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FEDERAL ELECTION COMMISSION  
WASHINGTON, D.C. 20463

Oct 13 1 55 PM '94

October 13, 1994

**MEMORANDUM**

TO: The Commission

THROUGH: John C. Surina  
Staff Director

FROM: Lawrence M. Noble  
General Counsel

N. Bradley Litchfield  
Associate General Counsel

Jonathan M. Levin  
Senior Attorney

SUBJECT: Revised Draft AO 1994-30

**AGENDA ITEM**

For Meeting of: OCT 20 1994

*RK fcs*

*[Signature]*

*L/ML*

On October 6, 1994, the Commission considered Draft Advisory Opinion 1994-30 (Agenda Document #94-114). After considerable discussion of the draft, with no motion for approval or disapproval, the Commission voted to continue discussion at its meeting on October 20. No specific suggestions for amendments to the draft were adopted at the October 6 meeting.

After reflecting on the discussion, however, this office has made a few changes for purposes of clarity and more precise phrasing. We request that this revised draft be placed on the October 20 agenda, instead of Agenda Document #94-114.

Each change appears on the attached document and is emphasized by underlining and bolding. Nearly all the changes are described on this listing:

- 1) The phrase "merely commercial" inserted to replace the phrase "principally entrepreneurial" on pages 10, 12, 13, 15, and 16.
- 2) Cites to 2 U.S.C. §441b and 11 CFR 114.2 added to pages 7 and 11.
- 3) New footnote on page 10 and revised footnotes on pages 13 and 14.

Attachment

**DRAFT**

1  
2  
3 ADVISORY OPINION 1994-30

4 Edward D. Feigenbaum  
5 Attorney at Law  
6 P.O. Box 383  
7 Noblesville, IN 46060-0383

8 Dear Mr. Feigenbaum:

9 This responds to your letter dated August 3, 1994, as  
10 supplemented by your letter dated August 31, 1994, requesting  
11 an advisory opinion on behalf of Conservative Concepts, Inc.  
12 and Michael R. Pence concerning the application of the  
13 Federal Election Campaign Act of 1971, as amended ("the  
14 Act"), and Commission regulations to ads for the sale of  
15 T-shirts bearing campaign messages.

16 Your request centers around two types of business  
17 ventures to be conducted by Conservative Concepts, Inc.  
18 ("CCI") entailing the manufacture, advertising and sale of  
19 T-shirts containing logos advocating the election of  
20 candidates, e.g., "X for Congress" or "Y for Senate," and  
21 perhaps including the phrases, "Vote Republican" or "Vote  
22 Democratic," as appropriate. One venture would involve  
23 advertising of T-shirts on a syndicated talk show known as  
24 The Mike Pence Show and the other would involve the sale of  
25 the T-shirts at events such as rallies, joint candidate  
26 appearances, and debates.

27 CCI is an Indiana company, incorporated in late 1993 by  
28 Ray Hilbert and Berry Payton, whose principal business is the  
29 manufacture for sale of assorted paraphernalia (e.g.,  
30 T-shirts, lapel and bumper stickers, mugs, and hats) with

logos on them, principally logos with political messages. The company markets its products at events such as outdoor festivals, flea markets, and conventions, and in wholesale sales to retail outlets. The company intends to focus its activities on candidates who have a conservative ideology, without regard to their party affiliation.

As an alternative to the sale by CCI, Raymar Incentives, a sole proprietorship formed by Mr. Hilbert in late 1992, would market and advertise the shirts. Raymar is a specialty advertising agency offering 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. You state that, to the best of your knowledge, Mr. Hilbert and Mr. Payton have not engaged in activities supporting candidates or political parties during the current election cycle, nor do they anticipate engaging in such activities during this cycle.

The Mike Pence Show is a daily syndicated radio talk show hosted by Indianapolis attorney Michael R. Pence. It is syndicated by Network Indiana, which is a division of Wabash Valley Broadcasting Corporation and includes 80 radio stations among its affiliates. The show is a joint venture between Network Indiana and Mr. Pence's Hoosier Conservative, Inc. (established in 1993). You describe the show as "Indiana's only conservative talk show dedicated exclusively to politics and popular culture in Indiana." It can be heard on 14 Network Indiana affiliate stations. You state that,

3 although it promotes itself as a "conservative" show, it is a  
4 non-partisan public affairs radio program. The three-hour  
5 format includes two hours of talk and telephone calls from  
6 statewide listeners based on topical news and a third hour  
7 focusing on a guest who appears in the studio or by  
8 telephone. These guests have included Federal and state  
9 candidates from both major parties, and there have been some  
10 joint appearances by candidates for the same office.

11 The first venture would involve the purchase by CCI of  
12 advertising time on the Pence Show for the sale of T-shirts  
13 using the following type of language:

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

21 Another advertisement featuring the name of more than  
22 one candidate might be aired as follows:

23 Listeners, if you live in the [D.C. Metro] area and  
24 wish to support [Trevor Potter], or if you live in  
25 the [greater northern Virginia] area and wish to  
26 show your support for [Danny McDonald], call [this  
27 telephone number] and you can buy a [Potter for  
28 Congress or McDonald for Senate]-imprinted t-shirt  
29 for just [\$15.95 plus tax and shipping costs].  
30 This offer is not affiliated with, or authorized or  
paid for by any candidate or political party.

CCI would use other language at the advice of the  
Commission.

You present the possibility of "packaging the  
advertisement as part of the radio show." You explain that  
the Mike Pence Show is marketed on a barter basis to Network

3 Indiana affiliates. Stations that decide to carry the show  
4 do so by yielding eight minutes of advertising time per hour  
5 to Network Indiana (part owner of the show), and these eight  
6 minutes are broadcast along with the program to the 14  
7 affiliates airing it. CCI plans to purchase a portion of  
8 those eight minutes per hour from Network Indiana. Thus,  
9 when the show is bartered to a station, the CCI ads will be  
10 already part of the package that the station receives. This  
11 also means that CCI will not have to purchase advertising  
12 time from each station.

13 CCI has not made any contact with any campaigns pending  
14 the outcome of this opinion. If CCI determines that it is  
15 permissible to market a product with a candidate's name  
16 without the candidate's permission, the company will make no  
17 contact, except perhaps for a letter to the candidate "simply  
18 indicating that the company is undertaking the activity."

19 The second situation, i.e., the sale of the same  
20 T-shirts at events such as rallies, joint appearances, and  
21 debates that the candidate would be attending, is not  
22 connected with any advertising. As with the above  
23 arrangement, no funds would go to the candidate's campaign.  
24 Periodically, CCI will request a list of appearances from the  
25 campaign, perhaps accompanied by a message to the candidate  
26 simply indicating that the company is undertaking the vending  
27 activity.

28 Neither one of the proposed activities will entail  
29 payments or contributions from CCI to the candidates'  
30

campaigns from the sale of the T-shirts. You assert that your client's interest is strictly profit-oriented and not for the purpose of influencing a Federal election. You note that CCI has no control over the use of the shirts after they are purchased and that there is no way to determine whether the purchaser is merely a collector or a supporter of the candidate who will wear the shirt in an attempt to convey his or her support.

You ask a number of questions pertaining to the above-described transactions. 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. Additionally, you ask whether, if the company seeks the approval of a candidate to use the candidate's name on a T-shirt, 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

3 producing shirts for only certain candidates or if it only  
4 featured one candidate in a given advertising spot.

5 With respect to the second venture, you wish to know  
6 whether a prohibited corporate contribution or expenditure  
7 would result and whether the Commission's conclusion would be  
8 affected by periodic requests from the company to the  
9 campaign for a list of scheduled appearances.

10 Analysis

11 I. First Situation

12 The Commission has considered situations involving  
13 business ventures by corporations and other entities  
14 involving candidate or party-related merchandise. If outlays  
15 of funds, goods, or services are made by a business entity  
16 selling items and these outlays are not paid for by the  
17 campaigns benefiting, referred to, or affected, the question  
18 arises as to whether such outlays are contributions or  
19 expenditures subject to the Act's limits under 2 U.S.C. §441a  
20 or prohibited by 2 U.S.C. §441b(a), or whether they are  
21 merely entrepreneurial or commercial activity unlimited by the  
22 Act. See 2 U.S.C. §§431(8)(A)(i) and 441b(b)(2); 11 CFR  
23 100.7(a)(1) and 114.1(a)(1). The same questions arise as to  
24 the purchases of the merchandise.

25 The above questions often arise in the context of  
26 coordination or arrangements between vendors and campaigns.  
27 If a vendor acts without such coordination or arrangement,  
28 and the vendor is incorporated, the activity will still be  
29 prohibited if it constitutes an independent expenditure,  
30

3 e.g., a communication which expressly advocates the election  
4 or defeat of a clearly identified candidate and which is not  
5 made with the cooperation or prior consent of, or in  
6 consultation with, or at the request or suggestion of, any  
7 candidate or authorized committee or agent of a candidate.  
8 2 U.S.C. §441b(a); 11 CFR 109.1(a) and 114.2(b). See also  
9 2 U.S.C. §431(17) and 11 CFR 100.16 and 109.1(b).

10 In Advisory Opinion 1976-50, a corporation planned to  
11 produce and market T-shirts at its own expense for a  
12 principal campaign committee, receive payment from individual  
13 purchasers, and send a portion of the purchase price to the  
14 committee. The Commission concluded that this amounted to  
15 the advance of corporate funds to assist the committee in a  
16 fundraising effort and was therefore impermissible. In  
17 Advisory Opinion 1989-21, the Commission considered an  
18 unincorporated free-lance artist's proposal to market  
19 merchandise embellished with "cartoon characters" and the  
20 likenesses of political candidates as a means of raising  
21 funds for Federal candidates and party committees. Under the  
22 plan, the artist would pay all the costs associated with  
23 producing the fundraising items and would send 10% of the  
24 retail price to the committees. The Commission held that the  
25 individual's advance outlays to produce and market the items  
26 would be considered loans to the candidates and that the  
27 entire amount paid for the fundraising items, not just the  
28 10%, would be considered contributions by purchasers. The  
29 Commission also stated that because the individual would be  
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3 acting as the committee's "agent . . . to receive  
4 contributions and make expenditures," she would have to  
5 include disclaimers with her solicitations and conform with  
6 the recordkeeping and reporting requirements of the Act.

7 In reaching this conclusion, however, the Commission  
8 also stated that "as a practical matter, [it] recognizes that  
9 entrepreneurial activity involving candidate-related  
10 merchandise is commonplace." Stating that the commercial  
11 sale of candidate-related merchandise "would not necessarily  
12 constitute an 'expenditure' or 'contribution' by the  
13 purchasers," the Commission identified certain factors that  
14 it would consider in determining the nature of such  
15 entrepreneurial activity: whether the sales involve  
16 fundraising activity or solicitations for political  
17 contributions; whether the activity is engaged in by the  
18 vendor for genuinely commercial purposes; whether the items  
19 are sold at the vendor's usual and normal charge; and whether  
20 the purchases are made by individuals for their personal use  
21 in political expression. Advisory Opinion 1989-21.

22 Examples of [ ] entrepreneurial activity may be found  
23 in Advisory Opinion 1988-17, which addressed several proposed  
24 transactions by a company, whose principal purpose was the  
25 production of commemorative medallions. Pursuant to  
26 contracts with congressional and presidential campaigns, the  
27 company planned to produce medallions containing the likeness  
28 of the particular presidential or congressional candidate.  
29 The campaigns would provide the upfront production expenses  
30

3 to the company and bear all the expenses for marketing, and  
4 pay a fee to the company. Checks for the purchase of the  
5 medallions would be sent to and payable to the respective  
6 campaigns. The Commission, in approving this arrangement,  
7 contrasted this situation with Advisory Opinion 1976-50 and  
8 other situations where the corporation forwarded "royalty"  
9 money or assumed costs without full compensation.

10 The Commission also considered other sales of the  
11 medallions. The company planned to market and sell the  
12 medallions to separate segregated funds and non-connected  
13 PACs which in turn would provide the medallions as gifts and  
14 souvenirs to their contributors. The Commission stated that  
15 the proposal appeared to entail "profit-making, arm's length  
16 commercial transactions in which the corporation offers to  
17 sell products that may be useful to political organizations"  
18 and that such transactions would not be precluded by the Act  
19 if the purchase price was usual and normal, and that the  
20 company's marketing activity to PACs will be conducted on a  
21 strictly commercial basis without an attempt to influence the  
22 election of a candidate. Another proposal entailed the  
23 company producing and marketing the medallions at its own  
24 expense and selling them to the general public only after the  
25 candidate's election, loss, or withdrawal, and after  
26 completion of the candidate's debt retirement. Without  
27 stating whether this proposal had to be conducted only after  
28 election day and debt retirement, the Commission asserted  
29 that the plan was permissible so long as the company  
30

3 "pursue[d] this venture on a commercial basis for the purpose  
4 of making a profit."

5 Your proposal for the radio advertising of T-shirts  
6 without the variations discussed below<sup>1/</sup> does not appear to  
7 entail any arrangements with campaigns, other than a possible  
8 letter informing the candidate that CCI is undertaking these  
9 ads, that would suggest an election influencing purpose  
10 instead of one that is merely commercial. For example, there  
11 is no arrangement whereby CCI would lay out funds for  
12 advertising expenses in coordination with a committee and no  
13 arrangements whereby a portion of the sales proceeds will be  
14 retained by or remitted to the committee of the referenced  
15 candidate. In addition, with reference to what may  
16 constitute coordination compromising the nature of an  
17 independent expenditure, the request does not appear to  
18 envisage any arrangements whereby information as to the  
19 amounts of sales, location, and other aspects of CCI's sales  
20 plan are communicated to any candidate's campaign, or whereby  
21 information as to any campaign's plans are communicated to  
22 CCI, thus affecting CCI's spending. See 11 CFR  
23 109.1(b)(4)(i).<sup>2/</sup> Thus, it appears that no prohibited  
24

25 1/ See discussion in footnote 2 and discussion as to seeking  
26 approval of the candidate's campaign.

27 2/ A simple statement that CCI is airing such ads (referred  
28 to above) would most likely not, by itself, constitute  
29 coordination or an arrangement with a campaign. Discussion  
30 as to when or how often the ads would air, or the volume of  
shirts to be sold, may lead to a different conclusion.  
Seeking and receiving consent from a campaign may also be a  
factor. See below.

3 corporate contribution by CCI, or contribution subject to the  
4 limits by Raymar Incentives, is implicated.

5 If the company's activities constitute independent  
6 expenditures, however, then such activity by CCI would be  
7 prohibited and such activity by Raymar would be reportable.  
8 2 U.S.C. §§434(c) and 441b(a); 11 CFR 104.4(b), 104.5(g),  
9 109.2, and 114.2(b). The T-shirts being sold to the general  
10 public undoubtedly display messages that "expressly advocate"  
11 the election or defeat of a candidate. See Buckley v. Valeo,  
12 424 U.S. 1, 44; FEC v. Massachusetts Citizens for Life  
13 ("MCFL"), 479 U.S. 238, 249-250 (1986). Nevertheless, in the  
14 absence of coordination or consultation with political  
15 committees resulting in contributions by the vendors, the  
16 Commission has still permitted an alternative to treating  
17 such activity as political activity resulting in independent  
18 expenditures. An application of the factors cited in  
19 Advisory Opinion 1989-21 may permit your activity to fall  
20 within the category of commercial, rather than political,  
21 activity. For example, you assert that CCI's interest is  
22 strictly profit-oriented and the activity is not undertaken  
23 for the purpose of influencing an election. You note that  
24 purchasers may respond to your ads for any number of reasons,  
25 e.g., as a political memorabilia collector's item or as a  
26 supporter of a given candidate. In addition, your activity  
27 does not entail any fund-raising or solicitation for a  
28 campaign.

29 You have stated that CCI intends to focus on candidates  
30

3 who have a conservative ideology. Companies often determine  
4 to direct their business activities toward one type of  
5 political orientation. Such a focus may require a careful  
6 scrutiny of the amounts charged by the company, the contacts  
7 the company may have with a campaign (as opposed to other  
8 vendors that may have reason to contact a campaign), the  
9 scheduling of business activities, and other business  
10 practices. See Advisory Opinion 1991-32. Nevertheless, it  
11 does not, by itself, negate the merely commercial nature of  
12 an activity.

13 As indicated in your questions, one aspect of your  
14 proposed message, however, would compromise the merely  
15 commercial nature of your activity and bring it under the  
16 category of independent expenditure. In addition to  
17 manufacturing and offering a shirt with a message of express  
18 advocacy, you propose to gear the motivation for making a  
19 purchase to those who wish to support or express support for  
20 a particular candidate. Moreover, you target the geographic  
21 area of the purchaser, i.e., to persons who are likely voters  
22 in the area in which the referenced candidate is running. A  
23 message that is merely commercial would make no mention of  
24 the motivation of the purchaser as being the support of a  
25 candidate. In order to avoid a message expressly inviting  
26 support for a candidate, i.e., express advocacy, the  
27 advertisement should omit the phrases "if you wish to  
28 support" or "wish to show your support" and the reference to  
29 where the purchaser lives. In the context of the language  
30

3 you have suggested, quoted above, the Commission advises you  
4 to state that the T-shirts are being offered for sale, state  
5 what is on the shirt or otherwise describe the shirt, and  
6 then provide the information as how to purchase the shirt.  
7 The restatement of the message printed on the shirt would  
8 not, by itself, constitute express advocacy if done as just  
9 described.<sup>3/</sup>

10 You posit the situation where the company seeks the  
11 approval of the candidate to use the candidate's name on the  
12 T-shirt, and ask whether this would change the relationship  
13 between the company and the candidate so as to constitute an  
14 in-kind corporate contribution. The response to this  
15 question depends upon the nature of the communication and the  
16 surrounding circumstances. If CCI calls the campaign only in  
17 order to avoid a legal conflict over trademark or other trade  
18 usage, the relationship between the company and the campaign  
19 is not changed. In contrast, the seeking of approval to  
20 proceed with the advertising on a basis related to the  
21 election of the candidate (e.g., the campaign is pleased to  
22 know that shirts with the candidate's name or likeness are  
23 being offered to the public), outside of a vendor-vendee  
24 business arrangement with a campaign, may change the nature  
25 of your activity from merely commercial. This would entail  
26 "prior consent" by the candidate for activity which would  
27  
28

29 <sup>3/</sup> The Commission's conclusion does not address a situation  
30 of a T-shirt advertisement that mentions opposing candidates  
who seek the same office.

affect his campaign. See 11 CFR 109.1(a).

You ask whether the packaging of the company's ad as part of the syndicated radio show would, by itself, result in a conclusion that the network responsible for the show's distribution had made a contribution or expenditure, assuming the ad was determined to be a contribution or expenditure. Without any further information indicating otherwise, the Mike Pence Show and its syndicator appear to be utilizing the kind of broadcast facilities that would fall within the news story exception to the definitions of "expenditure" and "contribution" at 2 U.S.C. 431(9)(B)(i), and 11 CFR 100.8(b)(2) and 100.7(b)(2).<sup>4/</sup> Network Indiana's sale of the advertising time to CCI and subsequent inclusion of the ad in its barter package to its affiliates would not result in a contribution or expenditure if such transactions involve the usual and normal charges and are in the ordinary course of business (i.e., Network Indiana packages other non-political ads as part of the Pence Show). See Advisory Opinions 1990-19 and 1979-36.<sup>5/</sup>

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<sup>4/</sup> Michael R. Pence was a Republican Congressional candidate in 1988 and 1990, but is not, at present, a candidate. There is no indication from the materials you have presented that Network Indiana, Hoosier Conservative, or the Wabash Valley Broadcasting Corporation is owned or controlled by a political party, political committee, or candidate.

<sup>5/</sup> Network Indiana's involvement may raise a concern in another respect if it sells advertising both to CCI and to the campaign of a candidate whose name appears on a shirt ad placed by CCI. The concern would arise if, in selling the time and placing these ads at certain points in the package, Network Indiana informs both CCI and the campaign as to the

3 Finally, with respect to the radio broadcasts, you wish  
4 to know whether the Commission's conclusions would change  
5 should CCI decide to limit itself to shirts for only certain  
6 candidates or only feature one candidate in a given spot. As  
7 alluded to above, a decision by CCI to limit itself to  
8 certain candidates is a factor relevant to determining  
9 whether a business enterprise's activities are merely  
10 commercial, rather than political, particularly in view of  
11 its intent to focus on candidates of a particular ideology.  
12 Nevertheless, there is nothing in the Act requiring a  
13 business entity to target its business toward clients or  
14 individuals that represent all parties or ideologies. The  
15 decision to feature a t-shirt for one candidate only in a  
16 given advertising spot does not, by itself, constitute an  
17 expenditure for that candidate. The normal business and  
18 advertising practices of the company, as well as any  
19 deviation from them, and how such business and advertising is  
20 usually conducted by businesses not attached to a campaign  
21 would have to be examined in order to reach any definitive  
22 conclusion.

23 **II. Second Situation**

24 Your second situation entails the sale of the T-shirts  
25

26 \_\_\_\_\_  
27 (Footnote 5 continued from previous page)  
28 other's plans with a view toward affecting how much time the  
29 campaign might purchase (e.g., for purposes of name  
30 recognition). Since this scenario was not explicitly  
presented, the Commission does not state an opinion as to  
this situation. Nevertheless, the situation does have  
implications under 11 CFR Part 109 (Independent  
Expenditures).

3 at rallies, joint appearances, and debates that the candidate  
4 would be attending. The Commission understands the business  
5 advantage to be gained by selling the T-shirts at such  
6 events. If this involves no coordination or arrangements  
7 with the candidate or his or her campaign, no contribution  
8 would result and your activity could be classified as  
9 merely commercial. Receiving a list of scheduled  
10 appearances, without any other communication between the  
11 company and the campaign as to the plans of the campaign or  
12 the company's plans to sell T-shirts featuring the candidate,  
13 would not change the Commission's conclusion.

14 If the campaign and the company communicate in order to  
15 make a determination as to the events at which CCI would sell  
16 and where (during the event) the company would place its  
17 booth or stand for the sale of shirts, the conclusion may  
18 differ. If a decision is made based on a discussion between  
19 the company and the campaign of how the campaign may benefit  
20 or otherwise be affected (e.g., whether this would conflict  
21 with the campaign's sales of its own shirts or augment the  
22 event's impact, what location for the company would  
23 beneficial for the campaign), such coordination may result in  
24 an in-kind contribution by the company. See Advisory Opinion  
25 1993-18. This latter situation may occur particularly with  
26 respect to closed spaces such as auditoriums (or large  
27 meeting rooms in hotels) and their outer halls or the  
28 enclosed exhibit areas of an outdoor fair where campaign  
29 officials may have control over the company's access to such  
30

3 space. In contrast, where the vendor would need only the  
4 permission of local authorities to perform its sales activity  
5 in outdoor locations near the site of a campaign rally, the  
6 possibility of a contribution in kind is greatly diminished.

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

11 For the Commission,

12  
13 Trevor Potter  
14 Chairman

15 Enclosures (AOs 1993-18, 1991-32, 1990-19, 1989-21, 1988-17,  
16 1979-36, and 1976-50)

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