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Office of General Counsel
Attn: Adav Noti, Esq., Acting Associate General Counsel for Policy
Federal Election Commission
999 E Street N.W.
Washington, DC 20463

Re: Advisory Opinion Request

Dear Mr. Noti:

Since the enactment of the Federal Election Campaign Act (the "Act"), throughout the entire era of modern campaign finance law, the national political party committees ("National Party Committees") have received public funding for their presidential nominating conventions. By law, these funds could not be used to support candidates or for party building, but solely to defray the core costs of holding their conventions, including infrastructure and the operating costs of administering the nominating election. Under recently enacted legislation, these funds are no longer available to the parties. Now, well into the process of organizing their nominating conventions for the 2016 presidential election, the national political party committees have neither access to public funds nor workable regulatory guidance on how to raise the private funding now needed.

Accordingly, pursuant to 2 U.S.C. § 437f, the Democratic National Committee and the Republican National Committee (collectively, the "National Party Committees") request an opinion that they may each raise Federal funds into a segregated account under a separate contribution limit, or alternatively into a convention committee, solely to finance convention expenses for their 2016 presidential nominating conventions that would previously have been paid for with public funds.

Background

The National Party Committees are national committees within the meaning of 2 U.S.C. § 431(14). Pursuant to 26 U.S.C. § 9008 and the implementing regulations of the Federal Election Commission (the "Commission"), the National Party Committees were entitled to receive public funds from the U.S. Treasury to defray the cost of operating their presidential nominating conventions between 1976 and

2012. In order to receive such funds, Commission regulations required the National Party Committees to each "establish a convention committee [to] be responsible for conducting the day to day arrangements and operations of that party's Presidential nominating convention."¹ The Commission also established a regime of permissible and impermissible "convention expenses" to cabin the convention committees' use of public funds received outside the National Party Committees' standard contribution limits.²

The amount of the public convention grant was indexed to inflation, and for the 2012 conventions, the National Party Committees' convention committees were each entitled to approximately \$18.2 million.

On April 3, 2014, Public Law 113-94 was enacted, substantially amending 26 U.S.C. § 9008 and eliminating the National Party Committees' entitlement to receive the public funds.³ Congress was silent on a replacement framework for funding the essential task of nominating presidential candidates. The National Party Committees and the Commission are now left to navigate the uncertainty that is left as a result of the changed law: the National Party Committees must identify private sources of funding for their presidential nominating conventions.⁴

As a means of addressing the gap in the campaign finance regime left by Public Law 113-94, the National Party Committees propose to each raise Federal funds into a segregated account subject to an additional, separate contribution limit in order to pay for 2016 convention expenses. Following the Commission regulations applicable to the public funding of convention expenses, funds in the account would not be used for candidate advocacy, for general party building expenses, or in any other way "for the purpose of influencing any Federal election" as the Commission has construed the term. Instead, the account would be used solely to pay for the same types of convention expenses for which the public funds were previously used.⁵

The National Party Committees could alternatively establish separate convention committees, just as they did to receive the public funds. The convention committees would raise and spend Federal funds under a separate limit to pay for the same types of convention expenses that they have paid for in previous cycles.

¹ 11 C.F.R. § 9008.3(a)(2).

² *See id.* § 9008.7.

³ Act of Apr. 3, 2014, § 2(a), Pub. L. No. 113-98, 128 Stat. 1085 (2014).

⁴ In the past, while the National Party Committees and their convention committees could legally solicit contributions for convention expenses, they generally did not do so because any amounts raised and spent would require a corresponding reduction in public funds to which they were entitled. 11 C.F.R. §§ 9008.6(a)(2), 9008.8(a).

⁵ *Id.* § 9008.7.

Questions Presented

1. May the National Party Committees raise Federal funds into segregated accounts subject to an additional, separate contribution limit solely to pay for convention expenses?
2. May the National Party Committees establish separate convention committees to raise and spend Federal funds under a separate limit solely to pay for convention expenses?

Legal Analysis

1. The National Party Committees May Raise Federal Funds Subject to an Additional, Separate Limit to Pay for Convention Expenses

The law has long recognized that certain activities conducted by the National Party Committees are separate and unique from campaign activity, and, therefore, require additional funding outside the National Party Committees' standard limits. Conventions are one such unique activity: they are important to party self-governance through the adoption of the party platform and party rules, and in the formal nomination of Presidential candidates chosen through the primary process. But these quadrennial processes are otherwise only peripherally related to the conduct of campaigns for federal office in every election cycle. Through the 2012 presidential election, the administrative requirements of nominating a presidential candidate were paid for not with funds within the National Party Committees' standard contribution limits, but rather with additional public funds received on the condition that those funds be used only to pay convention expenses, and not for the benefit of a specific candidate.⁶

The Commission has also provided for a separate limit for funds raised for activities that are not "for the purpose of influencing" an election. It has authorized Federal committees to establish segregated accounts to receive contributions raised under a separate limit for recount expenses.⁷ This allowance reflected the judgment that funds raised and spent for these recount purposes would not count as "contributions" or "expenditures," that is, for the purpose of influencing an election. For this reason, and in recognition of the practical challenge candidates faced in meeting substantial expenses for recount activity, the Commission authorized the separate limits for recount financing.

⁶ *Id.*

⁷ See Advisory Opinion 2006-24 (RNSC, DSCC, RSCP); Advisory Opinion 2009-04 (Franken/DSCC); Advisory Opinion 2010-14 (DSCC); Advisory Opinion 2011-03 (DSCC, DCCC, RNC, NRSC, and NRCC).

The Commission crafted the authorization, including the fundraising restriction that only Federal funds be used for recounts, around the difference between activities to "influence an election," which did not include recounts, and activities "in connection with" an election, which did.⁸ The Commission therefore set two conditions on the authorization of the separate limits: (1) that they be Federal funds raised within the source restrictions, amount limitations and reporting requirements of the Act; and (2) that they not otherwise be used for campaign activity.⁹ In Advisory Opinion 2009-04, the Commission extended this authorization to national party committees using these funds, affirming that "donations to such recount funds would not be aggregated with contributions from the same persons for purposes of the calendar-year ... contribution limits."¹⁰ The agency "struck a balance between preserving the 'hard money' framework established by Congress and allowing the national party committees the flexibility to deal with an atypical and unpredictable occurrence."¹¹

On this analysis, the National Party Committees would have the same legal authority to raise funds for convention expenses which, by law, are "not for the purpose of influencing an election." Federal law and Commission regulations governing the public financing of conventions restricted the use of the funds in a manner similar to the conditions that the Commission has placed on recount funds raised under a separate limit. Thus, public funds for convention costs could not "be used to defray the expenses of any candidate or delegate who is participating in any presidential nominating convention,"¹² or for "expenses related to party business,"¹³ or even for costs "*related to* the campaigns of the individual primary candidates."¹⁴

By contrast, the type of expenditures for which public convention funding *could* be used are, by definition, not for "campaign activities" or to influence an election. Commission regulations define "convention expenses" to include, for example:

⁸ See Advisory Opinion 2006-24.

⁹ See Advisory Opinion 2010-14 (holding that the funds may not be used to "campaign for any candidates or to influence any elections" and must "have no relation to campaign activities.").

¹⁰ In Advisory Opinion 2011-03, the Commission approved a request from national party committees to use Federal funds from such accounts to pay for legal expenses and settlement costs arising from a non-recount litigation. Three of the four commissioners who voted to approve the request agreed that "[t]he Commission's reasoning ... concerning recount funds has never explicitly limited the national party committees to using such funds exclusively to finance recount activities" and that the threshold issue was whether the funds would be used "in any way for campaign activities or for the purpose of influencing any Federal election." Advisory Opinion 2011-03, Agenda Document 11-14.

¹¹ Concurring Statement of Commissioner Ellen L. Weintraub, Advisory Opinion 2011-03 (April 11, 2011).

¹² 26 U.S.C. § 9008.

¹³ Presidential Election Campaign Fund and Federal Financing of Presidential Nominating Conventions, 59 Fed. Reg. 33,606, 33,608 (June 29, 1994).

¹⁴ Advisory Opinion 2000-06 (Reform Party USA) (emphasis added).

- Preparing, maintaining, and dismantling the physical convention site, including rental of the hall, platforms and seating;
- Convention personnel and staff expenses whose responsibilities involve planning, management, or otherwise conducting the convention;
- Conducting meetings related to rules, credentials, platform, and similar committee activities;
- Securing a convention city;
- Providing a transportation system in the convention city;
- Certain officially connected entertainment events;
- Printing of programs, agendas, tickets, badges, and other similar publications and the creation of certain convention films;
- The cost of administrative and office expenses for the convention;
- Security; and
- Limited entertainment activities which are part of the official convention activity and are not sponsored on behalf of presidential candidates.¹⁵

Because these are the types of expenses for which, by regulation, the National Party Committees could use public funds, they are not the expenses of any candidate and do not contribute to general party business. Rather, these are expenses made in connection with *administering* an election; they do not otherwise *influence* any Federal election within the meaning of the Act. Accordingly, they are also the types of expenses for which the National Party Committees seek Commission confirmation that may be paid from a Federal account subject to a separate contribution limit.

The legal significance of the nature of these expenses – that they are not for the purpose of influencing an election – becomes clear when considering the legal status and authority of convention "host committees." Host committees have been authorized to pay many of these exact same expenses funded by convention committees, such as security, certain entertainment events, offices and office equipment, and expenses for preparing the physical site of the conventions.¹⁶ The

¹⁵ 11 C.F.R. § 9008.7.

¹⁶ *Id.* § 9008.52(b).

Commission has taken the position that while this overlap "reflects the fact that some host committee disbursements are for goods or services related to the conduct of a convention, and not merely promotion of their cities,"¹⁷ these disbursements are not "in connection with" a Federal election.¹⁸ If the expenses are not "in connection with" an election when paid by the host committees, they cannot logically be treated as somehow "for the purpose of influencing" an election because the National Party Committees have paid for them. It is the nature of the expense and not the source of the payment that should be controlling in analyzing what the law requires or authorizes.

Of course, if "convention expenses" *were* for the purpose of influencing an election, because they met the definition of "expenditure," then the convention committees' payment of them in coordination with presidential campaigns would be in-kind contributions or party coordinated expenditures. The Commission has never endorsed this view of the law.

Permitting the National Party Committees to pay for these expenses under a separate contribution limit is therefore consistent with the law and with Commission rulings in the analogous case of recount and litigation expenses. It also serves sound public policy without harm to enforcement of the law's core contribution limitations, source restrictions and disclosure requirements.

As previously noted, prior to the elimination of public financing, the law permitted party and convention committees to solicit contributions for convention expenses and, in the event that they did so, provided for a corresponding reduction in their entitlement to public funding.¹⁹ This provision reflects a judgment that convention expenses might require separate and additional sources of funding. It is not clear whether there was any intention to provide for a separate limit but it is noteworthy that the provision in question did not require that the private funds needed to be transferred from party accounts established for other purposes. Convention costs were treated as unique, potentially necessitating an appeal for funds dedicated to this purpose if public funding was somehow unavailable or untimely.

¹⁷ Public Financing of Presidential Candidates and Nominating Conventions, 68 Fed. Reg. 47,386, 47,400.

¹⁸ *Id.* at 47,404.

¹⁹ 11 C.F.R. 9008.6.

Conventions are a critical function of the parties: for years, Congress made the judgment that over many decades the public should be encouraged through a government-administered voluntary check-off system to assist in funding them. The expenses for which the law authorized the use of these public funds are similarly removed from the promotion of specific candidacies as the recount expenses treated as "not for the purpose of influencing an election" and are therefore appropriately funded with separate limits. And in both cases, the law and Commission regulations account for the practical realities that certain expenses require a flexible regulatory response if the parties and candidates are to have the resources required to meet unique needs.

2. The National Party Committees May Either Raise Additional Federal Funds Into a Separate Committee Account or Establish Convention Committees

As explained above, the National Party Committees may permissibly raise additional Federal funds under a separate contribution limit to pay for convention expenses. The Act and Commission precedent allow the National Party Committees either to raise these funds into a separate account of the national committee or to establish separate convention committee accounts.

Under the first option, the National Party Committees would follow the Commission's established reporting guidelines for the recount funds the parties already operate. First, the National Party Committees' solicitations for their respective convention accounts would clearly state the purpose of the account and state that no donations to the account will be used for the purpose of influencing any Federal election.²⁰ The National Party Committees would report all contributions from the account as "other receipts" and all disbursements from the account as "other disbursements" on their reports filed with the Commission.²¹ Where the National Party Committees incur expenses attributable to both convention and campaign activities, they would allocate expenses and generally follow the other reporting and recordkeeping requirements the Commission has established for the National Party Committees' recount funds.²²

Alternatively, the National Party Committees could establish separate convention committees for their 2016 nominating conventions, just as they used to do to receive the public funds. The convention committees would register and report according to Commission regulations in much the same way they have in previous

²⁰ See Advisory Opinion 2010-14.

²¹ See *id.*

²² See *id.*

cycles. First, each convention committee would register with the Commission as a political committee.²³ The convention committees would file quarterly and post-convention reports disclosing the contributions the committees receive and the expenditures the committees make to defray convention expenses each reporting period.²⁴

The National Party Committees seek confirmation that either alternative structure for raising, spending, and reporting funds for convention expenses would be permissible under the Act.

Conclusion

The National Party Committees are already preparing for the 2016 conventions without the essential support of millions of dollars in public funding provided to them since 1976. They will now have to solicit private contributions to make up the enormous difference that has now opened up between the resources needed and the resources available. But the National Party Committees seek to replace the public money only with "hard money."

For the foregoing reasons, the National Party Committees seek confirmation that they may raise Federal funds into a segregated account or convention committee, subject to a separate contribution limit to pay for the same convention expenses that would have been permissibly paid with public convention funds.

Very truly yours,



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²³ See 11 C.F.R. § 9008.3(b)(1).

²⁴ See *id.* § 9008.3(b)(2).