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FEDERAL ELECTION COMMISSION
Washington, DC 20463

March 23, 1998

MEMORANDUM

TO: The Commission

THROUGH: John C. Surina
Staff Director

FROM: Lawrence M. Noble
General Counsel

N. Bradley Litchfield
Associate General Counsel

Jonathan M. Levin
Senior Attorney

AGENDA ITEM
For Meeting of: 4-2-98

SUBJECT: Alternative OGC Draft for AOR 1997-24

At the open session meeting on March 12, 1998, the Commission considered two alternative draft responses to Advisory Opinion Request 1997-24, as presented in Agenda Document #98-24. These drafts, representing the views of Commissioner Elliott and Commissioner Thomas respectively, were written as alternatives to the original agenda draft submitted by the Office of General Counsel in Agenda Document #98-18. No draft was approved by the Commission at the March 12 meeting, and the Commission will discuss the request further at its April 2 meeting.

Attached is another draft advisory opinion which retains the same basic conclusions of Agenda Document #98-18, but also contains some modifications. Where the new draft differs from Agenda Document #98-18, the text is marked in bold. This office requests that the attached alternative OGC draft and Agenda Document #98-24 be placed on the Agenda for April 2, 1998.

Attachment

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DRAFT

1 ADVISORY OPINION 1997-24

2
3 Gerald H. Flamm, M.D., Treasurer
4 Corporation for the Advancement of Psychiatry
5 Political Action Committee
6 1400 K Street, N.W.
7 Washington, D.C. 20005

8
9 Dear Dr. Flamm:

10
11 This responds to your letter dated October 21, 1997, as supplemented by your
12 letter dated January 15, 1998, on behalf of the Corporation for the Advancement of
13 Psychiatry ("CAP"), requesting an advisory opinion concerning the application of the
14 Federal Election Campaign Act of 1971, as amended ("the Act"), and Commission
15 regulations to the conversion of its separate segregated fund into a non-connected
16 committee.

17 CAP is a non-stock corporation exempt from taxation under 26 U.S.C. §501(c)(6).
18 It was incorporated in the District of Columbia in 1981 "to promote social justice and
19 further human welfare through the advancement of psychiatry and to represent the
20 interests of psychiatry before legislative and other government bodies." Shortly after its
21 incorporation, CAP established a separate segregated fund, the Corporation for the
22 Advancement of Psychiatry Political Action Committee ("CAPPAC").¹ CAPPAC
23 solicits contributions from the approximately 4,500 dues paying members of CAP.

24 For various reasons, the board of directors of CAP is considering the dissolution
25 of CAP and the termination of its existence.² However, various individuals, most of
26 whom are CAP members, hope to continue to operate CAPPAC as a non-connected
27 political committee. CAPPAC proposes to take the following steps upon CAP's
28 dissolution. First, CAPPAC would amend its bylaws to conform to its new status. For
29 example, the bylaws would indicate that CAPPAC is no longer the separate segregated
30 fund ("SSF") of CAP, but rather a non-connected political committee, and that the

¹ CAPPAC filed its statement of organization with the Commission on December 14, 1981.

² You note that "[i]t has become increasingly difficult for small interest groups, such as CAP, to effectively compete for members with the larger mental health organizations and therefore, from a business perspective, dissolution appears to be an appropriate action."

1 individuals who contribute to CAPPAC would be deemed voting members of the PAC
2 and entitled to participate in its governance. Second, CAPPAC would move its offices to
3 a new location, and the CAP employee who administered the PAC would become an
4 employee of the PAC. Third, the PAC would solicit contributions from a broad range of
5 individuals. According to CAPPAC's 1997 year end report, it had \$80,715 in cash on
6 hand as of December 31, 1997.³

7 In view of the plans of CAP and CAPPAC, you ask four questions, which have
8 been re-ordered as follows:

9 (1) Upon CAP's termination, may CAPPAC continue in existence as a non-connected
10 political committee by amending its statement of organization to indicate its new status?
11

12 (2) If CAPPAC may continue its existence as a non-connected committee following the
13 corporate termination, may it retain the funds contributed to CAPPAC prior to the
14 corporate termination and use those funds to make contributions and expenditures?
15

16 (3) If CAPPAC may continue its existence as a non-connected committee following the
17 corporate termination, may it purchase from CAP at fair market value the mailing lists,
18 personal computer and other equipment that are currently used for PAC administration?
19

20 (4) If CAPPAC may continue in existence as a non-connected political committee
21 following the corporate termination, may it continue to use the name CAPPAC?
22

23 In order to respond to your questions, it is necessary to examine the relationship
24 of a separate segregated fund to its connected organization. The Act and Commission
25 regulations prohibit a corporation from making a contribution in connection with a
26 Federal election. 2 U.S.C. §441b(a); 11 CFR 114.2(b). An exception to the definition of
27 corporate contribution permits a corporation to expend funds to establish, administer, and
28 solicit contributions to a separate segregated fund to be utilized for political purposes and
29 composed of voluntary contributions that were solicited from an eligible group of
30 personnel as defined by the Act. 2 U.S.C. §441b(b)(2)(C), 441b(b)(3) and 441b(b)(4); 11
31 CFR 114.1(a)(2)(iii) and 114.5(a). Commission regulations further make clear that

³ For the purposes of this opinion, the Commission accepts your representation that CAP is not an affiliate of the American Psychiatric Association or the Washington Psychiatric Society. The Commission also assumes that CAP is not an affiliate of any other incorporated entity. Therefore, there will be no surviving corporation that can continue or attain the status of a connected organization for CAPPAC. See 2 U.S.C. §431(7); 11 CFR 100.6(a) and 110.3(a); see also Advisory Opinions 1996-26 and 1983-19.

1 corporations, including membership organizations, may use general treasury moneys,
2 including moneys obtained in commercial transactions and dues moneys or membership
3 fees, for SSF establishment, administration, and solicitation costs, and that the
4 corporation "may exercise control over" its SSF. 11 CFR 114.5(b) and (d).

5 The nature of the relationship between an SSF and its connected organization has
6 been discussed by the United States Supreme Court. It has held that an SSF must be
7 separate from its connected organization "only in the sense that there must be a strict
8 segregation of its moneys from" general treasury funds. *Pipefitters Local Union No. 562*
9 *v. United States*, 407 U.S. 385, 414 (1972). The Court stated that, in view of a
10 sponsoring entity's ability to establish, administer, and solicit contributions to the SSF,
11 "it is difficult to conceive how a valid political fund can be meaningfully 'separate' from
12 [the sponsoring entity] in any way other than 'segregated'." 407 U.S. at 426. In *Bread*
13 *Political Action Committee v. Federal Election Commission*, the Court of Appeals for the
14 Seventh Circuit, citing *Pipefitters*, stated that "the separate segregated funds are simply
15 political arms of the parent organizations." 635 F.2d 621, 624, n.3 (7th Cir. 1980) (en
16 banc), *rev'd on jurisdictional grounds*, 455 U.S. 577 (1982).

17 You state that CAP will dissolve and terminate. Under the law of the District of
18 Columbia, a non-profit corporation that voluntarily seeks to terminate its existence adopts
19 a resolution to dissolve the corporation and then ceases to conduct its affairs, except
20 insofar as is necessary "for winding up." D.C. Code §29-548. The dissolution process
21 includes satisfying the corporation's liabilities and obligations and disposing of its assets.
22 D.C. Code §29-549. When the satisfaction of liabilities and obligations and the
23 disposition of assets have been completed, the corporation files articles of dissolution
24 with the Mayor and the existence of the corporation ceases upon the Mayor's issuance of
25 a certificate of dissolution. D.C. Code §§29-552 and 29-553. In view of the fact that the
26 SSF is a part of the corporation (with merely its funds segregated), the SSF may no
27 longer exist upon the cessation of the connected organization's existence. Hence, at that

1 point or before, CAPPAC should file a termination report with the Commission and
2 terminate its existence.⁴ See 2 U.S.C. §433(d)(1); 11 CFR 102.3(a)(1)

3 **If the CAP members and the other individuals referred to above wish to form**
4 **a new non-connected committee during the dissolution process, that new committee**
5 **may not receive or expend CAPPAC's cash on hand.** Those funds were raised under a
6 statutory exemption from the general definition of "contribution" that allowed CAP to
7 pay the committee's establishment, administration, and solicitation costs. 2 U.S.C.
8 §441b(b)(2)(C); 11 CFR 114.1(a)(2)(iii). Therefore, to permit the proposed non-
9 connected committee to retain those funds to make its own contributions to candidates or
10 other political committees would be contrary to the statutory scheme that regards as
11 contributions the costs of supporting a political committee that is not entitled to the
12 exemption. See *California Medical Association v. Federal Election Commission*, 453
13 U.S. 182, 198-201 (1982); see also Advisory Opinion 1982-63. Even though the cash on
14 hand was raised from a restricted class, such funds were raised with the use of corporate
15 moneys. To then allow a non-connected committee to avail itself of these funds for
16 administrative or other purposes, such as soliciting more contributions, would contravene
17 the purposes of 2 U.S.C. §441b.

18 In order to terminate, CAPPAC has a number of options as to how to distribute its
19 funds. In past opinions discussing disbursements by political committees that were
20 not the authorized committees of a Federal candidate, the Commission has noted that the
21 rules of 2 U.S.C. §439a and 11 CFR 113.2 do not apply, and that such a committee may
22 expend its funds for any lawful purpose consistent with the Act and Commission
23 regulations. Advisory Opinions 1992-10, 1991-21, and 1986-32. Accordingly,
24 CAPPAC may contribute its remaining funds to other political committees, such as
25 authorized candidate committees, political party committees, or non-connected political
26 committees, subject to the limits of the Act.⁵ CAPPAC may also donate the funds to

⁴ The only exception to the necessity for termination would be if there were still outstanding debts owed by the SSF. However, CAPPAC (according to its 1997 year end report) has no outstanding debts or obligations owed by it.

⁵ Presumably, CAPPAC would not make contributions to other SSFs because it would not be solicitable by them or their connected organizations (although it may make unsolicited contributions to such committees). 11 CFR 114.5(g), 114.5(j).

1 CAP before CAP's termination, if permissible under other applicable law. Advisory
2 Opinion 1986-32. It may also refund the contributions on hand to the persons who made
3 them, such as on a *pro rata* basis or on a last contributed, first refunded basis. See
4 Advisory Opinions 1991-21 and 1986-32.

5 **This opinion does not reach any issues related to the aggregation of**
6 **contributions made or received by a new non-connected committee, or related to**
7 **solicitations for contributions to the new committee. You have not described the**
8 **manner in which such contributions would be solicited, whether CAPPAC proposes**
9 **to make solicitations for contributions to the new committee, or how the new**
10 **committee will finance any future contribution solicitations. Moreover, the**
11 **formation of a new committee by persons associated with CAPPAC is hypothetical**
12 **at this time because three of your questions are predicated on the legality of**
13 **CAPPAC's conversion to a non-connected committee. As already discussed, such a**
14 **conversion is prohibited.**

15 **In order to answer question 3 specifically, however, the Commission assumes**
16 **the formation of a new committee. The new committee may be established while CAP**
17 **is engaged in dissolution, but not until after the termination of CAPPAC. The**
18 **Commission anticipates that CAP will cease to exist within a brief period after the**
19 **formation of the new committee.⁶ The new committee may purchase from CAP the**
20 **mailing lists, personal computer, and other equipment that are currently used for**
21 **CAPPAC administration as long as it pays the usual and normal charge for such goods.**
22 **See 11 CFR 100.7(a)(1)(iii)(A) and (B). This purchase will have to be made from**
23 **contributions raised by the new committee itself, e.g., from contributions by the**
24 **committee's organizers that otherwise comply with the Act.**

25 **As to the fourth question, the Commission notes that the Act and Commission**
26 **regulations require an SSF to include in its name the full name of the connected**

⁶ In view of the impending cessation of CAP's existence, the brief and transitional nature of the co-existence of CAP and the new committee, and the above-stated representation and assumption that CAP does not have any corporate affiliates (see footnote 3), the Commission will not address the governance aspect of the new committee's non-connected nature under the standards set out in Advisory Opinions 1997-26, 1997-15, and 1984-12. The Commission assumes, however, that CAP will provide no financial support to the new committee, as defined in Advisory Opinion 1997-15.

