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Washington, DC 20463

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**AGENDA ITEM**  
For Meeting of: 1-29-09

**SUBMITTED LATE**

MEMORANDUM

TO: The Commission

FROM: Thomasenia P. Duncan *JPD*  
General Counsel

Rosemary C. Smith *RC*  
Associate General Counsel

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Subject: Draft AO 2008-22

Attached is a proposed draft of the subject advisory opinion. We request that this draft be placed on the agenda for January 29, 2009.

Attachment

1 ADVISORY OPINION 2008-22

2 Marc E. Elias, Esq.  
3 Perkins Coie LLP  
4 607 Fourteenth Street NW  
5 Washington, DC 20005-2003

**DRAFT**

6 Dear Mr. Elias:

7           We are responding to your advisory opinion request on behalf of Senator Frank  
8 Lautenberg and his principal campaign committee, Lautenberg for Senate, concerning the  
9 application of the Federal Election Campaign Act of 1971, as amended (“the Act”), and  
10 Commission regulations to the Committee’s repayment of several personal loans made by  
11 Senator Lautenberg to Lautenberg for Senate using funds raised for Senator Lautenberg’s  
12 2008 and 2014 re-election campaigns. The Commission concludes that (1) Lautenberg  
13 for Senate may use contributions raised for the 2008 and 2014 campaigns to repay  
14 personal loans from Senator Lautenberg of any amount for the 2002 campaign; and (2)  
15 Lautenberg for Senate may use contributions received for the 2008 general election to  
16 repay personal loans from Senator Lautenberg of up to \$250,000 for the 2008 primary  
17 campaign.

18 ***Background***

19           The facts presented in this advisory opinion are based on your letter received on  
20 December 12, 2008 and publicly available materials, including reports filed with the  
21 Commission.

22           Lautenberg for Senate (the “Committee”) is Senator Frank Lautenberg’s principal  
23 campaign committee for the 2002 and 2008 Senate elections. Senator Lautenberg  
24 anticipates filing a Statement of Candidacy for 2014 designating the Committee as his  
25 principal campaign committee for the 2014 Senatorial race. Senator Lautenberg made

1 personal loans totaling \$1,510,000 to the Committee for the 2002 general election,  
2 between October 6 and October 17, 2002. \$1,090,000 of that debt remains outstanding.  
3 Senator Lautenberg also loaned the Committee a total of \$1,650,000 for the 2008 primary  
4 election, of which \$250,000 remains outstanding and \$1,400,000 has been converted to  
5 contributions from Senator Lautenberg. *See* Lautenberg for Senate 2008 30-day Post-  
6 General Election Report, transmittal cover page and Schedule C.

7 ***Questions Presented***

8 *(1) May the Committee use contributions received for the 2008 general election to*  
9 *repay up to \$250,000 owed to Senator Lautenberg for personal loans made to the*  
10 *Committee for the 2008 primary election?*

11 *(2) May the Committee use contributions received for the 2008 and 2014 elections*  
12 *to repay \$1,090,000 owed to Senator Lautenberg for personal loans made to the*  
13 *Committee for the 2002 election?*

14 ***Legal Analysis and Conclusions***

15 *(1) May the Committee use contributions received for the 2008 general election to*  
16 *repay up to \$250,000 owed to Senator Lautenberg for personal loans made to the*  
17 *Committee for the 2008 primary election?*

18 Yes, the Committee may use contributions received for the 2008 general election  
19 after the date of the 2008 primary election to repay up to \$250,000 of Senator  
20 Lautenberg's personal loans to the Committee for the primary election.

21 The Bipartisan Campaign Reform Act of 2002 ("BCRA") limited the extent to  
22 which candidates' personal loans to their authorized committees can be repaid after their  
23 elections. Up to \$250,000 of personal loans may be repaid with contributions received

1 before, on, or after the date of the election. 2 U.S.C. 441a(j); 11 CFR 116.11(b)(3); 11  
2 CFR 116.12(a). For personal loans that exceed \$250,000, a committee may only repay  
3 the portion above \$250,000 using contributions made on or before the date of the  
4 election. 2 U.S.C. 441a(j); 11 CFR 116.11(b)(2).

5 The regulation specifies that it “applies separately to each election.” 11 CFR  
6 116.12(b). Accordingly, the Explanation and Justification (“E&J”) states that this means  
7 that the \$250,000 limit on repayment applies separately to the primary election and the  
8 general election. *Increased Contribution and Coordinated Party Expenditure Limits for*  
9 *Candidates Opposing Self-Financed Candidates; Interim Final Rules, Explanation and*  
10 *Justification* 68 FR 3970, 3974, 3975 (Jan. 27, 2003). As an illustration of this point, the  
11 E&J discusses an example in which a candidate made personal loans to her authorized  
12 committee of \$250,000 for the primary election and \$250,000 for the general election, a  
13 set of facts that is somewhat analogous to the Committee’s situation. The E&J indicates  
14 that in the example, the authorized committee is permitted to use “contributions received  
15 before, during, or after the primary election” to repay both the primary election loan and  
16 the general election loan. *Id.*

17 The Committee may therefore use general election contributions received after the  
18 2008 primary election to repay the outstanding \$250,000 in personal loans made by  
19 Senator Lautenberg for the primary election.

20 (2) *May the Committee use contributions received for the 2008 and 2014 elections*  
21 *to repay \$1,090,000 owed to Senator Lautenberg for personal loans made to the*  
22 *Committee for the 2002 election?*

23 Yes, the Committee may use contributions received for the 2008 election or that

1 will be received for the 2014 election to repay the entire outstanding amount of Senator  
2 Lautenberg's personal loan to the Committee for the 2002 election.

3         The \$250,000 limit imposed by BCRA on repayment of personal loans from post-  
4 election contributions does not apply to loans made before the November 6, 2002  
5 effective date of the legislation. 2 U.S.C 441a(j); Pub. L. 107-155, Sec. 402, Mar. 27,  
6 2002. The E&J for the regulations implementing the statute explains that "the limitations  
7 on repayment of personal loans from contributions made after the respective election do  
8 not apply to personal loans made before this date. Consequently, any outstanding loan  
9 balances of candidate loans that were made before November 6, 2002, may be repaid  
10 with contributions made after this date subject to the provisions concerning net debts  
11 outstanding in 11 CFR 110.1(b)(3)." 68 FR at 3974; *see also* Advisory Opinion 2003-30  
12 (Fitzgerald). Because Senator Lautenberg made the loans for his 2002 election in  
13 October 2002, prior to the statute's effective date, BCRA does not limit the amount of  
14 personal loans for that election that the Committee can repay using contributions received  
15 after the 2002 election.

16         The Commission has previously permitted candidates' authorized committees to  
17 use otherwise lawful campaign contributions to repay debts outstanding from previous  
18 elections. For example, in Advisory Opinion 1989-22 (Nagle), the Commission  
19 concluded that Representative Nagle's authorized committee could use contributions  
20 made with respect to the 1990 primary election campaign to retire outstanding debts  
21 incurred by his 1988 campaign committee, including a bank loan for which

1 Representative Nagle was the guarantor.<sup>1</sup> The Commission noted that this use of  
2 contributions “does not require that they be counted against the limits applicable to the  
3 previous election unless there are facts and circumstances indicating that the  
4 contributions were actually solicited to pay the debts remaining from the previous  
5 election, or that contributors gave to the current campaign with knowledge that the funds  
6 would be applied only to debt retirement.” Advisory Opinion 1989-22 (Nagle).<sup>2</sup> More  
7 recently, in Advisory Opinion 2003-30 (Fitzgerald), the Commission concluded that  
8 Senator Fitzgerald’s principal campaign committee could use contributions made with  
9 respect to the 2004 primary election to repay loans made to the committee in connection  
10 with the 1998 election, including personal loans from Senator Fitzgerald. Similarly, the  
11 Committee may use contributions made in connection with Senator Lautenberg’s 2008  
12 and 2014 elections to repay outstanding debts from the 2002 election, including personal  
13 loans from Senator Lautenberg.<sup>3</sup>

14 The Commission notes that the Committee, in preparing its reports, should clearly  
15 identify which loans are being repaid with contributions made in connection with the  
16 2008 and 2014 elections. Specifically, the loan repayment should be itemized on  
17 Schedule B of FEC Form 3 for the appropriate line number (19(a)). For the “Purpose of  
18 Disbursement” line item on Schedule B, the Committee should briefly describe why it

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<sup>1</sup> The Commission notes that Advisory Opinion 1989-22 was not directly implicated by the subsequent enactment of the \$250,000 limit in 2 U.S.C. 441a(j) because the loan amount was under \$250,000. However, that advisory opinion should not be relied upon in situations where BCRA requires a different result.

<sup>2</sup> The Commission notes that Senator Lautenberg has not yet filed a Statement of Candidacy for the 2014 Senate race, and assumes that he intends to do so at the appropriate time.

<sup>3</sup> The Committee’s use of contributions received for the 2014 general election to repay debts from any previous election is conditioned on Senator Lautenberg’s actual candidacy in that election. See 11 CFR 110.1(b)(3)(i) (providing that “if a candidate is not a candidate in the general election, all contributions made for the general election shall be either returned or refunded to the contributors or redesignated . . . or reattributed . . .”).

1 made the disbursement. The loan repayment also should be noted in the “Cumulative  
2 Payment to Date” column on Schedule C.

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

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On behalf of the Commission,

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Steven T. Walther

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Chairman

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