



FEDERAL ELECTION COMMISSION
Washington, DC 20463

CERTIFIED MAIL,
RETURN RECEIPT REQUESTED

ADVISORY OPINION 1994-37

David A. Barrett
Duker & Barrett
1585 Broadway
New York, NY 10036

Dear Mr. Barrett:

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

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

You state that the Federal Committee will be funded by a transfer of excess funds from Mr. Schumer's 1994 House campaign committee, and it will seek additional contributions during the 1996 campaign.^{1/} Meanwhile, Mr. Schumer's exploratory committee ("the State Committee") would raise funds for testing the waters purposes, and these funds would be used for a gubernatorial campaign if he decides to run in the 1998 election. The State Committee would be completely separate from the Federal committee and would be organized in conformity with New York State law.^{2/}

Although the committees will have separate chairpersons, treasurers, and bank accounts, certain paid employees may perform services on behalf of both committees. It is also anticipated that the committees will use the same office space "at least until, and if," Mr. Schumer becomes a

candidate for Governor. You ask whether sharing personnel and equipment according to 11 CFR 110.8(d)(3) will contravene the requirements at subsections (1) and (2) for the separation of campaign organizations.

You also propose a method of conforming to the requirement to allocate expenditures between the campaigns as set out in section 106.1(a)(1), which provides that expenditures on behalf of one or more clearly identified Federal candidates and one or more other candidates shall be attributed to each candidate according to the benefit reasonably expected to be derived. You ask whether this method may apply where the Federal and non-federal candidates are the same person. Specifically, you plan to apply this formula as follows. You state that you will use a procedure similar to that prescribed in 11 CFR 106.5(g) and 106.6(e) for enabling payment by each committee. Instead of attempting to estimate in advance the Federal and non-federal funds, however, you propose that funds be transferred either to the Federal Committee or to an allocation account "in such a manner that, at the end of each calendar month, the total expenditure by each committee for shared facilities and services over the life of the arrangement will be proportionate to the total contributions received by the respective committees during such period of time." In other words, the formula for allocating payments to be made by the two committees is the ratio of each committee's contribution receipts to the total of contribution receipts. Rather than making an estimate before the exploratory committee begins its operations, a ratio will be determined at the end of the first month, and the ratio will be modified at the end of each month based on the new cumulative totals which include all contributions from prior months plus the contributions newly received in that month.

Finally, you propose that the State Committee should pay for expenses incurred in connection with political activities outside of Kings and Queens Counties (the counties in which the ninth district lies) and not "directly relating" to Mr. Schumer's reelection to the House. Such expenditures would include, but not be limited to: (1) expenditures for travel outside the counties for political activities at which his reelection is not urged and funds are not solicited for that purpose; (2) expenditures for statewide polling not related to the reelection effort; and (3) contributions to candidates for office outside Kings and Queens Counties.

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

In general, payments involving expenditures on behalf of a clearly identified Federal candidate and disbursements on 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 may not be permissible.

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

For allocation of costs or expenses that are not part of the direct costs of a fundraising event, the committees should use other methods. The use of office space and furniture may be allocated on a number of bases reasonably reflecting the benefit derived (which includes the concept of actual usage). See Advisory Opinions 1980-38 and 1978-67. For example, when committees have shared facilities with businesses, office space and utilities have been allocated on the percentage of time or space used by each entity. Advisory Opinions 1994-8, 1991-37, and 1977-12. A reasonable allocation of telephone costs for phone time not spent in fundraising would be a time-based division of the monthly base charge and the actual long-distance charges incurred by each committee. Advisory Opinions 1991-37 and 1977-12. For payment of compensation to personnel for time not spent on planning or administering a fundraising program or event or soliciting funds for such program or events, the actual time worked on each campaign may be used. See, by analogy, 11 CFR 106.5(a)(2)(ii).^{4/}

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

The use of a cumulative ratio, modified every month, may be appropriate if all expenses were the direct costs of fundraising events. It appears, however, that both campaigns will have significant expenses for other purposes. In a testing the waters effort, for example, the possible candidate's

activities are not aimed at amassing funds or raising more funds than would be reasonable to use for such an effort. See 11 CFR 100.7(b)(1)(i)(B) [referring to Federal exploratory efforts].

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

The committees may each pay their share of the bill on their own checking accounts to the same vendor who provides services or goods for shared use by each committee. In the alternative, the Federal Committee may create and use a proposed allocation account for the purpose of making payments in a single check to the vendor. Each committee would transfer its share of a billed amount to the separate allocation account, and it would issue a check to the vendor. The Federal Committee must disclose in its reports the vendor recipient of each payment on a bill for shared services or goods. The Federal Committee allocation account may accept transfers from the State Committee, but those transfers must be identified in the Federal Committee's reports (filed with 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.^{5/}

The Federal Committee has another option. It may use its regular operating account to accept transfers from the State Committee, provided that such transfers do not exceed the State Committee's portion of the shared expenditures and that the State Committee does not improperly advance any Federal election costs. See, by analogy, 11 CFR 106.5(g)(1)(i), (2)(i), (2)(ii)(B), and (2)(iii). The reporting would be the same as noted above for the use of an allocation account.

The Commission notes that the required allocation procedures and options discussed above would be greatly simplified if there is total separation of the two campaigns and committees; e.g. separate office facilities and equipment, separate personnel, separate contracts for consultant and polling services.

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 may be paid by the State Committee. Your first example is travel expenses for political activities at which Mr. Schumer's reelection to Congress is not advocated and no funds are solicited. The Commission has frequently considered whether particular activities involving the participation of a Federal candidate, or communications referring to a Federal candidate, result in a contribution to or

expenditure on behalf of such a candidate under the Act. The Commission has determined that financing such activities will result in a contribution to or expenditure on behalf of a candidate if the activities involve (i) the solicitation, making or acceptance of contributions to the candidate's campaign, or (ii) communications expressly advocating the nomination, election or defeat of any candidate. See Advisory Opinions 1994-15, 1992-6, and opinions cited therein. The Commission has also indicated that the absence of solicitations for contributions or express advocacy regarding candidates will not preclude a determination that an activity is "campaign-related." Advisory Opinions 1994-15, 1992-37, 1992-6, and opinions cited therein on that point. In the absence of further information as to specific appearances or events, the Commission cannot conclusively state that such appearances will not be considered to be related to the Congressional campaign.

With respect to expenditures for statewide polling, the geographic coverage of the poll is a strong indicator that it would not be related to the House reelection effort. A definite conclusion may not be made, however, without further knowledge as to the questions asked and the analysis of the data.

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

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)

Danny L. McDonald
Chairman

Enclosure (AOs 1994-15, 1994-8, 1993-22, 1992-37, 1992-34, 1992-27, 1992-6, 1992-2, 1991-37, 1990-7, 1985-38, 1980-38, 1978-67, and 1977-12)

1/ The Federal Committee's 1994 post-general election 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.

2/ Although you do not specifically propose to use excess campaign funds from the Federal Committee to fund activities for the gubernatorial effort, the Commission cautions you that the prohibition on personal use of campaign funds applies to all funds of the Federal Committee, whether they are expended by that committee or transferred to the State Committee. 2 U.S.C. 439a. See Advisory Opinion 1993-22.

3/ Although a testing the waters effort is not technically a candidacy as defined for Federal purposes (see Advisory 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.

4/ In Advisory Opinion 1992-2, a national party committee sought Commission approval to recompute retroactively the 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. The opinion appears to be limited to those types of employees. The Commission notes that that situation involved 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.

5/ 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. If funds are transferred to the allocation account, the Federal Committee must report the amounts received as transfers from the State Committee [Detailed Summary Page of FEC Form 3 - Line 12] and must report the total amounts disbursed to payees, itemized as required.