



FEDERAL ELECTION COMMISSION  
Washington, DC 20463

January 24, 1986

CERTIFIED MAIL,  
RETURN RECEIPT REQUESTED

ADVISORY OPINION 1985-40

James M. Cannon, Vice Chairman  
Republican Majority Fund  
227 Massachusetts Ave., N.E., Suite 220  
Washington, D.C. 20002

Dear Mr. Cannon:

This responds to your letter of November 25, 1985, requesting an advisory opinion on behalf of the Republican Majority Fund ("RMF") and the testing-the-waters fund ("the Fund") established by former U.S. Senator Howard H. Baker, Jr., concerning application of the Federal Election campaign Act of 1971, as amended ("the Act"), and Commission regulations. The request poses several questions with respect to the financing of certain activities relating to Mr. Baker's determination whether to become a candidate for the 1988 Republican Party presidential nomination.

You present several questions regarding certain planned activities (to take place before November 4, 1986) and expenses of both the Fund and RMF. You have also presented additional sets of facts with respect to each of these questions. Thus, this opinion reviews these additional factual settings and responds to each setting's related question or questions by including a reference to the numbered paragraph in which such facts and questions are presented in your request. This opinion responds to the specific questions raised based upon the specific facts presented and is not intended to affect other individuals or political committees unless their activities are indistinguishable in all material aspects from the transactions or activities found in this advisory opinion. See 2 U.S.C. 437f(c)(1)(B).

You state that the Republican Majority Fund ("RMF") is a multicandidate political committee registered with the Commission. You add that since its inception in 1980, RMF has been "closely identified" with Mr. Baker. For instance, Mr. Baker has hosted RMF fundraising events, has signed direct mail fundraising solicitations for RMF, and has been featured in RMF newsletters

to contributors. You state that RMF has been one of the ten largest contributors to Federal candidates among nonconnected political committees.

You state further that Mr. Baker has recently approved the receipt and expenditure of a limited amount of funds pursuant to 11 CFR 100.7(b)(1) and 100.8(b)(1) solely for the purpose of determining whether he should become a candidate for the 1988 Republican Party presidential nomination. You refer to this account as the "testing-the-waters fund" ("the Fund"). You state that Mr. Baker has not made a decision to become a candidate for Federal office, but that he is presently determining whether to become a candidate for the 1988 Republican presidential nomination. You add that Mr. Baker does not expect to make a decision whether to seek this nomination until after the November 1986 Federal elections. Accordingly, you explain that Mr. Baker wishes to avoid taking any action at this time, or have any action taken by the testing-the-waters fund, that will cause him to become a candidate under the Act before November 4, 1986. You also explain that the Fund wishes to avoid taking any action at this time that will require it to register as a political committee under the Act.

The Act provides that an individual becomes a candidate if such individual, or a person authorized by such individual, has received contributions aggregating in excess of \$5,000 or has made expenditures aggregating in excess of \$5,000. 2 U.S.C. 431(2); 11 CFR 100.3. Within 15 days of becoming a candidate, an individual must designate a principal campaign committee. 2 U.S.C. 432(e)(1); 11 CFR 101.1(a) and 102.12(a). Within 10 days of such designation, the principal campaign committee must file its Statement of Organization with the Commission. 2 U.S.C. 433(a); 11 CFR 102.1(a). A candidate may designate additional authorized committees, which must also register with the Commission. 2 U.S.C. 432(e)(1) and 433(a); 11 CFR 101.1(b), 102.1(b), and 102.13(a).<sup>1</sup> The Act further provides that a principal campaign committee, including any authorized committees, must file periodic reports and disclose their receipts and disbursements. 2 U.S.C. 434(a)(3) and 434(b); 11 CFR 104.3, and 104.5(b).<sup>2</sup>

The Act, however, prohibits a candidate from designating a multicandidate political committee, including one with which the candidate has been "closely identified," as either the candidate's principal campaign committee or as an authorized committee. 2 U.S.C. 432(e)(3); 11 CFR 102.12(c) and 102.13(c). The Act does permit a multicandidate political committee to make contributions to a candidate or his or her authorized committees that in the aggregate do not exceed \$5,000 with respect to any election for Federal office. 2 U.S.C. 441a(a)(2)(A) and 441a(a)(6); 11 CFR 110.2(a)(1) and (d)(1). This limitation applies to in-kind as well as direct contributions. 2 U.S.C. 431(8)(A)(i); 11 CFR 100.7(a)(1)(iii) and 100.8(a)(1)(iv).

## I. Testing-the-Waters Fund

### A. Application of Prohibitions and Limitations

In the paragraph numbered 1 in your request, you ask whether RMF expenditures that constitute in-kind gifts of a thing of value to Mr. Baker's testing-the-waters fund are subject to the \$5,000 limitation of 2 U.S.C. 441a(a)(2)(A) at the time such expenditures are made.<sup>3</sup>

Commission regulations permit an individual to both (1) receive funds and (2) make payments, if done solely for the purpose of determining whether he or she should become a candidate, without

such funds received or payments made being aggregated for purposes of the \$5,000 threshold for candidacy status under the Act.<sup>4</sup> Thus, funds received and payments made, solely for determining whether an individual should become a candidate, need not be reported at the time they are received or made. Nevertheless, once the individual becomes a candidate, these funds received and payments made must be reported, as contributions and expenditures under the Act, in the first report filed by the candidate's principal campaign committee. 50 Fed. Reg. 9992, 9994-5 (1985) (to be codified at 11 CFR 100.7(b)(1)(i), 100.8(b)(1)(i), and 101.3).

These provisions for testing-the-waters activity, however, do not apply to funds received or payments made for "activity indicating that an individual has decided to become a candidate for a particular office or for activities relevant to conducting a campaign." *Id.* Funds received or payments made for such campaign activity are aggregated for purposes of the candidacy and political committee thresholds and for the Act's contribution limitations and may trigger the Act's registration and reporting requirements. *Id.* at 9992-3.

Commission regulations further require that "[o]nly funds permissible under the Act may be used for such activities."<sup>5</sup> Thus, this regulation applies the prohibitions and limitations of the Act to the "funds received" and "Payments made" for the purpose of determining whether an individual should become a candidate under the Act. 50 Fed. Reg. at 9993-4; see also 50 Fed. Reg. 25698-9 (1985). Furthermore, the Commission has previously determined that such "funds received" and "payments made" include in-kind gifts of anything of value. Advisory Opinion 1981-32. Also, the above provisions apply whether the funds are received or the payments are made on behalf of the individual or his or her testing-the-waters fund or exploratory committee. 2 U.S.C. 432(e)(2); 11 CFR 101.2(b). For purposes of the Act's limitations, funds received from any committee, whether in-kind or direct, for an individual's testing-the-waters activities are aggregated with any contributions from the same committee to such individual as a candidate (or to his or her authorized committees). 2 U.S.C. 441a(a)(6); cf., Advisory Opinion 1982-39.

Accordingly, RMF expenditures that constitute in-kind gifts of a thing of value to Mr. Baker's Fund will be subject to the aggregate \$5,000 limitation of 2 U.S.C. 441a(a)(2)(A). Furthermore, pursuant to commission regulations, this limitation will apply at the time RMF makes any in-kind gifts to Mr. Baker's testing-the-waters fund.

#### B. Precandidacy Fundraising

In the paragraph numbered 10 in your request, you present additional facts and a related question regarding fundraising by Mr. Baker's testing-the-waters fund.

You state that the funds received by the testing-the-waters fund have so far come from private solicitations of Mr. Baker's associates and acquaintances. The Fund now plans to raise additional funds through direct mail solicitations addressed solely to previous contributors to Mr. Baker's prior campaigns or to contributors to RMF. The Fund plans an initial mailing to 1,500 such contributors with possible subsequent mailings addressed to an aggregate of as many as 10,000 such contributors. All solicitations will state that Mr. Baker has not decided whether to become a candidate for the 1988 Republican presidential nomination and that all funds received will be

used solely for his testing-the-waters activities without advocating the election or defeat of any candidate for Federal office.

You add that the testing-the-waters fund will reimburse the list owners for its use of these contributor lists. The Fund will not receive funds from the solicited contributors in amounts that will constitute "amassing campaign funds." You add that the Fund will also comply with the recordkeeping requirements of the Act regarding the funds received.

You ask whether such fundraising activity and its associated contributions and expenditures constitute testing-the-waters activity.

Commission regulations explain that testing-the-waters activities do not include activities that indicate an individual has decided to become a candidate. Examples of such activities include: (1) raising funds in excess of what could reasonably be expected to be used for exploratory activities or undertaking activities designed to amass campaign funds that will be spent after he or she becomes a candidate; (2) using general public political advertising to publicize his or her intention to campaign for Federal office; and (3) making or authorizing written or oral statements that refer to him or her as a candidate for a particular office. 50 Fed. Reg. at 9994 (to be codified at 11 CFR 100.7(b)(1)(ii)). Funds received or payments made for such campaign activity will be aggregable for the purposes of the thresholds for candidacy and political committee status and will trigger the Act's registration and reporting requirements. *Id.* at 9992-3. Customarily, candidate direct mail solicitations are considered general political advertising and do not qualify as testing-the-waters activity. See 11 CFR 100.7(b)(16) and 100.8(b)(17).

Nevertheless, the Commission concludes that the Fund's proposed direct mail solicitations will qualify as testing-the-waters activities rather than campaign activity because (1) you indicate that the solicitations will clearly state that Mr. Baker has not yet determined whether he will seek the 1988 Republican presidential nomination; (2) you state the funds raised will be used for the purpose of Mr. Baker's testing-the-waters activities; and (3) the solicitations will not result in amassing campaign funds for Mr. Baker's use if he should become a candidate.

If the Fund reimburses the owners of any mailing lists it uses at the usual and normal charge for their lists, no in-kind gift of a thing of value from the list owners to the Fund will occur. If, however, the Fund does not reimburse the list owners (or reimburses them at less than the usual and normal charge for the lists), an in-kind gift of a thing of value from the list owners to the Fund will occur. See, 11 CFR 100.7(a)(1)(iii) and 110.10; Advisory Opinion 1981-46; see also, 26 U.S.C. 9035(a); 11 CFR 9035.2.

### C. Candidacy Reporting and Allocation

In the paragraph numbered 11 in your request, you present three questions concerning RMF expenditures with respect to their reporting and allocation by Mr. Baker if he should become a candidate for the 1988 Republican presidential nomination.

#### 1. Testing-the-Waters Receipts and Expenditures

You first ask whether any RMF expenditures that are in-kind gifts to Mr. Baker's testing-the-waters fund (and thus are not in-kind contributions to Mr. Baker) will nevertheless become reportable and allocable, as contributions and expenditures, by Mr. Baker at the time he may become a candidate.

Commission regulations require that an individual (or an agent) keep records, in the form described in 11 CFR 102.9(a), of all funds and payments, including in-kind gifts, that are received or made solely for the purpose of determining whether to become a candidate and (if he or she should become a candidate) to report them as contributions and expenditures in the first report filed by his or her principal campaign committee. 50 Fed. Reg. at 9995 (to be codified at 11 CFR 101.3).

Commission regulations further provide that if an individual qualifies for presidential primary matching payments, any payments for the purpose of determining whether an individual should become a candidate that are incurred prior to the date he or she becomes a candidate shall be considered qualified campaign expenses and subject to the candidate's limits under 2 U.S.C. 441a(b). 11 CFR 9032.9(c) and 9034.4(a)(2). In-kind contributions to a candidate are, of course, reportable by the candidate as both a contribution and as an expenditure. 11 CFR 104.13(a). Thus, if an individual becomes a candidate, any in-kind gift of a thing of value to that individual for the purpose of determining whether he or she should become a candidate will become reportable as both a contribution and an expenditure. Furthermore, Commission regulations provide that testing-the-waters payments are allocable with respect to the state limitations of 2 U.S.C. 441a(b) in the same manner as other qualified campaign expenses. 11 CFR 106.2(a)(2).

Accordingly, if Mr. Baker becomes a candidate for the 1988 Republican presidential nomination, any RMF expenditures prior to the date of such candidacy for activities to determine whether Mr. Baker should become a candidate will be reportable as both contributions and expenditures by Mr. Baker's principal campaign committee in its first report filed with the commission.<sup>6</sup> Furthermore, if Mr. Baker qualifies for presidential primary matching payments, such RMF expenditures will be reportable and allocable as qualified campaign expenses with respect to the candidate's limits under 2 U.S.C. 441a(b). This allocation will relate to both the overall expenditure limits and the state expenditure limits.

## 2. Timing of Activities and Expenditures

You next ask whether the characterization of RMF expenditures as testing-the-waters activity or as campaign activity will depend on whether such transactions will have occurred prior to or after the date Mr. Baker may become a candidate under the Act.

The testing-the-waters provisions apply only during the period in which an individual is determining whether to become a candidate. Once an individual becomes a candidate under the Act, he or she may no longer avail himself or herself of these provisions. See 50 Fed. Reg. at 9993. Instead, the candidate's principal campaign committee must report all contributions and expenditures, including all in-kind gifts of anything of value, in the report covering the period in which such contributions are received or such expenditures are made. See 11 CFR 104.5(b) and 104.13(a).

Thus, RMF expenditures for those activities described in this request, if made after the date on which Mr. Baker may become a candidate, will constitute in-kind contributions to Mr. Baker and will be reportable and allocable as such. The conclusion applies whether or not such expenditures are for transactions or activities which, if they occur prior to the date of Mr. Baker's candidacy, will have otherwise constituted testing-the-waters activities.

### 3. Party-Building Presumption

You further ask whether the party-building presumption of 11 CFR 110.8(e)(1) will apply to RMF expenditures for Mr. Baker's appearances at certain party events and for RMF's steering committees in certain states.

Commission regulations provide that a political party may under certain circumstances reimburse a candidate who is engaging in party-building activities without such reimbursement being considered a contribution to the candidate or an expenditure by the candidate subject to the limitations of 2 U.S.C. 441a(b). 11 CFR 110.8(e).

This provision applies only to reimbursements by a "political party." You do not describe RMF as a political party. See 2 U.S.C. 431(16); 11 CFR 100.15. Thus, once Mr. Baker becomes a candidate, RMF payments for Mr. Baker's appearances at these party-building events will constitute contributions to Mr. Baker and expenditures by him. Prior to Mr. Baker's becoming a candidate, RMF expenditures to defray Mr. Baker's travel costs to party-building events that meet the requirements of 11 CFR 110.8(e) and where Mr. Baker does not engage in any testing-the-waters activities will not constitute an in-kind gift to the Fund or an in-kind contribution to Mr. Baker. See also Section II (B)(3) of this opinion.

## II. RMF Expenditures

### A. Public Appearances

In your request, you also present three sets of additional facts and related questions regarding expenditures by RMF for public appearances by Mr. Baker or by persons on his behalf.

#### 1. Travel Costs

In the paragraph numbered 2 in your request, you state that Mr. Baker has been invited to attend and address state and regional Republican Party meetings and conferences in conjunction with appearances by other reported potential contenders for the 1988 Republican presidential nomination. You describe these events as "cattle shows" and explain that they will be attended by party officials, party activists, elected officeholders, political consultants, and the press. You add that Mr. Baker's remarks at such events will indicate his potential interest in, and his ongoing consideration of whether to seek, the 1988 Republican presidential nomination.

You ask whether RMF expenditures to defray Mr. Baker's travel costs associated with his appearances at such events will constitute in-kind gifts to his testing-the-waters fund.

The purpose for Mr. Baker's travel to these party events includes activities undertaken to determine whether he should become a candidate for the 1988 Republican presidential nomination. For instance, his public remarks at such meetings will refer to his potential candidacy. Thus, the Commission concludes that travel for appearances at these party events will constitute testing-the-waters activity so long as Mr. Baker's activities at such events do not indicate that he has decided to become a candidate for the 1988 Republican presidential nomination or is conducting a campaign for such nomination. See 50 Fed. Reg. at 9994-5 (to be codified at 11 CFR 100.7(b)(1) and 100.8(b)(1)).

Accordingly, RMF expenditures to defray the travel costs for such appearances will constitute in-kind gifts of a thing of value to Mr. Baker's Fund.

## 2. Hospitality Suites

In the paragraph numbered 3 in your request, you state that in conjunction with Mr. Baker's appearances at these party events, RMF proposes hosting a hospitality suite or a reception in Mr. Baker's honor to which all party dignitaries and press representatives attending the event will be invited. You add that the remarks and context associated with such suites or receptions will acknowledge and reflect Mr. Baker's ongoing consideration of becoming a candidate for the 1988 Republican presidential nomination.

You ask whether RMF expenditures to host such a hospitality suite or reception will constitute in-kind gifts to Mr. Baker's Fund.

The use and purpose of these suites or receptions include activities undertaken to determine whether Mr. Baker should become a candidate for the 1988 Republican presidential nomination. Thus, the Commission concludes that such hospitality suites and receptions will constitute testing-the-waters activity so long as Mr. Baker does not indicate that he has decided to become a candidate and does not conduct any campaign activity for such nomination. Cf., Advisory Opinion 1978-22.

Accordingly, RMF expenditures to host such suites or receptions will be in-kind gifts to the Fund.

## 3. Baker Associates and Representatives

In the paragraph numbered 4 in your request, you state that political associates of Mr. Baker, such as U.S. Senators, Governors, and other recognized Republican Party figures may attend such party events or RMF receptions as Mr. Baker's authorized representatives. You add that they will be expected to express their support of Mr. Baker's potential candidacy and, in private meetings, encourage individuals attending these events to support Mr. Baker, if he should become a candidate.

You ask whether RMF expenditures to defray the travel costs for such representatives to attend these events will constitute in-kind gifts to Mr. Baker's Fund.

Based on your representation, the Commission assumes that these associates and representatives will not be engaging in activities that will indicate Mr. Baker has decided to become a candidate for the 1988 Republican presidential nomination or that will constitute conducting a campaign for such nomination. See 50 Fed. Reg. at 9993. Instead, the Commission assumes that their activities will be limited to determining whether Mr. Baker should become a candidate. Thus, the Commission concludes that RMF's use of representatives of Mr. Baker in such a limited manner will qualify as testing-the-waters activity.

Accordingly, RMF expenditures to defray the travel costs for such representatives in connection with these party events will constitute in-kind gifts to the Fund.

## B. Private Meetings

You also present three questions regarding Mr. Baker's travel for private meetings.

### 1. Travel Costs

In the paragraph numbered 6 in your request, you state that as part of Mr. Baker's testing-the-waters activities, he plans to travel to early primary and convention states to meet privately with Republican Party leaders to seek their views on whether he should seek the 1988 Republican presidential nomination.

You ask whether RMF expenditures to defray such travel costs will constitute in-kind gifts to Mr. Baker's Fund.

Mr. Baker will be undertaking travel for these private meetings to determine whether he should become a candidate. Thus, the Commission concludes that travel for such private meetings will constitute testing-the-waters activity. Accordingly, RMF expenditures to defray these travel costs will be in-kind gifts to the Fund.

### 2. With Federal Candidate Appearances

You next ask how RMF expenditures will be treated if Mr. Baker's travel for such private meetings is in conjunction with his appearances on behalf of candidates for Federal office in the 1986 election cycle.

Commission regulations provide that "[e]xpenditures...made on behalf of more than one candidate shall be attributed to each candidate in proportion to, and shall be reported to reflect, the benefit reasonably expected to be derived." 11 CFR 106.1(a). Authorized expenditures by a political committee on behalf of a candidate are reported as an in-kind contribution to the candidate on whose behalf the expenditure is made. 11 CFR 106.1(b).

RMF expenditures to defray travel costs for Mr. Baker's appearance on behalf of a Federal candidate will constitute an in-kind contribution to such candidate. Furthermore, where Mr. Baker's travel for such an appearance includes private meetings related to his testing-the-waters



activities, RMF expenditures to defray these travel costs will also constitute an in-kind gift to Mr. Baker's Fund. Although Mr. Baker may not be a candidate under the Act at the time he conducts such private meetings, RMF expenditures for travel related to such meetings will become reportable as in-kind contributions if Mr. Baker should become a candidate.

Therefore, the Commission concludes that RMF should use the allocation provision of 11 CFR 106.1(a) as the appropriate guideline for the treatment of its expenditures to defray Mr. Baker's travel costs when he holds private meetings related to his testing-the-waters activities in conjunction with his appearances on behalf of Federal candidates in the 1986 elections.

### 3. With State and Local Party-Building Appearances

You also ask how RMF expenditures will be treated if Mr. Baker's travel for such private meetings is in conjunction with party-building appearances, on behalf of state and local party committees, made by Mr. Baker and funded by RMF.<sup>7</sup>

Commission regulations provide guidelines for allocating travel costs where a trip includes both campaign and non-campaign activity either by presidential candidates who receive Federal funds pursuant to 11 CFR 9036 or by all other candidates. Compare 11 CFR 106.3 with 11 CFR 9034.7. Since the funds received and payments made by Mr. Baker's testing-the-waters fund will become reportable as contributions and expenditures if he should become a candidate, the Commission concludes that RMF should use whichever of these provisions is the appropriate one as the guideline for the treatment of Mr. Baker's travel costs where he holds private meetings relating to his testing-the-waters activities in conjunction with his appearances at state and local party-building events.<sup>8</sup>

### C. Steering Committees

In the paragraph numbered 5 in your request, you state that Mr. Baker's political associates and representatives are proposing to organize RMF steering committees in certain states, such as Iowa and New Hampshire, which will hold early caucuses and primaries in connection with the 1988 Republican presidential nomination. The members of such committees will number between 25 and 100 in each state and will be requested to (1) advise and consult with RMF regarding its contributions to candidates for Federal, state, and local offices in such states; (2) encourage Mr. Baker to seek the 1988 Republican presidential nomination; and (3) remain uncommitted to any other potential candidate for such nomination until Mr. Baker decides whether to become a candidate. You further state that in certain instances such steering committee members will be requested to join the committee with the understanding that it will become the official campaign organization supporting Mr. Baker in that state if he should become a candidate.<sup>9</sup>

You pose three questions:

(1) Will RMF expenditures associated with organizing such steering committees, including travel expenses and employing a staff of organizers, constitute either in-kind contributions to Mr. Baker or in-kind gifts to his Fund?

(2) If such expenditures exceed \$5,000 will Mr. Baker be deemed a candidate under the Act for the 1988 Republican presidential nomination?

(3) If the Fund finances the costs associated with these steering committees and expends more than \$5,000, will the Fund be required to register and report as a political committee under the Act?

The Commission notes your statement that Mr. Baker does not wish to take any action, or have any action taken on his behalf, at this time that will cause him to become a candidate under the Act. With regard to your proposed steering committee activity, the question arises whether it may constitute activity relevant to conducting a campaign or activity indicating Mr. Baker has decided to become a candidate rather than testing-the-waters activity. 50 Fed. Reg. at 9992-3; Advisory Opinions 1982-19 and 1981-32.

The Commission concludes that the proposed setting up of RMF steering committees, as described in the advisory opinion request, will assist Mr. Baker's testing-the-waters activities, and will not be "activities relevant to conducting a campaign." However, the described "understanding" by some committee members that the steering committees will become Mr. Baker's campaign organization if he becomes a candidate runs the risk of falling outside the exemption for testing-the-waters activity if the steering committees engage in activities on behalf of a Baker candidacy or if a campaign organization is actually established. As such, the setting up of these RMF steering committees will constitute in-kind support for Mr. Baker's testing-the-waters activities, and will be subject to the \$5,000 limit.

Accordingly, Mr. Baker will not become a candidate if such expenditures are made by the Fund nor will the Fund become a political committee by making such expenditures.

#### D. Administrative Expenses

In the paragraph numbered 7 in your request, you state that RMF employees and consultants will become involved on a more than incidental basis during business hours in coordinating, participating in, and facilitating the activities related to the public appearances by Mr. Baker or by persons on his behalf, his private meetings, and RMF steering committees.

You ask whether the salaries, consulting fees, administrative expenses, and overhead costs associated with such activities, incurred by RMF, will constitute either in-kind contributions to Mr. Baker or in-kind gifts to the Fund.

Commission regulations provide that "[e]xpenditures for rent, personnel, overhead, general administrative, fund-raising, and other day-to-day costs of political committees need not be attributed to individual candidates, unless these expenditures are made on behalf of a clearly identified candidate and the expenditure can be directly attributed to that candidate." 11 CFR 106.1(c); see also, 11 CFR 100.7(a)(3).

Although Mr. Baker may not be a candidate at the time RMF will make expenditures associated with Mr. Baker's activities, he will be clearly identified as the person on whose behalf such expenditures are made and to whom such expenditures are attributable. See 11 CFR 106.1(d). Furthermore, RMF expenditures for these activities will constitute either in-kind contributions to Mr. Baker as a candidate or in-kind gifts to Mr. Baker's testing-the-waters fund, which will become reportable as contributions and expenditures if he should become a candidate. Thus, the Commission concludes that the provisions of 11 CFR 106.1(c) provide the appropriate guidelines for these other related expenses.

Accordingly, the salaries, fees, and administrative and overhead expenses attributable to RMF activities on behalf of Mr. Baker should be treated in the same manner as the other expenditures for the activities to which they are related and attributable. For instance, this opinion concludes that Mr. Baker's private meetings with Republican Party leaders to seek their views on whether he should become a candidate will be testing-the-waters activity. Thus, RMF expenditures to defray Mr. Baker's travel costs solely for such meetings will constitute in-kind gifts to his Fund. Similarly, RMF salaries, fees, administrative and overhead expenses attributable to RMF activities related to such meetings and travel will also constitute in-kind gifts to the Fund.

#### E. Newsletters and Solicitations

You present two sets of additional facts and related questions regarding statements that will be made in RMF's newsletters and fundraising solicitations with respect to Mr. Baker's determination whether to seek the 1988 Republican presidential nomination.

In the paragraph numbered 8 in your request, you state that RMF publishes a quarterly newsletter that is distributed to approximately 42,000 of its contributors and a selected list of 3,000 Republican Party officials and activists.<sup>10</sup> You add that RMF periodically solicits contributions to RMF from its contributor list of 42,000 names. It is also considering soliciting contributions from direct mail prospects, at 5,000 addressees per mailing, none of whom have previously contributed to RMF or Mr. Baker.

You ask first whether brief references in such newsletters or solicitations to Mr. Baker's potential interest in the 1988 Republican presidential nomination or to the existence of his testing-the-waters fund will constitute an in-kind contribution to Mr. Baker or an in-kind gift to his Fund.

The content of the brief references in these communications, as you describe them, will refer only to Mr. Baker's potential candidacy and will not indicate he has decided to become a candidate for the 1988 Republican presidential nomination. These references are nevertheless a gift of a thing of value to Mr. Baker's testing-the-waters efforts. Accordingly, the Commission concludes that RMF expenditures allocable to these references will constitute in-kind gifts to the Fund.

You further state, in paragraph numbered 9 in your request, that RMF believes its fundraising solicitations will be considerably enhanced if it can (1) represent to such potential contributors that their contributions to RMF will "promote" Mr. Baker's potential candidacy for the 1988 Republican presidential nomination; (2) provide recipients of such mailings with copies of news

clippings favorable to Mr. Baker; and (3) represent that such contributors will, as a result of their contribution to RMF, be viewed as early supporters of Mr. Baker's possible candidacy.

You ask whether such written or oral representations by RMF to such potential direct mail contributors will constitute either in-kind contributions to Mr. Baker or in-kind gifts to his testing-the-waters fund.

These additional statements and materials, as you describe them, will be more than brief references to Mr. Baker's potential candidacy. Nevertheless, as you describe these references, they will not suffice as activities indicating that Mr. Baker has decided to become a candidate for the 1988 Republican presidential nomination. Thus, these solicitations will be permissible testing-the-waters activity. Accordingly, the Commission concludes that RMF expenditures allocable to these communications will constitute in-kind gifts to the Fund.

However, it is difficult from the facts presented to determine whether or not any one solicitation would be candidate related since you have not submitted samples of your proposed solicitations. Therefore, the Commission's conclusion should not be interpreted as a determination regarding any specific solicitation.

This response constitutes an advisory opinion concerning application of the Act, or regulations prescribed by the Commission, to the specific transactions or activities set forth in your request. See 2 U.S.C. 437f.

Sincerely yours,

(signed)

Joan D. Aikens  
Chairman for the Federal Election Commission

Enclosures (AOs 1983-9, 1982-39, 1982-19, 1981-46, 1981-32, and 1978-22).

Commissioner Harris voted against approval of this opinion and will file a dissenting opinion at a later date.

1. The Act also defines a political committee as any group of persons that receives contributions aggregating in excess of \$1,000 during a calendar year or makes expenditures aggregating in excess of \$1,000 in a calendar year. 2 U.S.C. 431(4); 11 CFR 100.5(a).

2. The Act and Commission regulations define principal campaign committee to include a candidate's authorized committees. 2 U.S.C. 431(5); 11 CFR 100.5(e)(1).

3. This opinion uses term "in-kind gifts to Mr. Baker's Fund" to refer to RMF expenditures on behalf of Mr. Baker for his testing-the-waters activity. The opinion uses the term "in-kind contributions to Mr. Baker" to refer to RMF expenditures on behalf of Mr. Baker for campaign activity that must be aggregated by Mr. Baker for purposes of determining his candidacy status.

4. Such funds and payments are also not aggregated for purposes of the \$1,000 threshold for political committee status under the Act.

5. Prior to July 1, 1985, the Commission had permitted an individual, who had not become a candidate under the Act, to receive funds from sources prohibited by the Act or funds in excess of the Act's limitations, prior to becoming a candidate under the Act, if such funds were used solely to determine whether the individual should become a candidate. The Commission did, however, require an individual to refund any contributions not in compliance with the Act within 10 days of becoming a candidate under the Act. See Advisory opinions 1983-9 and 1982-19. These opinions, however, were overruled in this regard with the revision of the Commission's testing-the-waters regulations, effective July 1, 1985. See 50 Fed. Reg. at 9993-4, 25698-9 (1985).

6. Accordingly, RMF should report its expenditures on behalf of Mr. Baker's testing-the-waters activities in the same manner as in-kind contributions. See 11 CFR 104.3(b)(3) and 104.9. The purpose of such expenditures should be described as for testing- the-waters activity on behalf of Howard H. Baker, Jr.

7. You refer to 11 CFR 110.8(e)(1) in your question. As explained above, this provision does not apply to reimbursements or expenditures by a multicandidate political committee, such as RMF. Your reference to this provision does, however, indicate that you are referring to the type of party-building events described in 11 CFR 110.8(e).

8. Generally, the entire cost of this travel will constitute an in-kind contribution to Mr. Baker's Fund unless such private meetings include only incidental contacts. See 11 CFR 106.3(b)(3) and 11 CFR 9034.7(b)(2).

9. But see 2 U.S.C. 432(e)(3); 11 CFR 102.12(c) and 102.13(c).

10. Under the Act and Commission regulations, the "news story" exemption to the definition of "contribution" and "expenditure" does not include any news story, commentary, or editorial distributed through facilities owned or, controlled by any political committee. 2 U.S.C. 431(9)(B)(i); 11 CFR 100.7(b)(2) and 100.8(b)(2). Thus, it does not apply to RMF's communications.