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AGENDA ITEM

For Meeting of: 3-7-96

February 29, 1996

MEMORANDUM

TO: The Commission

THROUGH: John C. Surina
Staff Director

FROM: Lawrence M. Noble
General Counsel

N. Bradley Litchfield
Associate General Counsel

SUBJECT: Draft AO 1996-5

Attached is a proposed draft of the subject advisory opinion. We request that this draft be placed on the agenda for March 7, 1996.

Attachment

1 **ADVISORY OPINION 1996-5**

2
3 **The Honorable Jay Kim**
4 **Member of Congress**
5 **Jay Kim for Congress**
6 **P.O. Box 127**
7 **Upland, CA 917855**

DRAFT

8
9 **Dear Mr. Kim:**

10
11 **This responds to your letter dated February 9, 1996, with enclosure, requesting an**
12 **advisory opinion concerning application of the Federal Election Campaign Act of 1971,**
13 **as amended ("the Act"), and Commission regulations to a proposed refund by your**
14 **campaign committee, Jay Kim for Congress ("the Committee"), of unlawful contributions**
15 **accepted by the Committee during your 1992 congressional campaign.**

16 **Your letter relates your view of the factual background regarding the**
17 **contributions in question and states as follows:**

18 **During my 1992 Congressional campaign, I received a total of**
19 **\$2,000 each from five different employees of Samsung America, Inc. (In**
20 **each case I received \$1,000 from each for the primary and \$1,000 from**
21 **each for the general in compliance with the Act and FEC regulations.) At**
22 **the time of receipt and deposit, my campaign had no reason to believe**
23 **these contributions were illegal.**

24 **However, on January 31, 1996, I learned for the first time that**
25 **Samsung America pled guilty in the United States District Court for the**
26 **Central District of California to reimbursing with cash each of these five**
27 **contributors the full amount of their total contributions to my campaign.**
28 **[Copy of indictment enclosed with request.] Again, my campaign had no**
29 **knowledge that Samsung America reimbursed the personal contributions**
30 **of its employees. As this was an internal corporate action, there is no way**
31 **my campaign or I could have known about such reimbursements at the**
32 **time. But, based on the new evidence produced by the indictment in U.S.**
33 **District Court, we have now discovered that these contributions should not**
34 **have been accepted and deposited.**

35
36 **You have requested Commission advice as to whom the Committee should**
37 **"disburse these tainted contributions." Given your assumption that the contributions**
38 **should be refunded to the individuals from whom the initial contribution was received,**

1 you further ask what action the Committee should take if it is unable to now find these
2 individuals within thirty days.

3 As you know, the Act generally prohibits the making or acceptance of any
4 contribution by any corporation whatever in connection with any election to Federal
5 office. 2 U.S.C. §441b(a). The statute provides, in pertinent part, that it is unlawful “for
6 any candidate, political committee, or other person knowingly to accept or receive any
7 contribution prohibited by” section 441b(a). Violations of section 441b(a) are subject to
8 civil enforcement action by the Commission, criminal prosecution by the United States
9 Department of Justice, or both.¹

10 At the outset the Commission emphasizes that this opinion does not address any
11 issues concerning the liability of the Committee, or you, or any other person with respect
12 to violations of the Act in connection with the making or acceptance of the contributions
13 described in your request. Those issues, including any sanctions or penalties that may be
14 appropriate, can only be considered by the Commission in the enforcement process. *See*
15 2 U.S.C. §437g and 11 CFR Part 111. Instead, this opinion pertains exclusively to the
16 narrow question of what action the Committee is required or permitted to take at this time
17 in the circumstances presented and in compliance with Commission regulations at 11
18 CFR 103.3.

19 The regulations prescribe the obligations of a committee treasurer upon receipt of
20 a contribution that appears unlawful or presents genuine questions of illegality when
21 received, or upon discovery of the contribution’s unlawful nature at a later date. 11 CFR
22 103.3(b). Where there is later discovery of evidence that a previous contribution “is
23 illegal based on new evidence not available to the political committee at the time of
24 receipt and deposit, the treasurer shall refund the contribution to the contributor within
25 thirty days of the date on which the illegality is discovered.” 11 CFR 103.3(b)(2).

26 Several past advisory opinions of the Commission have considered the quoted
27 rule in two types of situations where, at the time of initial receipt, there is no apparent

¹ Commission enforcement actions may require monetary civil penalties and other sanctions pursuant to 2 U.S.C. §437g. Criminal prosecutions by the United States for violations of 2 U.S.C. §441b may result in criminal fines and imprisonment not to exceed one year for each violation. 2 U.S.C. §437g(d).

1 reason to question the legality of the contribution, but thereafter evidence or information
2 is discovered that indicates doubt whether the contribution was lawful. *See* Advisory
3 Opinions 1995-19, 1991-39, 1989-5 and 1984-52. One situation is where there is a
4 factual dispute as to the actual source of the contributions, even though the discovery of
5 the new evidence means that the committee recipient can no longer rely on its initial
6 assumption that the contribution was lawful under the Act. Accordingly, a committee
7 that finds itself in those circumstances must disgorge an amount equal to the amount of
8 the suspect contributions. Advisory Opinions 1995-19 and 1991-39.²

9 The other situation is quite different in that the material facts as to the source of
10 the contribution have been established in a collateral legal proceeding, such as a guilty
11 plea indicating that crimes were committed by those who made the relevant
12 contributions.³ Advisory Opinions 1989-5 and 1984-52. In such circumstances where
13 the facts establish the identity of the unlawful source of the contributions, the
14 Commission has applied section 103.3(b)(2) and concluded that an amount equal to the
15 amount of the prohibited contributions should be promptly refunded to the contributor(s);
16 that is, to the person or entity that is determined to have been the source of the
17 contributions according to the guilty plea or other collateral legal proceeding. Advisory
18 Opinions 1989-5 and 1984-52.

19 That course of action is one option that may be taken in your case. Because the
20 facts established by the guilty plea indicate that Samsung America, Inc., was the source
21 of the \$10,000 in contributions originally made by five Samsung employees in their own
22 names, the payment of \$10,000 to Samsung would be required. In the alternative, the

² These opinions explained that the required payments could be made to a governmental entity at the Federal, State or local level, or to a public charity that qualified under 26 U.S.C. §170(c). All of these options are not available in your situation because the facts as to the actual source of the contributions in question have been determined. See discussion below.

³ The facts as to the illegality of a contribution may also be established in a conciliation agreement between the Commission and respondents in an enforcement matter that is concluded under 2 U.S.C. §437g. *See* Matter Under Review ("MUR") 3460.

1 Committee may pay \$10,000 to the United States Treasury.⁴ If that is the Committee's
2 preference, it should submit a Committee check for \$10,000 payable to the Treasury of
3 the United States; the check should be delivered to the Commission.

4 In either case, the Committee's payment must be made within 30 days of the
5 receipt of this opinion. In addition, the Committee is required to fully disclose (including
6 itemized data) the payment as a disbursement on its appropriate FEC report. 2 U.S.C.
7 §434(b)(6)(A), 11 CFR 104.3(b)(4)(vi).

8 Because the Committee is not permitted to make the \$10,000 payment to the five
9 Samsung employees who appeared to have made the original contributions, the
10 Commission need not address what steps the Committee would have to take if it could
11 not locate those individuals.

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

15 Sincerely,

16
17 Lee Ann Elliott
18 Chairman
19

20 Enclosures (AOs 1995-19, 1991-39, 1989-5 and 1984-52)
21
22

⁴ The Commission has directed in recent enforcement cases (and conciliation agreements) that amounts equal to mandatory contribution refund amounts may be disgorged to the United States Treasury, in lieu of making payment to the entity that unlawfully made the original contribution. See MUR 3460.

To the extent that Advisory Opinions 1989-5 and 1984-52 hold that payments equal to the amounts of previously accepted unlawful contributions may only be made to the entity that is determined to have been the source of the unlawful contributions, those opinions are hereby superseded. The Commission has heretofore adopted and followed the policy that refund equivalent payments to the United States Treasury would also satisfy the obligations of 11 CFR 103.3(b)(2) because such payments comport with the underlying reason for the refund rule. That is, to place the political committee in nearly the same financial position that would have existed if, knowing the unlawful source of the contributions at the outset, it had returned them within 10 days after receipt. 11 CFR 103.3(b)(1).