

SEP 21 2 00 PM '96



FEDERAL ELECTION COMMISSION
Washington, DC 20463

September 26, 1996

AGENDA ITEM
For Meeting of: OCT 3 1996

MEMORANDUM

TO: The Commission

THROUGH: John C. Surina
Staff Director

FROM: Lawrence M. Noble
General Counsel

N. Bradley Litchfield
Associate General Counsel

Michael G. Marinelli
Staff Attorney

SUBJECT: Draft AO 1996-39

Attached is a proposed draft of the subject advisory opinion. We request that this draft be placed on the agenda for October 3, 1996.

Attachment

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ADVISORY OPINION 1996-39

Jennifer Shoha, Finance Director
Heintz for Congress
P.O. Box 380286
Clinton Township, MI 48038

Dear Ms. Shoha:

This refers to your letters dated August 30 and July 22, 1996, on behalf of Heintz for Congress ("the Committee") concerning application of the Federal Election Campaign Act of 1971, as amended ("the Act"), and Commission regulations to receipt of contributions for payment of the Committee's legal expenses.

The Committee is the principal campaign committee of Susan Heintz who is the 1996 Republican nominee for the U.S. House of Representatives in the 10th Congressional District of Michigan. You state that the sufficiency of her nominating petitions to qualify for the Republican primary election ballot were challenged before State ballot officials. The challenges were made by the Michigan Democratic Party and by one of her Republican primary election opponents. The State agency reviewing these challenges could not resolve them with the result that no decision was made either to qualify or disqualify Ms. Heintz for the ballot. She then sought mandamus before the Michigan Court of Appeals which rejected the challenges and ruled that Ms. Heintz's name should be placed on the primary election ballot. This dispute, however, has resulted in legal fees of substantial amounts. The Committee wishes to know whether a

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1 separate account may be set up to pay for these legal expenses and, if so, whether corporate funds
2 may be accepted into this account.¹

3 The term "contribution" as defined in the Act includes, in part, "any gift, subscription,
4 loan, advance, or deposit of money or anything of value made by any person for the purpose of
5 influencing any election for Federal office." 2 U.S.C. §431(8)(A); 11 CFR 100.7(a)(1).

6 Similarly, the term "expenditure" is defined in an identical fashion as relating to payments made
7 for the purpose of influencing any election for Federal office. 2 U.S.C. §431(9)(a); 11 CFR

8 100.8(a)(1). The Act prohibits corporations and labor organizations from making any
9 contribution or expenditure in connection with Federal elections. 2 U.S.C. §441b. Contributions
10 covered by section 441b include direct or indirect payments or gifts of money or any services, or
11 anything of value, to any candidate for Federal office; although several significant exceptions are
12 made to the general definition of "contribution or expenditure". 2 U.S.C. §441b(b)(2); 11 CFR
13 114.1(a)(1).

14 Past opinions have considered specific situations where individuals faced with
15 preliminary legal actions contesting their access to the ballot needed to secure funds to pay for
16 the costs associated with these disputes.² Your situation is not unlike that of the requester in
17 Advisory Opinion 1982-35. In that opinion, a potential candidate for Federal office had to

¹ Included with your request are copies of the pleadings filed by counsel on Ms. Heintz's behalf in the legal proceedings.

² The Commission notes that the legal expenses at issue in your request do not fall into the exception to the definition of contribution in the Act and Commission regulations for free legal services provided for the purposes of ensuring compliance with the Act or for situations not relating directly to the furthering of the election of a Federal candidate. See 2 U.S.C. §431(8)(B)(ix) and 11 CFR 100.7(b)(13)(14). Another exception to the definition of contribution are the legal expenses associated with the Congressional reapportionment process if they are not funded by a political committee. See Advisory Opinions 1990-23 and 1981-35.

1 initiate a legal challenge to a party rule requiring a party convention endorsement vote before the
2 candidate could qualify for the party's primary election ballot. The Commission observed that
3 filing the lawsuit to challenge the party rule was "a condition precedent to the candidate's
4 participation in the primary election" and concluded that the activity to raise funds to defray the
5 cost of the litigation was outside the purview of the Act. See Advisory Opinion 1982-35.³
6 Similarly, the Commission ruled in Advisory Opinion 1983-37 that funds raised by the State
7 party to defend against the same lawsuit were also outside the purview of the Act.⁴ Given these
8 opinions, the Commission concludes that funds received and spent to pay for the expenses of the
9 litigation described in your request would not be treated as contributions or expenditures for
10 purposes of the Act, provided they are raised and spent by an entity other than a political
11 committee. As a result, corporate funds may be accepted by another entity for this purpose. As
12 discussed below, such funds must be separate and segregated from the Committee and its funds.

13 Regarding the establishment of a separate entity to raise funds, two opinions are
14 applicable to your situation: Advisory Opinions 1990-23 and 1983-30. The facts in Advisory
15 Opinion 1983-30, suggested how a fund may be established to raise and collect the funds
16 received for such litigation. The solicitations should be made in person or by mail and be
17 accompanied by a letter stating the purpose of the fund and noting that no donations to the fund

³ The Commission in Advisory Opinion 1982-35 was careful to distinguish Advisory Opinion 1980-57, a prior opinion dealing with ballot access. The Commission noted that in the earlier opinion, a candidate was seeking to prevent the electorate from voting for a particular opponent by challenging his opponent's ballot petitions in court. This candidate's efforts related, not to defending his own ballot position, but to disqualifying another person from ballot access. The Commission concluded that the funds raised on behalf of this candidate were contributions, as defined by the Act and Commission regulations.

⁴ In Advisory Opinion 1983-30, the Commission reached a similar conclusion regarding the funds raised for a Federal candidate's legal challenge to a State rule that barred the candidate, an incumbent elected official, from running for another elected position unless he resigned from the office then held.

1 would be used for the purpose of influencing any Federal election. Solicitations to the fund
2 should be conducted completely separate from any solicitations on behalf of the principal
3 campaign committee. Advisory Opinion 1990-23 addressed the similar situation of fundraising
4 for reapportionment purposes by a principal campaign committee. The Commission noted that
5 while funds could be raised for this purpose, the account and entity that engaged in the
6 fundraising must be separate and independent from the candidate's principal (or any authorized)
7 campaign committee. The Commission concludes that in raising funds for the litigation, Ms.
8 Heintz and those acting on her behalf should follow the guidelines in both opinions in order to
9 avoid activity which would influence the candidate's election. The Committee itself may not
10 establish the account or conduct the fundraising, but a separate entity may do so as long the
11 precautions listed above are followed.⁵

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

15 Sincerely,

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18 Lee Ann Elliott
19 Chairman

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21 Enclosures (AO 1990-23, 1983-37, 1983-30, 1982-35, 1981-35, and 1980-57)
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⁵ In Advisory Opinion 1990-23, the Commission further noted that, while the use of the candidate's name in the title of the fund would not by itself indicate a purpose of influencing or a connection with a Federal campaign, other such references to the candidacy would be viewed as something of value to the candidate's campaign. The Commission warned that other references to the candidate may or not result in a contribution to the campaign depending on all the facts and circumstances in a given situation. Again, these conclusions are applicable to the presented situation here