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FEDERAL ELECTION COMMISSION
Washington, DC 20463

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August 20, 2008

AGENDA ITEM

For Meeting of: 08-21-08

SUBMITTED LATE

MEMORANDUM

TO: The Commission

FROM: Thomasenia P. Duncan *pch for*
General Counsel

Rosemary C. Smith *RCS*
Associate General Counsel

Amy L. Rothstein *ALR*
Assistant General Counsel

Joanna S. Waldstreicher *ALR for JSW*
Attorney

Subject: Draft AO 2008-04

We have been asked to circulate the attached alternative draft B of the subject advisory opinion. Please place it on the agenda for August 21, 2008.

Attachment

1 ADVISORY OPINION 2008-04

2 Marc E. Elias, Esq.
3 Brian G. Svoboda, Esq.
4 Perkins Coie LLP
5 607 Fourteenth Street, NW
6 Washington, DC 20005-2011

Draft B

7 Dear Messrs. Elias and Svoboda:

8 We are responding to your advisory opinion request on behalf of Chris Dodd for
9 President, Inc. (the “Presidential Committee”), concerning the application of the Federal
10 Election Campaign Act of 1971, as amended (the “Act”), 2 U.S.C. 431 et seq., the
11 Presidential Primary Matching Payment Account Act (the “Matching Payment Act”), and
12 Commission regulations to the redesignation and refund of general election contributions
13 received by the Presidential Committee during the primary campaign.

14 The Commission concludes that, notwithstanding the Presidential Committee’s
15 acceptance of primary election public matching funds under the Matching Payment Act,
16 the Presidential Committee may issue refunds or obtain redesignations and transfer
17 contributions received for the general election into Friends of Chris Dodd (the “Senate
18 Committee”), Senator Dodd’s Senate campaign committee. The Commission further
19 concludes that the costs associated with issuing refunds or obtaining redesignations and
20 transferring contributions received for the general election are properly considered
21 “winding down costs” and therefore are “qualified campaign expenses” under 11 CFR
22 9034.11(a), which may be paid with presidential primary election funds. The
23 Commission notes that, ordinarily, the Presidential Committee would have to issue
24 refunds or obtain written redesignations for contributions received for the general election
25 within 60 days from the date Senator Dodd withdrew from the presidential campaign. .

1 However, in view of the fact that the advisory opinion request – which asked for
2 guidance on a novel question – was made 54 days after Senator Dodd’s withdrawal, the
3 Commission, consistent with prior precedent, concludes that the Presidential Committee
4 has six days from the date of its receipt of this opinion to obtain redesignations or to
5 make refunds to contributors.

6 ***Background***

7 The facts presented in this advisory opinion are based on your letters received on
8 February 26 and April 23, 2008, as well as publicly available information, including
9 reports filed with the Commission.

10 The Presidential Committee is the principal campaign committee for Senator
11 Dodd, who was a candidate for the nomination of the Democratic Party for President of
12 the United States. When Senator Dodd became a candidate for President, his Presidential
13 Committee began accepting private contributions for the general election under the
14 conditions set forth in Advisory Opinion 2007-03 (Obama). The Presidential Committee
15 has kept its general election contributions in a separate bank account from primary
16 election contributions, accessible only by the Presidential Committee’s Treasurer, and has
17 tracked them separately in its accounting database.

18 On November 13, 2007, the Presidential Committee applied for federal matching
19 funds for primary election contributions. On November 27, 2007, the Commission found
20 the Presidential Committee eligible for primary matching funds.¹ On January 3, 2008,

¹ Press Release, Federal Election Commission, Dodd Fourth Presidential Candidate Declared Eligible for Primary Matching Funds in 2008 Race (November 27, 2007), <http://www.fec.gov/press/press2007/20071126dodd.shtml>. On December 20, 2007, the Commission certified Senator. Dodd’s eligibility for \$1,447,568.09 in public matching funds. Press Release, FEC Approves Matching Funds for 2008 Candidates, <http://www.fec.gov/press/press2007/20071207cert.shtml>. To date, the Presidential Committee has received the full amount for which it was certified. . See Press

1 Senator Dodd withdrew from the Presidential campaign. On January 11, 2008, Senator
2 Dodd filed a Statement of Candidacy with the Secretary of the Senate indicating his
3 candidacy for U.S. Senate in Connecticut in the 2010 election.² In that statement, he
4 designated the Senate Committee as his principal campaign committee for that election.

5 As of February 26, 2008, the Presidential Committee had \$1,706,420.30 in
6 general election funds on hand and had refunded \$36,800 in general election
7 contributions in response to direct, unsolicited contributor requests. On February 28 and
8 29, 2008, the Presidential Committee sent requests via U.S. Mail to all remaining general
9 election contributors asking them to redesignate their contributions to the Senate
10 Committee in writing by facsimile or U.S. Mail. The Presidential Committee paid the
11 costs associated with sending these redesignation requests with funds received for the
12 presidential primary election. The Presidential Committee does not anticipate sending
13 any further requests for redesignation. As of April 22, 2008, the Presidential Committee
14 has refunded \$462,762.00 in general election funds at the request of contributors and
15 received signed redesignation letters for general election contributions totaling \$67,800.

16 ***Questions Presented***

17 *1. May the Presidential Committee, which has applied for and received primary*
18 *election public matching funds under the Matching Payment Act, issue refunds*
19 *and obtain redesignations for contributions designated for the presidential*
20 *general election?*

Release, FEC Approves Matching Funds for 2008 Presidential Candidates (July 16, 2008),
<http://www.fec.gov/press/press2008/20080714matching.shtml>.

² Senator Dodd had previously been a candidate for the U.S. Senate in Connecticut prior to becoming a candidate for the nomination of the Democratic Party for President, but stopped seeking Senate re-election to run for President.

1 2. *May the Presidential Committee consider the costs associated with issuing*
2 *refunds and obtaining redesignations of general election contributions as*
3 *“winding down costs” under 11 CFR 9034.11(a) and, thus, pay such costs with*
4 *funds received for the presidential primary election?*

5 3. *What is the deadline by which the Presidential Committee must issue refunds and*
6 *obtain redesignations of its contributions received for the general election?*

7 ***Legal Analysis and Conclusions***

8 *Question 1:* May the Presidential Committee, which has applied for and received
9 primary election public matching funds under the Matching Payment Act, issue refunds
10 and obtain redesignations for contributions designated for the presidential general
11 election?

12 Yes, the Presidential Committee may issue refunds and obtain redesignations for
13 contributions designated for the presidential general election as long as the Presidential
14 Committee complies with the requirements governing the refunding and redesignation of
15 general election funds as set forth in Commission regulations, advisory opinions, and
16 other rulings.

17 As a general matter, a candidate may accept contributions for the general election
18 prior to the primary election, or in the case of a Presidential candidate, before the
19 candidate receives his or her party’s nomination. *See* 11 CFR 102.9(e)(1). A candidate
20 receiving such general election funds must employ “an acceptable accounting method to
21 distinguish between contributions received for the primary election and contributions
22 received for the general election.” *Id.*

1 The Commission recently reiterated these general rules in the context of a
2 presidential campaign. *See* Advisory Opinion 2007-03 (Obama). In that Advisory
3 Opinion, the Commission confirmed that a presidential candidate does not waive his or
4 her ability to participate in the general election public funding program by soliciting and
5 raising general election funds before he or she secures his or her party's nomination. *Id.*
6 In reaching this conclusion, the Commission noted that a candidate's decision to refund
7 general election contributions in order to receive public funding would be analogous to a
8 candidate who failed to qualify for the general election and refunded general election
9 contributions in order to avoid accepting excessive contributions. *Id.*

10 Accordingly, a presidential candidate receiving general election funds prior to
11 becoming the party's nominee, and who does not become the party's nominee, may
12 refund any general election funds received from contributors. *See* 11 CFR 102.9(e)(3);
13 Advisory Opinion 2007-03 (Obama). Alternatively, the presidential candidate in such a
14 situation may obtain redesignations for a different election in accordance with 11 CFR
15 110.1(b)(5) or 110.2. *See* 11 CFR 102.9(e)(3).

16 Unlike the requestor in AO 2007-03 (Obama), who did not request public primary
17 matching funds, Senator Dodd's presidential campaign has applied for and received
18 public matching funds under the Matching Payment Act. As a result, the Presidential
19 Committee is subject to certain limitations on its expenditures after January 3, 2008, the
20 Presidential Committee's date of ineligibility. *See* 11 CFR 9034.4(b)(3) (“[e]xcept for
21 winding down costs . . . and certain convention expenses . . . , any expenses incurred
22 after a candidate's date of ineligibility . . . are not qualified campaign expenses”).
23 Accordingly, the requestor is concerned that any expenses that the Senate Committee

1 incurs using funds transferred from the Presidential Committee may not constitute
2 “qualified campaign expenses” under 11 CFR 9034.4(b)(3). However, because those
3 transferred funds would be from the private contributions that the Presidential Committee
4 received for the general election (and assuming that the Presidential Committee properly
5 redesignates such contributions as discussed herein), they are not subject to the 11 CFR
6 9034.4(b)(3) post-ineligibility limitations.

7 *Question 2: May the Presidential Committee consider the costs associated with issuing*
8 *refunds and obtaining redesignations of general election contributions as “winding down*
9 *costs” under 11 CFR 9034.11(a) and, thus, pay such costs with funds received for the*
10 *presidential primary election?*

11 Yes, the Presidential Committee may pay the costs associated with refunds and
12 redesignations of contributions received for the general election with funds received for
13 the primary election because the refund and redesignation of general election funds
14 would qualify as “winding down costs” under 11 CFR 9034.11(a), and therefore are
15 “qualified campaign expenses” under 11 CFR 9034.4(a) and are not subject to the
16 prohibition on “post-ineligibility expenditures” under 11 CFR 9034.4(b)(3).

17 Winding down costs are those costs associated with the termination of a
18 presidential candidate’s efforts to obtain his or her party’s nomination, and include “the
19 costs of complying with the post election requirements” of the Act and the Matching
20 Funds Act. 11 CFR 9034.11(a). Refunding and redesignating contributions designated
21 for the general election are clearly associated with the termination of political activity
22 related to the primary election and are required to ensure compliance with the Act and
23 Commission regulations. *Id.* Consequently, subject to the limitations of 11 CFR

1 9034.11(b), the costs associated with obtaining redesignations, transferring, and
2 refunding general election contributions constitute “qualified campaign expenses” under
3 26 U.S.C. 9032(9) and 11 CFR 9034.4(a) and may be paid with presidential primary
4 funds.

5 *Question 3: What is the deadline by which the Presidential Committee must issue refunds and*
6 *obtain redesignations of its contributions received for the general election?*

7 In Advisory Opinion 1992-15, the Commission held that the 60-day period for a
8 candidate to obtain redesignations begins to run from the date the candidate has actual
9 notice of the need to obtain the redesignations. Advisory Opinion 1992-15 (Russo).³ In
10 Advisory Opinion 1992-15, that period began to run on the date the candidate lost the
11 primary election. Applying the logic of Advisory Opinion 1992-15 here, the Commission
12 concludes that the 60-day period began to run when Senator Dodd withdrew from the
13 presidential campaign.

14 Moreover, in Advisory Opinion 1992-15, the Commission concluded that the
15 committee in question, which submitted its advisory opinion request 37 days after the
16 candidate lost the primary, had 23 days from receipt of the Commission’s advisory
17 opinion to obtain redesignations or make refunds, and in effect tolled the 60 day rule
18 because of the novel legal question being considered by the Commission. The same logic

³ Notwithstanding the plain text of the Commission’s regulations, which requires committees to refund, redesignate or reattribute contributions within 60 days of their receipt of the contributions (*see* 11 CFR 110.1(b)(3)(i) and (b)(5); 110.2(b)(3)(i) and (b)(5); 103.3(b)(3)), Advisory Opinion 1992-15 allowed for a more flexible approach. Relatedly, the Commission in several recent audit matters has permitted authorized candidate committees to obtain redesignations and/or reattributions of contributions after the 60-day period had elapsed. *See, e.g.*, Report of the Audit Division on Cynthia McKinney for Congress, January 1, 2005 – December 31, 2006; Report of the Audit Division on the Citizens for Arlen Specter, January 1, 2003 – December 31, 2004; Report of the Audit Division on Martinez for Senate, January 5, 2004 – December 31, 2004; Report of the Audit Division on Gephardt for President, Inc., January 7, 2003 – April 30, 2004; Report of the Audit Division on DeMint for Senate Committee, Inc., January 14, 2003 – December 31, 2004.

1 applies here. Therefore, because the Presidential Committee's question regarding two
2 potentially conflicting regulations is novel, the Presidential Committee has six days from
3 receipt of this opinion to obtain redesignations or make refunds because it filed its request
4 with the Commission 54 days after Senator Dodd withdrew.⁴

5 This response constitutes an advisory opinion concerning the application of the
6 Act and Commission regulations to the specific transaction or activity set forth in your
7 request. *See* 2 U.S.C. § 437f. The Commission emphasizes that, if there is a change in
8 any of the facts or assumptions presented, and such facts or assumptions are material to a
9 conclusion presented in this advisory opinion, then the requester may not rely on that
10 conclusion as support for its proposed activity. Any person involved in any specific
11 transaction or activity which is indistinguishable in all its material respects from the
12 transaction or activity with respect to which this advisory opinion is rendered may rely on
13 this advisory opinion. *See* 2 U.S.C. 437f(c)(1)(B). Please note the analysis or
14 conclusions in this advisory opinion may be affected by subsequent developments in the
15 law, including, but not limited to, statutes, regulations, advisory opinions and case law.
16 All cited advisory opinions are available on the Commission's website at
17 <http://saos.nictusa.com/saos/searchao>.

18 For the Commission,
19

20
21
22 Donald F. McGahn II
23 Chairman

⁴ The Commission notes that, at the time the requestor submitted his request, the Commission was in a state of unprecedented dormancy of the agency for approximately the first six months of the year, in which the Commission was unable to act on such requests.