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OFFICE OF GENERAL
COUNSEL

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AUG 5 12 01 PM '94

317/773-8715
317/773-9998 FAX

August 3, 1994

SENT VIA FAX

N. Bradley Litchfield, Esq.
Associate General Counsel
Federal Election Commission
999 E Street, N.W.
Washington, D.C. 20463

Dear Mr. Litchfield:

On behalf of my client, Conservative Concepts, Inc., I am requesting an Advisory Opinion from the Federal Election Commission on activity that the corporation is considering undertaking.

Conservative Concepts, Inc. is an Indiana corporation whose principal business is the manufacture for retail sale of logo T-shirts, principally those which carry some type of political message. Conservative Concepts is considering two potential business ventures and seeks the Commission's guidance to ensure compliance with the Federal Election Campaign Act.

The first business venture contemplated involves the purchase of advertising time on a locally produced radio talk show syndicated statewide in Indiana to promote and sell its products, including, *inter alia*, T-shirts that bear messages in support of the candidacy of assorted candidates for the U.S. House of Representatives from Indiana.

Conservative Concepts does not anticipate making any payment or contribution to the candidates' respective campaigns from sales of the T-Shirts, and thus does not precisely match the activity prohibited by the Commission under AOs 1975-15, 1976-50, and 1989-21 and a similar line of advisory opinions dealing with related items. Please note that my client's interest is strictly profit-oriented and is not being undertaken for the purpose of influencing any election for Federal office.

Because Conservative Concepts has no control over the use of a T-shirt after it is sold, there is now way to determine whether the purchaser is—e.g., a collector who will merely add the item to a political memorabilia collection, or a supporter of the given candidate, who will then go and wear the T-shirt in an attempt to convey support for the purchaser's chosen candidate—it is our

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contention that the Commission need not address the question of ultimate use for purposes of influencing an election because that is not my client's intent. Similarly, our understanding is that under the law, the purchaser cannot be determined to have made a contribution, AO 1982-30).

The following questions appear to be raised as a result of my client's proposed venture:

(1) Does radio advertising for the retail sale of T-shirts bearing a message supporting a named candidate for Congress constitute a "contribution" as defined by 2 U.S.C. § 431 (8)(A)(i) if the ad mentions candidates for Federal office by name? Would the answer be different if the advertisement suggests that if a listener backs the candidate's candidacy, the listener might wish to buy my client's T-shirt?

(2) Does radio advertising for the retail sale of T-shirts bearing a message supporting a named candidate for Congress constitute an "independent expenditure" as defined by 2 U.S.C. § 431 (17) if the ad mentions candidates for Federal office by name? Would the answer be different if the advertisement suggests that if a listener backs the candidate's candidacy, the listener might wish to buy my client's T-shirt? If Conservative Concepts seeks the approval of a candidate to use the candidate's name on its T-shirt, would this change the relationship between the advertiser and the candidate so as to constitute an impermissible independent expenditure because it would be "made in concert with" such candidate or candidates?

(3) If the Conservative Concepts advertisement is "packaged" as part of the syndicated radio show, would the Commission's determination that such an advertisement would constitute a contribution or an independent expenditure under terms of the Federal Election Campaign Act impute the contribution to the radio network responsible for distribution of the show that includes the advertisement?

(4) Would the Commission's determination in any of the above questions be changed should Conservative Concepts decide to limit itself to producing shirts for only certain candidates or only feature one candidate in a given advertising spot?

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Attorney at Law

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The second venture contemplated by Conservative Concepts also involves the T-shirts that bear messages in support of the candidacy of assorted candidates for the U.S. House of Representatives from Indiana. In this case, there would be no advertising, *per se*, but my client would sell the T-shirts at events such as rallies, joint appearances, and debates that the candidate would be attending. As with the arrangement proposed above, there would be no contribution to the candidate's campaign committee.

We would appreciate guidance from the Commission as to whether this activity would, as we firmly believe, fall outside the restrictions of the Federal Election Campaign Act. We would further appreciate guidance from the Commission as to whether the act of periodically requesting a list of scheduled appearances from the campaign would change the Commission's conclusion.

In arriving at its determination, I would ask the Commission to revisit AO 1989-21, the so-called "Cowtown" advisory opinion, in which the Commission, *in dictum*, states:

'Also, as a practical matter, the Commission recognizes that entrepreneurial activity involving candidate-related merchandise is commonplace. Under the Act, such vendor activity would not necessarily constitute an 'expenditure' or 'contributions' by the purchasers. The Commission would consider such factors as whether the sales did not involve any fundraising activity or solicitations for political contributions, the activity was engaged in by the vendor for genuinely commercial purposes, the items were sold at the vendor's usual and normal charge, and the purchases were made by individuals for their personal use in political expression.'

Conservative Concepts believes that its proposed activity falls within the spirit of this expression of Commission intent.

Please be assured that my client is well aware of the Act's prohibition on corporate contributions, and if the Commission determines that a contribution might result from certain courses of action as outlined above, such activity might then instead be undertaken by a related sole proprietorship.

Should you require any additional information, please contact me directly. Your prompt consideration of this Advisory Opinion Request would be most appreciated.

Cordially,





FEDERAL ELECTION COMMISSION

WASHINGTON DC 20463

August 12, 1994

**Edward D. Feigenbaum
Attorney at Law
Post Office Box 383
Noblesville, IN 46060**

Dear Mr. Feigenbaum:

This refers to your letter dated August 3, 1994, on behalf of your client, Conservative Concepts, Inc. ("the company"), concerning the application of the Federal Election Campaign Act of 1971, as amended ("the Act"), and Commission regulations to the advertising and sale of "logo T-shirts" that carry a political message.

You contemplate two types of business ventures in the sale of the shirts. The first venture involves the purchase of advertising time on a locally produced radio talk show syndicated statewide in Indiana to promote and sell the company's products, including T-shirts that carry messages in support of various U.S. House candidates from Indiana. You state that the company does not anticipate making any payment or contribution to the candidates' respective campaigns from sales of the T-shirts. You assert that the company has no control over the use of the T-shirt after it is sold, so there is no way to determine whether the purchaser used the shirt merely as a collector's item or to convey support for the candidate.

You ask a number of questions with respect to this activity. You wish to know if radio advertising for the retail sale of the shirts constitutes a contribution if the candidate(s) are named, and whether the result would differ if the ad suggests that if the listener backs the candidate's candidacy, the listener might wish to buy the T-shirt. You also ask whether either one of these types of radio ads constitutes an independent expenditure. You also pose a situation in which the company seeks the approval of a candidate to use the candidate's name on a T-shirt and ask whether this "would change the relationship between the advertiser and the candidate so as to constitute an impermissible independent expenditure."

Furthermore, you ask whether, if the company's ad is "'packaged' as part of the syndicated radio show," would the Commission impute a contribution to the radio network

responsible for distribution of the show. Finally, you ask whether the Commission's determination in any of the above questions would change if the company limited itself to producing shirts for only certain candidates or if it only featured one candidate in a given advertising spot.

The second venture involves the same T-shirts but there would be no radio advertising. Instead, the company would sell the T-shirts at events such as rallies, joint appearances, and debates that the candidate would be attending. The company would not make a contribution to the candidate's committee. You wish to know whether this would result in a prohibited corporate contribution or expenditure and whether the Commission's conclusion would be affected by periodic requests from the company to the campaign for a list of scheduled appearances.

The Act authorizes the Commission to issue an advisory opinion in response to a "complete written request" from any person with respect to a specific transaction or activity by the requesting person. 2 U.S.C. §437f(a). Commission regulations explain that such a request "shall include a complete description of all facts relevant to the specific transaction or activity with respect to which the request is made." 11 CFR 112.1(c). In addition, inquiries presenting only a future question of interpretation or the activities of third parties do not qualify as advisory opinion requests. 11 CFR 112.1(b).

In view of the cited requirements, you will need to provide responses to a number of questions. These questions are aimed at achieving greater clarity as to the entities involved, the media used, and the messages conveyed.

- (1) Give examples of the messages that will appear on the logo T-shirts.
- (2) Describe Conservative Concepts, Inc. in greater detail. Your response should include, but not be limited to, when and by whom the company was formed (including whether those persons have been or will be engaged in activities supporting candidates or political parties), the purposes of the company, whether the company's principals intended or intend to focus their activities on candidates of a particular party or ideology, and other activities engaged in by the company besides the manufacture of logo T-shirts for retail sale. Describe the related sole proprietorship (and its relationship with the company) that would conduct the activities if it were determined that prohibited contributions would otherwise result.
- (3) Describe the syndicated radio show on which you propose to advertise the shirts. Your description should include, but not be limited to, the name of the show, the purpose of

the show (e.g., general talk show, public issues and or political talk show, a show with a certain ideological emphasis and what that emphasis is), and a general description of the format.

(4) With respect to the first venture, describe or state the contents of the ad that mentions candidates for Federal office by name. This should include all proposed variations of the ads, e.g., those which mention a number of candidates or which feature only one candidate. Describe or state the contents of the ad that suggests that, if a listener backs the candidate's candidacy, the listener might wish to buy the T-shirt.

(5) State in full what is meant by packaging the advertisement as part of the syndicated radio show.

(6) Describe the communications between the company and the campaigns of the candidates when the company seeks approval of the use of the candidate's name and in any other situation related to the first venture. Describe the communications between the company and the campaigns of candidates in connection with the second venture, in addition to periodically requesting a list of scheduled appearances.

(7) State whether any arrangements have been made with the syndicated radio show or with the campaigns and what these arrangements are. In view of your question as to whether a contribution by the radio network would result and the statement of the law above as to third parties, please state whether you are also representing the radio network and/or the radio show, or any recipient candidates, in this request.

For your information and guidance, we have enclosed Advisory Opinion 1988-17, an opinion to consider in addition to those you mention. Upon receipt of your responses, this Office and the Commission will give further consideration to your inquiry as an advisory opinion request. If you have any questions about this letter, the questions, or the advisory opinion process, please contact the undersigned.

Sincerely,

Lawrence M. Noble
General Counsel

By:


N. Bradley Litchfield
Associate General Counsel

Enclosure

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EDWARD D. FEIGENBAUM

Attorney at Law

FAX TRANSMITTAL SHEET

TO: Brad Litchfield

AOR 1994-30

FAX NO: 202/219-3880

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AUG 31 9 46 AM '94

FROM: Ed Feigenbaum [Voice 317/773-8715; FAX 317/773-9998]

DATE: August 31, 1994

TIME:

Number of pages, including this page: 6

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August 31, 1994

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Dear Mr. Litchfield:

Thank you for your letter of August 12, 1994, received August 22, 1994 responding to my request for an Advisory Opinion from the Federal Election Commission on behalf of Conservative Concepts, Inc.

This letter answers the questions that you raised about our August 3, 1994 Advisory Opinion Request. Before proceeding with the specifics, I would note for your benefit that I have also been retained by Michael R. Pence, an Indianapolis attorney who owns and produces *The Mike Pence Show*, the syndicated radio broadcast on which Conservative Concepts, Inc. wishes to advertise. This aspect of my representation, which is for purposes of receiving guidance from the Commission on the questions contained in the Advisory Opinion Request, is relevant with respect to your questions three (3), five (5), and seven (7).

QUESTION 1. Your first question asks for examples of messages that would appear on the proposed logo t-shirts.

The t-shirts proposed for sale would bear messages such as or substantially similar to, "Potter for Congress," or "McDonald for Senate." The message might also include "Vote Republican" or "Vote Democratic" as appropriate. Conservative Concepts plans to include a disclaimer that would read along the lines of, "Not authorized or paid for by any candidate or political party."

QUESTION 2. Your second question requests a more complete description of Conservative Concepts, Inc. and Raymar Incentives, their respective owners, and their activities.

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Conservative Concepts, Inc. was incorporated in Indiana in late 1993 by Ray Hilbert and Berry Payton for the purpose of marketing assorted paraphernalia, including, *inter alia*, t-shirts, lapel and bumper stickers, mugs, and hats. The company markets its products at events such as outdoor festivals, flea markets, and conventions, and also is involved in wholesale sales to retail outlets.

Raymar Incentives is a sole proprietorship owned by Mr. Hilbert that is entirely separate from Conservative Concepts. Raymar is a specialty advertising entity formed in late 1992 to offer such products and services as the wholesale and retail of clothing; corporate gifts; incentive programs; consumer marketing; and private franchising to a principally non-political market.

To the best of my knowledge, Messrs. Hilbert and Payton have not been engaged during this current election cycle in activities supporting candidates or political parties, nor does either anticipate such activity beyond that which might be contemplated as part of this Advisory Opinion Request.

Conservative Concepts, Inc. intends to focus its activities on candidates who share a conservative ideology, without concern for the party affiliation any such candidates might have.

QUESTION 3. Your third question asks for a description of the syndicated radio show on which Conservative Concepts proposes to advertise its t-shirts.

The radio show proposed as the medium for advertising is *The Mike Pence Show*, a daily syndicated radio talk show hosted by Indianapolis attorney Michael R. Pence. The show is syndicated by Network Indiana—a division of Wabash Valley Broadcasting Corporation—that includes 80 radio stations among its affiliates. *The Mike Pence Show* is a joint venture between Mr. Pence's Hoosier Conservative, Inc. (established 1993) and Network Indiana.

The show itself is Indiana's only conservative talk show dedicated exclusively to politics and popular culture in Indiana, and can be heard on 14 Network Indiana affiliate radio stations throughout the state. While it promotes itself as a "conservative" show, it is a non-partisan public affairs radio program. The format of the three-(3) hour daily broadcast includes two hours of talk and telephone calls from statewide listeners based on topical news, and a third hour typically devoted to a guest who appears either in-studio or

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via the telephone. Guests have included candidates for federal and state office from both major political parties, including some joint appearances by candidates for the same office. By way of example, Marion County (Indianapolis) Prosecutor Jeffrey Modisett (D) appeared on the show August 24 to talk about the decision to seek the death penalty in a heinous local murder case. U.S. Rep. John Myers (R) was on the show August 25, and his opponent, Greencastle Mayor Michael Harmless (D) was a guest on August 29.

QUESTION 4. Your fourth question solicits a description of advertisements that would mention candidates for Federal office (or the contents of the ad).

Conservative Concepts, Inc. is asking for guidance from the Federal Election Commission on what the Commission deems proper with respect to its proposed concept for advertising, and, as a result, no actual language has been drafted, pending the Commission's response. Recognizing that the Commission would prefer to deal with actual language rather than concepts, however, Conservative Concepts preliminarily suggests that such radio advertisements might best be roughly paraphrased along the following lines:

"Listeners, if you live in the [D C. Metro] area and wish to show your support for [Trevor Potter], call [this telephone number] and you can buy a [Potter for Congress]-imprinted t-shirt for just [\$15.95 plus tax and shipping costs]. This offer is not affiliated with, or authorized or paid for by any candidate or political party"

"Listeners, if you live in the [D C Metro] area and wish to support [Trevor Potter], or if you live in the [greater northern Virginia] area and wish to show your support for [Danny McDonald], call [this telephone number] and you can buy a [Potter for Congress or McDonald for Senate]-imprinted t-shirt for just [\$15 95 plus tax and shipping costs]. This offer is not affiliated with, or authorized or paid for by any candidate or political party"

Again, Conservative Concepts is not wedded to the actual language. Should the Commission determine that other language be more appropriate in comporting with the letter and spirit of the Federal Election Campaign Act, Conservative Concepts would be most amenable to your suggestions. Indeed, that is why the company is asking the commission for this Advisory Opinion.

QUESTION 5. Your fifth question inquires about the concept of packaging the advertisement as part of the radio show.

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Attorney at Law

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The *Mike Pence Show* is marketed on a barter basis to Network Indiana affiliates. Stations that opt for carrying the broadcast do so by yielding eight (8) minutes of advertising time per hour to Network Indiana. These eight (8) minutes are then broadcast along with the program to the 14 affiliates which currently air the program. Purchase of a portion of those eight (8) minutes is what Conservative Concepts, Inc. is contemplating, dependent, of course, upon the Commission's response to this Advisory Opinion Request.

QUESTION 6. Your sixth question requests a description of communications between the company and candidates with respect to the contemplated transactions.

Rest assured that no contact has yet been made with any candidate's campaign by Conservative Concepts pending resolution of this Advisory Opinion Request. Indeed, if Conservative Concepts determines that it is permissible to market a product with a candidate's name without the candidate's permission, the company will do so without any communication with the candidate in question, save perhaps a letter to the candidate simply indicating that the company is undertaking the activity.

Any potential communications with a candidate about following the candidate to various public campaign events will be limited to a request for a candidate's public appearance schedule on a periodic basis, perhaps accompanied or preceded by a message to the candidate simply stating that the company is undertaking the activity.

QUESTION 7. Your final question contemplates arrangements between *The Mike Pence Show* and any campaigns, as well as my representation of the show or radio network.

No arrangements have been made by the *Mike Pence Show* or Network Indiana with any candidates or campaigns, nor are any such arrangements contemplated. However, this statement should not be interpreted to preclude future acceptance of candidate advertising that might be proffered in the ordinary course of business.

As noted on the first page of this letter, I have also been retained for purposes of obtaining this clarification from the Commission by Mr. Pence, who has the full ownership of *The Mike Pence Show*.

Edward D. Feigenbaum
Attorney at Law

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I trust that these answers to your questions are sufficient to afford the Commission the level of detail needed to render an appropriate Advisory Opinion. Again, should further information be required, please do not hesitate to contact me directly.

My clients look forward to a prompt response from the Commission so that any permissible activity may be undertaken without further delay.

Cordially,


Edward D. Feigenbaum

cc: Ray Hilbert
Michael R. Pence, Esq.