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VIA E-MAIL: LEGALREQUESTPROGRAM@FEC.GOV

Chairman Matthew S. Petersen; Vice Chair Steve T. Walther; and Commissioners Ellen L. Weintraub, Caroline C. Hunter, Lee E. Goodman, and Ann M. Ravel
Federal Election Commission
c/o Ms. Shawn Woodhead Werth, Secretary
999 E Street, NW
Washington, DC 20463

RE: Request for Consideration of Legal Question by the Commission

Dear Commissioners:

We represent David Vitter for U.S. Senate (the “Committee”). On behalf of the Committee, we request Commission consideration of a determination by the Reports Analysis Division (“RAD”) that the Committee return contributions it received for the 2016 general election.

I. Factual Background

Through filings with the Commission and other statements and documents, Senator Vitter announced several years ago his candidacy for reelection to the U.S. Senate in 2016. Consistent with the Federal Election Campaign Act of 1971, as amended (the “Act”) and Commission regulations, the Committee solicited and received contributions from individuals and political committees designated for the 2016 primary, general, and runoff elections.

Then, in 2014, Senator Vitter announced his candidacy for Governor of Louisiana, a Louisiana state election in the fall of 2015. At no time prior to or while running for governor did Senator Vitter announce that he would not run for the U.S. Senate in 2016 should he not be elected governor.

In 2014, while Senator Vitter was still a candidate for the U.S. Senate, the Committee properly and legally contributed \$823,000 to the Fund for Louisiana’s Future, a political committee established to independently support Senator Vitter in all of his political endeavors, including his gubernatorial campaign.

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On November 21, 2015, Senator Vitter was defeated in his bid for governor. At that point and for the first time, he announced that he would no longer seek reelection to the U.S. Senate in 2016.

On April 12, 2016, the Committee received a Request for Additional Information (“RFAI”) from RAD stating: “Since the candidate is not seeking office and will not participate in the general and runoff elections, any contribution received for the general and runoff elections must be returned to the donors, in accordance with 11 CFR §110.1(b)(3).”

On May 17, 2016, the Committee filed a response notifying RAD that all contributions for the runoff election, which all along had been properly segregated pursuant to the Commission's guidelines, were refunded once Senator Vitter announced that he would not run for reelection. However, the Committee disagreed with RAD’s position regarding the general election funds because those funds had been spent on fully legal and allowable expenses while Senator Vitter was a candidate for the 2016 U.S. Senate election. Unlike runoff funds, the Commission has never directed or suggested in any way that general election funds must be segregated and only spent after a particular date.

On July 27, 2016, RAD notified the Committee by telephone that the Office of General Counsel (“OGC”) supported RAD’s determination that the Committee was required to refund contributions designated for the 2016 general election. Due to the unique nature of Louisiana’s election laws and the fact that RAD is pursuing a “segregation of general election funds” position for the first time ever regarding Louisiana elections, the Committee brings this request pursuant to the Program for Requesting Consideration of Legal Questions by the Commission.¹

II. Legal Analysis

Under Louisiana law, “[p]rimary and general elections are held to elect persons to Congress and to all the elective offices in this state, except the office of presidential elector.”² For congressional races, the primary election is “held on the first Tuesday after the first Monday in November of an election year,” and the general election is “held on the fifth Saturday after the first Tuesday after the first Monday in November of an election year.”³ A candidate who receives a majority of the vote in the primary election wins the election and no general election is held for that office.⁴ If no candidate receives a majority of the vote, the two candidates who received the highest number of votes will proceed to the general election.⁵ In other words, the November general election is, under Louisiana law, the primary election. If no candidate receives more

¹ See Fed. Election Comm’n. Policy Statement Regarding a Program for Requesting Consideration of Legal Questions by the Commission. 78 Fed. Reg. 63203 (Oct. 23, 2013).

² R.S. § 18:401.1.

³ R.S. § 18:402.

⁴ R.S. § 18:511.

⁵ R.S. § 18:481.

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than 50% of the vote, the top two candidates, regardless of party, run in a general election or “runoff” election in December.

Unlike Louisiana law, the Commission has consistently stated that the November general election date “is the date of the general election for Federal offices in Louisiana as it is in the 49 States of the United States.”⁶ Thus, while Louisiana law describes the November election as a “primary” election, the Commission has concluded that the November election is, in fact, the general election, and the potential December election is a runoff. Based on this interpretation, the Commission has concluded that there is “a general election contribution limit” for candidates who participate in the November election, and an additional contribution limit for those candidates who participate in a runoff election.⁷

As part of this unique construct, the Commission designated a fictional primary election date whereby congressional candidates would treat the last day to file for the general election ballot as the date of the primary election.⁸ Thus, Louisiana congressional candidates could raise separate amounts for a fictional primary election, for the general election held in November, and for a runoff election in December if necessary.

In creating this fictional primary election, the Commission has never stated that primary and general election funds must be segregated, or that general election funds can only be expended after a certain date. This is in stark contrast to the Commission's long-standing position that runoff contributions must be segregated and can only be spent after the general election if a runoff is necessary.

As a practical matter, Louisiana campaigns do not have primary expenses, beyond the qualifying fee.⁹ Rather, all expenses incurred by Louisiana campaigns are general election expenses, regardless of whether they are incurred before or after the filing deadline.¹⁰ Because all candidates appear on the general election ballot in November, the campaign committees for those candidates invariably spend general election funds prior to the designated primary election day because the expenses that are incurred are almost exclusively for the general election. Thus, in practice, Louisiana campaigns do not segregate primary and general contributions.

⁶ See FEC AO 2000-29 at 2. See also FEC AO 1978-79 and 1984-54. This interpretation was affirmed by the United States Supreme Court in *Foster v. Love*, 522 U.S. 67 (1997).

⁷ See FEC AO 2000-29.

⁸ *Id.* at 5. See 11 C.F.R. §100.2(c)(4).

⁹ By way of comparison, even candidates who run unopposed in a traditional primary election incur primary expenses, such as fundraising expenses to deter potential primary opponents, voter registration, and voter identification in connection with the primary. Moreover, failure to qualify for the general election ballot is immaterial because the moment a Louisiana candidate announces they are running for federal office all efforts thereafter are in connection with the November general election.

¹⁰ For example, a Louisiana campaign will retain consultants and staff specifically for the November general election, which is the only certain election, from the first day of the campaign. There may be provisions or contingencies if the candidate proceeds to a runoff, but there is no primary election so all expenses from the first day of the campaign are for the November general election.

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Contributions to the runoff election are treated quite differently. Pursuant to clear Commission guidance, runoff contributions are segregated. They can only be legally spent after the general election, and they must be refunded if a runoff is not required or if a candidate does not participate in the runoff. As noted above, Senator Vitter complied with this requirement.

We respectfully request that the Commission consider the unique circumstances candidates and campaigns in Louisiana encounter. As soon as an individual becomes a candidate in Louisiana, he or she is a candidate for the November general election, and should be permitted to spend general election funds at the outset of the campaign.

This has been the consistent practice in Louisiana. The Commission has never stated or suggested in any way that general election funds must be segregated and cannot be legally spent until after a certain date. Therefore, we request that the Commission instruct RAD that the Committee is not required refund contributions designated for the 2016 general election.

Should the Commission hold otherwise, this will have major implications for all Louisiana federal campaigns. It will mean that the great majority of these campaigns are out of compliance since they do not segregate general election funds or ensure that they are only spent after a certain date.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Charles R. Spies". The signature is fluid and cursive, with the first name "Charles" being the most prominent.

Charles R. Spies
Elizabeth Beacham White