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FEDERAL ELECTION COMMISSION  
Washington, DC 20463

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**AGENDA ITEM**  
For Meeting of: 07-28-09

**SUBMITTED LATE**

MEMORANDUM

TO: The Commission

FROM: Thomasenia P. Duncan *JPD*  
General Counsel

Rosemary C. Smith *RC5*  
Associate General Counsel

Amy L. Rothstein *ARR*  
Assistant General Counsel

Cheryl A.F. Hemsley *CAH*  
Attorney

Subject: Draft AO 2009-17 (Romney for President, Inc.)

We have been asked to circulate the attached two proposed drafts of the subject advisory opinion. We request that these drafts be placed on the agenda for July 28, 2009.

Attachment

ADVISORY OPINION 2009-17

Benjamin L. Ginsberg  
Glenn Willard  
Patton Boggs LLP  
2550 M Street, NW  
Washington, D.C. 20037

Dear Mr. Ginsberg and Mr. Willard:

We are responding to your request for an advisory opinion on behalf of Romney for President, Inc. (the “Committee”), concerning the application of the Federal Election Campaign Act of 1971, as amended (the “Act”), and Commission regulations to the proposed disposition of contributions, which either on their face or when aggregated with other contributions by the same contributor, exceed the contribution limitations set forth in the Act and Commission regulations.

The Commission concludes the Committee may not donate an amount equal to such excessive contributions to a charitable organization. Rather, the Committee must disgorge the funds to the U.S. Treasury.

***Background***

The facts presented in this advisory opinion are based on your letter received on June 16, 2009 and a July 7, 2009 telephone conversation with Commission attorneys.

The Committee is the principal campaign committee of Governor Mitt Romney’s 2008 presidential campaign. The Committee is currently winding down all operations and “will seek to terminate as soon as the issue presented here is answered and all outstanding invoices can be settled.” The Committee did not apply for, and did not

1 accept, any public funding during the 2008 primary election season under 26 U.S.C.

2 §9031 *et seq.* and 11 CFR 9031.1 *et seq.*

3         The Committee states that it received and refunded within sixty days of receipt  
4 contributions designated for the primary election that exceeded the contribution limits set  
5 forth in the Act and Commission regulations. However, refund checks representing  
6 approximately \$156,000 have not been presented to the bank for payment. The most  
7 recent of the unpresented checks at issue here were issued by the Committee on March  
8 24, 2008.

9         The Committee proposes donating the funds remaining in the Committee's  
10 accounts that represent the unpresented checks to the Cystic Fibrosis Foundation ("the  
11 Foundation"). The Foundation is a charitable organization described in section 170(c) of  
12 the Internal Revenue Code and also qualifies as a tax exempt organization under section  
13 501(c)(3) of the Internal Revenue Code.

14 ***Questions Presented***

15 1) *May the Committee donate to the Foundation an amount equal to that of the*  
16 *refund checks not presented for payment?*

17 2) *If the response to Question 1 is "no," must the Committee disgorge the funds to*  
18 *the U.S. Treasury, or may the Committee donate the funds to some other entity?*

19 ***Legal Analysis and Conclusions***

20 1) *May the Committee donate to the Foundation an amount equal to that of the*  
21 *refund checks not presented for payment?*

22         No, the Committee may not donate to the Foundation, the funds representing the  
23 refund checks that have not been presented for payment.

1           When a political committee receives a contribution, which either on its face or  
2           when aggregated with other contributions by the same contributor, exceeds the  
3           contribution limits set forth in the Act and Commission regulations, the committee may  
4           either deposit the entire contribution or return it to the contributor. 11 CFR 103.3(b)(3).  
5           If the contribution is deposited, the treasurer may request from the contributor permission  
6           to either redesignate (to another election) or reattribute (to another contributor) in  
7           accordance with 11 CFR 110.1(b), 110.1(k) or 110.2(b). *Id.* If permission to redesignate  
8           or reattribute is not obtained from the contributor, “the treasurer shall, within sixty days  
9           of the treasurer’s receipt of the contribution, refund the contribution to the contributor.”  
10          *Id.*

11           Although the Act and Commission regulations specifically permit a candidate to  
12           transfer Committee funds to any organization described in 26 U.S.C. 170(c), *see* 2 U.S.C.  
13           439a and 11 CFR 113.2(b), these provisions are not applicable in this situation because  
14           both provisions are premised upon the funds consisting of contributions that were  
15           *permissible* under the Act and Commission regulations. Here, the Committee is in  
16           receipt of contributions which on their face or when aggregated with other contributions  
17           from the same contributor, exceed the contribution limitations set forth in the Act and  
18           Commission regulations. Thus, the Committee may not donate excessive contributions to  
19           the Foundation.

20           We note the Commission has previously permitted committees, under limited and  
21           unusual circumstances, to disburse funds representing possibly illegal contributions for “a  
22           lawful purpose,” such as donating the funds to a qualified charitable organization  
23           described in section 170(c) consistent with 2 U.S.C. 439a. *See* Advisory Opinion 1991-

1 39 (D'Amato) and 1995-19 (Indian-American Leadership Investment Fund). In both  
2 opinions, the funds in question were contributions possibly made in the name of another  
3 in violation of 2 U.S.C. 441f and thus, the committees could not determine the  
4 appropriate party to whom the contributions should have been refunded. By contrast, the  
5 funds at issue here are contributions exceeding the amount limitations, and the  
6 Committee, unequivocally, may not legally retain the funds.

7       There is no indication here that the Committee is unable to identify to whom  
8 refunds should be made. In fact, the Committee has already identified the contributors  
9 who made the excessive contributions and, despite its diligent efforts, was unsuccessful  
10 in its attempt to refund the contributions.

11 2) *If the response to Question 1 is "no," must the Committee disgorge the funds to*  
12 *the U.S. Treasury, or may the Committee donate the funds to some other entity?*

13       The Committee must disgorge the funds to the U.S. Treasury.

14       As noted above, a committee in receipt of excessive contributions, where  
15 permission to redesignate or reattribute is not obtained from the contributor, "the  
16 treasurer shall, within sixty days of the treasurer's receipt of the contribution, refund the  
17 contribution to the contributor." 11 CFR 103.3(b)(3).

18       Although the Act and Commission regulations do not specifically address what  
19 options are available to authorized committees that do not accept public financing with  
20 leftover funds resulting from stale-dated committee refund checks, Commission  
21 regulations, in analogous circumstances require disgorgement of amounts representing  
22 stale-dated committee checks to the U.S. Treasury. *See* 11 CFR 9007.6 (General Election  
23 Financing; Stale-Dated Committee Checks), 9008.16 (Federal Financing of Presidential

1 nominating Conventions; Stale-Dated Committee Checks) and 9038.6 (Presidential  
2 Primary Matching Fund; Stale-Dated Committee Checks). These regulations provide  
3 that committees must submit a check payable to the U.S. Treasury equal to the total  
4 amount of outstanding checks to contributors or creditors that have not been cashed.

5 Thus, under 11 CFR 103.3(b)(3) and Commission regulations governing  
6 analogous stale-dated committee checks, contributions exceeding the amount limitations  
7 set forth in the Act and Commission regulations must neither be refunded to the  
8 contributors and, if the committee is unsuccessful in its attempt to refund, disgorged to  
9 the U.S. Treasury. As the Committee was unsuccessful in its attempt to refund the  
10 excessive contributions to the contributors the Committee must disgorge such funds to  
11 the U.S. Treasury.

12 The Commission has previously considered a similar situation, and has required  
13 that a candidate for U.S. Senate disgorge excessive funds to the U.S. Treasury that the  
14 candidate was unable to refund to contributors. The Commission did not permit the  
15 candidate to donate such funds to a proposed charitable organization. *See* Advisory  
16 Opinion 2003-18 (Smith). The Commission stated that once it was determined that the  
17 candidate could not participate in the general election, contributions received prior to the  
18 primary election and designated for the general election became excessive contributions.  
19 The Commission concluded that the committee was prohibited from retaining the  
20 excessive contributions, and the funds could only be refunded to the contributors or  
21 disgorged to the U.S. Treasury. *Id.*

22 As in Advisory Opinion 2003-18 (Smith), the Committee here is in receipt of  
23 excessive contributions that the Committee may not legally retain. Such excessive

1 contributions must either be returned to the contributors or disgorged to the U.S.  
2 Treasury. Because the Committee was unsuccessful in its attempt to refund the  
3 contributions, the Committee must disgorge an amount representing such excessive  
4 contributions to the U.S. Treasury. The fact that the Committee seeks guidance on funds  
5 received for the primary election, as opposed to funds received for the general election at  
6 issue in Advisory Opinion 2003-18 (Smith), does not alter the Commission's conclusion,  
7 because in both circumstances, the committees seeks to dispose of contributions  
8 exceeding the amount limitations, and thus were unable to legally retain such funds, and  
9 the committees were unable to successfully refund the contributions.

10 To disgorge the funds to the U.S. Treasury, the Committee must deliver to the  
11 Commission a check in the full amount of the unrepresented refund checks, payable to the  
12 Treasury of the United States. In addition, the Committee must fully disclose the  
13 payment as a disbursement under 2 U.S.C. 434(b)(6)(A) and 11 CFR 104.3(b)(4)(vi).

14 This response constitutes an advisory opinion concerning the application of the  
15 Act and Commission regulations to the specific transaction or activity set forth in your  
16 request. *See* 2 U.S.C. 437f. The Commission emphasizes that, if there is a change in any  
17 of the facts or assumptions presented, and such facts or assumptions are material to a  
18 conclusion presented in this advisory opinion, then the requestor may not rely on that  
19 conclusion as support for its proposed activity. Any person involved in any specific  
20 transaction or activity which is indistinguishable in all its material aspects from the  
21 transaction or activity with respect to which this advisory opinion is rendered may rely on  
22 this advisory opinion. *See* 2 U.S.C. 437f(c)(1)(B). Please note the analysis or  
23 conclusions in this advisory opinion may be affected by subsequent developments in the

1 law including, but not limited to, statutes, regulations, advisory opinions, and case law.

2 The cited advisory opinions are available at <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



ADVISORY OPINION 2009-17

Benjamin L. Ginsberg  
Glenn Willard  
Patton Boggs LLP  
2550 M Street, NW  
Washington, D.C. 20037

Dear Mr. Ginsberg and Mr. Willard:

We are responding to your request for an advisory opinion on behalf of Romney for President, Inc. (the “Committee”), concerning the application of the Federal Election Campaign Act of 1971, as amended (the “Act”), and Commission regulations to the proposed disposition of excessive contributions remaining in the Committee’s account after the Committee issued refund checks that became stale after contributors failed to present them for payment.

The Commission concludes that these unclaimed refunded contributions may be distributed to a charitable organization.

***Background***

The facts presented in this advisory opinion are based on your letter received on June 16, 2009, and a July 7, 2009, telephone conversation with Commission attorneys.

The Committee is the principal campaign committee of Governor Mitt Romney’s 2008 presidential campaign. The Committee is currently winding down all operations and “will seek to terminate as soon as the issue presented here is answered and all outstanding invoices can be settled.” The Committee did not apply for, and did not

1 accept, any public funding during the 2008 primary election season under 26 U.S.C.  
2 § 9031 *et seq.* and 11 CFR 9031.1 *et seq.*

3 The Committee states that it refunded within sixty days of receipt all excessive  
4 contributions designated for the primary election. Refund checks representing  
5 approximately \$156,000 have not been presented to the bank for payment and are now  
6 stale.<sup>1</sup>

7 The Committee proposes donating the funds remaining in the Committee's  
8 accounts that represent the stale refund checks to the Cystic Fibrosis Foundation ("the  
9 Foundation"). The Foundation is a charitable organization described in section 170(c) of  
10 the Internal Revenue Code and also qualifies as a tax exempt organization under section  
11 501(c)(3) of the Internal Revenue Code.

## 12 ***Questions Presented***

13 1) *May the Committee donate to the Foundation an amount equal to that of the*  
14 *refund checks not presented for payment?*

15 2) *If the response to Question 1 is "no," must the Committee disgorge the funds to*  
16 *the U.S. Treasury, or may the Committee donate the funds to some other entity?*

## 17 ***Legal Analysis and Conclusions***

18 1) *May the Committee donate to the Foundation an amount equal to that of the*  
19 *refund checks not presented for payment?*

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<sup>1</sup> Under D.C. law, where the Committee's depository is located, checks are "overdue" 90 days after their date. D.C. Code § 28:3-304(a)(2). The most recent of the unrepresented checks at issue here was issued by the Committee on March 24, 2008.

1           Yes, the Committee may donate to the Foundation the funds representing the  
2 refund checks that have not been presented for payment, which are now stale under  
3 governing law.

4           A political committee that receives an excessive contribution may either deposit  
5 the contribution or return it to the contributor. 11 CFR 103.3(b)(3). If the contribution is  
6 deposited, the treasurer may request redesignation or reattribution by the contributor, as  
7 appropriate. *Id.* If a redesignation or reattribution is not obtained, “the treasurer shall,  
8 within sixty days of the treasurer’s receipt of the contribution, refund the contribution to  
9 the contributor.” *Id.*

10           The Act and Commission regulations do not specifically address what happens to  
11 excessive contributions when an authorized committee that does not accept public  
12 financing refunds contributions pursuant to the Act but the refund checks issued have  
13 become stale because the contributors have not presented the checks for payment. In  
14 Advisory Opinions 1991-39 (D’Amato) and 1995-19 (Indian-American Leadership  
15 Investment Fund), the Commission concluded that, with respect to funds representing  
16 illegal (or, in the latter case, possibly illegal) contributions, committees could disburse  
17 such funds for “a lawful purpose,” such as donating the funds to a qualified charitable  
18 organization described in section 170(c) of the Internal Revenue Code. However, in  
19 Advisory Opinion 2003-18 (Smith), the Commission required a candidate for U.S. Senate  
20 who received contributions designated for a general election but who lost in his party’s  
21 primary election to disgorge unclaimed refunded contributions to the U.S. Treasury,  
22 rather than donating that money to a charitable organization that the candidate recently  
23 had established.

1           The Commission concludes that the reasoning in Advisory Opinions 1991-39  
2 (D’Amato) and 1995-19 (Indian-American Leadership Investment Fund) governs here.  
3 Therefore, the Committee may donate its unclaimed refunded contributions to a qualified  
4 charitable organization.

5           Where the Act and Commission regulations are silent as to a particular proposed  
6 activity, such actions are presumed to be permissible. Nothing in the Act or Commission  
7 regulations specifically mandates disgorgement in this situation. Nor does anything in  
8 the Act or Commission regulations specifically foreclose the donation of unclaimed  
9 refunded contributions to a qualified charitable organization.

10           Commission regulations require, or have required, disgorgement to the U.S.  
11 Treasury in only three instances: (1) the disposition of national party committee non-  
12 Federal funds, including office building funds, after the passage of the Bipartisan  
13 Campaign Finance Reform Act (“BCRA”); (2) the disposition of outstanding checks by  
14 publicly financed presidential primary and general election candidates and national party  
15 nomination conventions; and (3) refunds of “excess contributions” under the so-called  
16 “Millionaire’s Amendment.” None of those three instances is analogous to the current  
17 situation.

18           The post-BCRA requirement that national party committees disgorge to the U.S.  
19 Treasury any remaining non-federal funds was designed to prevent national party  
20 committees from donating non-federal funds to 501(c)(3) organizations, which could  
21 conduct the sorts of federal election activities that national party committees could no  
22 longer undertake using non-federal funds. Prohibited or Excessive Contributions: Non-  
23 Federal Funds or Soft Money, 67 Fed. Reg. 49064, 49091-92 (July 29, 2002). This

1 disgorgement approach was undertaken to give “effect to the use of the word ‘solely’ in 2  
2 U.S.C. 431 note, and to the legislative intent to prohibit national party non-Federal  
3 money from being used in future Federal elections.” *Id.* This disgorgement rationale is  
4 inapplicable to the circumstances presented in this request.

5         The other two instances where Commission regulations require disgorgement are  
6 not analogous either. While Commission regulations require publicly funded candidates  
7 to disgorge outstanding checks, *see* 11 C.F.R. 9007.6 and 9038.6, both the Act and  
8 Commission regulations are silent as to how non-publicly funded candidates may  
9 properly dispose of outstanding checks. Requiring publicly funded candidates to  
10 disgorge unclaimed refunded contributions to the U.S. Treasury ensures that the same  
11 entity that disburses public funds to the candidates receives any remaining funds, which  
12 among other things, helps defray the costs of the public financing system. No similar  
13 justification exists for non-publicly funded candidates.

14         And while Commission regulations had required candidates whose contribution  
15 limits in an election increased due to their opponent triggering the Millionaire’s  
16 Amendment to disgorge excess contributions if they went unspent in connection with that  
17 election, the statutory basis for those regulations was struck down by the Supreme Court  
18 in *Davis v. FEC*, 128 S. Ct. 2759 (2008). Consequently, the regulations implementing  
19 Millionaire’s Amendment, as the requestor points out, have been repealed. Repeal of  
20 Increased Contribution and Coordinated Party Expenditure Limits for Candidates  
21 Opposing Self-Finance Candidates, 73 Fed. Reg. 79597 (Dec. 30, 2008). This repealed  
22 regulation, therefore, provides no guidance in this matter.

1           Even if one or more of the regulatory situations listed above potentially were  
2 analogous, the Court of Federal Claims has cast doubt over whether 11 CFR 103.3(b)(3)  
3 permits disgorgement of excessive or illegal contributions to the U.S. Treasury by non-  
4 publicly funded candidates. *Fireman v. United States*, 44 Fed. Cl. 528, 538-39 (1999)  
5 (holding that an advisory opinion permitting disgorgement rather than refund of illegal  
6 contributions improperly interpreted 11 C.F.R. 103.3(b)(2), which stated at the time that a  
7 treasurer “shall refund” contributions to a contributor after an illegality is discovered).<sup>2</sup>  
8 Regardless of the precedential value of that decision, there is a question as to whether  
9 disgorgement is even *allowed* when a regulation provides that a treasurer “shall refund”  
10 certain contributions. Thus, at a minimum, it is an open question as to whether  
11 disgorgement is *required* in such instances, absent an explicit statutory mandate.

12           The current request is also distinguishable from Advisory Opinion 2003-18  
13 (Smith). That advisory opinion dealt with the donation of unclaimed refunded  
14 contributions to a charitable organization that the requestor himself had recently  
15 established. In this request, however, the Committee wishes to give the unclaimed  
16 refunded contributions to a long-established charitable foundation. There is no evidence  
17 that the respondent was involved in the establishment of the Foundation or is otherwise

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<sup>2</sup> In Advisory Opinion 2003-18 (Smith), the Commission determined that the *Fireman* decision and analysis did not apply when a committee refunded the contributions in question but the money was never claimed. The court’s decision, though, did not hinge on whether attempts to refund the illegal or improper contributions were made or the refunds were claimed. Instead, the court broadly states that the Commission “fundamentally misread[] 11 C.F.R. § 103.3(b)(2).” *Fireman*, 44 Fed. Cl. at 538. Moreover, the court “could not accept [the] argument” that “it was not unlawful for the ... Committee to have sent the money to the United States Treasury.” *Id.* Whether or not a committee *can* send the money to the U.S. Treasury is not before us here, nor was it before the Commission in Advisory Opinion 2003-18 (Smith). Rather, before us is the question of whether a committee *must* send the unclaimed refunded contributions to the U.S. Treasury. And one can infer from the court’s decision the answer to that question is no. To the extent that this Advisory Opinion conflicts with the Commission’s conclusion in Advisory Opinion 2003-18 (Smith), that opinion is superseded.

1 compensated by the Foundation. Nor is there is any evidence that the requestor will  
2 receive anything from the Foundation as a result of the proposed donation. Finally, as the  
3 requestor notes, the Foundation “does not engage in electioneering activities or issue  
4 advocacy campaigns.” Request at 2. It appears, therefore, that the requestor will receive  
5 no tangible benefit, either directly or indirectly, as a result of the proposed donation.

6 Consistent with Advisory Opinion 1991-39 (D’Amato), the Commission  
7 concludes that the Committee may donate the funds consisting of excessive contributions  
8 to the Foundation.

9

10 2) *If the response to Question 1 is “no,” must the Committee disgorge the funds to*  
11 *the U.S. Treasury, or may the Committee donate the funds to some other entity?*

12 Because the answer to Question 1 is Yes, Question 2 is moot.

13

14 This response constitutes an advisory opinion concerning the application of the  
15 Act and Commission regulations to the specific transaction or activity set forth in your  
16 request. *See* 2 U.S.C. § 437f. The Commission emphasizes that, if there is a change in  
17 any of the facts or assumptions presented, and such facts or assumptions are material to a  
18 conclusion presented in this advisory opinion, then the requestor may not rely on that  
19 conclusion as support for its proposed activity. Any person involved in any specific  
20 transaction or activity which is indistinguishable in all its material aspects from the  
21 transaction or activity with respect to which this advisory opinion is rendered may rely on  
22 this advisory opinion. *See* 2 U.S.C. § 437f(c)(1)(B). Please note the analysis or  
23 conclusions in this advisory opinion may be affected by subsequent developments in the

1 law including, but not limited to, statutes, regulations, advisory opinions, and case law.

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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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