



FEDERAL ELECTION COMMISSION
Washington, DC 20463

April 2, 1993

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

ADVISORY OPINION 1993-3

B. Holly Schadler
Perkins Coie
607 14th Street, N.W.
Washington, D.C. 20005-2011

Dear Ms. Schadler:

This responds to your letters dated February 23, 1993, and December 31, 1992, on behalf of Democrats 2000 ("the Committee") concerning application of the Federal Election Campaign Act of 1971, as amended ("the Act"), and Commission regulations to a proposed transfer reflecting a retroactive reallocation of expenses between a non-Federal and a Federal account.

You state that Democrats 2000 is a political committee organized in 1988 to operate on the Federal and non-Federal level. It is registered as a non-connected committee. It has two full-time staff members and an annual budget of \$130,000.^{1/}

You state that the Committee did not fully understand the requirements of the new allocation regulations when they took effect in 1991, and had difficulty in categorizing expenses as administrative or fundraising, or Federal or non-Federal. The Committee had difficulty finding professional assistance to set up an appropriate accounting system. In addition, you assert that the Committee's activities did not fit neatly into the categories set out in the regulations. For example, the Committee conducts issue forums featuring elected officials and distributes a newsletter on Committee issue programs and other events. You state that such activities do not directly support either Federal or non-Federal candidates and are neither clearly fundraising or administrative events, and, as a consequence, "implementation of its current procedures took considerable time to finalize."

The Committee has gone through three phases in its attempts to allocate. From January to June 1991, the Committee used several methods, "many of which were modifications of their previous

system." Some expenses were determined to be non-Federal because "they had no direct federal impact." Some late June 1991 expenses were allocated as Federal because some of the Committee's activities involved Federal elected officials, although none of the activities related to the election of a particular candidate.

From August 1991 to May 1992, the second phase, only nominal transfers were made from the non-Federal to the Federal account. You state that the amount of the transfers was considerably below the amount of the non-Federal share of allocable expenses.

During the period from January 1991 to May 1992, the Committee "understood" that it could spend funds out of the Federal account and make corrections from the non-Federal account later, but was not aware of the time limit on such corrections at 11 CFR 106.6(e)(2)(ii)(B). The Committee was also uncertain as to how to account and report for in-kind contributions.

At the end of May 1992, a law firm assisted the Committee in developing new procedures to "track" and allocate expenses more effectively. Currently, the committee lists each check written from the Federal account individually on an accounting sheet. After that, it lists a total for each category (administrative and separate fundraising activities) in an individual column followed by a Federal column and a non-Federal column for each category. Whenever the Committee makes a transfer from the non-Federal to the Federal account, the totals from the non-Federal columns are added to determine the amount to be transferred.

You state that, in the fall of 1992, the Committee decided to recalculate the allocations made during the period through May 1992 to determine how much it had overpaid from its Federal account. You state that the process was completed in late 1992 and took a long time to complete "because of other demands during the campaign and the minimal staff available to complete this review." It revealed that, if the newly-used method had been used for the period in question, the Committee's cash-on-hand in its Federal account at the end of May 1992 would have been \$21,731.12, instead of \$1,355.78, a difference of \$20,375.34.

You note the caution exercised by the Committee in making greater than necessary payments originally from the Federal account. You request that the Commission permit Democrats 2000 to retroactively reallocate its fundraising and administrative expenses from January 1991 to May 1992 in accordance with the more recent calculations.

The allocation regulations promulgated on January 1, 1991, provide that a political committee, including a non-connected political committee,^{2/} which has separate Federal and non-Federal accounts, shall allocate their Federal and non-Federal expenses for certain purposes. 11 CFR 106.6(a). These purposes include: (1) administrative expenses not directly attributable to a clearly identified candidate including rent, utilities, office supplies, and salaries; and (2) the direct costs of a fundraising program or event including disbursements for solicitation of funds and for planning and administration of actual fundraising events, where Federal and non-Federal funds are collected through such program.

The regulations explicitly provide for the method of allocating administrative expenses and the direct fundraising costs. Administrative costs should be allocated based on the ratio of Federal

expenditures to total Federal and non-Federal disbursements made by the committee during the two-year election cycle. An estimate of the ratio may be based upon a prior comparable cycle or a reasonable prediction of disbursements. Calculations of Federal expenditures should include only amounts contributed to or otherwise spent on behalf of specific Federal candidates, and calculations of total disbursements should include only disbursements for specific Federal and non-Federal candidates, and not overhead or other generic costs. 11 CFR 106.6(c)(1). The regulations also provide for adjusting the allocation ratio periodically to reconcile it with actual activity to date, and to make appropriate transfers. 11 CFR 106.6(c)(2).

Direct fundraising costs should be allocated on a funds received basis whereby a committee allocates its fundraising costs based on the ratio of funds received into its Federal account to its total receipts for each fundraising program or event. Estimates of the ratio for disbursements prior to the event should be based upon reasonable predictions and adjustments should be made after the event to correspond to the actual ratio of funds received. 11 CFR 106.6(d).

The allocation regulations have always allowed Federal accounts to pay all committee expenses, if desired. 11 CFR 106.6(a). Furthermore, these regulations have always provided a time window within which non-Federal accounts may transfer funds to the Federal accounts for the non-Federal share of joint expenditures.

In the original proposed rule the window was a brief 10 days after payment from the Federal account (no time before). The 40 day window contained in the final rules, effective January 1, 1991, was 10 days longer than that advocated in any of the comments received in response to that proposed rule. Nevertheless, in an effort to be even more accommodating to committees, the window was expanded to 70 days (10 days before/60 days after the payment from the Federal account) in an amended rule that took effect on June 18, 1992. 11 CFR 106.6(e)(2)(ii)(B).^{3/}

The Committee's long-standing difficulties occurred despite the guidance and instructions set out in the new allocation regulations, published June 26, 1990, and other Commission publications such as the FEC Record Supplement on Allocation issued in November 1990. Nevertheless, the Commission, on three occasions, has permitted retroactive reallocation to remedy errors by political committees acting in good faith.

In Advisory Opinion 1991-15, issued in June 1991, the Commission permitted retroactive application by a state party committee of a ballot composition formula for administrative costs where the initial formula was based on a "good faith miscalculation" and had resulted in transfers of non-Federal funds to the Federal account in amounts that were lower than the permissible share of joint expenditures. The committee stated that it had not realized at first that certain special elections could be counted in the total of statewide offices. In Advisory Opinion 1992-2, issued in March 1992, the Commission permitted a national party committee to take a discrete group of expenses that had previously been allocated as administrative costs and retroactively reallocate them as direct costs of fundraising. This group of expenses consisted of salaries and fringe benefits of employees in the committee's Fundraising and Direct Mail divisions. In Advisory Opinion 1992-27, issued in August 1992, the Commission permitted a national party committee, which recognized its responsibilities under the rules but which did not have an adequate accounting and reporting system in place until March, 1992, to retroactively break

down prior fundraising costs (from the beginning of 1991 through February 1992) into Federal and non-Federal shares and make the necessary transfer to the Federal account.

The Commission's decisions to permit retroactive reallocations and resultant non-Federal to Federal transfers were a recognition that "the allocation regulations represent significant revisions to past practice and require a brief period of adjustment, i.e., the current [1991-92] election cycle, by political committees acting in good faith." Advisory Opinion 1992-2. See Advisory Opinion 1992-27.^{4/}

Based on the circumstances presented, the Commission concludes that Democrats 2000 may retroactively reallocate its fundraising and administrative expenses for the period from January 1991 through May 1992. The Commission notes that this request was submitted on December 31, 1992, the last day of the 1991-1992 allocation cycle, and that the "brief period of adjustment" referenced in Advisory Opinion 1992-2 has now ended. Consistent with Advisory Opinions 1991-15, 1992-2, and 1992-27, the Committee may, within 30 days after the date of this opinion, transfer \$20,375.34 from its non-Federal to its Federal account.

From an examination of Democrats 2000's reports filed with the Commission, it appears that the joint expenditures from January 1991 through May 1992 have now been reported on Schedule H4's. The Committee should file with its mid-year 1993 report amended H2's and H4's listing each covered expenditure and the revised calculations. See Advisory Opinion 1991-15. If any allocable expenditures have been reported solely as expenditures itemized on Schedule B, the Committee should file Schedule H2's, H3's, and H4's for these expenditures, also at the time it files its mid-year 1993 report. See Advisory Opinion 1992-27. The Committee should include in its report an explanatory letter noting the reason for the new allocations and resulting transfers.

An entry for the adjustment should be made on Schedule H3 when the transfer is actually made. Democrats 2000 should note that this adjustment reflects retroactive reallocations during the period January 1, 1991, through May 31, 1992, made pursuant to Advisory Opinion 1993-3.

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

Sincerely,

(signed)

Scott E. Thomas
Chairman

Enclosures (AOs 1992-27, 1992-2, 1991-15, and 1991-6)

ENDNOTES

1/ In 1992, the Committee disbursed \$141,182.

2/ A non-connected committee includes any committee which conducts activity in connection with an election, but which is not a party committee, an authorized committee, or a separate segregated fund. 11 CFR 106.6(a).

3/ Commission regulations also now provide for a 60-day period after a fundraising program or event for payment to the Federal account by the non-Federal account if the Federal account had paid more than its allocable share. 11 CFR 106.6(d)(2).

4/ The Commission notes that the election cycle for allocation purposes differs from that found at 11 CFR 100.3(b), where the cycle is defined with respect to candidates and is considered as ending "on the date on which the general election for the office or seat that the individual seeks is held." 11 CFR 100.3(b). As was made clear in Advisory Opinion 1991-6, the allocation rules envision a two year cycle which begins on January 1 of each odd-numbered year, and extends through December 31 of the following even-numbered year. Advisory Opinions 1991-15 and 1991-6.