



FEDERAL ELECTION COMMISSION  
Washington, DC 20463

November 10, 1997

MEMORANDUM

TO: The Commission  
Staff Director  
General Counsel  
Public Records Branch  
Press Office

FROM: N. Bradley Litchfield  
Associate General Counsel

A handwritten signature in black ink, appearing to be "N. Bradley Litchfield", written over the printed name.

SUBJECT: Letter requesting reconsideration of Advisory Opinion 1997-21

The attached letter requesting reconsideration of Advisory Opinion 1997-21 was received at the Commission on November 5, 1997. It is timely submitted within the 30 calendar days period specified in 11 CFR 112.6(a). The requester received the cited advisory opinion on October 6, 1997.

The requester's letter is a public document, but is not a new advisory opinion request under 2 U.S.C. §437f. See 11 CFR 112.1, 112.2 and 112.6. Therefore, public comments will not be invited or accepted. The Office of General Counsel will submit a memorandum of legal analysis addressing the arguments made in the letter, and it will recommend that the Commission either grant or deny reconsideration.

The Commission is not subject to a 30 (or 60) day timetable for acting on this reconsideration request. This office expects, however, to circulate its memorandum no later than December 1, 1997.

Attachment

# PERKINS COIE

A LAW PARTNERSHIP INCLUDING PROFESSIONAL CORPORATIONS  
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JUDITH L. CORLEY  
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November 5, 1997

Federal Election Commission  
999 E Street, N.W.  
Washington, D.C. 20463

AO/AOR 1997-21  
RECONSIDERATION  
under 11 CFR 112.

**Re: Firebaugh for Congress**  
**Request for Reconsideration of AO 1997-21**

Dear Commissioners:

Firebaugh for Congress (the "Committee") submits this request for reconsideration in response to the Federal Election Commission's (the "Commission") Advisory Opinion 1997-21. The Advisory Opinion concluded that, in the absence of additional information, the Committee may not use an unexpected refund from a vendor to "repay the candidate for her previous donations to the campaign that were not, at that time, reported as loans from her personal funds to the Committee, and as outstanding debts of the Committee." On the basis of the Committee's review of the analysis contained in the Advisory Opinion and the underlying statutes and regulations, the Committee respectfully submits that the Commission erred in concluding that Ms. Firebaugh's payment of a bank loan owed by the Committee "was intended to be a contribution by her with no obligation to repay." The Committee contends that there is no basis for this inference and respectfully requests that the Commission reconsider its decision in Advisory Opinion 1997-21.

Emily Firebaugh was a first time candidate for the House of Representatives in the 8th District, in the State of Missouri, during the November 1996 election. The Firebaugh for Congress Committee (the "Committee") was her principal campaign committee for the election. Charles Rorex was the treasurer of the Committee. He had never held such a position in the past.

On June 25, 1996, the Committee borrowed \$100,000 from First State Bank of Farmington. Ms. Firebaugh guaranteed this loan with her personal assets. Mr. Rorex reported this loan on the July 15, 1996 quarterly campaign report and continuously reported it thereafter as a loan guaranteed by the candidate.

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The loan came due in November 1996, after Ms. Firebaugh had lost the election. The campaign treasury did not have the funds available to pay this loan, and the campaign did not anticipate being able to raise this amount. As a result, Ms. Firebaugh used \$126,449.84 of her own funds to stop the accrual of interest and dissolve the debts of the Committee. The payment of \$103,499.99 was made directly to the bank, to repay the \$100,000 loan plus accrued interest. All other debts of the committee were also extinguished. The loan repayment was reported on the 30-day post-election report, on December 5, 1996.

Both Ms. Firebaugh and Mr. Rorex understood that any moneys remaining in or received by the campaign treasury after all other debts were dissolved would be returned to Ms. Firebaugh as a loan repayment. See Affidavits of Candidate Emily Firebaugh and Committee Treasurer Charles Rorex. However, it seemed clear to Mr. Rorex and Ms. Firebaugh that, as a losing campaign, the Committee would not have sufficient funds to repay Ms. Firebaugh, nor would additional funds be forthcoming to dissolve this debt. Neither had any knowledge of a media refund owed to the Committee. See id. Ms. Firebaugh wanted to terminate her committee to avoid any additional reporting obligations. Thus, on November 20, 1996, the same day Ms. Firebaugh made the \$103,499.99 payment to the bank on behalf of the Committee and five days before the close of books for the post-election report, she forgave the obligation of the Committee to repay her. When the post-election report was filed, Mr. Rorex showed this transaction as an in-kind contribution from the candidate without disclosing the surrounding circumstances.

Mr. Rorex made a mistake in failing to report this transaction as a loan forgiven by Ms. Firebaugh and by not explaining the underlying basis of the transaction when he submitted the request for an advisory opinion after the Committee received an unexpected refund from its media firm for \$46,131 for prepaid advertising that was never run. However, these mistakes do not change the nature of the transaction any more than any other reporting error could alter the subject reported. Indeed, Mr. Rorex's use of the phrase "in-kind contribution" to refer to this transaction is consistent with the statutory definition of contribution which encompasses a loan or the forgiving of a loan. See 2 U.S.C. § 431(8)(A); 11 C.F.R. 100.7(a)(1)(iii).

The proper classification of the loan hinges on the intent of the parties when they entered into the transaction. The Candidate and the Treasurer understood that the funds used by the candidate to pay the debts of the Committee would be repaid if there were sufficient funds after all vendors had been paid. See Affidavits of

Candidate Emily Firebaugh and Committee Treasurer Charles Rorex. Although the Commission relies on the erroneous report referring to the forgiven loan as a contribution, the best contemporaneous evidence of the parties' intent is their actual belief when they entered into the agreement. From the outset, the parties intended to treat the \$125,000 contribution as a loan.

In the past, the Commission has held that the intent of the parties governs whether a transaction should be considered a loan, despite other evidence to the contrary, as for example, in the Audit of Buchanan for President, Inc., the campaign committee established to elect Pat Buchanan in the 1992 presidential elections. The relevant facts are set out as follows.

At the request of Bay Buchanan, the campaign manager, Mr. Buchanan advanced two checks totalling \$50,000 to the committee in November and December of 1991. He designated the first check as "First Contribution," despite an oral agreement between Mr. Buchanan and his campaign manager that these funds would be repaid after all other vendors were paid, if funds were available. The committee treasurer reported these funds as "candidate contributions" on the 1991 Year-End Report. The treasurer of the committee later reported to FEC investigators that he was unaware that the funds from Buchanan were loans.

In August of 1992, Mr. Buchanan received a check from his campaign committee marked "loan repayment." In October of 1992, the campaign manager informed the treasurer that the funds from Buchanan were mischaracterized as contributions. The treasurer filed an amended 1991 Year-End Report designating the funds from Buchanan as "loans."

On October 11, 1994, the Audit Staff filed the Final Audit Report which found that the \$50,000 from Buchanan was indeed a contribution and ordered him to return the money paid to him from the committee as a loan repayment. The Audit Staff expressed the concern that "the committee's retroactive characterization of the contribution creates new debt, and ultimately results in a greater entitlement to matching funds." See Final Audit Report of Buchanan for President, Inc., filed 10/11/94, citing, 11 C.F.R. §9034.5(g)(3).

On appeal, the Commission found that Mr. Buchanan intended to make a \$50,000 loan to his campaign committee and that the \$50,000 disbursement from the committee was intended to repay the loan. The Commission found that the erroneous

report filed by the committee indicating that Buchanan made a \$50,000 contribution was not dispositive, but rather that a sworn affidavit from the candidate was the best contemporaneous evidence of the parties' intent that the funds from Buchanan constituted a loan subject to repayment.

In the present situation, Ms. Firebaugh advanced funds intended to be a loan but erroneously disclosed as an in-kind contribution since she subsequently forgave the loan. The Committee is not attempting to recharacterize a contribution as a loan in order to repay Ms. Firebaugh. The loan was forgiven since the candidate did not anticipate receiving any funds to repay it. Had she known of the refund from the media company, the loan would have been left outstanding, and the refund applied to its balance.

While forgiveness of a loan is considered an "in-kind contribution," Ms. Firebaugh is entitled to repayment of funds under the Commission's reasoning in Advisory Opinion 1980-114. In that Advisory Opinion, a candidate loaned his campaign committee \$10,000. The committee paid all vendors and creditors but was left with insufficient funds to repay the candidate. Therefore, the candidate forgave the loan so that the committee may be terminated in accordance with 11 C.F.R. 102.3 and 104.1(a). After termination, the committee received an unexpected refund check from the telephone company and sought an advisory opinion to determine whether it could use this refund to repay part of the loan made by the candidate.

The Commission held that "it was permissible under the Act for the principal campaign committee to assign to the candidate refunds that were owed to the committee in partial repayment of the loans made by the candidate to the committee." AO 1980-114. Since the committee had been terminated prior to its receipt of the refund, the Commission required the committee to file an amended termination report indicating the refund and the repayment to the candidate.

As the previous discussion of AO 1980-114 demonstrates, the Commission generally allows repayment of loans when funds unexpectedly became available after termination, regardless of the fact that the candidate forgave the loan and forgiveness of a loan is technically considered an "in-kind contribution."

There are no public policy reasons to prevent the Committee from using the refund to repay Ms. Firebaugh. All obligations of the Firebaugh Committee have been paid in full, with the exception of Ms. Firebaugh. No one stands to be injured if

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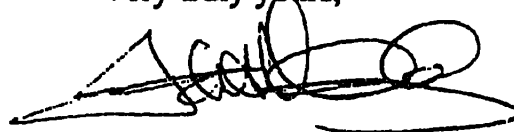
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the Commission allows the Committee to use funds recently refunded to repay Ms. Firebaugh. Indeed, the Audit Staff's concern in the Buchanan for President, Inc. about greater entitlement to matching funds is completely absent in this case.

In light of the fact that the Committee was new to campaign laws during the 1996 election, the candidate and her novice committee did an admirable job in attempting to follow complex reporting requirements. Ms. Firebaugh does not deserve to be penalized \$46,131.00 for paying the Committee's bank loan with personal funds in good faith and in a timely manner in order to stop the accrual of interest and to terminate her committee's reporting obligations. The committee's one reporting error is understandable and should be forgiven. The Commission should take this opportunity to demonstrate that it protects not only the politically sophisticated, but also those who make a good faith effort to follow its regulations. The Committee will amend its reports to reflect more accurately the transaction as a loan from Ms. Firebaugh, the outstanding balance of which was forgiven by her.

For the aforementioned reasons, the Firebaugh for Congress Committee respectfully requests that the Commission reconsider Advisory Opinion 1997-21 and permit the Committee to use the unexpected refund to repay Ms. Firebaugh.

Very truly yours,



Judith L. Corley  
Counsel to Firebaugh for Congress

Affidavit of Emily Firebaugh

I, Emily Firebaugh, hereby state as follows:

1. I have personal knowledge of the facts set forth herein and if called to testify in this matter, I would testify as set forth herein.

2. I was a first-time candidate for the House of Representatives in the 8th District, in the State of Missouri, during the November 1996 election. The Firebaugh for Congress (the "Committee") was my principal campaign committee.

3. On June 25, 1996, I secured a \$100,000 loan with the First State Bank of Farmington for the Committee with my personal assets. When the loan came due in November of 1996, the Committee did not have sufficient funds to pay this debt. Having lost in the general election, I did not anticipate being able to raise any additional funds to retire this loan.

4. I paid the bank \$103,499.99 on November 20, 1996 in order to cover the outstanding loan, plus the accrued interest. I used an additional \$22,999.85 of my personal funds to dissolve the debts of the committee. It was my understanding at that time that the Committee would repay me, if possible.

5. I realized that I would not be repaid after all other vendors had been paid. I forgave the loan so that the Committee could be terminated in accordance with 11 C.F.R. 102.3 and 104.1(a).

6. I had no knowledge of the refund from the media company owed to the Committee.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed this 3RD day of NOVEMBER, 1997.

  
\_\_\_\_\_  
EMILY FIREBAUGH

**Affidavit of Charles Rorex**

I, Charles Rorex, hereby state as follows:

1. I have personal knowledge of the facts set forth herein and if called to testify in this matter, I would testify as set forth herein.

2. Emily Firebaugh was a first-time candidate for the House of Representatives in the 8th District, in the State of Missouri, during the November 1996 election. I was the treasurer of Firebaugh for Congress (the "Committee"), Ms. Firebaugh's principal campaign committee. This was my first time to hold such a position.

3. On June 25, 1996, Emily Firebaugh secured a \$100,000 loan with the First State Bank of Farmington for her campaign committee, Firebaugh for Congress (the "Committee") with her personal assets. When the loan came due in November of 1996, the Committee did not have sufficient funds to pay this debt.

4. Ms. Firebaugh paid the bank \$103,499.99 on November 20, 1996 in order to cover the outstanding loan, plus the accrued interest. She used an additional \$22,999.85 of her personal funds to dissolve the debts of the committee. It was my understanding at that time that the Committee would repay Ms. Firebaugh, if possible..

5. Subsequently, it became clear that the Committee would not have sufficient funds to repay Ms. Firebaugh after all other vendors had been paid. She forgave the loan so that the Committee could be terminated in accordance with 11 C.F.R. 102.3 and 104.1(a). I mistakenly recorded this transaction as an "in-kind contribution" on the post-election termination report of the Committee, without disclosing that this transaction was, in fact, the forgiveness of a loan to the Committee by Ms. Firebaugh.

6. I had no knowledge of the refund from the media company owed to the Committee.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed this 3 day of November, 1997

CHARLES ROREX

*Charles Rorex*