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FEDERAL ELECTION COMMISSION

Washington, DC 20463

SUBMITTED LATE

September 29, 1997

MEMORANDUM

AGENDA ITEM

For Meeting of: OCT 1 1997

TO: The Commission

THROUGH: John C. Sprina
Staff Director

FROM: Lawrence M. Noble
General Counsel

N. Bradley Litchfield
Associate General Counsel

Jonathan M. Levin
Senior Attorney

SUBJECT: Amended Draft AO 1997-20

In a September 24 phone conversation between Rita Copeland of the Friends of McCarthy ("the Committee") and Jonathan Levin of this office, Ms. Copeland stated that the Committee had filed a statement of organization and a disclosure report with the Commission.

The present Agenda Draft (Agenda Document #97-68) is written with the assumption that the Committee has not yet registered and reported. Thus, this office proposes the substitution of the attached draft for that document. The new draft contains additions and deletions to reflect the Committee's actions. The report filed by the Committee, however, does not disclose the contributions that were the source of the Federal contribution made by the Committee or the remaining cash on hand. Therefore, the issue raised by the requester remains the same and the draft remains largely the same.

The additional language in the attached draft is in bolded type. The deletions are in bolded brackets. All changes are marked by vertical lines to the right of the text. The additions and/or deletions appear on pages 1, 2, 4, 5, 6, and 7.

Attachment

DRAFT

1 ADVISORY OPINION 1997-20

2
3 Rita Copeland
4 River City Business Services
5 5435 Madison Avenue
6 Sacramento, CA 95841
7

8 Dear Ms. Copeland:
9

10 This responds to your letters dated May 15 and August 18, 1997, on behalf of
11 Friends of McCarthy ("the Committee"), requesting an advisory opinion concerning the
12 application of the Federal Election Campaign Act of 1971, as amended ("the Act"), and
13 Commission regulations to contributions by the Committee to Federal candidates.

14 You are the treasurer of the Committee, which is a California non-Federal
15 committee. It is the "controlled committee" used by former Lieutenant Governor Leo T.
16 McCarthy for his re-election campaign in 1990, and qualified as a state committee on
17 May 11, 1989.¹ You state that the Committee is in the process of terminating its
18 existence and would like to use its remaining funds on hand to make contributions to
19 several Federal candidates. As of May 15, 1997, the Committee had approximately
20 \$3,500 in cash on hand. The Committee subsequently contributed \$2,000 to a Federal
21 principal campaign committee, Nancy Pelosi for Congress on June 3, 1997.² According
22 to the Committee's Semi Annual Statement filed with the California Fair Political
23 Practices Commission ("FPPC") covering activity in the first half of 1997, the
24 Committee had a cash balance of \$1,227.

25 [You note your awareness of the Committee's need to file a statement of
26 organization with the Commission and report as a Federal political committee. However,
27 you are not sure that the funds in the Committee's account at the time of the contribution

¹ Under California State law, a "controlled committee" is defined as:
a committee which is controlled directly or indirectly or indirectly by a candidate or state
measure proponent or which acts jointly with a candidate, controlled committee or state
measure proponent in connection with the making of expenditures. A candidate or state
measure proponent controls a committee if he, his agent or any other committee he
controls has a significant influence on the actions or decisions of the committee.

California Government Code §82016.

² Nancy Pelosi for Congress reported this contribution as two \$1,000 contributions received on June 9; one
was reported as a 1998 primary election contribution and the other as made for the general election.

1 to the Pelosi Committee or at the time of future Federal contributions are permissible
2 funds under the Act.]

3 Between 1995 and 1997, the Committee received refunds totaling \$6,841.01 from
4 various radio and television stations for media buys made during the 1990 election.
5 These refunds and the dates they were received are as follows: (a) \$1,373.68 on January
6 9, 1995; (b) \$1,264.32 on February 28, 1995; (c) \$1,752.68 on August 25, 1995; and (d)
7 \$2,450.33 on May 1, 1997. The refunds were made as the result of legal action taken
8 against various stations and in settlement of Committee claims that it was not charged the
9 lowest unit rate for the time purchased. The refunds constitute the most recent receipts
10 of the Committee and are at a higher amount than the Committee's present balance, or the
11 cash on hand at the time of its contribution to the Pelosi Committee. There have been no
12 other receipts since October 1, 1994.

13 On June 23, 1997, the Committee filed a statement of organization with the
14 Commission.³ Subsequently, the Committee filed a mid-year report disclosing the
15 receipt of the most recent of the refunds, the contribution to the Pelosi Committee,
16 and operating expenditures also disclosed on the mid-year statement to the FPPC.

17 You are not sure that the funds in the Committee's account at the time of the
18 contribution to the Pelosi Committee or at the time of future Federal contributions
19 are permissible funds under the Act. During its years of operation, the Committee
20 received a combination of funds, some lawful and some unlawful under the Act, but
21 permissible under California law. You state that the media refunds are a return of funds
22 that were originally contributions received by the Committee, and thus may consist of
23 permissible funds, subject to a reasonable accounting method for tracking the funds. You
24 propose an accounting method for determining whether some or all of the Committee's
25 balance consists of permissible funds and whether the funds determined to be permissible
26 under that method may be contributed to Federal political committees.⁴ You describe the
27 method as follows:

³ The Committee is currently registered with the Commission as "California '98."

⁴ Two authorized committees from Mr. McCarthy's Federal campaigns (1988 and 1992) are still in existence. You state that none of the funds would be contributed to those committees. See 11 CFR

1 Accumulate all cash receipts and disbursements by the committee from
2 inception using two categories. One for permissible funds and one for
3 prohibited federal funds. We would track chronologically by these two
4 categories to arrive at the amount of funds available by category at the
5 time of each media buy. By demonstrating that there were sufficient
6 permissible funds available when making the media buy to offset the
7 refund amounts we would demonstrate that the amounts refunded were
8 permissible funds.

9
10 According to the Act, a committee that receives contributions aggregating in
11 excess of \$1,000 during a calendar year or makes expenditures aggregating in excess of
12 \$1,000 in a calendar year, is a political committee. 2 U.S.C. §431(4); 11 CFR 100.5(a).
13 The terms "contribution" and "expenditure" include any gift, advance, or deposit of
14 money or anything of value made for the purpose of influencing any election for Federal
15 office. 2 U.S.C. §431(8)(A)(i) and (9)(A)(i); 11 CFR 100.7(a)(1) and 100.8(a)(1).

16 By contributing \$2,000 to a Federal candidate, the Committee has become a
17 political committee. It was required to file a statement of organization with the
18 Commission within ten days of making the contribution and file the next report due, i.e.,
19 the mid-year report. 2 U.S.C. §§433(a) and 434(a)(4); 11 CFR 102.1(d) and 104.5(c).

20 Commission regulations at 11 CFR 104.12 prescribe a procedure for political
21 committees that have cash on hand at the time of registration, and this procedure has been
22 applied to non-Federal committees that become political committees by making transfers
23 or contributions to Federal committees. But for the situation that you present, the
24 Commission would require the use of this method, as described in a number of Advisory
25 Opinions, in determining the contents of the beginning cash on hand and the
26 permissibility of contributions by the Committee to Federal political committees. See
27 Advisory Opinions 1990-16 and 1985-18.

28 The uniqueness of the Committee's situation, however, allows for an alternative
29 option that takes into account the media refunds, as you suggest. The Committee has had
30 no receipts other than the media refunds in the last three years. The refunds consist of the
31 return of funds that originated with contributions to the Committee, and the Committee

110.3(d) (which prohibits transfers of funds or assets from a candidate's nonfederal campaign committee to his or her Federal authorized committees).

1 had sought such refunds through legal action begun over five years ago. Moreover, the
2 Committee will not raise any funds and will discontinue its activities as soon as it
3 disposes of the amounts from the refunds. Thus, the Commission concludes that the
4 Committee may use either the traditionally required method under 11 CFR 104.12
5 (Option A) or the alternative described by the Commission (Option B). **An amended
6 mid-year report reflecting the use of either option should be filed by the Committee.**

7 **Option A**

8 On [its first] the amended mid-year report, the Committee should disclose the
9 sources of the funds in its account at the time it became a political committee. The cash
10 on hand is presumed to be composed of those contributions most recently received by the
11 Committee. 11 CFR 104.12. Thus, the cash on hand would not consist of the media
12 refunds, but would instead consist of the most recent contributions to the Committee,
13 which were received before the refunds. The Committee would have to exclude, from the
14 funds that may be used, those contributions not permissible under the Act's prohibitions
15 or limitations. *Id.* Thus, the amounts comprised of donations from corporations, labor
16 organizations, and Federal contractors must be subtracted from the cash on hand amount.⁵
17 2 U.S.C. §§441b(a) and 441c. Because the \$5,000 limit of 2 U.S.C. §441a(a)(1)(C)
18 applicable to contributions to the Committee exceeds the cash on hand, no exclusion for
19 excessive contributions is necessary.⁶ Advisory Opinion 1990-16.

20 Therefore, to arrive at the amount that could have been used for the contribution
21 to the Pelosi Committee, the Committee should subtract from the \$3,500 cash on hand
22 figure (at the time of that contribution) the amounts, within the most recently received
23 \$3,500 in donations, that are not permissible as described above. That amount should be

⁵ Presumably, the Committee, regardless of its present non-Federal status has not received contributions from national banks, corporations organized by any law of Congress, or foreign nationals. Such entities are forbidden to make both Federal and non-Federal contributions. 2 U.S.C. §§441b(a) and 441e.

⁶ For the permissibility of including funds from non-Federal committees that contributed to the Committee and that may themselves have impermissible funds, see the portion of Advisory Opinion 1983-34 describing the receipt of contributions from state political action committees. If such a committee is not able to demonstrate through the procedures set out in that opinion, that its donation was made with permissible funds, then the full amount of that contribution must be subtracted from the cash on hand amount. See 11 CFR 102.5(b)(1). In view of the likely dates of these contributions, the Commission considers it highly doubtful that such contributions are permissible.

1 reported as the Committee's cash on hand in its new status as a Federal political
2 committee and the remainder of the \$3,500 should have been transferred out of the
3 Committee's bank account within ten days of the contribution to the Pelosi Committee.
4 See 11 CFR 103.3. In addition, since the funds of the beginning cash on hand, although
5 originally donated for state campaign purposes will now be used for Federal activity, the
6 persons who contributed those funds should be notified that their contributions will be
7 subject to the limitations and prohibitions of the Act. See 11 CFR 102.5(a)(2). Advisory
8 Opinion 1990-16. If such notification is not given for contributions comprising the
9 beginning cash on hand, those funds must also be subtracted and transferred out. The
10 contributions comprising the cash on hand must be itemized in accordance with the
11 requirements of 2 U.S.C. §434(b) and listed as the beginning cash on hand for the first
12 report. For an illustration of this process, see Advisory Opinion 1990-16.

13 **Option B**

14 The Committee may use the media refunds as a basis for determining whether the
15 \$3,500 in cash on hand consisted of contributions that were permissible under the Act. In
16 an analogy to a situation where an organization that is not a political committee makes a
17 contribution that does not trigger political committee status, the Committee may
18 demonstrate through a reasonable accounting method that it has received sufficient funds
19 subject to the limitations and prohibitions of the Act to make the contribution. See 11
20 CFR 102.5(b)(1)(ii). [The Committee is still obligated to register and report, but] The
21 cash on hand would be considered as originating from the contributions that were used to
22 make the media disbursements that resulted in the refunds, rather than resulting from the
23 most recent contributions received by the Committee. The method to be used is as
24 follows:

25 First, the Committee must identify the media vendors that were the source of the
26 most recent \$3,500 in refunds. With respect to each vendor, the Committee should
27 ascertain the dates of the payments to the stations for which those recent refunds were
28 made. If the Committee is unable to tie the refunds from a station to particular payments
29 to that station, then the refunds should be tied to the most recent payments made to that
30 station. This may be done by using the percentage that the refunds from that station bears

1 to the amounts paid to that station and ascribing that refund to the most recent payments
2 to that station, i.e., using the refunds as a numerator and the original payment as the
3 denominator.

4 For each of the dates of the payments considered under this method, the
5 Committee must do a cash receipt analysis. The Commission assumes that the
6 Committee will not be able to ascertain the time of day that a payment was made to a
7 station or the time of other disbursements or receipts on that day. So the Committee
8 should identify every donation it took in that day and construe the payment to come from
9 a total of the donations received that day plus the donations comprising the cash on hand
10 at the beginning of the day. In the specific circumstances you present, the Commission
11 will permit the Committee to construe the media payments as made after the receipts for
12 that day, but before the Committee's other disbursements for that day. If the available
13 cash on hand computed this way is, for some reason, still in a negative balance, no part of
14 the media payments may be construed as coming from permissible funds.

15 Upon determining the total of the cash on hand available, the Committee must
16 review the most recent donations comprising that total. Using the criteria described
17 above with respect to the method under 11 CFR 104.12,⁷ the Committee must determine
18 the ratio of permissible donations to the total of donations comprising the cash on hand.⁸
19 The disbursement to a specific station that day will be construed as being comprised of
20 the corresponding percentage of permissible and impermissible funds. If there was more
21 than one relevant media buy that day (i.e., a disbursement for which a part of the most
22 recent \$3,500 in media refunds was made) or relevant buys from more than one station,
23 each disbursement will be construed as being comprised of the same percentage of
24 permissible funds.

25 An illustration of this method is as follows: Assume that at the beginning of the
26 day on which relevant media payments were made, the Committee has \$3,000 in cash on
27 hand, and that it receives another \$2,000 that day. So, the Committee will be construed

⁷ See footnote 6 with respect to contributions from non-Federal committees.

⁸ The earliest donation may be partially outside the total. The Committee has the option of including or not including this donation for percentage purposes.

1 as having \$5,000 available for making media payments that day. Assume further that, of
2 this \$5,000, the Committee received \$2,500, or 50 percent, from permissible sources.
3 The Committee made relevant media buys from two stations that day, one for \$2,000 and
4 another for \$1,000. The refunds from each station were 20 percent of the amounts of the
5 Committee's buys from that station, that is, \$400 and \$200 (\$600 total). Half of that
6 amount (\$300) is construed to be from permissible sources.⁹

7 If, after applying this method to the most recent refunds, the total of permissible
8 funds available for contribution by the Committee is less than the amount contributed to
9 the Pelosi campaign, the McCarthy Committee must ask the Pelosi campaign for a refund
10 of the impermissible amount. Moreover, the Committee may make no further Federal
11 contributions. If there are remaining permissible funds to be contributed after the
12 contribution to the Pelosi campaign (and assuming no further receipts since then), the
13 Committee may contribute those remaining funds to Federal campaigns.

14 [The use of this alternative method does not negate the Committee's obligation to
15 register and file a 1997 mid-year report with the Commission. Under either accounting
16 option, the Committee must file a statement of organization within ten days of its receipt
17 of this opinion.] Under either accounting option, the Committee must file the
18 amended mid-year report within thirty days of its receipt of this opinion. The Committee
19 may terminate its Federal registration upon the contribution of its remaining permissible
20 funds to Federal campaigns, or the return of the funds from the Pelosi committee as
21 described above. These actions must also be reported before termination. If any part of
22 the Pelosi contribution must be refunded, the Pelosi campaign must refund that amount to
23 the Committee within thirty days of being informed by the Committee. See 11 CFR
24 103.3(b)(2). If the Committee does not dispose of its remaining permissible funds within
25 thirty days of its receipt of this opinion and thus continues its activity beyond that point,
26 it must disburse its impermissible funds to a separate bank account that cannot be used
27 for Federal election purposes, by that date. See 11 CFR 102.5(a)(1) and 103.2.

⁹ If the earliest refund in the \$3,500 total is partially outside the total, the Committee should apply the appropriate percentage to that portion of the refund that is inside the total.

