



FEDERAL ELECTION COMMISSION
Washington, DC 20463

March 14, 1996

CERTIFIED MAIL,
RETURN RECEIPT REQUESTED

ADVISORY OPINION 1996-5

The Honorable Jay Kim
Member of Congress
Jay Kim for Congress
P.O. Box 127
Upland, CA 91785

Dear Mr. Kim:

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

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

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

However, on January 31, 1996, I learned for the first time that Samsung America pled guilty in the United States District Court for the Central District of California to reimbursing with cash each of these five contributors the full amount of their total contributions to my campaign. [Copy of indictment enclosed with request.] Again, my campaign had no knowledge that Samsung America reimbursed the personal contributions of its employees. As this was an internal corporate action, there is no way my campaign or I could have known about such

reimbursements at the time. But, based on the new evidence produced by the indictment in U.S. District Court, we have now discovered that these contributions should not have been accepted and deposited.

You have requested Commission advice as to whom the Committee should "disburse these tainted contributions." Given your assumption that the contributions should be refunded to the individuals from whom the initial contribution was received, you further ask what action the Committee should take if it is unable to now find these individuals within thirty days.

As you know, the Act generally prohibits the making or acceptance of any contribution by any corporation whatever in connection with any election to Federal office. 2 U.S.C. 441b(a). The statute provides, in pertinent part, that it is unlawful "for any candidate, political committee, or other person knowingly to accept or receive any contribution prohibited by" section 441b(a). Violations of section 441b(a) are subject to civil enforcement action by the Commission, criminal prosecution by the United States Department of Justice, or both.¹ At the outset the Commission emphasizes that this opinion does not address any issues concerning the liability of the Committee, or you, or any other person with respect to violations of the Act in connection with the making or acceptance of the contributions described in your request. Those issues, including any sanctions or penalties that may be appropriate, can only be considered by the Commission in the enforcement process. *See* 2 U.S.C. 437g and 11 CFR Part 111. Instead, this opinion pertains exclusively to the narrow question of what action the Committee is required or permitted to take at this time in the circumstances presented and in compliance with Commission regulations at 11 CFR 103.3.

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

Several past advisory opinions of the Commission have considered the quoted rule in two types of situations where, at the time of initial receipt, there is no apparent reason to question the legality of the contribution, but thereafter evidence or information is discovered that indicates doubt whether the contribution was lawful. *See* Advisory Opinions 1995-19, 1991-39, 1989-5 and 1984-52. One situation is where there is a factual dispute as to the actual source of the contributions, even though the discovery of the new evidence means that the committee recipient can no longer rely on its initial assumption that the contribution was lawful under the Act. Accordingly, a committee that finds itself in those circumstances must disgorge an amount equal to the amount of the suspect contributions. Advisory Opinions 1995-19 and 1991-39.²

The other situation is quite different in that the material facts as to the source of the contribution have been established in a collateral legal proceeding, such as a guilty plea indicating that crimes were committed by those who made the relevant contributions.³ Advisory Opinions 1989-5 and 1984-52. In such circumstances where the facts establish the identity of the unlawful source of

the contributions, the Commission has applied section 103.3(b)(2) and concluded that an amount equal to the amount of the prohibited contributions should be promptly refunded to the contributor(s); that is, to the person or entity that is determined to have been the source of the contributions according to the guilty plea or other collateral legal proceeding. Advisory Opinions 1989-5 and 1984-52.

That course of action is one option that may be taken in your case. Because the facts established by the guilty plea indicate that Samsung America, Inc., was the source of the \$10,000 in contributions originally made by five Samsung employees in their own names, the payment of \$10,000 to Samsung would be required. In the alternative, the Committee may pay \$10,000 to the United States Treasury.⁴ If that is the Committee's preference, it should submit a Committee check for \$10,000 payable to the Treasury of the United States; the check should be delivered to the Commission.

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

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

This response constitutes an advisory opinion concerning the 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 1995-19, 1991-39, 1989-5 and 1984-52)

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).

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.

4 The Commission has interpreted the statute to allow amounts equal to mandatory contribution refund amounts to be disgorged to the United States Treasury, in lieu of making payments 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. Refund equivalent payments to the United States Treasury comport with the underlying reason for the refund rule of 11 CFR 103.3(b)(2). 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).