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February 11, 2016

MEMORANDUM

TO: The Commission

FROM: Daniel A. Petalas *DAP by AN*
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Subject: AO 2015-16 (Innis) Draft B

Attached is a proposed draft of the subject advisory opinion.

For more information about how to submit comments or attend the Commission meeting, go to <http://www.fec.gov/law/draftaos.shtml>.

Attachment

1 ADVISORY OPINION 2015-16

2
3 Dan Backer, Esq.
4 Counsel, Niger Innis for Congress
5 DB Capitol Strategies PLLC
6 203 South Union Street
7 Suite 300
8 Alexandria, VA 22314

9
10 Dear Mr. Backer:

11 We are responding to your advisory opinion request on behalf of Niger Innis for
12 Congress (the “Committee”) concerning the application of the Federal Election Campaign Act,
13 52 U.S.C. §§ 30101-46 (the “Act”), and Commission regulations to your proposal to pay for
14 certain costs with general election funds and to donate other general election funds to charity.
15 The Commission concludes that the Committee may not pay the proposed costs out of general
16 election contributions, but the Committee may donate the non-refundable general election
17 contributions to a charity as proposed.

18 ***Background***

19 The facts presented in this advisory opinion are based on your letter received on
20 November 25, 2015, and your email dated December 14, 2015.

21 The Committee was the principal campaign committee of Niger Innis, who was a
22 candidate for Congress in the 2014 election cycle. On June 10, 2014, he lost the primary
23 election. The Committee is in the process of winding down.

24 Prior to the primary, the Committee received contributions for the general election. After
25 Mr. Innis’s loss in the primary election, the Committee states that it timely issued to general
26 election contributors checks in the full amount of their general election contributions. Because
27 some of the contributors, however, did not cash their refund checks, Mr. Innis and Committee
28 staff reached out to those persons who had not cashed their refund checks to ask that the refund

1 checks be cashed. After the first refund checks had gone stale, the Committee reissued refund
2 checks to persons who had not cashed the previously issued refund checks. The Committee
3 states that, despite its repeated efforts, it has been unable to refund general election contributions
4 totaling \$8,000 from four individuals, and that the reissued refund checks are now stale.

5 The Committee also represents that it has incurred certain “unique costs” associated with
6 the outstanding \$8,000 in general election contributions. These consist of transaction-specific
7 costs and legal, accounting, and compliance costs. The transaction-specific costs include: per-
8 transaction credit card-processing fees; bank fees, such as account maintenance fees, check-
9 processing fees, and transfer fees; and fundraising commissions paid for the successful
10 solicitation of general election contributions. The Committee states that these costs are “incurred
11 exclusively by the receipt of, and . . . are exclusively traceable to, the mere existence of general
12 election contributions.” Advisory Opinion Request (“AOR”) at AOR002. As to the legal,
13 accounting, and compliance costs, the Committee refers to its winding down costs and the
14 “substantial costs . . . from . . . efforts to settle any outstanding debt or obligations.” AOR007.
15 The Committee asserts that “over time these [legal, accounting, and compliance] burdens
16 ultimately become far removed from the primary election activity and become entirely a product
17 of the general election contributions themselves.” AOR002-003. The Committee wishes to pay
18 these costs from its general election contributions, rather than from its primary election
19 contributions.

20 Additionally, the Committee seeks to dispose of its remaining general election
21 contributions so that it can terminate. Rather than disgorge the remaining funds to the U.S.
22 Treasury, Mr. Innis seeks to donate the remaining Committee funds to a tax-exempt organization
23 that operates under 26 U.S.C. § 501(c)(3) (the “charity”). The request represents that Mr. Innis

1 has not directly or indirectly established, maintained, financed, or controlled the charity, and that
2 “he has no direct or indirect ties” to the organization. AOR009. He also represents that he will
3 not incur any tax or other benefit from a donation of the funds and will have no control over the
4 funds once disgorged.

5 ***Questions Presented***

6 1. *Is the Committee prohibited from paying certain unique costs that are distinctly traceable*
7 *to specific general election contributions out of those funds rather than from primary election*
8 *contributions?*

9 2. *Is the Committee prohibited from donating the remaining non-refundable general*
10 *election contributions to a charitable organization exempt from taxation under IRC section*
11 *501(c)(3) if the Candidate does not directly or indirectly establish, maintain, finance, or control*
12 *that organization or derive any personal benefit from it?*

13 ***Legal Analysis and Conclusions***

14 1. *Is the Committee prohibited from paying certain unique costs that are distinctly traceable*
15 *to specific general election contributions out of those funds rather than from primary election*
16 *contributions?*

17 The Committee may not pay out of its general election contributions any legal,
18 accounting, compliance, or transaction costs associated with those contributions.

19 The Act’s contribution limitations on contributions made to a candidate for federal office
20 apply separately with respect to each election. 52 U.S.C. § 30116(a)(1)(i); 11 C.F.R.

21 § 110.1(b)(2). Commission regulations provide that a candidate or authorized committee may,
22 prior to a primary election, accept contributions designated by the contributor for use in

23 connection with the general election. 11 C.F.R. §§ 102.9(e), 110.1(b)(2), 110.2(b)(2). The

1 recipient committee, however, must “use an acceptable accounting method to distinguish
2 between contributions received for the primary and contributions received for the general
3 election.” 11 C.F.R. § 102.9(e). The committee’s “records must demonstrate that, prior to the
4 primary election, recorded cash on hand was at all times equal to or in excess of the sum of
5 general election contributions received less the sum of general election disbursements made.”
6 *Id.* at § 102.9(e)(2); *see also* Advisory Opinion 1986-17 (Green) at 4, (“the Act does not prohibit
7 [an authorized committee] from using contributions designated for the general election to make
8 expenditures, prior to the primary election, exclusively for the purpose of influencing the
9 prospective general election.”); Factual and Legal Analysis at 3, 5, MUR 6811 (Marjorie 2014)
10 (dismissing complaint where committee paid advances for general election expenses before
11 primary but received full refunds of advances after losing primary). “These regulations are
12 designed to ensure that candidates . . . do not use general election contributions for the primary
13 election.” Advisory Opinion 1992-15 (Russo for Congress) at 1.

14 Subsequently, “[i]f a candidate is not a candidate in the general election, any
15 contributions made for the general election shall be refunded to the contributors, redesignated . . .
16 or reattributed.” 11 C.F.R. § 102.9(e)(3); *see also* 11 C.F.R. § 110.1(b)(3)(i) (“If the candidate is
17 not a candidate in the general election, all contributions made for the general election shall be
18 either returned or refunded to the contributors or redesignated . . . , or reattributed . . . , as
19 appropriate.”).¹ As the Commission has explained, “where a general election is held, but the
20 candidate does not participate in that election, no separate contribution limit for that general

¹ “For purposes of these regulations, contributions are ‘returned’ when the negotiable instrument comprising the contribution is sent back to the contributor instead of being deposited. Contributions are ‘refunded’ when the recipient committee sends the contributor a check for the amount of the contribution which has been previously deposited.” Contribution and Expenditure Limitations and Prohibitions; Contributions by Persons and Multicandidate Political Committee, 52 Fed. Reg. 750, 768 (Jan. 9, 1987).

1 election is available to contributors.” Contribution and Expenditure Limitations and
2 Prohibitions; Contributions by Persons and Multicandidate Political Committee, 52 Fed. Reg.
3 750, 751 (Jan. 9, 1987) (internal cites omitted).

4 The Commission has consistently noted that if the candidate does not become a candidate
5 for the general election, the Act requires the authorized committee to “make a full refund” of
6 general election contributions, regardless of whether it had already “made any expenditure from
7 these contributions.” Advisory Opinion 1986-17 (Green) at 3-4 (citing, *inter alia*, Advisory
8 Opinion 1986-12; Advisory Opinion 1983-39); 11 C.F.R. § 102.9(e)(3); *see also* Advisory
9 Opinion 2009-15 (Bill White for Texas) at 7 (“Contributions designated for an election . . . in
10 which a person is not a candidate . . . must be refunded.”); Advisory Opinion 1992-15 (Russo) at
11 2; Factual and Legal Analysis at 4, MUR 6230 (Wynn for Congress) (finding reason to believe
12 where committee spent general election contributions during primary and was unable to refund
13 contributions to general election contributors); Factual and Legal Analysis at 3-4, MUR 6057
14 (Jennifer Horn for Congress) (“[G]eneral election contributions may be used to make advance
15 payments for general election purposes, but should the candidate not win the primary election,
16 the committee must have enough cash on hand to refund all general election contributions.”).

17 For example, in Advisory Opinion 1980-122 (New Yorkers for Myerson), the
18 Commission concluded that the Act prohibited a candidate who had lost a primary election from
19 paying outstanding primary campaign debts and winding down costs with contributions
20 designated for the general election. Because the candidate in that advisory opinion “was
21 involved only in the primary election, all of the debts and obligations of the Committee exist[ed]
22 with respect to that election.” *Id.* at 2. Therefore, to the extent that general election contributors
23 also made maximum contributions with respect to the primary election, the Commission

1 concluded that the Act prohibited the Committee from paying primary election debts with
2 general election funds, because doing so would result in the contributors making excessive
3 contributions with respect to the primary election. *Id.*

4 Here, the Committee proposes to pay out of general election contributions various costs
5 associated with those contributions, including transaction fees, fundraising commissions, and
6 legal, accounting, and compliance costs. As the regulations and opinions cited above uniformly
7 note, the Committee may not do so. Because Mr. Innis lost the primary election and therefore
8 was not a candidate in the general election, the Commission's regulations require him to timely
9 refund, reattribute, or redesignate all contributions that the Committee received for the general
10 election. This refund obligation includes any contributions that the Committee spent on general
11 election expenses prior to losing the primary, and it necessarily precludes the Committee from
12 now spending *additional* general election funds, as proposed in the request, on an election in
13 which Mr. Innis did not participate.

14 Accordingly, the Committee may not pay out of its general election contributions any
15 legal, accounting, compliance, or transaction costs.

16 2. *Is the Committee prohibited from donating the remaining non-refundable general*
17 *election contributions to a charitable organization exempt from taxation under IRC section*
18 *501(c)(3) if the Candidate does not directly or indirectly establish, maintain, finance, or control*
19 *that organization or derive any personal benefit from it?*

20 The Committee may donate its remaining, non-refundable general election contributions
21 to charity.

22 As discussed above, “[i]f a candidate is not a candidate in the general election, any
23 contributions made for the general election shall be refunded to the contributors,” 11 C.F.R.

1 § 102.9(e)(3), because “no separate contribution limit for that general election is available to
2 contributors.” 52 Fed. Reg. 750 at 751 (internal cites omitted). Neither the Act nor Commission
3 regulations, however, explicitly address the situation where a Committee is unable, despite its
4 efforts,² to refund general election contributions after losing a primary.

5 In previous advisory opinions, the Commission has addressed the analogous situation of a
6 committee seeking to issue a refund under 11 C.F.R. § 103.3 where the committee had a “basis
7 to question the lawfulness of [previously accepted] contributions” but could not “determine the
8 identity of the original contributor.” Advisory Opinion 1991-39 (Friends of Senator D’Amato) at
9 2 (addressing committee that believed it might have received contributions made in name of
10 another); *see also* Advisory Opinion 1995-19 (Indian-American Leadership Investment Fund) at
11 3-4 (same). In both advisory opinions, the Commission advised the committees to disburse the
12 funds “for a lawful purpose unrelated to any Federal election, campaign, or candidate,” such as
13 to a charitable organization described in section 170(c) of the Internal Revenue Code. Advisory
14 Opinion 1991-39 (Friends of Senator D’Amato) at 2; *see also* Advisory Opinion 1995-19
15 (Indian-American Leadership Investment Fund) at 4.

16 The Commission departed from this line of reasoning in Advisory Opinion 2003-18 (Bob
17 Smith for U.S. Senate), which addressed whether a candidate who had lost a primary election
18 and was unsuccessful in his efforts to refund general election contributions could donate the non-
19 refundable contributions to a charity that he had “recently established.” There, the Commission
20 concluded that the requestor was required to disgorge the general election contributions to the
21 U.S. Treasury, and that he was not permitted to donate the funds to his charity. *Id.* at 3-4. The

² For purposes of this opinion, the Commission assumes without deciding that the Committee undertook sufficient efforts to attempt to refund the general election contributions.

1 Commission explained that “the contributions received during the primary election period that
2 were specifically designated for the general election must not be treated as permissible campaign
3 funds, and such funds are not usable in accordance with [52 U.S.C. § 30114] and 11 C.F.R. Part
4 113.” Thus, the committee’s general election funds could not be donated to the candidate’s
5 charity “because such use is not among the uses permitted in [Commission regulations].” *Id.*
6 at 3. The legal bases for these conclusions have since lost their force.³

7 In any event, Advisory Opinion 2003-18 (Bob Smith for U.S. Senate) is distinguishable
8 from the Committee’s request here. Unlike the proposed charity in that prior opinion, Mr. Innis
9 represents that he will not have established, financed, maintained, or controlled the charity to
10 which he proposes to donate funds, that he will have “no direct or indirect ties” to the charity,
11 and that he will receive no benefit from making the donation. AOR009. There is therefore
12 minimal risk that Mr. Innis will, through a donation to the charity, “convert[] . . . to personal
13 use,”⁴ 52 U.S.C. § 30114(b)(1), the general election funds that he and his committee accepted.

14 The Commission concludes that the reasoning of Advisory Opinion 1991-39 (Friends of
15 Senator D’Amato) and Advisory Opinion 1995-19 (Indian-American Leadership Fund) is more
16 applicable and persuasive here. Because the Committee — like those in the prior advisory
17 opinions — has been unable to refund contributions that it is required to refund, the Committee

³ Personal-use concerns appear to have played a role in Advisory Opinion 2003-18 (Bob Smith for U.S. Senate), *see id.* at 2 (noting that “at some point” requestor’s charity might “employ one or more of [the requestor’s] former official staff members”), but that opinion’s legal conclusion relied on analogies to three other provisions: 11 C.F.R. § 400.53, which has since been repealed; 11 C.F.R. § 300.12, which applied only to funds received before the 2002 elections; and regulations governing publicly funded presidential committees, which present unique accounting and refund concerns. None of these provisions is readily applicable to the Committee’s proposal here.

⁴ Even though “no separate contribution limit for [the] general election is available to [the Committee],” 52 Fed. Reg. at 751, and the general election contributions must be refunded, the Committee’s disposition of the funds remains subject to the Act’s personal use prohibition because they were contributions “accepted” by Mr. Innis and the Committee. *See* 52 U.S.C. § 30114(a).

1 may donate its remaining, non-refundable general election contributions to “a qualified
2 charitable organization described in 26 U.S.C. 170(c)”⁵ for “a lawful purpose unrelated to any
3 Federal election, campaign, or candidate.” Advisory Opinion 1991-39 (Friends of Senator
4 D’Amato) at 2.⁶

5 This response constitutes an advisory opinion concerning the application of the Act and
6 Commission regulations to the specific transaction or activity set forth in your request. *See*
7 52 U.S.C. § 30108. The Commission emphasizes that, if there is a change in any of the facts or
8 assumptions presented, and such facts or assumptions are material to a conclusion presented in
9 this advisory opinion, then the requestor may not rely on that conclusion as support for its
10 proposed activity. Any person involved in any specific transaction or activity which is
11 indistinguishable in all its material aspects from the transaction or activity with respect to which
12 this advisory opinion is rendered may rely on this advisory opinion. *See* 52 U.S.C.
13 § 30108(c)(1)(B). Please note that the analysis or conclusions in this advisory opinion may be
14 affected by subsequent developments in the law including, but not limited to, statutes,
15 regulations, advisory opinions, and case law. Any advisory opinions cited herein are available
16 on the Commission’s website.

17 On behalf of the Commission,
18 Matthew S. Petersen
19 Chairman

⁵ Pursuant to 26 U.S.C. § 170(c)(2)(D), the recipient charity cannot be one that “attempt[s] to influence legislation” or “participate[s] in, or intervene[s] in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office.”

⁶ In *Fireman v. United States*, 44 Fed. Cl. 528 (1999), the court declined to defer to a Commission determination that a committee could disgorge unlawful contributions to the U.S. Treasury instead of refunding the contributions to the contributor under 11 C.F.R. § 103.3(b). 44 Fed. Cl. at 538-39; *see also* Advisory Opinion 1996-05 (Jay Kim for Congress). Because the Committee here represents that it has attempted to refund the general election contributions to contributors, who have not accepted the refunds, the proposed donation does not implicate the court’s concern that the contributors’ “right of repayment” has been “taken away.” *See Fireman*, 44 Fed. Cl. at 536.