FEDERAL ELECTION COMMISSION
Washington, DC 20463

May 18, 1983

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

ADVISORY OPINION 1983-11

J. Curtis Herge, Esq.
Sedam & Herge
8300 Greensboro Drive
McLean, Virginia 22102

Dear Mr. Herge:

This responds to your letter dated March 17, 1983, requesting an advisory opinion concerning application of 26 U.S.C. 9012(f) to your client, Fund For A Conservative Majority ("FCM"), a multicandidate political committee.

Your letter sets forth the following factual situation. FCM expects that President Reagan will be nominated in 1984 by the Republican Party for re-election to the office of President and has publicly announced its intention to make expenditures on behalf of President Reagan's re-election. For purposes of this request, FCM assumes that President Reagan will be certified by the Commission as eligible to receive, and will in fact receive, Federal funds in 1984 under the Presidential Election Campaign Fund Act ("the Fund Act"). FCM will not at any time be an authorized committee with respect to President Reagan.

According to the request, FCM proposes to make expenditures to further Mr. Reagan's re-election; such expenditures would be of the kind which, if made by President Reagan's authorized campaign committee, would constitute qualified campaign expenses of such committee. FCM proposes to make these expenditures in amounts exceeding $1,000 and throughout the United States, including the District of Columbia. In view of the foregoing factual representations, the Commission assumes that FCM's expenditures are proposed to be made at a date after President Reagan receives Federal funds in 1984 pursuant to the Fund Act. FCM also asks the Commission to assume that its expenditures on behalf of President Reagan's re-election would constitute "independent expenditures" as defined in 2 U.S.C. 431(17) and Commission regulations at 11 CFR 109.1.

The specific issue raised by your request is whether FCM's proposed expenditures, under the circumstances and assumptions set forth, are limited by 26 U.S.C. 9012(f)(1) to an aggregate amount not exceeding $1,000. The Commission concludes that the proposed expenditures are so limited by 26 U.S.C 9012(f)(1).

The cited 9012(f)(1) provides, in pertinent part:

> it shall be unlawful for any political committee which is not an authorized committee with respect to the eligible candidates of a political party for President and Vice President in a presidential election knowingly and willfully to incur expenditures to further the election of such candidates, which would constitute qualified campaign expenses if incurred by an authorized committee of such candidates, in an aggregate amount exceeding $1,000.

By its terms, the quoted provision limits FCM to $1,000 of expenditures that further the election of President Reagan, assuming he is an "eligible candidate" under the Fund Act when any such expenditure is incurred, and assuming further that the expenditure is of the kind that would constitute a "qualified campaign expense" if made by an authorized campaign committee of President Reagan. See, Federal Election Commission v. Americans For Change, 512 F.Supp. 489 (D.D.C. 1980), (three judge court), and the following discussion in this advisory opinion.

The terms "eligible candidate" and "qualified campaign expense" delineate the applicability of 9012(f)(1) in several respects. As defined in 26 U.S.C. 9002(4), an "eligible candidate" means the candidate of a political party for President (or Vice President) who has met all applicable conditions for eligibility to receive payments under the Fund Act. These conditions are specified in 26 U.S.C. 9003. With respect to a candidate nominated by a major political party, one of the significant eligibility conditions in 9003 is the occurrence of that candidate's nomination. See 26 U.S.C. 9003(b) and 9002(2)(A). The term "qualified campaign expense" is also used in 9012(f)(1) thereby indicating that to be the equivalent of a "qualified campaign expense" incurred by the authorized committee of an eligible presidential candidate, a 9012(f)(1) expenditure must be incurred within the expenditure report period.[1] It may, however, be made before that period if incurred for property, services, or facilities to be used during such period. 26 U.S.C. 9002(11)(B); see generally 26 U.S.C. 9002(11) which sets forth other requirements of a qualified campaign expense. Accordingly, the question of whether FCM's proposed expenditures are subject to the 9012(f) limit would be determined with reference to the above cited provisions of the Fund Act.

By reference to the decision Federal Election Commission v. Americans for Change, 512 F.Supp. 489 (D.D.C. 1980), (three-judge court), aff'd by an equally divided Court, 455 U.S. 129 (1982), this advisory opinion request appears to suggest that the district court's decision vitiates the continuing "applicability and effect of 26 U.S.C. 9012(f)(1) to the factual situation" presented in the request. The cited district court decision found that 9012(f) prohibited certain expenditures

[1] The expenditure report period for a major party candidate begins on the date of the candidate's nomination by a major party if that date is before September 1 of the presidential election year. The period ends 30 days after the November general election. See 26 U.S.C. 9002(12)(A).

made by various unauthorized political committees in 1980 on behalf of the election of then presidential candidate Ronald Reagan; the court then held, however, that 9012(f) was unconstitutional. On January 19, 1982, the Supreme Court affirmed the judgment of the district court by an equally divided Court, Justice O'Connor not participating.

While the Court's decision effectively concludes the civil litigation in FEC v. AFC, supra, the equally divided nature of the Court's affirmance leaves the issue of the constitutionality of 9012(f) still unresolved. Moreover, since the Court's affirmance of the decision below was by an equally divided Court, it has no precedential effect. The operative principle is that "nothing is settled" by such a 4-4 split, Ohio ex rel. Eaton v. Price, 364 U.S. 263, 264 (1960).[2] Such an affirmance does not indicate any approval of the reasoning of the court below, nor does it even stand for the proposition that the result reached below was correct. See, Trans World Airlines v. Hardison, 432 U.S. 63, 73 n.8 (1977); Neil v. Biggers, 409 U.S.188 (1972). The Court has long held that "the principle of law involved not having been agreed upon by a majority of the court sitting prevents the case from becoming an authority for the determination of other cases, either in this or in inferior courts." Hertz v. Woodman, 218 U.S. 205, 213-14 (1910).

Given the law regarding the nature of equally divided Supreme Court affirmances and the foregoing statutory analysis, the Commission concludes that FCM's proposed expenditures would be subject to the $1,000 limitation of 26 U.S.C. 9012(f)(1).

This response constitutes an advisory opinion concerning 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 yours,

(signed)

Danny L. McDonald
Chairman for the
Federal Election Commission

Note: Commissioner Aikens voted against approval of this opinion and has indicated that she will file a dissenting opinion at a later date. Commissioner Elliott voted to approve this opinion but has indicated that she will file a separate concurring opinion at a later date. Both of these individual opinions will be forwarded to you when they are submitted.

[2] Id. at 263-64, where Justice Brennan wrote: "The judgment of the Ohio Supreme Court in this case is being affirmed ex necessitate, by an equally divided Court. Four of the Justices participating are of opinion that the judgment should be affirmed, while we four think it should be reversed. Accordingly, the judgment is without force as precedent." See also United States v. Pink, 315 U.S. 203, 216 (1942).