



FEDERAL ELECTION COMMISSION
Washington, DC 20463

March 7, 1988

CERTIFIED MAIL,
RETURN RECEIPT REQUESTED

ADVISORY OPINION 1988-1

Rand Hoch
Kaplan Sicking & Bloom, P.A.
Suite 200
Forum 111
1675 Palm Beach Lakes Blvd.
West Palm Beach, Florida 33401

Dear Mr. Hoch:

This responds to your letter of December 23, 1987 and your supplements of January 12 and February 4, 1988 requesting an advisory opinion concerning the application of the Federal Election Campaign Act of 1971, as amended ("the Act"), and Commission regulations to your proposed candidacy for delegate to the Democratic National Convention.

Your request indicates that you plan to seek selection as a delegate pledged to Michael Dukakis from the State of Florida. In Florida, a presidential preference primary will be held on March 8, 1988. Democratic presidential candidates who receive more than 15% of the vote in any congressional district will be entitled to at least one delegate from that district. The delegates are actually selected at congressional district caucuses held on March 26, 1988. Attendees at the caucuses will be those who have qualified as candidates for delegate and registered Democratic voters who will vote to select the national convention delegates from that district. The sole purpose of the Congressional District caucuses will be the selection of delegates to the national convention.

You state that you are currently serving as an unpaid "coordinator" for the Dukakis campaign in the 12th and 14th Congressional Districts of Florida, and that you also act as the campaign's liaison with organized labor. You report directly to a member of the paid campaign staff and have another paid staff member who reports in part directly to you. Your request further states that you plan to direct and organize the campaign activities of the delegate committees in these

two congressional districts, one of which is the district you are seeking to represent as a Dukakis delegate at the Democratic National Convention.

You indicate that the delegate committee activities, including fundraising, would not begin until after the March 8 preferential primary. You plan to engage in a variety of activities during this time. These include phone banks, direct mail and palm cards to be handed out at the congressional district caucuses. All of these communications will make reference to Governor Dukakis. The phone banks will be staffed by volunteers and will use only lists generated by yourself, the Dukakis campaign and the state party. No commercial lists will be used. The phone calls will identify likely caucus attendees, who will then receive follow-up letters as the direct mail component of the activity. You also state that you would like to use a portion of the funds raised to defray your costs for travel and subsistence while attending the convention if you are selected as a delegate.

Finally, you indicate that, in addition to your own efforts in directing and organizing the Dukakis delegate activities in these two congressional districts, paid campaign staff members may remain in Florida to supervise the delegate selection process or to help with the selection of Dukakis delegates. The Dukakis campaign may also provide the delegate committees with lists of contributors or arrange that contributions be made to the committees, may provide "ongoing administrative support" to the committees, and may file statements or reports on behalf of the delegate committees.

Your request presents the following questions for Commission consideration:

- (1) Whether the delegate selection rules at 11 CFR 110.14 apply to prospective delegates and committees formed to support a group of delegates in the Florida Democratic Congressional District caucuses?
- (2) Must advertising or communications by delegates include a disclaimer notice?
- (3) Can a prospective delegate use literature supplied by a Presidential candidate to advocate the individual's own campaign for delegate?
- (4) Would a delegate committee formed by the requestor be considered to be affiliated with the campaign of the presidential candidate he supports?
- (5) Whether a contribution results if various organizations, including state and federal political action committees, unions, and non-profit organizations, provide their membership lists at no cost to the requestor's campaign for delegate?

In response to question 1, the Commission notes that its delegate selection regulations at 11 CFR 110.14* apply to the activities of delegates to national nominating conventions and those who seek to become national nominating convention delegates. See Advisory Opinions 1986-6 and 1980-5. As the Florida Congressional District caucuses are held for the purpose of directly selecting delegates to the Democratic National Convention, the activities of prospective delegates in those caucuses are clearly covered by the regulations.

Under the delegate selection regulations, a group of persons that forms a delegate committee becomes a political committee subject to the Act's registration and reporting requirements if it receives contributions or makes expenditures that aggregate in excess of \$1000 during a calendar year. In addition, contributions received by a delegate committee may not exceed \$5000 per contributor in a calendar year. See 11 CFR 110.14(g). Thus, any delegate committees formed by individuals seeking to be chosen as delegates at the Florida caucuses will be subject to the contribution limits and may incur registration and reporting obligations. By contrast, individuals who seek to become delegates, but do not form delegate committees, are not required to report contributions received for the purpose of furthering their selection. 11 CFR 110.14(d)(3). Depending on the type of individual delegate activity, reporting requirements, contribution prohibitions and limits, as well as presidential expenditure limits, may apply. See 11 CFR 110.14(c)(1), (c)(2), (d)(1), (d)(2), (f)(2), (f)(3).

With respect to question 2, the Act and Commission regulations provide, *inter alia*, that all communications that expressly advocate the election or defeat of a clearly identified candidate through a form of general public political advertising are required to include a disclaimer notice reflecting who paid for the communication and whether it was authorized by the candidate. 2 U.S.C. 441d; 11 CFR 110.11. For the purposes of this requirement, the Act includes direct mail as one example of general public political advertising. 2 U.S.C. 441d(a).

Your request identifies three types of communications that the delegate committees will use in generating support from voters: palm cards, phone banks and direct mail. Although all three activities will make reference to the Presidential campaign of Governor Dukakis, two of these communications, the palm cards and phone banks, will not involve general public political advertising and thus will not require disclaimer notices. If, however, the text of the direct mail appeals contains any express advocacy of Governor Dukakis' candidacy, those communications must include a disclaimer notice stating who paid for the communication and whether it was authorized by the candidate.

The third question raised by your request concerns the ability of prospective delegates to use campaign literature supplied by the candidate they support to advocate their own candidacy. The Commission concludes that prospective delegates or a delegate committee may use materials provided by a Presidential candidate, in whole or in part, to advocate their own selection as delegates. However, any costs incurred to disseminate, distribute or republish these materials are considered in-kind contributions to the Presidential candidate. As such, these expenditures are subject to the contribution limits of the Act and must be aggregated with any other contributions to the candidate by the prospective delegate or delegate committee. 11 CFR 110.14(f)(3) and (i)(3). In addition, these expenditures will count against the Presidential candidate's expenditure limit if they are made with the cooperation, or with the prior consent, or in consultation with, or at the request or suggestion of, the candidate or any agent or authorized committee of that candidate. *Id.*

The fourth question presented by your request asks whether the delegate committees you plan to form would be considered to be affiliated with the Dukakis campaign. Under the delegate selection regulations, the Commission may consider a variety of factors in determining whether a

delegate committee is affiliated with a presidential candidate's authorized committee. See 11 CFR 110.14(j). These factors include, among others, whether a "person associated with the Presidential authorized committee played a significant role in the formation of the delegate committee"; whether the presidential campaign "arranged for contributions to be made to the delegate committee"; whether one committee provides a mailing list to the other committee; whether the Presidential campaign "provides ongoing administrative support" to the delegate committee; whether "any person associated with" the presidential campaign "directs or organizes the specific campaign activities of the delegate committee"; and whether a "person associated with" the campaign files statements or reports on behalf of the delegate committee.

A preliminary question posed by your request is whether you are a "person associated with" the Dukakis campaign for purposes of section 110.14(j) of the regulations. The Commission concludes that your position in the campaign is one that would cause you to be so considered. Your supervision of a paid campaign staff person, your efforts as "coordinator" for the campaign in two Congressional districts, and your activities as the campaign's liaison with organized labor all indicate that your role in the campaign is one of responsibility and authority. Therefore, the Commission will look at your involvement with the delegate committees when determining if they are affiliated with the Dukakis campaign.

As a result of your status within the campaign, your intention to form the delegate committees, and to direct and organize their activities, would be a significant factor in the Commission's consideration of whether the delegate committees are affiliated with the Dukakis committee. Other links between the delegate committees and the Dukakis campaign are also present. For example, you indicate that there have been ongoing exchanges of lists of supporters, which lists will be used in the delegate committees' proposed phone bank and direct mail activity. You also raise the possibility that the campaign will arrange for contributions to be made to the delegate committees. Paid campaign staff members may remain in Florida to assist in the efforts of the delegate committees. The campaign may also provide "ongoing administrative support" to the committees and you or another person associated with the campaign may file statements or reports on behalf of the committees.

All of these facts demonstrate that the delegate committees would be affiliated with the Dukakis campaign. In addition, your involvement in establishing and directing the activities of delegate committees in both the 12th and 14th Congressional Districts leads the Commission to conclude that these two committees would be affiliated with each other for purposes of 11 CFR 110.14(k).

Your fifth question concerns the offers of some of your clients to provide their membership lists to you, at no charge, to assist you in your campaign for delegate. Those offering the lists include state and Federal political action committees, labor unions, and "non-profit" organizations. The lists would presumably be available to the delegate committees you establish.

The Act and Commission regulations include in the definition of contribution "anything of value" provided by a person for the purpose of influencing a Federal election. See 2 U.S.C. 431(8)(A)(i) and 11 CFR 100.7(a)(1). The regulations further explain that "anything of value" includes in-kind contributions, such as providing membership lists, unless the recipient pays the "usual and normal charge" for the item. 11 CFR 100.7(a)(1)(iii) (A).

Since your clients propose to provide their membership lists at no charge, the value of those lists at the time they are provided would be a contribution to the delegate committees. Those clients, such as the Federal political committees, that may lawfully make contributions under the Act may make their lists available; however, the value of the list must be aggregated with any other contributions to the delegate committee for purposes of the limits on contributions. See 2 U.S.C. 441a(a)(1)(C) and 11 CFR 110.14(g). Other clients, such as the labor unions, are prohibited from making contributions under the Act. See 2 U.S.C. 441b. The delegate selection regulations make clear that neither individual delegates nor delegate committees may accept contributions from prohibited sources. See 11 CFR 110.14(c)(2). Therefore, these clients may not provide their membership lists as proposed.

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)

Thomas J. Josefiak
Chairman for the Federal Election Commission

Enclosures (AOs 1980-5, 1986-6)

P.S. Commissioner Thomas voted to approve but will file a concurring opinion at a later date.

*/ As revised and made effective November 20, 1987, these regulations were published in the Federal Register on September 22, 1987. 52 Fed. Reg. 35530, 35534 (1987).