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FEDERAL ELECTION COMMISSION
Washington, DC 20463

JUN 14 1 24 PM '01

AGENDA ITEM
For Meeting of: 6-21-01

June 14, 2001

MEMORANDUM

TO: The Commission

THROUGH: James A. Pehrkon
Staff Director

FROM: Lois G. Lerner
Acting General Counsel

N. Bradley Litchfield
Associate General Counsel

Jonathan M. Levin 92
Senior Attorney

Subject: Draft AO 2001-08

Attached is a proposed draft of the subject advisory opinion. We request that this draft be placed on the agenda for June 21, 2001.

Attachment

1 ADVISORY OPINION 2001-08

2
3 The Honorable Arlen Specter
4 United States Senate
5 Washington, D.C. 20510

DRAFT

6
7 Dear Senator Specter:

8 This responds to your letters dated May 16 and 25, 2001, requesting an advisory
9 opinion concerning the application of the Federal Election Campaign Act of 1971, as
10 amended ("the Act"), and Commission regulations to the use of campaign funds to
11 purchase copies of a book authored by you.

12 ***Background***

13 You are a United States Senator from Pennsylvania, and your principal campaign
14 committee for election to the Senate is Citizens for Arlen Specter ("the Committee").¹
15 Recently, you wrote your autobiography, *Passion for Truth*. The book was published by
16 HarperCollins Publishers, which is a division of the News Corporation and a major
17 publisher. The Committee plans to purchase copies of the book in bulk from the
18 publisher, and it will give those copies to contributors who have given \$1,000. All
19 royalties attributable to the books purchased by the Committee would be given to charity.
20 You will receive no royalties or income from the sale to the Committee, and will take no
21 tax deductions related to the sale.² You have been advised by the publisher that royalties
22 due on sales of the book have now exceeded the publisher's advance on royalties which
23 you previously received. Moreover, the copies purchased by the Committee will not be
24 included in any count that increases or escalates the royalty calculation (percentage
25 earned) based on the number of copies sold (regardless of method of sale).

26 The books purchased by the Committee will be used only for distribution to
27 campaign supporters and will not be either sold or promoted for sale by the campaign.

¹ Most of the facts below are derived from your March 16 letter to the Senate Select Committee on Ethics requesting approval of your proposal and from the May 3 advice letter sent to you by that committee. In your advisory opinion request to the Commission, you enclose the letters and state that they "specify the facts on which [you] seek clearance" to have the Committee give books to the contributors.

² Given the statement in your May 25 letter that you "will be receiving no royalties" as a result of the books sold to the Committee, and your March 16 letter (to the Senate Ethics Committee) stating that "royalties attributable to" the described book sale will be given to charity, the Commission understands that the publisher will directly pay such amounts to charity.

1 You indicate that all uses of the book will be for the purpose of influencing a Federal
2 election, and the quantity purchased by the Committee will not exceed the number needed
3 for those campaign purposes. The Committee's purchase of the books "will be conducted
4 at arm's length, at the bulk rate available as the standard fair market price that publishers
5 under normal industry practice make available to large purchasers under standard
6 conditions (e.g., that the book not be resold through normal book distribution channels
7 and that the author receive no royalties on those copies purchased by the campaign)."

8 In a letter dated May 3, 2001, the Senate Select Committee on Ethics concluded
9 that your proposal would not constitute a conversion of campaign funds to the personal
10 use of any Member in violation of Senate Rule 38.2. (See footnote 1.) You ask the
11 Commission to determine whether your proposal would constitute the personal use of
12 campaign funds under the Act and Commission regulations. As discussed below, your
13 request also raises the question of whether the purchase by the Committee, at a bulk rate,
14 would entail an in-kind contribution from the publishing company.

15 *Analysis*

16 Under the Act and Commission regulations, a candidate and the candidate's
17 committee have wide discretion in making expenditures to influence the candidate's
18 election, but may not convert excess campaign funds to the personal use of the candidate
19 or any other person. 2 U.S.C. §§431(9) and 439a; 11 CFR 113.1(g) and 113.2(d); *see*
20 *also* Advisory Opinions 2001-3, 2000-40, 2000-12, and 2000-02.

21 Commission regulations provide guidance regarding what would be considered
22 personal use of campaign funds. Personal use is defined as "any use of funds in a
23 campaign account of a present or former candidate to fulfill a commitment, obligation or
24 expense of any person that would exist irrespective of the candidate's campaign or duties
25 as a Federal officeholder." 11 CFR 113.1(g). Commission regulations list a number of
26 purposes that would constitute personal use. 11 CFR 113.1(g)(1)(i). Where a specific

1 use is not listed as personal use, the Commission makes a determination on a case-by-
2 case basis, using the regulation's definition of personal use at 11 CFR 113.1(g). 11 CFR
3 113.1(g)(1)(ii).³

4 The facts, as described in the request, indicate that Committee funds will be used
5 to defray an expense that would not exist irrespective of your Senate campaign. The
6 Commission bases its conclusion on several key facts, as follows. The books purchased
7 by the Committee will be used solely for distribution to contributors to the Committee
8 and thus will be used by the Committee only for the purpose of influencing your election
9 to the Senate.⁴ In addition, the quantity purchased by the Committee will not exceed the
10 number needed for the described distribution. You also indicate that you will receive no
11 royalties or income, and will declare no tax deductions, as a result of the sale of these
12 books to the Committee. Moreover, such sales will not increase your opportunity to
13 receive future royalties.⁵ Although the regulations on personal use have been interpreted
14 to permit a candidate to sell or rent space, equipment, or other items to his principal
15 campaign committee at the usual and normal charge, your non-receipt of such royalties or
16 other benefits indicates that the sale to the Committee is not, in reality, a device to use the
17 Committee to benefit you financially.⁶ See Advisory Opinion 1995-46.

18 The Committee's bulk purchase of the books at a discounted rate raises the issue
19 of whether the vendor publisher is making an in-kind corporate contribution. See 2

³ In explaining the application of the case-by-case approach, the Commission:
reaffirm[ed] its long-standing opinion that candidates have wide discretion over the use
of campaign funds. If the candidate can reasonably show that the expenses at issue
resulted from campaign or officeholder activities, the Commission will not consider the
use to be personal use.

Explanation and Justification, *Expenditures; Reports by Political Committees; Personal Use of Campaign Funds*, 60 *Fed. Reg.* 7862, 7867 (February 9, 1995).

⁴ You state that the book will be given to those who have contributed \$1,000 to your Committee. Thus, the distribution of the book may be viewed as an expression of thanks for past support of your past campaigns and an incentive to provide support to your next Senate campaign. See Advisory Opinion 1993-20.

⁵ Furthermore, no royalties will result from the distribution of the books because the Committee does not plan to sell the books.

⁶ See Advisory Opinions 2000-2 and 1995-8 (where the Commission concluded that a principal campaign committee could rent office space and office facilities from the candidate at the usual and normal charge); see also Advisory Opinion 1995-24 (where the candidate was permitted to sell copies of his self-published book to his PCC at the market price for such sales, so that the committee could sell the book to the public and use the proceeds to repay debts owed to the candidate).

1 U.S.C. §441b(a); 11 CFR 114.2(b). The term "contribution" includes giving "anything of
2 value" for the purpose of influencing an election. 2 U.S.C. §§431(8)(A)(i) and
3 441b(b)(2); 11 CFR 100.7(a)(1) and 114.1(a)(1). The term "anything of value" includes
4 the provision of goods or services at less than the usual and normal charge. 11 CFR
5 100.7(a)(1)(iii)(A). The "usual and normal charge" for goods means the price of those
6 goods in the market from which they ordinarily would have been purchased at the time of
7 the contribution. 11 CFR 100.7(a)(1)(iii)(B). In the past, the Commission has concluded
8 that the purchase of goods or services at a discount does not result in a contribution when
9 the discounted items are made available in the ordinary course of business and on the
10 same terms and conditions to the vendor's other customers that are not political
11 organizations or committees. *See* Advisory Opinions 1996-2, 1995-46, and 1994-10.
12 The description of the proposed transaction indicates that the Committee will pay the
13 usual and normal charge for this type of bulk purchase from publishers and thus would
14 not receive an in-kind corporate contribution.

15 Based on the foregoing analysis, the proposed activity is permissible under the
16 Act and Commission regulations. The amounts spent by the Committee for the purchase
17 of the books should be reported as operating expenditures for the 2004 election cycle. 2
18 U.S.C. §434(b)(4)(A) and (5)(A); 11 CFR 104.3(b)(2)(i) and (b)(4)(i). Committee reports
19 filed with the Commission indicate that it has already received contributions of
20 approximately \$110,000 in 1999 and 2000, thus triggering the requirement to file a
21 statement of candidacy for 2004. *See* 2 U.S.C. §§431(2)(A) and 432(e)(1); 11 CFR
22 100.3(a)(1) and 101.1(a).

23 The Commission expresses no opinion regarding the application of any rules of
24 the United States Senate or any tax law ramifications of the proposed activity because
25 those issues are not within its jurisdiction.

