



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

JAN 5 1995

January 5, 1995

MEMORANDUM

TO: The Commission

THROUGH: John C. Surina *JCS*
Staff Director

FROM: Lawrence M. Noble *LN*
General Counsel

N. Bradley Litchfield *NBL*
Associate General Counsel

Jonathan M. Levin *JML*
Senior Attorney

SUBJECT: Draft AO 1994-37

Attached is a proposed draft of the subject advisory opinion.

We request that this draft be placed on the agenda for January 12, 1995.

AGENDA ITEM

For Meeting of: JAN 12 1995

Attachment

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2 **ADVISORY OPINION 1994-37**

3 David A. Barrett
4 Duker & Barrett
5 1585 Broadway
6 New York, NY 10036

DRAFT

7 Dear Mr. Barrett:

8 This responds to your letter dated November 17, 1994,
9 requesting an advisory opinion on behalf of Congressman
10 Charles E. Schumer, concerning the application of the Federal
11 Election Campaign Act of 1971, as amended ("the Act"), and
12 Commission regulations to proposed joint Federal and
13 non-federal activities to be undertaken by the Congressman.

14 Congressman Schumer represents the Ninth Congressional
15 District of New York. Presently, he wishes to establish a
16 principal campaign committee for his re-election to Congress
17 in 1996 ("the Federal Committee") and to begin exploring the
18 possibility of running for Governor of New York in 1998. In
19 brief, you seek an advisory opinion (i) permitting Mr.
20 Schumer to share the use of certain facilities and paid staff
21 between the Federal committee and a second committee
22 conducting exploratory activities (and ultimately, perhaps, a
23 separate campaign); and (ii) confirming the propriety of
24 applying certain allocation procedures to expenditures made
25 in connection with both the Federal and non-federal
26 activities.

27 You state that the Federal Committee will be funded by a
28 transfer of excess funds from Mr. Schumer's 1994 House
campaign committee, and it will seek additional contributions

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2 during the 1996 campaign.^{1/} Meanwhile, Mr. Schumer's
3 exploratory committee ("the State Committee") would raise
4 funds for testing the waters purposes, and these funds would
5 be used for a gubernatorial campaign if he decides to run in
6 the 1998 election. The State Committee would be completely
7 separate from the Federal committee and would be organized in
8 conformity with New York State law.

9 Although the committees will have separate chairpersons,
10 treasurers, and bank accounts, certain paid employees may
11 perform services on behalf of both committees. It is also
12 anticipated that the committees will use the same office
13 space "at least until, and if," Mr. Schumer becomes a
14 candidate for Governor. You ask whether sharing personnel
15 and equipment according to 11 CFR 110.8(d)(3) will contravene
16 the requirements at subsections (1) and (2) for the
17 separation of campaign organizations.

18 You also propose a method of conforming to the
19 requirement to allocate expenditures between the campaigns as
20 set out in section 106.1(a)(1), which provides that
21 expenditures on behalf of one or more clearly identified
22 Federal candidates and one or more other candidates shall be
23 attributed to each candidate according to the benefit
24 reasonably expected to be derived. You ask whether this
25 method may apply where the Federal and non-federal candidates

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27 ^{1/} The Federal Committee's 1994 post-general election
28 report disclosed cash on hand of \$2,194,729, with \$10,000
owed to the committee. The Federal Committee did not report
any debts owed to others.

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2 are the same person. Specifically, you plan to apply this
3 formula as follows. You state that you will use a procedure
4 similar to that prescribed in 11 CFR 106.5(g) and 106.6(e)
5 for enabling payment by each committee. Instead of
6 attempting to estimate in advance the Federal and non-federal
7 funds, however, you propose that funds be transferred either
8 to the Federal Committee or to an allocation account "in such
9 a manner that, at the end of each calendar month, the total
10 expenditure by each committee for shared facilities and
11 services over the life of the arrangement will be
12 proportionate to the total contributions received by the
13 respective committees during such period of time." In other
14 words, the formula for allocating payments to be made by the
15 two committees is the ratio of each committee's contribution
16 receipts to the total of contribution receipts. Rather than
17 making an estimate before the exploratory committee begins
18 its operations, a ratio will be determined at the end of the
19 first month, and the ratio will be modified at the end of
20 each month based on the new cumulative totals which include
21 all contributions from prior months plus the contributions
22 newly received in that month.

23 Finally, you propose that the State Committee should pay
24 for expenses incurred in connection with political activities
25 outside of Kings and Queens Counties (the counties in which
26 the ninth district lies) and not "directly relating" to Mr.
27 Schumer's reelection to the House. Such expenditures would
28 include, but not be limited to: (1) expenditures for travel

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2 outside the counties for political activities at which his
3 reelection is not urged and funds are not solicited for that
4 purpose; (2) expenditures for statewide polling not related
5 to the reelection effort; and (3) contributions to candidates
6 for office outside Kings and Queens Counties.

7 Commission regulations provide generally for the
8 sharing of personnel and facilities that you propose.
9 The regulations at section 110.8(d) provide that an
10 individual who is a candidate for a Federal office and a
11 State office must designate separate principal campaign
12 committees and establish completely separate organizations,
13 and that no funds, goods, or services, including loans and
14 loan guarantees may be transferred between or jointly used by
15 the separate campaigns. 11 CFR 110.8(d)(1) and (2). See
16 110.3(c)(5). Nevertheless, these regulations clarify the
17 concept of separation by providing that Congressional and
18 State office campaigns by the same person may share personnel
19 and facilities, as long as expenditures are allocated between
20 the campaigns, and the payment made from each campaign
21 account reflects the allocation. 11 CFR 110.8(d)(3).^{2/}

22 In general, payments involving expenditures on behalf of
23 a clearly identified Federal candidate and disbursements on
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26 ^{2/} Although a testing the waters effort is not technically
27 a candidacy as defined for Federal purposes (see Advisory
28 Opinion 1990-7), the exploratory efforts by Mr. Schumer for a
gubernatorial candidacy would constitute a campaign
necessitating a separate organization from that of his House
candidacy. In addition, the exploratory effort may very well
develop into a candidacy.

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behalf of a non-federal candidate, should be attributed to each such candidate according to the benefit expected to be derived by each candidate. 11 CFR 106.1(a)(1). Advisory Opinion 1978-67. In principle, the language of 11 CFR 110.8(d)(3) extends this concept to the situation where the same person is seeking a Federal and non-federal office. In illustrating how the benefit may be ascertained, Commission regulations note that, in the case of a campaign publication or broadcast communication, the attribution may be determined by the proportion of space or time devoted to each candidate as compared to all candidates. In connection with a fundraising event or program, the attribution is determined by the proportion of funds received by each candidate as compared to the total received by all of them. 11 CFR 106.1(a)(1). There are two basic problems with your proposal. First, the use of the ratio of contributions received by each committee as the only allocation formula for all allocable expenses is not appropriate. As a consequence, your application of the proposed monthly payment based on a revised, cumulative formula estimate may not be permissible.

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In arriving at the costs allocable or attributable to a committee, the Commission has used different methods for different activities. As referred to above, for the direct costs of a fundraising event such as a dinner or a mailing [e.g., as in 11 CFR 106.5(a)(2)(ii), disbursements for solicitation of funds and for actual planning or administration of events], the attribution of expenses

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2 according to the funds received by each candidate is
3 appropriate. See Advisory Opinions 1992-27 and 1992-2 for
4 further discussion of direct costs of fundraising events, as
5 compared to other expenses.

6 For allocation of costs or expenses that are not part of
7 the direct costs of a fundraising event, the committees
8 should use other methods. The use of office space and
9 furniture may be allocated on a number of bases reasonably
10 reflecting the benefit derived (which includes the concept of
11 actual usage). See Advisory Opinions 1980-38 and 1978-67.
12 For example, when committees have shared facilities with
13 businesses, office space and utilities have been allocated on
14 the percentage of time used by each entity. Advisory
15 Opinions 1994-8, 1991-37, and 1977-12. A reasonable
16 allocation of telephone costs for phone time not spent in
17 fundraising would be a time-based division of the monthly
18 base charge and the actual long-distance charges incurred by
19 each committee. Advisory Opinions 1991-37 and 1977-12. For
20 payment of compensation to personnel for time not spent on
21 planning or administering a fundraising program or event, or
22 time spent soliciting funds for such program or events, the
23 actual time worked on each campaign may be used. See, by
24 analogy, 11 CFR 106.5(a)(2)(ii).^{3/}

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26 ^{3/} In Advisory Opinion 1992-2, a national party committee
27 sought Commission approval to recompute retroactively the
28 Federal/non-federal allocation for employees who had worked
solely in programs devoted 100 percent to fundraising. The
national party wished to reallocate such expenses as direct
fundraising expenses, instead of administrative expenses.

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2 In addition, as you have noted, travel costs by a
3 Federal candidate making a trip with both Federal campaign-
4 related stops, and stops not related to the Federal
5 candidacy, are determined by a specific method set out at 11
6 CFR 106.3(b). The expenditures are calculated based on the
7 actual cost-per-mile of the means of travel actually used,
8 starting at the point of origin of the trip, via every
9 campaign-related stop and ending at the point of origin. 11
10 CFR 106.3(b)(2). Where a candidate makes one campaign-
11 related appearance in a city, that city is a campaign-related
12 stop and the trip to that city is reportable as a campaign-
13 related expense. 11 CFR 106.3(b)(3). See Advisory Opinion
14 1992-34. The amount calculated as travel to stops (cities or
15 towns) related to your Federal campaign, even if also related
16 to other purposes such as your gubernatorial campaign, would
17 be allocable to and payable by the Federal campaign.

18 The use of a cumulative ratio, modified every month, may
19 be appropriate if all expenses were the direct costs of
20 fundraising events. It appears, however, that both campaigns
21 will have significant expenses for other purposes. In a
22 testing the waters effort, for example, the possible
23 candidate's activities are not aimed at amassing funds or
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25 (Footnote 3 continued from previous page)
26 The opinion appears to be limited to those types of
27 employees. The Commission notes that that situation involved
28 a request for reallocation and thus certainty or precision in
the recalculation was even a more important issue than usual.
In your situation, the Commission is not requiring that the
fundraising formula be applied only to those personnel who
work entirely in fundraising.

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2 raising more funds than would be reasonable to use for such
3 an effort. See 11 CFR 100.7(b)(1)(i)(B) [referring to
4 Federal exploratory efforts].

5 The Commission concludes, therefore, that payments
6 should be made to vendors and lessors by the Federal
7 committee and the non-federal committee as the expenses are
8 billed, according to the appropriate percentage attributable
9 to each committee. Ratios based on cumulative amounts may be
10 used in determining the proper allocation for direct costs of
11 fundraising programs, and adjustments may be made later in
12 the form of greater or lesser percentage payments by the
13 Federal committee on subsequent payments to the vendors
14 involved in those events.

15 The committees may each pay their share of the bill on
16 their own checking accounts to the same vendor who provides
17 services or goods for shared use by each committee. In the
18 alternative, the Federal Committee may create and use a
19 proposed allocation account for the purpose of making
20 payments in a single check to the vendor. Each committee
21 would transfer its share of a billed amount to the separate
22 allocation account, and it would issue a check to the vendor.
23 The Federal Committee must disclose in its reports the vendor
24 recipient of each payment on a bill for shared services or
25 goods. The Federal Committee allocation account may accept
26 transfers from the State Committee, but those transfers must
27 be identified in the Federal Committee's reports (filed with
28 the Commission) as related only to allocable expenses. The

funds transferred must be deposited and maintained only in the separate allocation account of the Federal Committee and may not be used for any purpose, other than payment of the allocable expenditures of both committees. See, by analogy, 11 CFR 106.5(g)(1)(ii)(A). This last method also contemplates the use of bulk transfers of funds. If the committees wish to pay a number of bills or compensation to several persons at the same time, each committee would transfer to the allocation account its share of the total amount payable to all payees, and the Federal Committee would then issue a check to each vendor or person, as appropriate. The Federal Committee would still report for each item billed or person paid as if a separate transfer had been made for each separate payee.^{4/}

Finally, you present three examples of expenses incurred outside of Kings and Queens County that you state are not directly related to the Federal reelection effort and thus

^{4/} For example, a consultant who worked twenty hours during a billing period for each committee at \$20 per hour on matters not related to the direct costs of fundraising would be paid \$400 by each committee. This may be done through a payment of separate \$400 checks to the consultant or a payment by each committee of \$400 to the allocation account, with an \$800 check issued by the allocation account to the consultant. If other costs are due at the same time, e.g., (a) telephone costs of \$100 for the Federal Committee and \$150 for the State Committee, based on factors described above, and (b) the \$700 rent divided at a rate of \$200 from the Federal Committee and \$500 from the State committee based on time used, payment (including the consultant payment) may be done as follows: the State Committee pays \$1,050 and the Federal committee pays \$700 to the allocation account. The allocation account issues checks of \$800, \$250, and \$700 to the respective payees.

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2 may be paid by the State Committee. Your first example is
3 travel expenses for political activities at which Mr.
4 Schumer's reelection to Congress is not advocated and no
5 funds are solicited. The Commission has frequently
6 considered whether particular activities involving the
7 participation of a Federal candidate, or communications
8 referring to a Federal candidate, result in a contribution to
9 or expenditure on behalf of such a candidate under the Act.
10 The Commission has determined that financing such activities
11 will result in a contribution to or expenditure on behalf of
12 a candidate if the activities involve (i) the solicitation,
13 making or acceptance of contributions to the candidate's
14 campaign, or (ii) communications expressly advocating the
15 nomination, election or defeat of any candidate. See
16 Advisory Opinions 1994-15, 1992-6, and opinions cited
17 therein. The Commission has also indicated that the absence
18 of solicitations for contributions or express advocacy
19 regarding candidates will not preclude a determination that
20 an activity is "campaign-related." Advisory Opinions
21 1994-15, 1992-37, 1992-6, and opinions cited therein on that
22 point. In the absence of further information as to specific
23 appearances or events, the Commission cannot conclusively
24 state that such appearances will not be considered to be
25 related to the Congressional campaign.

26 With respect to expenditures for statewide polling, the
27 geographic coverage of the poll is a strong indicator that it
28 would not be related to the House reelection effort. A

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2 definite conclusion may not be made, however, without further
3 knowledge as to the questions asked and the analysis of the
4 data.

5 It is also premature to conclude that contributions to
6 candidates for office outside of Kings and Queens Counties
7 would, in all cases, be exclusively to influence Mr.
8 Schumer's State office campaign and not his House reelection
9 campaign. The underlying purpose and the recipient of each
10 such contribution would be relevant factors. The Commission
11 notes, however, that, when previously addressing a situation
12 involving a political organization formed by a House member
13 for the support only of non-federal candidates and charities,
14 the entity was not required to register and report. Advisory
15 Opinion 1985-38. There is a likelihood, therefore, that
16 contributions to non-federal candidates by the State
17 Committee would not be considered as influencing your House
18 candidacy.

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

23 For the Commission,

24
25 Danny L. McDonald
Chairman

26 Enclosure (AOs 1994-15, 1994-8, 1992-37, 1992-34, 1992-27,
27 1992-6, 1992-2, 1991-37, 1990-7, 1985-38,
28 1980-38, 1978-67, and 1977-12)