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FEDERAL ELECTION COMMISSION  
WASHINGTON, D.C. 20463

93 MAR 25 AM 11:57

March 25, 1993

**MEMORANDUM**

**TO:** The Commission

**THROUGH:** John C. Surina  
Staff Director

**FROM:** Lawrence M. Noble  
General Counsel

N. Bradley Litchfield  
Associate General Counsel

Jonathan M. Levin  
Senior Attorney

**SUBJECT:** Draft AO 1993-3

**AGENDA ITEM**  
For Meeting of: APR 1 1993

RECEIVED  
FEDERAL ELECTION COMMISSION  
OFFICE OF GENERAL COUNSEL  
93 MAR 29 PM 3:03

Attached is a proposed draft of the subject advisory opinion. We request that this draft be placed on the agenda for April 1, 1993.

The opinion responds to a request that Democrats 2000, a non-connected committee, be allowed to transfer approximately \$20,400 from its non-Federal to its Federal account. The transfer would reimburse the Federal account for the non-Federal share of joint expenditures incurred between January 1, 1991 and the end of May, 1992.

The Office of General Counsel believes that this transfer should not be authorized. First, the committee had solved its allocation problems many months before it approached the Commission with this request. Throughout the period in question, it demonstrated a systemic inability to comply with these rules, despite the substantial assistance available to it. Also, the provision at issue is not at all complex, but rather an explicit statement as to the 30, then 60, day transfer window for payments from the non-Federal to the Federal account. In our view, these factors are sufficient to distinguish this request from those which led to advisory opinions where retroactive reallocation was allowed. The draft advisory opinion would thus prohibit reallocation.

However, because of Commission interest in another approach, the Office of General Counsel has also drafted an

alternative document in which the requested reallocation would be allowed. Revised material in the alternative starts at the top of page 8 and continues through the penultimate paragraph. The alternative cites the earlier advisory opinions which allowed retroactive reallocation as the basis for its conclusion.

Attachment

1  
2 ADVISORY OPINION 1993-3

3 B. Holly Schadler  
4 Perkins Coie  
5 607 14th Street, N.W.  
6 Washington, D.C. 20005-2011

**DRAFT**

7 Dear Ms. Schadler:

8 This responds to your letters dated February 23, 1993,  
9 and December 31, 1992, on behalf of Democrats 2000 ("the  
10 Committee") concerning application of the Federal Election  
11 Campaign Act of 1971, as amended ("the Act), and Commission  
12 regulations to a proposed transfer reflecting a retroactive  
13 reallocation of expenses between a non-Federal and a Federal  
14 account.

15 You state that Democrats 2000 is a political committee  
16 organized in 1988 to operate on the Federal and non-Federal  
17 level. It is registered as a non-connected committee. It  
18 has two full-time staff members and an annual budget of  
19 \$130,000.<sup>1/</sup>

20 You state that the Committee did not fully understand  
21 the requirements of the new allocation regulations when they  
22 took effect in 1991, and had difficulty in categorizing  
23 expenses as administrative or fundraising, or Federal or  
24 non-Federal. The Committee had difficulty finding  
25 professional assistance to set up an appropriate accounting  
26 system. In addition, you assert that the Committee's  
27 activities did not fit neatly into the categories set out in  
28 the regulations. For example, the Committee conducts issue

<sup>1/</sup> In 1992, the Committee disbursed \$141,82.

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2 forums featuring elected officials and distributes a  
3 newsletter on Committee issue programs and other events. You  
4 state that such activities do not directly support either  
5 Federal or non-Federal candidates and are neither clearly  
6 fundraising or administrative events, and, as a consequence,  
7 "implementation of its current procedures took considerable  
8 time to finalize."

9 The Committee has gone through three phases in its  
10 attempts to allocate. From January to June 1991, the  
11 Committee used several methods, "many of which were  
12 modifications of their previous system." Some expenses were  
13 determined to be non-Federal because "they had no direct  
14 federal impact." Some late June 1991 expenses were allocated  
15 as Federal because some of the Committee's activities  
16 involved Federal elected officials, although none of the  
17 activities related to the election of a particular candidate.

18 From August 1991 to May 1992, the second phase, only  
19 nominal transfers were made from the non-Federal to the  
20 Federal account. You state that the amount of the transfers  
21 was considerably below the amount of the non-Federal share of  
22 allocable expenses.

23 During the period from January 1991 to May 1992, the  
24 Committee "understood" that it could spend funds out of the  
25 Federal account and make corrections from the non-Federal  
26 account later, but was not aware of the time limit on such  
27 corrections at 11 CFR 106.6(e)(2)(ii)(B). The Committee was  
28 also uncertain as to how to account and report for in-kind

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2 contributions.

3 At the end of May 1992, a law firm assisted the  
4 Committee in developing new procedures to "track" and  
5 allocate expenses more effectively. Currently, the committee  
6 lists each check written from the Federal account  
7 individually on an accounting sheet. After that, it lists a  
8 total for each category (administrative and separate  
9 fundraising activities) in an individual column followed by a  
10 Federal column and a non-federal column for each category.  
11 Whenever the Committee makes a transfer from the non-Federal  
12 to the Federal account, the totals from the non-Federal  
13 columns are added to determine the amount to be transferred.

14 You state that, in the fall of 1992, the Committee  
15 decided to recalculate the allocations made during the period  
16 through May 1992 to determine how much it had overpaid from  
17 its Federal account. You state that the process was  
18 completed in late 1992 and took a long time to complete  
19 "because of other demands during the campaign and the minimal  
20 staff available to complete this review." It revealed that,  
21 if the newly-used method had been used for the period in  
22 question, the Committee's cash-on-hand in its Federal account  
23 at the end of May 1992 would have been \$21,731.12, instead of  
24 \$1,355.78, a difference of \$20,375.34.

25 You note the caution exercised by the Committee in  
26 making greater than necessary payments originally from the  
27 Federal account. You request that the Commission permit  
28 Democrats 2000 to retroactively reallocate its fundraising

1  
2 and administrative expenses from January 1991 to May 1992 in  
3 accordance with the more recent calculations.

4 The allocation regulations promulgated on January 1,  
5 1991, provide that a political committee, including a  
6 non-connected political committee,<sup>2/</sup> which has separate  
7 Federal and non-Federal accounts, shall allocate their  
8 Federal and non-Federal expenses for certain purposes. 11  
9 CFR 106.6(a). These purposes include: (1) administrative  
10 expenses not directly attributable to a clearly identified  
11 candidate including rent, utilities, office supplies, and  
12 salaries; and (2) the direct costs of a fundraising program  
13 or event including disbursements for solicitation of funds  
14 and for planning and administration of actual fundraising  
15 events, where Federal and non-Federal funds are collected  
16 through such program.

17 The regulations explicitly provide for the method of  
18 allocating administrative expenses and the direct fundraising  
19 costs. Administrative costs should be allocated based on the  
20 ratio of Federal expenditures to total Federal and  
21 non-Federal disbursements made by the committee during the  
22 two-year election cycle. An estimate of the ratio may be  
23 based upon a prior comparable cycle or a reasonable  
24 prediction of disbursements. Calculations of Federal  
25 expenditures should include only amounts contributed to or  
26

27 <sup>2/</sup> A non-connected committee includes any committee which  
28 conducts activity in connection with an election, but which  
is not a party committee, an authorized committee, or a  
separate segregated fund. 11 CFR 106.6(a).

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2 otherwise spent on behalf of specific Federal candidates, and  
3 calculations of total disbursements should include only  
4 disbursements for specific Federal and non-Federal  
5 candidates, and not overhead or other generic costs. 11 CFR  
6 106.6(c)(1). The regulations also provide for adjusting the  
7 allocation ratio periodically to reconcile it with actual  
8 activity to date, and to make appropriate transfers. 11 CFR  
9 106.6(c)(2).

10 Direct fundraising costs should be allocated on a funds  
11 received basis whereby a committee allocates its fundraising  
12 costs based on the ratio of funds received into its Federal  
13 account to its total receipts for each fundraising program or  
14 event. Estimates of the ratio for disbursements prior to the  
15 event should be based upon reasonable predictions and  
16 adjustments should be made after the event to correspond to  
17 the actual ratio of funds received. 11 CFR 106.6(d).

18 The allocation regulations have always allowed Federal  
19 accounts to pay all committee expenses, if desired. 11 CFR  
20 106.6(a). Furthermore, these regulations have always  
21 provided a time window within which non-Federal accounts may  
22 transfer funds to the Federal accounts for the non-Federal  
23 share of joint expenditures.

24 In the original proposed rule the window was a brief 10  
25 days after payment from the Federal account (no time before).  
26 The 40 day window contained in the final rules, effective  
27 January 1, 1991, was 10 days longer than that advocated in  
28 any of the comments received in response to that proposed

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2 rule. Nevertheless, in an effort to be even more  
3 accommodating to committees, the window was expanded to 70  
4 days (10 days before/60 days after the payment from the  
5 Federal account) in an amended rule that took effect on  
6 June 18, 1992. 11 CFR 106.6(e)(2)(ii)(B).<sup>3/</sup>

7 The Committee's long-standing difficulties occurred  
8 despite the guidance and instructions set out in the new  
9 allocation regulations, published June 26, 1990, and other  
10 Commission publications such as the FEC Record Supplement on  
11 Allocation issued in November 1990. Nevertheless, the  
12 Commission, on three occasions, has permitted retroactive  
13 reallocation to remedy errors by political committees acting  
14 in good faith.

15 In Advisory Opinion 1991-15, issued in June 1991, the  
16 Commission permitted retroactive application by a state party  
17 committee of a ballot composition formula for administrative  
18 costs where the initial formula was based on a "good faith  
19 miscalculation" and had resulted in transfers of non-Federal  
20 funds to the Federal account in amounts that were lower than  
21 the permissible share of joint expenditures. The committee  
22 stated that it had not realized at first that certain special  
23 elections could be counted in the total of statewide offices.  
24 In Advisory Opinion 1992-2, issued in March 1992, the

25  
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27 <sup>3/</sup> Commission regulations also now provide for a 60-day  
28 period after a fundraising program or event for payment to  
the Federal account by the non-Federal account if the Federal  
account had paid more than its allocable share. 11 CFR  
106.6(d)(2).



1  
2 Commission permitted a national party committee to take a  
3 discrete group of expenses that had previously been allocated  
4 as administrative costs and retroactively reallocate them as  
5 direct costs of fundraising. This group of expenses  
6 consisted of salaries and fringe benefits of employees in the  
7 committee's Fundraising and Direct Mail divisions. In  
8 Advisory Opinion 1992-27, issued in August 1992, the  
9 Commission permitted a national party committee, which  
10 recognized its responsibilities under the rules but which did  
11 not have an adequate accounting and reporting system in place  
12 until March, 1992, to retroactively break down prior  
13 fundraising costs (from the beginning of 1991 through  
14 February 1992) into Federal and non-Federal shares and make  
15 the necessary transfer to the Federal account.

16 The Commission's decisions to permit retroactive  
17 reallocations and resultant non-Federal to Federal transfers  
18 were a recognition that "the allocation regulations represent  
19 significant revisions in past practice and require a brief  
20 period of adjustment, i.e., the current [1991-92] election  
21 cycle, by political committees acting in good faith."

22 Advisory Opinion 1992-2. See Advisory Opinion 1992-27.<sup>4/</sup>  
23

24 <sup>4/</sup> The Commission notes that the election cycle for  
25 allocation purposes differs from that found at 11 CFR  
26 100.3(b), where the cycle is defined with respect to  
27 candidates and is considered as ending "on the date on which  
28 the general election for the office or seat that the  
individual seeks is held." 11 CFR 100.3(b). As was made  
clear in Advisory Opinion 1991-6, the allocation rules  
envision a two year cycle which begins on January 1 of each  
odd-numbered year, and extends through December 31 of the  
following even-numbered year. Advisory Opinions 1991-15 and

1  
2 Based on the circumstances presented, however, the Commission  
3 concludes that the committee may not retroactively reallocate  
4 its fundraising and administrative expenses for the period  
5 from January 1991, through May 1992. The basic, systemic  
6 inability to distinguish clearly between Federal and  
7 non-Federal expenses and between administrative expenses and  
8 direct fundraising costs, as well as an acknowledged  
9 ignorance of time limits for the transfer of non-Federal  
10 funds in the allocation regulations, distinguish this  
11 situation from those presented in Advisory Opinions 1991-15  
12 and 1992-2, which involved specific circumstances and  
13 problems. This situation is also distinguishable from the  
14 situation presented in Advisory Opinion 1992-27. Even though  
15 the requester in that opinion acknowledged not having an  
16 adequate system to conform with the new requirements, its  
17 problems were still confined to correctly allocating  
18 fundraising expenses and did not stem from overlooking more  
19 basic requirements in the rules.

20 The opinions referred to above are a recognition of  
21 possible difficulties political committees may have in  
22 adjusting to the new regulations. The Committee's request,  
23 however, falls short in view of the explicit nature of the  
24 regulations combined with the long-standing availability of  
25 Commission resources for guidance on the allocation rules  
26 since November 1990. In consideration of the broad sweeping  
27

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28 (Footnote 4 continued from previous page)  
1991-6.

3 problems of Democrats 2000, which were apparently recognized  
4 much earlier in the election cycle and presumably remedied  
5 seven months before the December 31, 1992, letter, the  
6 Committee could have requested assistance from the  
7 Commission's Information Division or through the advisory  
8 opinion process in a much more timely manner.

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

13 Sincerely,

14  
15 Scott E. Thomas  
16 Chairman

17 Enclosures (AOs 1992-27, 1992-2, 1991-15, and 1991-6)  
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Page 3

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25 days after payment from the Federal account (no time before).  
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10 Commission publications such as the FEC Record Supplement on  
11 Allocation issued in November 1990. Nevertheless, the  
12 Commission, on three occasions, has permitted retroactive  
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15 In Advisory Opinion 1991-15, issued in June 1991, the  
16 Commission permitted retroactive application by a state party  
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21 the permissible share of joint expenditures. The committee  
22 stated that it had not realized at first that certain special  
23 elections could be counted in the total of statewide offices.  
24 In Advisory Opinion 1992-2, issued in March 1992, the

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27 <sup>3/</sup> Commission regulations also now provide for a 60-day  
28 period after a fundraising program or event for payment to  
the Federal account by the non-Federal account if the Federal  
account had paid more than its allocable share. 11 CFR  
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Page 7

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2 Commission permitted a national party committee to take a  
3 discrete group of expenses that had previously been allocated  
4 as administrative costs and retroactively reallocate them as  
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9 Commission permitted a national party committee, which  
10 recognized its responsibilities under the rules but which did  
11 not have an adequate accounting and reporting system in place  
12 until March, 1992, to retroactively break down prior  
13 fundraising costs (from the beginning of 1991 through  
14 February 1992) into Federal and non-Federal shares and make  
15 the necessary transfer to the Federal account.

16 The Commission's decisions to permit retroactive  
17 reallocations and resultant non-Federal to Federal transfers  
18 were a recognition that "the allocation regulations represent  
19 significant revisions in past practice and require a brief  
20 period of adjustment, i.e., the current [1991-92] election  
21 cycle, by political committees acting in good faith."

22 Advisory Opinion 1992-2. See Advisory Opinion 1992-27.<sup>4/</sup>

23  
24 <sup>4/</sup> The Commission notes that the election cycle for  
25 allocation purposes differs from that found at 11 CFR  
26 100.3(b), where the cycle is defined with respect to  
27 candidates and is considered as ending "on the date on which  
28 the general election for the office or seat that the  
individual seeks is held." 11 CFR 100.3(b). As was made  
clear in Advisory Opinion 1991-6, the allocation rules  
envision a two year cycle which begins on January 1 of each  
odd-numbered year, and extends through December 31 of the  
following even-numbered year. Advisory Opinions 1991-15 and

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2 Page 8

3 Based on the circumstances presented, the Commission  
4 concludes that Democrats 2000 may retroactively reallocate  
5 its fundraising and administrative expenses for the period  
6 from January 1991 through May 1992. The Commission notes  
7 that this request was submitted on December 31, 1992, the  
8 last day of the 1991-1992 allocation cycle, and that the  
9 "brief period of adjustment" referenced in Advisory Opinion  
10 1992-2 has now ended. Consistent with Advisory Opinions  
11 1991-15, 1992-2, and 1992-27, the committee may, within 30  
12 days after the date of this opinion, transfer \$20,375.34 from  
13 its non-Federal to its Federal account.

14 From an examination of Democrats 2000's reports filed  
15 with the Commission, it appears that the joint expenditures  
16 from January 1991 through May 1992 have now been reported on  
17 Schedule H4's. The committee should file with its mid-year  
18 1993 report amended H2's and H4's listing each covered  
19 expenditure and the revised calculations. See Advisory  
20 Opinion 1991-15. If any allocable expenditures have been  
21 reported solely as expenditures itemized on Schedule B, the  
22 committee should file Schedule H2's, H3's, and H4's for these  
23 expenditures, also at the time it files its mid-year 1993  
24 report. See Advisory Opinion 1992-27. The committee should  
25 include in its report an explanatory letter noting the reason  
26 for the new allocations and resulting transfers.

27 An entry for the adjustment should be made on Schedule  
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(Footnote 4 continued from previous page)  
30 1991-6.

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1 AO 1993-3  
2 Page 9

3 H3 when the transfer is actually made. Democrats 2000 should  
4 note that this adjustment reflects retroactive reallocations  
5 during the period January 1, 1991, through May 31, 1992, made  
6 pursuant to Advisory Opinion 1993-3.

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

11 Sincerely,

12  
13 Scott E. Thomas  
14 Chairman

15 Enclosures (AOs 1992-27, 1992-2, 1991-15, and 1991-6)  
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