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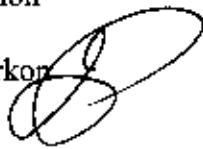
AGENDA ITEM


November 21, 2001


For Meeting of: 11-29-01

MEMORANDUM

TO: The Commission

THROUGH: James A. Pehrkon 
Staff Director

FROM: Lawrence H. Norton 
General Counsel

N. Bradley Litchfield 
Associate General Counsel

SUBJECT: Revised Draft Advisory Opinion 2001-16

Attached is the revised draft of the subject opinion for the Commission's approval on the November 29 agenda.

This draft anticipates Commission approval of a final Policy Statement that declares the Commission's intention as to the exercise of its enforcement discretion for certain allocation-related transfers by party committees. The Policy Statement document is separately circulated, also for the November 29 agenda.

The revisions in the attached draft are made to Agenda Document No. 01-55 which was considered at the Commission meeting of November 1, 2001. The revisions are on pages 4 and 5, and are denoted by using a **bold font**.

Attachment

1 ADVISORY OPINION 2001-16

2
3 Joseph E. Sandler
4 Sandler, Reiff & Young, P.C.
5 50 E Street S.E.
6 Suite 300
7 Washington, DC 20003

DRAFT

8
9 Dear Mr. Sandler:

10 This responds to your letter dated September 28, 2001, as supplemented by your
11 letters dated October 25 and 23, on behalf of the Democratic National Committee
12 ("DNC"), concerning the application of the Federal Election Campaign Act of 1971, as
13 amended ("the Act"), and Commission regulations to the DNC's proposed schedule for
14 making allocation transfers from its non-federal accounts to its Federal accounts on dates
15 that would exceed the 60 day period prescribed in Commission regulations.

16 The request explains that the DNC transfer proposal stems from the national
17 emergency that ensued after the tragic events of September 11. The national emergency
18 "made it appropriate for the DNC to suspend its fundraising events and mail
19 solicitations" after that date. Transfers from non-federal DNC accounts to its Federal
20 accounts would cover the allocable expenses of various activities conducted by the DNC
21 for both Federal and non-federal election purposes that are subject to allocation between
22 its Federal and non-federal accounts. See Commission regulations at 11 CFR 106.5(a),
23 106.5(b), 106.5(f), and 106.5(g). Among other requirements, these regulations prescribe
24 a 60 day period, beginning once an allocable expenditure is made, during which transfers
25 related to the non-federal portion of each designated (and allocable) expenditure must be
26 made. 11 CFR 106.5(g)(2)(ii)(B).¹ Your request indicates that the proposed delay in
27 DNC transfers would occur during a period that started on or about August 27, 2001, and
28 would end on April 30, 2002.

29 The request further describes the circumstances underlying the proposed time
30 periods for future DNC transfers from its non-federal to its Federal accounts:

¹ The cited allocation regulations also provide that, for certain expenditures, an advance transfer is permitted 10 days prior to the actual expenditure if a reasonable estimate of the final cost can be made. 11 CFR 106.5(g)(2)(i). In addition, special time schedules and procedures are prescribed for transfers resulting from adjustments in the "direct costs of fundraising" that qualify for allocation. 11 CFR 106.5(a)(2)(ii), 106.5(f)(2). The application of these provisions is not fully discussed in this opinion.

1 In the aftermath of the events of September 11, the DNC immediately
2 suspended significant aspects of its fundraising operations. This action was taken
3 out of respect for the victims of this enormous tragedy and to ensure that no
4 element of partisanship be permitted to undermine or detract from the strong
5 unified bipartisan support for President Bush in his leadership of the nation's
6 response to this unprecedented challenge.

7 While it is possible that fundraising activities may be resumed on a limited
8 basis in the coming weeks, in view of the elections still scheduled for 2001 and
9 other factors, it is impossible to determine in the present circumstances which
10 activities will be deemed appropriate if any. In any event, any such activities
11 would necessarily be greatly reduced in scale and frequency in view of the need
12 for the attention and energies of all elected officials and political leaders to be
13 focused on the tasks and challenges at hand.²

14 In these circumstances, it will likely continue to prove extremely difficult for
15 the DNC to raise funds of all kinds, in particular, non-federal funds, for the
16 foreseeable future.

17
18 The request also asserts that the "current situation is truly one in which sufficient
19 amounts of non-federal monies are not being received by the DNC in time to make
20 allocation transfers because of circumstances outside the control of the committee or its
21 agents." [Internal quotation marks omitted.]

22 Given the circumstances described, the DNC requests permission from the
23 Commission to extend the 60 day window cited in 11 CFR 106.5(g)(2)(ii)(B) to one
24 hundred twenty (120) days, for allocable expenditures made from August 27, 2001,
25 through and including December 31, 2001. The effect of such an extension would be that
26 transfers designated for allocable expenditures within this period could be made presently
27 and continue, subject to a rolling 120 day window, until no later than April 30, 2002.

28 In support of the request, you cite past Commission advisory opinions and the
29 underlying purposes of the applicable allocation regulations:

30 There is truly no precedent for the current situation, in any respect. As a
31 legal matter, however, the Commission has recognized that it has authority to
32 exempt a party committee from strict application of the allocation window when a
33 transfer could not be accomplished within the window due to circumstances
34 beyond the committee's control. For example, in Advisory Opinion 2001-11, the
35 Commission permitted a state party committee to make a transfer from its non-
36 federal account more than 60 days after the allocable expenditures were made,

² Quoting a named DNC official, it was reported in *The Washington Times* of October 2, 2001, that the DNC had resumed some fundraising, with an event scheduled for October 1, and other events planned in the days and weeks ahead. In addition, *The New York Times* of October 11 reported that, during the first week of October, the DNC distributed its first mailed solicitation since September 11.

1 when the committee's bank failed to effectuate a requested wire transfer. The
2 Commission noted that, "In a number of advisory opinions, the Commission has
3 addressed situations where contribution monies were not received by a political
4 committee, or deposited by it in a timely manner . . . because of circumstances
5 outside the control of the committee or its agents." *Id.*, slip op. at 3, citing
6 Advisory Opinions 1999-23, 1993-5 and 1992-42.

7 * * * *

8 Temporarily extending the allocation window would in no way undermine
9 the fundamental purposes of the allocation regulations with respect to limiting the
10 amount of non-federal funds that a party committee may expend for mixed federal
11 and non-federal activities. Such an extension would in no way decrease the
12 amount of federal funds that the DNC would be required to use for such allocable
13 expenses. In establishing the allocation "window," the Commission's purpose
14 was solely to "allow the Commission to track the flow of non-federal funds into
15 federal accounts, and to ensure that the use of such funds is strictly limited to
16 payment for the non-federal share of allocable activities." Explanation and
17 Justification of Regulations on Methods of Allocation Between Federal and Non-
18 Federal Accounts; Payments; Reporting, 55 Fed. Reg. 26058, 26066 (June 26,
19 1990). To ensure that this purpose is fully achieved under an extended allocation
20 window, the DNC would be willing to submit any additional information or
21 documentation in connection with its disclosure reports, that the Commission may
22 deem necessary or desirable in order to monitor compliance with the allocation
23 regulations with regard to transfers from the DNC's non-federal to federal
24 accounts for allocable disbursements.

25
26 You have summarized, and cite as persuasive precedent, one very recent advisory
27 opinion (Advisory Opinion 2001-11) where the Commission permitted a party committee
28 to make allocation-based transfers after the 60 day window prescribed in its regulations.
29 That opinion is distinguishable from the situation you present. First, the State party
30 committee in the prior opinion had received funds into its non-federal account and
31 attempted to make one allocation-based transfer for designated allocable expenditures to
32 its Federal account. The bank account transfer was timely requested by a party official,
33 and the party had sufficient available funds in its non-federal account to cover the
34 transfer. For some reason, the bank did not make the party's requested transfer, even
35 though, in the ordinary and usual course of its relationship with the party, the bank would
36 have normally complied with the account transfer requests of the party committee
37 official.

38 In the situation you present, however, the DNC seeks an extension of the transfer
39 time frame, mandated in 11 CFR 106.5(g)(2)(ii)(B), for an indefinite number of

1 allocation-based transactions made over a period that exceeds four months in duration.
2 The DNC's argument that it is unable to allocate expenditures is premised on the
3 following: (1) prior to September 11, the DNC was depending on fundraising activities to
4 generate sufficient non-federal funds to make allocation transfers; (2) in the aftermath of
5 the September 11 events, the DNC determined that political fundraising would not be
6 appropriate and immediately suspended "significant aspects" of its fundraising activities;
7 (3) the DNC anticipates that future fundraising will be "greatly reduced" as elected
8 officials devote attention to the current situation.

9 Conceding for purposes of this request that the events of September 11 compelled
10 the decision to suspend "significant aspects" of fundraising, and thus like the party
11 committee in Advisory Opinion 2001-11, the DNC was faced with a circumstance
12 outside of its control, the DNC has not made a detailed showing demonstrating that its
13 inability to make allocation transfers in the period prescribed by the Commission's
14 regulations results entirely (or almost entirely) from its decision to suspend fundraising,
15 and not, at least in part, from other circumstances that existed, or spending decisions that
16 occurred, before and after September 11. For these reasons, your request presents a
17 materially distinguishable situation from that addressed in Advisory Opinion 2001-11. 2
18 U.S.C. §437f(c) [Any person may rely on an advisory opinion issued to another if the
19 specific transaction or activity of the relying person is "indistinguishable in all its
20 material aspects" from the activity described in the issued opinion.]³ **Accordingly, the
21 Commission is not persuaded that the cited regulations, which prescribe time limits
22 for allocation-based transfers, may be applied in these circumstances to reach the
23 outcome advocated by the DNC.**

24 The DNC request also invites the Commission to use this opinion as a means of
25 granting the same relief it seeks (a temporary extension of the allocation transfer period
26 from 60 days to 120 days) to all national, state and local party committees that are subject
27 to the allocation regulations. Commission regulations governing the advisory opinion
28 process provide that an inquiry seeking an opinion does not qualify as an advisory

³ See, *Federal Election Commission v. National Rifle Ass'n*, 254 F.3d 173, 184, 185 (D.C. Cir. 2001) [Advisory opinions are entitled to judicial deference, reflect the Commission's "considered judgment...[with] binding legal effect," and can be relied upon by others involved in any materially indistinguishable transaction.]

1 opinion request, pursuant to the Act, if it presents "a general question of interpretation, or
2 . . . [poses] a hypothetical situation, or [describes]... the activities of third parties." 11
3 CFR 112.1(b). To the extent the DNC request invites the Commission to address the
4 activities of other party committees, or presents hypothetical situations or general
5 questions of interpretation, it does not qualify as an advisory opinion request.

6 **Notwithstanding the conclusion of this opinion and the described constraints**
7 **of the advisory opinion process, the Commission has discretion to consider other**
8 **means of granting some temporary and circumscribed relief that is similar to that**
9 **proposed in the DNC request. See 2 U.S.C. §437c(b)(1) [Commission has duty to**
10 **administer, seek to obtain compliance with, and formulate policy with respect to,**
11 **the Act]. As a result of this advisory opinion request and given the extraordinary,**
12 **unprecedented circumstances presented, the Commission has considered and**
13 **approved a Statement of Policy that declares its intentions with respect to the**
14 **exercise of its enforcement authority regarding compliance with the transfer time**
15 **periods in the cited allocation regulations. See, *Request for Comment on Draft***
16 ***Statement of Policy Regarding Party Committee Transfers of Nonfederal Funds for***
17 ***Payment of Allocable Expenses*, 66 *Fed. Reg.* 56247 (November 7, 2001). According**
18 **to its terms, the Statement of Policy will apply to the DNC and to other political**
19 **party organizations that are subject to the Commission's allocation regulations.**
20 **The final Statement of Policy issued by the Commission will be published in the**
21 ***Federal Register* at an early date.**

22 This response constitutes an advisory opinion concerning the application of the
23 Act, or regulations prescribed by the Commission, to the specific transaction or activity
24 set forth in your request. See 2 U.S.C. §437f.

25 Sincerely,

26
27 Danny L. McDonald
28 Chairman
29

30 Enclosure (AO's 2001-11)