



FEDERAL ELECTION COMMISSION  
Washington, DC 20463

July 2, 1990

CERTIFIED MAIL  
RETURN RECEIPT REQUESTED

ADVISORY OPINION 1989-32

Lance H. Olson, Esquire  
Olson, Connelly, Hagel & Fong  
300 Capitol Mall  
Suite 350  
Sacramento, CA 95814

Dear Mr. Olson:

This responds to your letter dated December 22, 1989, as supplemented by your letters dated January 18, and May 1, 1990, requesting an advisory opinion on behalf of Californians for Safe Streets ("CSS") concerning application of the Federal Election Campaign Act of 1971, as amended ("the Act"), and Commission regulations to the receipt by CSS of a contribution from a foreign national.

You state that CSS is a non-profit committee formed to qualify and pass a state ballot measure in California known as the Safe Streets Initiative ("SSI"). This initiative would increase sentences for major offenders and would create a \$1.6 billion fund for various anti-drug and crime prevention activities. You state that CSS is in the process of collecting the 372,175 signatures necessary to qualify for the November, 1990, ballot.

You state that the initiative is sponsored and promoted by Lieutenant Governor Leo McCarthy who is running for re-election as Lieutenant Governor in 1990. He will be on the ballot this November since he won his party's primary on June 5, 1990. Mr. McCarthy also helped to draft the initiative and organized CSS. Under California law, the full name of the committee is Californians for Safe Streets Organized by Lt. Governor Leo McCarthy.

You state that, under California law, CSS is a "controlled committee" because the candidate has significant influence on the committee's actions. A controlled committee is defined as:

a committee which is controlled directly or indirectly by a candidate or state measure proponent or which acts jointly with a candidate, controlled committee or state measure proponent in connection with the making of expenditures. A candidate or state measure proponent controls a committee if he, his agent or any other committee he controls has a significant influence on the actions or decisions of the committee.

CGC §82016.

You state, however, that none of CSS's resource will be used "to support the candidate," and that all resources will be used to qualify the initiative for the ballot and pass it in November.

California law requires that the name of the controlling candidate appear in the name of the committee. CGC §84106. The full name of the committee must appear on the committee's Statement of Organization; on reports filed with the Secretary of State; and on the outside envelope and at least one insert, in six-point type, of any mass mailing of 200 or more identical pieces of mail. CGC §§84102(a) and (e), 84211(o), and 84305(a). You enclose correspondence between the California Fair Political Practices Commission ("FPPC") and you with respect to a committee controlled by a candidate for State Controller. According to the correspondence, the FPPC does not consider contributions to a controlled ballot measure committee to be contributions to the controlling candidate. You also note that California law prohibits the transfer of money from CSS to the candidate's election committee.

You have submitted responses and other materials pertaining to the relationship between CSS and Mr. McCarthy's re-election committee, Friends of Leo McCarthy ("Friends"). Although communications from CSS will not refer to Mr. McCarthy's past or present candidacies, Mr. McCarthy will be involved in communications from CSS, including personalized letters to potential donors and press statements from Mr. McCarthy on behalf of CSS. There are no plans to send mass mailings or large scale direct mail pieces, but CSS has sent approximately three to four hundred similar letters for which Friends is paying half "in order to comply with FPPC regulations," and CSS will make reference to Mr. McCarthy "in normal communications it may have."

You state that Friends will make reference to the activities of Leo McCarthy, including the pursuit of environmental legislation and SSI. Friends' literature "will not make reference to [CSS] in any substantial way, although it is possible (but has not been determined at this point) that [Friends] will refer to his legislative accomplishments and include reference to [SSI]." You state that there will likely be activities wherein Mr. McCarthy links his candidacy to SSI, e.g., as a spokesman in paid media for CSS. You state that, in accordance with FPPC rulings, Friends would pay for those ads or, if a proposed FPPC regulation is adopted, one-half each would be paid by CSS and Friends. Other than producing and mailing letters for CSS signed by Mr. McCarthy, there are no planned joint purchases or financial transactions between CSS and Friends.

You describe a "substantial overlap" in personnel between the two committees. The committees have the same campaign manager, controller, scheduler, attorneys, media consultants, pollsters,

and Los Angeles receptionist. Campaign messages are prepared by the same person. In addition, the committees share office space in Los Angeles, paid for entirely by Friends. The committees also have a Los Angeles based fundraiser in common.

You state that a foreign national wishes to make a contribution to support the Safe Streets Initiative. You ask whether CSS may accept such a contribution. You also ask whether the answer to the question would differ if CSS placed the contribution in a separate account used only to pay administrative expenses and ballot measure qualification expenses, "none of which is used to pay expenses associated with promotional materials where the candidate's name appears."

Under the Act and Commission regulations, foreign nationals are prohibited from making contributions, directly or through any other person, in connection with an election to any political office or in connection with any primary election, convention or caucus held to select candidates for any political office. In addition, it is unlawful for any person to solicit, accept, or receive any such contribution from a foreign national. 2 U.S.C. 441e(a); 11 CFR 110.4(a)(1) and (2).<sup>1</sup> The Act defines the term "person" to include a committee. 2 U.S.C. 431(11). Unlike most of the other provisions of the Act, 441e applies to elections for any political office, including state and local as well as Federal elections.

The Commission has previously recognized the distinction between a candidate-related "election to any political office," as used in 2 U.S.C. 441e and other provisions of the Act, and issue-related ballot initiatives. The Commission has stated that contributions or expenditures relating only or exclusively to ballot referenda issues, and not to elections to any political office, do not fall within the purview of the Act. Advisory Opinions 1984-62, fn.2, and 1980-95. See also Advisory Opinion 1982-10.

For example, in Advisory Opinion 1980-95, a national bank requested an opinion as to whether it could make a contribution to a fund that was promoting adoption of amendments to the Florida state constitution in an upcoming election. The fund had been established at the request of the Governor of Florida who set a goal of raising \$500,000 for media advertising to promote adoption of the amendments. The ratification was to coincide with a primary run-off election to nominate various Federal, state, and local candidates, but not for the office of Governor. None of the funds to be raised would be applied to those election campaigns. The Commission observed that the bank "[was] being asked to contribute money to a fund whose express purpose is to promote or influence the adoption of amendments to the Florida Constitution, as opposed to a contribution to a fund in connection with the election of candidates to any political office." The Commission concluded, therefore, that the contribution did not fall within the purview of the Act as it "relate[d] only to ballot referenda issues and not to elections to any political office." Advisory Opinion 1980-95.

Your request includes a number of additional facts not presented in Advisory Opinion 1980-95. First, the law of the State of California imposes certain requirements upon the ballot measure committee including the requirement that the name of the individual who controls a ballot measure committee must appear with committee mailings of even a minimal amount. Second,

the activities of CSS entail the sponsorship and participation of a candidate seeking election to public office concurrently with the ballot referendum effort.

The Commission considered the issue of the association of a Federal candidate's name with a committee in Advisory Opinion 1985-38. That opinion presented a situation in which a Congressman who was a Federal candidate proposed the establishment of a committee to support only state candidates. In response to a proposal to include the Congressman's name in the committee name, the Commission stated that "a reference to [the Congressman] in the name of the state committee would not in itself result in a contribution to his re-election campaign." The Commission also stated, however, that references to the Congressman in connection with the state committee's "fundraising efforts, general public advertising, or charitable donations, may or may not result in a contribution to his Federal campaign, depending upon all the facts and circumstances in a given situation."

With respect to the second issue, the Commission has, in past opinions, considered whether the activities of a particular organizational entity which involves the participation of a Federal candidate, or communications referring to a Federal candidate, result in a contribution or expenditure, i.e., something of value for the purpose of influencing a Federal election. See 2 U.S.C. 431(8)(A)(i). Such activities have involved candidate appearances at charitable functions, testimonial dinners, and issue forums; candidate appearances in advertisements endorsing other candidates; a candidate as a host of a radio program; and candidates holding chairmanships of political or advocacy organizations. Although the Commission's consideration of the issue has involved the participation of Federal, as opposed to state or local, candidates, the standards pertaining to the issue of candidate support are applicable in this request because the relevant issue was the relationship to a candidacy.

The Commission has taken the position that financing the foregoing activities will result in a contribution to or an expenditure on behalf of a candidate if the activities involve (i) the solicitation, making, or acceptance of contributions to the candidate's campaign, or (ii) communications expressly advocating the nomination, election, or defeat of any candidate. Advisory Opinions 1988-27, 1986-37, 1986-26, 1982-56, 1981-37, 1980-22, 1978-56, 1978-15, 1977-54, and 1977-42. The Commission has also indicated that the absence of solicitations or express advocacy will not preclude a determination that an activity is campaign-related. Advisory Opinions 1990-5, 1988-27, 1986-37, 1986-26, 1984-13, and 1983-12.

The activity presented contrasts with other situations in which a candidate or the candidate's name was to appear in a political context during the candidacy. In Advisory Opinion 1977-54, the Commission determined that donations to a statewide petition drive against the Panama Canal Treaties chaired by a House candidate in Georgia would not be contributions to his candidacy where the candidate's name appeared in the drive's mailings and advertisements. Unlike the present situation, however, the petition drive was not limited to the candidate's electorate. (See facts and assumptions in Advisory Opinion 1977-54.)

Similarly, in Advisory Opinion 1982-56, the Commission concluded that, when a Congressman running for re-election appeared in television advertisements advocating the election of a candidate for County Prosecutor in his Congressional district, the Prosecutor candidate's

campaign, in paying for the advertisements, did not also make an in-kind contribution to the Congressional candidate. The advertisement ran 30 seconds with a seven second appearance by the Congressman complimenting the Prosecutor candidate. In discussing the basis for this conclusion, the Commission stated that the purpose of the advertisement, as well as of the Congressman's appearance, was the endorsement of the county candidate, and the content of the advertisement did not reflect an intent to influence the Congressman's reelection, as it only identified the Congressman and contained no mention of his candidacy. See Advisory Opinion 1980-28. Absent from this situation is the control of the Prosecutor campaign by the Congressional candidate himself, the constant presence of the Congressional candidate's name in either the advertisement or the campaign of the candidate for prosecutor, and a substantial overlap of committee personnel.

The Commission concluded in Advisory Opinion 1984-13 that contributions to candidates would result if Congressional candidates of one party were invited to speak at a trade association's conference. The Commission noted the requestor's assertions that all candidates would be asked to refrain from soliciting contributions or other aid to their campaigns and to limit their remarks to a discussion of the issues. The requestor also would advise attendees that the appearance of any candidate was not to be construed as an endorsement by the requestor. The event was to be held simultaneously with the party's national convention occurring in the same city, and shortly before a number of primary dates and a few weeks prior to the general election. The Commission also noted that the association planned to seek the assistance of party committees in obtaining the candidates' attendance and, possibly, providing a meeting location, and the candidates were to be invited as candidates, not on the basis of any other criteria. The Commission, observing that the event would be linked by timing and purpose to Congressional elections and would "carry partisan overtones," concluded that the candidate appearances would "inevitably be campaign-related." The Commission stated that this characterization would be reinforced if any portion of the audience consisted of part of any candidate's electorate. Advisory Opinion 1984-13.

Finally, in Advisory Opinion 1990-5, the Commission concluded that a newsletter discussing public policy issues that is originated, implemented, and funded by a candidate could be campaign-related. The Commission reviewed the circumstances surrounding the newsletter, including the candidate's control, the fact that the newsletter was inspired by her previous experiences as a candidate, the targeted audience, the fact that some persons were involved in both the campaign and the newsletter, and the public policy content of the newsletter. The Commission stated that "any reference to or discussion of your candidacy or campaign in the newsletter, or presentation of policy issues or opinions closely associated with you or your campaign, would be inevitably perceived by readers as promoting your candidacy, and viewed by the Commission as election-related and subject to the Act." The Commission concluded that, although the content of the newsletters suggests other significant purposes of informing the public about current issues of public interest and encouraging discussion of such issues, continued publication during the candidacy would be viewed as campaign-related if any one of certain conditions existed. One of these conditions was the publication of articles or editorials referring to the candidate's views on public policy issues, or those of her opponent, or referring to issues in the campaign, whether written by the candidate or anyone else.

In this case, although CSS will not expressly advocate the election of Mr. McCarthy or solicit funds or other support for his campaign and although you note the statutory prohibitions on transfers to a candidate's election committee, Mr. McCarthy has organized CSS with the knowledge that his name will be inextricably linked with the committee before the same electorate voting on his reelection and at the same time as the campaign and voting for such reelection take place. Through communications with the electorate, CSS and he have actively linked their names; CSS, going even beyond the statutory requirement, has sent out personalized letters from Mr. McCarthy soliciting donations and press releases quoting Mr. McCarthy. Finally, CSS is coordinating its efforts with Mr. McCarthy's reelection committee to such an extent that the two committees appear to be functioning as one, including a substantial overlap of key personnel for all major facets of the campaigns.

Based on the foregoing, the activities of CSS should be viewed as campaign-related. Therefore, the Commission concludes that the CSS may not accept contributions from a foreign national. This conclusion would not differ if CSS placed the foreign national contribution in a separate account that would not be used to pay expenses associated with materials that include the candidate's name.

The Commission expresses no opinion as to issues involving the application of State law to the situation presented.

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,

(signed)

Lee Ann Elliott  
Chairman for the Federal Election Commission

Enclosures (AOs 1990-5, 1988-27, 1986-37, 1986-26, 1985-38, 1984-62, 1984-13, 1983-12, 1982-56, 1982-10, 1981-37, 1980-95, 1980-28, 1980-22, 1978-56, 1978-15, 1977-54, and 1977-42)

1/ According to 2 U.S.C. 441e(b), the term "foreign national" includes an individual who is not a U.S. citizen or lawfully admitted for permanent residence under 8 U.S.C. 1101(a)(20); the term also includes a "foreign principal" as defined in 22 U.S.C. 611(b), as long as that foreign principal is not a U.S. citizen. Although you have not identified the prospective contributor, the Commission assumes, for purposes of the opinion, that such contributor is a foreign national.