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FEDERAL ELECTION COMMISSION
Washington, DC 20463

AGENDA ITEM
For Meeting of: **FEB 1 1996**

January 25, 1996

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 1995-46

Attached is a proposed draft of the subject advisory opinion.

We request that this draft be placed on the agenda for February 1, 1996.

Attachment

1 ADVISORY OPINION 1995-46

2

3 Benjamin L. Ginsberg
4 Patton Boggs, L.L.P.
5 2550 M Street, N.W.
6 Washington, D.C. 20037

DRAFT

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8 Dear Mr. Ginsberg:

9

10 This responds to your letter dated December 4, 1995, requesting an advisory
11 opinion on behalf of Friends of Senator Alfonse D'Amato ("the Committee")
12 concerning the application of the Federal Election Campaign Act of 1971, as amended
13 ("the Act"), and Commission regulations to the use of campaign funds to purchase copies
14 of the candidate's autobiography.

15 The Committee is the principal campaign committee of Senator Alfonse D'Amato
16 for re-election to the U.S. Senate in 1998.¹ Recently, Senator D'Amato wrote his
17 autobiography, *Power, Pasta & Politics*. The book was published by Hyperion, a part of
18 Disney Book Publishing, Inc., and has been distributed for sale at book stores around the
19 country. The Senator's book contract with Hyperion provided for advance payments
20 against sums due the author for sales of the book. The contract provides that, once the
21 amount of the advance is reached in sales, the Senator will receive royalty payments. In
22 anticipation of that occurrence, Senator D'Amato has assigned all rights to the payment
23 of royalties from the book sales to Chaminade High School in Mineola, New York. You
24 state Senator D'Amato will treat the royalties assigned to Chaminade as his income for
25 tax purposes, and he will take the appropriate charitable deduction.

¹ Senator D'Amato filed his Statement of Candidacy for the 1998 U.S. Senate election cycle on July 28, 1993.

1 The Committee proposes to use campaign funds to purchase up to several
2 thousand copies of the book to be used solely in campaign related activities, such as
3 distributing signed and unsigned copies to financial contributors and other “political
4 supporters” as “thank you” gifts. The Committee would, for example, offer copies of the
5 book through its direct mail solicitations to those who contribute above a certain amount.
6 The Committee will not sell the copies it purchases, or ask that they be purchased. You
7 state that all uses of the book by the Committee will be for the purpose of influencing a
8 Federal election, and the quantity purchased will not exceed the number needed for those
9 campaign purposes.

10 You state that the negotiations for the Committee’s purchase of the books will be
11 conducted at arm’s length. The Committee wishes to use any “bulk rate” purchase prices
12 that may be available for the number of books purchased. The bulk rate the Committee
13 would pay is the standard fair market price that publishers, under normal industry
14 practice, make available to large purchasers subject to several conditions. Among these
15 conditions are the stipulations that the book not be resold through normal book
16 distribution channels, and that the author receives no royalties on those copies purchased
17 by him under the bulk rate.

18 The Committee wishes to confirm that the transactions described above would not
19 constitute a personal use of campaign funds by Senator D’Amato or a contribution by the
20 publishing company to the Committee.

21 Under the Act and Commission regulations, a candidate and the candidate’s
22 campaign committee have wide discretion in making expenditures to influence the
23 candidate’s election, but may not convert excess campaign funds to personal use. 2

1 U.S.C. §§431(9) and 439a; 11 CFR 113.1(g) and 113.2; see also Advisory Opinions
2 1995-42, 1995-26 and 1995-23. Commission regulations provide guidance regarding
3 what would be considered personal use of campaign funds. Personal use is defined as
4 “any use of funds in a campaign account of a present or former candidate to fulfill a
5 commitment, obligation or expense of any person that would exist irrespective of the
6 candidate’s campaign or duties as a Federal officeholder.” 11 CFR 113.1(g).
7 Commission regulations list a number of purposes that would constitute personal use. 11
8 CFR 113.1(g)(1)(i). Where a specific use is not listed as personal use, the Commission
9 makes a determination on a case-by-case basis. 11 CFR 113.1(g)(1)(ii).²

10 You represent that the books to be purchased by the Committee will be used
11 solely in campaign related activities, including distribution to contributors and other
12 political supporters. The Commission assumes that the book copies purchased by the
13 Committee will not be offered or made available to persons who do not make
14 contributions to the Committee, to persons who otherwise are not “political supporters”
15 of Senator D’Amato’s campaign for re-election to the U.S. Senate in 1998, or where the
16 distribution is primarily for a purpose unrelated to the Senator’s 1998 campaign. The
17 Commission notes that the Committee will not purchase any more books than are needed
18 for campaign-related purposes. It appears therefore that the proposed use of the

² In explaining the application of the case-by-case approach, the Commission

reaffirmed its long-standing opinion that candidates have wide discretion over the use of campaign funds. If the candidate can reasonably show that the expenses at issue resulted from campaign or officeholder activities, the Commission will not consider the use to be personal use.

1 Committee's funds would fulfill an expense that exists because of Senator D'Amato's
2 campaign activities. See 11 CFR 113.1(g); see also Advisory Opinion 1995-23.

3 The fact that Senator D'Amato will not receive proceeds from the proposed
4 transactions also indicates that personal use of campaign funds will not result.³ You
5 explain that one condition for the publisher's sale to the Committee is that the author
6 receives no royalties from the sale.⁴ Furthermore, no royalties will result from the
7 Committee's distribution of the books because the Committee does not plan to sell the
8 books.⁵

9 The Committee wishes to avoid an in-kind corporate contribution from the
10 publisher in connection with the bulk purchase of the books. See 2 U.S.C. §441b(a); 11
11 CFR 114.2(b). The term "contribution" includes giving "anything of value" for the
12 purpose of influencing an election. 2 U.S.C. §§431(8)(A)(i) and 441b(b)(2); 11 CFR
13 100.7(a)(1) and 114.1(a)(1). The term "anything of value" includes the provision of
14 goods or services at less than the usual and normal charge. 11 CFR 100.7(a)(1)(iii)(A).
15 The "usual and normal charge" for goods means the price of those goods in the market
16 from which they ordinarily would have been purchased at the time of the contribution. 11

³ The Commission notes, however, that it has previously concluded that the regulations on personal use permit a candidate and his professional corporation to charge his campaign committee the usual and normal charge for rental of an office and equipment. Advisory Opinion 1995-8. A usual and normal charge would often, but not always, include profit for the vendor. In addition, the Commission has permitted a candidate to sell copies of his self-published book in bulk to his campaign committee, at the market price for such sales, so that the committee could sell the book to the public and use the proceeds to repay debts owed to the candidate. Advisory Opinion 1995-24.

⁴ The Commission assumes that the contractual provision on purchases by the author applies, as well, to purchases by the Committee.

⁵ In addition, any future royalties that could otherwise result from the sale to the Committee will be assigned to Chaminade High School. Such royalties may result if book sales have not yet reached the level triggering the payment of royalties, and the bulk purchase by the Committee brings total sales up to, or past, that level.

1 CFR 100.7(a)(1)(iii)(B). In the past, the Commission has concluded that the purchase of
2 goods or services at a discount does not result in a contribution when the discounted
3 items are available on equal terms to other customers that are not political organizations
4 or committees. Advisory Opinion 1994-10, 1993-20, and 1989-14. Your description of
5 the proposed transaction indicates that the Committee will pay the usual and normal
6 charge for this type of bulk purchase from publishers and thus would not receive an in-
7 kind corporate contribution.

8 The Commission expresses no opinion regarding the application of any rules of
9 the United States Senate or any tax ramifications of the proposed activity, because those
10 issues are not within its jurisdiction.

11 This response constitutes an advisory opinion concerning application of the Act,
12 or regulations prescribed by the Commission, to the specific transaction or activity set
13 forth in this request.

14 Sincerely,

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16 Lee Ann Elliott
17 Chairman

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19 Enclosures (AOs 1995-42, 1995-26, 1995-24, 1995-23, 1995-8, 1994-10, 1993-20, and
20 1989-14)

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