

National Republican Senatorial Committee

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

Dear Mr. Litchfield:

I am writing on behalf of the National Republican Senatorial Committee ("NRSC") to request an advisory opinion pursuant to 2 U.S.C. § 437f concerning the issue set forth below.

FACTS

The NRSC is a national political party committee organized primarily to support Republican candidates throughout the United States seeking election to federal office. When budgetary considerations allow, the NRSC also supports Republican candidates at the state and local level through a non-federal account as permitted by the Federal Election Campaign Act ("Act") and its regulations¹¹ and by state laws. The NRSC's determination as to whether it will be able to support non-federal candidates cannot be made until around the mid-point of the two-year federal election cycle due to a host of variables beyond the NRSC's control. Such factors influencing the determination include the level and types of non-federal funds available to the NRSC, the political environment, polling, the strength of the candidate pool, and other information accumulated through research conducted during the first half of the cycle.

Consistent with this policy, the NRSC spent the first part of the 1995-96 election cycle collecting data on a wide variety of federal and non-federal races and candidates. In the first few months of 1996, the NRSC's leadership began to analyze the information collected during 1995 and to evaluate the NRSC's budgetary status. On April 22, 1996, the NRSC made the determination that funds were available in the non-federal account to institute an aggressive program of support for Republican candidates at the state and local level. As a result, the NRSC has already made and continues to make substantial contributions to a broad range of non-federal candidates. The non-federal candidates targeted for NRSC support are those that have emerged as politically and financially viable candidates who share philosophies consistent with those of the NRSC. The NRSC makes these contributions in its role as a national party committee supporting all candidates on the Republican ticket and, more specifically, recognizing that candidates on the state and local level today are the U.S. Senate candidates of tomorrow.

¹¹ 11 C.F.R. §§ 102.5 and 106.5.

Given that the NRSC will have made contributions to both federal and non-federal candidates during the 1995-96 election cycle, the NRSC is required to "allocate its administrative expenses and costs of generic voter drives. . . according to the funds expended method".² Under this method, the NRSC must allocate such expenses "based on the ratio of federal expenditures to total federal and non-federal disbursements made by the committee during the two-year federal election cycle."³ In calculating the amount of federal and non-federal disbursements for the purpose of determining this ratio, the regulations are unmistakably clear that only amounts spent on "specific candidates" shall be included.⁴ Thus, the NRSC is prohibited from including other types of disbursements, such as overhead costs or national or state party transfers, when determining its allocation ratio.

It was impossible for the NRSC to estimate and report its allocation ratio at the beginning of the 1995-96 cycle based on "prior comparable election cycles" or a "reasonable prediction"⁵ given that its prior election practices were widely divergent and its ability to fund non-federal races during the 1995-96 cycle was contingent on a number of unpredictable factors. For example, the NRSC had no way of knowing at the beginning of the cycle: (1) whether there would be adequate funds available in the non-federal account; (2) what candidates would emerge to run at the state and local levels; (3) how politically and financially viable such candidates would be; (4) how particular races would be effected by evolving political climates in the states; or (5) how its ability to contribute to state and local candidates would be impacted by changes in state election laws. Without knowing how these factors would play out, it would have been patently unreasonable for the NRSC to make any blind prediction.

² 11 C.F.R. § 106.5(c)(1).

³ 11 C.F.R. § 106.5(c)(1)(i). The Commission's intent that allocation ratios be calculated based on expenditures over the course of the entire *two-year election cycle* is emphasized in the explanatory language accompanying the publication of the new allocation rules in 1990:

Under the revised method, allocation ratios are determined by disbursements over the two-year federal election cycle, rather than disbursements made in the current calendar year. Thus, committees would have a basis for allocating their administrative expenses and costs of generic voter drive activity each year, including years in which no federal election is held. Such allocation is necessary to account for the portion of a committee's off-year administrative functions and generic activities that impact future federal elections.

55 Fed. Reg. 311 (1990).

⁴ 11 C.F.R. § 106.5(c)(1)(i).

⁵ Id.

In light of such contingencies, the NRSC decided to exercise extreme caution by refraining from attempting to estimate any ratio on its Schedule H report filed at the beginning of the 1995-96 election cycle. Moreover, the NRSC took the added precaution of ensuring that only federal funds subject to the Act would be spent on all administrative expenses before any affirmative decision was made regarding support of non-federal campaigns.⁶¹ The NRSC's goal in proceeding with such caution was to avoid making any speculative assumptions regarding the volatile factors listed above that might have resulted in an inaccurate ratio prediction that could have led to non-federal funds improperly subsidizing the NRSC's administrative costs.

To illustrate the potential problem envisioned by the NRSC, assume *arguendo* that the NRSC had estimated an allocation ratio at the beginning of the cycle that included a substantial percentage for non-federal expenditures. However, mid-way through the cycle, the realities of the cycle could have dictated that the NRSC could not support any non-federal races due to a lack of funds or viable candidates. Had this occurred, the NRSC justifiably could have been charged with using non-federal funds to subsidize committee overhead. This is exactly the situation the NRSC wished to avoid by refraining from estimating its allocation ratio based on pure speculation.

The NRSC is now, however, in a position to predict accurately that non-federal expenditures will comprise at least 35 percent of total candidate expenditures made during the 1995-96 election cycle, resulting in 65 percent of expenses being allocated to the federal account for the cycle.⁷¹ In light of this, the NRSC recognizes that its federal account has thus far paid more than its allocable share of administrative expenses for the "two-year cycle" upon which the entire allocation regulations are premised.

REQUEST

The NRSC is preparing to make a one-time transfer of funds from its non-federal account to its federal account in order to ensure that its "funds expended ratio" for administrative expenses to date is accurate for the entire two-year election cycle. This is required by federal election regulations and the NRSC requests an advisory opinion to clarify the appropriate procedures for reporting such a transfer.

⁶¹ The NRSC exercised similar caution in Advisory Opinion Request 1992-27 concerning its allocation of fundraising expenses, in which the NRSC stated that it "paid 100% of its fundraising costs from its Federal account until such time as it was competent to adapt to the [new] Commission regulations".

⁷¹ This 65 percent federal expenditures to 35 percent non-federal expenditures ratio is the maximum ratio permitted by the regulations even though the NRSC may actually spend more than 35 percent of its candidate expenditures on non-federal races. 11 C.F.R. § 106.5(c)(2). Moreover, given its reasonable certainty that the 65-35 ratio is accurate, the NRSC is now paying its on-going administrative expenses on a 65 percent to 35 percent basis, and is doing the same for those expenses incurred within 60-days of April 22nd pursuant to 11 C.F.R. § 106.5(g)(2)(ii)(B).

DISCUSSION

The language of 11 C.F.R. § 106.5(c)(1) is unmistakably clear that a national campaign committee such as the NRSC must allocate administrative expenses between its federal and non-federal accounts according to the ratio of federal expenditures to total expenditures made *during the two-year federal election cycle*. Yet the regulations offer no guidance in reconciling this mandate with 11 C.F.R. § 106.5(g)(2)(ii)(B) regarding the proper way for a campaign committee to reallocate funds retroactively from its non-federal account to its federal account should an intervening event at the mid-point of the cycle alter the ratio for the cycle.¹¹ This is the case here.

Several advisory opinions rendered by the Commission do provide guidelines regarding the appropriate procedures to reallocate funds retroactively from a non-federal account to a federal account. These advisory opinions include AO 1991-15, AO 1991-25, AO 1992-2 and AO 1992-27.

In AO 1991-15, the Commission unanimously advised that a state central committee should transfer funds from its non-federal account to its federal account where the committee made a "good faith miscalculation of the proper ballot composition ratio which resulted in an underpayment to a federal from a non-federal account" with respect to joint administrative/voter drive expenditures. The Commission noted that "there is ordinarily a 30-day post-expenditure deadline for a committee's non-federal account to reimburse its federal account for its non-federal expenditures",¹² but that this requirement would not apply under the circumstances of a good faith mistake.¹⁰ In allowing the committee to make the transfer within 30-days of the rendering of the opinion, the Commission reasoned that "the requested adjustment would. . .not result in the use of non-FECA money to influence Federal elections, but would rather reimburse the Federal account for expenditures it had made to influence state and local elections."¹¹ The Commission also instructed the committee to include an explanatory note on its next Schedule H1 and provided specific instructions for reporting the adjustment on its next Schedules H3 and H4.¹²

¹¹ 11 C.F.R. § 106.5(c)(1)(ii) is not applicable in this situation because it governs only situations where a *non-federal account* has paid more than its allocable share of expenses, not vice versa.

¹² This 30-day post-expenditure deadline requirement of 11 C.F.R. § 106.5(g)(2)(ii)(B) was expanded to 60 days in 1992.

¹⁰ AO 1991-15.

¹¹ *Id.*

¹² *Id.*

The Commission unanimously reaffirmed these principles in AO 1991-25 by allowing a state central committee to reallocate funds retroactively from its non-federal account to its federal account when an unexpected general election caused a change in the allocation ratio. Recognizing once again that the necessity for such a corrective transfer superseded the 30-day post-expenditure deadline of 11 C.F.R. § 106.5(g)(2)(ii)(B), the Commission granted the committee an additional 30-day "window" from the date of the issuance of the opinion to make the retroactive reallocation.^{13/} The Commission also advised the committee to file an explanatory note and provided specific instructions for filing revised reports indicating the adjustment.^{14/}

Likewise, in AO 1992-2 the Commission unanimously instructed a national party committee to transfer funds from its non-federal account to its federal account on a retroactive basis when it became clear that certain staffers were working solely on fundraising and direct mail activities, as opposed to administrative activities.^{15/} In rendering this opinion, the Commission confirmed that "retroactive changes" in allocation formulae are "permitted. . .after the occurrence of a mistake or an intervening event."^{16/} As was the case in AO 1991-15 and AO 1991-25, the Commission instructed that the then 30-day post expenditure transfer deadline of 11 C.F.R. § 106.5(g)(2)(ii)(B) would not apply and granted the committee a 30-day "window" from the date of its opinion for the retroactive reallocation.^{17/} The Commission also requested that the committee submit an explanatory letter and offered detailed instructions for submitting revised reports.^{18/}

Finally, the Commission unanimously advised the NRSC in AO 1992-27 to "retroactively allocate" funds from its non-federal account to its federal account when a lack of "proper accounting and reporting programs" resulted in the federal account paying more than its allocable share of fundraising expenditures.^{19/} Consistent with prior opinions, the Commission again

^{13/} AO 1991-25.

^{14/} Id.

^{15/} This distinction is important given that fundraising expenses are required to be allocated based on a different ratio than administrative expenses. See 11 C.F.R. § 106.5.

^{16/} AO 1992-2.

^{17/} Id.

^{18/} Id.

^{19/} Part of the Commission's rationale for granting leeway for failure to properly allocate in AO 1992-27 and in AO 1992-2 was that the allocation regulations were a "significant" change from past practices and required a "brief period of adjustment". See AO's 1992-27 and 1992-2. The newness of regulations was irrelevant in the context of an intervening or special circumstance in AO 1991-25. See AO 1991-25. Therefore, the "adjustment period" rationale was not offered by the Commission in AO 1991-25 and is similarly irrelevant in the case at hand.

permitted the transfer despite the 30-day post-expenditure deadline of 11 C.F.R. §106.5(g)(2)(ii)(B), granted the NRSC an additional 30-day period for the date of its opinion "to make the necessary reallocations", and requested an explanatory letter and revised reports.^{20/} To facilitate such reporting, the Commission provided sample reports and other specific instructions.^{21/}

Like the various committees in AO's 1991-15, 1991-25, 1992-2 and 1992-27, the NRSC is now confronted with the task of retroactively reallocating funds from its non-federal account to its federal account in order to comply with the requirements of 11 C.F.R. § 106.5. The NRSC's situation is analogous to the committees in these prior advisory opinions since "a mistake or an intervening event" has occurred during the course of the election cycle which necessitates a change in the allocation of expenses. Just as the committee in AO 1991-15 could not anticipate a miscalculation in its allocation ratio, or the committee in 1991-25 had no way of knowing that a special election would held, or the committee in AO 1992-2 could not predict how the duties of certain staffers would evolve, or the NRSC in AO 1992-27 could not foresee that its accounting and reporting programs would be inadequate, it was also impossible in the case at hand for the NRSC to predict how the many volatile factors governing its decision regarding non-federal candidates would eventually play out over the course of the 1995-96 cycle.

Due to such uncertainty, the NRSC could not make a "reasonable prediction" of its allocation ratio as required by the regulations. Instead, the NRSC proceeded very cautiously by refraining from offering any potentially misleading allocation predictions and by ensuring that all administrative expenses incurred before making a decision on non-federal support were paid solely out of its federal account. The NRSC simply felt that exercising such caution was a more appropriate path to take than venturing a guess as to how certain factors would evolve, especially since an erroneous guess could have resulted in the NRSC's non-federal account improperly subsidizing its federal account for overhead expenses.

It was not until April 22, 1996, that the NRSC was able to ascertain that adequate non-federal funds would be available, that strong and viable candidates had emerged to run at the state and local levels, and that the political and legal environments in a number of states were developing in a positive manner. The alignment of these factors allowed the NRSC to decide to actively support state and local candidates. Once this decision was made, it not only enabled the NRSC to make for the first time an accurate prediction of its 65 percent to 35 percent funds expended ratio^{22/}, it also resulted in the NRSC's recognition that its federal account had paid for

^{20/} AO 1992-27.

^{21/} Id.

^{22/} As required by 11 C.F.R. § 106.5(c)(1)(i), the NRSC calculated its funds expended ratio based solely on its anticipated level of direct support to specific federal and non-federal candidates. Costs such as overhead and national and state party transfers were not included in this calculation.

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more than its proper share of the administrative expenses incurred from January 1, 1995 through April 22, 1996.

Consistent with the Commission's clear instructions in the stated advisory opinions, the NRSC is preparing to comply with 11 C.F.R. § 106.5(c)(1)(i) by making a one-time transfer of funds from its non-federal account to its federal account to accurately reflect the 65 percent to 35 percent federal to non-federal expenditure ratio for the entire 1995-96 election cycle. The Commission's prior advisory opinions also clearly indicate that the now 60-day post-expenditure deadline will be inapplicable due to the special circumstances presented and that the NRSC should make the necessary retroactive reallocations within a 30-day "window"^{23/} from the date that the Commission renders an opinion. In addition, it is clear that the NRSC must submit an explanatory letter to the Commission as well as revised reports providing the accounting details of the retroactive transfer.

However, due to the individualized nature of reporting, it is difficult for the NRSC to glean any direction from the prior advisory opinions as to how its transfer should be reported in this particular case. Just as the Commission provided specific reporting guidance to each of the committees in the noted advisory opinions, the NRSC requests similar clarification of the appropriate procedures for reporting this transfer on its next Schedules H1 through H4.

In exercising an abundance of caution in seeking this opinion, the NRSC's goal is to comply fully with all reporting requirements stemming from 11 C.F.R. § 106.5(c)(1)'s mandate that administrative expenditures be allocated based on the ratio of federal versus non-federal expenditures over the course of the entire two-year cycle.

Sincerely,



Craig M. Engle
General Counsel

CME/jeb
#194296

^{23/} Even though the transfer deadline in 11 C.F.R. § 106.5(g)(2)(ii)(B) has been expanded to 60-days, the NRSC is willing to make the necessary reallocations within the established 30-day "window" should the Commission so require.