FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

CONCURRING OPINION OF COMMISSIONER SCOTT E. THOMAS

Re Advisory Opinion 2001-17

The opinion issued by the Commission to the Democratic National Committee ("DNC") was limited in its scope to address only the reporting issue raised by the requestor. Several legal issues regarding the proper handling of checks exceeding the federal contribution limits warrant further explication, in my view.

One issue that should be clarified is the legality of depositing large checks in the federal account and transferring out the excessive portion to a nonfederal account. . . Because the parties currently are allowed to accept unrestricted donations to their nonfederal accounts (so called 'soft money'),[1] the Commission for years has sanctioned the practice of depositing checks exceeding the federal limits in the federal account and thereafter transferring out the excessive portions to a nonfederal account. The Commission's regulations expressly contemplate the deposit of such excessive contributions.[2] The primary reason the Commission took this approach was to allow a committee time to seek written authorization to reattribute, for example, part of the contribution to a spouse if it so chooses.[3] The other practical reason for this approach

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[1] Commission regulations permit this approach. Groups that qualify as a federal "political committee" are allowed to either undertake their federal and nonfederal activity from one account, or to split off their nonfederal activity into a separate nonfederal account. 11 C.F.R. § 102.5(a)(1). By setting up a separate nonfederal account such groups can accept donations permitted by whatever state or local law applies.

[2] Pursuant to 11 C.F.R. 103.3(b)(3), "[c]ontributions which on their face exceed the contribution limitations . . . may be either deposited into a campaign depository . . . or returned to the contributor." Further, "[if any such contribution is deposited, the treasurer may request redesignation [applicable to candidate committees] or reattribution of the contribution by the contributor . . . ." *Id.*

The Commission has prevented abuse of this allowance by requiring that any impermissible amount "shall not be used for any disbursements by the political committee until the contribution has been determined to be legal," 11 C.F.R. § 103.3(b)(4), and requiring that either such amounts be put in a separate account or the committee maintain sufficient funds to make refunds. *Id.* Further, the committee must make a record of any impermissible amount deposited and include a statement about such receipt in the applicable report. 11 C.F.R.§ 103.3(b)(5).

Some have noted that 11 C.F.R. § 102.5(a)(1)(i) states: "Only funds subject to the prohibitions and limitations of the Act shall be deposited in such separate federal account." The more recent regulatory language in 11 C.F.R. § 103.3 (It dates from 1987, whereas § 102.5 dates to 1977; *see* 52 Fed. Reg. 768 (Jan. 9, 1987) and H. Doc. 95-44, 95th Cong., 1st Sess. at 44 (Jan. 12, 1977)) clearly was intended to modify this. Moreover, the regulations should be read to make sense together. The only plausible construction is that once the options to explore the permissibility of questionable contributions are exhausted pursuant to § 103.3, the only proper remaining federal account deposits are those that comply with the Act.

[3] *See* n. 2.

was to streamline and simplify committee accounting and processing procedures so that convoluted check return and check reissuance steps could be avoided.

The legal authority to transfer the excessive portion to the nonfederal account is less obvious, but nonetheless sustainable. The regulations contemplate the "refund" of the excessive portion of a contribution,[4] and the Commission has deemed it sufficient to make a transfer to the nonfederal account and provide written notice to the contributor that a refund will be made if requested.[5] While this approach usually leaves the money in the hands of the committee, rather than in the pocket of the contributor, the Commission has accomplished its goal of getting the impermissible funds out of the federal account, and the contributor is given the right to the funds upon request. Although the Commission is considering amending the regulations to specify what procedures should be followed for 'transfers out,'[6] the current legal construction is defensible, in my view.

One offshoot of the Commission's 'transfer out' policy is that the committee in question has 60 days to effect the 'transfer out.' Some of my colleagues seemed perplexed by this concept, but the same regulations that form the basis for allowing the deposit and 'transfer out' permit the committee 60 days to accomplish this.[7] Thus, while the DNC was willing to effect 'transfers out' on the same day the check was deposited, there is no legal requirement to do so.[8] In addition, should a committee such as the DNC take more than a day to effect a transfer, a reporting system like the 'refund/transfer out' approach set forth in the Commission's opinion might be more appropriate than the 'same day' approach spelled out for same day transfers.[9] Another advisory opinion request may be needed to properly address this remaining reporting issue.

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[4] Following the language quoted in n. 2, 11 C.F.R. § 103.3(b)(3) provides: "If a redesignation or reattribution is not obtained, the treasurer shall, within sixty days of the treasurer's receipt of the contribution, refund the contribution to the contributor."

[5] This construction of its regulations has been reflected for years in the letters approved by the Commission for use by the Reports Analysis Division. *See, e.g.*, Memorandum from John Gibson dated Sept. 13, 2001 (nonpublic). While two of my colleagues and I argued against this approach when it was first debated at the agency, we acceded in order to get a majority position in place that would provide adequate safeguards. The Explanation and Justification for 11 C.F.R. 103.3 stated: "Contributions are 'refunded' when the recipient committee sends the contributor a check for the amount of the contribution which had been previously deposited." 52 Fed. Reg. 768 (Jan. 9, 1987). Nonetheless, the agency has sufficient authority to "formulate policy" with respect to the Act (*see* 2 U.S.C. § 437c(b)(1)) using means other than regulations, and the approval of the Reports Analysis Division letters is one such means.

[6] *See* Notice of Proposed Rulemaking, 63 Fed. Reg. 37733 (July 13, 1998). The proposal in the notice would be more stringent than the Commission's current policy, requiring that a donor provide written authorization for transferring out the excessive portion to the nonfederal account. While the written authorization requirement makes some sense when the money in question will be staying in the federal election process (e.g., as a result of a redesignation or a reattribution), there is less need for such a step when the money is removed from the federal election process via a 'transfer out.'

[7] *See* n. 4.

[8] At some point, the federal account's ability to earn interest on impermissible funds might become an issue, but the Commission's current regulations do not address this.

[9] *See* 11 C.F.R. §§ 103.3(b)(5), 104.8(d)(4).

An additional legal issue that warrants some clarification is the permissibility of retaining the federally permissible amount in the federal account even though the donor may not have provided some written indication of authorization to do so. While the DNC has opted to transfer even the federally permissible amounts to the nonfederal account if no such written authorization is obtained, it is not legally required to do so.[10] From the very earliest days, the Commission specified in its regulations that committees may deposit contributions without obtaining such written donor authorizations as long as certain other precautions are taken to assure that the donor intended the funds to be used for federal purposes. At 11 C.F.R. § 102.5(a)(2), committees are allowed to deposit: "(i) Contributions designated for the federal account; (ii) Contributions that result from a solicitation which expressly states that the contribution will be used in connection with a federal election; and (iii) Contributions from contributors who are informed that all contributions are subject to the prohibitions and limitations of the Act."[11] Clearly, only the first description suggests some form of authorization provided by the donor.[12] The second description permits the committee's solicitation materials to satisfy any concerns about donor intent. The third description permits even a committee's notice after receipt to suffice as an indication of donor intent.

The DNC, therefore, could permissibly retain any contribution within the limits that resulted from a solicitation containing the language in the draft donor card provided with the DNC's request. *See* 11 C.F.R. § 102.5(a)(2)(ii). It specifies that checks from individuals and federal PACs would be used in connection with federal elections. Moreover, even without a tie to such solicitation materials, contributions in permissible amounts could be retained by the DNC in the federal account as long as a follow up notice alerts the donor that the amount given is subject to the prohibitions and limits in the Federal Election Campaign Act. *See* 11 C.F.R. § 102.5(a)(2)(iii). Written authorization from the individuals or PACs in question is not required in either instance. While the DNC's apparent policy of forwarding even the federally permissible amount to the nonfederal account where no written authorization is received is understandable, it is not legally necessary.

The foregoing approach reflects an understanding by the Commission that (1) most donors understand when their checks will be subject to the federal rules, (2) most

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[10] As the record in MUR 4961 makes clear, the DNC took heat from the media and some donors as a result of depositing some large checks in its federal account and thereby causing some donors to exceed their $25,000 per year aggregate federal contribution limit. *See* 2 U.S.C. § 441a(a)(3). While such contributions in most of those cases would have been within the donors' $20,000 per year limit on contributing to the DNC, one can understand, from the DNC's current perspective, wanting to avoid any FEC problems where the donor has not been crystal clear about the intended use of the contributed amount.

[11] The Commission has interpreted this regulation to permit the deposit of contributions that meet any one of these descriptions. Advisory Opinion 2000-25, Fed. Elec. Camp. Fin. Guide (CCH), ¶ 6342. This is the only plausible interpretation since some contributions might not be designated by donors for the federal account, some might be received without any solicitation, and some might be received that are neither designated nor solicited. The original regulation used disjunctive rather than conjunctive language and, therefore, was clearer, *see* 11 C.F.R. § 102.6(b) (1977), but the current language is clear enough.

[12] It should be noted that the "designation" language in § 102.5(a)(2)(i) does not require a signed written statement from the donor as is required for a reattribution or redesignation. *Compare with* 11 C.F.R.§ 110.1(b)(5)(ii)(B) and (k)(3)(ii)(B).

committees are anxious to try to avoid getting themselves and their donors in trouble with the FEC because of a lack of understanding, (3) there is no real purpose in imposing artificial barriers that will be easily avoided where big money is involved, and (4) any problems with the current system are really traceable to the fact that amounts above the federal limits may be contributed to committees for nonfederal election activity, subject only to whatever laws the states or local jurisdictions impose. That said, the Commission may reconsider this area of law in a rulemaking.[13] In the mean time, though, the DNC and similarly situated committees have more options than that set forth in the DNC's advisory opinion request.

It would have been better to use the opinion issued to the DNC to lay out the foregoing concepts. That would have prevented at least some of the erroneous interpretations of the opinion issued that may result.[14] The Commission's advisory opinion process can and should be an educational vehicle. In the complex and important area of combined 'hard money' and 'soft money' fundraising and compliance, this would have been a good opportunity to serve this purpose.

1/31/02
Date

Scott E. Thomas
Commissioner

[13] The Commission's Regulations Committee discussed a draft regulation covering the topic of disgorgement of impermissible funds and 'transfers out' in early 2001. Partly as a result of the developments in MUR 4961 and similar matters before the agency, it is likely this project will expand to deal with the language of 11 C.F.R. § 102.5(a). Further, while sidelined due to congressional consideration of 'soft money' legislation, a regulation project dealing with the permissibility of 'soft money' deposits and the use of such funds has been on the Commission's docket for several years. *See* 63 Fed. Reg. 37721 (July 13, 1998); FEC Agenda Document 00-95, Sept. 21, 2000.

[14] For example, the FEC's most loyal scribe, Ken Doyle, wrote: "The advisory allows the DNC to split large single-check contributions among its accounts, *so long as it has written permission from the donor*. If no word comes from the donor about how the money is to be used, it *must* all go to the DNC's soft money account." BNA *Money and Politics Report*, Jan. 18, 2002 (emphasis added). Although the Commission's narrow opinion tried carefully to explain that methods other than that proposed by the DNC for handling big checks might be permissible, even the most knowledgeable can get the erroneous impression that written permission is required in order to keep federally permissible amounts in the federal account.