FEDERAL ELECTION COMMISSION
Washington, DC 20463

MEMORANDUM

TO: The Commission

FROM: Commission Secretary's Office

DATE: February 10, 2016

SUBJECT: Comments on Draft AO 2015-16
(Niger Innis for Congress)

Attached are timely submitted comments received from Mr. Dan Backer, Esq. on behalf of the requestor. This matter is on the February 11, 2016 Open Meeting Agenda.

Attachment

From: Dan Backer
To: ABell@fec.gov
Cc: rknop@fec.gov
Subject: Public Comment on AO 2015-16 Draft A
Date: 02/10/2016 11:30 AM
Attachments: 20160210 Public Comment on AO 2015-16 DRAFT A.pdf

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Please confirm receipt, thank you.

I will be attending the meeting tomorrow.

Regards,

Dan Backer, Esq.

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February 10, 2016

Office of the General Counsel
Attn: Daniel A. Petalas, Esq.
Acting general Counsel
Federal Election Commission
999 E Street N.W.
Washington, DC 20463

Re: Comment on Draft Advisory Opinion 2015-16 (Innis)

Dear Mr. Petalas:

I submit these public comments on behalf of Niger Innis for Congress ("Committee") in response to the Federal Election Commission's ("Commission") draft Advisory Opinion 2015-16 ("DAO").

In the DAO, the Commission concludes the Committee may not donate remaining, non-refundable general election contributions to a 501(c)(3) charitable organization that would not personally benefit the candidate and that is not established, maintained, financed, or controlled by the candidate. However, neither the Federal Election Campaign Act ("FECA") nor Commission regulations explicitly address what candidate committees are to do when attempts to refund contributions prove unsuccessful. Rather, the Commission has elucidated the general purpose behind the refund rule – to return the candidate to the position he would be in otherwise but for the contribution and to prevent any personal benefit – and so far provided only a single mechanism to achieve that. The DAO's arbitrary solution is inconsistent with the Commissions prior application of the FECA and Commission regulations, the underlying policy justifications of the "refund rule," and amounts to an overbroad restraint on political activity without statutory authority.

The Commission states in the DAO that the Committee's general election funds could not be donated to charity "because such use is not among the uses permitted" in Commission regulations governing general election contributions received by candidates during the primary election period. The Commission cited 11 C.F.R. §§ 102.9(e)(3), 110.1(b)(3)(i), 110.2(b)(3)(i). 11 C.F.R. §102.9(e)(3) requires a candidate to refund any contributions made for the general election if the candidate does not become a candidate in the general election. The Committee has complied by returning the contributions made for the general election to the contributors. Further, 11 CFR §§ 110.1(b)(5) and 110.2(b)(5) permit a candidate to redesignate in accordance with, or reattribute in accordance with, 11 CFR § 110.1(k)(3). In order to redesignate or reattribute a contribution, the candidate must ask the contributor whether the contribution may be redesignated or reattributed and to whom. 11 CFR §§ 110.1(b)(5), 110.2(b)(5), 110.1(k)(3). Redesignation or reattribution is rather obviously inapplicable here because the Committee has been unable to effectively communicate with the contributors. AOR002. 11 CFR §§ 110.1(b)(3)(i) and 110.2(b)(3)(i) requires a candidate to return a contribution that was designated in writing for a particular election, which was made after the election and exceeds net debts outstanding. However, 11 CFR §§ 110.1(b)(3)(i) and 110.2(b)(3)(i) are equally inapplicable here as the contributions were not made after the election and did not exceed the net debts outstanding. The Committee has complied with the applicable regulation, 11 C.F.R. §102.9(e)(3), and neither the FECA nor Commission regulations explicitly address the situation where refunding contributions proves unsuccessful. A solution is needed, and the Committee's comports to FECA.

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The Commission has interpreted "the underlying reason for the refund rule of 11 CFR § 103.3(b)(2)... to place a political committee in nearly the same financial position that would have existed" without the contribution. AO 1996-05, fn. 4. This objective is met by disgorgement to a 501(c)(3) organization in which the candidate has no role and receives no benefit. Such a donation would put the candidate in the same financial position that would have existed had it never received the un-refundable contribution. A 501(c)(3) organization under the Internal Revenue Code (IRC) is prohibited from influencing legislation or intervening in any political campaign on behalf of any candidate for public office, 26 U.S.C. § 501(c)(3); 26 U.S.C. § 170(c)(2)(D) and the FECA prohibits personal benefit from converted campaign contributions. 52 U.S.C. § 30114(b)(1). The Committee's proposal does not exceed the statutory boundaries.

Donating non-refundable general election contributions to a 501(c)(3) organization is analogous to existing methods used by committees to remedy excessive or prohibited contributions. *See* 11 CFR § 103.3(b)(2); AO 1991-39; AO 1995-19. In Advisory Opinion 1991-39, the Commission determined that the funds, where the committee could not determine the true identity of the original contributor, may be disbursed by the committee for a lawful purpose such as to a qualified charitable organization described in 26 U.S.C. 170(c). *Id.* In Advisory Opinion 1995-19, the Commission concluded the amounts of the contributions for which the identified donors did not provide confirmation of legality may be disbursed for any of the lawful purposes listed in Advisory Opinion 1991-39. *Id.* Like the committees in Advisory Opinions 1991-39 and 1995-19, the Committee is unable to comply with the refund rule with respect to 4 contributions.

The Commission relies on AO 2003-18 (Smith) in stating contributions received during the primary election period that were specifically designated for the general election must not be treated as permissible campaign funds and not usable in accordance with 52 U.S.C. § 30114 and 11 C.F.R. § 113. DAO at 7. However, Innis is distinguishable from Smith. Smith, as expressly noted in AO 2003-18, was an incumbent who intended to donate non-refundable contributions to a charity he established and might employ former campaign staffers. Smith's case presented potential for an incumbent to convert campaign funds for personal use, and a possible quid pro quo from an officeholder. Innis, by contrast, presents no such potential as he is not an incumbent, is not creating his own charity, nor would the charity employ himself or his campaign staff.

The Commission created a solution for Smith - to disgorge the un-refundable funds to the United States Treasury – as a mechanism in accord with the underlying rule. The Commission noted that in analogous circumstances the regulations provided for disgorgement to the United States Treasury. Here, analogous authority provides for the disgorgement Innis seeks to engage in, the conduct is not prohibited by FECA or regulations, comports to the underlying reason of the refund rule, and is materially distinguishable from the pitfalls of Smith that the commission clearly identified and considered. The Commission should not arbitrarily prohibit this conduct simply because it fashioned an alternate solution in a materially distinguishable case. By doing so, the Commission is forcing political committees to violate its conscience-to transfer funds to a spendthrift treasury whose pitfalls a candidate ran to oppose

Sincerely,

/s/

Dan Backer
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