



FEDERAL ELECTION COMMISSION  
Washington, DC 20463

May 26, 1989

CERTIFIED MAIL,  
RETURN RECEIPT REQUESTED

ADVISORY OPINION 1989-4

Vigo G. Nielsen, Jr.  
Nielsen, Merksamer, Hodgson, Parrinello & Mueller  
650 California Street, Suite 2650  
San Francisco, California 94108

Dear Mr. Nielsen:

This responds to your letter dated March 31, 1989, requesting an advisory opinion on behalf of Californians for Pete Wilson concerning application of the Federal Election Campaign Act of 1971, as amended, (the "Act" or "FECA") and Commission regulations to the proposed sale of assets by Mr. Wilson's Federal campaign committee to his California gubernatorial campaign committee.

Californians for Pete Wilson ("Federal committee"), the principal campaign committee of United States Senator Pete Wilson in his 1988 reelection campaign, proposes to sell its mailing lists, computer hardware, and used furniture to Mr. Wilson's California campaign committee, Pete Wilson for Governor, established to support his candidacy for the governorship in 1990 ("State committee" or "gubernatorial committee"). In a telephone conversation with the Office of General Counsel, subsequent to your request, you indicated that the Federal committee has recently received sufficient contributions to retire its debt from the 1988 campaign, and that contributions received by the Federal committee with respect to a potential 1994 Senate candidacy by Mr. Wilson will soon exceed the \$5,000 threshold for qualification as a "candidate" under the Act. 11 CFR 100.3. See also 11 CFR 101.1 and 102.1.

You propose to sell these assets of the Federal committee to the State committee at the "usual and normal charge," and indicate that "an independent evaluation would be made to ascertain this value." Because California election law permits the State committee to accept corporate contributions that the Federal committee would be prohibited from receiving under the FECA (see 2 U.S.C. 441b), you suggest that the State committee could establish a separate accounting

mechanism to insure that no corporate funds are used by the State committee for this purchase. Further, you state that the Federal committee would likely want to repurchase these assets from the State committee, should Mr. Wilson's 1990 gubernatorial campaign be unsuccessful.

You ask whether the Act and Commission regulations permit the Federal committee to sell its mailing lists, computer hardware, and used furniture to the State committee at the "usual and normal charge" and to repurchase these assets at a later date.

The Commission first notes that your request describes the proposed transactions as "sales" and not as "transfers" between the Federal and State committees. Under the criteria in the Commission's regulations, Mr. Wilson's Federal committee and his State committee are affiliated, and are generally permitted unlimited transfers between them, provided any funds transferred to the Federal committee are permissible under the FECA. 11 CFR 100.5(g)(2) and 102.6(a). See Advisory Opinions 1987-12, 1984-46, 1983-34 and 1982-52. But see 11 CFR 110.8(d)(1) and (2), which may be applicable. Under the Act and the Commission's regulations, therefore, the Federal committee is not required to sell these assets in order to provide them to the State committee.<sup>1</sup> Your request raises the issue of whether the committees are precluded by the FECA from treating the proposed transactions as bona fide sales, or would be subject to particular limitations or requirements in order to do so.

Generally, the Commission has viewed the selling or commercial use of committee assets by a principal campaign committee or other political committee to be fundraising for political purposes, resulting in contributions subject to the Act.<sup>2</sup> Advisory Opinions 1988-12 and 1986-14. Particularly, the Commission has specifically permitted isolated sales of political committee assets without inherent contribution consequences, however, when the assets had been purchased or developed for the committee's own particular use, rather than for sale in a campaign fundraising activity, and such assets had ascertainable market value. Advisory Opinions 1986-14 (campaign van), 1985-1 (computer), 1981-53 (mailing list), 1979-24 (yard sign material and office equipment) and 1979-18 (contributor list).<sup>3</sup> In each instance, the Commission has emphasized that contributions would result if the price paid to the political committee for the assets exceeded the "usual and normal charge" for such assets in the market where ordinarily sold. Id.

Accordingly, the Commission concludes that the proposed sale by the Federal committee of its mailing lists, computer hardware, and used furniture to the State committee at the usual and normal charge will not result in a contribution to the Federal committee, nor will the transaction constitute a transfer of funds between affiliated committees.<sup>4</sup> The Commission further observes that the purchase price at a "usual and normal charge" for such goods in the marketplace must be reasonably capable of objective verification. See Advisory Opinions 1986-14 and 1985-1. Your plan to engage an "independent evaluation" to determine the fair market value of these assets would satisfy this requirement.

Your request also asks whether the Federal committee may repurchase these same assets from the State committee after 1990, should the gubernatorial campaign be unsuccessful. In the context of a sale of an asset by a political committee, the Commission has generally not favored "lease-back" situations, in which the committee sells the equity in the asset but retains possession

and pays rent for its use, or "repurchase" situations, in which a committee may receive the equity value of an asset long enough to use the funds for other purposes but retains the right to buy back the asset at any time. See Advisory Opinion 1986-14. Both situations raise problems of fundraising through what are effectively "loans" to a political committee, in which the committee receives money for the value of the asset but does not relinquish, or relinquishes only briefly, the possession and use of the asset. Based upon the facts presented in your request, however, and assuming that the Federal committee fully divests itself of the ownership and use of the assets to be sold, retains no legal right to repurchase and would not attempt to repurchase the items until the conclusion of the 1990 gubernatorial campaign, the Commission views the two proposed transactions as sufficiently separated in time and independent in purpose so as not to implicate the Commission's usual concerns. Under these circumstances, therefore, the Commission concludes that the Federal committee would not be precluded from later repurchasing the assets from the State committee. Any such repurchase would also be subject to the "usual and normal charge" requirement, as indicated in your request.

The sale proceeds should be reported by the Federal committee as "other receipts," including itemized information that identifies the purchaser and amount and date of receipt. 2 U.S.C. 434(b)(3)(G), 11 CFR 104.3(a)(4)(vi). The Federal committee may wish to add a brief explanation to its report that the receipt represents the purchase price paid for these assets.

The Commission expresses no opinion about the legal consequences of the proposed transactions or activity under California law, or under Federal or state tax laws.

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

Yours truly,  
(signed)

Lee Ann Elliott  
Vice Chairman for the Federal Election Commission

Enclosures (AO's 1988-12, 1987-12, 1986-14, 1986-5, 1985-1, 1984-50, 1984-46, 1983-34, 1983-2, 1982-52, 1981-53, 1981-7, 1980-70, 1980-34, 1980-19, 1979-76, 1979-24, 1979-18 and 1979-17)

1/ Also, in prior advisory opinions, the Commission has interpreted the Act and its regulations to permit a federal political committee to donate excess campaign assets to a state committee without charge, if otherwise lawful. See Advisory Opinions 1986-5 and 1984-50 (interpreting 2 U.S.C. 439a and 11 CFR 113.2(d)).

2/ The Act defines "contribution" to include any gift, loan, advance, or deposit of money made by any person for the purpose of influencing an election for Federal office. 2 U.S.C. 431(8)(A). The Commission's regulations provide that a contribution will result when goods are provided to a candidate or political committee "... without charge or at a charge which is less than the usual

and normal charge for such goods ..." 11 CFR 100.7(a)(1)(iii)(A). When a political committee sells assets, a contribution can also result if the purchase price exceeds the "usual and normal charge" for such goods. Advisory Opinions 1986-14 and 1979- 24. The "'usual and normal charge' for goods means the price of those goods in the market from which they ordinarily would have been purchased." 11 CFR 100.7(a)(1) (iii)(B). Commission has concluded that contributions would result when committees have proposed to sell campaign fundraising items, or unique political campaign materials without a genuinely independent market value. See Advisory Opinions 1980-70, 1980-34, 1980-19 and 1979-76. Furthermore, the Commission has considered the use of committee assets to generate income through ongoing business or commercial ventures to be fundraising. See Advisory Opinions 1988-12, 1983-2, 1981-7 and 1979-17.

3/ Although Advisory Opinion 1979-24 has been interpreted to view such sales as avoiding contribution consequences only when committees seek to liquidate assets for debt retirement purposes and terminate their operations, and Advisory Opinion 1985-1 left open the question of the effect upon such transactions of a committee's failure to terminate, the Commission now concludes that the legal character of such isolated sales of assets by political committees is not contingent upon committees pursuing debt retirement or termination. Compare Advisory Opinion 1986-14.

4/ Regardless of your assertion that only "clean funds" would be used for the purchase of the assets by the State committee, however, the circumstances of a bona fide sale, rather than a transfer, would permit the State committee to use any of its funds as payment to the Federal committee, including those monies raised outside the limits and prohibitions of the Act and not otherwise permitted to be transferred to the affiliated Federal committee. A prohibited contribution would result from the sale if the payment price exceeds the "usual and normal charge" for such items and the State committee has received funds from sources not permitted under the FECA. 2 U.S.C. 441b. See Advisory Opinion 1979-24. Furthermore, the State committee should not solicit funds for use in the purchase in a manner suggesting that its receipts will be "contributions" to the Federal committee, or that its payment will be an "expenditure," "for the purpose of influencing any election for Federal office." See 2 U.S.C. 431(8) and (9).