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November 13, 2002

VIA FEDEX & FACSIMILE

Lawrence Norton, Esq.
General Counsel
Central Enforcement Docket
Federal Election Commission
999 E Street, NW
Washington, DC 20463

RECEIVED
FEDERAL ELECTION
COMMISSION
OFFICE OF GENERAL
COUNSEL
2002 NOV 15 P 1:21

Re: Torricelli For U.S. Senate, Inc.: MUR 5316

Dear Mr. Norton:

This correspondence is provided to you in reply to a request for an investigation filed by the National Republican Senatorial Committee ("NRSC") which you communicated to Michael J. Perrucci, Treasurer, Torricelli for U.S. Senate, Inc. with your letter of October 15, 2002.

Please note that a request for an extension of time within which to reply to your communication was granted by your office and communicated by letter dated November 7, 2002, allowing for such extension through November 13, 2002. Please note that the undersigned represents Michael J. Perrucci, Treasurer, and Torricelli For U.S. Senate, Inc. the campaign committee of Senator Robert G. Torricelli, in connection with your inquiry. In addition, this communication is provided to you to demonstrate that no action should be taken against the Committee, the Candidate and its Treasurer in this matter for the reasons set forth below.

BACKGROUND

Robert G. Torricelli, United States Senator from New Jersey, chose to withdraw from the United States Senate race in New Jersey on September 30, 2002. Senator Torricelli publicly announced the withdrawal of his candidacy. He was duly replaced on the ballot by another candidate shortly thereafter. At the time of his withdrawal, Senator Torricelli made clear that he had no present intention of participating in the general election for United States Senate scheduled for November 5, 2002.

In the politically charged wake of Senator Torricelli's withdrawal, and predicated upon news reports regarding Senator Torricelli's intentions with regard to the disposition of funds then remaining in his candidate committee, the NRSC filed correspondence triggering this inquiry. For the reasons set forth below, there is absolutely no factual or legal merit to the allegations contained in the NRSC's submission and no reason to believe that a violation of the Act has occurred.

There Is No Factual Basis For Pursuing An Investigation of The Claims Asserted By The NRSC.

The NRSC's claims rely upon speculation and conjecture. Citing only news articles published proximate to Senator Torricelli's withdrawal, the NRSC speculates that Senator Torricelli's campaign committee intended to transfer its resources to the campaign fund of the candidate who replaced him on the ballot. The reality is that such a transfer has not come to pass. The Commission should only proceed upon a showing that there exists actual facts sufficient to warrant an inquiry.

Here, the NRSC's allegations are at best moot. The election is over and the transfer of funds as incorrectly forecasted to be made in news reports have simply not happened. Given that the transfer of campaign funds to the campaign fund of the successor candidate have not occurred, there is no basis for pursuing the matter further. There can be no rational reason to believe that a violation of the Act has occurred or is likely to occur. See, 2 U.S.C. 437 g(a)(2); 11 C.F.R. 111.9; 11 C.F.R. 111.10.

The NRSC Misreads and Misapplies Applicable Law

The central argument advanced by the NRSC for its request for an investigation is based upon an unfounded legal theory that has no support in statute or in our federal election laws. The NRSC essentially argues that upon Senator Torricelli's withdrawal from the ballot in the November general election, he was no longer a "candidate" within the meaning of 2 U.S.C. §439(a). As you are no doubt aware, 2 U.S.C. §439(a) vests in a candidate the right to transfer

excess campaign funds, after defraying any ordinary and necessary expenses, in any lawful manner. In relevant part, 2 U.S.C. §439(a) reads:

> Amounts received by candidate as contributions that are in excess of any amount necessary to defray his expenditures, and any other amounts contributed to an individual for the purpose of supporting his or her activities as a holder of federal office, may be used by such candidate or individual, as the case may be, to defray any ordinary and necessary expenses incurred in connection with his or her duties as a holder of federal office, may be contributed to any organization described in §170(c) of the Internal Revenue Code of 1954 [26 U.S.C. §170(c)], or may be used for any other lawful purpose, including transfers without limitation to any national, state, or local committee of any political party, except that no such amounts may be converted by any person to any personal use, other than to defray any ordinary and necessary expenses incurred in connection with his or her duties as a holder of federal office. (Emphasis supplied).

First, it is noteworthy that the statute itself draws a distinction between one who is a "candidate" from one who is an "individual for the purpose of supporting his or her activities as a holder of federal office." With his withdrawal as a "candidate", Senator Torricelli did not simultaneously withdraw as a federal office holder. It is a maxim of legislative interpretation that such distinctions must be given their separate meaning. A differentiation born of the literal words of the statute suggests strongly that there is a creature other than a candidate who is an "individual for the purpose of supporting his or her activities as a holder of federal office." Thus, the NRSC's contention that because Senator Torricelli withdrew as a candidate in the November 2002 general election, he no longer qualifies as a "candidate" within the meaning of 2 U.S.C. §439(a) vested with the rights contained therein, materially ignores the fact that one need not be a "candidate" to avail himself of the rights and obligations set forth in 2 U.S.C. §439(a).

Notwithstanding this distinction, it is clear that Senator Torricelli nonetheless qualifies as a "candidate" vested with the rights and responsibilities set forth in 2 U.S.C. §439(a) as a matter of law. Torricelli For U.S. Senate, Inc. functions as a candidate committee on behalf of a candidate pursuant to 2 U.S.C. §431(2). It does not lose its status, as the NRSC suggests, by virtue of Senator Torricelli's withdrawal from the race. This provision describes a "candidate" as an "individual who seeks nomination for election, or election, to federal office." In addition, 2 U.S.C. §431(2)(a) further describes a person who seeks nomination as a person who "has received contributions aggregating in excess of $5,000 or has made expenditures aggregating in excess of $5,000 or if the "individual has given his consent to another person to receive

contributions or make expenditures on behalf of such individual and if such person has received such contributions aggregating in excess of $5,000 or has made such expenditures aggregating in excess of $5,000." Senator Torricelli's candidacy, through his campaign committee, meets these criteria and there can be no dispute to that conclusion. Yet, the NRSC would have the FEC believe, in the context of this inquiry, that having withdrawn from the race, Senator Torricelli (and his campaign committee) was no longer a "candidate" subject to the rights and obligations set forth in 4 U.S.C. §439(a). This legal conclusion is without merit, without support and unprecedented for the proposition advanced by the NRSC.

The Commission has on previous occasions considered a decision by an incumbent United States Senator to no longer seek reelection (effectively withdrawing from a future candidacy) and the impact of such a decision on the disposition of funds remaining in the Senator's campaign fund. In Advisory Opinion 1996-9, the FEC clearly addresses the ability of a campaign committee to transfer excess campaign funds in the wake of the retirement of an incumbent United States Senator who chooses to no longer seek reelection. The FEC's advice in that circumstance is materially on point. The provoking event triggering the disposition of excess campaign funds, by way of a voluntary decision by an incumbent federal office holder to no longer pursue a federal candidacy, whether by retirement, withdrawal or for any other reason, proved not to be outcome determinative to the FEC's decision to apply 2 U.S.C. §439(a).

As noted above, 2 U.S.C. §439(a), in relevant part, provides that excess campaign funds may be used for any lawful purpose specifically identified therein. In the case of Senator Exon of Nebraska, who voluntarily chose to retire from the United States Senate and not pursue reelection, the Commission considered the disposition of excess campaign funds of the Re-elect Exon For U.S. Senate Committee and the application of 2 U.S.C. §439(a). There, Senator Exon chose to transfer excess campaign funds to the Nebraska Democratic Party with his retirement and decision not to be a candidate. The Commission advised that since its regulations provide that excess campaign funds may be used for any lawful purpose, including specifically transfers without limitations to any national, state or any local committee of any political party, such disposition was deemed appropriate. When asked by Senator Exon, the Commission acknowledged that 2 U.S.C. §439(a) applied to the disposition of his excess campaign funds upon his withdrawal of his future candidacy by retirement.

It is also noteworthy that the Commission issued its advice predicated upon a factual scenario comparable to that presented by the NRSC's inquiry. In the Exon matter, the Commission considered that Senator Exon's term was due to expire on January 3, 1997, a little less than a year after the date the Advisory Opinion request was requested. It also noted that Senator Exon had indicated that he was not running for reelection. Importantly, the Commission pointed out that "in light of Senator Exon's announced retirement, his campaign committee

planned to make an unlimited transfer of excess campaign funds to the Nebraska Democratic Party."

There is legally no difference between an announced retirement and an announced withdrawal of candidacy as it relates to the disposition of excess campaign funds. 2 U.S.C. §439(a) applies in either case. Although the provoking events in each circumstance may have occurred in different contexts, their consequences are nonetheless legally the same. Regardless of whether an incumbent United States Senator chooses to withdraw his continued candidacy by way of retirement or announced withdrawal from an election, the disposition of excess campaign funds in both cases is legally the same. In either case, the campaign committee continues to function on behalf of an individual who is no longer a candidate for federal office, but nonetheless, remains a "candidate" within the meaning of U.S.C §439(a) and the Commission's own interpretative rules. Accordingly, and for the reasons expressed in Advisory Opinion 1996-9, there can be little doubt that for purpose of the disposition of excess campaign funds, Senator Torricelli and his campaign committee are entitled to dispose of such funds in a manner consistent with 2 U.S.C. §439(a).

The NRSC Incorrectly Relies Upon FEC Regulations
Which Are Inapplicable To The Facts And Circumstances Here

The NRSC seeks to have the Commission interpret its own regulations in a manner inconsistent with their express language and purpose. The NRSC argues that 11 C.F.R. 110.1(b)(3)(i)(c), and 11 C.F.R. 102.9(e), prohibit the transfer of excess campaign funds by Torricelli for U.S. Senate, Inc. in the manner permitted by 2 U.S.C. §439(a). It is readily apparent that neither of these regulations can be read in a manner inconsistent with the express intent of the underlying enabling legislation as set forth in 2 U.S.C. §439(a).

First, the NRSC conveniently ignores the express purpose of 11 C.F.R. 110.1(b)(3)(i)(c), which was designed to address contributions designated in writing for a particular election, and which in fact were made after such election. In other words, to the extent that the cited regulation seeks to require the refund of contributions under that specific regulation, such refunds are limited to "a contribution designated in writing for a particular election, but made after that election." That is not the circumstance here. This regulation was not intended to restrict the disbursement of excess campaign funds which are occasioned by withdrawal of a candidacy, by retirement or otherwise, which are allowed for under 2 U.S.C. §439(a). Moreover, the cited regulation is irrelevant because the contributions forming the corpus of the Torricelli for U.S. Senate, Inc. were not made after a particular election (i.e., the general election) because at the time of the NRSC's inquiry, that election had yet to take place.

Equally obvious is that the NRSC misreads 11 C.F.R. 102.9(e) for the proposition that once a candidate is not a candidate in a general election, any contributions made for the general election need to be refunded to contributors, redesignated or reattributed in accordance with relevant regulations. The fact is that this regulation expressly refers to contributions made prior to the date of the primary election that are designated in writing by the contributor for use in connection with the general election. See 11 C.F.R. 102.9(e). The prefatory language contained in this regulation lays the foundation for its limited application. In relevant part, 11 C.F.R. 102.9(e) reads:

> If the candidate, or his or her authorized committee(s), receives contributions prior to the date of the primary election, which contributions are designated in writing by the contributor for use in connection with the general election, such candidate or such committee(s) shall use an acceptable accounting method to distinguish between contributions received for the primary election and contributions received for the general election.

The regulation then goes on to identify acceptable accounting methods for this purpose. After having done so, the regulation then recites that if a candidate is not a candidate in the general election, any contributions made for the general election shall be refunded, redesignated or reattributed as appropriate in accordance with the cited regulations. 11 C.F.R. 102.9(e) speaks only to candidates that are not candidates in a general election but limits its application to "a candidate or his or her authorized committee which receives contributions prior to the date of the primary election who designate contributions in writing for use in the general election." (emphasis supplied.) Like 11 C.F.R. 110.1(b)(3)(i)(c) this regulation has no application under these circumstances and should be ignored as a basis for the NRSC's allegations. It applies only to the return of such contributions received prior to the primary election properly earmarked for use in the general election. Were it to apply in the manner suggested by the NRSC, such an interpretation would effectively neuter the express authorization of 2 U.S.C. 439(a) to dispose of excess campaign funds in the manner permitted by the Act..

CONCLUSION

For the reasons set forth above, and particularly because there is no factual predicate for the NRSC's allegations which are simply moot (the election is over), the Commission should not pursue an investigation of this matter, nor pursue the initiation of a proceeding in connection therewith. There is no reason to believe a violation of the Act has occurred. Moreover, there is no cognizable legal support for the claims asserted by the NRSC. Legal precedent and statutory interpretation hold to the contrary.

If you require anything further in connection with your consideration of this inquiry, please do not hesitate to contact me.

Sincerely,

GENOVA, BURNS & VERNOIA

ANGELO J. GENOVA

AJG:mj

cc: Michael J. Perrucci, Esq., Treasurer
Torricelli For U.S. Senate, Inc. (Honorable Robert G. Torricelli)

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