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OFFICE OF GENERAL COUNSEL

August 7, 2006

By Hand
Lawrence M. Norton, Esquire
General Counsel
Federal Election Commission
999 E Street, NW
Washington, DC 20463

Re: Advisory Opinion Request

FEC AOR AOR 2006-24

Dear Mr. Norton:

Pursuant to 2 U.S.C. § 437f and 11 C.F.R. 112.1, the National Republican Senatorial Committee ("NRSC") and Democratic Senatorial Campaign Committee ("DSCC") (collectively "Party Committees"), through counsel, hereby submit this request for an Advisory Opinion. Specifically, the Party Committees are requesting an Advisory Opinion regarding the application of the amount limitations, source prohibitions, and reporting obligations under the Federal Election Campaign Act of 1971, as amended by the Bipartisan Campaign Reform Act of 2002 ("BCRA") (collectively, the "Act"), and Federal Election Commission ("Commission") regulations to the establishment and administration of a recount fund by Federal campaign committees ("Campaign") that will be used to pay recount, election contest and other post-election litigation costs resulting from their Federal elections, and the role the Party Committees, and their agents, can play in the administration of a state party and/or Campaign recount fund. In addition, the Republican Federal Committee of Pennsylvania ("State Party"), through counsel, seeks guidance concerning the establishment and administration of a recount fund to pay similar recount and election contest expenses resulting from a Federal election.

Introduction

The NRSC is comprised of sitting Republican Members of the United States Senate and includes all incumbent Republican Senators who are currently Federal candidates. The DSCC is comprised of sitting Democratic Members of the United States Senate and includes all incumbent Democratic Senators who are currently Federal candidates. As part of their primary function to aid the election of candidates affiliated with their respective parties, the Party Committees provide political and financial support and guidance to incumbent Federal candidates, as well as to challengers and to candidates for open senatorial seats. The Party Committees submit this request on behalf of their Members who are currently candidates for the 2006 midterm elections and other candidates for the midterm Federal election who look to the Party Committees for financial and political support. The candidates who may be concerned about a close race are unwilling to identify themselves, for obvious reasons, given the close proximity to the Federal general election. The Party Committees, moreover, do not maintain lists of candidates for whom special recount preparations are made prior to Election Day. The Party Committees' experience is that there is no way to predict the races that will result in recounts or election contests, much less the ones that will result in significant, costly recounts or election contests holding out the possibility of overturning the official results. Yet, in order to address the recounts and election contests that do develop, the Party Committees must clarify the applicable law and conduct activities accordingly in the coming weeks. This is a core responsibility of the Party Committees.

Nonetheless, the Party Committees will advise their Members involved in close elections within a very short time period to establish and administer recount funds to finance recount, election contest, and other post-election litigation costs. Each Campaign's leadership will establish and administer the

fund and will exercise decision making authority over the raising and spending of monies by the recount fund. The Campaigns will also consult state and national party committee officials concerning fundraising programs, administrative issues, and recount and election contest strategies and tactics. All monies raised for the recount funds will comply with the restrictions contained in Commission regulations; namely, no funds from corporations, labor unions, or foreign nationals will be solicited or accepted. No monies raised by the recount funds will be used to pay for pre-election or Election Day get-out-the-vote activities or communication expenses. All monies raised by the recount funds will be used to pay expenses resulting from a recount, election contest, counting of provisional and absentee ballots and ballots cast in polling places, other post-election litigation and administrative proceeding expenses concerning the casting and counting of ballots during the Federal election, fees for the payment of staff assisting the recount or election contest efforts, and administrative and overhead expenses in connection with recounts and election contests ("Recount Activities"). Finally, the NRSC and DSCC intend to sit down with the state party committees and Federal campaign committees of their respective political parties to participate in planning and strategy sessions regarding the establishment and administration of their respective recount funds. Such planning sessions will include fundraising strategies, events and activities, and where, when and how the funds should be spent during a recount or election contest, and recount and election contest strategies and tactics.

The State Party is the Republican state party in the Commonwealth of Pennsylvania and registered with the Commission as a political committee. The State Party intends to establish within a very short time period a recount fund to support its Federal candidates by financing recount, election contest, and other post-election litigation costs. The State Party's leadership will establish and administer the recount fund and will make decisions over the raising and spending of monies by the recount fund in consultation with a Federal candidate who is, or may be, involved in a recount, election contest, or other post-election litigation. The Federal candidate consultations will occur prior to, on, and after Election Day. The State Party will also consult national party committee officials concerning fundraising programs, administrative issues, and recount and election contest strategies and tactics. All monies raised for the recount fund will comply with the restrictions contained in Commission regulations; namely, no funds from corporations, labor unions, or foreign nationals will be solicited or accepted. No monies raised by the fund will be used to pay for Federal election activities, coordinated or independent expenditures, exempt party activities, or any communications referring to any Federal candidate prior to or on Election Day. All monies raised by the fund will be used to pay expenses resulting from Recount Activities.

Discussion

I. The Act and Commission regulations exempt funds raised and spent to finance recounts and election contest activities from the definitions of "contribution" and "expenditure."

The Act and Commission regulations prohibit Federal candidates and officeholders and their agents from soliciting, receiving, directing, transferring, spending, or disbursing funds that do not comply with the Federal amount limitations and source prohibitions "in connection with an election for Federal office." 2 U.S.C. § 441i(e)(1)(A); 11 C.F.R. § 300.61. Similarly, the Act and Commission regulations prohibit a state party committee from raising and spending non-Federal funds for Federal election activities. See 11 C.F.R. § 300.30-37. State parties must raise and spend Federal funds or a combination of Federal and Levin funds for Federal election activities depending upon the specific type of activity. See id. §§ 300.32-34. Finally, the Act and Commission regulations prohibit national party committees from soliciting, receiving, directing, or spending any funds that do not comply with the Federal amount limitations and source prohibitions. 2 U.S.C. §§ 441i(a) & (c); 11 C.F.R. § 300.10.

The Act and Commission regulations define "elections" to include, in relevant part, primary, general, special, and runoff elections. 2 U.S.C. § 431(1); 11 C.F.R. § 100.2. The definitions do not include recounts, election contests, or other post-election litigation concerning the results of a Federal election. See 2 U.S.C. § 431(1); 11 C.F.R. § 100.2.

Further, the Act and Commission regulations define the terms "contribution" and "expenditure" to include any gift, subscription, loan, or anything of value "made by any person for the purpose of influencing any election for Federal office." 2 U.S.C. § 431(8) (defining "contribution"); id. § 431(9) (defining "expenditure"); 11 C.F.R. § 100.52 (defining "contribution"); id. § 100.111 (defining "expenditure"). Commission regulations, however, provide that monies raised to finance recount or election contest activities are exempt from the definition of "contribution."

> A gift, subscription, loan, advance, or deposit of money or anything of value made with respect to a recount of the results of a Federal election, or an election contest concerning a Federal election, is not a contribution except that the prohibitions of 11 C.F.R. 110.20 and part 114 apply.

11 C.F.R. 100.91. Commission regulations contain a similar exemption to the definition of "expenditure." Id. § 100.151. The Commission explained the exclusion of recount and election contest expenses from these definitions "since, [recounts and election contests] are related to elections, [they] are not Federal elections as defined by the Act." H.R. Doc. 95-44 at 40 (1977).

A. The Commission opined in previous Advisory Opinions that Federal candidates are permitted to establish and operate recount funds. There is no indication in the legislative history of BCRA that Congress intended to change this established precedent.

In Advisory Opinion 1978-92, the Commission held, inter alia, that a Campaign is permitted to establish a separate bank account to receive and disburse funds for the sole purpose of defraying the costs of a Federal election recount. The funds raised by the Campaign are subject to the prohibition on contributions from foreign nationals, corporations, and labor unions. However, the funds received are not subject to the contribution limits under the Act and Commission regulations. In reaching its holding, the Commission advised the Campaign that the funds received for such purposes must be included in the Campaign's disclosure reports as other receipts, and disbursements should be disclosed as well.

The Commission has relied on its holding in Advisory Opinion 1978-92 in subsequent Advisory Opinions on related issues. See FEC Adv. Op. 1990-23 n.2 (The Commission "approved an authorized committee's proposal to establish a bank account to receive donations and make disbursements with respect to a vote recount, provided that receipts and disbursements were properly reported and that the account did not receive funds prohibited under Part 114."); Id. 1998-26 ("Under the Act, a Federal candidate raising and spending funds to defend against an election challenge may raise funds using her principal campaign committee. . ."). The Commission has not issued any Advisory Opinions or policy statements regarding the establishment of recount funds by state party committees or Federal candidates since the enactment of BCRA.

The Commission, however, has held that Federal officeholders and candidates are permitted to establish legal defense funds for other purposes. In Advisory Opinion 2003-15 -- which was adopted after BCRA's effective date -- the Commission held that a Federal officeholder and candidate is permitted to establish a separate legal defense fund for the purpose of defraying legal costs in connection with litigation over a state's open primary system. In reaching its holding, the

Commission opined that donations raised and disbursements made in connection with a "lawsuit challenging the legality of a Federal election ballot" are not made in connection with a Federal election for purposes of the Act and Commission regulations. The Commission further held that the soft money ban applicable to Federal candidates and officeholders does not bar them from raising soft money for their legal defense funds.

> The Commission concludes that 2 U.S.C. 441i(e)(1)(A) does not change this result. There is no indication in the legislative history of BCRA that Congress intended section 441i(e)(1)(A) to change an area that is both well-familiar to members of Congress and subject of longstanding interpretation through statements of Congressional policy and Commission Advisory Opinions. . . . This supports the conclusion that Congress did not intend 2 U.S.C. 441i(e)(1)(4) to bar Federal officeholders from accepting non-Federal funds for their legal expense funds.

Thus, the Commission held that the non-Federal funds prohibition applicable to a Federal officeholder and candidate does not apply to soliciting and spending money for a legal defense fund.

Given the Commission's precedent permitting the establishment of recount funds by Federal candidates – precedent that was both well-familiar to members of Congress and the subject of longstanding interpretation through Commission Advisory Opinions – the same principles justifying the establishment of legal defense funds by Federal officeholders and candidates appears to apply equally to the establishment of recount funds by Federal candidates. Accordingly, there is no evidence that Congress intended to overturn this longstanding precedent concerning Federal candidate recount funds with the passage of BCRA.

II. All funds raised by the State Party for recount and election contest expenses do not qualify as funds raised and spent in connection with a Federal election. Therefore, such funds are not subject to the Federal contribution funding restrictions applicable to Federal election activities.

Commission regulations require state party committees that make disbursements for Federal election activities to establish and maintain either: (1) multiple Federal accounts; (2) at least three separate accounts such as a Federal account, Levin account, and a non-Federal account; or (3) a Federal account and a combined Levin/non-Federal account. 11 C.F.R. §300.30(c). Commission regulations also require state party committees to deposit only funds that comply with the amount limitations and source prohibitions the Act and Commission regulations into their Federal account. See id. 300.30(b)(3). All monies spent on activities in connection with a Federal election must be made through a state party's Federal account, or an allocation account, depending upon the type of expense. See id. § 300.30(b)(3)(iii).

As discussed above, the Commission has concluded through prior rulemakings and Advisory Opinions that monies raised and spent for recount or election contest purposes are not funds raised or spent in connection with a Federal election. Further, recount and election contest expenses do not qualify as Federal election activities under the Act and Commission regulations. See id. § 100.24 (defining "Federal election activities"). Therefore, there does not appear to be any regulatory bar prohibiting a state party committee from establishing a recount fund containing permissible non-Federal funds, or from using its non-Federal account, to finance recount and election contest costs resulting from the outcome of a Federal election.

A. Pennsylvania statutory provisions regarding campaign contributions and expenses of state party committees.

The Pennsylvania Election Code, 25 P.S. §§2600 et seq. (the "Election Code") regulates contributions and expenditures for state and local political campaigns and activities. Subject to the registration, reporting, and other requirements of the Election Code, state party committees are permitted to raise and expend funds in connection with political campaigns and activities.

Pennsylvania law does not impose any limits on the amount of political contributions or expenditures, and this applies to state party committees as well as to candidates, candidate political committees and political action committees. The Election Code, however, does restrict certain types of contributions. Contributions by national banks, corporations, or unincorporated associations are prohibited. Contributions must be made in the name of the person making the contribution and not from funds received from another source. Anonymous contributions and cash contributions in excess of $100 are prohibited. See §§3253 and 3254 of the Election Code.

Lawful expenditures under the Election Code are broadly defined as those whose purpose is to influence the outcome of an election. See §§3254.1 and 3241(d) of the Election Code. Expenditures are broadly defined to include money as well as any "valuable thing." See §3241(d) and (k). Political committees can also contribute money and valuable things to other political committees. As such, there is nothing under Pennsylvania law that prohibits or restricts a state party committee from raising and expending funds for recount purposes for state and local candidates.

State party committees are required under the Election Code to file with the Secretary of the Commonwealth reports of receipts and expenditures, with specified detail regarding the contributors, the amount contributed, the expenses paid, and all unpaid debts and liabilities. The reporting requirements include an annual report, pre- and post-primary, and pre- and post-election reports. Because state party committees often support candidates in every primary and election, they frequently are required to file all of these reports every year. See §3246 of the Election Code.

III. The United States Supreme Court held in McConnell v. FEC that national party committees have the associational right under the First Amendment to participate in planning and strategy sessions with state parties and candidates – even if the purposes of such sessions involve the raising and spending of non-Federal funds.

Under McConnell v. FEC, 540 U.S. 93 (2003) ("McConnell"), the United States Supreme Court upheld the constitutionality of BCRA's soft money ban for national party committees, in part, because the ban does not infringe upon the associational rights of national party committees to engage in collective decision making with state party committees and candidates regarding party and campaign programs. In briefs before the Court, the plaintiffs challenging BCRA's national party committee soft money ban argued that such a ban unconstitutionally infringes upon a national party committee's ability to sit down at a table and engage in "collective decision making about how soft money will be solicited, received, and spent." Id. at 160.

The United States Supreme Court, relying in part on the briefs submitted by the proponents of BCRA, held that national party committees, including the Party Committees and their agents, have the ability under the associational rights guaranteed by the First Amendment to sit down with "state and local party committees or candidates to plan and advise how to raise and spend soft money." Id. at 160. Specifically, the Supreme Court held:

> Nothing on the face of [BCRA] prohibits national party officers, whether acting in their official or individual capacities, from sitting down with state and local party committees or

> candidates to plan and advise how to raise and spend soft money. As long as the national party committee officer does not personally spend, receive, direct, or solicit soft money, [BCRA] permits a wide range of joint planning and electioneering activity. Intervenor-defendants, the principal drafters and proponents of the legislation, concede as much. Brief for Intervenor-Defendants Sen. John McCain et al. in No. 02-1674 et al., p. 22 ("BCRA leaves parties and candidates free to coordinate campaign plans and activities, political messages, and fundraising goals with one another."). The FEC's current definitions of [relevant terms in BCRA] are consistent with that view. . . . Given the straightforward meaning of this provision, Justice Kennedy is incorrect that "[a] national party's mere involvement in the strategic planning of fundraising for a state ballot initiative" or its assistance in developing a state party's Levin-money fundraising efforts risks a finding that the officers are in "indirect control" of the state party and subject to criminal penalties. . . . Moreover, [BCRA] leaves national party committee officers entirely free to participate, in their official capacities, with state and local parties and candidates in soliciting and spending hard money; party committee officials may also solicit soft money in their unofficial capacities.

Id. at 160-161 (emphasis added and some citations omitted). Given this precedent, it appears that the NRSC and DSCC will not run afoul of BCRA's national party soft money ban if they participate in planning and strategy sessions regarding the operations of the recount funds established by the Campaigns and state party committees of their respective political parties.

Questions Presented

I. The Campaigns.

The Party Committees seek guidance from the Commission with respect to the following questions concerning the establishment and administration of recount funds by Campaigns.

1. May a Campaign and its agents raise funds from individuals and Federal PACs in unlimited amounts for a fund to finance Recount Activities?

    A. If a Campaign recount fund is not permitted to raise such funds in unlimited amounts, may it raise funds from individuals in amounts that do not exceed $2,100 and Federal PACs in amounts that do not exceed $5,000 without such donations counting against an individual's or PAC's per election contribution limits to the Campaign and the individual's biennial aggregate contribution limit?

2. Are a Campaign and its agents permitted to organize and operate the recount fund if it contains such funds? Is a Campaign required to establish a separate account for these purposes?

3. How should the receipts to and disbursements from such a recount fund be reported to the Commission?

4. May State Party officials help raise funds for a recount fund established by a Campaign by signing fundraising letters, making solicitation telephone calls, or appearing as the featured guest at an event benefiting a Campaign's recount fund?

5. May other Federal candidates or officeholders appear as featured guests at a fundraising event benefiting a Campaign's recount fund? Are there any restrictions on such appearances or pre-event publicity?

6. May other Federal candidates or officeholders sign fundraising mail pieces or make telephone solicitations benefiting a Campaign's recount fund? Are there any restrictions on such fundraising efforts?

7. If permitted to establish a recount fund, how should a Campaign dispose of any excess funds remaining in its recount fund? Who may receive such funds?

   A. If the candidate is elected, can he or she keep the recount funds segregated in a separate account for a future election? What are the recordkeeping and reporting requirements if a Campaign is permitted to maintain the recount fund beyond the current election?

II. The State Party.

The State Party seeks guidance from the Commission with respect to the following questions.

1. May the State Party and its agents raise funds from individuals and Federal PACs in unlimited amounts for a fund to finance Recount Activities?

   A. If the State Party recount fund is not permitted to raise such funds in unlimited amounts, may it raise funds from individuals in amounts that do not exceed $10,000 and Federal PACs in amounts that do not exceed $5,000 without such donations counting against an individual's or PAC's per calendar year contribution limits to the State Party and the individual's biennial aggregate contribution limit?

2. Are the State Party and its agents permitted to organize and operate the recount fund if it contains such funds? Is the State Party required to establish a separate account for these purposes?

3. How should the receipts to and disbursements from such a recount fund be reported to the Commission?

4. Since the State Party recount fund will be established to finance Recount Activities, are the state contribution and expenditure limitations and reporting obligations preempted by the Act and Commission regulations?

5. May a Federal candidate and his or her agents be involved in the decision making process prior to, on, and after election day, concerning the State Party recount fund's activities and fully coordinate Recount Activities with the State Party recount fund?

6. May Federal candidates or officeholders appear as featured guests at a fundraising event benefiting the State Party's recount fund? Are there any restrictions on such appearances or pre-event publicity?

A. May Federal candidate or officeholders sign fundraising letters or make telephone solicitations on behalf of the State Party's recount fund? Are there any restrictions on such fundraising activities by Federal candidate or officeholders?

7. How should the State Party dispose of any excess funds remaining in its recount fund? Who may receive such funds?

8. If the State Party is permitted to establish such a recount fund, may it keep the recount funds segregated in a separate bank account for future elections? What are the recordkeeping and reporting requirements if the State Party is permitted to maintain the recount fund beyond the current election?

9. If the State Party is not permitted to establish a recount fund, may it use the non-Federal account to pay for Recount Activities so long as the fund does not contain any funds from corporations, labor unions or foreign nationals? Are there any recordkeeping and reporting requirements with the Commission if the State Party uses its non-Federal account to pay for Recount Activities?

   A. If the State Party is permitted to use its non-Federal account to pay for Federal Recount Activities, are the contribution limits, reporting requirements, and disbursement restrictions under State law preempted if the non-Federal account is used to pay for Federal Recount Activities?

10. May the State Party recount fund or non-Federal account pay attorney's fees and other litigation costs of a Federal candidate/officeholder that is a party in a recount or election contest? Will such payments constitute a contribution to the Federal candidate? If they do constitute contributions, what are the limits and how should they be reported by the State Party and the recipient Federal candidate?

III. The NRSC & DSCC.

The Party Committees seek guidance from the Commission with respect to the following questions.

1. May the Party Committees and their agents participate in planning and strategy sessions regarding the establishment, administration, fundraising strategies, and Recount Activities of a state party committee and Campaign's respective recount funds? Are there any restrictions regarding the Party Committees and their agents participating in such planning and strategy sessions?

Conclusion

As discussed above, the Party Committees respectfully request that the Commission confirm that a Campaign is permitted to establish and administer a recount fund for the limited purpose of financing Recount Activities. Likewise, the State Party respectfully requests that the Commission confirm that it is permitted to establish and administer a recount fund for the limited purpose of financing Recount Activities. Finally, the NRSC and DSCC respectfully request that the Commission confirm that they are permitted to participate in planning and strategy sessions with a state party committee and Campaign of their respective political parties concerning the administration and operation of their respective recount funds.

Thank you for your prompt attention to this request. Please do not hesitate to contact us with any questions.

Respectfully submitted,

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