FEDERAL ELECTION COMMISSION
Washington, DC 20463

August 26, 1993

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

ADVISORY OPINION 1993-15

L. Anthony Sutin
Hogan & Hartson
Columbia Square
55 Thirteenth Street, N.W.
Washington, D.C. 20004-1109

Dear Mr. Sutin:

This responds to your letters dated June 30 and July 9, 1993, on behalf of The Tsongas Committee, Inc. ("the Committee") concerning application of the Federal Election Campaign Act of 1971, as amended ("the Act"), and Commission regulations to the acceptance of contributions by the Committee to pay legal fees.

The Committee is an authorized campaign committee of former Senator Paul E. Tsongas' 1992 Presidential candidacy. Since Senator Tsongas' withdrawal from the 1992 campaign, the Committee has been engaged in debt retirement and the Commission's audit process. Your firm, Hogan & Hartson, has been representing the Committee before the Commission.

Information provided by the Committee may indicate that its principal fundraising consultant misappropriated a large amount of contributions intended for the Committee and may have engaged in other activities that may be violations of the Act. As your request indicates, the Commission commenced an investigation of these circumstances, with the Committee's cooperation, as an adjunct to the ongoing audit process.

The Department of Justice and the Internal Revenue Service also began an investigation ("the DOJ investigation") into the same activities of the fundraising consultant, as well as other actions having no relationship to the Tsongas campaign. You state that the Committee "sought to cooperate fully with the DOJ investigation, making a number of Committee personnel and Committee records available at the request of federal investigators." Although the Committee

was never notified that it was a target of the DOJ investigation, the Committee retained the law firm of Foley, Hoag & Eliot ("the law firm"), to advise the Committee and its personnel during the course of the DOJ investigation. The fundraising consultant has been indicted by a Federal grand jury on 47 counts relating to mail fraud, financial transactions with proceeds of illegal activity, bank fraud, making false statements to the Commission, and violating the Act.

The law firm's services to the Committee are primarily related to the DOJ investigation. You state that, "although the underlying facts of the fundraising consultant's activities are material to matters raised in the FEC audit process," separate counsel (Hogan & Hartson) has been handling those matters as they relate to compliance and audit issues before the Commission. You note that the Foley law firm has undertaken representation of certain Committee personnel who are witnesses in connection with a compliance matter before the Commission, but that it will maintain separate billing records for that representation and the DOJ investigation.

The law firm has billed the Committee for its services in connection with the DOJ investigation. The Committee seeks an advisory opinion as to whether funds raised to defray legal expenses in connection with the DOJ investigation would be considered contributions under the Act and, therefore, subject to the Act's limitations and prohibitions.

Under the Act, a "contribution" is a gift, subscription, loan, advance, or deposit of money or anything of value made for the purpose of influencing any election for Federal office. 2 U.S.C. 431(8)(A)(i); 11 CFR 100.7(a)(1). The term "expenditure" is defined in an identical manner with respect to payments made for the purpose of influencing an election. Excepted from both terms are:

> any legal or accounting services rendered to or on behalf of--
>
> (II) an authorized committee of a candidate or any other political committee, if the person paying for such services is the regular employer of the individual rendering such services and if such services are solely for the purpose of ensuring compliance with this Act or chapter 95 or 96 of title 26.2 U.S.C. 431(8)(B)(ix) and 431(9)(B)(vii). See also 11 CFR 100.7(b)(14) and 100.8(b)(15).

Although the donation of legal services solely to ensure compliance with the Act would be exempt from the definition of contribution, i.e., where the regular employer of the person rendering such services donates that person's time to the committee, the Act and regulations provide no exception for the donation of money to defray the costs of such services. Advisory Opinions 1990-17, 1981-16 and 1977-5. In past opinions, the Commission concluded that the costs of legal representation with respect to post-election audit and compliance matters relating to that election emanate from activities clearly within the scope of the Act. Donations to defray such costs, therefore, were treated as contributions subject to the limits and prohibitions of the Act. Advisory Opinions 1990-17 and 1981-16. See also Advisory Opinion 1989-10. Even though such costs and the donations for such costs occurred after the election, they were still considered to be expenditures and contributions. The Commission considered the situation to be analogous to a debt situation; if the committee did not have sufficient cash on hand to pay for the legal costs, the committee could accept further contributions, designated by the contributors for the

relevant election, to pay for the new costs arising from that election. Advisory Opinion 1990-17. See Advisory Opinion 1981-16.

The Commission has also determined that donations and disbursements made for the purpose of defending a Federal officeholder with respect to activities unrelated to compliance with the Act were not contributions or expenditures. See Advisory Opinions 1983-21, 1981-16, 1981-13, and 1979-37. Similarly, the Commission has also determined that money or in-kind donations to a principal campaign committee of a presidential candidate, or a fund established by it, were not contributions if donated for purposes such as defending against violations of the Hatch Act, the Appropriations Act, or constitutional rights, or pursuing commercial litigation such as a contract dispute. See Advisory Opinions 1981-16 and 1980-4.

Unlike the opinions referred to directly above, your situation relates to activities directly implicating the provisions of the Act. Even though your request pertains to costs for representation before the Justice Department and the IRS, the Justice Department has criminal enforcement authority with respect to the Act and has other bases within Title 18 for proceeding against activities that fall within the purview of the Act. As alluded to above, some of the indictment counts explicitly refer to violations of 2 U.S.C. 441a(a)(1)(A) with respect to causing 16 excessive loans to be made payable to the Committee. Other counts refer to mail fraud as a result of causing the loans, fraudulently billing the Committee, diverting loan and direct contribution funds from the Committee, using the funds for personal use, and concealing such activities from the Committee. The indictment's description of those mail fraud counts refers to the violations of the Act and regulations that resulted from such activity, including 2 U.S.C. 432(a)(3), 432(b), 432(c), 432(h), 434(b), and 11 CFR 102.8, 102.9, 102.15, 103.3, and 104.3-104.11. The count relating to financial transactions with the proceeds of illegal activity refers to the activity covered under mail fraud. Ten of the counts with respect to filing false statements refer to causing false Committee reports to be filed with the Commission, and two of the false statement counts refer to the defendant's statements to the Commission. Ten of 47 counts refer to charges of bank fraud and mail fraud which do not pertain to the Committee or Committee funding.

The Commission concludes that donations raised to defray the legal expenses in connection with the DOJ investigation must be treated as contributions to the Committee subject to the Act's limitations, prohibitions, and disclosure requirements.[1/] The activities being investigated "emanate not only out of the election, but also from matters clearly within the scope of the Act." Advisory Opinion 1981-16. As contributions, these donations must be aggregated with a contributor's previous contributions to the Tsongas presidential primary campaign to determine compliance with the contribution limits of 2 U.S.C. 441a. Advisory Opinions 1990-17 and 1981-16. The payments of the described legal expenses, however, do not count toward the presidential primary expenditure limits set out at 2 U.S.C. 441a(b)(1)(A) and 441a(c), and 26 U.S.C. 9035(a). 11 CFR 100.8(b)(15).

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)

Scott E. Thomas
Chairman

Enclosures (AOs 1990-17, 1989-10, 1983-21, 1981-16, 1981-13, 1980-4, 1979-37, and 1977-5)

ENDNOTES

1/ This conclusion does not apply to any legal expenses incurred in connection with any investigated activity that does not pertain to the Committee or its activities. For example, the activities described in ten of the counts do not, on their face, relate to the Committee or Committee funding. Without further information, donations toward expenses for the law firm's work pertaining to these charges and not pertaining in any way to the Committee, would appear not to be contributions to the Committee.