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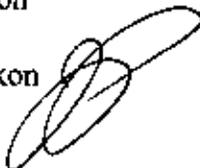
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AGENDA ITEM
For Meeting of: 11-1-01

October 25, 2001

MEMORANDUM

TO: The Commission

THROUGH: James A. Pehrkon
Staff Director 

FROM: Lawrence H. Norton
General Counsel 

N. Bradley Litchfield *NBL (rcs)*
Associate General Counsel

Subject: Draft AO 2001-16

Attached is a proposed draft of the subject advisory opinion. We request that this draft be placed on the agenda for November 1, 2001.

Attachment

1 ADVISORY OPINION 2001-16

2
3 Joseph E. Sandler
4 Sandler, Reiff & Young, P.C.
5 50 E Street, S.E.
6 Suite 300
7 Washington, DC 20003

DRAFT

8
9 Dear Mr. Sandler:

10 This responds to your letter dated September 28, 2001, as supplemented by your
11 letter dated October 23, 2001, on behalf of the Democratic National Committee ("DNC"),
12 concerning the application of the Federal Election Campaign Act of 1971, as amended
13 ("the Act"), and Commission regulations to the DNC's proposed schedule for making
14 allocation transfers from its non-federal accounts to its Federal accounts on dates that
15 would exceed the 60 day period prescribed in Commission regulations.

16 The request explains that the DNC transfer proposal stems from the national
17 emergency that ensued after the tragic events of September 11. The national emergency
18 "made it appropriate for the DNC to suspend its fundraising events and mail
19 solicitations" after that date. Transfers from non-federal DNC accounts to its Federal
20 accounts would cover the allocable expenses of various activities conducted by the DNC
21 for both Federal and non-federal election purposes that are subject to allocation between
22 its Federal and non-federal accounts. See Commission regulations at 11 CFR 106.5(a),
23 106.5(b), 106.5(f), and 106.5(g). Among other requirements, these regulations prescribe
24 a 60 day period, beginning once an allocable expenditure is made, during which transfers
25 related to the non-federal portion of each designated (and allocable) expenditure must be
26 made. 11 CFR 106.5(g)(2)(ii)(B).¹ Your request indicates that the proposed delay in
27 DNC transfers would occur during a period that started on or about August 27, 2001, and
28 would end on April 30, 2002.

29 The request further describes the circumstances underlying the proposed time
30 periods for future DNC transfers from its non-federal to its Federal accounts:

¹ The cited allocation regulations also provide that, for certain expenditures, an advance transfer is permitted 10 days prior to the actual expenditure if a reasonable estimate of the final cost can be made. 11 CFR 106.5(g)(2)(i). In addition, special time schedules and procedures are prescribed for transfers resulting from adjustments in the "direct costs of fundraising" that qualify for allocation. 11 CFR 106.5(a)(2)(ii), 106.5(f)(2). The application of these provisions is not fully discussed in this opinion.

1 In the aftermath of the events of September 11, the DNC immediately
2 suspended significant aspects of its fundraising operations. This action was taken
3 out of respect for the victims of this enormous tragedy and to ensure that no
4 element of partisanship be permitted to undermine or detract from the strong
5 unified bipartisan support for President Bush in his leadership of the nation's
6 response to this unprecedented challenge.

7 While it is possible that fundraising activities may be resumed on a limited
8 basis in the coming weeks, in view of the elections still scheduled for 2001 and
9 other factors, it is impossible to determine in the present circumstances which
10 activities will be deemed appropriate if any. In any event, any such activities
11 would necessarily be greatly reduced in scale and frequency in view of the need
12 for the attention and energies of all elected officials and political leaders to be
13 focused on the tasks and challenges at hand.²

14 In these circumstances, it will likely continue to prove extremely difficult for
15 the DNC to raise funds of all kinds, in particular, non-federal funds, for the
16 foreseeable future.

17
18 The request also asserts that the "current situation is truly one in which sufficient
19 amounts of non-federal monies are not being received by the DNC in time to make
20 allocation transfers because of circumstances outside the control of the committee or its
21 agents." [Internal quotation marks omitted.]

22 Given the circumstances described, the DNC requests permission from the
23 Commission to extend the 60 day window cited in 11 CFR 106.5(g)(2)(ii)(B) to one
24 hundred twenty (120) days, for allocable expenditures made from August 27, 2001,
25 through and including December 31, 2001. The effect of such an extension would be that
26 transfers designated for allocable expenditures within this period could be made presently
27 and continue, subject to a rolling 120 day window, until no later than April 30, 2002.

28 In support of the request, you cite past Commission advisory opinions and the
29 underlying purposes of the applicable allocation regulations:

30 There is truly no precedent for the current situation, in any respect. As a
31 legal matter, however, the Commission has recognized that it has authority to
32 exempt a party committee from strict application of the allocation window when a
33 transfer could not be accomplished within the window due to circumstances
34 beyond the committee's control. For example, in Advisory Opinion 2001-11, the
35 Commission permitted a state party committee to make a transfer from its non-
36 federal account more than 60 days after the allocable expenditures were made,

² Quoting a named DNC official, it was reported in *The Washington Times* of October 2, 2001, that the DNC had resumed some fundraising, with an event scheduled for October 1, and other events planned in the days and weeks ahead. In addition, *The New York Times* of October 11 reported that, during the first week of October, the DNC distributed its first mailed solicitation since September 11.

1 when the committee's bank failed to effectuate a requested wire transfer. The
2 Commission noted that, "In a number of advisory opinions, the Commission has
3 addressed situations where contribution monies were not received by a political
4 committee, or deposited by it in a timely manner . . . because of circumstances
5 outside the control of the committee or its agents." *Id.*, slip op. at 3, citing
6 Advisory Opinions 1999-23, 1993-5 and 1992-42.

7 * * * *

8 Temporarily extending the allocation window would in no way undermine
9 the fundamental purposes of the allocation regulations with respect to limiting the
10 amount of non-federal funds that a party committee may expend for mixed federal
11 and non-federal activities. Such an extension would in no way decrease the
12 amount of federal funds that the DNC would be required to use for such allocable
13 expenses. In establishing the allocation "window," the Commission's purpose
14 was solely to "allow the Commission to track the flow of non-federal funds into
15 federal accounts, and to ensure that the use of such funds is strictly limited to
16 payment for the non-federal share of allocable activities." Explanation and
17 Justification of Regulations on Methods of Allocation Between Federal and Non-
18 Federal Accounts; Payments; Reporting, 55 Fed. Reg. 26058, 26066 (June 26,
19 1990). To ensure that this purpose is fully achieved under an extended allocation
20 window, the DNC would be willing to submit any additional information or
21 documentation in connection with its disclosure reports, that the Commission may
22 deem necessary or desirable in order to monitor compliance with the allocation
23 regulations with regard to transfers from the DNC's non-federal to federal
24 accounts for allocable disbursements.

25
26 You have summarized, and cite as persuasive precedent, one very recent advisory
27 opinion (Advisory Opinion 2001-11) where the Commission permitted a party committee
28 to make allocation-based transfers after the 60 day window prescribed in its regulations.
29 That opinion is distinguishable from the situation you present. First, the State party
30 committee in the prior opinion had received funds into its non-federal account and
31 attempted to make one allocation-based transfer for designated allocable expenditures to
32 its Federal account. The bank account transfer was timely requested by a party official,
33 and the party had sufficient available funds in its non-federal account to cover the
34 transfer. For some reason, the bank did not make the party's requested transfer, even
35 though, in the ordinary and usual course of its relationship with the party, the bank would
36 have normally complied with the account transfer requests of the party committee
37 official.

38 In the situation you present, however, the DNC seeks an extension of the transfer
39 time frame, mandated in 11 CFR 106.5(g)(2)(ii)(B), for an indefinite number of

1 allocation-based transactions made over a period that exceeds four months in duration.
2 The DNC's argument that it is unable to allocate expenditures is premised on the
3 following: (1) prior to September 11, the DNC was depending on fundraising activities to
4 generate sufficient non-federal funds to make allocation transfers; (2) in the aftermath of
5 the September 11 events, the DNC determined that political fundraising would not be
6 appropriate and immediately suspended "significant aspects" of its fundraising activities;
7 (3) the DNC anticipates that future fundraising will be "greatly reduced" as elected
8 officials devote attention to the current situation. Conceding for purposes of this request
9 that the events of September 11 compelled the decision to suspend "significant aspects"
10 of fundraising, and thus like the party committee in 2001-11, the DNC was faced with a
11 circumstance outside of its control, the DNC has not made a detailed showing
12 demonstrating that its inability to make allocation transfers in the period prescribed by
13 the Commission's Regulations results entirely (or almost entirely) from its decision to
14 suspend fundraising, and not, at least in part, from other circumstances that existed, or
15 spending decisions that occurred, before and after September 11. For these reasons, your
16 request presents a materially distinguishable situation from that addressed in Advisory
17 Opinion 2001-11. 2 U.S.C. §437f(c) [Any person may rely on an advisory opinion issued
18 to another if the specific transaction or activity of the relying person is "indistinguishable
19 in all its material aspects" from the activity described in the issued opinion.] See *Federal*
20 *Election Commission v. National Rifle Ass'n*, 254 F.3d 173, 184, 185 (D.C. Cir. 2001)
21 [Advisory opinions are entitled to judicial deference, reflect the Commission's
22 "considered judgment...[with] binding legal effect," and can be relied upon by others
23 involved in any materially indistinguishable transaction.]

24 The DNC request also invites the Commission to use this opinion as a means of
25 granting the same relief it seeks (a temporary extension of the allocation transfer period
26 from 60 days to 120 days) to all national, state and local party committees that are subject
27 to the allocation regulations. Commission regulations governing the advisory opinion
28 process provide that an inquiry seeking an opinion does not qualify as an advisory
29 opinion request, pursuant to the Act, if it presents "a general question of interpretation, or
30 ... [poses] a hypothetical situation, or [describes]... the activities of third parties." 11
31 CFR 112.1(b). To the extent the DNC request invites the Commission to address the

1 activities of other party committees, or presents hypothetical situations or general
2 questions of interpretation, it does not qualify as an advisory opinion request.

3 The legal interpretations stated above are mandated by the Act and Commission
4 regulations. The Commission understands, however, that the horrific events of September
5 11 and their aftermath have profoundly affected the United States and many other nations
6 in countless and unprecedented ways that are only beginning to be recognized in our
7 national life. Against this backdrop, the Commission recognizes that some dispensation
8 may be appropriate in the application of the allocation transfer time periods prescribed in
9 its regulations.

10 The Commission has discretion to consider other means of granting the type of
11 relief sought in your request. For example, it may undertake an expedited rulemaking
12 proceeding to revise the applicable regulations in a manner that would give a temporary
13 extension of time for making the described transfers. *See* 2 U.S.C. §437d(a)(8)
14 [Commission has power to amend or repeal its rules pursuant to 5 U.S.C. §551, *et. seq.*;
15 i.e., the Administrative Procedure Act]. In addition, the Commission may consider the
16 issuance of a policy statement that would declare its intentions regarding prospective
17 enforcement or regulatory compliance policy given the circumstances presented and with
18 reference to the transfer time periods in the cited allocation regulations. *See* 2 U.S.C.
19 §437c(b)(1) [Commission has duty to administer, seek to obtain compliance with, and
20 formulate policy with respect to, the Act]. As a result of this advisory opinion request,
21 the Commission is actively considering these options. Any Commission action to
22 implement them would, given their nature, be applicable to other political party
23 organizations, not just the DNC. Future announcements as to the Commission's
24 decisions on this subject will be made at an early date.

