



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

2016 SEP 29 PM 3:25

SENSITIVE

MEMORANDUM

TO: The Commission

FROM: Adav Noti ^{AN}
Associate General Counsel
Policy Division

Lorenzo Holloway ^{LH}
Assistant General Counsel
Compliance Advice

Danita Alberico ^{DA}
Attorney

SUBJECT: Request for Consideration of a Legal Question Submitted by David Vitter for U.S. Senate (LRA 1027)

**I. REQUEST FOR CONSIDERATION OF A LEGAL QUESTION:
MAY THE COMMITTEE RETAIN GENERAL ELECTION
CONTRIBUTIONS**

On August 17, 2016, the Commission received a Request for Consideration of a Legal Question ("Request") from counsel on behalf of David Vitter for U.S. Senate (the "Committee"), the principal campaign committee of Louisiana Senator David Vitter ("Candidate").¹ See Attachment.

The Request addresses a determination by the Reports Analysis Division, based on informal guidance provided by the Office of General Counsel, that the Committee must refund certain contributions designated for the general election that it accepted and spent before the date of the primary election. The Candidate filed a Statement of Candidacy on June 9, 2011 seeking reelection to the U.S. Senate during the 2010-16 election cycle. On November 21, 2015, however, the Candidate announced that he would no longer seek reelection to the U.S. Senate in 2016.

¹ At least two Commissioners agreed to consider this Request pursuant to the Policy Statement Regarding a Program for Requesting Consideration of Legal Questions by the Commission. 81 Fed. Reg. 29861 (May 13, 2016).

The Committee received \$319,650 in contributions designated for the 2016 general election prior to the primary election.² The Committee did not refund these general election contributions. Instead, the Committee contends that it properly spent the funds on allowable expenses and that it is not required to refund the general election contributions because Senator Vitter was a candidate in the 2016 general election at the time the funds were expended.

We considered the Committee's arguments and the law that governs this area, and we recommend that the Commission conclude that the Committee is required to refund all general election contributions that it received, including those it spent on general election expenses.

II. THE COMMITTEE MUST REFUND ALL GENERAL ELECTION CONTRIBUTIONS BECAUSE THE CANDIDATE DID NOT PARTICIPATE IN THE GENERAL ELECTION

Under the Federal Election Campaign Act of 1971, as amended (the "Act"), and Commission regulations implementing the Act, no person may make contributions to candidates and their authorized political committees with respect to any election that, in the aggregate, exceed certain limits. *See* 52 U.S.C. § 30116(a)(1)(A); 11 C.F.R. § 110.1(b)(1). A primary election and a general election are each considered a separate "election" for the purpose of applying these limits. *See* 52 U.S.C. § 30101(1)(A); 11 C.F.R. §§ 100.2, 110.1(j)(1).

Pursuant to section 102.9(e), candidates and their authorized committees may accept contributions designated for the general election before the date of the primary election. 11 C.F.R. § 102.9(e)(1). If a committee or its candidate does so, it must use an acceptable accounting method to distinguish the primary election contributions from the general election contributions. *Id.* Regardless of the accounting method used, the committee's records must show that at all times before the primary election, the committee's recorded cash on hand equaled or exceeded the difference between the total amount of general election contributions received and the total amount of general election disbursements made. 11 C.F.R. § 102.9(e)(2).

If a candidate does not participate in the general election, his committee must refund all contributions designated for the general election for which it was unable to obtain written redesignations within 60 days after the withdrawal. 11 C.F.R. § 102.9(e)(3); Advisory Opinion 2015-16 (Niger Innis for Congress); Advisory Opinion 2008-04 (Dodd for President). If, however, a candidate campaigns as a general election candidate and incurs expenses but withdraws prior to the date of the general election, then the candidate may retain general election contributions made before his withdrawal. Advisory Opinion 1994-31 (Gallo).

Section 102.9(e) applies slightly differently here than in most congressional elections because Louisiana uses an election system that defines primary and general elections differently from how those terms are generally used in Commission rules and Federal law governing elections for Federal offices. Louisiana uses an "open primary" election system. Under this

² The Committee also received contributions totaling \$1,800 for the 2016 runoff election but refunded these contributions within 60 days of the Candidate's announcement that he was not seeking reelection.

open primary system, any qualified elector may qualify as a candidate, regardless of party, and run for office. La. Rev. Stat. Ann. §18:461 (2015). All eligible voters may cast a vote in an election. La. Rev. Stat. Ann. §18:401. The candidate obtaining the majority vote wins the election contest. La. Rev. Stat. Ann. §18:511. Although this election, which includes Congressional candidates, is held on the same day in November when all other states hold their general elections, Louisiana law identifies the election held on that day as its primary election. La. Rev. Stat. Ann. §18:402. If a single candidate does not receive a majority vote during Louisiana's primary election, then the top two candidates participate in a run-off election held in December of the same election year. *Id.*; see La. Rev. Stat. Ann. §18:511. Louisiana identifies the December run-off election as its general election. La. Rev. Stat. Ann. §18:481.

To address this election system, the Commission treats Louisiana's open primary election as the general election for purposes of Federal campaign finance law. Advisory Opinion 2000-29 (Louisiana Congressional Delegation). The Commission considers the primary election date to be the last day to file with the Louisiana Secretary of State to gain ballot access for the general election. *Id.*

Senator Vitter was not a candidate in the general election because he withdrew from the U.S. Senate race prior to the date the Commission considers as the primary election date for Louisiana's Congressional candidates. Advisory Opinion 2008-04 (Dodd for President). Senator Vitter withdrew from the Senate race in November 2015 (when he lost the Louisiana gubernatorial election), eight months before the primary election for the U.S. Senate, which was July 22, 2016. At no point after November 2015 did Senator Vitter reinstate or reactivate his U.S. Senate candidacy, and he did not qualify for the 2016 general election ballot. To the contrary, the Committee had donated 89% of its funds (including its general election funds) to a state political committee supporting Senator Vitter's gubernatorial campaign in November and December 2014 and 50% of its remaining funds to the same state political committee in July 2015. 2014 Year End Report, 2015 October Quarterly Report. The Committee received no contributions in 2016. 2016 April Quarterly Report, 2016 July Quarterly Report. Given these facts, we conclude that Senator Vitter did not participate in the 2016 general election.

The Commission has made clear that the requirement to refund, redesignate, or reattribute general election contributions when a candidate does not participate in the general election applies even where the committee has expended the general election contributions for advance payments for the general election. Since 1986, the Commission has allowed candidates and their authorized committees to use general election contributions accepted before the date of the primary election "exclusively for the purpose of influencing the prospective general election in those limited circumstances where it is necessary to make advance payments or deposits to vendors for services that will be rendered, or goods that will be provided, to [the] committee after [the candidate has] established [his or her] candidacy with respect to the general election." Advisory Opinion 1986-17 (Green). However, in so permitting, the Commission emphasized the following:

[T]he Commission concludes that if you do not establish your candidacy with respect to the general election, your committee must refund within a reasonable time contributions designated for

the general election, *whether or not your committee has made any expenditure from these contributions, since a separate contribution limitation will not be available to these contributors with respect to the general election. See 11 C.F.R. § 103.3(b); Advisory Opinion 1986-12.*³

Id. (emphasis added).

Thus, while candidates may choose to spend some or all of the general election contributions they collect before the primary election takes place, they do so at the risk that if they do not participate in the general election, they will be required to refund the general election contributions.⁴ Here, Senator Vitter withdrew his candidacy during the primary election period. Therefore, he is not entitled to retain contributions under the general election contribution limit.⁵ See 11 C.F.R. § 102.9(e)(3), 11 C.F.R. § 110.1(b) and 110.2(b); Advisory Opinions 2015-16 (Niger Innis for Congress), 2009-15 (Bill White for Congress), 2008-04 (Dodd for President), 1992-15 (Russo), and 2003-18 (Smith).⁶

III. RECOMMENDATION

For the reasons noted above, we recommend that the Commission conclude that the Committee is required to refund all general election contributions it accepted.

Attachment – Request for Legal Consideration from David Vitter for U.S. Senate, dated August 17, 2016

³ Advisory Opinion 1986-12 (Ferraro) also concluded that contributions to a candidate with respect to an election in which she does not participate as a candidate must be refunded to the contributors.

⁴ The Commission has similarly determined in matters involving special elections that a candidate who had both accepted and spent contributions designated for an anticipated special election that was not ultimately called was required to refund, redesignate or reattribute all such contributions. See Advisory Opinion 2009-15 (Bill White for Texas): *Certification In the Matter of Request for Commission Consideration of a Legal Question by the Michael Williams for U.S. Senate Committee* (LRA # 872) (April 12, 2012); *Certification In the Matter of Request for Commission Guidance on the Michael Williams for U.S. Senate Committee* (LRA # 872) (Feb. 7, 2012); see also Office of General Counsel Memorandum to Commission on Request for Commission Consideration of a Legal Question by the Michael Williams for U.S. Senate Committee (LRA # 872), at 5 (Mar. 19, 2012) (discussing Advisory Opinion 2009-15 (Bill White for Texas)).

⁵ The Committee could have redesignated the contributions in accordance with 11 C.F.R. § 110.1(b)(5), or reattributed them in accordance with 11 C.F.R. § 110.1(k)(3), as appropriate, if it had done so within the permissible time frame. 11 C.F.R. § 102.9(e)(3); 11 C.F.R. § 110.1(b)(3).

⁶ The Request asserts that committees in Louisiana might have difficulty segregating primary and general election contributions due to the uniqueness of Louisiana's election system. However, as the authorities cited above demonstrate, the Commission has repeatedly explained how the Act and Commission regulations — including the accounting requirements of 11 C.F.R. § 102.9(e), see Advisory Opinion 2009-29 (Louisiana Congressional Delegation) — apply to Louisiana candidates.

CLARK HILL

Charles R. Spies
T 202.572.8663
F 202.572.8683
Email: cspies@clarkhill.com

Clark Hill PLC
601 Pennsylvania Avenue NW
North Building, Suite 1000
Washington, DC 20004
T 202.772.0909
F 202.772.0919

clarkhill.com

August 17, 2016

VIA E-MAIL: LEGALREQUESTPROGRAM@FEC.GOV

Chairman Matthew S. Petersen; Vice Chair Steve T. Walther; and Commissioners Ellen L. Weintraub, Caroline C. Hunter, Lee E. Goodman, and Ann M. Ravel
Federal Election Commission
c/o Ms. Shawn Woodhead Werth, Secretary
999 E Street, NW
Washington, DC 20463

RE: Request for Consideration of Legal Question by the Commission

Dear Commissioners:

We represent David Vitter for U.S. Senate (the "Committee"). On behalf of the Committee, we request Commission consideration of a determination by the Reports Analysis Division ("RAD") that the Committee return contributions it received for the 2016 general election.

I. Factual Background

Through filings with the Commission and other statements and documents, Senator Vitter announced several years ago his candidacy for reelection to the U.S. Senate in 2016. Consistent with the Federal Election Campaign Act of 1971, as amended (the "Act") and Commission regulations, the Committee solicited and received contributions from individuals and political committees designated for the 2016 primary, general, and runoff elections.

Then, in 2014, Senator Vitter announced his candidacy for Governor of Louisiana, a Louisiana state election in the fall of 2015. At no time prior to or while running for governor did Senator Vitter announce that he would not run for the U.S. Senate in 2016 should he not be elected governor.

In 2014, while Senator Vitter was still a candidate for the U.S. Senate, the Committee properly and legally contributed \$823,000 to the Fund for Louisiana's Future, a political committee established to independently support Senator Vitter in all of his political endeavors, including his gubernatorial campaign.

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On November 21, 2015, Senator Vitter was defeated in his bid for governor. At that point and for the first time, he announced that he would no longer seek reelection to the U.S. Senate in 2016.

On April 12, 2016, the Committee received a Request for Additional Information (“RFAI”) from RAD stating: “Since the candidate is not seeking office and will not participate in the general and runoff elections, any contribution received for the general and runoff elections must be returned to the donors, in accordance with 11 CFR §110.1(b)(3).”

On May 17, 2016, the Committee filed a response notifying RAD that all contributions for the runoff election, which all along had been properly segregated pursuant to the Commission’s guidelines, were refunded once Senator Vitter announced that he would not run for reelection. However, the Committee disagreed with RAD’s position regarding the general election funds because those funds had been spent on fully legal and allowable expenses while Senator Vitter was a candidate for the 2016 U.S. Senate election. Unlike runoff funds, the Commission has never directed or suggested in any way that general election funds must be segregated and only spent after a particular date.

On July 27, 2016, RAD notified the Committee by telephone that the Office of General Counsel (“OGC”) supported RAD’s determination that the Committee was required to refund contributions designated for the 2016 general election. Due to the unique nature of Louisiana’s election laws and the fact that RAD is pursuing a “segregation of general election funds” position for the first time ever regarding Louisiana elections, the Committee brings this request pursuant to the Program for Requesting Consideration of Legal Questions by the Commission.¹

II. Legal Analysis

Under Louisiana law, “[p]rimary and general elections are held to elect persons to Congress and to all the elective offices in this state, except the office of presidential elector.”² For congressional races, the primary election is “held on the first Tuesday after the first Monday in November of an election year,” and the general election is “held on the fifth Saturday after the first Tuesday after the first Monday in November of an election year.”³ A candidate who receives a majority of the vote in the primary election wins the election and no general election is held for that office.⁴ If no candidate receives a majority of the vote, the two candidates who received the highest number of votes will proceed to the general election.⁵ In other words, the November general election is, under Louisiana law, the primary election. If no candidate receives more

¹ See Fed. Election Comm’n. Policy Statement Regarding a Program for Requesting Consideration of Legal Questions by the Commission. 78 Fed. Reg. 63203 (Oct. 23, 2013).

² R.S. § 18:401.1.

³ R.S. § 18:402.

⁴ R.S. § 18:511.

⁵ R.S. § 18:481.

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than 50% of the vote, the top two candidates, regardless of party, run in a general election or "runoff" election in December.

Unlike Louisiana law, the Commission has consistently stated that the November general election date "is the date of the general election for Federal offices in Louisiana as it is in the 49 States of the United States."⁶ Thus, while Louisiana law describes the November election as a "primary" election, the Commission has concluded that the November election is, in fact, the general election, and the potential December election is a runoff. Based on this interpretation, the Commission has concluded that there is "a general election contribution limit" for candidates who participate in the November election, and an additional contribution limit for those candidates who participate in a runoff election.⁷

As part of this unique construct, the Commission designated a fictional primary election date whereby congressional candidates would treat the last day to file for the general election ballot as the date of the primary election.⁸ Thus, Louisiana congressional candidates could raise separate amounts for a fictional primary election, for the general election held in November, and for a runoff election in December if necessary.

In creating this fictional primary election, the Commission has never stated that primary and general election funds must be segregated, or that general election funds can only be expended after a certain date. This is in stark contrast to the Commission's long-standing position that runoff contributions must be segregated and can only be spent after the general election if a runoff is necessary.

As a practical matter, Louisiana campaigns do not have primary expenses, beyond the qualifying fee.⁹ Rather, all expenses incurred by Louisiana campaigns are general election expenses, regardless of whether they are incurred before or after the filing deadline.¹⁰ Because all candidates appear on the general election ballot in November, the campaign committees for those candidates invariably spend general election funds prior to the designated primary election day because the expenses that are incurred are almost exclusively for the general election. Thus, in practice, Louisiana campaigns do not segregate primary and general contributions.

⁶ See FEC AO 2000-29 at 2. See also FEC AO 1978-79 and 1984-54. This interpretation was affirmed by the United States Supreme Court in *Foster v. Love*, 522 U.S. 67 (1997).

⁷ See FEC AO 2000-29.

⁸ *Id.* at 5. See 11 C.F.R. §100.2(c)(4).

⁹ By way of comparison, even candidates who run unopposed in a traditional primary election incur primary expenses, such as fundraising expenses to deter potential primary opponents, voter registration, and voter identification in connection with the primary. Moreover, failure to qualify for the general election ballot is immaterial because the moment a Louisiana candidate announces they are running for federal office all efforts thereafter are in connection with the November general election.

¹⁰ For example, a Louisiana campaign will retain consultants and staff specifically for the November general election, which is the only certain election, from the first day of the campaign. There may be provisions or contingencies if the candidate proceeds to a runoff, but there is no primary election so all expenses from the first day of the campaign are for the November general election.

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Contributions to the runoff election are treated quite differently. Pursuant to clear Commission guidance, runoff contributions are segregated. They can only be legally spent after the general election, and they must be refunded if a runoff is not required or if a candidate does not participate in the runoff. As noted above, Senator Vitter complied with this requirement.

We respectfully request that the Commission consider the unique circumstances candidates and campaigns in Louisiana encounter. As soon as an individual becomes a candidate in Louisiana, he or she is a candidate for the November general election, and should be permitted to spend general election funds at the outset of the campaign.

This has been the consistent practice in Louisiana. The Commission has never stated or suggested in any way that general election funds must be segregated and cannot be legally spent until after a certain date. Therefore, we request that the Commission instruct RAD that the Committee is not required refund contributions designated for the 2016 general election.

Should the Commission hold otherwise, this will have major implications for all Louisiana federal campaigns. It will mean that the great majority of these campaigns are out of compliance since they do not segregate general election funds or ensure that they are only spent after a certain date.

Respectfully submitted,



Charles R. Spies
Elizabeth Beacham White