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November 20, 2015

Office of the General Counsel
Attn: Daniel A. Petalas, Esq.
Acting General Counsel
Federal Election Commission
999 E Street N.W.
Washington. D.C. 20463

Re: Advisory Opinion Request of Niger Innis for Congress

Dear Mr. Petalas:

Niger Innis for Congress ("Committee") was the principal campaign committee for Niger Innis ("Innis"), a candidate for the 4th Congressional District of Nevada's 2014 Republican primary.[1] The Committee requests an advisory opinion from the Federal Elections Commission ("FEC" or "Commission"), as to whether certain unique transactional costs resulting from contributions to the general election may be paid from general election funds rather than from primary election contributions; and, whether the Federal Elections Campaign Act of 1971, as amended ("FECA"), 52 U.S.C. §30101 *et seq.*, and FEC regulations prohibit the Committee from disgorging general election contributions, which are otherwise non-refundable, to a charitable organization pursuant to 26 U.S.C. §170(c), in lieu of the United States Department of Treasury ("U.S. Treasury").

INTRODUCTION

Niger Innis for Congress was the authorized campaign committee of Niger Innis, pursuant to 52 U.S.C. §30102(e)(1). On June 10, 2014, Innis lost the primary election. Prior to the primary, the candidate received contributions designated for Innis' general election campaign.

In connection with specific general election contributions received by Innis' political committee during the primary election, Innis incurred certain discrete and uniquely traceable costs. These costs are treated as operating expenses payable from the primary election account. *See* 11 CFR §102.8. Deducting these discrete, uniquely traceable costs from the primary election account diminishes the speech and associational value of contributions made to the primary election. To avoid cheapening primary election contributors' political speech, the Committee should not be forced to expend precious primary election resources to pay costs unrelated to that election's activity. *See* AOs 1998-08; 1995-34; 1991-01; 11 CFR §102.9(e)(1).

[1] 52 U.S.C. §30101(5) (defining a "principal campaign committee" as "a political committee designated and authorized by a candidate under section 30102(e)(1)").

In addition, pursuant to 11 CFR §110.1(b)(3)(i), following the loss in the primary election, the Committee made several attempts to return all general election contributions. Despite the Committee's repeated efforts, it has been unable to return contributions from four contributors totaling $8,000 in outstanding general election refunds that contributors have not accepted.

In disposing of the remaining, non-refundable general election contributions, Innis - in keeping with his general messages and the themes his contributors supported - would prefer not to throw money down the bottomless pit of indiscriminately wasteful federal bureaucracy. Rather, Innis intends to contribute to a tax-exempt organization under 26 U.S.C. 501(c)(3) which he has not directly or indirectly established, maintained, financed, or controlled. Innis does not stand to incur any tax or other benefit from a donation of the non-refundable general election contributions, and will have no control over the money once disgorged. Innis will therefore not directly or indirectly benefit personally from the planned donation.

BACKGROUND

During a primary election, an individual may contribute to a candidate's primary election, general election, or both. 52 U.S.C. §30116(a)(1)(A); 11 CFR §110.0(b). However, "[n]o person shall make contributions to a candidate and his authorized political committee with respect to any election for Federal office which, in the aggregate, exceed $2,000."[2] 52 U.S.C. §30116(a)(1)(A); 11 CFR §110.1(a)(1). If an individual's contribution exceeds the contribution limit, "either on its face or when aggregated with other contributions from the same individual during the same election," the excessive portion of that contribution may be redesignated to the general election. 11 CFR §110.1(b)(5)(A) and (C). This typically results in the redesignation of excessive contributions made for a candidate's primary election to the general election. However, redesignation of contributions to a future election may not cause an individual to exceed contribution limits for that election. *See* 11 CFR §110.1(b)(1).

There are certain costs incurred exclusively by the receipt of, and that are exclusively traceable to, the mere existence of general election contributions. These include credit card processing fees; commissions paid to fundraisers for successfully soliciting designated general election contributions; and the legal, accounting and compliance costs resulting from the mere existence of a separate general election account. These costs are wholly apart from any primary election related purposes. Most Legal, Accounting, and Compliance (LAC) costs and activity related to general election funds are at least in part also related to properly providing those services with respect to primary election activity; for example reattributions. However, over time these LAC burdens ultimately become far removed from the primary election activity and become entirely a

[2] The limits on contributions made by individuals to candidates and candidate committees under 52 U.S.C. §30116(a)(1)(A) are indexed for inflation. 52 U.S.C. §30116(c); *See also* 11 CFR 110.1(b)(1)(i)-(iii). The limit for the 2013-2014 election cycle was $2,600. *See* Price Index for Adjustments for Contributions and Expenditure Limitations and Lobbyist Bundling Disclosure Threshold, 78 Fed. Reg. at 8532 (Feb. 2, 2013).

product of the general election contributions themselves. The continued provision of LAC services is necessary for ongoing compliance with the FECA and applicable FEC regulations.

Further, when a contribution designated for the general election is received during the primary election, it incurs specific costs uniquely traceable to the mere existence of such funds. *See* 11 CFR § 102.9(e)(1). "The Committee must treat the full amount of a donor's contribution as the contributed amount for purposes of the limits and reporting provisions of the Act, even though the Committee will receive a lesser amount" after the Committee pays the amount deducted by companies processing specific contributions. *See* 11 CFR §110.1(b)(3); AO 1995-09. However, if a Committee may not expend any amount of such a general contribution during the primary election period, then primary election contributions are used to for pay these processing costs. As a result, committees are forced to expend precious primary election resources – and sacrifice the speech and associational interests they were contributed to foster - on transactional costs solely related to the general election contributions.

When transactional costs are uniquely attributable to general election contributions and wholly separate from and outside the scope of primary election activity, they should be paid out of the contributions to which they actually relate. These unique costs should not burden speech and associational interest in primary elections when they result from general election activity.

Following a loss in a primary election, a candidate must refund, redesignate, or reattribute all general election contributions within sixty days. *See* 11 CFR §110.1(b)(3)(i). The Commission has interpreted "the underlying reason for the refund rule of 11 CFR §103.3(b)(2)...to place a political committee in nearly the same financial position that would have existed" without the contribution. AO 1996-05, fn. 4; *See* MUR 3460. Contributions, particularly those not capable of being refunded, may be disgorged to the U.S. Treasury, which the FEC has said "comports with the underlying reason for the refund rule of 11 CFR 103.3(b)(2)." AO 1996-05, fn. 4.

This objective can be met by disgorgement to a tax-exempt charitable organization in which the candidate has no role and which provides no benefit to the candidate. To qualify as a 501(c)(3) organization under the Internal Revenue Code ("IRC"), an entity is prohibited from influencing legislation or intervening in "any political campaign on behalf of (or in opposition to) any candidate for public office."[3] 26 U.S.C. 501(c)(3); 26 U.S.C. §170(c)(2)(D). A 'charitable contribution' may be made to an entity established "for religious, charitable, scientific, literary, or educational purposes." 26 U.S.C. §170(c)(2)(B). Innis' intent to donate otherwise non-refundable general election contributions to a 501(c)(3) organization is consistent with the Commission's existing policy prohibiting candidates for Federal office from incurring personal benefit from campaign contributions. *See* 52 U.S.C. §30114(b); 11 §CFR 113.1(g).

[3] Judith E. Kindell and John Francis Reilly, *Election Year Issues* (2002), Section 2 *IRC 501(c)(3) Organizations and the Political Campaign Prohibition*, at page 339, http://www.irs.gov/pub/irs-tege/eotopici02.pdf.

QUESTIONS PRESENTED

1. Is the Committee prohibited from paying certain unique costs that are distinctly traceable to specific general election contributions out of those funds rather than from primary election contributions?
2. Is the Committee prohibited from donating the remaining non-refundable general election contributions to a charitable organization exempt from taxation under IRC section 501(c)(3) if the Candidate does not directly or indirectly establish, maintain, finance, or control that organization or derive any personal benefit from it?

DISCUSSION

1. Is the Committee prohibited from paying certain unique costs that are distinctly traceable to specific general election contributions out of those funds rather than from primary election contributions?

When a candidate receives a contribution that must be attributed, in whole or in part, to the general election, the candidate incurs certain costs, most notably fundraising commissions and credit card or bank merchant processing fees. Ironically, a candidate who loses his primary election cannot pay the costs associated with his receipt of general election funds out of those funds, but rather must pay for those costs out of his primary election funds. Thus, the mere existence of a general election contribution unintentionally burdens the speech and associational rights embodied in a primary election contribution.

The underlying purpose of the refund rule, which requires candidates to refund general election contributions, is to place the candidate in the same *ex ante* state of affairs he would have occupied, had the general election contribution never been made. This logic should also apply to the use of primary election funds; candidates should be protected from having to use primary election funds to pay for expenses that, but for the general election contribution, never would have been incurred. Moreover, as discussed below, shifting the fees that exist only as a consequence of a general election contribution to the primary election funds has the perverse effective outcome of creating involuntarily excessive contributions exceeding the applicable limits for the general election.

In AO 1986-17 the Commission opined as to whether a candidate may make expenditures of general election contributions before becoming a candidate in the general election.

> "The Act does not prohibit a committee from using contributions designated for the general election to make expenditures, prior to the primary election, exclusively for the purpose of influencing the prospective general election in those limited circumstances where it is necessary to make advance

payments or deposits to vendors for services that will be rendered, or goods that will be provided, to the committee, after candidacy for the general election has been established."

The Commission went on to limit the scope of this use to only activities that are not related to the primary election activities. 52 U.S.C. §30116(f).

A. SHIFTING COSTS CREATES POTENTIALLY EXCESSIVE GENERAL ELECTION CONTRIBUTIONS

When general election contributions are accepted during the primary election, certain discrete and uniquely traceable costs are incurred. *See* 11 CFR § 102.9(e)(1). "All costs incurred in connection with the administration and solicitation of contributions to the Committee are defrayed from the contribution received by the committee," *see* AO 1991-01. Under current practice, these costs incurred with the administration of general election contributions are treated as operating expenses payable from the primary election account. Treating costs derived from the processing of general election contributions as primary election operating expenses requires expending valuable primary election resources to pay for costs unrelated to primary election activity. This unjustly reduces the speech and associational value of contributions to the primary election. The mere existence of a general election contribution should not diminish the value of primary election contributions. *See* 11 CFR §102.9(e)(1); AOs 1998-08; 1995-34; 1991-01.

Shifting transactional costs away from the general election may, as a function of the operation of law, cause contributors to potentially violate the FECA's general election contribution limit. *See* 11 CFR § 102.9(e)(1). The FEC states that "[n]o person shall make contributions to a candidate and his authorized political committee with respect to any election for Federal office which, in the aggregate, exceeds $2,000." 52 U.S.C. §30116(a)(1)(A); 11 CFR §110.1(a)(1). A committee must include any fees attached to the contribution and comply with the FECA provisions on contribution limits, reporting requirements, and prohibited sources of contributions. 52 U.S.C. §§ 30102, 30116, 30104, 30119, 30121, and 30122. However, this causes an unintended result. For example, a contributor makes a $5,400 contribution to the primary and general election of a candidate for Congress (the current combined limit per contributor). The processing costs total of 10% of the amount raised, for $540, or $270 for each of the 2 distinct contributions being made. However, the $270 processing cost related to the general election contribution is not deducted from the $2,700 general election contribution, but rather paid out of the $2,700 primary election contribution from that same contributor. Thus, the actual value of the Primary contribution becomes $2,430 and the actual value of the general election contribution – the amount received and any attending fees – is an excessive $2,970.

These transactional costs should properly be deducted from the originating contribution. This would resolve the inadvertent burden placed upon committees' and their contributors' speech

and associational rights, as well as more properly reflect the reality of economic activity. The three most obvious transactional costs include:

- Per-transaction credit card processing fees charged as a percentage of a specific general election contribution transaction;
- Per-dollar fundraising commission paid for the successful solicitation of a general election contribution;
- Any account maintenance fees incurred due to the mere existence of the bank account used to house such general election contributions - particularly after extended periods of time after the lost primary election

Improperly deducting transactional costs results in the diminishing of speech and associational rights with respect to a primary election, creating a potentially excessive and imbalanced contribution to a general election that did not actually occur. Rather than draining primary funds for the benefit of an election that it may not yet spend money on, a committee should properly pay its transactional costs from the actual contribution under which they arise. Otherwise, the fees being paid from the primary election effectively become an accretion to general election contributions, resulting in potentially excessive contributions and causing otherwise non-permissible general election expenditures during the primary. This cannot reasonably be the intent of the law, particularly given the complexity it imposes upon individuals seeking to engage in political speech to the maximum, non-corrupting amount.

Credit Card and Banking Fees

Processing and administrative fees charged by credit card companies and banking institutions on each transaction have been interpreted as part of the cost of accepting certain kinds of contributions. Banking fees are another potential cause of processing fees on general election contributions charged to the primary election account. FECA regulations require a committee to "have a government-insured checking account, at minimum." 52 USC § 30102(h). Banks may assess a fee for transactional costs connected to processing contributions made by check, or if the bank must move money into another account, or as relates to bounced checks. These actions are specific to the receipt and/or transfer of general election contributions into the general election account. These fees are wholly unrelated to primary election activity, but rather is a result of the mere existence of general election funds.

Costs to Raise General Election Contributions

Campaigns run on money and money must be raised, generally by fundraising. Professional fundraisers who solicit and secure large contributions are almost always compensated on a percentage of funds received through their efforts. So, if a fundraiser raises a $5400 contribution for the primary and general election, they are compensated on the entire amount. But, if they may only be paid from the Primary election portion of a contribution, this results in a substantial added burden – as much as an additional 15 to 25% of a primary contribution.

The mere existence of general election contributions financially burdens a campaign's primary election by doubling the costs incurred, and paid out of, the primary election account. Contributions raised on behalf of a Federal candidate's general election campaign are subject to the same limitations, prohibitions, and reporting requirements as primary election contributions. 52 U.S.C.§30125(e). Fairly allocating fundraising costs to the general election for general election contributions would remedy the substantial burden currently placed on primary election funds, and is in line the FECA's contributions limits for each election. *See* 52 U.S.C.§30116(e).

B. LEGAL, ACCOUNTING, AND COMPLIANCE (LAC) COSTS

Legal, accounting, and compliance (LAC) costs related to discrete and uniquely traceable general election contributions exist outside the normal scope of campaign wind down services. The mere existence of general election contributions – and specifically general election contributions that are difficult or impossible to refund – inherently create LAC costs that are uniquely attributed to general election contributions. Such costs, particularly after the statutory window to make such refunds or when unable to do so, can readily be seen as being apart from what would reasonably be incurred in the ordinary course of primary election activity, even when dealing with general election contributions. While most such LAC activity falls outside this limited scope, when LAC costs are so far removed from the primary election activity as to render them wholly unique to the general election, they are more properly paid from the general election funds whose extended existence has created such costs.

Attorneys in particular have a legal, moral, and ethical obligation to their clients. *See* MODEL RULES OF PROF'L CONDUCT, *Preamble: A Lawyer's Responsibilities.* Such obligations exist regardless of the attorney's ability to be compensated for services rendered. *See* MODEL RULES OF PROF'L CONDUCT, R. 1.18. Even if an attorney has not been compensated for maintaining the client's general election account, a client seeking to terminate a political committee may cause his attorney, acting diligently and in good conscience to his client, to expend substantial time performing LAC functions. Consequently, substantial costs can result from the attorney's efforts to settle any outstanding debt or obligations owed by the committee, pursuant to the 11 CFR §116.2. Where such costs are distinct from the primary election's activity, and are uniquely traceable to the LAC services performed with respect to the general election contributions – particularly when non-refundable – those costs are properly borne out of general election funds.

A candidate is prohibited from using campaign contributions for personal use. 52 U.S.C. §30114(b). 'Personal use' means using "funds in a campaign account...to fulfill a commitment, obligation, or expense of any person that would exist irrespective of the candidate's campaign." 52 U.S.C. §30114(b). Legal expenses incurred in relation to a candidate's campaign activity may

be paid with campaign funds for up to 100% of the committee's expenses.[4] The Commission has adopted the "irrespective test" as a method of determining whether contributions may be used to cover legal expenses on a case-by-case basis. 52 U.S.C. 30114; 11 CFR 113.1(g)(ii)(A). This provides an inconsistent approach by the commission and no clear guidance for political committees and lawyers who must proceed with wrapping up activities and costs associated solely with the general election account.

Unless prohibited by the FECA, the Committee's legal expenses associated with the specific legal, accounting and compliance costs of handling the general election account and contributions should be payable from the general election account. These services, which are inextricably linked to the general rather than the primary campaign, should be compensable from the general election fund rather than the primary fund. Using the Commission's irrespective test, Innis' general election LAC costs should be permissibly paid using the general election account because these costs do not "exist irrespective of the candidate's campaign." Specifically, they do not exist irrespective of the Innis' perspective general election campaign, but likely *do exist* irrespective of his former primary election campaign.

Allowing general election LAC costs to be paid from general election funds is consistent with the FECA and would not cause the candidate any personal benefit from paying for compliance with FEC regulations. Compliance burdens arise out of specific activities performed with respect to a particular election – in most cases either a primary or a general election campaign. Consequently, the Compliance burdens arising from one election exist largely irrespective of another, particularly beyond the basic administrative burden of reporting the receipt of general election funds during a primary, and the refund of such contributions within the statutory period. Allowing general election LAC costs to be paid out of the general election account, using reasonable accounting methods, would comply with the FEC's interpretation of the FECA's intent "to place a political committee in nearly the same financial position that would have existed" without the contribution. AO 1996-05, fn. 4.

2. Is the Committee prohibited from donating the remaining non-refundable general election contributions to a charitable organization exempt from taxation under IRC section 501(c)(3) if the Candidate does not directly or indirectly establish, maintain, finance, or control that organization or derive any personal benefit from it?

A. PREVENTING INUREMENT

In advisory opinion request 2003-18, the Commission was asked whether contributions designated for incumbent Senator Bob Smith's general election campaign could be disgorged to a 501(c)(3) organization under the Internal Revenue Code. Senator Smith had recently lost the

[4] *See* Congressional Candidates and Committees, Fed. Elections Comm'n (2014), at 56. *See also* AO 1997-27

primary election and made several attempts to refund general election contributions. *See* AO 2003-18. Rather than disgorge non-refundable contributions to the U.S. Treasury, Smith planned to donate his remaining contributions to the American Patriot Fund ("APF"), a 501(c)(3) organization Smith had recently established. *Id.*

Personally benefiting from converted campaign contributions is prohibited by 52 U.S.C. §30114(b)(1). "A contribution is considered to be converted to personal use if...used to fulfill any commitment, obligation, or expense of a person that would exist irrespective of the candidate's election campaign." 52 U.S.C. §30114(b)(2). Senator Smith would have retained control of the campaign contributions donated to AFP, a 501(c)(3) he directly established, maintained, financed, and/or controlled, and would receive a direct financial benefit by a donation from his campaign committee, in violation of the Act. *See* 52 U.S.C. §30114(b); 11 CFR §113.1(g)(2). The Commission ultimately denied Senator Smith's proposed donation of general election contributions to APF, "because it is not among the uses permitted" by the Commission's regulations. *See* AO 2003-18.

Senator Smith's request is distinguishable from the instant request because Innis would not receive any personal or other benefit; the recipient 501(c)(3) organization would not be directly or indirectly established, maintained, financed, or controlled by him; thus no personal benefit attaches. *See* 52 U.S.C. §30114(b)(2). Charitable donations made pursuant to IRC §170 are not considered as being made for personal use "unless the candidate making the donation receives compensation from the organization before the organization has expended the entire amount donated for purposes unrelated to the candidate's personal benefit." 11 CFR §113.1(g)(2). A donation to a 501(c)(3) organization by a candidate who does not directly or indirectly establish, maintain, finance, or control the recipient charitable organization precludes personal benefit to the candidate. *See* 11 CFR §113.1(g).

Unlike Senator Smith, Innis specifically intends to donate to 501(c)(3) organizations to which he has no direct or indirect ties. Innis does not stand to incur any tax benefit from a donation of the non-refundable general election contributions and will have no control over the money once it is disgorged. Rather than disgorge funds to a spendthrift Treasury, Innis' plan to disgorge non-refundable general election contributions serves the underlying purpose of the refund rule, without violating the conscience of the candidate or his contributors. Innis' proposal is no less legitimate than disgorgement to the U. S. Treasury, since such disgorgement is also not among the permitted uses authorized by the FEC for handling non-refundable contributions. *See* AOs 1996-05, fn. 4; 2003-18.

Limited risk of potential undue influence, as opposed to an incumbent

A sitting member remains uniquely positioned to deliver a corrupted quo in exchange for a corrupting contributed quid with respect to contributions towards a general election in which a

defeated incumbent shall not participate. Senator Smith was an incumbent raising contributions for his re-election campaign. Even though he lost his primary, he was still an office holder after the primary. *See* AO 2003-18. The FECA was adopted with the "primary purpose of preventing quid pro quo corruption and its appearance." *Buckley v. Valeo*, 424 U.S. 1, 29 (1976). Unlike Senator Smith, Innis was not an incumbent and, having lost his primary election, necessarily triggers a modestly lower level of concern by the Commission in preventing remaining funds from casting an undue influence on the judgment of a current officer holder – even a lame duck - than was present with Senator Smith.

Unjustly Enriching the Government

Forcing otherwise non-refundable general election contributions to be disgorged to the U.S. Treasury unreasonably burdens the speech and associational rights of candidates like Innis and his many contributors who are philosophically opposed to a bloated government that has seemingly found not one penny amongst nearly two quadrillion that it cannot spend. Innis has publicly described the Federal government as "getting too large...too much into our business, into our lives."[5] Limiting a committee's ability to disgorge non-refundable general election contributions to the same U.S. Treasury that funds Cowboy Poetry[6] and other meretricious government programs expressly contradicts the desires of Innis' contributors to rein in such wasteful government. Such a requirement also raises serious constitutional issues under the Fifth Amendment's Takings Clause. *See Horne v. USDA*, No 14-275, at 4-5 (U.S. 2014) (holding that an appropriation of an entity's personal property is a taking); *see also Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992) (holding that a government regulation constitutes a taking when it completely strips property of any value).

B. COMPLIES WITH UNDERLYING PRINCIPLE BEHIND THE REFUND RULE

When the government seeks to impose restrictions on the First Amendment right to political expression, the requisite standard of review is dependent on whether the expression entails political contributions. *Buckley v. Valeo*, 424 U.S. 1 (1976). Though the Supreme Court has taken a less rigid approach with contributions than with other forms of expression, the government must still establish "a sufficiently important interest" and must "employ means closely drawn to avoid unnecessary abridgment of associational freedoms." *Id.* at 25. Essentially, there must be an important government interest and the government's means must be substantially related to that interest. Here, Innis is seeking to challenge the restrictions on the disgorgement of his general election contributions and therefore the *Buckley* standard applies.

[5] Bill Hoffmann, *Niger Innis Considering Congressional Run*, Newsmax (Nov. 18, 2013) http://www.newsmax.com/NewsmaxTv/innis-congressional-candidacy-strategist/2013/11/18/id/537310/

[6] *See* Cowboy Poetry. J.P. Freire, Harry Reid calls cuts to "campaign poetry festivals" heartless (March 8, 2011), http://www.washingtonexaminer.com/harry-reid-calls-cuts-to-cowboy-poetry-festivals-heartless/article/141885.

Prohibiting a committee from disgorging non-refundable general election contributions to a charitable organization would ignore the underlying rationál of 11 CFR 103.3(b)(2). The prohibition must comply with the statutory goal of placing "a political committee in nearly the same financial position that would have existed" without the contribution. AO 1996-05, fn. 4. Interpreting the FECA to prevent Innis from donating non-refundable contributions is not substantially related to FECA's purpose; it neither prevents any personal benefit nor thwarts any "quid pro quo corruption and its appearance" *See Buckley v. Valeo*, 424 U.S. 1, 29 (1976); *See also Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010); *McCutcheon v. Fed. Election Comm'n*, 134 S. Ct. 1434 (2014); and *Fed. Election Comm'n v. Wisconsin Right To Life, Inc.*, 551 U.S. 449 (2007). As discussed below, the Commission has authorized that contributions be disgorged to 501(c)(3) organizations in analogous circumstances that were similarly distinguishable from Senator Smith's proposed self-benefiting disgorgement. Prohibiting all but a single narrow means of disgorgement of non-refundable general election contributions is not "closely drawn" to the underlying purpose of the refund requirement, and lacks an adequate basis in statute. *See* AO 2007-04, Commissioner Von Spakovsky (dissenting).

Donating Prohibited or Excessive Contributions

Donating general election contributions to a 501(c)(3) organization is analogous to existing methods used by committees to remedy excessive or prohibited contributions. *See* 11 CFR §103.3(b)(2); AOs 1991-39 and 1995-19.

The FEC has established a variety of procedures for committees handling prohibited contributions, typically requiring the contribution be refunded to the contributor. *See* 11 CFR §103.3(a) and (b). In some circumstances, a contribution may not become prohibited until new information becomes available to a committee. For example, a contribution made by an individual that is later discovered to be a foreign national or federal government employee may appear legal to a committee but, upon discovery of its prohibited nature, must be disgorged by the committee. *See* 11 CFR §103.3(a) and (b).

"A candidate or committee receiving an anonymous cash contribution in excess of $50 must promptly dispose of the amount over $50." 11 CFR §110.4(c). The amount exceeding $50 "may be used for any lawful purpose" so long as it is unrelated to the recipient's campaign activities. *Id.* This would necessarily include disposing of excess cash contributions, made anonymously during the primary election and designated for general election activity. These contributions may be donated to a charitable organization, as defined by IRC §170(c), and 11 CFR §110.4. Like the non-refundable general election contributions, excessive cash contributions made anonymously cannot, by their very nature, be refunded. In both situations, the contribution cannot be refunded because the contributor cannot be located to accept the returned contribution. The FEC has

alternatively authorized committees receiving anonymous, excessive cash contributions to instead donate the excess amount to the U.S. Treasury, or to a 501(c)(3) organization.[7]

"No candidate or political committee shall knowingly accept a contribution made for the benefit or use of a candidate, or knowingly make any expenditure on behalf of a candidate, in violation of any limitation imposed on contributions and expenditures." 52 U.S.C. §30116(f). The non-refundable nature of the contribution is not a result of a contributor or candidate's attempt at personal benefit. A contrary reading, preventing Innis from disgorging non-refundable general election contributions, would be an overbroad restraint on the Committee based on the purpose of the refund rule because it would not further the anti-corruption rationale.[8] AO 1996-05, fn. 4

While the contributor's identity may raise concern of a potentially corrupting contribution, it bears no relevance on the mechanisms available to a committee when disposing of legally raised funds. When a contributor can't be found to refund money, a committee is unable to comply with the refund rule. Since anonymous cash contributions that exceed $50 can be used "for any lawful purpose" except campaign activity, transferring funds to a 501(c)(3) should also be allowed.

The FEC has explicitly authorized contributions, not discovered to be prohibited until later, to be disgorged to either the U.S. Treasury, *or to a 501(c)(3) organization when the contributor's identity is not known.* Oddly, if the identity of the contributor was known when the contribution was made, disgorging that contribution to the U.S. Treasury is the only recognized alternative to a refund.[9] Yet, the contributor's identity is irrelevant to the candidate unable to find him. Such a groundless disparity raises serious Equal Protection issues.

C. TERMINATING A COMMITTEE WHEN DEBT IS DEEMED "UNPAYABLE"

Despite a committee's efforts to refund all contributions, it may not be possible. *See* AO 2003-18. A committee "may not terminate until it has complied with the requirements of 11 CFR §102.3(a)."[10] *See* 52 U.S.C. §30103(d)(1); 11 CFR. §102.3(c). When a committee cannot locate a creditor to settle its outstanding debt it may request that the remaining debt be deemed "unpayable."[11] *See* 11 CFR §§116.4 and 116.9. In order to qualify for debt forgiveness the

[7] Congressional Candidates and Committees, *Disgorge Prohibited Contributions Discovered Late*, at 34, THE FED. ELECTIONS COMM'N (2011).
[8] "The Commission has interpreted the statute to allow amounts equal to mandatory contribution refund amounts to be disgorged to the United States Treasury, in lieu of making payments to the entity that unlawfully made the original contribution. *See* MUR 3460."
[9] *See* Congressional Candidates and Committees, *Disgorge Prohibited Contributions Discovered Late*, at 34, THE FED. ELECTIONS COMM'N (2011).
[10] A committee does not qualify to proceed with the Commission's termination process until it first settles any and all outstanding debts or obligations.
[11] *See Id.* Among the general requirements, a committee must show reasonable diligence to locate the creditor to no avail.

committee must show it has exercised reasonable diligence to locate creditors. Reasonable diligence means the committee must have made attempts to "ascertain the current address and telephone number, and has attempted to contact the creditor by registered mail...and either in person or by telephone." 11 CFR §116.9(a)(2).

Innis' Committee has exercised reasonable diligence to refund contributions. Attempts to locate and refund the contributions have proven futile. When a political committee cannot locate a creditor to pay outstanding debt, the Commission recognizes a committee's reasonable diligence by offering additional opportunities to these committees attempting to settle outstanding debt. *See* 11 CFR §116.9. Innis' plan to disgorge non-refundable contributions to a 501(c)(3) organization would enable the Committee the same flexibility extended to committees when a creditor cannot be located to settle debt. *See* 11 CFR §116.9.

Many of the underlying principles behind the Commission's regulations are to prevent candidates and candidate committees from using campaign contributions for their personal benefit. See 52 U.S.C. §30114(b). Innis' intent to donate otherwise non-refundable general election contributions to a 501(c)(3) charitable organization would be consistent with the Commission's existing policies, which prohibit candidates for Federal office from incurring a personal benefit from campaign contributions. *See* 52 U.S.C. §30114(b); 11 CFR §113.1(g).

CONCLUSION

The Commission should permit certain specific, uniquely traceable costs that exist only as a result of specific general election contributions to be paid from those funds. It should not burden the speech and associational rights of Committees and contributors by required primary contributions be used for general election expenses. Further, the Commission should not prohibit the Committee from disgorging non-refundable general election contributions to a tax-exempt 501(c)(3) charitable organization that the candidate does not directly or indirectly establish, maintain, finance, or control, or derive any personal benefit from.

Respectfully Submitted,

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To: "TLutz@fec.gov" <TLutz@fec.gov>,
Cc: "ANoti@fec.gov" <ANoti@fec.gov>, "rknop@fec.gov" <rknop@fec.gov>, "ABell@fec.gov" <ABell@fec.gov>,
Bcc:
Subject: RE: Advisory Opinion Request on behalf of Niger Innis for Congress
From: Dan Backer <dbacker@dbcapitolstrategies.com> - Monday 12/14/2015 06:18 PM

The information below is correct.

Regards,

Dan Backer, Esq.
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From: TLutz@fec.gov [mailto:TLutz@fec.gov]
Sent: Monday, December 14, 2015 4:57 PM
To: Dan Backer <dbacker@dbcapitolstrategies.com>
Cc: ANoti@fec.gov; rknop@fec.gov; ABell@fec.gov
Subject: Advisory Opinion Request on behalf of Niger Innis for Congress

Dear Mr. Backer,

This email is to confirm the additional information that you provided by phone. Please either confirm via reply email that the information below is correct, or respond with any necessary corrections or clarifications. Once we have received your confirmation, the email will become part of the public record as part of the advisory opinion request on behalf of Niger Innis for Congress:

1. Niger Innis for Congress (committee identification number C00554485) is in the process of winding down. In so doing, the Committee issued refund checks to persons who had, prior to the primary, made general election contributions to the Committee. The Committee issued to these contributors checks in the full amount of their general election contributions, and the refund checks were timely issued.

2. Because some of the contributors, however, did not cash their refund checks, Mr. Innis and Committee staff reached out to persons who had not cashed their refund checks to ask that the refund checks be cashed. The Committee also reissued refund checks to persons who had not cashed the previously-issued refund checks, after the first checks had gone stale. The reissued refund checks are now stale.

3. The "unique costs" referred to in the Committee's first question are costs associated with the outstanding $8,000 in general election contributions. These consist of transaction-specific costs: per-transaction credit card-processing fees; bank fees, such as account maintenance fees, check-processing fees, transfer fees, and bounced-check fees; and fundraising commissions paid for the solicitation of those general election contributions. The "legal, accounting, and compliance" costs referred to at pages 7-8 of the request are those incurred by the existence of the $8,000 in general election contributions.

Please let me know if you have any questions.

Sincerely,

Theodore M. Lutz
Attorney, Policy Division
Office of General Counsel
Federal Election Commission
(202) 694-1650