



FEDERAL ELECTION COMMISSION
Washington, DC 20463

April 20, 1998

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

ADVISORY OPINION 1997-21¹

Charles Rorex, Treasurer
Firebaugh for Congress Committee
PO Box 676
Farmington, MO 63640

Dear Mr. Rorex:

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

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

The candidate explains in an affidavit that "when the loan came due in November of 1996, the Committee did not have sufficient funds to pay this debt. Having lost the

¹ This Opinion was originally issued October 2, 1997, but was vacated and modified by the Commission on April 16, 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.

² 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.

general election, I did not anticipate being able to raise any additional funds to retire this loan.”

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

You state in your affidavit that, when it became clear that the Committee would not have sufficient funds to repay Ms. Firebaugh after all the vendors had been paid, she forgave the advances³ so that the Committee could be terminated in accordance with 11 CFR 102.3 and 104.1(a). You explain that you mistakenly recorded the circumstances surrounding these transactions as an “in-kind” contribution on the post-election report of the Committee, rather than advances forgiven by Ms. Firebaugh.

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

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

The Commission regulations define what would constitute personal use of campaign funds. In general, "personal use" means "any use of funds in a campaign account of a present or former candidate to fulfill a commitment, obligation or expense of any person

³ Although you refer to the transaction as loans by Ms. Firebaugh, in fact these circumstances represent advances. Rather than loaning money to the Committee, Ms. Firebaugh was paying off creditors with the hope of receiving reimbursement.

that would exist irrespective of the candidate's campaign or duties as a Federal officeholder." 11 CFR 113.1(g). The Act further requires that the reports filed by a candidate's principal campaign committee disclose, among other transactions, all loans made by or guaranteed by the candidate, as well as contributions from the candidate. 2 U.S.C. §§434(b)(2)(B),(G) and 434(b)(8). See also 11 CFR 104.3(a)(4)(iv) and 104.3(d). Debts and obligations owed by or to a political committee which remain outstanding shall be continuously reported until extinguished. 11 CFR 104.11.

Several previous advisory opinions concerning proposed retroactive changes of candidate transactions with his or her campaign committee are relevant to your request. In Advisory Opinion 1977-58, a former candidate wished to retroactively change the designation of a transfer (or gift) of funds, made by the candidate to his campaign committee, to a "loan" that would then permit committee fundraising in order to "repay" the candidate for the funds he had earlier donated. The Commission concluded that this was not permissible since it would contravene the intent of section 434(b) that "the debts and obligations be initially disclosed in a timely manner and be continuously reported thereafter until extinguished." By contrast in Advisory Opinion 1980-114, the Commission permitted a campaign committee to transfer to a candidate an unanticipated refund from a vendor which was received after the filing of the committee's termination report. However, as the Commission noted in that instance, the transfer was in repayment of a previous loan the candidate had made to the committee which loan had been reported as such by the committee and subsequently forgiven. See also Advisory Opinion 1997-28.⁴

However, when determining the nature of a transaction between a candidate and the candidate's committee the Commission has taken into account not only the way in which the transaction was reported, but also affidavits evidencing the intent of the parties involved in the transactions. Of relevance to your situation is the Statement of Reasons in the Commission's final repayment determination for the 1992 Buchanan for President campaign. See *Statement of Reasons-Final Repayment determination of Buchanan for President, Inc.* (August 1, 1995). In circumstances similar to yours, Mr. Buchanan, advanced \$50,000 in a series of transfers to his campaign committee. These transfers were reported on the committee's reports as contributions. However, during the audit process, the candidate and the campaign chair produced affidavits that affirmed that the reporting had been in error, and the original intention of the candidate and the committee was that the transfers were loans with repayment to be made if the campaign should have the funds available. The Commission accepted the affidavits as manifesting the true nature of the transaction. See *Id.*

⁴ 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).

Similarly here, with the affidavits of both the candidate and committee treasurer explaining that the reported November 20, 1996, transactions were intended as advances, but were mistakenly reported as simply an in-kind contribution, the Commission accepts the status of the transactions as advances. Since your circumstances are similar to those in Advisory Opinion 1980-114, the Commission concludes that the Committee may use the media refund proceeds, as well as other Committee funds that remain following the final settlement of Committee debts, to repay the \$132,723 in advances and loans made by the candidate.

Finally, because the Committee had erroneously reported the November 20 (1996) repayment by the candidate of the committee's \$100,000 loan and other outstanding debts simply as an in-kind contribution, it is now required to amend its 30-day post election report (filed December 5, 1996) and subsequent reports to designate the transactions as advances from the candidate to the Committee. This loan and any other Committee debts owed to Ms. Firebaugh should also be reported as forgiven to the extent that they remain unpaid following the payment of the \$46,131 media refund and other remaining Committee funds to the former candidate. The amended reports should be filed within 30 days of the receipt of this opinion. See Advisory Opinion 1997-28.

This response constitutes an advisory opinion concerning the 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)

Joan D. Aikens
Chairman

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