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FEDERAL ELECTION COMMISSION  
WASHINGTON DC 20463

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September 24, 1992

60 days  
10-13-92

**AGENDA ITEM**  
For Meeting of: OCT 1 1992

**MEMORANDUM**

TO: The Commission  
THROUGH: John C. Surina  
Staff Director  
FROM: Lawrence M. Noble  
N. Bradley Litchfield  
SUBJECT: Draft AO 1992-33

Comm. Chair  
8/26/92

Attached is a proposed draft of the subject advisory opinion.

We request that this draft be placed on the agenda for October 1, 1992.

Attachment

SET: need for Fed and to always demonstrate to had enough  
103.3 - Fed. to pay if it were buying the eq. flowers.  
--- 103-174 only all info on from schedule.  
make sure  
Fed account will pay so when ed) period over there is not subsidy of Fed by non Fed.

**DRAFT**

1  
2  
3 **ADVISORY OPINION 1992-33**

4 **Carol C. Darr**  
5 **General Counsel**  
6 **Democratic National Committee**  
7 **430 South Capitol Street, S.E.**  
8 **Washington, D.C. 20003**

**Benjamin L. Ginsberg**  
**General Counsel**  
**Republican National Committee**  
**310 First Street, S.E.**  
**Washington, D.C. 20003**

9 **Dear Ms. Darr and Mr. Ginsberg:**

10 **This responds to your letter dated August 13, 1992,**  
11 **requesting an advisory opinion on behalf of the Democratic**  
12 **National Committee and the Republican National Committee**  
13 **("the national party committees") concerning the application**  
14 **of the Federal Election Campaign Act of 1971, as amended**  
15 **("the Act"), and Commission regulations to the acceptance of**  
16 **in-kind contributions from sources otherwise prohibited by**  
17 **the Act in connection with events and administrative expenses**  
18 **involving shared Federal and non-federal payments.**

19 **You state that the national party committees currently**  
20 **accept "non-federal" in-kind contributions for allocable**  
21 **expenses in connection with administrative and fundraising**  
22 **expenses. You believe this is in accordance with Commission**  
23 **regulations at 11 CFR 106.5 requiring national party**  
24 **committees to pay for the allocable expenses with a**  
25 **combination of both Federal and non-federal funds according**  
26 **to an appropriate percentage. You provide the following**  
27 **example of the treatment of "non-federal" in-kind**  
28 **contributions:**

29 **If a corporate vendor donates flowers with a fair**  
30 **market value of \$5,000 for a national party committee**  
**fundraising event, the committee would consider the full**

3 amount as an in-kind contribution to the non-federal  
4 account. Expenses for a fundraising event are allocated on a  
5 funds received basis under 11 CFR 106.5(f). Accordingly, if  
6 the event raises funds at a 50/50 Federal/non-federal ratio,  
7 \$2,500 of Federal funds would have been used to pay for the  
8 flowers had the national party committee paid for them  
9 directly. To ensure that the corporate donor does not "pay  
10 for" the Federal portion of the allocable expense, the  
11 committee transfers the amount from its Federal account to  
12 its non-federal account. For an administrative expense, a  
13 transfer of the Federal portion would be made no earlier than  
14 10 days before or no later than 60 days after the receipt of  
15 the in-kind contribution. For a fundraising event, the  
16 committees would make such transfers within 60 days of the  
17 event.<sup>1/</sup> If more than one non-federal in-kind contribution is  
18 received for an event, the adjustment would be made through  
19 one consolidated transfer, rather than by a transfer for each  
20 in-kind received for a specific event.

21 You propose to report the receipt and disbursement of an  
22 in-kind non-federal contribution on Schedule I, lines 1 and  
23 5. You also propose that the transfer of the Federal portion  
24 be reported on Schedule B, Line 22 of the national party  
25 committee's Federal report as a transfer to an affiliated  
26 committee and that it be clearly identified as a transfer of  
27

28  
29 <sup>1/</sup> You assert that such time periods are consistent with  
30 the rules governing transfers for allocable expenses set out  
at 11 CFR 106.5(g)(2)(ii)(B).

3 the Federal portion of an in-kind contribution. The  
4 non-federal account would report the receipt of the transfer  
5 on line 1 of Schedule I.

6 You state that there is no need for the committee to  
7 file an H3 or H4 schedule. You believe that the reporting  
8 will be adequate by identifying on line 22, for each in-kind  
9 received, the specific in-kind contribution for which the  
10 transfer is made and the event for which the in-kind  
11 contribution was received. You assert that, by cross  
12 referencing the committee's Schedules H1 and H2, the  
13 Commission can ascertain whether the transfer is for the  
14 proper amount and within the correct time period.

15 You ask the Commission to confirm that your proposed  
16 "method of accounting" for the Federal portion of an in-kind  
17 contribution from an otherwise prohibited source is  
18 permissible.

19 Commission regulations provide for allocation of  
20 expenses by party committees making disbursements for  
21 administrative expenses, fundraising activities, exempt  
22 activities, or generic voter drives in connection with both  
23 Federal and non-federal elections. 11 CFR 106.1(e). More  
24 specifically with respect to the first two categories, party  
25 committees that make disbursements in connection with Federal  
26 and non-federal elections shall allocate expenses for (i)  
27 administrative expenses not attributable to a clearly  
28 identified candidate, including rent, utilities, supplies,  
29 and salaries; and (ii) the direct costs of a fundraising  
30

3 program or event, including disbursements for solicitation of  
4 funds and for planning and administration of actual  
5 fundraising events, where Federal and non-federal funds are  
6 collected by one committee through such a program or event.  
7 11 CFR 106.5(a)(2)(i) and (ii).

8 All administrative expenses must be allocated between  
9 Federal and non-federal accounts, if incurred by a committee  
10 that makes disbursements in connection with both Federal and  
11 non-federal elections, and that chooses to pay any portion of  
12 such disbursement from its non-federal account. Explanation  
13 and Justification of 11 CFR Part 106, 55 Fed. Reg. 26058,  
14 26063 (June 26, 1990). Each national party committee, other  
15 than a Senate or House campaign committee, shall allocate a  
16 fixed percentage of its administrative expenses during a  
17 reporting period, and such minimum Federal percentages differ  
18 depending upon the year the expenses were incurred. 11 CFR  
19 106.5(b)(1) and (2). These minimum percentages, 65 percent  
20 in a presidential election year and 60 percent in other  
21 years, reflect the national party committees' primary focus  
22 on presidential and other Federal elections, while still  
23 recognizing party-building activities at state and local  
24 levels. 55 Fed. Reg. at 26063.

25 Fundraising costs, however, must be allocated on a  
26 different basis, i.e., on the basis of the particular event  
27 or program. A party committee, whether national or not,  
28 allocates the direct costs of each fundraising program or  
29 event, where both Federal and non-federal funds are collected  
30

3 by that one committee through such program or event. (This  
4 is not to be confused with joint fundraising events conducted  
5 by more than one committee.) 11 CFR 106.5(f); 55 Fed. Reg.  
6 at 26065. A party committee should allocate its fundraising  
7 costs based on the ratio of funds received into its Federal  
8 account to its total receipts from each fundraising program  
9 or event. Each event or program has its own ratio. The  
10 committee estimates this ratio prior to each program or  
11 event, based on the committee's reasonable prediction of its  
12 Federal and non-federal revenue for the program or event. 11  
13 CFR 106.5(f)(1). The committee adjusts its ratio no later  
14 than 60 days following each such event to reflect the actual  
15 ratio of funds received. If either the Federal or  
16 non-federal account has paid more than its share, then the  
17 necessary transfers will be made from the other account, and  
18 the adjustments will be noted in the report for the period in  
19 which the program or event occurred. 11 CFR 106.5(f)(2).

20 The purpose of these allocation rules is to assure that  
21 non-federal funds do not pay for the Federal share of a mixed  
22 expense. See 55 Fed. Reg. at 26066. Committees have the  
23 option of two payment procedures: (1) committees pay an  
24 entire bill from the Federal account and transfer funds from  
25 the non-federal to the Federal account to cover the  
26 non-federal share; or (2) committees establish a separate  
27 allocation account, which the Commission considers to be a  
28 Federal account, and funds are transferred from the Federal  
29 account and the non-federal account solely to make allocable  
30

3 payments. 11 CFR 106.5(g)(1)(i) and (ii). Although the  
4 promulgation of the allocation regulations mark the first  
5 time that the Commission has allowed non-federal funds to be  
6 transferred to a committee's Federal account, this was only  
7 for the limited purpose of paying allocable expenses. Under  
8 the new rules, committees are prohibited from making such  
9 payments through their non-federal accounts. 55 Fed. Reg. at  
10 26066.

11 Commission regulations provide that in-kind  
12 contributions that are used or consumed as they are given,  
13 i.e., items other than stocks, bonds, art objects, or similar  
14 items to be liquidated, are both contributions and  
15 expenditures at the time they are accepted and reported as  
16 such. 11 CFR 104.13(a)(2) and (b). See 11 CFR  
17 100.8(a)(1)(iv)(A). The acceptance of flowers, food, or the  
18 use of a reception room from a corporation occurs at the time  
19 of their use. Since both the non-federal and Federal  
20 accounts would benefit at the time of acceptance, and since  
21 only the non-federal account may lawfully accept an in-kind  
22 donation from a corporation, the Federal account would  
23 benefit from an expenditure (of the in-kind donation) by the  
24 non-federal account. This, in effect, results in the use of,  
25 non-federal funds to pay the Federal share. The subsidy of  
26 the Federal account in this manner may be avoided by a  
27 payment from the Federal account to the non-federal account  
28 at the time of the acceptance of the in-kind donation.

29 Unlike payments from the non-federal account to the  
30

3 Federal account or the allocation account (also a Federal  
4 account), which may be made within 60 days of the payment of  
5 the allocable expense by the Federal account to a vendor, the  
6 payment from the Federal account in this case is to avoid  
7 subsidization by the non-federal account and should be made  
8 at the time of the benefit. See 11 CFR 106.5(g)(2)(ii)(B).<sup>2/</sup>  
9 Therefore, for each in-kind donation given with respect to an  
10 administrative event or program, the committee shall transfer  
11 from the Federal account 65 percent of the usual and normal  
12 charge of the item donated (or 60 percent in any year when a  
13 presidential election is not held) to the non-federal account  
14 on the day the committee receives the donation. For each  
15 in-kind contribution given with respect to a fundraising  
16 event or program, the committee should determine the ratio of  
17 funds received into the Federal account to the total  
18 receipts. 11 CFR 106.5(f). This ratio will not include  
19  
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21 <sup>2/</sup> The regulations also permit a prepayment from the  
22 non-federal account to the Federal account ten days prior to  
23 the payment to the vendor. 11 CFR 106.5(g)(2)(ii)(B). The  
24 ten-day limit's purpose is to prevent subsidization by the  
25 non-federal account. 55 Fed. Reg. at 26066. In view of the  
26 circumstances presented and the nature of the regulations,  
27 the Commission does not grant a ten-day window for payment by  
28 the Federal account after the receipt of the benefit.  
29 Commission regulations on allocation do not explicitly make  
30 provisions for the receipt of in-kind corporate and labor  
organization contributions. Based on the Act and other  
Commission regulations defining contributions as including an  
advance, the Commission concludes that the requirement of the  
contemporaneous payment is the best accommodation for this  
situation. 2 U.S.C. §431(8)(A); 11 CFR 100.7(a)(1). The  
Commission also notes that most in-kind donations of a  
significant amount would be anticipated before actual  
delivery by the donor, so their value can be ascertained and  
payment made upon receipt by the committee.

3 those amounts received in the form of in-kind contributions  
4 because such inclusion would artificially inflate the  
5 non-federal share. The Federal percentage of the in-kind  
6 donation will be paid to the non-federal account upon receipt  
7 of the donation. Because the ratio may be an estimate at  
8 first, an adjustment may be made in either direction to  
9 conform to the actual ratio, but no later than 60 days after  
10 the date of the event. 11 CFR 106.5(f)(2).

11 If more than one in-kind corporate donation is received  
12 for an administrative or fundraising program or event, the  
13 payments from the Federal account may be made through one  
14 consolidated transfer if the transfer is made in a timely  
15 manner as described above. Nevertheless, for each transfer,  
16 the committee must itemize in its reports the allocable  
17 activities for which the transferred funds are intended as  
18 payment and the allocated disbursement for that activity. 11  
19 CFR 106.5(g)(2)(ii)(A) and (3). This itemization is  
20 inadequate without the use of the H3 and H4 schedules which  
21 were designed to provide public disclosure of the transfers  
22 and related specific activities. Only through the use of  
23 these schedules will there be full and clear disclosure of  
24 the Federal and non-federal share of all the transfers.

25 The receipt of an in-kind contribution for shared  
26 expenses should be reported in a manner consistent with the  
27 reporting of other in-kind contributions, which takes into  
28 account the need to balance the receipt with a disbursement  
29 in the same amount. Thus, to reflect the receipt of the  
30

3 in-kind corporate donation in this case, the committee must  
4 report a transfer from the non-federal account of an amount  
5 equal to the value of the in-kind. In addition, the  
6 committee must make and report the payment to the non-federal  
7 account which payment represents the Federal share of the  
8 in-kind donation.

9 For the contribution of \$5,000 in flowers, on Schedule  
10 H3 (Transfers from Non-federal Accounts) covering the  
11 relevant reporting period, the committee should first  
12 disclose a transfer (in-kind) for that fundraising event of  
13 the full amount of \$5,000 on the date the committee receives  
14 the flowers, e.g., the date of the fundraiser, next to a  
15 space on line ii identifying the event.<sup>3/</sup> (If there are other  
16 such in-kind contributions on that date for the fundraiser,  
17 those amounts should also be included.) On Schedule H4  
18 (Joint Federal/Non-federal Activity Schedule), the committee  
19 should make two separate entries, the first of which  
20 discloses the use or "expenditure" of the \$5,000 in-kind  
21 contribution, and the second of which reflects actual  
22 contemporaneous payment of \$2,500 by the Federal account to  
23 the committee's non-federal account. Schedule H4 should also  
24 include a description of the reason for the transaction,  
25  
26

27 <sup>3/</sup> Schedule H3 should reflect not just the remaining  
28 non-federal amount (\$2,500) after the \$2,500 transfer from  
29 the Federal account, but the total of the corporate gift,  
30 i.e., \$5,000. Such figure should be included on line 18 of  
the Detailed Summary Page; no portion may be reported on line  
11a because this transfer cannot be accepted by the Federal  
account as a contribution.

Line 2 (a)  
(1)  
5000  
2500

expand  
line 21(b)  
with 2/6/9

2500  
2500  
2500

line 21  
heads more

3 i.e., transfer of Federal share of in-kind contribution to  
4 non-federal account, with a reference to the donation of  
5 flowers above. 11 CFR 104.10(b)(4).

6 If the flowers were provided for an administrative event  
7 or purpose, a payment of \$3,250 would be required (and  
8 reported) in a presidential election year and a payment of  
9 \$3,000 in any other year. Consistent with the reporting of  
10 in-kind contributions, the donor florist should be reported  
11 on the Schedule H4 as the payee of the \$5,000. The  
12 non-federal account should be reported as the payee of the  
13 \$2,500 (or \$3,250 or \$3,000) disbursement. Sample FEC  
14 Schedules H3 and H4 illustrate the appropriate reporting  
15 entries and are expressly incorporated as part of this  
16 opinion.

17 On Schedule I, the committee should include the full  
18 \$5,000 as an in-kind contribution received by the non-federal  
19 account with a supporting memo Schedule A that itemizes the  
20 contributor's identification. 11 CFR 104.8(e). The \$5,000  
21 amount should also be reported on line 2 of Schedule I as a  
22 transfer to the Federal account with a memo Schedule B that  
23 itemizes the distribution of the \$5,000 in-kind contribution.  
24 11 CFR 104.9(c).

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

29 Sincerely,  
30

3  
4 Joan D. Aikens  
5 Chairman for the  
6 Federal Election Commission

7 Attachments (Sample FEC Schedules H3 and H4)  
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Receipt

18

[Attachment to: ADVISORY OPINION 1992-33]

NAME OF COMMITTEE <b>National Party Committee</b>		TOTAL AMOUNT TRANSFERRED
NAME OF ACCOUNT <b>Non-federal Account</b>	DATE OF RECEIPT <b>10/1/92</b>	<b>\$ 5,000</b>

BREAKDOWN OF TRANSFER RECEIVED

i) Total Administrative Voter Drive			
ii) Direct Fundraising (List Events Amount for Each)			
a) <u>CHAIRMAN'S GALA</u>			
b) _____			
c) _____			
d) _____			
e) Total Amount Transferred For Direct Fundraising			
iii) Exempt Activity/Direct Candidate Support (List Events Amount For Each)			
a) _____			
b) _____			
c) _____			
d) _____			
e) Total Amount Transferred For Exempt Activity/Direct Candidate Support			

NAME OF ACCOUNT	DATE OF RECEIPT	\$
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BREAKDOWN OF TRANSFER RECEIVED

	ADMIN/VOTER DRIVE AMOUNT	DIRECT FUND-RAISING AMOUNT	EXEMPT ACTIVITY/DIRECT
i) Total Administrative/Voter Drive			
ii) Direct Fundraising (List Events Amount for Each)			
a) _____			
b) _____			
c) _____			
d) _____			
e) Total Amount Transferred For Direct Fundraising			
iii) Exempt Activity/Direct Candidate Support (List Events Amount For Each)			
a) _____			
b) _____			
c) _____			
d) _____			
e) Total Amount Transferred For Exempt Activity/Direct Candidate Support			

	ADMIN/VOTER DRIVE AMOUNT	DIRECT FUND RAISING AMOUNT	EXEMPT ACTIVITY/DCS
SUBTOTAL THIS PAGE			
TOTAL THIS PERIOD			

JOINT FEDERAL NON-FEDERAL  
 ACTIVITY SCHEDULE

[Attachment to: ADVISORY OPINION 1992-33] Distributed

NAME OF COMMITTEE

National Party Committee

A FULL NAME MAILING ADDRESS & ZIP CODE	PURPOSE/EVENT	DATE	TOTAL AMOUNT	FEDERAL SHARE	NON FEDERAL SHARE
Flowers by Fader, Inc. 300 Main Highway City, State Zip Code	Flowers for Chairman's Gala	10/1/92	5,000 In-kind	0	5,000
CATEGORY <input type="checkbox"/> ADMINISTRATIVE/VOTER DRIVE <input checked="" type="checkbox"/> FUNDRAISING <input type="checkbox"/> EXEMPT EVENT YEAR TO DATE \$ 21,000 <input type="checkbox"/> DIRECT CANDIDATE SUPPORT					
B FULL NAME MAILING ADDRESS & ZIP CODE	PURPOSE/EVENT	DATE	TOTAL AMOUNT	FEDERAL SHARE	NON FEDERAL SHARE
National Party Committee Non-Federal Account	Transfer of Federal Share (See above)	10/1/92	2,500	2,500	0
CATEGORY <input type="checkbox"/> ADMINISTRATIVE/VOTER DRIVE <input type="checkbox"/> FUNDRAISING <input type="checkbox"/> EXEMPT EVENT YEAR TO DATE \$ <input type="checkbox"/> DIRECT CANDIDATE SUPPORT					
C FULL NAME MAILING ADDRESS & ZIP CODE	PURPOSE/EVENT	DATE	TOTAL AMOUNT	FEDERAL SHARE	NON FEDERAL SHARE
CATEGORY <input type="checkbox"/> ADMINISTRATIVE/VOTER DRIVE <input type="checkbox"/> FUNDRAISING <input type="checkbox"/> EXEMPT EVENT YEAR TO DATE \$ <input type="checkbox"/> DIRECT CANDIDATE SUPPORT					
D FULL NAME MAILING ADDRESS & ZIP CODE	PURPOSE/EVENT	DATE	TOTAL AMOUNT	FEDERAL SHARE	NON FEDERAL SHARE
CATEGORY <input type="checkbox"/> ADMINISTRATIVE/VOTER DRIVE <input type="checkbox"/> FUNDRAISING <input type="checkbox"/> EXEMPT EVENT YEAR TO DATE \$ <input type="checkbox"/> DIRECT CANDIDATE SUPPORT					
E FULL NAME MAILING ADDRESS & ZIP CODE	PURPOSE/EVENT	DATE	TOTAL AMOUNT	FEDERAL SHARE	NON FEDERAL SHARE
CATEGORY <input type="checkbox"/> ADMINISTRATIVE/VOTER DRIVE <input type="checkbox"/> FUNDRAISING <input type="checkbox"/> EXEMPT EVENT YEAR TO DATE \$ <input type="checkbox"/> DIRECT CANDIDATE SUPPORT					
F FULL NAME MAILING ADDRESS & ZIP CODE	PURPOSE/EVENT	DATE	TOTAL AMOUNT	FEDERAL SHARE	NON FEDERAL SHARE
CATEGORY <input type="checkbox"/> ADMINISTRATIVE/VOTER DRIVE <input type="checkbox"/> FUNDRAISING <input type="checkbox"/> EXEMPT EVENT YEAR TO DATE \$ <input type="checkbox"/> DIRECT CANDIDATE SUPPORT					
SUBTOTAL OF JOINT FEDERAL AND NON-FEDERAL ACTIVITY THIS PAGE					
TOTAL THIS PERIOD (last page for each line only)(Fed share to 21 a ; and non-Fed share to 21 a a)					
TOTAL THIS PERIOD FOR THE NON FEDERAL SHARE (used for line 31 of the detailed summary page)					