FEDERAL ELECTION COMMISSION
Washington, DC 20463

April 6, 1995

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

ADVISORY OPINION 1995-7

Kenneth D. Albertsen
Birch, Horton, Bittner and Cherot
1127 West Seventh Avenue
Anchorage, Alaska 99501-3563

Dear Mr. Albertsen:

This refers to your March 2, 1995, letter on behalf of the Key Bank of Alaska ("Key Bank") regarding the application of the Federal Election Campaign Act of 1971, as amended, to Key Bank's attempt to collect a debt owed to it by Patrick M. Rodey who authorized the Pat Rodey Campaign Committee (the "Committee").

You state that Patrick M. Rodey was a former Alaska state legislator who was unsuccessful in a 1992 congressional campaign.[1/] You explain that Mr. Rodey affirms that the funds he borrowed from Key Bank were used in his 1992 congressional campaign and that he now desires to have the Committee retire his personal debt to Key Bank.

You state that on August 24, 1992, the candidate executed and delivered to Key Bank a promissory note in the original amount of $40,573 for a personal loan to him in that amount. The note names him alone as the borrower, obligor and guarantor of the loan. Mr. Rodey subsequently defaulted under the payment terms of the first note and, after Key Bank filed suit against him several times, he agreed to a revised loan agreement and then later he executed a new promissory note for the same amount as the first note. This new note again named Mr. Rodey as the sole borrower, obligor and guarantor. Mr. Rodey defaulted on this second note, and Key Bank again filed suit against him. You state that Mr. Rodey answered the complaint and alleged that he is prevented from making payment to Key Bank by Commission regulations which require Commission prior approval before payment is made. In particular, you state that Mr. Rodey suggests that 11 CFR 116.7, relating to debt settlement plans filed by terminating

committees, prevents his repayment of this debt. You ask whether Commission regulations act as bar to the bank's claim against Mr. Rodey for repayment of this campaign loan.

A threshold issue raised by your inquiry is whether the situation you present qualifies for an advisory opinion. Commission regulations state that requests regarding the activities of third parties do not qualify as advisory opinion requests. 11 CFR 112.1(b). Key Bank is an obligee and holder of a claim against Mr. Rodey and is now engaged in court proceedings to secure payment on the claim. A third party, other than Key Bank, is raising the defense that is the subject of your advisory opinion request. The Commission notes, however, that the validity of this defense will impact the success of Key Bank's continuing efforts to collect on the alleged claim. For this reason, the Commission concludes that your request qualifies for treatment as an advisory opinion request. See Advisory Opinion 1984-58.[2/]

Commission regulations at 11 CFR 116.7 provide procedures for debt settlement plans filed by terminating committees for Commission review. It requires such committees to file a debt settlement plan after the creditors included in the debt settlement plan have agreed to the settlement or forgiveness of the particular debt(s) owed to each of them. See 11 CFR 116.7. The regulation further provides that "the terminating committee shall not make any payments to the creditors included in the debt settlement plan until completion of the Commission review." Id.

Section 116.7(b) of the regulations lists some of the types of debts subject to debt settlement. These include amounts owed to commercial vendors, debts arising from advances by committee staff and other individuals, salaries owed to committee employees and debts arising from loans made by political committees or individuals, including candidates. See 11 CFR 116.7(b). Bank loans, however, have been specifically excluded from this list. The Explanation and Justification for section 116.7 noted that "at the time the Commission issued the [notice of proposed rule making], it indicated that the revised debt settlement rules would not apply to bank loans, since the Commission does not generally consider bank loans in the debt settlement process, and does not intend to change its approach." 55 Fed. Reg. 26384 (June 27, 1989).

Reliance on section 116.7(b) as an affirmative defense to a bank lender's claim against a former candidate or his campaign committee was never contemplated by the Commission. First, the Commission has long held that state law governs whether an alleged debt in fact exists, what the amount of a debt is, and which persons or entities are responsible for paying a debt. See Advisory Opinions 1989-2, 1988-44, and 1981-42.

Advisory Opinion 1989-2 is especially relevant to your situation. In that opinion, a committee, which was being sued by a vendor, was negotiating to settle the claim before judgment was reached. The committee inquired in an advisory opinion request whether the Act would preclude the payment of the judgment should the settlement negotiations fail and the committee also lose the case. The Commission concluded that the Act and Commission regulations would not preclude the Committee from paying the debt even if that meant using all of the committee's remaining cash on hand.

Further, the text of the regulation would make it, in any case, inapplicable to your circumstances. Section 116.7 concerns circumstances in which a committee has already reached

settlement with its creditors over its debts. Key Bank and Mr. Rodey have not reached settlement on the bank's claim. Rather, the parties are currently engaged in litigation, not negotiation, over the loan payment and are not in a settlement process. Finally, even if settlement was contemplated, it has been the general policy of the Commission not to apply its debt settlement regulations to bank loans. Considering these factors, the Commission concludes that 11 CFR 116.7 would not bar Key Bank's claim against the former candidate for repayment of the campaign loan.

Although not dispositive of your request, the Commission notes that a recent case, Karl Rove & Company v. Thornburgh, 39 F.3d 1273 (5th Cir. 1994), is consistent with this conclusion. A candidate seeking to defend against personal liability for the debts of his committee argued that the Act's pre-emption provision superseded state law as regards his liability. The court first noted that the Act is silent on personal liability of a candidate for campaign debts. Then, citing Advisory Opinion 1989-2, the court correctly concluded that the Act did not pre-empt state law in this instance and that state law controlled as to the liability of the candidate. See Rove at 1280.

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

Sincerely,

(signed)

Danny L. McDonald
Chairman

Enclosures (AOs 1989-2, 1988-44, 1984-58 and 1981-42)

1 General reference sources indicate that Mr. Rodey was a member of the Alaska State Senate from 1974 to 1993 and sought the Democratic nomination for election to the U.S. House of Representatives as the at-large member from Alaska.
2 The circumstances in Advisory Opinion 1984-58 were similar to those presented in your situation. The City of Cupertino attempted to collect a claim against the principal campaign committee of a presidential candidate. Stating that the Act prevented payment, the committee refused to pay the claim. The City then requested an opinion from the Commission regarding the validity of the defense. The Commission, citing the impact the success of the defense would have on the City's effort to secure payment, concluded that this request did not present a third party situation.