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For meeting of February 11, 2016
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February 5, 2016

MEMORANDUM

TO: The Commission

FROM: Daniel A. Petalas *DAP*
Acting General Counsel

Adav Noti *AN*
Acting Associate General Counsel

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Assistant General Counsel

Jessica Selinkoff *JS by RMK*
Attorney

Subject: AO 2015-16 (Innis) Draft A

Attached is a proposed draft of the subject advisory opinion.

Members of the public may submit written comments on the draft advisory opinion. We are making this draft available for comment until 12:00 pm (Eastern Time) on February 10, 2016.

Members of the public may also attend the Commission meeting at which the draft will be considered. The advisory opinion requestor may appear before the Commission at this meeting to answer questions.

For more information about how to submit comments or attend the Commission meeting, go to <http://www.fec.gov/law/draftaos.shtml>.

Attachment

1 ADVISORY OPINION 2015-16

2

DRAFT A

3 Dan Backer, Esq.
4 Counsel, Niger Innis for Congress
5 DB Capitol Strategies PLLC
6 203 South Union Street
7 Suite 300
8 Alexandria, VA 22314

9

10 Dear Mr. Backer:

11 We are responding to your advisory opinion request on behalf of Niger Innis for
12 Congress (the “Committee”) concerning the application of the Federal Election Campaign Act,
13 52 U.S.C. §§ 30101-46 (the “Act”), and Commission regulations to your proposal to pay for
14 certain costs with general election funds and to donate other general election funds to charity.

15 The Commission concludes that the Committee may neither pay the proposed costs out of
16 general election contributions nor donate the non-refundable general election contributions to a
17 charity as proposed.

18 ***Background***

19 The facts presented in this advisory opinion are based on your letter received on
20 November 25, 2015, and your email dated December 14, 2015.

21 The Committee was the principal campaign committee of Niger Innis, who was a
22 candidate for Congress in the 2014 election cycle. On June 10, 2014, he lost the primary
23 election. The Committee is in the process of winding down.

24 Prior to the primary, the Committee received contributions for the general election. After
25 Mr. Innis’s loss in the primary election, the Committee states that it timely issued to general
26 election contributors checks in the full amount of their general election contributions. Because
27 some of the contributors, however, did not cash their refund checks, Mr. Innis and Committee
28 staff reached out to those persons who had not cashed their refund checks to ask that the refund

1 checks be cashed. After the first refund checks had gone stale, the Committee reissued refund
2 checks to persons who had not cashed the previously issued refund checks. The Committee
3 states that, despite its repeated efforts, it has been unable to refund general election contributions
4 totaling \$8,000 from four individuals, and that the reissued refund checks are now stale.

5 The Committee also represents that it has incurred certain “unique costs” associated with
6 the outstanding \$8,000 in general election contributions. These consist of transaction-specific
7 costs and legal, accounting, and compliance costs. The transaction-specific costs include: per-
8 transaction credit card-processing fees; bank fees, such as account maintenance fees, check-
9 processing fees, and transfer fees; and fundraising commissions paid for the successful
10 solicitation of general election contributions. The Committee states that these costs are “incurred
11 exclusively by the receipt of, and . . . are exclusively traceable to, the mere existence of general
12 election contributions.” Advisory Opinion Request (“AOR”) at AOR002. As to the legal,
13 accounting, and compliance costs, the Committee refers to its winding down costs and the
14 “substantial costs . . . from . . . efforts to settle any outstanding debt or obligations.” AOR007.
15 The Committee asserts that “over time these [legal, accounting, and compliance] burdens
16 ultimately become far removed from the primary election activity and become entirely a product
17 of the general election contributions themselves.” AOR002-003. The Committee wishes to pay
18 these costs from its general election contributions, rather than from its primary election
19 contributions.

20 Additionally, the Committee seeks to dispose of its remaining general election
21 contributions so that it can terminate. Rather than disgorge the remaining funds to the U.S.
22 Treasury, Mr. Innis seeks to donate the remaining Committee funds to a tax-exempt organization
23 that operates under 26 U.S.C. § 501(c)(3) (the “charity”). The request represents that Mr. Innis

1 has not directly or indirectly established, maintained, financed, or controlled the charity, and that
2 “he has no direct or indirect ties” to the organization. AOR009. He also represents that he will
3 not incur any tax or other benefit from a donation of the funds and will have no control over the
4 funds once disgorged.

5 ***Questions Presented***

6 1. *Is the Committee prohibited from paying certain unique costs that are distinctly traceable*
7 *to specific general election contributions out of those funds rather than from primary election*
8 *contributions?*

9 2. *Is the Committee prohibited from donating the remaining non-refundable general*
10 *election contributions to a charitable organization exempt from taxation under IRC section*
11 *501(c)(3) if the Candidate does not directly or indirectly establish, maintain, finance, or control*
12 *that organization or derive any personal benefit from it?*

13 ***Legal Analysis and Conclusions***

14 1. *Is the Committee prohibited from paying certain unique costs that are distinctly traceable*
15 *to specific general election contributions out of those funds rather than from primary election*
16 *contributions?*

17 The Committee may not pay out of its general election contributions any legal,
18 accounting, compliance, or transaction costs associated with those contributions.

19 The Act’s contribution limitations on contributions made to a candidate for federal office
20 apply separately with respect to each election. 52 U.S.C. § 30116(a)(1)(i); 11 C.F.R.

21 § 110.1(b)(2). Commission regulations provide that a candidate or authorized committee may,
22 prior to a primary election, accept contributions designated by the contributor for use in

23 connection with the general election. 11 C.F.R. §§ 102.9(e), 110.1(b)(2), 110.2(b)(2). The

1 recipient committee, however, must “use an acceptable accounting method to distinguish
2 between contributions received for the primary and contributions received for the general
3 election.” 11 C.F.R. § 102.9(e). The committee’s “records must demonstrate that, prior to the
4 primary election, recorded cash on hand was at all times equal to or in excess of the sum of
5 general election contributions received less the sum of general election disbursements made.”
6 *Id.* at § 102.9(e)(2). “These regulations are designed to ensure that candidates . . . do not use
7 general election contributions for the primary election.” Advisory Opinion 1992-15 (Russo for
8 Congress) at 1.

9 Subsequently, “[i]f a candidate is not a candidate in the general election, any
10 contributions made for the general election shall be refunded to the contributors, redesignated . . .
11 or reattributed.” 11 C.F.R. § 102.9(e)(3); *see also* 11 C.F.R. § 110.1(b)(3)(i) (“If the candidate is
12 not a candidate in the general election, all contributions made for the general election shall be
13 either returned or refunded to the contributors or redesignated . . . , or reattributed . . . , as
14 appropriate.”).¹ As the Commission has explained, “where a general election is held, but the
15 candidate does not participate in that election, no separate contribution limit for that general
16 election is available to contributors.” Contribution and Expenditure Limitations and
17 Prohibitions; Contributions by Persons and Multicandidate Political Committee, 52 Fed. Reg.
18 750, 751 (Jan. 9, 1987) (internal cites omitted).

19 In Advisory Opinion 1986-17 (Green) at 4, the Commission concluded that “the Act does
20 not prohibit [an authorized committee] from using contributions designated for the general

¹ “For purposes of these regulations, contributions are ‘returned’ when the negotiable instrument comprising the contribution is sent back to the contributor instead of being deposited. Contributions are ‘refunded’ when the recipient committee sends the contributor a check for the amount of the contribution which has been previously deposited.” Contribution and Expenditure Limitations and Prohibitions; Contributions by Persons and Multicandidate Political Committee, 52 Fed. Reg. 750, 768 (Jan. 9, 1987).

1 election to make expenditures, prior to the primary election, exclusively for the purpose of
2 influencing the prospective general election.” The expenditures, however, may be made only “in
3 those limited circumstances where it is necessary to make advance payments or deposits to
4 vendors for services that will be rendered, or goods that will be provided, to [the] committee
5 after [the candidate] ha[s] established . . . candidacy with respect to the general election.” *Id.*;
6 *see also* Factual and Legal Analysis at 3, 5, MUR 6811 (Marjorie 2014) (dismissing complaint
7 where committee paid advances for general election expenses before primary but received full
8 refunds of advances after losing primary).

9 Critically, the Commission has consistently noted that if the candidate does not become a
10 candidate for the general election, the Act requires the authorized committee to “make a full
11 refund” of general election contributions, regardless of whether it had already “made any
12 expenditure from these contributions.” Advisory Opinion 1986-17 (Green) at 3-4 (citing, *inter*
13 *alia*, Advisory Opinion 1986-12; Advisory Opinion 1983-39); 11 C.F.R. § 102.9(e)(3); *see also*
14 Advisory Opinion 2009-15 (Bill White for Texas) at 7 (“Contributions designated for an election
15 . . . in which a person is not a candidate . . . must be refunded.”); Advisory Opinion 1992-15
16 (Russo) at 2; Factual and Legal Analysis at 4, MUR 6230 (Wynn for Congress) (finding reason
17 to believe where committee spent general election contributions during primary and was unable
18 to refund contributions to general election contributors); Factual and Legal Analysis at 3-4, MUR
19 6057 (Jennifer Horn for Congress) (“[G]eneral election contributions may be used to make
20 advance payments for general election purposes, but should the candidate not win the primary
21 election, the committee must have enough cash on hand to refund all general election
22 contributions.”).

23 For example, in Advisory Opinion 1980-122 (New Yorkers for Myerson), the

1 Commission concluded that the Act prohibited a candidate who had lost a primary election from
2 paying outstanding primary campaign debts and winding down costs with contributions
3 designated for the general election. Because the candidate in that advisory opinion “was
4 involved only in the primary election, all of the debts and obligations of the Committee exist[ed]
5 with respect to that election.” *Id.* at 2. Therefore, to the extent that general election contributors
6 also made maximum contributions with respect to the primary election, the Commission
7 concluded that the Act prohibited the Committee from paying primary election debts with
8 general election funds, because doing so would result in the contributors making excessive
9 contributions with respect to the primary election. *Id.*

10 Here, the Committee proposes to pay out of general election contributions various costs
11 associated with those contributions, including transaction fees, fundraising commissions, and
12 legal, accounting, and compliance costs. As the regulations and opinions cited above uniformly
13 note, the Committee may not do so. Because Mr. Innis lost the primary election and therefore
14 was not a candidate in the general election, the Commission’s regulations require him to timely
15 refund, reattribute, or redesignate all contributions that the Committee received for the general
16 election. This refund obligation includes any contributions that the Committee spent on general
17 election expenses prior to losing the primary, and it necessarily precludes the Committee from
18 now spending *additional* general election funds, as proposed in the request, on an election in
19 which Mr. Innis did not participate.

20 Accordingly, the Committee may not pay out of its general election contributions any
21 legal, accounting, compliance, or transaction costs.

1 2. *Is the Committee prohibited from donating the remaining non-refundable general*
2 *election contributions to a charitable organization exempt from taxation under IRC section*
3 *501(c)(3) if the Candidate does not directly or indirectly establish, maintain, finance, or control*
4 *that organization or derive any personal benefit from it?*

5 The Committee may not donate its remaining, non-refundable general election
6 contributions to charity.

7 As discussed above, “[i]f a candidate is not a candidate in the general election, any
8 contributions made for the general election shall be refunded to the contributors,” 11 C.F.R.
9 § 102.9(e)(3), because “no separate contribution limit for that general election is available to
10 contributors.” 52 Fed. Reg. 750 at 751 (internal cites omitted). Neither the Act nor Commission
11 regulations, however, explicitly address the situation where a Committee is unable, despite its
12 efforts,² to refund general election contributions after losing a primary.

13 In Advisory Opinion 2003-18 (Bob Smith for U.S. Senate) (“Smith”), the Commission
14 addressed whether a candidate who had lost a primary election and was unsuccessful in his
15 efforts to refund general election contributions could donate the non-refundable contributions to
16 a charity. There, the Commission concluded that the requestor was required to disgorge the
17 general election contributions to the U.S. Treasury, and that he was not permitted to donate the
18 funds to charity. *Id.* at 3-4. The Commission explained that “the contributions received during
19 the primary election period that were specifically designated for the general election must not be
20 treated as permissible campaign funds, and such funds are not usable in accordance with [52
21 U.S.C. § 30114] and 11 C.F.R. Part 113.” Thus, the committee’s general election funds could

² For purposes of this opinion, the Commission assumes without deciding that the Committee undertook sufficient efforts to attempt to refund the general election contributions.

1 not be donated to a charity “because such use is not among the uses permitted” in the
2 Commission regulations that govern general election contributions received by candidates in
3 primary elections. *See id.* at 3 (citing 11 C.F.R. §§ 102.9(e)(3), 110.1(b)(3)(i), 110.2(b)(3)(i)).

4 The Committee’s proposal here is materially indistinguishable from that considered and
5 rejected in Advisory Opinion 2003-18 (Smith). Here, as in that advisory opinion, the Committee
6 received general election contributions prior to the primary, which the candidate lost, and, as the
7 Committee represents, it attempted unsuccessfully to refund the general election contributions.
8 Therefore, like the general election contributions in Advisory Opinion 2003-18 (Smith) at 3, the
9 Committee’s general election contributions “must not be treated as permissible campaign funds .
10 . . usable in accordance with [52 U.S.C. § 30114] and 11 C.F.R. Part 113.”³ Accordingly, the
11 Commission concludes that the Committee may not donate its remaining, non-refundable general
12 election contributions to the charity.⁴

13 This response constitutes an advisory opinion concerning the application of the Act and
14 Commission regulations to the specific transaction or activity set forth in your request. *See*
15 52 U.S.C. § 30108. The Commission emphasizes that, if there is a change in any of the facts or
16 assumptions presented, and such facts or assumptions are material to a conclusion presented in
17 this advisory opinion, then the requestor may not rely on that conclusion as support for its

³ As the Committee notes, the candidate in Advisory Opinion 2003-18 (Smith) had established the charity to which he proposed to donate his general election funds. AOR009. But nowhere in the legal analysis of Advisory Opinion 2003-18 (Smith) did the Commission even mention that fact, much less state or imply that it was material to the result. *See id.* at 3-4.

⁴ In *Fireman v. United States*, 44 Fed. Cl. 528 (1999), the court declined to defer to a Commission determination that a committee could disgorge unlawful contributions to the U.S. Treasury instead of refunding the contributions to the contributor under 11 C.F.R. § 103.3(b). 44 Fed. Cl. at 538-39; *see also* Advisory Opinion 1996-05 (Jay Kim for Congress). Because the Committee here represents that it has attempted to refund the general election contributions to contributors, who have not accepted the refunds, the proposed donation does not implicate the court’s concern that the contributors’ “right of repayment” has been “taken away.” *See Fireman*, 44 Fed. Cl. at 536.

1 proposed activity. Any person involved in any specific transaction or activity which is
2 indistinguishable in all its material aspects from the transaction or activity with respect to which
3 this advisory opinion is rendered may rely on this advisory opinion. *See* 52 U.S.C.
4 § 30108(c)(1)(B). Please note that the analysis or conclusions in this advisory opinion may be
5 affected by subsequent developments in the law including, but not limited to, statutes,
6 regulations, advisory opinions, and case law. Any advisory opinions cited herein are available
7 on the Commission's website.

8 On behalf of the Commission,
9

10
11 Matthew S. Petersen
12 Chairman