likely not, by itself, constitute
29 coordination or an arrangement with a campaign. Discussion
30 as to when or how often the ads would air, or the volume of
shirts to be sold, may lead to a different conclusion.
Seeking and receiving consent from a campaign may also be a
factor. See below.

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

5 If the company's activities constitute independent
6 expenditures, however, then such activity by CCI would be
7 prohibited and such activity by Raymar would be reportable.
8 2 U.S.C. §§434(c) and 441b(a); 11 CFR 104.4(b), 104.5(g),
9 109.2, and 114.2(b). The T-shirts being sold to the general
10 public undoubtedly display messages that "expressly advocate"
11 the election or defeat of a candidate. See Buckley v. Valeo,
12 424 U.S. 1, 44; FEC v. Massachusetts Citizens for Life
13 ("MCFL"), 479 U.S. 238, 249-250 (1986). Nevertheless, in the
14 absence of coordination or consultation with political
15 committees resulting in contributions by the vendors, the
16 Commission has still permitted an alternative to treating
17 such activity as political activity resulting in independent
18 expenditures. An application of the factors cited in
19 Advisory Opinion 1989-21 may permit your activity to fall
20 within the category of commercial, rather than political,
21 activity. For example, you assert that CCI's interest is
22 strictly profit-oriented and the activity is not undertaken
23 for the purpose of influencing an election. You note that
24 purchasers may respond to your ads for any number of reasons,
25 e.g., as a political memorabilia collector's item or as a
26 supporter of a given candidate. In addition, your activity
27 does not entail any fund-raising or solicitation for a
28 campaign.

29 You have stated that CCI intends to focus on candidates
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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
30

3 you have suggested, quoted above, the Commission advises you
4 to state that the T-shirts are being offered for sale, state
5 what is on the shirt or otherwise describe the shirt, and
6 then provide the information as how to purchase the shirt.
7 The restatement of the message printed on the shirt would
8 not, by itself, constitute express advocacy if done as just
9 described.^{3/}

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

29 ^{3/} The Commission's conclusion does not address a situation
30 of a T-shirt advertisement that mentions opposing candidates
who seek the same office.

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

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

^{4/} Michael R. Pence was a Republican Congressional candidate in 1988 and 1990, but is not, at present, a 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.

^{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

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

23 **II. Second Situation**

24 Your second situation entails the sale of the T-shirts
25

26 _____
27 (Footnote 5 continued from previous page)
28 other's plans with a view toward affecting how much time the
29 campaign might purchase (e.g., for purposes of name
30 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).

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

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

12
13 Trevor Potter
14 Chairman

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

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