



FEDERAL ELECTION COMMISSION
Washington, DC 20463

February 25, 2016

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

ADVISORY OPINION 2015-16

Dan Backer, Esq.
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Alexandria, VA 22314

Dear Mr. Backer:

We are responding to your advisory opinion request on behalf of Niger Innis for Congress (the “Committee”) concerning the application of the Federal Election Campaign Act, 52 U.S.C. §§ 30101-46 (the “Act”), and Commission regulations to your proposal to pay for certain costs with general election funds and to donate other general election funds to charity. The Commission concludes that the Committee may not pay the proposed costs out of general election contributions. The Commission could not approve a response by the required four affirmative votes concerning the donation of general election funds to charity.

Background

The facts presented in this advisory opinion are based on your letter received on November 25, 2015, and your email dated December 14, 2015.

The Committee was the principal campaign committee of Niger Innis, who was a candidate for Congress in the 2014 election cycle. On June 10, 2014, he lost the primary election. The Committee is in the process of winding down.

Prior to the primary, the Committee received contributions for the general election. After Mr. Innis’s loss in the primary election, the Committee states that it timely issued to general election contributors checks in the full amount of their general election contributions. Because some of the contributors, however, did not cash their refund checks, Mr. Innis and Committee staff reached out to those persons who had not cashed their refund checks to ask that the refund

checks be cashed. After the first refund checks had gone stale, the Committee reissued refund checks to persons who had not cashed the previously issued refund checks. The Committee states that, despite its repeated efforts, it has been unable to refund general election contributions totaling \$8,000 from four individuals, and that the reissued refund checks are now stale.

The Committee also represents that it has incurred certain “unique costs” associated with the outstanding \$8,000 in general election contributions. These consist of transaction-specific costs and legal, accounting, and compliance costs. The transaction-specific costs include: per-transaction credit card-processing fees; bank fees, such as account maintenance fees, check-processing fees, and transfer fees; and fundraising commissions paid for the successful solicitation of general election contributions. The Committee states that these costs are “incurred exclusively by the receipt of, and . . . are exclusively traceable to, the mere existence of general election contributions.” Advisory Opinion Request (“AOR”) at AOR002. As to the legal, accounting, and compliance costs, the Committee refers to its winding down costs and the “substantial costs . . . from . . . efforts to settle any outstanding debt or obligations.” AOR007. The Committee asserts that “over time these [legal, accounting, and compliance] burdens ultimately become far removed from the primary election activity and become entirely a product of the general election contributions themselves.” AOR002-003. The Committee wishes to pay these costs from its general election contributions, rather than from its primary election contributions.

Additionally, the Committee seeks to dispose of its remaining general election contributions so that it can terminate. Rather than disgorge the remaining funds to the U.S. Treasury, Mr. Innis seeks to donate the remaining Committee funds to a tax-exempt organization that operates under 26 U.S.C. § 501(c)(3). The request represents that Mr. Innis has not directly or indirectly established, maintained, financed, or controlled the charity, and that “he has no direct or indirect ties” to the organization. AOR009. He also represents that he will not incur any tax or other benefit from a donation of the funds and will have no control over the funds once disgorged.

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?*

Legal Analysis and Conclusions

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?*

The Committee may not pay out of its general election contributions any legal, accounting, compliance, or transaction costs associated with those contributions.

The Act's contribution limitations on contributions made to a candidate for federal office apply separately with respect to each election. 52 U.S.C. § 30116(a)(1)(i); 11 C.F.R. § 110.1(b)(2). Commission regulations provide that 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 C.F.R. §§ 102.9(e), 110.1(b)(2), 110.2(b)(2). The recipient committee, however, must "use an acceptable accounting method to distinguish between contributions received for the primary and contributions received for the general election." 11 C.F.R. § 102.9(e). The committee's "records must demonstrate that, prior to the primary election, recorded cash on hand was at all times equal to or in excess of the sum of general election contributions received less the sum of general election disbursements made." *Id.* at § 102.9(e)(2); *see also* Advisory Opinion 1986-17 (Green) at 4 ("[T]he Act does not prohibit [an authorized 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 . . ."); Factual and Legal Analysis at 3, 5, MUR 6811 (Marjorie 2014) (dismissing complaint where committee paid advances for general election expenses before primary but received full refunds of advances after losing primary). "These regulations are designed to ensure that candidates . . . do not use general election contributions for the primary election." Advisory Opinion 1992-15 (Russo for Congress) at 1.

Subsequently, "[i]f a candidate is not a candidate in the general election, any contributions made for the general election shall be refunded to the contributors, redesignated . . . or reattributed." 11 C.F.R. § 102.9(e)(3); *see also* 11 C.F.R. § 110.1(b)(3)(i) ("If the candidate is not a candidate in the general election, all contributions made for the general election shall be either returned or refunded to the contributors or redesignated . . . , or reattributed . . . , as appropriate.").¹ As the Commission has explained, "where a general election is held, but the candidate does not participate in that election, no separate contribution limit for that general election is available to contributors." Contribution and Expenditure Limitations and Prohibitions; Contributions by Persons and Multicandidate Political Committees, 52 Fed. Reg. 760, 761 (Jan. 9, 1987) (internal citations omitted).

The Commission has consistently noted that if the candidate does not become a candidate for the general election, the Act requires the authorized committee to "make a full refund" of

¹ "For purposes of these regulations, contributions are 'returned' when the negotiable instrument comprising the contribution is sent back to the contributor instead of being deposited. Contributions are 'refunded' when the recipient committee sends the contributor a check for the amount of the contribution which has been previously deposited." Contribution and Expenditure Limitations and Prohibitions; Contributions by Persons and Multicandidate Political Committees, 52 Fed. Reg. 760, 768 (Jan. 9, 1987).

general election contributions, regardless of whether it had already “made any expenditure from these contributions.” Advisory Opinion 1986-17 (Green) at 3-4 (citing, *inter alia*, Advisory Opinion 1986-12 (Ferraro); Advisory Opinion 1983-39 (Krueger)); 11 C.F.R. § 102.9(e)(3); *see also* Advisory Opinion 2009-15 (Bill White for Texas) at 7 (“Contributions designated for an election . . . in which a person is not a candidate . . . must be refunded.”); Advisory Opinion 1992-15 (Russo) at 2; Factual and Legal Analysis at 4, MUR 6230 (Wynn for Congress) (finding reason to believe where committee spent general election contributions during primary and was unable to refund contributions to general election contributors); Factual and Legal Analysis at 3-4, MUR 6057 (Jennifer Horn for Congress) (“[G]eneral election contributions may be used to make advance payments for general election purposes, but should the candidate not win the primary election, the committee must have enough cash on hand to refund all general election contributions.”).

For example, in Advisory Opinion 1980-122 (New Yorkers for Myerson), the Commission concluded that the Act prohibited a candidate who had lost a primary election from paying outstanding primary campaign debts and winding down costs with contributions designated for the general election. Because the candidate in that advisory opinion “was involved only in the primary election, all of the debts and obligations of the Committee exist[ed] with respect to that election.” *Id.* at 2. Therefore, to the extent that general election contributors also made maximum contributions with respect to the primary election, the Commission concluded that the Act prohibited the Committee from paying primary election debts with general election funds, because doing so would result in the contributors making excessive contributions with respect to the primary election. *Id.*

Here, the Committee proposes to pay out of general election contributions various costs associated with those contributions, including transaction fees, fundraising commissions, and legal, accounting, and compliance costs. As the regulations and opinions cited above uniformly note, the Committee may not do so. Because Mr. Innis lost the primary election and therefore was not a candidate in the general election, the Commission’s regulations require him to timely refund, reattribute, or redesignate all contributions that the Committee received for the general election. This refund obligation includes any contributions that the Committee spent on general election expenses prior to losing the primary, and it necessarily precludes the Committee from now spending *additional* general election funds, as proposed in the request, on an election in which Mr. Innis did not participate.

Accordingly, the Committee may not pay out of its general election contributions any legal, accounting, compliance, or transaction costs.

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?*

The Commission could not approve a response to Question 2 by the required four affirmative votes. *See* 52 U.S.C. § 30106(c); 11 C.F.R. § 112.4(a).

This response constitutes an advisory opinion concerning the application of the Act and Commission regulations to the specific transaction or activity set forth in your request. *See* 52 U.S.C. § 30108. The Commission emphasizes that, if there is a change in any of the facts or assumptions presented, and such facts or assumptions are material to a conclusion presented in this advisory opinion, then the requestor may not rely on that conclusion as support for its proposed activity. Any person involved in any specific transaction or activity which is indistinguishable in all its material aspects from the transaction or activity with respect to which this advisory opinion is rendered may rely on this advisory opinion. *See* 52 U.S.C. § 30108(c)(1)(B). Please note that the analysis or conclusions in this advisory opinion may be affected by subsequent developments in the law including, but not limited to, statutes, regulations, advisory opinions, and case law. Any advisory opinions cited herein are available on the Commission's website.

On behalf of the Commission,

A handwritten signature in blue ink, appearing to read "Matthew S. Petersen", with a long horizontal flourish extending to the right.

Matthew S. Petersen
Chairman