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FEDERAL ELECTION COMMISSION
WASHINGTON DC 20463

September 30, 1994

**SUBMITTED LATE
AGENDA ITEM**

For Meeting of: OCT 6 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: Draft AO 1994-30

Attached is a proposed draft of the subject advisory opinion.

We request that this draft be placed on the agenda for October 6, 1994.

Attachment

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

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

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

21 The Mike Pence Show is a daily syndicated radio talk
22 show hosted by Indianapolis attorney Michael R. Pence. It is
23 syndicated by Network Indiana, which is a division of Wabash
24 Valley Broadcasting Corporation and includes 80 radio
25 stations among its affiliates. The show is a joint venture
26 between Network Indiana and Mr. Pence's Hoosier Conservative,
27 Inc. (established in 1993). You describe the show as
28 "Indiana's only conservative talk show dedicated exclusively
29 to politics and popular culture in Indiana." It can be heard
30 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
18 for Congress]-imprinted t-shirt for just [\$15.95
19 plus tax and shipping costs. This offer is not
20 affiliated with, or authorized or paid for by any
21 candidate or political party.

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

24 Listeners, if you live in the [D.C. Metro] area and
25 wish to support [Trevor Potter], or if you live in
26 the [greater northern Virginia] area and wish to
27 show your support for [Danny McDonald], call [this
28 telephone number] and you can buy a [Potter for
29 Congress or McDonald for Senate]-imprinted t-shirt
30 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

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4 Indiana affiliates. Stations that decide to carry the show
5 do so by yielding eight minutes of advertising time per hour
6 to Network Indiana (part owner of the show), and these eight
7 minutes are broadcast along with the program to the 14
8 affiliates airing it. CCI plans to purchase a portion of
9 those eight minutes per hour from Network Indiana. Thus,
10 when the show is bartered to a station, the CCI ads will be
11 already part of the package that the station receives. This
12 also means that CCI will not have to purchase advertising
13 time from each station.

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

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

29 Neither one of the proposed activities will entail
30 payments or contributions from CCI to the candidates'

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
24 impermissible independent expenditure..."

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

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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)(1) 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,

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

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

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

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

23 Examples of purely entrepreneurial activity may be found
24 in Advisory Opinion 1988-17, which addressed several proposed
25 transactions by a company, whose principal purpose was the
26 production of commemorative medallions. Pursuant to
27 contracts with congressional and presidential campaigns, the
28 company planned to produce medallions containing the likeness
29 of the particular presidential or congressional candidate.
30 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 "pursue[d] this venture on a commercial basis for the purpose
5 of making a profit."

6 Your proposal for the radio advertising of T-shirts
7 standing alone does not appear to entail any arrangements
8 with campaigns, other than a possible letter informing the
9 candidate that CCI is undertaking these ads, that would
10 suggest an election influencing purpose instead of one that
11 is principally commercial. For example, there is no
12 arrangement whereby CCI would lay out funds for advertising
13 expenses in coordination with a committee and no arrangements
14 whereby a portion of the sales proceeds will be retained by
15 or remitted to the committee of the referenced candidate. In
16 addition, with reference to what may constitute coordination
17 compromising the nature of an independent expenditure, the
18 request does not appear to envisage any arrangements whereby
19 information as to the amounts of sales, location, and other
20 aspects of CCI's sales plan are communicated to any
21 candidate's campaign, or whereby information as to any
22 campaign's plans are communicated to CCI, thus affecting
23 CCI's spending. See 11 CFR 109.1(b)(4)(1).^{1/} Thus, it
24 appears that no prohibited corporate contribution by CCI, or
25 contribution subject to the limits by Raymar Incentives, is

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27 ^{1/} 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.

4 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); 11 CFR 104.4(b), 104.5(g), and 109.2(a) and
9 (b). The T-shirts being sold to the general public
10 undoubtedly display messages that "expressly advocate" the
11 election or defeat of a candidate. See Buckley v. Valeo, 424
12 U.S. 1, 44; FEC v. Massachusetts Citizens for Life ("MCFL"),
13 479 U.S. 238, 249-250 (1986). Nevertheless, in the absence
14 of coordination or consultation with political committees
15 resulting in contributions by the vendors, the Commission has
16 still permitted an alternative to treating such activity as
17 political activity resulting in independent expenditures. An
18 application of the factors cited in Advisory Opinion 1989-21
19 may permit your activity to fall within the category of
20 entrepreneurial, rather than political, activity. For example,
21 you assert that CCI's interest is strictly profit-oriented
22 and the activity is not undertaken for the purpose of
23 influencing an election. You note that purchasers may
24 respond to your ads for any number of reasons, e.g., as a
25 political memorabilia collector's item or as a supporter of a
26 given candidate. In addition, your activity does not entail
27 any fund-raising or solicitation for a campaign.

28 You have stated that CCI intends to focus on candidates
29 who have a conservative ideology. Companies often determine
30 to direct their business activities toward one type of

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4 political orientation. Such a focus may require a careful
5 scrutiny of the amounts charged by the company, the contacts
6 the company may have with a campaign (as opposed to other
7 vendors that may have reason to contact a campaign), the
8 scheduling of business activities, and other business
9 practices. See Advisory Opinion 1991-32. Nevertheless, it
10 does not, by itself, negate the principally entrepreneurial
11 nature of an activity.

12 As indicated in your questions, one aspect of your
13 proposed message, however, would compromise the principally
14 entrepreneurial nature of your activity and bring it under the
15 category of independent expenditure. In addition to
16 manufacturing and offering a shirt with a message of express
17 advocacy, you propose to gear the motivation for making a
18 purchase to those who wish to support or express support for
19 a particular candidate. Moreover, you target the geographic
20 area of the purchaser, i.e., to persons who are likely voters
21 in the area in which the referenced candidate is running. A
22 message that is principally entrepreneurial would make no
23 mention of the motivation of the purchaser as being the
24 support of a candidate. In order to avoid a message
25 expressly inviting support for a candidate, i.e., express
26 advocacy, the advertisement should omit the phrases "if you
27 wish to support" or "wish to show your support" and the
28 reference to where the purchaser lives. In the context of
29 the language you have suggested, quoted above, the Commission
30 advises you to state that the T-shirts are being offered for

4 sale, state what is on the shirt or otherwise describe the
5 shirt, and then provide the information as how to purchase
6 the shirt. The restatement of the message printed on the
7 shirt would not, by itself, constitute express advocacy if
8 done as just described.^{2/}

9 You posit the situation where the company seeks the
10 approval of the candidate to use the candidate's name on the
11 T-shirt, and ask whether this would change the relationship
12 between the company and the candidate so as to constitute an
13 in-kind corporate contribution. The response to this
14 question depends upon the nature of the communication and the
15 surrounding circumstances. If CCI calls the campaign only in
16 order to avoid a legal conflict over trademark or other trade
17 usage, the relationship between the company and the campaign
18 is not changed. In contrast, the seeking of approval to
19 proceed with the advertising on a basis related to the
20 election of the candidate (e.g., the campaign is pleased to
21 know that shirts with the candidate's name or likeness are
22 being offered to the public), outside of a vendor-vendee
23 business arrangement with a campaign, may change the nature
24 of your activity from merely entrepreneurial. This would
25 entail "prior consent" by the candidate for activity which
26 would affect his campaign. See 11 CFR 109.1(a).

27 You ask whether the packaging of the company's ad as

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29 ^{2/} The Commission's conclusion does not address a situation
30 of an advertisement that offers T-shirts referring to
candidates opposing each other.

4 part of the syndicated radio show would, by itself, result in
5 a conclusion that the network responsible for the show's
6 distribution had made a contribution or expenditure, assuming
7 the ad was determined to be a contribution or expenditure.
8 Without any further information indicating otherwise, the
9 Mike Pence Show and its syndicator appear to be utilizing the
10 kind of broadcast facilities that would fall within the news
11 story exception to the definitions of "expenditure" and
12 "contribution" at 2 U.S.C. 431(9)(B)(i), and 11 CFR
13 100.8(b)(2) and 100.7(b)(2).^{3/} Network Indiana's sale of the
14 advertising time to CCI and subsequent inclusion of the ad in
15 its barter package to its affiliates would not result in a
16 contribution or expenditure if such transactions involve the
17 usual and normal charges and are in the ordinary course of
18 business (i.e., Network Indiana packages other non-political
19 ads as part of the Pence Show). See Advisory Opinions
20 1990-19 and 1979-36.^{4/}

21
22 ^{3/} Michael R. Pence was a Republican Congressional
23 candidate in 1988 and 1990, but is not, at present, a
24 candidate. There is no indication from the materials you
25 have presented that Network Indiana, Hoosier Conservative, or
26 the Wabash Valley Broadcasting Corporation is owned or
27 controlled by a political party, political committee, or
28 candidate.

29 ^{4/} Network Indiana's involvement may raise a concern in
30 another respect if it sells advertising both to CCI and to
the campaign of a candidate whose name appears on a shirt
advertised by CCI. Assume Network Indiana sells advertising
time to CCI and to candidates whose names are used in the CCI
ads. 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 other's plans with a view toward
affecting how much the campaign might purchase (e.g., for
purposes of ~~name~~ recognition). Since this scenario was not

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

24 **II. Second Situation**

25 Your second situation entails the sale of the T-shirts
26 at rallies, joint appearances, and debates that the candidate

27
28 _____
29 (Footnote 4 continued from previous page)
30 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) - -

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 principally entrepreneurial. 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
30 space. In contrast, where the vendor would need only the

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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
Chairman

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