AGENDA DOCUMENT NO. 01-10

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FEDERAL ELECTION COMMISSION
Washington, DC 20463

February 12, 2001

MEMORANDUM

TO: The Commission

THROUGH: James A. Pehrkon
Staff Director

FROM: Lois G. Lerner
Acting General Counsel

N. Bradley Litchfield NBL (RCS)
Associate General Counsel

Michael Marinelli
Staff Attorney

AGENDA ITEM
For Meeting of: 2-15-01

SUBMITTED LATE

SUBJECT: Draft AO 2001-01 Alternative Drafts

Attached are two proposed drafts of the subject advisory opinion. We request that both drafts be placed on the agenda for February 15, 2001.

These drafts address various questions regarding the scope of the office building fund exception. The main difference between the two drafts is on the question of whether fundraising expenses for the office building fund are themselves entitled to be part of the office building fund exception. Draft A, which the Office of General Counsel recommends for approval, answers the question in the positive. This position represents a change from the initial position taken in the White Draft circulated to the Commission on January 29, 2001 and was occasioned by a re-examination of the relevant statutes and regulations as well as through conversation with various Commission offices. However, because several Commissioners had expressed initial support of the White Draft, this Office is circulating Alternative Draft B to offer another possible approach. This draft incorporates the reasoning of the White Draft and answers the above question in the negative. Bolded print is used in Draft A to indicate where it differs from Draft B.

Attachments

Alternative Draft A

ADVISORY OPINION 2001-01

DRAFT

Scott R. Falmlen, Executive Director
North Carolina Democratic Party
220 Hillsborough Street
Raleigh, NC 27603

Dear Mr. Falmlen:

This refers to your letter dated January 4, 2001, on behalf of the North Carolina Democratic Party ("the Party") concerning the application of the Federal Election Campaign Act of 1971, as amended ("the Act"), and Commission regulations to the use of an office building fund, maintained by the Party, for various purposes related to the renovation of the Party's office building.

You state that the Party is preparing to embark on a wholesale restoration and renovation of its historic headquarters building in Raleigh, NC.[1] You believe, based on past policy and opinions of the Commission, that the actual expenditures for the restoration and renovation, machinery and equipment, furniture and fixtures, and other similar property may be made from the Party's office building fund.[2] However, you seek clarification on whether the office building fund can be used for spending in several specific areas.

You ask whether expenditures such as construction management and architectural fees, directly and solely related to the restoration and renovation project, may be paid

[1] You state that the renovation will be extensive, requiring external and interior work of both a structural and cosmetic nature. The anticipated cost of the project is $1.5 to 2.5 million necessitating a full-time fundraising effort. The Party headquarters is housed in a building it owns, the Goodwin House, built in 1903 and designated as a Raleigh Historic Site in 1980.

[2] You cite to the Commission's conclusions in Advisory Opinion 1998-7 to support your position.

from the Party's office building fund. You explain that a construction manager is the equivalent of a general contractor. This is an individual or firm that, while not actually doing any of the actual renovation work, would oversee and manage the work of the various subcontractors involved in the renovation project. You also ask whether, based on the funds received method of allocating expenses, fundraising expenses may be paid from the Party's office building fund. Specifically, you wish to know whether the office building fund could be used to pay the salary or fees **and other expenses** of an employee or consultant whose sole responsibility is to raise funds for the office building fund.[3]

ACT AND COMMISSION REGULATIONS

Under the Act and Commission regulations, a gift, subscription, loan, advance, or deposit of money or anything of value made to a national committee or a State committee of a political party, that is specifically designated to defray the costs incurred for construction or purchase of an office facility, is not considered to be a contribution or expenditure, provided that the facility is not acquired for the purpose of influencing the election of any candidate in any particular election for Federal office. 2 U.S.C. §431(8)(B)(viii); 11 CFR 100.7(b)(12), 100.8(b)(13), and 114.1(a)(2)(ix). The Commission has applied these provisions to permit State party committees and national party committees to accept corporate and labor union donations to office building funds (or accounts) established and used for the purpose of purchasing or constructing an office

[3] In a phone conversation with Commission staff you identified the other expenses as the health insurance benefits, travel expenses and the employer's portion of the withholding tax associated with this employee.

1 facility by the cited party committees. Advisory Opinions 1997-14, 1993-9, 1991-5,
2 1986-40, and 1983-8; *see also* Advisory Opinions 1998-8, 1998-7 and 1996-8.

3 Commission regulations at 11 CFR 106.5 provide that party committees that make
4 disbursements in connection with Federal and non-Federal elections "shall make those
5 disbursements entirely from funds subject to the prohibitions and limitations of the Act,
6 or from accounts established pursuant to 11 CFR 102.5," which provides for the
7 establishment of Federal and non-Federal accounts. 11 CFR 106.5(a) and 102.5(a). Party
8 committees that establish separate Federal and non-Federal accounts shall allocate
9 specific categories of expenses between those two accounts according to section 106.5.

10 **When one Fundraising program or event is held to collect Federal funds (i.e.,**
11 **funds to be used in Federal elections) and non-Federal funds (i.e., funds to be used**
12 **in nonfederal elections), the sponsoring committee must allocate the direct costs of**
13 **the activity, including planning, administrative and solicitation costs. 11 CFR**
14 **106.5(a)(2)(ii). Party committees must use the funds received allocation method for**
15 **these fundraising expenses. 11 CFR 106.5(f)**

16 **Under this approach, the costs are allocated according to the ratio of Federal**
17 **funds received to total receipts for the**

1 **building fund, there is no need to allocate the expenses. Consequently, the full**
2 **amount of the salary, fees and other related expenses of the employee or consultant**
3 **who is working exclusively to raise money for the restoration and renovation project**
4 **may be paid from the building fund.**[6]

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

8 Sincerely,

9

10 Danny L. McDonald
11 Chairman
12
13 Enclosures (AOs 1998-8, 1998-7, 1997-14, 1996-8, 1993-9, 1991-5, 1986-40 and 1983-8)
14

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facilities. However this opinion did not address whether fundraising costs could also be paid out of the office building fund.

[6] The Commission notes that you have not asked whether any law of North Carolina would be pre-empted by 2 U.S.C. §431(8)(B)(viii) if that law impeded the ability to raise funds for the Party's headquarters. Accordingly, while this opinion does not consider any issue relating to the laws of North Carolina, other opinions have examined the extent to which State laws were pre-empted by the operation of section 431(8) and 2 U.S.C. §453. *See* Advisory Opinions 1998-8, 1998-7, 1997-14, 1993-9, 1991-5 and 1986-40. However, while the Commission has construed the Act and Congressional intent to require disclosure of office building fund activity by the national party committees in reports they file with the Commission (*see* 11 CFR 104.8(f) and 104.9(d)), it has also concluded that any State level disclosure requirements regarding a State party office building fund are not pre-empted or superseded by the Act or Commission regulations. *See* Advisory Opinions 1997-14 and 1991-5.

Alternative Draft B

ADVISORY OPINION 2001-01

DRAFT

Scott R. Falmlen, Executive Director
North Carolina Democratic Party
220 Hillsborough Street
Raleigh, NC 27603

Dear Mr. Falmlen:

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You ask whether expenditures such as construction management and architectural fees, directly and solely related to the restoration and renovation project, may be paid

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2 equivalent of a general contractor. This is an individual or firm that, while not actually
3 doing any of the actual renovation work, would oversee and manage the work of the
4 various subcontractors involved in the renovation project. You also ask whether, based
5 on the funds received method of allocating expenses, fundraising expenses may be paid
6 from the Party's office building fund. Specifically, you wish to know whether the office
7 building fund could be used to pay the salary or fees and other expenses of an employee
8 or consultant whose sole responsibility is to raise funds for the office building fund.[3]

9 ***ACT AND COMMISSION REGULATIONS***
10
11 Under the Act and Commission regulations, a gift, subscription, loan, advance, or
12 deposit of money or anything of value made to a national committee or a State committee
13 of a political party, that is specifically designated to defray the costs incurred for
14 construction or purchase of an office facility, is not considered to be a contribution or
15 expenditure, provided that the facility is not acquired for the purpose of influencing the
16 election of any candidate in any particular election for Federal office. 2 U.S.C.
17 §431(8)(B)(viii); 11 CFR 100.7(b)(12), 100.8(b)(13), and 114.1(a)(2)(ix). The
18 Commission has applied these provisions to permit State party committees and national
19 party committees to accept corporate and labor union donations to office building funds
20 (or accounts) established and used for the purpose of purchasing or constructing an office

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2 1986-40, and 1983-8; *see also* Advisory Opinions 1998-8, 1998-7 and 1996-8.

3 Commission regulations at 11 CFR 106.5 provide that party committees that make
4 disbursements in connection with Federal and non-Federal elections "shall make those
5 disbursements entirely from funds subject to the prohibitions and limitations of the Act,
6 or from accounts established pursuant to 11 CFR 102.5," which provides for the
7 establishment of Federal and non-Federal accounts. 11 CFR 106.5(a) and 102.5(a). Party
8 committees that establish separate Federal and non-Federal accounts shall allocate
9 specific categories of expenses between those two accounts according to section 106.5.
10 One of these categories is administrative expenses, including rent, utilities, office
11 supplies, and salaries, except for expenses directly attributable to a clearly identified
12 candidate. 11 CFR 106.5(a)(2)(i).

13 Commission regulations provide that state party committees with separate Federal
14 and non-Federal accounts shall allocate their administrative expenses and generic voter
15 drive costs between those accounts using the "ballot composition method." This method
16 is based on the ratio of Federal offices to total Federal and non-Federal offices expected
17 on the ballot in the State's next general election. 11 CFR 106.5(d)(1)(i). The ballot
18 composition ratio is determined at the start of each two-year Federal election cycle, in
19 accordance with a point system set out in 11 CFR 106.5.[4]

[4] The offices of President, United States Senator, and United States Representative count as one Federal point each, and the offices of Governor, State Senator, and State Representative count as one non-Federal point each, if expected on the ballot in the next general election. If other partisan statewide executive candidates will be on the ballot, these offices count as no more than two non-Federal points in the ratio. Similarly, if any partisan local offices are expected on the ballot in any regularly scheduled election during the two-year cycle, these offices count as one non-Federal point. Finally, the rules also allow state parties to include an additional, generic non-Federal point. 11 CFR 106.5(d)(1)(ii).

1 ***APPLICATION TO PARTY PROPOSAL***

2

3 *Construction management and architectural fees*

4 In the Commission's consideration of what constitutes the proper use of the office
5 building fund, the Commission has drawn a parallel between permissible uses of the
6 office building fund and the description and treatment of capital expenditures found in the
7 Internal Revenue Code and related IRS regulations. Under the IRS regulations, a capital
8 expenditure includes the cost of the acquisition, construction, or erection of buildings,
9 machinery and equipment, furniture and fixtures and similar property. 26 CFR 1.263(a)-1
10 and 1.263(a)-2. The Commission has concluded that items that would fall under the
11 category of capital expenditures would also be considered the type of expenditures that
12 are legitimately part of the construction of a political party's office facility. See Advisory
13 Opinion 1998-7. In this instance, the Commission notes that "the amount expended for
14 architect's services" are explicitly listed in IRS regulations as an example of a capital
15 expenditure. See 26 CFR 1.263(a)-2(d). The Commission concludes that the office
16 building fund may be used to pay for architectural fees directly and solely related to the
17 restoration and renovation project for Party headquarters.

18 With regard to construction management expenses, the Commission notes that the
19 expenses relating to the construction manager directly relate to the actual renovation of
20 the Party's headquarters. These are direct construction costs. Therefore, the office
21 building fund may be used to pay for these expenses as well.

22 *Fund raising costs*

23 The situation, however, is different with regard to the expenses of raising funds
24 for the office building fund. The expenses that may be covered by 2 U.S.C.

1 §431(8)(B)(viii) apply only to direct expenses involved in the actual purchase or
2 construction of a party headquarters. For example, in Advisory Opinion 1983-8, the
3 Commission concluded that the office building fund exception did not apply to donations
4 to pay for the costs of the property taxes, assessments, charges and other expenses
5 incurred by a trust that administered a party's office facilities. In Advisory Opinion 1988-
6 12, the Commission similarly concluded that the office building fund exception did not
7 cover rent, building maintenance, utility, office equipment expenses and other
8 administrative expenses of a party headquarters.[5] Therefore, the Commission concludes
9 that the Party may not use its office building fund to pay for fundraising expenses to
10 solicit donations that will be expended for the construction or renovation of the Party's
11 headquarters.

12 The expenses that the Commission has previously concluded did not fall within
13 the office building fund exception were administrative and overhead costs associated with
14 the building headquarters. The fees and salaries for fundraising services that you describe
15 in your request are a similar type of expense associated with the office building fund. As
16 noted above, a State party's administrative and overhead expenses (including amounts
17 paid for salaries) are divided into separate portions that may be allocated between the
18 Party's Federal and non-Federal accounts using the ballot composition method for the
19 current election cycle.[6] Therefore, while the Party's office building fund may not be used

[5] In Advisory Opinion 1993-9, the Commission concluded that a Party could establish an office building fund to pay off the land contract on its current headquarters so that it could sell the property and use the proceeds toward the purchase or construction of new office facilities. This opinion, as well as previous opinions, did not address whether fundraising costs could also be paid out of the office building fund.
[6] Although not explicitly raised in your request, there may be expenses related to a multi-purpose fundraising event which is intended to collect contributions for the Party's building fund, as well as for its Federal and non-Federal election activities. The Commission notes that 11 CFR 106.5(f) discusses the allocation of direct costs for mixed fundraising events, but does not mention the treatment of building fund

1 to pay the fundraising expenses you describe in your proposal, a certain portion of these
2 costs may nonetheless be paid with funds raised pursuant to State law rather than Federal
3 law.[7]

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

7 Sincerely,

8

9 Danny L. McDonald
10 Chairman
11
12 Enclosures (AOs 1998-8, 1998-7, 1997-14, 1996-8, 1993-9, 1991-5, 1986-40 and 1983-8)
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fundraising expenses. In these situations, the Commission suggests the following: The Party should follow the requirements of section 106.5(f) and divide the fundraising expenses into portions to be paid from the Federal account or non-Federal account according to the fund received allocation approach as described in the regulations. The Party should, however, split whatever share that may be attributable to the building fund into equal portions to be paid by the Federal and non-Federal accounts.

[7] The Commission notes that you have not asked whether any law of North Carolina would be pre-empted by 2 U.S.C. §431(8)(B)(viii) if that law impeded the ability to raise funds for the Party's headquarters. Accordingly, while this opinion does not consider any issue relating to the laws of North Carolina, other opinions have examined the extent to which State laws were pre-empted by the operation of section 431(8) and 2 U.S.C. §453. *See* Advisory Opinions 1998-8, 1998-7, 1997-14, 1993-9, 1991-5 and 1986-40. However, while the Commission has construed the Act and Congressional intent to require disclosure of office building fund activity by the national party committees in reports they file with the Commission (*see* 11 CFR 104.8(f) and 104.9(d)), it has also concluded that any State level disclosure requirements regarding a State party office building fund are not pre-empted or superseded by the Act or Commission regulations. *See* Advisory Opinions 1997-14 and 1991-5.