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AGENDA ITEM

For Meeting of: 8-23-01



FEDERAL ELECTION COMMISSION
Washington, DC 20463

August 15, 2001

MEMORANDUM

TO: The Commission

THROUGH: James A. Pehrkon
Staff Director

FROM: Lois G. Lerner *LGL (acs)*
Acting General Counsel

N. Bradley Litchfield *NBL (acs)*
Associate General Counsel

Jonathan M. Levin *JL*
Senior Attorney

Subject: Draft AO 2001-11

Attached is a proposed draft of the subject advisory opinion. We request that this draft be placed on the agenda for August 23, 2001.

Attachment

1 ADVISORY OPINION 2001-11

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

DRAFT

8
9 Dear Mr. Reiff:

10 This responds to your letter dated July 23, 2001, on behalf of the Democratic
11 Party of Virginia (the "State Party"), concerning the application of the Federal Election
12 Campaign Act of 1971, as amended ("the Act"), and Commission regulations to a transfer
13 from the State party's non-Federal account to its Federal account with respect to the
14 payment of allocable expenses.

15 ***Background***

16 The State Party is the "State committee" of the Democratic party for the
17 Commonwealth of Virginia as defined in 2 U.S.C. §431(15) and 11 CFR 100.14(a). It
18 pays for expenditures that are allocable between its Federal and non-Federal accounts in
19 accordance with 11 CFR 106.5. The State Party's ordinary practice is to review its
20 allocable disbursements on a monthly basis to determine the amount (of disbursements
21 during the prior month) to be transferred from its non-Federal account to its Federal
22 account in accordance with the allocation ratios prescribed in Commission regulations.
23 This determination is made by an independent Certified Public Accountant, Karen
24 Nuckols, who has been retained by the State Party to provide accounting services.
25 Ordinarily, Ms. Nuckols provides the information necessary to make the transfer to the
26 State Party's Executive Director, Alan Moore. Mr. Moore then requests, by facsimile
27 transmission, that the State Party's bank, Wachovia Bank ("the Bank"), effectuate a wire
28 transfer from the non-Federal account to the Federal account.

29 On June 18, 2001, Mr. Moore was advised by Ms. Nuckols that the State Party
30 should transfer \$43,679.88 from the non-Federal to the Federal account to pay for the
31 non-Federal share of certain allocable disbursements made between April 20 and May 3.
32 All of these payments were for State Party administrative expenses, such as rent, salaries,
33 payroll taxes, letterhead, and equipment. On June 18, Mr. Moore also sent a written

1 request to the Bank, via facsimile, requesting that the wire transfer be made in that
2 amount.

3 On July 12, Ms. Nuckols, in the ordinary course of her duties, reviewed the June
4 bank statements for the State party in order to conduct a monthly bank account
5 reconciliation and noticed that the Bank had not made the requested transfer. Ms.
6 Nuckols immediately informed Mr. Moore that the transfer was not made, and he
7 immediately contacted the Bank. Upon review of its records, the Bank could not confirm
8 whether it had received Mr. Moore's June 18 request. The State Party cannot locate any
9 written record confirming the Bank's receipt, but also cannot locate any notification from
10 its facsimile machine that the transmission was unsuccessful, even though that
11 notification is ordinarily received upon an unsuccessful transmission. Mr. Moore has a
12 specific recollection of sending the instructions via fax to the Bank on June 18 to make
13 the wire transfer on that date. In a signed, sworn declaration submitted to the
14 Commission as part of this request, he has asserted this recollection and has also stated
15 that, to the best of his knowledge, the Bank received the request and failed to honor it.¹

16 The April 20 - May 3 disbursements for which the non-Federal portion was to be
17 transferred (see footnote 1) were disclosed on the H4 schedule of the State Party's pre-
18 special election report, which covers the period from January 1 to May 30, and which was
19 filed in a timely manner on June 7. (An amended report, also disclosing these
20 disbursements, was filed on July 19.) The H3 schedule of the State Party's post-special
21 election report, timely filed on July 19 which was a week after the discovery that the
22 transfer was not made, lists a number of transfers from the non-Federal to the Federal
23 account, but not a transfer on June 18 or in the amount requested.

24 As described below, a party committee has a window of 10 days before an
25 allocable disbursement is made and 60 days after the disbursement to transfer funds from
26 the non-Federal to the Federal account. Due to the foregoing described circumstances,
27 the transfer was not completed within that time frame. The State Party requests
28

¹ Mr. Moore's declaration briefly describes the State Party's customary procedure and the sequence of events on June 18 as to the transfer instructions, and also attaches a copy of the written request transmitted on that date to the Bank. Your opinion request also includes a copy of Ms. Nuckols' June 18 communication with Mr. Moore and a list of the disbursements for which the non-Federal portion was to be transferred.

1 permission from the Commission to allow the transfer of \$43,679.88 from its non-Federal
2 account to its Federal account to recover, for the Federal account, the funds that it had
3 attempted to transfer in a timely manner on June 18.

4 *Analysis*

5 Commission regulations require that a State party committee with separate
6 Federal and non-Federal accounts established under 11 CFR 102.5 shall pay the expenses
7 of mixed Federal and non-Federal activities described in 11 CFR 106.5(a)(2) (including
8 administrative expenses such as rent, utilities, office supplies, and salaries, except for
9 such expenses directly attributable to a clearly identified candidate) from its Federal
10 account or a separate allocation account.² 11 CFR 106.5(g)(1). The committee shall
11 transfer funds from its non-Federal account to the Federal account solely to cover the
12 non-Federal share of the allocable expense. Such a transfer must be made no more than
13 10 days before, and no more than 60 days after, the payments for which they are
14 designated are made. 11 CFR 106.5(g)(2)(ii). Any transfer from the non-Federal account
15 made outside this window is "presumed to be a loan or contribution from the non-federal
16 account to a federal account, in violation of the Act." 11 CFR 106.5(g)(2)(iii). If the
17 wire transfer had been made on June 18, it would have been timely for all of the
18 disbursements covered in the amount of the transfer.³

19 The Commission relies upon the representations in the advisory opinion request
20 as a truthful description of the events surrounding the transmittal of instructions to the
21 Bank.⁴ In a number of advisory opinions, the Commission has addressed situations where
22 contribution monies were not received by a political committee, or deposited by it in a
23 timely manner (under 11 CFR 103.3(a)), because of circumstances outside the control of
24 the committee or its agents. See Advisory Opinions 1999-23, 1993-5, and 1992-42. For
25

² The separate allocation account is an account in which funds from the Federal and non-Federal account are deposited and which is established solely to pay the expenses of such allocable activities. 11 CFR 106.5(g)(1)(ii).

³ The amount to be transferred is comprised of 75 percent of the State Party's disbursements for allocable administrative disbursements between April 20 and May 3, as tabulated by Ms. Nuckols. This is consistent with the 75% non-Federal/25% Federal administrative expense ratio disclosed on the State Party's H1 Schedule. These percentages were determined through the use of the ballot composition method required for such expenses under 11 CFR 106.5(d)(1)(ii) and (2).

⁴ This includes an acceptance of the assertion that the Bank received Mr. Moore's transmitted instructions.

1 example, in Advisory Opinion 1992-42, contribution checks were received by a principal
2 campaign committee prior to the 1992 general election and mailed to a bank for deposit,
3 but were lost in transit. The loss was not discovered and investigated until after the
4 general election. The Commission concluded that, since the committee and its agents had
5 not been at fault, it could receive replacement checks and treat them as made for the 1992
6 general election even though the committee had no outstanding debts. In Advisory
7 Opinion 1999-23, a contribution check mailed in late December 1998 by one PAC to
8 another was never received by the intended recipient PAC. Before the filing due date
9 (July 31, 1999) of the report that would normally have disclosed the receipt of the
10 contribution, the recipient PAC inquired with the Commission as to how to proceed. The
11 Commission concluded that the recipient PAC could accept a replacement check that
12 would not count towards either PAC's contribution limit for 1999 so long as the donor
13 PAC stopped payment on the original check and provided specific relevant confirmations.

14 The situation you present is analogous to the situations described above.⁵ Just as
15 the failure of the postal service to deliver contribution checks posed issues of compliance
16 with the Act, the Bank, in this situation, has not performed the requisite action, even
17 though the State Party requested it. It is significant that the State Party's request to the
18 Bank was made in a timely manner so that the relevant transfer (relating to allocable
19 expenses between April 20 and May 3) would have been made between 46 and 59 days
20 after the disbursements. Moreover, the State Party discovered that the transfer was not
21 effectuated and notified the Bank of the discovery within 30 days after the requested
22 transfer date and before the filing due date for the report that would have disclosed the
23 transfer, had it been made as directed by the State Party. In addition, the State Party
24 expeditiously followed up its discovery by submitting this request to the Commission
25 seeking legal review. Based on the Bank's control of the means of the transfer and on the

⁵ In the request, you refer to Advisory Opinions in which the Commission allowed party committees to recoup non-Federal funds after the end of the allowable transfer period when inadvertent errors had been made in the allocation process. See Advisory Opinions 1993-3, 1992-27, 1992-2, and 1991-15. These opinions, however, are not particularly relevant to the State Party's situation. The Commission's decisions to allow the retroactive changes were in recognition of the fact that the applicable allocation regulations were new and represented significant revisions to past practice, so that a brief period of adjustment was required for committees acting in good faith. The 2001-2002 election cycle is the sixth cycle since the implementation of the current allocation system.

1 actions of the State Party with respect to the requested transfer as described above, the
2 Commission concludes that the State Party may now cause the Bank to make the transfer,
3 originally requested on June 18, from the non-Federal to the Federal account.⁶ This
4 transfer must be made within fifteen days after your receipt of this opinion.

5 The transfer from the non-Federal account to the Federal account should be
6 reported on the next report due (which, absent a special Federal election, is the 2001 year
7 end report). The State Party should report the date the transfer actually occurs. The report
8 entry should be accompanied by a note stating that the transfer was not made within the
9 70-day window of 11 CFR 106.5(g)(2)(ii) because of special circumstances, but that the
10 Commission expressly allowed the State Party to make the transfer in this opinion, which
11 should be cited by number.

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

15 Sincerely,

16
17 Danny L. McDonald
18 Chairman
19

20 Enclosures (AOs 1999-23, 1993-5, and 1992-42)
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⁶ A review of the list, submitted with the request, of disbursements for which the non-Federal portion was to be transferred indicates that the total of the disbursements was \$450 less than the aggregate figure calculated by Ms. Nuckols. Thus, the amount of the transfer should be reduced by 75% of \$450.