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FEDERAL ELECTION COMMISSION

Washington, DC 20463

September 24, 1997

AGENDA ITEM
For Meeting of: 10-1-97

MEMORANDUM

TO: The Commission

THROUGH: John C. Surina *John C. Surina*
Staff Director

FROM: Lawrence M. Noble *Lawrence M. Noble*
General Counsel

N. Bradley Litchfield *N. Bradley Litchfield*
Associate General Counsel

Michael G. Marinelli *Michael G. Marinelli*
Staff Attorney

SUBJECT: Draft AO 1997-21

Attached is a proposed draft of the subject advisory opinion. We request that this draft be placed on the agenda for October 1, 1997.

Attachment

1 **ADVISORY OPINION 1997-21**

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

DRAFT

7
8 **Dear Mr. Rorex:**

9 **This refers to your August 29, 1997, letter which requests advice concerning**
10 **application of the Federal Election Campaign Act of 1971, as amended ("the Act"), to the**
11 **disposition of an unexpected refund check from a media firm to the Firebaugh for**
12 **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. 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.¹ The loan came due in November 1996. The principal,**
18 **as well as interest of \$3,500, was paid by the Committee with funds advanced by Ms.**
19 **Firebaugh on November 20. The loan repayment was reported on the 30-day post.**
20 **election report, filed on December 5.**

21 **You state that the candidate "advanced" \$125,000 of her personal funds on**
22 **November 20, in order for the Committee to pay off the loan, as well as several other**
23 **obligations. You explain that there were no other funds available, and there was no**
24 **expectation of additional funds coming to the Committee. Due to these circumstances,**

¹ You state that Ms. Firebaugh pledged personal securities as collateral for this loan.

1 the advance of personal funds by Ms. Firebaugh was reported as an in-kind contribution
2 from the candidate.

3 During the first half of 1997, the Committee paid all of its debts in preparation for
4 terminating. You explain that the candidate once again advanced her own funds in order
5 to meet the Committee's obligations. On January 27, 1997, she loaned the committee
6 \$7,723 of her personal funds for this purpose. This transaction was reported on the July
7 Mid Year report as a loan from the candidate. More recently on March 20, the
8 Committee received a refund check from its media firm for \$46,131 for prepaid
9 advertising that was not run. You state that this refund was completely unanticipated.
10 You further state your intention to refund this entire amount, along with any remaining
11 balance of Committee funds, to Ms. Firebaugh in repayment of her total advance of
12 \$132,723 to the campaign from her personal funds. You state that this refund would be
13 reported on the Committee's termination report. You wish to know whether this action
14 would be permitted under the Act and Commission regulations.

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

1 The Commission regulations define what would constitute personal use of campaign
2 funds. In general, "personal use" means "any use of funds in a campaign account of a
3 present or former candidate to fulfill a commitment, obligation or expense of any person
4 that would exist irrespective of the candidate's campaign or duties as a Federal
5 officeholder." 11 CFR 113.1(g). The Act further requires that the reports filed by a
6 candidate's principal campaign committee disclose, among other transactions, all loans
7 made by or guaranteed by the candidate, as well as contributions from the candidate.
8 2 U.S.C. §§434(b)(2)(B),(G) and 434(b)(8). See also 11 CFR 104.3(a)(4)(iv) and
9 104.3(d). Debts and obligations owed by or to a political committee which remain
10 outstanding shall be continuously reported until extinguished. 11 CFR 104.11.

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

1 as such by the committee. The Commission, in distinguishing Advisory Opinion 1977-58,
2 noted that if the candidate "had contributed the money to the committee, the committee
3 would have no outstanding debts or obligations and any refund received would have been
4 considered an amount in excess of any amount necessary to defray expenditures." More
5 recently, in Advisory Opinion 1991-9, a candidate wished to change the rate of interest for
6 loans already fully repaid to the candidate. The Commission concluded that, while a new
7 interest rate could be applied to any unrepaid loan balances, the application of the rate
8 retroactively to repaid loans would be prohibited by 2 U.S.C. §439a and §434(b).

9 The Commission concludes that the Committee may use the media refund proceeds
10 to repay the \$7,723 loan made by the candidate in January 1997. However, following the
11 above cited opinions, the Commission concludes that the Committee may not use the
12 refund to repay the candidate for her previous donations to the campaign that were not, at
13 that time, reported as loans from her personal funds to the Committee, and as outstanding
14 debts of the Committee.² These retroactive changes are contrary to 2 U.S.C. §434(b), 11
15 CFR 104.3(a), (d) and 104.11. Furthermore, any use of the refund proceeds to "repay" the
16 candidate's prior contributions would represent a conversion of excess funds to personal
17 use which is prohibited by 2 U.S.C. §439a and 11 CFR 113.2(d).

² In your request you state that the candidate should not be penalized "for what now appears to be a reporting error on the part of the Committee." The Commission notes that this is a somewhat inaccurate portrayal of the situation. Your letter indicates that the candidate's payment of the bank loan owed by the Committee was intended to be a contribution by her with no obligation to repay. From this standpoint, the reporting of the loan was accurate. It is only changed circumstances, i.e. the discovery of a refund, that makes the designation, in the candidate's view, unfortunate.

