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FEDERAL ELECTION COMMISSION  
Washington, DC 20463

March 23, 1998

## AGENDA ITEM

For Meeting of: 4-2-98

### MEMORANDUM

TO: The Commission

THROUGH: John C. Surina  
Staff Director

FROM: Lawrence M. Noble  
General Counsel

N. Bradley Litchfield  
Associate General Counsel

Michael Marinelli  
Staff Attorney

SUBJECT: Request for Reconsideration of Advisory Opinion 1997-21

#### ***Background***

On October 2, 1997, the Commission issued Advisory Opinion 1997-21 which denied the proposal of the Firebaugh for Congress Committee to use an unexpected media refund to reimburse the former candidate for her previous repayment of a bank loan, owed by the Committee, which she had guaranteed with her personal assets. The Commission based its conclusion on the fact that the candidate's bank loan repayment was reported as her in-kind contribution to the Committee and not as a loan by her to the Committee.

On November 5, 1997, Counsel for the Committee submitted a timely request for reconsideration of that opinion, pursuant to 11 CFR 112.6. A copy of counsel's letter seeking reconsideration was circulated to the Commission on November 7, 1997. This memorandum sets forth the basis of the request for reconsideration and recommends that the Commission grant the request.

***Counsel's Arguments***

Counsel has produced affidavits from Ms. Firebaugh and the Committee treasurer setting forth the intent of the parties regarding the funds that were paid by her to the lending bank in repayment of the Committee's bank loan. According to the affidavits, the bank loan repayment was intended to be a loan by Ms. Firebaugh to the Committee, and the original reporting as an in-kind contribution from her was in error. Counsel also cites the Commission audit of the Buchanan 1992 presidential campaign as precedent for reliance on sworn affidavits to illustrate the original intent of persons who are parties to transactions between candidates and their own campaign committees.

After reviewing these affidavits, as well supplementary documents submitted and circulated to the Commission, this office now concludes that the transactions described in this opinion are indistinguishable from those addressed by the Commission in the Buchanan audit. Thus, they may be regarded as loans by the former candidate and not as in-kind contributions from her. This office has prepared a reconsideration draft opinion for Advisory Opinion 1997-21 which incorporates these views and changes the original conclusion regarding use of the media refund to repay Ms. Firebaugh.

***General Counsel Recommendation***

The Office of General Counsel recommends that the Commission grant the request to reconsider and vacate Advisory Opinion 1997-21, and that it approve the attached reconsidered opinion draft.

Attachment

1 **ADVISORY OPINION 1997-21<sup>1</sup>**

2  
3 **Charles Rorex, Treasurer**  
4 **Firebaugh for Congress Committee**  
5 **PO Box 676**  
6 **Farmington, MO 63640**

7  
8 **Dear Mr. Rorex:**

9 **This refers to your August 29, 1997, letter and subsequent submissions which**  
10 **request advice concerning application of the Federal Election Campaign Act of 1971, as**  
11 **amended ("the Act"), to the disposition of an unexpected refund check from a media firm**  
12 **to the Firebaugh for Congress Committee ("the Committee").**

13 **You state that Emily Firebaugh was a candidate in 1996 for the House of**  
14 **Representatives in the 8th Congressional District of Missouri. The Committee was her**  
15 **principal campaign committee, and you are its treasurer.<sup>2</sup> On June 25, 1996, the**  
16 **Committee borrowed \$100,000 from First State Bank of Farmington, with the candidate**  
17 **acting as the personal guarantor who pledged personal securities as collateral for this**  
18 **loan. The loan came due in November 1996. The principal, as well as interest of \$3,500,**  
19 **was paid directly to the bank by Ms. Firebaugh on November 20. The loan repayment**  
20 **was reported on the 30-day post election report, filed on December 5.**

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<sup>1</sup> This Opinion was originally issued October 2, 1997, but was vacated and modified by the Commission on April , 1998, pursuant to Ms. Firebaugh's request for reconsideration dated November 5, 1997. See 11 CFR 112.6(a). The opinion as issued today modifies the original opinion's conclusion that the advance of funds by the candidate for her committee was a contribution, rather than a loan.

<sup>2</sup> In an affidavit, Ms. Firebaugh states that she was a first-time candidate for Federal office. Supplementary information included with your request also indicates that she had never been a candidate for any other political office. Your own affidavit and other information included in the request states that while you had been a candidate for state office ten years previously, you had never held any position with any other political organization or political committee, whether local, State or Federal.

1           The candidate explains in an affidavit that "when the loan came due in November  
2 of 1996, the Committee did not have sufficient funds to pay this debt. Having lost the  
3 general election, I did not anticipate being able to raise any additional funds to retire this  
4 loan."

5           You state that the candidate then "advanced" \$125,000 of her personal funds on  
6 November 20 to pay off the loan, as well as several other obligations. It was the  
7 understanding of the candidate "at that time that the Committee would repay me, if  
8 possible." You confirm in your own affidavit that it was your understanding that the  
9 Committee would repay Ms. Firebaugh "if possible."

10           You state in your affidavit that, when it became clear that the Committee would not  
11 have sufficient funds to repay Ms. Firebaugh after all the vendors had been paid, she  
12 forgave the loans so that the Committee could be terminated in accordance with 11 CFR  
13 102.3 and 104.1(a). However, you explain that you mistakenly recorded this transaction  
14 as an "in-kind" contribution on the post-election termination report of the Committee,  
15 without disclosing that this transaction was, in fact, the forgiveness of a loan to the  
16 Committee by Ms. Firebaugh.

17           During the first half of 1997, the Committee continued to pay all of its debts in  
18 preparation for terminating. You explain that to enable the Committee to do so that the  
19 candidate once again advanced her own funds in order to meet the Committee's  
20 obligations. On January 27, 1997, she loaned the committee \$7,723 of her personal funds  
21 for this purpose. This transaction was reported on the July Mid Year report as a loan  
22 from the candidate. More recently on March 20, the Committee received a refund check  
23 from its media firm for \$46,131 for prepaid advertising that was not run. You state that

1 this refund was completely unanticipated. You further state your intention to refund this  
2 entire amount, along with any remaining balance of Committee funds, to Ms. Firebaugh  
3 in repayment of her total advance of \$132,723 from personal funds on behalf of the  
4 campaign. You state that this refund would be reported on the Committee's termination  
5 report. You wish to know whether this action would be permitted under the Act and  
6 Commission regulations.

7 The Commission has previously stated that, under the Act and Commission  
8 regulations, a candidate and the candidate's campaign committee have wide discretion in  
9 making expenditures to influence the candidate's election. The Act provides, however,  
10 that the candidate and the campaign committee may not convert excess campaign funds to  
11 the personal use of the candidate or any other person. 2 U.S.C. §439a; 11 CFR 113.2(d);  
12 Advisory Opinions 1997-11 and 1997-2. However, excess campaign funds may be used to  
13 repay to a candidate any loan the proceeds of which were used in connection with his or  
14 her campaign. 11 CFR 113.2(d).

15 The Commission regulations define what would constitute personal use of campaign  
16 funds. In general, "personal use" means "any use of funds in a campaign account of a  
17 present or former candidate to fulfill a commitment, obligation or expense of any person  
18 that would exist irrespective of the candidate's campaign or duties as a Federal  
19 officeholder." 11 CFR 113.1(g). The Act further requires that the reports filed by a  
20 candidate's principal campaign committee disclose, among other transactions, all loans  
21 made by or guaranteed by the candidate, as well as contributions from the candidate.

1 2 U.S.C. §§434(b)(2)(B),(G) and 434(b)(8). See also 11 CFR 104.3(a)(4)(iv) and  
2 104.3(d). Debts and obligations owed by or to a political committee which remain  
3 outstanding shall be continuously reported until extinguished. 11 CFR 104.11.

4 Several previous advisory opinions concerning proposed retroactive changes of  
5 candidate transactions with his or her campaign committee are relevant to your request. In  
6 Advisory Opinion 1977-58, a former candidate wished to retroactively change the  
7 designation of a transfer (or gift) of funds, made by the candidate to his campaign  
8 committee, to a "loan" that would then permit committee fundraising in order to "repay"  
9 the candidate for the funds he had earlier donated. The Commission concluded that this  
10 was not permissible since it would contravene the intent of section 434(b) that "the debts  
11 and obligations be initially disclosed in a timely manner and be continuously reported  
12 thereafter until extinguished." By contrast in Advisory Opinion 1980-114, the  
13 Commission permitted a campaign committee to transfer to a candidate an unanticipated  
14 refund from a vendor which was received after the filing of the committee's termination  
15 report. However, as the Commission noted in that instance, the transfer was in repayment  
16 of a previous loan the candidate had made to the committee which loan had been reported  
17 as such by the committee and subsequently forgiven. See also Advisory Opinion 1997-  
18 28.<sup>3</sup>

19 However, when determining the nature of a transaction between a candidate and the  
20 candidate's committee the Commission has taken into account not only the way in which

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<sup>3</sup> In both Advisory Opinion 1980-114 and 1997-28, candidates were also permitted to reverse prior forgiveness of loans previously made to their Committees. This was due to the unanticipated circumstances that arose subsequent to the forgiveness of the loans. See Advisory Opinion 1980-114 (the receipt of a media refund check) and Advisory Opinion 1997-28 (the discovery of an error in advice regarding the tax consequences of loan forgiveness).

1 the transaction was reported, but also affidavits evidencing the intent of the parties  
2 involved in the transactions. Of relevance to your situation is the Statement of Reasons in  
3 the Commission's final repayment determination for the 1992 Buchanan for President  
4 campaign. See *Statement of Reasons-Final Repayment determination of Buchanan for*  
5 *President, Inc.* (August 1, 1995). In circumstances similar to yours, Mr. Buchanan,  
6 advanced \$50,000 in a series of transfers to his campaign committee. These transfers were  
7 reported on the committee's reports as contributions. However, during the audit process,  
8 the candidate and the campaign chair produced affidavits that affirmed that the reporting  
9 had been in error, and the original intention of the candidate and the committee was that  
10 the transfers were loans with repayment to be made if the campaign should have the funds  
11 available. The Commission accepted the affidavits as manifesting the true nature of the  
12 transaction. See *Id.*

13 Similarly here, with the affidavits of both the candidate and committee treasurer  
14 explaining that the reported transaction was intended as a loan, to be forgiven by the  
15 candidate, but was mistakenly reported as in-kind contribution, the Commission accepts  
16 the status of the transaction as a loan. Since your circumstances are identical to those in  
17 Advisory Opinion 1980-114, the Commission concludes that the Committee may use the  
18 media refund proceeds, as well as other Committee funds that remain following the final  
19 settlement of Committee debts, to repay the \$132,723 in loans made by the candidate.

20 Finally, because the Committee had erroneously reported the November 20 (1996)  
21 repayment by the candidate of the committee's \$100,000 loan as an in-kind contribution,  
22 it is now required to amend its 30-day post election report (filed December 5, 1996) and  
23 subsequent reports to designate the transaction as a loan from the candidate to the

1 Committee. This loan and any other Committee debts owed to Ms. Firebaugh should also  
2 be reported as forgiven to extent that they remain unpaid following the payment of the  
3 \$46,131 media refund and other remaining Committee funds to the former candidate.  
4 The amended reports should be filed within 30 days of the receipt of this opinion. See  
5 Advisory Opinion 1997-28.

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

9 Sincerely,

10  
11 Joan D. Aikens  
12 Chairman  
13

14 Enclosures (AOs 1997-28, 1997-11, 1997-2, 1980-114, and 1977-58)