FEDERAL ELECTION COMMISSION
Washington, DC 20463

July 22, 1993

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

ADVISORY OPINION 1993-8

James H. London
London & Amburn, P.C.
1716 Clinch Avenue
Knoxville, TN 37916

Dear Mr. London:

This responds to your letter dated June 3, 1993, as supplemented by your letters dated June 11 and June 18, 1993, requesting an advisory opinion on behalf of Congressman John J. Duncan, Jr. concerning application of the Federal Election Campaign Act of 1971, as amended ("the Act"), to contributions and expenditures by an incorporated principal campaign committee.

Mr. Duncan is a Congressman representing the Second District of Tennessee. Presently, Mr. Duncan's campaign funds are held in the account of his principal campaign committee, Duncan for Congress. Mr. Duncan would like to incorporate his re-election campaign, under the Tennessee Nonprofit Corporation Act, for liability purposes under 11 CFR 114.12(a). Therefore, he would like to transfer the funds remaining in his present committee to a new, incorporated principal campaign committee named Duncan for Congress, Inc.[1/]

You state that, in accordance with 11 CFR 113.2, excess campaign funds are used to make contributions to the Republican Party on the national, state and local levels. Congressman Duncan intends that the incorporated committee continue to make contributions. In an average year, you anticipate that the committee would make contributions totaling in the range of $5,000 to $10,000. You anticipate that approximately half of the contributions will be made to political parties and approximately half will be made to political candidates, "with a large part of these contributions going to the Knox County Republican ticket."[2/]

You note that Commission regulations permit a political committee to incorporate, and not be treated as a corporation subject to the provisions of 11 CFR Part 114, if it incorporates for

liability purposes only. 11 CFR 114.12(a). Tennessee law, however, differs with respect to incorporated committees. Under the Tennessee Code, the funds of any corporation doing business within the State may not be used "for the purpose of aiding either in the election or defeat in any primary or final election, of any candidate for office, national, state, county, or municipal, or in any way contributing to the campaign fund of any political party, for any purpose whatever." Tennessee Code Annotated §2-19-132(a). This prohibition does not apply "to a contribution made by a national committee of a political party as defined in 2 U.S.C. §431(14) [defining national committee] and (16) [defining political party], which has incorporated in accordance with 11 CFR 114.12(a), when such committee contributes to a state political party executive committee, ... if the funds contributed do not contain any corporate contributions to the national committee of the political party." T.C.A. §2-19-132(b). The Tennessee Code does not go beyond this to permit other incorporated committees to make contributions or expenditures.

In view of the Tennessee law, you ask whether the incorporated committee may contribute excess campaign funds to the Republican party and candidates. You also ask whether the estimated amounts of these contributions raise any specific problems.

The Act states that its provisions and the rules prescribed thereunder, "supersede and preempt any provision of State law with respect to election to Federal office." 2 U.S.C. §453. The House committee that drafted this provision intended "to make certain that the Federal law is construed to occupy the field with respect to elections to Federal office and that the Federal law will be the sole authority under which such elections will be regulated." H.R. Rep. No. 93-1239, 93d Cong., 2d Sess. 10 (1974). According to the Conference Committee report on the 1974 Amendments to the Act, "Federal law occupies the field with respect to criminal sanctions relating to limitations on campaign expenditures, the sources of campaign funds used in Federal races, the conduct of Federal campaigns, and similar offenses, but does not affect the States' rights" as to other areas such as voter fraud and ballot theft. H.R. Rep. No. 93-1438, 93d Cong., 2d Sess. 69 (1974). The Conference report also states that Federal law occupies the field with respect to reporting and disclosure of political contributions to and expenditures by Federal candidates and political committees, but does not affect state laws as to the manner of qualifying as a candidate, or the dates and places of elections. Id. at 100-101.

When the Commission promulgated regulations at 11 CFR 108.7 on the effect of the Act on state law, it stated that the regulations follow section 453 and that, specifically, Federal law supersedes state law with respect to the organization and registration of political committees supporting Federal candidates, disclosure of receipts and expenditures by Federal candidates and political committees, and the limitations on contributions and expenditures regarding Federal candidates and political committees. Federal Election Commission Regulations, Explanation and Justification, House Document No. 95-44, at 51. 11 CFR 108.7(b). The regulations provide that the Act does not supersede state laws concerning the manner of qualification as a candidate or political party organization, dates and places of elections, voter registration, voting fraud and similar offenses, or candidates' personal financial disclosure. 11 CFR 108.7(c). The Commission explained that "[t]hese types of electoral matters are interests of the states and are not covered in the act." House Document No. 95-44, at 51.

As part of its occupation of the area of contributions and expenditures regarding Federal candidates and committees, the Act and Commission regulations provide that excess campaign funds may be used for several specific purposes, including defrayal of any ordinary and necessary expenses in connection with the recipient's duties as a Federal officeholder, contributions to any organization described in 26 U.S.C. 170(c), transfers without limitation to any national, State, or local committee of any political party, or for any other lawful purpose. 11 CFR 113.2; see 2 U.S.C. 439a. "Excess campaign funds" are defined as amounts received by a candidate as contributions which he or she determines are in excess of any amount necessary to defray his or her campaign expenditures. 11 CFR 113.1(e). Assuming Mr. Duncan determines that the amounts he wishes to have his committee contribute are not needed to defray his campaign expenditures, such funds would qualify as excess campaign funds. See Advisory Opinion 1990-2 (where a Congressman who intended to stay in office proposed to use his committee as a guarantor of a $20,000 loan to a local party committee).

With respect to contributions of excess funds to political party committees, the Act preempts the Tennessee law. Section 439a and 11 CFR 113.2 specifically permit the transfer of excess funds to party committees regardless of whether such committees are political committees under the Act or whether they engage in Federal activity. Thus, the incorporated committee may donate to national, state, and local party committees.

With respect to contributions of excess funds to Federal candidates or their authorized campaign committees, the Act preempts Tennessee State law. The incorporated committee may make such contributions up to the limits of 2 U.S.C. 441a(a)(1)(A). This results from the Federal law's sole authority with respect to contributions and expenditures regarding Federal candidates and committees. By this same reasoning, however, the Act does not preempt Tennessee State law with respect to contributions to non-Federal candidates. Section 439a permits contributions to non-Federal candidates if otherwise lawful. In the case of the incorporated committee, however, contributions to non-Federal candidates do not appear to be lawful under the Tennessee Code. See Advisory Opinion 1986-5.

It should also be noted that Tennessee law appears to speak broadly with respect to the activities of an incorporated committee, prohibiting the use of funds for the purpose of aiding in the election or defeat of a candidate. This may be read as prohibiting the committee from making any expenditures aiding in Mr. Duncan's election or the defeat of his opponent. Under the broad preemptive powers of the Act with respect to contributions and expenditures regarding Federal candidates, such a prohibition is preempted.

In response to your follow-up question, the aggregate yearly amounts referred to by you do not raise any specific problems under the Act. With the exception of the latitude provided by 2 U.S.C. 439a as to party committees, any donation of excess funds to a particular political committee should not exceed the limits set out in 2 U.S.C. 441a.

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 1990-2 and 1986-5)

ENDNOTES

1/ You have stated that the first committee will be terminated upon the incorporation of the second committee. The proposed transfer may occur pursuant to 11 CFR 110.3(c)(4) which permits transfers outside the limits of 2 U.S.C. 441a between a candidate's previous Federal campaign committee and his or her current Federal committee. Incorporation of the latter committee under 11 CFR 114.12(a) does not prevent the application of this rule. In addition, in view of the relationship of the two committees, contributions to the first committee for an election, e.g., the 1994 primary or 1994 general, must be aggregated with contributions to a new committee for the purposes of section 441a. The Duncan campaign also has the option of not terminating the first committee, but incorporating it instead, without forming a new committee.

2/ According to the most recent report filed by Duncan for Congress, the 1992 Year End, the committee has $225,372 cash on hand, and no debts are owed to or by it.