



FEDERAL ELECTION COMMISSION
Washington, DC 20463

MEMORANDUM

TO: The Commission
FROM: Commission Secretary's Office
DATE: February 24, 2016
SUBJECT: Comments on Draft AO 2015-16
(Niger Innis for Congress)

Attached are comments received from Mr. Dan Backer, Esq. on behalf of the requestor. This matter is on the February 25, 2016 Open Meeting Agenda.

Attachment

From: Dan Backer
To: JSelinkoff@fec.gov
Cc: rkoon@fec.gov; ANoti@fec.gov; ABell@fec.gov
Subject: Public Comment on Draft B of AO 2015-16 (INNIS)
Date: 02/24/2016 02:37 PM
Attachments: 20160223 Public Comment on AO 2015-16 DRAFT B.PDF

Please find attached public comment on Draft B.

I will be in attendance tomorrow.

Regards,

Dan Backer, Esq.

DB Capitol Strategies PLLC

PAC * CAMPAIGN * NON-PROFIT * POLITICAL LAW

203 South Union Street, Suite 300, Alexandria VA 22314

202-210-5431 office // 202-478-0750 fax // www.DBCapitolStrategies.com

<http://twitter.com/DBCapStrategies> // <http://www.Facebook.com/CampaignFinance>

February 23, 2016

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

Re: Comment to Draft Advisory Opinion B 2015-16 (Innis)

Dear Mr. Petalas:

I submit these public comments on behalf of Niger Innis for Congress ("Committee") in response to the Federal Election Commission's ("Commission") draft Advisory Opinion B 2015-16.

In Draft Advisory Opinion B ("DAO-B"), the Commission concludes the Committee may not pay out of its general election contributions any legal, accounting, and compliance, or any transaction-specific costs associated with those contributions. AO 2015-16 Draft B at 3. However, if a committee may not expend any amount of a general contribution during the primary election period, then primary election contributions are in effect used to pay processing costs of general election contributions. As a result, committees are forced to expend primary election resources, and thus sacrifice the speech and associational interests embodied in their primary election contributions¹ and effectively make potentially excessive resulting contributions to general elections (which may not occur, but for which the excessive contribution still exists).² Contributors engaged in long established permissible conduct may find they have in fact violated the Federal Election Campaign Act's ("FECA") general election contribution limit. *See* 11 CFR § 102.9(e)(1). This creates an internally inconsistent reading of the law, and one easily resolved in a manner according with statute, and an equally avoidable burden upon the ration of associational and speech rights available to contributors.

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 § 110.1(b)(2); 11 CFR 110.2(b)(2). However, no 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. 52 U.S.C. § 30116(a)(1)(A); 11 CFR § 110.1(a)(1). The recipient committee must use an acceptable accounting method to distinguish between contributions received for the primary and contributions received for the general election. 11 CFR § 102.9(e)(2). If an individual's contribution exceeds the contribution limit, the excessive portion of that contribution may be redesignated to the general election. 11 CFR § 110.1(b)(5)(i). Following a loss in a primary election, a candidate must refund, redesignate, or reattribute general election contributions within sixty days. 11 CFR

¹ *See Buckley v. Valeo*, 424 U.S. 1 (1976). When an individual contributes money to a candidate, he exercises both his political expression and political association rights: The contribution "serves as a general expression of support for the candidate and his views" and "serves to affiliate a person with a candidate." *Id.* at 21-22. Although the Supreme Court has taken a less rigid approach with contributions than with other forms of expression *id.* at 20-25, the government must still establish a sufficiently important interest and employ means closely drawn to avoid unnecessary abridgement of associational freedoms. *See id.* at 25, 29.

² A candidate or authorized committee may, prior to a primary election, accept contributions designated by the contributor for use in connection with the general election. 11 CFR §§ 102.9(e)(2), 110.1(b)(2), 110.2(b)(2).

§ 110.1(b)(3)(i). These regulations are designed to ensure candidates do not use general election contributions for the primary election. AO 2015-16 Draft B at 4; AO 1991-15 at 2.

When a candidate receives a contribution to the general election, the candidate incurs certain costs, most notably fundraising commissions and credit card or bank merchant processing fees. The Commission has concluded that any processing fees with respect to a contribution is itself part of that contribution. AO 2007-04 (Atlant). Where a contribution by credit card is made and expenses are deducted by the recipient committee's credit card company or other processors, the entire amount of the cardholder's transaction is a contribution even though the amount the committee receives is reduced by the deducted expenses. AO 1999-8 (Specter); AO 1995-34 (Politechs). Because a Committee must include any fees attached to the contribution and comply with the FECA provisions on contribution limits, the risk of an excessive contribution exists where a contributor makes the maximum legal contribution to both the primary and general election, but the entirety of fees is effectively paid out of the primary election account because they are prohibited from expending the general election funds to do so.

For example, a contributor makes a \$5,400 contribution in the current cycle to the primary and general election of a candidate for Congress. The fundraising commission is 10% of the amount raised, and the credit card processing costs are 5% of the amount raised. This totals \$810, or \$405 for each of the 2 distinct contributions being made. However, the \$405 in costs 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 beneficial value of the primary contribution becomes \$1,890 and the actual value of the general election contribution- the amount received and any attending fees- is an excessive \$3,105. This cannot reasonably be the intent of the law, as the Commission itself suggested in Advisory Opinion 1980-122 (New Yorkers for Myerson).

In Myerson, the Commission concluded the FECA prohibited a candidate who lost a primary election from paying outstanding primary campaign debts and winding down costs with contributions designated for the general election. AO 1980-122 at 2. The Commission noted that where general election contributors made maximum contributions to the primary election, paying primary election debts with general election funds would be prohibited because doing so would result in excessive contributions with respect to the primary election. *Id.* *Innis* is distinguishable from AO 1980-122 because the general election contributions in *Innis* are not intended to be used to pay primary election debts, but rather fees associated with the general election contributions themselves.³ The Commission, by forcing the Committee to use primary election funds to pay for general election transactional costs, effectively results in the same manner of unlawful contribution that the Commission noted prohibitive in Myerson. If paying primary election debts with general election funds is prohibited because it results in excessive contributions, then paying general election processing and transactional costs with primary election funds should also be prohibited. The latter is internally consistent with the law where the Commission's current draft is not, and under general principles of administrative law should control. See *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 842-44 (1984); *City of Arlington v. FCC*, 133 S. Ct. 1863, 1864-65 (2013); *Michigan v. EPA*, 135 S. Ct. 2699, 2706-07 (2015); *Fed. Election Comm'n v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 32 (1981). These transactional costs should properly be deducted from the transaction from whence they originated, and that is the general election contributions. Allowing general election funds to pay for their own unique costs does not contravene 52 U.S.C. § 30116(a)(1)(i); 11 CFR §§ 102.9(e), 110.1(b)(2) or its underlying purpose - to

³ For the same reason, *Innis* is also distinguishable from AO 1992-15(Russo), MUR 6057 (Jennifer Horn for Congress).

ensure that candidates do not use general election contributions for the primary election. It also ensures that the amount of the contribution is within the limit when taking together the funds contributed and the fees charged, precisely as required by the FECA.

Deducting legal, accounting, and compliance, or any transaction-specific costs associated with general election contributions from the primary election account also diminishes the ration of speech and associational rights with respect to the primary election. Free discussion about candidates for public office is no less critical before a primary than before a general election. *Eu v. San Francisco County Democratic Cent. Comm.*, 489 U.S. 214, 223 (1989).

When an individual contributes money to a candidate, he exercises both his political expression and political association rights: The contribution "serves as a general expression of support for the candidate and his views" and "serves to affiliate a person with a candidate." *Buckley v. Valeo*, 424 U.S. 1, 21-22 (1976). A restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached. *Id.* at 19. This is because virtually every means of communicating ideas in today's mass society requires the expenditure of money. *Id.* Making a contribution, like joining a political party, serves to affiliate a person with a candidate. *Id.* at 22. It enables like-minded persons to pool their resources in furtherance of common political goals. *Id.* Given the important role of contributions in financing political campaigns, contribution restrictions could have a severe impact on political dialogue if the limitations prevented candidates and political committees from amassing the resources necessary for effective advocacy. *Id.* at 21. Here, by sequestering funds designated for the primary election to pay for general election costs, the quantity of expression in the primary election is reduced- the number of issues discussed, the depth of the Committee's exploration, the size of the audience reached is compromised by the reduction.

The Committee urges the Commission to draft a substitute advisory opinion concluding the Committee is permitted to use general election contributions to pay processing and transactional fees associated with those contributions.

We appreciate the opportunity to submit these comments.

Sincerely,

/s/

Dan Backer
202-201-5431
dbacker@dbcapitolstrategies.com