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
AGENDA ITEM
For Meeting of: 12-13-01

December 6, 2001

MEMORANDUM

TO: The Commission

THROUGH: James A. Pehrkon
Staff Director 

FROM: Lawrence H. Norton
General Counsel 
N. Bradley Litchfield
Associate General Counsel 
Jonathan M. Levin
Senior Attorney 

Subject: Draft AO 2001-17

Attached is a proposed draft of the subject advisory opinion. We request that this draft be placed on the agenda for December 13, 2001.

Attachment

1 ADVISORY OPINION 2001-17

DRAFT

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

8
9 Dear Mr. Reiff:

10 This responds to your letter dated October 29, 2001, as supplemented by
11 documents submitted on November 6, 2001, on behalf of the DNC Services
12 Corporation/Democratic National Committee (the "DNC"), concerning the application of
13 the Federal Election Campaign Act of 1971, as amended ("the Act"), and Commission
14 regulations to the reporting of contributions received by the DNC that are deposited in
15 Federal and non-Federal accounts.

16 By way of background, this opinion is requested in accordance with a conciliation
17 agreement entered into by the DNC and the Commission in connection with an
18 enforcement case, MUR 4961. This case involved the Commission's investigation into
19 the DNC's practice of splitting single check contributions between the Federal and non-
20 Federal accounts, and apportioning the excessive portion to the non-Federal account.
21 Although such a split is permissible under certain circumstances, the DNC requires
22 specific guidance as to the appropriate method of disclosing the receipt of such
23 contributions on reports filed with the Commission. Therefore, the DNC requests this
24 advisory opinion to ascertain the appropriate method of disclosing the receipt of
25 contributions that it proposes to split, pursuant to donors' directions, between its Federal
26 and non-Federal accounts.¹

27 You state that the DNC handles contributions that are split between Federal and
28 non-Federal accounts in the following manner:

29 (1) The DNC provides all disclaimer language necessary to comply with the
30 requirements of 11 CFR 102.5(a)(2) at the time of solicitation.² On its donor cards, the

¹ Specifically, the conciliation agreement states: "In connection with the Committee's contention that the requirements are not clear regarding the reporting of single-check contributions split between the federal and non-federal accounts, the Committee may request from the Commission an Advisory Opinion regarding the reporting of such single-check contributions received in the future." Section IV.15.

² See discussion of 11 CFR 102.5(a)(2) below in the "Analysis" section.

1 DNC asks donors to apportion, in writing, their contributions to either the Federal or non-
2 Federal account. All donor cards will be required to be signed by the contributor. The
3 donor card included with the request supplement and provided as an example solicits
4 contributions for both the Federal and non-Federal accounts specifically. (Donor card is
5 attached.) It informs individuals and Federal PACs that their contributions will be used
6 in connection with Federal elections and will be subject to the limits and prohibitions of
7 the Act; instructs those persons to make their contributions payable to the "DNC Federal
8 Account" or to designate the "Federal Account below" in order to allow for deposit in the
9 Federal account; advises "other contributors" that their contributions will be used for
10 State and local elections and asks them to make their checks payable to the "DNC—Non-
11 Federal Account"; informs individuals of the \$20,000 annual limit on contributions to the
12 DNC and the \$25,000 annual contribution limit for contributions to all Federal campaigns
13 and accounts;³ informs individuals that any portion in excess of the \$20,000 limit will be
14 "allocated" to a non-Federal account; asks the contributor to designate, on the donor card,
15 either the entire contribution or "the first \$20,000 (or other \$___)" of it for the Federal
16 account, or to designate the full amount for the non-Federal account; and asks for the
17 contributor's signature.⁴

18 (2) To the extent that a contribution, whether on its face, or when aggregated with
19 prior contributions from the same donor, exceeds the Federal limit, the DNC seeks the
20 donor's permission to split the contribution between its Federal and non-Federal accounts
21 if the donor has not provided clear instructions as to how their contribution should be
22 apportioned.⁵ Such permission may be granted directly on the donor card (see above) or
23 in response to a written follow-up request to the donor.

24 (3) When donor permission is sought by follow-up request, the DNC notifies the
25 donor that he or she may request a refund of the excessive portion of the contribution in
26 lieu of reapportionment to the DNC's non-Federal account.

³ The Act and regulations provide that the political committees established by a national party may receive no more than \$20,000 in any calendar year from a person other than a multicandidate committee and no more than \$15,000 per calendar year from a multicandidate committee. 2 U.S.C. §441a(a)(1)(B) and (2)(B); 11 CFR 110.1(c)(1) and 110.2(c)(1).

⁴ In addition, the donor card asks for information about the contributor to help insure against the receipt of foreign national contributions.

⁵ If a donor's contribution clearly indicated that it is intended to be a non-Federal contribution, the DNC will deposit the contribution directly into a non-Federal account.

1 (4) Upon receipt of a contribution which the DNC proposes to split between
2 Federal and non-Federal accounts, the DNC immediately transfers the excessive portion
3 to a non-Federal account. This process is ordinarily accomplished within one to two
4 business days after deposit of the contribution into the DNC's Federal account.

5 (5) In the event that the DNC does not receive written donor permission to split
6 the contribution between its Federal account and non-Federal account within sixty days
7 after receipt of the contribution, or does not receive a donor request for a refund of the
8 contribution, the DNC transfers the portion of the contribution that was retained in its
9 Federal account to a non-Federal account at the expiration of the sixty-day period.

10 As indicated above, you ask the Commission to advise the DNC as to the
11 reporting procedures for the receipt of contributions that it proposes to split between the
12 Federal and non-Federal accounts. Using the example of a \$50,000 contribution from an
13 individual, where \$20,000 is retained in the Federal account and \$30,000 is transferred to
14 the non-Federal account, you propose that the DNC disclose a \$20,000 contribution to its
15 Federal account and a \$30,000 donation to its non-Federal account. You also suggest that
16 the DNC could file a memo schedule document that describes the contributions that were
17 split during a particular reporting period and provide a listing of the transfers of the
18 excessive portions of such contributions. In addressing your request, the Commission
19 assumes that the donor card provided as an example will be part of the solicitation used
20 for each of the contributions at issue. The Commission also assumes that the contribution
21 will be accompanied by the donor card, whether completed or not, thus indicating that the
22 contribution was in response to a solicitation containing the donor card. The Commission
23 premises its conclusions on these assumptions.⁶

24 *Analysis*

25 *Retention of Split Contributions*

26 Before providing guidance as to the correct reporting of the contributions
27 described above, the Commission should address the issue of how and when such
28 contributions may be retained by the DNC. According to your description, the DNC will

⁶ If there are other situations and circumstances where the DNC receives combined Federal and non-Federal contributions, they may be presented in another advisory opinion request. This opinion does not foreclose other possible DNC procedures that may comply with the Act and Commission regulations. The

1 seek written permission from the contributor to split contributions that have exceeded the
2 \$20,000 annual limit by a follow-up request, if permission was not granted on a donor
3 card. You state that upon its receipt of the contribution, the DNC immediately (within
4 one to two business days after deposit into the Federal account) transfers the excess to the
5 non-Federal account, and, if no written permission is granted within 60 days of the
6 receipt of the contribution, or the contributor does not request a refund, the excess
7 amount is still retained in the non-Federal account but the amount within the section
8 441a(a)(1) limit is also transferred to the non-Federal account. Your proposal is derived,
9 in part, from Commission regulations that address a political committee's receipt and
10 deposit of contributions, including excessive contributions, in 11 CFR 103.2 and 103.3.

11 All receipts by a political committee must be deposited in its depository account
12 within 10 days of the treasurer's receipt, except that any contribution may be returned to
13 the contributor, without being deposited, within that 10 day period. 11 CFR 103.3(a); *see*
14 *also* 2 U.S.C. §432(h), 11 CFR 103.2. The treasurer is responsible for examining all
15 contributions received for evidence of illegality and for ascertaining whether
16 contributions received, when aggregated with other contributions from the same
17 contributor, exceed the contribution limits at 11 CFR 110.1 and 110.2. 11 CFR 103.3(b).

18 The treatment to be accorded excessive contributions is as follows:
19

20 (3) Contributions which on their face exceed the contribution limitations
21 set forth in 11 CFR 110.1 or 110.2, and contributions which do not appear
22 to be excessive on their face, but which exceed the contribution limits set
23 forth in 11 CFR 110.1 or 110.2 when aggregated with other contributions
24 from the same contributor, and contributions which cannot be accepted
25 under the net debts outstanding provisions of 11 CFR 110.1(b)(3) and
26 110.2(b)(3) may be either deposited into a campaign depository under 11
27 CFR 103.3(a) or returned to the contributor. If any such contribution is
28 deposited, the treasurer may request redesignation or reattribution of the
29 contribution by the contributor in accordance with 11 CFR 110.1(b),
30 110.1(k) or 110.2(b), as appropriate.⁷ If a redesignation or reattribution is

Commission needs a complete description of the relevant and specific facts in order to issue an advisory
opinion. 11 CFR 112.1(b) and (c).

⁷ Redesignation in 11 CFR 110.1(b) and 110.2(b) refers to a written, signed authorization by the
contributor to redesignate the excessive portion of a contribution made to an authorized candidate
committee for another election. 11 CFR 110.1(b)(5), 110.2(b)(5). Reattribution in 11 CFR 110.1(k) refers
to the reattribution of the excessive portion of a contribution to another person pursuant to a writing signed
by each contributor. 11 CFR 110.1(k)(3)(ii). In either case, the committee treasurer seeking the
redesignation or reattribution must inform the contributor of the option to have the contribution or the

1 not obtained, the treasurer shall, within sixty days of the treasurer's receipt
2 of the contribution, refund the contribution to the contributor.

3
4 (4) Any contribution which appears to be illegal under 11 CFR 103.3(b)(1)
5 or (3), and which is deposited into a campaign depository shall not be used
6 for any disbursements by the political committee until the contribution has
7 been determined to be legal. The political committee must either establish
8 a separate account in a campaign depository for such contributions or
9 maintain sufficient funds to make all such refunds.

10
11 11 CFR 103.3(b)(3) and (4).

12
13 The contribution review process set out in 11 CFR 103.3 recognizes that political
14 committees, particularly committees with significant activity, might receive
15 impermissible or excessive contributions on occasion, and that they need time to refund
16 the contribution, to determine its legality, or to engage in a curative procedure that will
17 permit retention of the funds in a Federal account for later use by the committee. (These
18 time periods are allowed so long as the committee does not make disbursements from
19 these funds.) However, you present a situation entailing a program where, on a
20 somewhat regular basis, the DNC would receive excessive contributions and would
21 deposit those funds in its Federal account, but where there is no permissible option that
22 would allow the use of the excess amount by the Federal account. Commission
23 regulations address the conditions under which a committee that supports both Federal
24 and non-Federal candidates (such as a party committee) may accept contributions for
25 those purposes. 11 CFR 102.5(a).

26 Section 102.5(a) provides that a party committee financing political activity in
27 connection with both Federal and non-Federal elections must either (1) establish a
28 separate Federal account (which shall be treated as a Federal political committee) that
29 must comply with the Act's requirements and that must make all of the committee's
30 disbursements in connection with a Federal election; or (2) establish a Federal political
31 committee that must comply with the Act's requirements, even though it makes
32 contributions in connection with Federal and non-Federal elections. 11 CFR
33 102.5(a)(1)(i) and (ii). Under the first option, only funds subject to the limitations and

excessive portion of the contribution refunded. 11 CFR 110.1(b)(5)(ii)(A), 110.2(b)(5)(ii)(A), and
110.1(k)(3)(ii)(A).

1 prohibitions of the Act can be deposited in the separate Federal account.⁸ Moreover, no
2 transfers may be made to the Federal account from the non-Federal account except for the
3 limited Federal/non-Federal allocation purpose set out at 11 CFR 106.5(g) and 106.6(e).

4 Section 102.5(a)(2) provides that only contributions meeting the following
5 conditions may be deposited in a Federal account established under option 1 or a
6 committee established under option 2: (i) contributions designated for the Federal
7 account; (ii) contributions that result from a solicitation which expressly states that the
8 contribution will be used in connection with a Federal election; and (iii) contributions
9 from contributors who are informed that all contributions are subject to the prohibitions
10 and limitations of the Act. The Commission has recently interpreted these criteria in a
11 disjunctive, rather than conjunctive, manner. *See* Advisory Opinion 2000-25.

12 Commission regulations specifically contemplate that party committees will have
13 both Federal and non-Federal accounts and thus that one individual may contribute to
14 both types of accounts. 11 CFR 102.5(a). The content of the donor card submitted as
15 part of the request would satisfy the requirements of 11 CFR 102.5(a)(2) for deposit of
16 contributions into the Federal account, and, significantly, it makes clear that amounts
17 from an individual in excess of the \$20,000 limit would be deposited in a non-Federal
18 account. The Commission will respond with respect to three types of contributions from
19 individuals, all of which would be accompanied by the donor card, whether completed or
20 not. For purposes of illustration and using the example described in the request, the
21 Commission will assume that the contributor has written a \$50,000 check and this is his
22 only contribution for the year to the DNC. These three scenarios are: (1) the check is
23 made payable to the "DNC Federal Account" or the "DNC" and the contributor has
24 indicated on the signed donor card or other contemporaneous signed writing that the
25 contribution should be split with \$20,000 going into the Federal account and \$30,000 into
26 the non-Federal account; (2) the check is made payable to the "DNC Federal Account"
27 but there is no indication on the signed donor card or other contemporaneous signed
28 writing that the contribution should be split between the accounts; and (3) the check is

⁸ There is a similar provision for the second option, stating that the committee "shall receive only contributions subject to the prohibitions and limitations of the Act." 11 CFR 102.5(a)(1)(ii).

1 made payable to the "DNC" without a contemporaneous written indication as to a split
2 between the accounts.

3 Given the content of the donor card and its compliance with 11 CFR 102.5(a)(2),
4 the DNC may retain \$20,000 in the Federal account in each of the above situations. In
5 view of the fact that the amounts on the check exceed the §441a(a) limit and the
6 §102.5(a)(1)(i) rule that only funds subject to the limitations and prohibitions of the Act
7 can be deposited in the separate Federal account, the Commission concludes that, in order
8 for the DNC to implement a program for the receipt of a check in excess of the \$20,000
9 individual limit, it must not deposit more than the limit into the Federal account. It must,
10 instead, endorse the check to (or otherwise instruct the depository bank to immediately
11 deposit the check proceeds into) two or more separate accounts with no more than
12 \$20,000 placed in the Federal accounts.⁹

13 The Commission also concludes that, in the first two examples, no follow-up
14 communication to or from the contributor is required for the retention of the \$30,000
15 excess in the non-Federal account. In the first example, the contributor has provided
16 clear instructions as to the treatment of the check. In the second example, the designation
17 of the Federal account and the return of the donor card indicate the contributor's
18 knowledge of both the limits and the DNC's treatment of the excess amounts; these
19 actions also signify the contributor's intent to contribute to the Federal account. With
20 respect to the third example, the donor card, specifically its notice to individuals that their
21 contributions would be used for Federal elections and are subject to the limitations and
22 prohibitions of the Act, informs the individual of the use of the portion of funds that is
23 within the applicable limit. However, the manifestation of the contributor's intent is
24 slightly confused or uncertain by virtue of the contributor's lack of specific instructions
25 on the check or donor card. Although the information given by the DNC on the donor
26 card would be sufficient to allow the deposit and retention of \$20,000 in the Federal
27 account, the DNC must send a follow-up written notice to the contributor informing him
28 that the excessive amount was deposited in the non-Federal account and that he may
29 request a refund of that amount. This notice must be sent promptly enough so that the

⁹ The Commission recognizes that this procedure may entail a deposit of all the funds into the Federal account to be followed by a virtually instant bank transfer of the excess to a non-Federal account.

1 contributor may consider and ask for a refund in sufficient time to enable the DNC to
2 make any requested refund within 60 days of its receipt of the contribution check. See 11
3 CFR 103.3(b)(3). Accordingly, to ensure the timeliness of a requested refund, the DNC
4 must send this written notice no later than 30 days after its receipt of the check, and the
5 notice may include a reasonable deadline for the contributor to submit his refund request
6 to the DNC.

7 *Reporting and Recordkeeping*

8 The Act and Commission regulations require a party political committee to report
9 the receipt of contributions, including contributions from individuals. The committee
10 must report the identification (name, address, occupation, and employer) of each
11 individual who makes a contribution to the committee during the reporting period whose
12 contribution or contributions aggregate in excess of \$200 during the calendar year, along
13 with the date of receipt, amount of the contribution, and aggregate year-to-date total. 2
14 U.S.C. §§434(b)(2)(A) and (3)(A), and 431(13); 11 CFR 104.3(a)(2)(i) and (4)(i), and
15 100.12. Commission regulations also require a national party committee, such as the
16 DNC, to disclose in a memo Schedule A the name, address, and occupation or type of
17 business of any individual or entity donating more than \$200 in a calendar year to the
18 non-Federal accounts, along with the date and amount of the donation. 11 CFR 104.8(e).
19 National party committees must also disclose in a memo schedule B the name and
20 address of each person to whom disbursements from the non-Federal accounts are made
21 which aggregate in excess of \$200 in a calendar year along with the date, amount, and
22 purpose of the disbursement. 11 CFR 104.9(c). These memo schedules A and B are part
23 of a Schedule I filed by the national party committee.

24 Commission regulations do not specifically address the reporting of the receipt of
25 contribution checks where the proceeds are intended to be split between Federal and non-
26 Federal accounts. Under the circumstances and assumptions described above, the
27 contributor may contribute via a combined check. However, because the DNC will
28 initially receive a check in excess of the §441a(a)(1) limit, it is essential that the
29 contribution and the division of the funds be disclosed in a manner that is clear on the
30 public record. This need for clarity is amplified by the fact that national party
31 committees file voluminous reports for all their activities, and the DNC might accept

1 numerous contributions that are split between Federal and non-Federal accounts. Thus,
2 the splitting of funds that are placed in separate accounts requires the use of memo entries
3 with explicit cross references between the disclosure of the initial receipt by the
4 committee and the receipt of funds into the non-Federal account. Using the above
5 example of the \$50,000 check from a contributor who has made no other contributions to
6 the DNC Federal Account during the year, the split contribution should be reported as
7 follows.

8 Each contribution by an individual that is intended to be split must be itemized on
9 Schedule A. The entry must report a receipt of \$20,000, the date of receipt, and other
10 contributor information required by the regulations.¹⁰ This would not be a memo entry; it
11 would be added to the totals for line 11a on the Detailed Summary Page. With this entry,
12 there must also be a reference forward to a corresponding entry on memo Schedule A for
13 the receipt of \$30,000 by the non-Federal account. This reference would say "Combined
14 on check with \$30,000 nonFed donation on memo Schd A, Schd I, p. xx, line x."¹¹

15 The memo Schedule A must itemize the \$30,000 donation in accordance with 11
16 CFR 104.8(e). The date of receipt will be the date that the DNC received the check.
17 With this entry, there must also be a notation stating that this donation was "combined on
18 check with \$20,000 Fed contrib on Schd A, p. xx, line x."

19 As indicated above, the contributor may request and receive a refund of the excess
20 amount. When such a refund is made, it must be reported on the memo Schedule B of
21 Schedule I and included in the category of "other disbursements." See 11 CFR 104.9(c).
22 The entry on the memo Schedule B must refer to the location of the original entry for the
23 receipt of the funds into the non-Federal account (memo schedule A), including the report
24 disclosing that entry if different from the report disclosing the refund. Thus, after the
25 itemization of the refund in accordance with 11 CFR 104.9(c), the reference would state:
26 "Refund of nonFed donation prev. disclosed on XXX Report, memo Schd A, p. yy, line
27 y."

¹⁰ If the contributor had already contributed to the DNC during the year, the amount reported would be the amount which, when aggregated with the contributor's other contributions to the Federal account that year, equals \$20,000.

¹¹ Use of reasonable abbreviations will be necessary because, in electronically filed reports, the length of such an entry is currently limited to 100 characters.

1 The disclosure data prescribed above must be listed together in consecutive lines
2 on the appropriate schedule so that the public record indicates the receipt of a specific
3 type of contribution; that is, the combination of a donor's Federal contribution and non-
4 Federal donation in one check, pursuant to a specific plan of the DNC. The DNC must
5 provide a heading on the first page of each part set aside for these entries.

6 The DNC must also retain records in connection with these contributions.
7 Commission regulations provide that each political committee required to file any report
8 or statement with the Commission shall:

9 [m]aintain records, including bank records, with respect to the matters
10 required to be reported, including vouchers, worksheets, receipts, bills and
11 accounts, which shall provide in sufficient detail the necessary information
12 and data from which the filed reports and statements may be verified,
13 explained, clarified, and checked for accuracy and completeness.

14
15 11 CFR 104.14(b)(1). The committee must preserve such records for audit or inspection
16 by the Commission for a period of at least three years after the related report or statement
17 is filed. See 11 CFR 104.14(b)(3) and 102.9(c). Accordingly, the DNC must maintain,
18 for the required time period, a copy of the contributor check together with the particular
19 donor card sent with each check. In addition, the DNC must maintain a copy of the
20 written notification sent to each contributor that was informed of the refund opportunity
21 and each request for a refund, either in the form of the written refund request or a written
22 record of any refund request made orally.

23 The Commission emphasizes that the above prescriptions for deposit of the check,
24 later treatment of the contribution/donation, and reporting are based on the circumstances
25 and assumptions presented, such as the use of the attached donor card as part of the
26 solicitation; the contributor's sending of the donor card together with the check; and the
27 examples of how the check or donor card is filled out. The Commission acknowledges
28 that single check contributions with excessive amounts might be lawfully received by the
29 DNC under other factual circumstances, but this opinion does not address those
30 circumstances. In the absence of such accompanying facts as a donor card with
31 materially indistinguishable language and a clear indication as to the content of
32 solicitation materials received by the contributor who signed the check, the DNC's
33 acceptance and deposit of a check in excess of the Act's limits may not be permissible.

DONOR CARD

Federal law requires us to use our best efforts to collect and report the name, mailing address, occupation and name of employer of individuals whose contributions exceed \$200 in a calendar year:

Name of donor: _____

Contact: _____
(if donor is corporation, union or partnership)

Current address: _____

Telephone number: Home _____ Office _____

Current occupation: _____ Employer: _____

Amount contributed: \$ _____ Social Security #: _____ Date of birth _____

Contributions to the DNC are not tax-deductible for federal income tax purposes.

Individuals/Federal PACs: Your contribution will be used in connection with federal elections and is subject to the limitations and prohibitions of the Federal Election Campaign Act. In order for the DNC to deposit your check into our Federal Account, you must make your check payable to "DNC Federal Account" or designate Federal Account below.

Other contributors: Your contribution will be used in connection with state and local elections. Please make check payable to "DNC--Non-Federal Account".

An individual may contribute up to \$20,000 per calendar year to the DNC's federal account. Any portion of a contribution in excess of that amount will be allocated to a non-federal account. An individual may contribute only up to \$25,000 per calendar year to the federal accounts of all party committees, PACs and federal campaigns combined.

Please designate:

_____ My entire contribution to the DNC's Federal Account.

_____ The first \$20,000 (or other \$ _____) of my contribution to the Federal Account.

_____ My entire contribution to the DNC's Non-Federal Account.

Federal law prohibits foreign nationals, except legal permanent residents of the U.S., from contributing to the DNC. Please certify the information below by signing this card.

If an individual: I am a citizen of the United States _____ (or)

I am a legal permanent resident of the United States _____

If a corporation or partnership: _____ I certify that no persons were involved in the decision to make this corporate contribution other than U.S. citizens or legal permanent residents.

The majority of the ultimate beneficial ownership of this corporation or partnership is held by United States citizens and/or legal permanent residents of the U.S. YES _____ NO _____

If NO: I certify that this contribution is being made solely from revenues generated by U.S. operations of this corporation.

Signature _____ Name (print) _____

Title (if a corporation or partnership): _____

