FEDERAL ELECTION COMMISSION
Washington, DC 20463

October 6, 1980

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

ADVISORY OPINION 1980-108

Mitchell Rogovin, Esq.
Counsel to John B. Anderson and General Counsel
for the National Unity Campaign for John Anderson
Rogovin, Stern & Huge
1730 Rhode Island Avenue, N.W.
Washington, D.C. 20036

Dear Mr. Rogovin:

This is in response to your letter of September 17, 1980, supplemented by your letters of September 18 and 22, 1980, requesting an advisory opinion on behalf of John B. Anderson and the National Unity Campaign for John Anderson concerning the application of the Federal Election Campaign Act of 1971, as amended ("the Act") to bank loans made to the National Unity Campaign pursuant to the draft credit agreement attached to your request. Specifically you ask the following:

1. Whether a loan made by an appropriate bank pursuant to the draft credit agreement would fall outside of the "ordinary course of business" because the principal or only practical means of repayment of some or all of the loan would be through post-election federal funding, receipt of which is contingent upon Mr. Anderson obtaining 5 percent or more of the popular vote.

2. Whether a loan made by an appropriate bank pursuant to the draft credit agreement would be considered to be a loan not "made on a basis which assures repayment" solely because post-election federal funding was contingent upon Mr. Anderson receiving more than 5 percent of the popular vote.

Your request sets forth the following facts:

The National Unity Campaign has been conducting intensive discussions with a number of large banks in New York and elsewhere concerning obtaining a revolving line of credit

against, inter alia, post-election federal funding. Several of those banks have expressed a positive interest in making such a loan. In further discussions, counsel for one bank has raised the question of whether such a loan, which has never before been made in these precise circumstances, would be treated by the Commission as falling within the provisions of 2 U.S.C. 431(8)(B)(vii) and thus treated as a bona fide loan made in the ordinary course of business rather than as an unlawful contribution.

As you state in your letter dated September 22, 1980, the draft credit agreement, captioned "Revolving Credit Agreement", envisions a consortium of up to 10 banks, each of which would commit an amount to be specified for a total amount not to exceed $10,000,000. The amount available at any given time, referred to as "Available Commitments", is that portion of the commitments which bears the same proportion to the total of the commitments as the most recent average poll results bears to the base poll results. For the purpose of computing the available commitments on any date, the average poll results would be the average of the percentage of persons reported to be favoring Mr. Anderson in the most recently published Harris, Gallup, Roper and New York Times/CBS polls of voter preferences for the 1980 United States Presidential election, and the base poll results would be 20 percent.[1]

In addition, there are timing limitations on the availability of funds. The agreement contemplates an initial borrowing of $3,000,000,[2] subject to the "available commitments" formula noted above.[3] Thereafter, all subsequent borrowings could be made only after 10 days of any previous borrowing[4] upon three days notice by the National Unity Campaign.[5] Any such subsequent borrowing must be in an amount of not less than $250,000 and not more than $3,000,000.[6] However, the total indebtedness, including such borrowing, may not exceed the "available commitments" on the date of such borrowing.[7] All advances made for each borrowing would be ratably apportioned according to each bank's share of the total commitment.[8] No advances may be made after December 31, 1980 or after the date on which Mr. Anderson receives post-election funding, whichever occurs first.[9]

The interest rate charged on all borrowed funds would be at or above the prime lending rate as of the date of the agreement[10], payable quarterly and on the termination date of the agreement.[11] An additional "commitment fee" of .5 percent would be charged on the unused portion of the total $10,000,000 commitment.[12] Various other costs associated with the

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[1] See Revolving Credit Agreement ("Agreement"), page 1, 1.01, "Available Commitments." For example, if on a particular date, the average of these four polls showed Mr. Anderson as favored by 15 percent of the voters, then the available commitments on that date would be 15/20 (or 3/4) of $10,000,000, or $7,500,000.
[2] See Agreement, page 3, §2.02.
[3] See Agreement, page 7, §3.02(a).
[4] See Agreement, page 3, §2.01(ii).
[5] See Agreement, page 3, §2.02.
[6] See Agreement, page 3, §2.01(i).
[7] See Agreement, page 7, §3.02(a).
[8] See Agreement, page 3, §2.01(iii).
[9] See Agreement, page 1, §2.01.
[10] See letter from Mitchell Rogovin, dated September 17, 1980, page 1, paragraph 3.
[11] See Agreement, page 4, §2.05
[12] See Agreement, page 3, §2.03.

undertaking and administration of the agreement would be chargeable to the National Unity Campaign.[13]

All advances and borrowings would be conducted through a central agent, who would be vested with primarily non-discretionary powers to administer the agreement.[14] Each bank would remain responsible for making its credit decisions independently without reliance upon the agent or the other banks.[15] As a condition precedent to the initial advances, the agent shall have received, inter alia: [16]

- copies of an assignment by Mr. Anderson to the National Unity Campaign of his rights to post-election funding and an assignment by the National Unity Campaign of all such rights to the agent on behalf of the banks as security for the loans.

- a copy of an irrevocable letter of instructions to the Commission directing it to forward all post-election funding directly to the agent;

- all necessary documents to perfect the banks' security interest in such funds pursuant to the Uniform Commercial Code;

- evidence of all necessary corporate action and governmental approvals regarding the agreement, including Advisory Opinion 1980-96 issued by the Commission on September 4, 1980;

- a fully-paid life insurance policy or binder and a fully-paid disability insurance policy or binder on Mr. Anderson through November 4, 1980 in amounts of not less than $10,000,000 and naming the agent on behalf of the banks as beneficiary for the purpose of securing the loans.

In addition, the National Unity Campaign is obliged to maintain with the agent a cash collateral account for the purpose of receiving Mr. Anderson's post-election funding and/or the proceeds of the insurance policies covering Mr. Anderson and to assign to the agent on behalf of the banks a secured interest in all sums deposited in the account.[17] So long as any portion of the loans remain unpaid, the National Unity Campaign may not permit the existence of any other security interest in its rights to receive Mr. Anderson's post-election funding or in the cash collateral account.[18]

As a condition precedent to all subsequent borrowings, the National Unity Campaign must renew the representations and warranties set forth in the agreement.[19] Should any such

[13] See Agreement, page 15, §8.04.
[14] See Agreement, pages 12-14, Article VII.
[15] See Agreement, page 13, §7.04
[16] See Agreement, pages 5-7, Article III.
[17] See Agreement, page 9, §5.01(c).
[18] See Agreement, page 10, §5.02(a).
[19] See Agreement, page 7, §3.02(i).

representation or warranty prove to be incorrect, or upon the occurrence of any other "event of default",[20] then the banks' obligation to make any further advances ceases.[21]

The loans are payable in full with interest on the earlier of the date that Mr. Anderson receives post-election funds or December 31, 1980.[22] All payments received by the agent or by any participating bank must be distributed among the banks in proportion to their ratable share of the total commitment.[23] In the event of default each bank may exercise a right of set-off against any other accounts the National Unity Campaign has with that bank;[24] however, funds so obtained must also be shared with all participating banks in accordance with their ratable share of the total commitment.[25] The National Unity Campaign must warrant that all proceeds of the advances will be used for payment of "qualified campaign expenses" within the meaning of the Presidential Election Campaign Fund Act.[26] Upon the borrower's failure to observe this or any other provision of the agreement, the banks may declare their obligation to make further advances to be terminated and declare all sums advanced to be due and payable.[27]

* * * *

As you note in your request, the Act expressly prohibits national banks from making any contribution or expenditure in connection with any election to any political office. See 2 U.S.C. 441b(a). This prohibition has been in effect since the Tillman Act in 1907.[28] The Tillman Act was followed by the Federal Corrupt Practices Act of 1925, amended in 1940 and 1948, which defined "contribution" as "a gift, subscription, loan, advance, or deposit of money, or anything of value...." The inclusion of the term "loan" in the definition of "contribution" had been interpreted by the Department of Justice (at that time vested with prosecutorial authority over the statute) to prohibit candidates from obtaining even rather modest ($10,000), fully secured loans if the loans were to be used in a campaign.[29]

In response, Congress amended the statute (then codified in 18 U.S.C. 591 and 610) in 1972 to exclude from the definition of contribution "a loan of money by a National or State bank made in accordance with the applicable banking laws and regulations and in the ordinary course of business." The report of the Senate Committee on Rules and Administration on S. 382 sets forth the underlying reasons for this exception:

> Testimony received from witnesses was unanimously in favor of the granting of loans by national or state banks if such loans were made pursuant to applicable

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[20] See Agreement, pages 10-11, Article VI.
[21] See Agreement, page 7, §3.02(ii).
[22] See Promissory Note, page 1.
[23] See Agreement, pages 4 and 5, §§2.07, 2.09.
[24] See Agreement, page 16, §8.05.
[25] See Agreement, pages 4-5, §2.09.
[26] See Agreement, page 8, §4.01(f).
[27] See Agreement, pages 10-11, Article VI.
[28] See Act of January 26, 1907, ch. 420, 34 Stat. 864 (1907).
[29] See U.S. v. First National Bank of Cincinnati, 329 F. Supp. 1251, 1254, (S.D. Ohio 1971), the court holding that the prohibition of fully secured loans at normal interest rates, made in the ordinary course of business, placed an "unreasonable restraint on the First Amendment rights of individuals."

> banking rules and regulations. This means that a bank should exercise sound business judgment in extending loan privileges to a political candidate or committee in the ordinary course of business and demand, where necessary, certain security or collateral in order to support a reasonable expectation of payment in due course. S. Rep. No. 92-229, 2 U.S. Code Cong. & Ad. News 1823 (1972).

In 1976, these provisions were placed in the Federal Election Campaign Act of 1971, 2 U.S.C. 431, et seq.

Most recently, the 1979 amendments to the Act established guidelines for determining when a loan is made in the ordinary course of business. These guidelines are now set forth at 2 U.S.C. 431(8)(B)(vii) and exclude from the definition of "contribution"

> any loan of money by a State bank, a federally chartered depository institution, or a depository institution the deposits or accounts of which are insured by the Federal Deposit Insurance Corporation, Federal Savings and Loan Insurance Corporation, or the National Credit Union Administration, other than any overdraft made with respect to a checking or savings account, made in accordance with applicable law and in the ordinary course of business, but such loan
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> > (I) shall be considered a loan by each endorser or guarantor, in that proportion of the unpaid balance that each endorser or guarantor bears to the total number of endorsers or guarantors;
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> > (II) shall be made on a basis which assures repayment, evidenced by a written instrument, and subject to a due date or amortization schedule; and
> >
> > (III) shall bear the usual and customary interest rate of the lending institution.

See also 11 CFR 100.7(b)(11). The legislative history for the 1979 amendments sheds little light upon the Congressional intent underlying these amendments or the particular requirement that a loan be made "on a basis which assures repayment".[30] Nor does the Commission's regulation promulgated pursuant to this amendment substantially serve to clarify the meaning of the requirement that bank loans be made "on a basis which assures repayment". See 11 CFR 100.7(b)(11).[31] However, nothing in the Federal Election Campaign Act, the Presidential Election Campaign Fund Act, the legislative history thereto, or the regulations promulgated thereunder indicates that Congress intended to preclude banks from lending to new party

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[30] The sole reference to these amendments in the legislative history states: The bill also establishes guidelines for determining when a loan is made in the ordinary course of business. To be exempted, a loan must be evidenced by a written instrument, subject to a due date or amortization schedule and bear the usual and customary interest rate of the lending institution. If a loan does not meet all of these criteria it will be considered a contribution by the lending institution. See H.R. Rep. No. 96-422, 96th Cong., 1st Sess. 8 (1979).

[31] See also Explanation and Justification of Regulations, 45 Fed. Reg. 15081 (March 7, 1980).

candidates on the strength of their likelihood of receiving post-election financing.[32] Indeed, as the Supreme Court observed in Buckley v. Valeo, 424 U.S. 1, 102 (1976):

> Of course, nonmajor parties and their candidates may qualify for post-election participation in public funding and in that sense the claimed discrimination is not total. Appellants contend, however, that the benefit of any such participation is illusory due to 9004(c), which bars the use of the money for any purpose other than paying campaign expenses or repaying loans that had been used to defray such expenses. The only meaningful use for post-election funds is thus to repay loans; but loans, except from national banks, are "contributions" subject to the general limitations on contributions, 18 U.S.C. 591(e) (1970 ed., Sup. IV). Further, they argue, loans are not readily available to nonmajor parties or candidates before elections to finance their campaigns. Availability of post-election funds therefore assertedly give them nothing. But in the nature of things the willingness of lenders to make loans will depend upon the pre-election probability that the candidate and his party will attract 5% or more of the voters. When a reasonable prospect of such support appears, the party and candidate may be an acceptable loan risk since the prospect of post-election participation in public funding will be good.

Moreover, the requirements of Chapter 95 of Title 26, when considered together with those of Title 2, impose additional constraints upon the types of bank loan agreements in which a candidate opting to receive public financing may participate. under 100.7(a)(i) of the Commission's regulations, the term "contribution" is defined to include "a guarantee, endorsement, and any other form of security." A candidate who is subject only to the requirements of Title 2 may make unlimited expenditures from his personal funds; consequently he could personally guarantee a bank loan for an unlimited amount, subject of course to the provisions of 2 U.S.C. 431(8)(B)(vii) discussed above. The candidate seeking to participate in public financing under Title 26, however, must certify to the Commission as a condition of eligibility that he will not knowingly make expenditures from his personal funds, or the personal funds of his immediate family, in connection with his presidential campaign, in excess of an aggregate amount of $50,000. See 26 U.S.C. 9004(d). Thus, a candidate who elects to receive public funds may guarantee a bank loan only up to $50,000, assuming that such guarantee, when added to his other expenditures and those of his immediate family, does not exceed the $50,000 limit. Furthermore, guarantees by individuals are subject to the $1,000 contribution limitation set forth at 2 U.S.C. 441a(a)(1)(A). Similarly, loan guarantees by qualified multicandidate political committees may not exceed $5,000 under 2 U.S.C. 441a(a)(2)(A). Guarantees by other banks,

[32] The sparse legislative history on this issue indicates that Congress believed that new party candidates would use post-election funds to repay loans. In the course of floor debates in 1971, Senator Kennedy stated that, "A new party may accept private contributions in the form of loans, to be returned if the party's showing in the election qualifies it to receive public funds." 117 Cong. Rec. S18,894 (daily ed. November 17, 1971). In 1974, the Senate Committee on Rules and Administration, reporting on legislation proposing public financing of congressional campaigns, observed that "minor candidates" could use post-election funds "to reimburse loans" in keeping with "principles established by Congress in the 1971 Tax Act for Presidential election financing." See S. Rep. No. 93-689, 93d Cong. 2d Sess. 9 (1974).

corporations and labor organizations would constitute prohibited contributions. See 2 U.S.C. 441b(a), 441b(b)(2); 11 CFR 100.7(b)(11).

As you state in your request, the draft credit agreement looks primarily to post-election funding as the source of repayment.[33] However, in the event that Mr. Anderson fails to qualify for any post-election financing, or for sufficient financing to repay the loans in full, the National Unity Campaign remains liable for the debt and must repay it no later than December 31, 1980. Presumably any outstanding balance on the loans would be repaid through normal fundraising efforts.

To date, the Commission has never considered whether bank loans made on the strength of a candidate's contingent future interest in post-election funding would per se place such a loan outside the "ordinary course of business". However, the Commission has on prior occasions upheld the lawfulness of bank loans collateralized by the candidate's expectation of qualifying for and receiving primary matching funds.[34] While the risk of nonrepayment may be higher in the context of a loan made upon the expectation of a candidate qualifying for and receiving sufficient post-election financing than it is in the context of a loan made upon the expectation of a candidate qualifying for and receiving sufficient primary matching funds, the Commission concludes that the existence of such risk does not, standing alone, take a loan secured by an expectancy in post-election public funds outside the scope of the "ordinary course of business" for the purpose of 2 U.S.C. 431(8)(B)(vii).

The central issue raised by your request is, therefore, whether the terms of the proposed credit agreement mitigate the risk assumed by the lenders to such an extent that the loans may be deemed to be made "on a basis which assures repayment". In this regard, the draft agreement contains a number of unique, risk-reducing features. The central such feature is the provision concerning "available commitments". Under this provision, the amount of funds available to the National Unity Campaign depends upon Mr. Anderson's performance in the most recent polls. The impact of fluctuations or errors in the polls is reduced, however, by the requirement that the results of the four leading independent polls be averaged; the overall reliance on poll results is further diminished by the concept of the "Base Poll Results", which effectively reduces the average poll results.

Another risk-reducing feature is the $10 million limit on the total commitment. Should Mr. Anderson qualify for post-election funds, he would be entitled to an amount equal to an amount which bears the same ratio to the amount allowed to major party candidates ($29,440,000 in 1980) as the number of popular votes received bears to the average number of

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[33] The only other sources expressly provided for in the agreement are life and disability insurance policies on Mr. Anderson through November 4, 1980. In the event of default each participating bank is entitled to exercise a right to set-off against any other accounts which the National Unity Campaign has with that bank. However, the agreement does not require that the borrower maintain any such additional accounts.

[34] See, e.g., MUR 1195, in which the Commission on June 3, 1980, found no reason to believe that the bank and the borrowing committee violated 2 U.S.C. 441b(a) in connection with a $1 million loan, secured by primary matching funds prior to the Commission's certification of the candidate's eligibility to receive matching funds; MUR 382, in which the Commission on August 1, 1977, found no reason to believe that four banks and the borrowing committee violated the Act in connection with nine separate short-term unsecured loans where the lender was looking to the committee's anticipated receipt of funds from fundraising concerts and federal matching payments.

popular votes received by the major party candidates. See 26 U.S.C. 9004(a)(3). Assuming that Mr. Anderson receives 15 percent of the vote, and the two major party candidates receive all the remaining votes, or 85 percent, then Mr. Anderson would be entitled to approximately $10,390,585.[35] If Mr. Anderson receives 14 percent of the vote, the two major party candidates receive 83 percent of the vote, and all other candidates receive 3 percent of the vote, then Mr. Anderson would be entitled to approximately $9,931,563.[36] By application of the "available commitments" formula, however, the maximum amount the National Unity Campaign could borrow if the polls show Mr. Anderson as favored by 15 percent of the voters is $7.5 million.[37] Should Mr. Anderson qualify for public funds, his entitlement would, in any event, be limited to the extent of his outstanding obligations for "qualified campaign expenses". See 11 CFR 9004.3(c). Again, the draft agreement takes this limitation into account by requiring that all loan funds be used solely to defray qualified campaign expenses.

Yet another mechanism for minimizing the risk inheres in the requirement that the first borrowing be in the amount of $3,000,000, provided that this amount is within the "available commitment" on that date. Thus, for Mr. Anderson to be able to borrow at all under the agreement, he must be favored in the polls by no less than 6 percent of the voters,[38] 1 percent more than the 5 percent eligibility threshold set forth at 26 U.S.C. 9004(a) (3).[39]

Similarly, the dollar amount limitations on all subsequent borrowings, when coupled with the timing restraints on such borrowings, further serve to limit the risk. The agreement specifies that no borrowing can occur within ten days of the preceding borrowing and may not, when added to all prior borrowings, exceed the "available commitment" on that date. Nevertheless, no single borrowing may be greater than $3 million nor less than $250,000. Thus, no subsequent borrowing may occur if Mr. Anderson does not achieve at least 6.5 percent in the polls.[40] Nor could all borrowings exceed $6 million within 20 days of the agreement or $9 million within 30 days of the agreement. Thus, if the first borrowing under the agreement were to occur on October 2, 1980, the maximum amount which the National Unity Campaign could receive prior to the election would be $9 million.[41] If the first borrowing were to occur on October 7, 1980, then the maximum amount which could be borrowed before the election would be $6 million.[42]

Finally, those provisions relating to the manner in which the lenders' interests are secured merit attention. Should Mr. Anderson qualify for post-election financing, the funds would be paid directly to him. See 26 U.S.C. 9004(a)(3), 9005, 9006. The agreement accounts for this fact by requiring that as a condition precedent of lending, the agent must have received an assignment executed by Mr. Anderson assigning his rights to post-election funding to the National Unity Campaign, together with an assignment by the National Unity Campaign assigning to the agent on behalf of the banks all such rights as security for payment of the loans. In addition, the agent

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[35] 15/42.5 : $10,390,585/$29,440,000.
[36] 14/41.5 : $9,931,563/$29,440,000.
[37] 15/20 : $7,500,000/$10,000,000
[38] 6/20 : $3,000,000/$10,000,000
[39] This first borrowing would occur on the date the agreement is executed. If Mr. Anderson's average poll rating is 6 percent on that date, the banks would be free to consider this fact and decline to enter into the agreement.
[40] 6.5/20 : $3,250,000/$10,000,000
[41] The last pre-election borrowing could theoretically occur as early as October 31 and as late as November 4, 1980.
[42] The last pre-election borrowing could theoretically occur as early as October 26 and as late as November 4, 1980.

must have received a copy of an irrevocable letter to the Commission instructing it to forward all post-election funding directly to the agent for deposit in the cash collateral account. Numerous other provisions of the agreement serve to safeguard and perfect the banks' first-priority security interest in post-election funds received. The agreement further provides for the apportionment among the participating banks of all advances made, as well as all payments received, on the loans in accordance with its ratable share of the total commitment. This provision prevents any given bank from effectively guaranteeing sums advanced by any other bank[43] and serves to spread the risk of loss among the participating banks in accordance with their ratable share of the total commitment.

The Commission concludes that such loans would not violate the requirement that bank loans be "made on a basis which assures repayment" solely because the principal source of repayment would be through post-election federal funding, receipt of which is contingent upon Mr. Anderson receiving 5 percent or more of the popular vote. However, the Commission expressly does not decide that any particular loan made by any particular bank pursuant to this agreement would be deemed to be made in the ordinary course of business. Numerous factors involved in a particular transaction would come to bear on whether that transaction occurred within the ordinary course of business.[44] Thus, the Commission cautions against any use of this opinion as a legal sanction for any particular loan transaction. Furthermore, the Commission does not express any opinion as to the tax ramifications, the impact of state and Federal banking laws and regulations, or the effect of any other statute over which the Commission has no jurisdiction, on any such loans.

This response constitutes an advisory opinion concerning application of the Federal Election Campaign 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)

Max L. Friedersdorf
Chairman for the
Federal Election Commission

[43] See 11 CFR 100.7(b)(11).

[44] On previous occasions the Commission, in determining whether a loan was made in the ordinary course of business, has considered such factors as: the amount, duration, interest rate, collateral, co-signers or guarantors of the loan; whether the loan complied with Federal banking laws or regulations; whether normal channels and procedures were observed; whether sufficient evidence supported the credit judgment at the time the loan was made; whether the bank was looking to a third party as a guarantor even though that party was not a co-signer or guarantor of the note; whether the bank makes loans of a similar nature, i.e., of comparable purpose, amount and terms; if more than one bank is involved, the relationship among the banks. See, e.g., MURs 1195, 382, 218 and 216/239.