FEDERAL ELECTION COMMISSION
Washington, DC 20463

July 21, 1989

CERTIFIED MAIL,
RETURN RECEIPT REQUESTED

ADVISORY OPINION 1989-10

Gene Karp, Legal Counsel
c/o Senator Dennis DeConcini
328 Hart Senate Office Building
Washington, D.C. 20510

Dear Mr. Karp:

This responds to your letter of June 7, 1989, requesting an advisory opinion on behalf of the DeConcini '88 Committee (the "Committee" or the '"88 Committee") concerning application of the Federal Election Campaign Act of 1971, as amended, (the "Act") and Commission regulations to proposed measures intended to reduce the losses caused by the apparent misappropriation of campaign funds by the Committee's former treasurer.

The Committee is the principal campaign committee of United States Senator Dennis DeConcini for his 1988 re- election campaign. You assert that the Committee's former treasurer "has misappropriated" approximately $500,000 of campaign funds "over a long period of time" before the 1988 general election.[1] Because the former treasurer may have disregarded some bills and filed false or misleading reports, the Committee has undertaken an audit to determine its true financial condition. After the audit is completed, the Committee will file amended, accurate reports.

You expect that the audit will show that the Committee has only a "negligible amount" of cash on hand. And based on what the Committee has learned thus far about the former treasurer's assets, you conclude that the former treasurer is unlikely to "be able to repay the campaign any of the money he has [allegedly] embezzled."

You raise several questions. First, if the auditors find unpaid 1988 campaign bills for which the Committee has insufficient cash on hand and if Mr. DeConcini lends money to the Committee to help it pay those bills, will the DeConcini loans "create a deficit"? Second, is the "audit bill for the audit of the DeConcini '88 campaign accounts chargeable to that campaign and considered an

expense of that campaign?" Or are the audit costs "chargeable to" the Senator's 1994 campaign? You point out that the 1988 elections are over and that Mr. DeConcini has authorized the DeConcini '94 Committee.[2] Third, do the Act and Commission regulations permit the '88 Committee to raise funds to retire 1988 campaign debts "caused by [the former treasurer's alleged] misappropriation of funds"?

In regard to your first question, we note that the regulations and FEC Form 3--the financial disclosure report that authorized committees must periodically file--do not use the term "deficit." Instead, they refer to "debts," "obligations," and "loans." (Loans are a special kind of debt or obligation.) If Mr. DeConcini lends money to his '88 Committee to help it pay its outstanding bills, the amount he lends will become a debt or obligation arising from the 1988 election campaign and will be owed by the '88 Committee to him. See, e.g., 2 U.S.C. 434(b)(2)(G) and (3)(E), 11 CFR 104.3(a)(3) (vii)(B), 104.3(a)(4)(iv), and 104.3(d), FEC Form 3, Page 1, Line 10, and Page 2, Line 13(a), and Schedules A, C, and D (Line 3).[3]

The Act and Commission regulations provide that outstanding debts and obligations owed by a political committee shall be continuously reported until extinguished. See 2 U.S.C. 434(b)(8), 11 CFR 104.3(d) and 104.11. Also see Advisory Opinion 1985-33. Cf. Advisory Opinion 1988-44. This requirement applies to loans from a candidate's personal funds to his or her authorized committees. Therefore, until the debts to Mr. DeConcini are extinguished, the '88 Committee must include them in its FEC Form 3 reports, even though Mr. DeConcini has qualified as a candidate in a subsequent election cycle.

In regard to your second question, the '88 Committee is under a duty to file timely, accurate reports that disclose its financial condition and activity. See, e.g., 2 U.S.C. 432(a) and 434(a) and (b), 11 CFR 102.7, 104.1(a), 104.3, and 104.14. To satisfy this requirement, the Committee has apparently had to employ auditors. The audit is being conducted at the direction of the '88 Committee and to assist the Committee in fulfilling its duty to file accurate FEC disclosure reports. One item that the Committee must include in its future reports is the debt or obligation it owes the auditors for their services. Therefore, in your terminology, the "audit bill" is "chargeable" to the '88 Committee.

Although the audit debt arose in connection with the 1988 election cycle and must be reported by the '88 Committee, the DeConcini '94 Committee may pay all or part of the debt. Commission regulations expressly exempt from limitation the transfer of funds between the current and previous principal campaign committees of the same candidate as long as the funds transferred include no contributions that would violate the Act. 11 CFR 110.3(a)(2)(iv).[4] The DeConcini '94 Committee may, therefore, transfer funds to the '88 Committee to enable the '88 Committee to pay its audit bill. See, e.g., Advisory Opinions 1987-4, 1981-9, 1980-143, and 1980-32. Cf. Advisory Opinion 1986-8. Under 11 CFR 104.3(b)(4)(ii), the DeConcini '94 Committee would itemize the payment as a transfer disbursement. The '88 Committee would itemize the payment as a transfer receipt. 11 CFR 104.3(a)(4)(iii)(A).

In answer to your third question, the '88 Committee may raise funds to pay its outstanding debts and obligations. For example, if Mr. DeConcini lends the Committee money from his personal funds to enable the Committee to pay debts owed to other creditors, then the Committee may

raise funds to pay the resulting debt to him. The Committee may also raise funds from other persons to pay any debts it owes to suppliers of goods and services, including the auditors who examined its campaign accounts. Any funds that the Committee solicits (and accepts) for these purposes must be donor-designated for the 1988 general election and must be aggregated with other contributions made by the same donors for the 1988 general election. See 2 U.S.C. 431(8)(A)(i), 11 CFR 100.7(a)(1), 110.1(b)(3), 110.2(b)(3), and 110.1(g) ("Contributions made to retire debts . . . are subject to the limitations of 11 CFR Part 110"); Advisory Opinion 1983-2; and FEC v. Ted Haley Congressional Comm., 852 F.2d 1111 (9th Cir. 1988).

Commission regulations limit the contributions that an authorized committee may accept with respect to an election already held. A committee may only accept an amount that does not exceed the "adjusted amount of net debts outstanding on the date the contribution is received." 11 CFR 110.1(b)(3)(iii).[5] Any funds that the former treasurer allegedly embezzled or misappropriated are not debts or obligations owed by the '88 Committee. Therefore, the amount of those funds may not be included in calculating the total amount of post-election contributions that the Committee may lawfully accept. As a consequence, even if the auditors find that the funds allegedly taken exceed the "net debts outstanding," the Committee may only accept contributions in an amount equal to its net debts. It may not solicit or accept contributions to restore the Committee's cash balance to what it would have been absent the embezzlement.

In order that its reports will present a true and accurate statement of the actual cash balance, the Committee must report the total amount that its former treasurer allegedly embezzled or misappropriated. The Committee should report that amount as "Other Disbursements" on line 21 and should explain the entry on a Schedule B by giving the name of the former treasurer, the amount, the date(s), and a brief description of the circumstances. 11 CFR 104.3(b)(2)(vi) and (b)(4)(vi).

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)

Danny L. McDonald
Chairman for the Federal Election Commission

Enclosures (AOs 1988-44, 1987-4, 1986-45, 1986-8, 1985-33, 1983-2, 1981-9, 1980-143, and 1980-32)

1/ When the Committee discovered the apparent wrongdoing, it appointed a new treasurer. It also referred the matter to the U.S. Attorney in Arizona for "appropriate action."

2/ The DeConcini '94 Committee, a registered principal campaign committee, has reported contributions aggregating more than $25,000.

3/ Commission regulations permit a candidate for Federal office (other than one who receives public funding) to make unlimited expenditures, including loans, from his or her "personal funds." 11 CFR 110.10(a) and (b); Advisory Opinions 1986-45 and 1985-33. We assume that any money that Mr. DeConcini lends to his committee will come from his "personal funds."

4/ The Commission has interpreted the requirement that transferred funds may not include contributions "in violation of the Act" to prohibit transfers of funds contributed by entities whom the Act bars from making contributions. Contributions need not be traced to the original donors and aggregated, however, when the transfers are made between two principal campaign committees of the same individual who was a candidate for Federal office in sequential election cycles. See generally Advisory Opinion 1987-4. Individuals who are candidates for two Federal offices at the same time must follow special rules for aggregating contributions. See id.

5/ The final sentence of 11 CFR 110.1(b)(3)(iii) reads in full:

> The candidate and his or her authorized committee(s) may accept contributions made after the date of the election if such contributions are designated in writing by the contributor for that election and if such contributions do not exceed the adjusted amount of net debts outstanding on the date the contribution is received.