



FEDERAL ELECTION COMMISSION
Washington, DC 20463

January 11, 1996

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

ADVISORY OPINION 1995-43

Stephen M. Sacks
Arnold & Porter
555 Twelfth Street, N.W.
Washington, D.C. 20004-1202

Dear Mr. Sacks:

This responds to your letter dated November 20, 1995, for the law firm of Arnold & Porter ("the firm") which requests an advisory opinion concerning application of the Federal Election Campaign Act of 1971, as amended ("the Act"), and Commission regulations to the firm's proposed refund of legal fees previously received on behalf of former Senator Bob Packwood.

The factual background of this request is presented in your letter of November 20 and also in three letters from the firm to the Senate Select Committee on Ethics ("the ethics committee"); these letters bear the 1994 dates of October 24, November 10 and December 16. In addition, the request includes a letter to the firm from the ethics committee dated June 9, 1995.

According to the request, the firm served as legal counsel to Senator Packwood in connection with the ethics committee's inquiry into certain activities relating to Mr. Packwood's service in the Senate. The firm ended its representation of Mr. Packwood in early December 1993, but continued to provide legal services to him on a pro bono basis until May 19, 1994. The pro bono services were provided to assist in Mr. Packwood's transition to other legal counsel.

During the period of its representation, the firm received approximately \$800,000 from Mr. Packwood's Legal Expense Trust Fund ("the trust fund") and the Re-Elect Packwood Committee ("the Committee"). About 75% of this amount was paid directly with funds from the Committee and the balance was paid in funds from the trust fund. The year end report filed by

the Committee for 1993 indicates that it paid the amount of \$600,000 to the firm on November 18, 1993.

The firm sought guidance from the ethics committee with respect to refunding \$200,000 to the trust fund. The committee advised that the fee adjustment refundable to the trust should only be the pro rata amount of \$50,000 (25% of \$200,000). You seek the Commission's advice as to whether the firm's proposed pro rata refund of \$150,000 to the Committee would be a contribution under the Act.

The reasons for the firm's fee settlement with Mr. Packwood when it terminated its representation of him are described in the request. The most extensive explanation is contained in the firm's letter dated December 16, 1994, and states the following.

When the firm withdrew as counsel to Mr. Packwood in December 1993, he was required to retain new counsel because the ethics committee matter remained active. Prior to the withdrawal, the firm had sent bills to the Senator reflecting the work it had performed. When the firm withdrew, it recognized that its billings calculated solely on the basis of hourly rates did not accurately reflect the fair market value of the services that it had performed for Senator Packwood.

The value of the work that the firm had performed to that date depended to an appreciable extent on the continued provision of services by the firm, so that the investment the firm had made in familiarizing its lawyers with the facts and issues in the case and in developing its expertise and knowledge would be available to the Senator throughout the proceeding. Once the firm withdrew, the value of that expertise and knowledge was no longer available to the Senator, and the Senator was required to pay successor counsel to replicate it.

The firm then made its best estimate (\$200,000) of what it would cost Senator Packwood to replicate with new counsel the expertise and knowledge the firm had developed at his expense which was no longer available to him. At the same time as the withdrawal, the firm made a commitment to Senator Packwood to adjust its fees (in the amount of \$200,000) for prior services, provided it could do so in a lawful manner.

The firm has further stated that the proposed adjustment was not a gift by the firm to Senator Packwood, nor was it a voluntary or requested "forgiveness" of fees or a different form of providing pro bono services to the Senator. Quite the contrary, it was a reflection of a loss to the Senator of a portion of the value of the services the firm had performed, occasioned by the change in circumstances, and was intended to assure that Mr. Packwood was not charged more than fair market value for those services. The process the firm went through in proposing the adjustment was not unique to Senator Packwood. It is a process the firm has gone through and would go through in comparable situations for any of its clients. The firm emphasized to the ethics committee that the hourly billing rates upon which most law firm statements are based are only the starting point for assessing the fair market value of legal services. Statements submitted by law firms to clients are frequently adjusted after they are rendered, and sometimes even after they are paid. This is not because the firms wish to make a gift to their clients or are settling

overcharge claims. Such adjustments are made to conform billings to the fair market value of the legal services actually rendered.

The firm also cited the example when withdrawal from a matter is required due to a conflict of interest that develops during the course of the matter. According to the firm's explanation, it is common in a conflict situation to recognize, in light of the changed circumstances, that the fair market value of its services were less than the amount calculated on the basis of hourly rates alone, since the client did not receive the benefit of the firm's continuing expertise and knowledge and was confronted with a need to incur duplicative expense. Fee adjustments in such circumstances do no more than assure that the client is not overcharged.

In summary, and as it advised the ethics committee, the firm believes the \$200,000 refund payment, to which the firm committed itself, is completely in keeping with ethics committee rules authorizing legal services to be received by Senators, provided Senators are charged fair market value for those services.

For similar reasons and subject to the discussion below, the Commission concludes that the proposed refund payment by the firm to the Committee is not a contribution under the Act and Commission regulations.

The Act and Commission regulations provide that the terms contribution and expenditure include, *inter alia*, gifts or payments made by any person for the purpose of influencing any election for to Federal office. 2 U.S.C. 431(8)(A)(i), 431(9)(A)(i); 11 CFR 100.7(a)(1), 100.8(a)(1). The facts and circumstances of a given gift or payment to a political committee are relevant, if not dispositive, as to the question of the purpose underlying such a transaction. The foregoing circumstances clearly indicate that the purpose of the firm's refund is not to influence any election for Federal office. Instead, the purpose is to implement an adjustment with respect to billings previously issued (and thereafter paid) for the firm's legal services to Senator Packwood where the originally contemplated scope of the firm's engagement by him was materially altered upon its withdrawal as his counsel.

The Commission views such circumstances as somewhat similar to those where a vendor of campaign services to a political committee receives payment in expectation of future events that later are modified from the original agreement or terminated, or that become a matter of dispute between the committee and the vendor. See Advisory Opinion 1987-3 [radio network's refund payment for broadcast services not provided to presidential campaign was permitted, although payable to U.S. Treasury because campaign accepted Federal matching funds and had repayment obligations under 26 U.S.C. 9038]. See also Advisory Opinion 1986-1 [theater corporation allowed to provide valuable tickets to campaign committee as settlement of committee's potential claim for corporation's cancellation of use of its facilities by committee].

The Commission emphasizes that this advisory opinion only addresses the specific factual circumstances and narrow legal issue presented; that is, the firm's proposed refund of amounts previously paid by the Committee for legal representation of former Senator Packwood in a matter before the Senate ethics committee. The opinion does not address any questions as to whether the Committee's initial disbursement of campaign funds for the firm's legal

representation of Senator Packwood was lawful under 2 U.S.C. 439a and Commission regulations at 11 CFR Part 113.

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

Sincerely,

(signed)

Lee Ann Elliott
Chairman

Enclosures (AOs 1987-3 and 1986-1)