

# National Republican Senatorial Committee

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September 17, 1998

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AOR 1998-21

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FEDERAL ELECTION COMMISSION  
OFFICE OF THE GENERAL COUNSEL

**Re: Advisory Opinion Request Concerning Allocation of Administrative Expenses by a Senate Campaign Committee of a National Party.**

Dear Brad:

This Advisory Opinion Request is submitted on behalf of the National Republican Senatorial Committee ("NRSC") pursuant to 2 U.S.C. § 437f.

**1. Question Presented.**

May the NRSC make a single post-election transfer between its federal and non-federal accounts for administrative expenses to reflect its actual "funds expended" ratio under 11 C.F.R. 106.5(c) even if the non-federal percentage exceeds 35 percent, providing the NRSC pays no more than 35 percent of its administrative expenses from its non-federal account during the election cycle?

**2. Introduction.**

The NRSC is a national party committee that supports candidates in both federal and state elections. In addition to promoting the election of Republican candidates for the United States Senate, the NRSC considers it important, where possible, to promote candidates that will

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PAID FOR AND AUTHORIZED BY THE NATIONAL REPUBLICAN SENATORIAL COMMITTEE

further Republican values and interests at all levels of government. The Congress, and thus the Republican Senators who comprise the NRSC, must work with state governors and legislators on a host of issues, such as highway funding, Medicare, Medicaid, public works projects, and the like. Encouraging the election of like-minded individuals at the state level furthers the ability of Republican U.S. Senators to develop support for their positions on these legislative issues. Strong state Republican officials also help to promote Republican values among the general population and to develop strong Republican federal candidates in future election cycles.

Pursuant to Commission regulations, the NRSC maintains separate federal and non-federal accounts in order to keep funds that are subject to the restrictions and limitations of the Federal Election Campaign Act of 1971, as amended ("FECA"), separate from funds that are not so regulated. 11 C.F.R. § 102.5(a)(i). The NRSC pays for candidate-specific activities on behalf of federal candidates with funds from the federal account, and for candidate-specific activities on behalf of non-federal candidates with funds from the non-federal account. The Commission, however, requires the NRSC to allocate certain administrative costs such as rent, utilities, office supplies, certain salaries and generic voter drive expenses or voter registration expenses -- between its federal and non-federal accounts. 11 C.F.R. §§ 106.5(a)(2) and (c); Advisory Opinion 1992-33.

The Commission has chosen to require the NRSC to allocate its administrative costs between its federal and non-federal accounts based on the relative amounts it spends on candidate-specific activities. At the beginning of a two-year federal election cycle, the NRSC is required to estimate the ratio of the amount it will spend on behalf of specific federal candidates to the amount it will spend on behalf of all specific candidates during the election cycle. 11

C.F.R. § 106.5(c)(1)(i). The NRSC uses this estimated "funds expended" ratio to allocate administrative costs between its federal and non-federal accounts. If the actual ratio subsequently reflects more federal expenditures than estimated, the NRSC must transfer funds from its federal account to its non-federal account to reflect the correct allocation percentage. 11

C.F.R. § 106.5(c)(1)(ii). If the actual ratio reflects less federal expenditures than estimated, Commission regulations permit, but do not require, the NRSC to transfer funds from its non-federal account to its federal account to reflect the correct percentage, subject to the limitation that no less than 65% of these administrative costs must be allocated to the federal account. 11

C.F.R. § 106.5(c)(2).

The 65% minimum federal percentage reflects the Commission's belief at the time the allocation regulations were promulgated that Senate and House campaign committees had a "narrower focus on Congressional candidates" and would never have more than a "limited involvement in non-federal elections." *Methods of Allocation Between Federal and Non-Federal Accounts; Payments; Reporting* (codified at 11 C.F.R. pts. 102, 104, 106), 55 Fed. Reg. 26,058 (1990). Based on this factual premise, and in contrast to its treatment of other political committees (such as non-connected committees and separate segregated funds) that use the funds expended ratio, the Commission imposed an arbitrary minimum federal expense allocation ratio on Senate and House campaign committees. 11 C.F.R. § 106.5(c)(2).

Contrary to the Commission's assumption, the NRSC participates in non-federal elections to a significant degree, and the level of its contributions to and expenditures on behalf of state gubernatorial and legislative candidates has in fact increased in recent years. As the NRSC has pointed out in an earlier request for advice, by the 1996 election cycle, its percentage

of non-federal candidate-specific expenses had increased to 35 percent. See Advisory Opinion Request 1996-32.

**3. Proposal.**

Although it is impossible to predict with certainty, the NRSC currently expects that more than 35 percent of its contributions to and expenditures on behalf of specific candidates will be for non-federal campaigns during the 1998 election cycle. If this turns out to be the case, application of the arbitrary minimum federal allocation percentage of 65 percent in Section 106.5(c)(2) will result in the NRSC paying a disproportionate share of administrative costs out of federal funds.

The NRSC seeks to correct any variance between its estimated and actual administrative cost allocation ratios through a single transfer after the November 3, 1998, election. No earlier than the day after the election<sup>1</sup>, the NRSC will calculate its actual ratio of expenditures on specific federal candidates to expenditures on all specific candidates during the election cycle. Based on the actual ratio, the NRSC then intends to make a transfer from its non-federal to its federal account, or vice versa, to ensure that the final allocation of its administrative expenses accurately reflects the actual candidate-specific expenditures made during the election cycle. This transfer would be reported (with explanatory notations, as the Commission has

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<sup>1</sup> The Commission has indicated that, for purposes of the allocation regulations, the election cycle is not that specified in 11 C.F.R. § 100.3(b), but instead will end on December 31, 1998. Advisory Opinion 1991-15 at n. 1.

indicated in prior advisory opinions concerning allocations) "in the NRSC's next report required to be filed after the allocations are made."<sup>2</sup>

The NRSC respectfully submits that such an adjustment conforms with the FECA and the Commissions allocation regulations for the following reasons: (i) the post-election adjustment would ensure that administrative expenses are allocated in proportion to the actual ratio of federal to non-federal specific candidate support provided by the NRSC; and (ii) the NRSC will use a maximum non-federal percentage of 35 percent during this election cycle to ensure that unregulated non-federal funds are not used, even temporarily, to subsidize the federal account's share of campaign activity.

**4. The NRSC's Administrative Expense Allocation Should Reflect Its Actual, Not an Artificial or Arbitrary, Funds Expended Ratio.**

The principle driving the Commission's 1990 allocation rulemaking was that a mixed expense should be accurately allocated with reference to the activity that gave rise to that expense. See Common Cause v. Federal Election Commission, 692 F. Supp 1391, 1395 (D.D.C. 1987) (FEC should seek to avoid "inaccurate allocation between federal and non-federal funds") (cited in the Explanation and Justification for part 106, CCH Federal Election Campaign Financing Guide, Vol. I, at ¶ 807). While the basis for a given allocation ratio will depend on the underlying activity, every allocation is supposed to track the actual proportions of the underlying activities. For example, the ratio for the costs of a joint public broadcast is pegged to the time or space devoted to each candidate; the ratio for the costs of a joint fundraiser is pegged to the funds actually received into federal and non-federal accounts. 11 C.F.R. §§ 106.1(a)(1), 106.5(f). The

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<sup>2</sup> Advisory Opinion 1992-27; see also Advisory Opinion 1991-15.

basis for the two ratios is different, but each allocates general costs on an objective basis by looking to the specific activities related to the costs.

Contrary to this principle, the Commission's regulations do not allow the NRSC to track its actual specific candidate expenditures in allocating its general administrative expenses. Instead, due to circumstances not anticipated by the Commission, the NRSC must distort its allocation ratio through application of a minimum federal percentage. As the following illustrates, this exception to the rationale of the allocation regulations is inequitable, unrealistic and inconsistent with the principle underlying the regulations.

First, every political committee allocates direct fundraising costs in proportion to the contributions received into its federal and non-federal accounts. 11 C.F.R. § 106.5(f). The NRSC estimates its "funds received ratio" prior to a fundraising program, and after the program, the NRSC adjusts its ratio "to reflect the actual ratio of funds received." 11 C.F.R. § 106.5(f)(1), (2) (emphasis added). If the non-federal account has paid more than its share, then the NRSC transfers within 60 days "funds from its non-federal to its federal account" to reflect the actual amounts received. 11 C.F.R. § 106.5(f)(2). Unlike administrative expense allocations, however, Section 106.5(c)(3) allows the NRSC to allocate fundraising costs "with no minimum federal percentages required." This decision undoubtedly reflects a recognition that Senate and House campaign committees may sponsor individual fundraising programs that raise more funds for state and local candidates than for federal candidates.

Second, the Commission regulations require all political committees - be they party committees, non-connected committees, or separate segregated funds - to allocate the cost of communications supporting the election or defeat of both state and federal candidates on the

basis of the relative time or space devoted to each. 11 C.F.R. §§106.1(a)(1), 106.5(e). Again, no maximum or minimum federal percentage applies.

Third, non-connected committees and separate segregated funds must allocate administrative expenses and costs of generic voter drives based on the actual levels of federal and non-federal candidate support. 11 C.F.R. § 106.6(c)(1). No arbitrary maximum or minimum percentage is imposed.

Finally, each state and local political party allocates its administrative expenses according to a "ballot allocation" ratio of non-federal to federal candidates on the ballot. 11 C.F.R. § 106.5(d)(1). This ratio is flexible enough to yield dramatically different results: the current federal percentages range from 12% in Wyoming to 50% in Louisiana. Indeed, the Commission redrafted its original ballot allocation regulation "because state situations differ widely" and to "provide the necessary flexibility" to its prior formulation of the ratio. See Explanation and Justification for Part 106, CCH Federal Election Campaign Financing Guide, Vol. 1, at ¶ 807.

There is no principled reason why the Commission should apply a different, arbitrary and inflexible standard to the NRSC's administrative expenses. When the Commission inserted the minimum federal percentage in Section 106.5(c)(2), it did so on the assumption that the NRSC would have no interest in spending more than 35 percent of its budget on non-federal candidates over the course of an entire election cycle. Current expectations, however, indicate that the Commission's presumption was wrong, or at least did not contemplate the NRSC's new expenditure pattern.

The Commission previously has permitted deviations from the letter of the allocation regulations, when those regulations "do not contemplate" a new situation. Advisory Opinion 1991-25. Thus, when the death of Senator Heinz created a special election under Pennsylvania State law, state committees were allowed to change their ballot composition ratios, even though this was "not specifically provided for in the regulation." Id. Section 106.5(d)(ii) was later amended to reflect the logic of Advisory Opinion 1991-25. See Explanation and Justification for Part 106, CCH Federal Election Campaign Financing Guide, Vol. 1, at ¶ 807. Similarly, in Advisory Opinion 1991-6, the retirement of Senator Cranston meant that there would be two California Senate elections in the same cycle. As the regulations did not address the situation, the Commission held that each of the Senate races should be included as a federal point in the ballot allocation ratio.<sup>3</sup>

The Commission also has on several past occasions permitted retroactive reallocations – for example, to correct good faith mistakes in calculating a ratio or deciding whether an expense should be classified as administrative or fundraising. Advisory Opinions 1991-15, 1992-2, 1992-27. Section 106.5 itself requires a retroactive adjustment of allocation percentages to correct deviations from the initial estimated percentage. Finally, in the final draft of Advisory Opinion 1996-32, the Office of the General Counsel opined that the NRSC could "retroactively allocate its administrative expenses" and that "any future reallocations should reflect the actual Federal and non-federal disbursements made." Final Draft for Advisory

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<sup>3</sup> The Commission also advised Senator John Glenn that he could exceed the limitation on expenditures from his personal funds to repay outstanding campaign debts due to "exceptional circumstances." Advisory Opinion 1993-19.



Opinion Request 1996-32, Federal Election Commission Agenda Document # 96-91 (emphasis added).

Thus, this request seeks an Advisory Opinion from the Commission concerning its allocation regulations similar to those that have been granted in the past. The regulations set a minimum percentage for the NRSC's federal allocative share of administrative costs based on a currently incorrect presumption that the NRSC has a "narrower focus on congressional candidates." *Methods of Allocation Between Federal and Non-Federal Accounts; Payments; Reporting* (codified at 11 C.F.R. pts. 102, 104, 106), 55 Fed. Reg. 26,058 (1990). The Commission simply did not contemplate that the NRSC would ever have more than a "limited involvement in non-federal elections." *Id.* That factual premise is not accurate during the current election cycle. Accordingly, the Commission should, as it has in the past, interpret its regulation in light of new information or waive its literal requirements. See Colorado Republican Federal Campaign Committee v. Federal Election Commission, 518 U.S. 604, 619-20 (1996) (Commission may not make presumptions that are contrary to fact).

**5. The NRSC Proposal Protects Against Use of Non-Federal Funds to Subsidize Federal Activities.**

One of the reasons that the Commission may have imposed the minimum federal allocation percentage in Section 106.5(c)(2) was to prevent the temporary subsidization of a federal account with non-federal funds caused by the timing of payments. For example, a committee might "estimate" a very low federal allocation percentage and make contributions only to state candidates during the early part of an election cycle, but make much larger contributions to federal candidates later in the cycle. Without a minimum federal percentage, the

committee could fund up to 100 percent of its administrative expenses with non-federal funds during the early part of the election cycle even though its percentage of non-federal support over the course of the entire election cycle would be far lower.

The NRSC's proposed reallocation protects against any such temporary use of non-federal funds to subsidize the NRSC's federal account. During the election cycle the NRSC intends to pay for no more than 35 percent of its administrative expenses out of its non-federal account. Even though the NRSC's non-federal spending in this cycle may exceed this 35 percent figure, the NRSC intends to maintain this maximum non-federal allocation percentage during the cycle as a protective measure. Any reallocation transfer would be made after the election. Under these circumstances, the reallocation would "not result in the use of non-FECA money to influence Federal elections, but would rather reimburse the Federal account for expenditures it had made to influence state and local elections." Advisory Opinion 1991-15. This measure would also require Commission approval to make the reallocation transfer after the 60-day window set forth in Section 106.5(g)(2)(ii)(B).<sup>4</sup>

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The minimum federal percentage imposed on the NRSC's funds expended ratio forces the NRSC either to spend its limited federal dollars on non-federal administrative costs -- or to abandon Republican candidates in state elections who need its support. To avoid this unfair burden, the NRSC should be permitted to make a one-time retroactive reallocation of

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<sup>4</sup> The NRSC does not propose how soon following the election it would transfer the funds pursuant to the proposal made herein and seeks guidance from the Commission. One logical answer might be to transfer the funds within 60 days of the last candidate support check written by the NRSC, which would track the timing of transfers provision in Section 106.5(g)(2)(ii)(B).

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administrative costs to reflect the actual amounts it expends on behalf of specific candidates over the course of the current election cycle. Such an interpretation also will be consistent with the general principle, expressed in the Commission's allocation regulations, that mixed costs should be allocated with reference to the underlying activities supported by those costs.

Thank you for your consideration of this matter.

Sincerely,

A handwritten signature in black ink, appearing to read "Craig M. Ergle", with a long horizontal flourish extending to the right.

Craig M. Ergle  
General Counsel