FEDERAL ELECTION COMMISSION
Washington, DC 20463

January 17, 1997

CERTIFIED MAIL,
RETURN RECEIPT REQUESTED

ADVISORY OPINION 1996-52

Ronald S. Ladell
Attorney at Law
30 Vreeland Road, Building A
Florham Park, NJ 07932

Dear Mr. Ladell:

This responds to your letter dated December 9, 1996, requesting an advisory opinion on behalf of a political committee, Robert E. Andrews for Congress ("the Committee"), regarding application of the Federal Election Campaign Act of 1971, as amended ("the Act"), and Commission regulations to the use of excess campaign funds remaining in Committee accounts after the 1996 campaign.

The Committee was authorized by Representative Andrews as his principal campaign committee in his 1996 re-election campaign for Congress from the First District of New Jersey. You state that the Committee holds an amount of excess campaign funds, i.e., funds that are in excess of the expenses incurred by the Committee during the campaign. 11 CFR 113.1(e). These funds are in two accounts, one consisting of contributions received from individuals [the "individual account"] and the other holding contributions received from political action committees, or PACs [the "PAC account"].

The Committee would like to identify the individuals and PACs who contributed the funds that remain in the two accounts. It proposes to do so separately for the two accounts by identifying those individuals and PACs whose contributions were most recently received into the two accounts. Once the Committee has identified these contributors, it intends to use the excess funds in two ways. First, it intends to refund the contributions of some individual contributors, while also soliciting contributions from these contributors for a state campaign committee established by Mr. Andrews in support of his 1997 candidacy for Governor of New Jersey. Second, the Committee intends to transfer the funds in the PAC account to an "Andrews for Congress in 1998" PAC account opened for the next Federal election cycle.

You ask four questions about the application of the Act and the regulations to the proposed disposition of the funds in these accounts. These questions will be restated and addressed in turn.

The initial question is whether future expenditures from the two accounts would come first from the oldest contributions received by the Committee, or would instead come first from the contributions most recently received by the Committee? You also ask whether the same rule would apply to permissible transfers from the accounts to a state campaign committee? You cite 11 CFR 104.12 in support of your view that future expenditures would come first from the oldest contributions received by the Committee.

No provision in the Act or regulations expressly states a generally applicable rule governing the sequence in which the funds in a campaign account are depleted when the committee makes expenditures or other disbursements. The provision you cite, 11 CFR 104.12, describes the method that newly registering political committees must use to identify the source of the funds in their accounts at the time of registration. Since Mr. Andrews' principal campaign committee for Congressional office is not a newly registering committee, section 104.12 is not directly applicable in this situation.

However, section 104.12 does reflect the Commission's general practice of treating the funds in a committee's account at any particular time as consisting of the funds most recently received by the committee. *See, e.g.,* 11 CFR 110.3(c)(4) and (5)(ii). If the funds in a committee's account are, at any given time, deemed to be the funds most recently received by the committee, the necessary implication is that disbursements made by the committee first deplete the funds that have been in the committee's account the longest, i.e., the oldest contributions. Thus, the Commission concludes that future disbursements by the Committee (including payments it makes for the purpose of influencing a Federal election) would come first from the oldest contributions received by the Committee.

With regard to whether the same rule would apply to permissible transfers to a state political committee, the Commission concludes that there is no basis in the Act or regulations for distinguishing between expenditures and transfers in determining the sequence in which funds in a campaign account are depleted. Consequently, transfers of excess funds to a state campaign committee would also come first from the oldest contributions received by the Committee.

Next, you describe the way in which the Committee intends to refund contributions, and ask whether this plan would be permissible. The Committee proposes to select certain contributors from among those whose contributions remain in the Committee's accounts, and offer these contributors a refund. You state that the Committee would offer refunds to the selected contributors irrespective of whether it chooses to offer refunds to more recent contributors. When making these refunds, the Committee would also solicit donations from the recipients of the refunds for the state campaign committee established to support Mr. Andrews' campaign for Governor. Any remaining funds not selected for refund or otherwise refunded would then be transferred to an "Andrews for Congress in 1998" account for use in the next Congressional election. You ask whether the Committee may distribute its excess campaign funds in this manner.

The Act, at 2 U.S.C. 439a, places certain limits on the uses of excess campaign funds. Under this section, excess funds (1) may be used to defray ordinary and necessary expenses incurred in connection with the duties of a holder of Federal office; (2) may be contributed to any organization described in section 170(c) of title 26; or (3) may be used for any other lawful purpose, including transfers without limitation to any national, State or local committee of any political party; except that no such amounts may be converted by any person to any personal use. The proposed uses described in your request are not related to the duties of a Federal officeholder, nor are they donations to a section 170(c) organization. However, if the proposed use of excess campaign funds does not constitute "personal use" and is not otherwise "unlawful," it is permissible under the Act.

The refund and resolicitation plan you describe appears to be an effort to facilitate subsequent donations to a state campaign committee formed to support Mr. Andrews' campaign for a New Jersey state office. In past advisory opinions, the Commission has determined that the use of excess campaign funds for future non-federal election campaigns would be a lawful purpose under section 439a. In particular, in Advisory Opinion 1993-10, a former Federal candidate sought to use excess campaign funds left over from his Federal campaign to run for the office of Governor of Puerto Rico. Relying on its previous conclusions in Advisory Opinions 1986-5 and 1980-113, the Commission concluded that the use of funds for state or local campaigns would not violate the personal use ban in section 439a. Therefore, the requester's use of the funds in his campaign for Governor was held permissible.

The Commission's conclusion in Advisory Opinion 1993-10 was based, in part, on the requester's assurances that the funds would never be used for the candidate's personal benefit. The Commission also noted that its conclusion was consistent with the Internal Revenue Service's treatment of the personal use of excess campaign funds. Under 26 U.S.C. 527(e)(1) and (2) and IRS Reg. 1.527-5(c)(1), the transfer of excess campaign funds to a political organization whose function is to influence "the selection, nomination, election or appointment of any individual to any Federal, State or local public office or office in a political organization" would not be considered personal use of such funds. See 26 U.S.C. 527(d).

Your request is slightly different than Advisory Opinion 1993-10 in that, instead of using its excess funds to finance state campaign activity directly, the Committee proposes to refund a portion of those funds to the original contributors, and then solicit donations from them for the New Jersey gubernatorial campaign. Generally, committees have complete discretion in refunding otherwise permissible contributions, since these refunds are not required or limited by the Act or the regulations. However, refunds of excess campaign funds are subject to the prohibition on the conversion of campaign funds to personal use. In some circumstances, refunding contributions could raise personal use issues if refunds are made on the basis of criteria that are not campaign related.

Your request identifies a specific, upcoming state election campaign in which Mr. Andrews plans to be a candidate. In addition, you have stated that the Committee intends to make direct transfers of some of the funds currently in its account to the state committee established to support his candidacy. Your request also suggests that the Committee's process of selecting

contributors to whom it will offer refunds will be driven by its desire to successfully solicit donations for Mr. Andrews' campaign for Governor of New Jersey.

Under these circumstances, the Commission concludes that the refund and resolicitation plan that the Committee proposes represents an effort to use excess campaign funds in a future campaign for state office, and therefore is permissible under section 439a. The Commission regards it as significant that the Committee has limited its own discretion over these refunds by its pledge to offer them only to those contributors whose contributions are currently in the Committee's accounts. The Commission also notes that the Committee's plan is analogous to an approach specifically endorsed in 11 CFR 110.3(d) of the regulations. Section 110.3(d) prohibits transfers of funds from a nonfederal campaign committee to a Federal campaign committee of the same candidate. However, it specifically states that the nonfederal committee may refund contributions and make arrangements with the Federal committee for solicitation of the same contributors.

In the third question, you ask whether, in identifying the contributors of the excess funds, the Committee may separately trace the most recent contributors to each of the separate accounts, or whether it is instead required to identify the most recent contributors irrespective of its maintaining separate accounts? As part of this question, you explain that the Committee intends to transfer the PAC account contributions to an "Andrews for Congress in 1998" PAC account opened for the next Federal election cycle, and you ask whether excess funds would then be determined solely from the contributors whose contributions make up the individual account.

The Commission concludes that the Committee may separately trace the most recent contributions to the two accounts, so long as this approach does not alter the number or identity of the contributors who will be eligible for refunds. Thus, the pool of contributors eligible for refunds should consist of the most recent individual contributors whose contributions, when aggregated, equal the amount of excess funds in the individual account. No other contributors should be eligible for refund offers. If the Committee intends to transfer the funds in the PAC account to a Federal campaign committee for the 1998 election cycle, the amount of funds in the PAC account should not be considered in the contributor identification process, and, in particular, should not in any way enlarge the pool of contributors who will be eligible for refund offers.

The Commission notes that the Committee is required to report refunds as offsets to contributions, and must itemize refunds of contributions that were itemized when they were received. 2 U.S.C. 434(b), (b)(5); 11 CFR 104.3(b)(2)(v); 104.8(d)(4). Authorized committees are also required to identify each person who receives a refund. 11 CFR 104.3(b)(4)(v).

Finally, you ask whether the answers to any of these questions would be affected by other permissible transfers or uses of excess funds under 11 CFR 113.2. However, the request provides no additional information on the nature or timing of these transfers. The advisory opinion process may only be used with respect to a specific transaction or activity as set forth by the requester. 2 U.S.C. 437f, 11CFR 112.1(b). Therefore, the Commission expresses no opinion regarding impact of other transfers on the guidance given in this opinion.

In addition, the Commission expresses no opinion as to the possible applicability of state and Federal tax or other laws, or rules of the House of Representatives, to the matters presented in your request, since those issues are not within its jurisdiction.

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)

John Warren McGarry
Chairman

Enclosures (AOs 1993-10, 1986-5 and 1980-113)