FEDERAL ELECTION COMMISSION
Washington, DC 20463

November 7, 2003

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

ADVISORY OPINION 2003-26

William L. Curlis, Treasurer
Voinovich for Senate
865 Macon Alley
Columbus, Ohio 43206

Dear Mr. Curlis:

This responds to your letter dated August 25, 2003, requesting an advisory opinion on behalf of Voinovich for Senate, concerning the application of the Federal Election Campaign Act of 1971, as amended ("the Act"), and Commission regulations, to the proposed use of campaign funds received by Voinovich for Senate to refund contributions received by Voinovich for Governor.

Background

Voinovich for Senate ("the Senate Committee") is the principal campaign committee of Senator George V. Voinovich. Senator Voinovich is a candidate for the U.S. Senate in 2004.[1] Voinovich for Governor ("the State Campaign Committee") was the principal campaign committee authorized under the laws of Ohio for then Governor (now Senator) Voinovich. In 1998, the State Campaign Committee concluded its activities, filed all of its required reports and terminated its existence with a zero balance.

You explain that an investigation by the United States Attorney for the Northern District of Ohio revealed improper or illegal campaign contributions from a corporation, PIE

[1] On March 20, 2002, Senator George Voinovich filed a statement of candidacy for re-election to the U.S. Senate.

Mutual Insurance, its officers and employees.[2] You state that the United States Attorney specifically found that, "no wrongdoing [had] . . . been found on the part of any recipient political candidate or political committee." The United States Attorney, nonetheless, identified the contributions that were improper and identified the campaign committees that had received the contributions and the amount of those contributions. The request does not present any facts indicating that any State or Federal authorities have demanded that the Senate Committee make the refunds on behalf of the State Campaign Committee, or that the Senate Committee is otherwise legally obligated to do so.[3] You also state that any refunds that would be made by the Senate Committee would be made to the PIE liquidation fund established subsequent to the corporation's bankruptcy. [4]

Legal Analysis and Conclusion

Question: May the candidate's principal campaign committee use its Federal campaign funds to refund contributions received by that candidate's now non-existent State campaign committee?

No, the Senate Committee may not use its Federal campaign funds to refund the illegal contributions received by the State Campaign Committee. As explained below, this purpose is not one of the permissible uses of campaign funds under the Act and Commission regulations.

Under the Act, there are four categories of permissible uses of campaign funds: (1) otherwise authorized expenditures in connection with the candidate's campaign for Federal office; (2) ordinary and necessary expenses incurred in connection with the duties of the individual as a holder of Federal office; (3) contributions to organizations described in 26 U.S.C. 170(c); and (4) transfers, without limitation, to national, State or local political party committees. 2 U.S.C. 439a(a); *see also* 11 CFR 113.2. Before 2002, section 439a also included "any other lawful purpose" within the list of permissible uses. Congress in the Bipartisan Campaign Reform Act of 2002 ("BCRA"), Pub. L. No. 107-155, 116 Stat. 81 (2002), deleted this phrase when it amended section 439a. The Commission in the Explanation and Justification for 11 CFR 113.2 discussed the significance of this deletion:

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[2] A September 2, 2003 *Columbus Dispatch* article identifies the corporation as PIE Mutual Insurance and provides more details. According to the article, PIE Mutual Insurance, which was Ohio's largest medical-malpractice insurer, failed in 1998. The article states that former chief executive, Larry E. Rogers, gave $1.5 million in illegal contributions to 75 politicians or campaign committees in Ohio and three other States between 1990 and 1997. Mr. Rogers is serving a 40-month prison term for fraud and improper contributions. Returned contributions from PIE are placed in the PIE liquidation fund being maintained by the Ohio Department of Insurance. According to the article, PIE has unpaid insurance claims worth $150 million.

[3] According to a conversation with the PIE liquidation fund administrator, the PIE liquidation fund has never asked either the Senate Committee or Senator Voinovich to make these refunds.

[4] In your October 12, 2003 email to the Commission staff, you indicated that the Senate Committee had refunded $15,450 in contributions to the PIE liquidation fund. The 2002 Year-End Report filed by the Senate Committee confirms this July 2, 2002 disbursement. Also, in a September 24, 2003 conversation with Commission staff you stated that the amount of similar improper contributions made to the State Campaign Committee was $85,000.

> The Commission … is removing and reserving paragraph (d) of former section 113.2, which referred to "any other lawful purpose." With this revision, it is now clear that in addition to defraying expenses in connection with a campaign for federal office, campaign funds may be used only for the enumerated non-campaign purposes identified in paragraphs (a), (b) and (c) of section 113.2, and that *this listing of permissible non-campaign purposes is exhaustive.*

Explanation and Justification for Disclaimers, Fraudulent Solicitations, Civil Penalties, and Personal Use of Campaign Funds; Final Rule, 67 Fed. Reg. 76970, 76975 (Dec. 13, 2002) (emphasis added).

You propose to use the Senate Committee's campaign funds to refund improper contributions originally made to the State Campaign Committee in prior campaigns. Your proposed refunds are linked to contributions made to Senator Voinovich's past State campaigns for Governor, campaigns that occurred well before Senator Voinovich's Federal candidacy for the 1998 or 2004 elections.[5] Further, as noted above, your request does not indicate that the Senate Committee or Senator Voinovich is under any legal obligation to make these refunds. The facts before the Commission in this advisory opinion do not support a conclusion that a refund of the impermissible State contributions would be in connection with either of Senator Voinovich's campaigns for Federal office.

The proposed refunds also would not comply with the other three permissible uses set forth in 2 U.S.C. 439a in that they are not ordinary and necessary expenses incurred in connection with Senator Voinovich's duties as a U.S. Senator; they are not contributions to an organization described in section 170(c) of the Internal Revenue Code of 1986; and they are not transfers to a national, State or local committee of a political party.[6] Therefore, the Commission concludes that your proposal would not comply with 2 U.S.C. 439a(a) and 11 CFR 113.2.

This response constitutes an advisory opinion concerning the application of the Act and Commission regulations to the specific transaction or activity set forth in your request. *See* 2 U.S.C. 437f. The Commission emphasizes that, if there is a change in any of the facts or assumptions presented, and such facts or assumptions are material to a conclusion presented in this opinion, then the requestor may not rely on that conclusion as support for its proposed activity.

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[5] Senator Voinovich's campaigns for Governor occurred in 1990 and 1994.

[6] A conversation with the P.I.E. liquidation fund administrator confirms that the fund is not a section 170(c) organization. Furthermore, the PIE liquidation fund is not making payments to any section 170(c) organization.

The Commission notes that this advisory opinion analyzes the Act, as amended by the Bipartisan Campaign Reform Act of 2002, and Commission regulations, including those promulgated to implement the BCRA amendments, as they pertain to your proposed activities. On May 2, 2003, a three-judge panel of the United States District Court for the District of Columbia ruled that a number of BCRA provisions are unconstitutional and issued an order enjoining the enforcement, execution, or other application of those provisions. *McConnell v. FEC*, 251 F.Supp. 2d 176 (D.D.C. 2003); *prob. juris. noted*, 123 S.Ct. 2268 (U.S. argued Sept. 8, 2003). Subsequently, the district court stayed its order and injunction in *McConnell v. FEC*, 253 F. Supp. 2d 18 (D.D.C. 2003), pending review by the Supreme Court. The Commission has determined that your request for advice is not affected by *McConnell v. FEC* because the provisions of the Act underlying this advisory opinion are not challenged in that litigation.

Sincerely,

(signed)

Ellen L. Weintraub
Chair