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FEDERAL ELECTION COMMISSION
Washington, DC 20463

2009 JUL 23 P 3: 20

AGENDA ITEM

For Meeting of: 07-28-09

SUBMITTED LATE

MEMORANDUM

TO: The Commission

FROM: Thomasenia P. Duncan *JPD*
General Counsel

Rosemary C. Smith *RCS*
Associate General Counsel

Robert M. Knop *RMK*
Assistant General Counsel

Anthony T. Buckley *ATB*
Attorney

Subject: Draft AO 2009-15 (Bill White for Texas)

Attached are two proposed drafts of the subject advisory opinion. We request that these drafts be placed on the agenda for July 28, 2009.

Attachment

1 ADVISORY OPINION 2009-15

2

3 Barry Hunsaker, Treasurer

4 Bill White for Texas

5 P.O. Box 131197

6 Houston, TX 77219 - 1197

7

8 Dear Mr. Hunsaker:

DRAFT A

9 We are responding to your advisory opinion request, on behalf of Bill White for
10 Texas (the “White Committee”), concerning the application of the Federal Election
11 Campaign Act of 1971, as amended (the “Act”), and Commission regulations to the
12 raising and acceptance of contributions for a special election that may not occur. The
13 Commission concludes that the White Committee may accept contributions for the
14 Senatorial primary and general elections to be held in 2012 in Texas, and may currently
15 accept contributions for a special or emergency election or runoff in 2009 or 2010 that
16 has not been scheduled and may not occur.

17 ***Background***

18 The facts presented in this advisory opinion are based on your letter received on
19 June 12, 2009, and on reports filed with the Commission.

20 Bill White is currently the mayor of Houston, Texas. The White Committee is
21 Mayor White’s principal campaign committee for election to the United States Senate
22 from Texas. The White Committee registered with the Commission on December 12,
23 2008. On December 15, 2008, Mayor White filed a Statement of Candidacy with respect
24 to the 2012 Senate race. If a special or emergency election is called before 2012 to fill a
25 vacancy in the Senate seat, Mayor White intends to be a candidate in that election.

26 Currently, Senator Kay Bailey Hutchison holds the Senate seat that will be
27 contested in the 2012 primary and general elections. However, Senator Hutchison has

1 stated publicly that she will not be a candidate for re-election in 2012,¹ and she has
2 formed a committee under Texas law to raise funds to run for Governor of Texas in the
3 2010 March primary and November general elections. Senator Hutchison has discussed
4 the possibility of resigning from the Senate during the course of her gubernatorial
5 campaign.²

6 Under the Texas Election Code (the “Election Code”), if Senator Hutchison
7 resigns from the Senate before her term expires, a “special election” to fill that seat may
8 be scheduled for November 3, 2009, May 8, 2010, or November 2, 2010, depending on
9 the timing of the resignation. Election Code §§210.023 and 3.003. It is also possible that
10 the Governor may schedule an “emergency election” on another date to fill the vacancy if
11 the Governor determines that an emergency exists. Election Code §41.0011. The
12 Governor has considerable discretion in deciding whether to call such an election, and it
13 is not currently possible to predict whether he would do so.³

14 A special election to fill a U.S. Senate seat would not be conducted as a party
15 primary, but as an election in which candidates from all parties appear on the same ballot,
16 with party affiliation indicated. Election Code §203.003. If no candidate receives a
17 majority, that election is followed by a runoff election between the two candidates
18 receiving the most votes in the first election.

19 Regularly scheduled party primary and general elections for the Senate seat will
20 be held in 2012. If no candidate receives a majority in the party primary, a runoff will be
21 held. It is thus conceivable that Mayor White could be a candidate in up to five elections

¹ Gamboa, Suzanne, “Texas senator won't run for re-election,” *USA Today*, October 16, 2007.

² *Id.*

³ The term “special election” is used throughout the remainder of this advisory opinion to refer to either a special or emergency election.

1 for the same U.S. Senate seat between now and November 2012: a special election in
2 2009 or 2010, a runoff for that election, the 2012 Democratic party primary, a primary
3 runoff, and a general election in November 2012.

4 ***Questions Presented***⁴

5 1. *If a contributor makes an undesignated contribution to the White Committee of*
6 *\$2,400 or less, and a special Senate election is subsequently scheduled after that*
7 *contribution is made but before the March 2012 Senate primary election, would that*
8 *undesignated contribution be available to the White Committee to use for the special*
9 *Senate election?*

10 2. *May the White Committee accept a contribution of up to \$4,800 from an*
11 *individual before a special Senate election is scheduled if the contributor (i) designates*
12 *up to \$2,400 for a special Senate election if one is held, or for the 2012 primary election*
13 *if there is no special Senate election; and (ii) designates up to \$2,400 for either a runoff*
14 *election following the special Senate election if a runoff is held, or to the 2012 general*
15 *election if there is no such runoff?*

16 3. *With respect to a contribution that exceeds \$2,400 and that is made before any*
17 *special election is scheduled:*

18 *(a) Is the contribution properly designated if the contributor uses a form stating*
19 *that “Federal Election Law allows individuals to donate up to \$4,800; \$2,400 for*
20 *the first election and \$2,400 for any subsequent election” and there is no other*
21 *designation language provided?*

⁴ These questions use the \$2,400 per person per election contribution limit in place for the 2009-2010 election cycle. That amount may be adjusted for inflation in the 2011-2012 election cycle. *See generally*, 2 U.S.C. 441a(b).

1 ***(b) Is the contribution designated to the 2012 primary and/or 2012 general***
2 ***election pursuant to a form described in question 3(a) properly redesignated to***
3 ***the special and/or runoff election if the White Committee provides the contributor***
4 ***a form letter, such as the one attached as Appendix D in the Request, stating that***
5 ***the White Committee is designating \$2,400 for “the first election” and the***
6 ***remaining amount for “the second election in which Mayor White participates”?***

7 ***(c) If the notice of redesignation described in question 3(b) relating to a special***
8 ***election and possible runoff election is not effective as to a special election and***
9 ***possible runoff election, will the notice of redesignation nevertheless be effective***
10 ***as to the primary and general elections of 2012?***

11 ***(d) If the notice of redesignation is effective as to the 2012 primary and general***
12 ***elections, may the White Committee use the contribution for a special election***
13 ***and, if one is required, a runoff election if special election is called before the***
14 ***2012 primary election occurs?***

15 4. ***If the White Committee raises money for a special election, and for a runoff***
16 ***following a special election, and the special election or runoff does not occur, what may***
17 ***the Committee do with the money?***

18 5. ***How should the White Committee report designated contributions if the answer to***
19 ***Question 2 is yes, and redesignated contributions if the answer to Question 3 is yes?***

20 ***Legal Analysis and Conclusions***

21 1. ***If a contributor makes an undesignated contribution to the White Committee of***
22 ***\$2,400 or less, and a special Senate election is subsequently scheduled after that***
23 ***contribution is made but before the March 2012 Senate primary election, would that***

1 *undesignated contribution be available to the White Committee to use for the special*
2 *Senate election?*

3 Yes, an undesignated contribution of up to \$2,400 would be available to the
4 White Committee to use for the Senate special election that is called after the contribution
5 is made.

6 Contributions by a person other than a multicandidate committee to a Federal
7 candidate's authorized committees are limited to \$2,400 "with respect to any election."
8 11 CFR 110.1(b); 2 U.S.C. 441a(a)(1)(A) and 441a(c). Commission regulations state that
9 "with respect to any election" means: (1) in the case of a contribution designated in
10 writing by the contributor for a particular election, the election so designated; and (2) in
11 the case of a contribution not designated in writing by the contributor, the next election
12 for the Federal office after the contribution is made. 11 CFR 110.1(b)(2). Under the
13 circumstances described, a special election that has been called would be the next Federal
14 election after the undesignated contribution is made. Therefore, the undesignated
15 contribution may be used for that election (but is subject to the reporting requirements set
16 forth in the answer to question 5).

17 2. *May the White Committee accept a contribution of up to \$4,800 from an*
18 *individual before a special Senate election is scheduled if the contributor (i) designates*
19 *up to \$2,400 for a special Senate election if one is held, or for the 2012 primary election*
20 *if there is no special Senate election; and (ii) designates up to \$2,400 for either a runoff*
21 *election following the special Senate election if a runoff is held, or to the 2012 general*
22 *election if there is no such runoff?*

1 Yes, contributions may be designated in the alternative, under the circumstances
2 as set forth in question 2. The White Committee may accept up to \$2,400 from an
3 individual contributor for the 2012 primary or, in the alternative, a special election that
4 has not yet been scheduled. The White Committee may also accept up to \$2,400 from
5 that same individual contributor for the general election in 2012 or, in the alternative, for
6 a runoff for a not-yet-declared special election.

7 Commission regulations provide for the designation of a contribution for “a
8 particular election.” *See* 11 CFR 110.1(b)(2), (3), and (4). Such a designated
9 contribution must not cause the contributor to exceed the contribution limits at 2 U.S.C.
10 441a(a)(1) with respect to the particular election, and contributions designated for an
11 election that has already occurred may only be accepted to the extent such contributions
12 do not exceed the committee’s net debts outstanding. *See* 11 CFR 110.1(b)(1) and (3)(i).
13 Thus, for an authorized committee to accept a designated contribution of \$4,800, which is
14 \$2,400 in excess of the per election limit, the contributor must clearly state in writing that
15 \$2,400 is designated for one particular election and \$2,400 is designated for another
16 particular election, either on the check (or other negotiable instrument) or in a writing
17 accompanying the contribution.

18 The Commission concludes that designations for the special election and for the
19 runoff would qualify as references to “a particular election.” Although the designations
20 present these particular elections in the alternative (*i.e.*, (1) the special election if held
21 before 2012 and, if not so held, the 2012 primary; or (2) the special election runoff if
22 held before 2012 and, if not so held, the 2012 general election), the specific use of the
23 contribution will be clear to both the Committee and the contributor based on

1 circumstances that will be a matter of public record: that the Governor would have to call
2 a special election following the resignation of Senator Hutchinson.

3 Moreover, the likelihood of the occurrence of a special election is sufficiently real
4 in this situation. Based on statements from Senator Hutchison and her agents, Mayor
5 White is presented with a strong possibility that Senator Hutchison will resign before the
6 gubernatorial primary or gubernatorial general election as well as a certainty that she will
7 resign by the end of 2010 if she is elected Governor.⁵

8 Thus, the White Committee may use the described designations to accept up to
9 \$2,400 for the special election and up to \$2,400 for the runoff to that election. The White
10 Committee must use an acceptable accounting method to distinguish between the
11 contributions received for each of the two elections, *e.g.*, by designating separate bank
12 accounts for each election or maintaining separate books and records for each election.
13 11 CFR 102.9(e)(1).⁶

14 The designations described in question 2 would be treated as designations for the
15 special election or the runoff to that election at the point that Senator Hutchison
16 announces her resignation and Mayor White becomes a candidate in a special election
17 called by the Governor. At that point, the contributions can no longer be considered to be
18 designated for the 2012 regularly scheduled elections. After the end of any pre-2012
19 elections (special or runoff) in which Mayor White actually participates as a candidate,

⁵ See Advisory Opinion 2006-22 (Wallace) (where the Commission concluded that an individual raising and spending funds for his candidacy was considered a Federal candidate even at a time when the question of whether the relevant special nominating process would be held was subject to court rulings that had not yet been made).

⁶ The Committee must not spend funds designated for the runoff election unless Mayor White participates in the runoff as a candidate. See 11 CFR 102.9(e)(3).

1 the White Committee may use unused surplus funds (as determined by use of a
2 reasonable accounting method under 11 CFR 110.3(c)(4)) for the 2012 primary election.

3 3. *With respect to a contribution that exceeds \$2,400 and that is made before any
4 special election is scheduled:*

5 *(a) Is the contribution properly designated if the contributor uses a form
6 stating that "Federal Election Law allows individuals to donate up to
7 \$4,800; \$2,400 for the first election and \$2,400 for any subsequent
8 election" and there is no other designation language provided?*

9 Yes, any such contribution is properly designated. If at the time the contribution
10 is made Senator Hutchison has not resigned, no special or runoff election has been called,
11 and the possibility of a special or runoff election is not even mentioned in the forms,
12 current contributors who use the form described in question 3(a) must conclude that the
13 "first election" referenced in the forms means the 2012 primary, and the "second
14 election" means the 2012 general election. Accordingly, barring any further instruction
15 from a contributor, the first \$2,400 contributed would be designated for the 2012 primary
16 election. Any remaining amount up to \$2,400 would likewise be considered designated
17 for the 2012 general election. *See* 11 CFR 110.1(b)(2) and (4).

18 *(b) Is the contribution designated to the 2012 primary and/or 2012 general
19 election pursuant to a form described in question 3(a) properly redesignated to
20 the special and/or runoff election if the White Committee provides the contributor
21 a form letter, such as the one attached as Appendix D in the Request, stating that
22 the White Committee is designating \$2,400 for "the first election" and the*

1 *remaining amount for “the second election in which [Mayor White]*
2 *participates”?*

3 No, any contributions designated for the 2012 primary and/or general election are
4 not properly redesignated to the special and/or runoff election by the form letter
5 described in question 3(b). Once a contribution is designated to a particular election, it
6 cannot be presumptively redesignated to another election, which is what the form letter
7 attached as Appendix D in the Request purports to do. *See* 11 CFR 110.1(b)(5)(ii)(B)(2)
8 and (C)(2). Thus, in order to use funds received in response to the wording of the form
9 described in question 3(a) for a 2009 or 2010 special election or runoff, the White
10 Committee must first obtain written redesignations from the contributors for the special
11 election or runoff in accordance with 11 CFR 110.1(b)(5)(ii)(A)(1) and (2).⁷

12 *(c) If the notice of redesignation described in question 3(b) relating to a special*
13 *election and possible runoff election is not effective, will the notice of*
14 *redesignation nevertheless be effective as to the primary and general elections of*
15 *2012?*

16 Given that the Commission has already concluded in answering question 3(a)
17 above that the language in the forms would result in the proper designation of the
18 contributions for the 2012 primary and general elections, this question is moot. The
19 White Committee would not need to redesignate contributions that already are properly
20 designated. If the Request is asking whether the White Committee may use the notice of

⁷ Although Commission regulations only specifically address redesignation of excessive contributions, nothing in the Commission’s regulations is intended to suggest that political committees may not seek redesignation of contributions that are *within* the contribution limitations and restrictions. *See* 11 CFR 110.1(b)(5)(i)(A)-(D).

1 redesignation described in question 3(b), such as the one attached as Appendix D in the
2 Request, to redesignate contributions that already are designated, the answer remains the
3 same as the answer to question 3(b). Contributions that already are designated must be
4 redesignated by obtaining a writing from the contributor; simply issuing a notice to the
5 contributor, such as the one attached as Appendix D, will not suffice. *See* 11 CFR
6 110.1(b)(5)(ii)(A)(1) and (2).

7 If, on the other hand, the Request is asking whether undesignated contributions
8 that exceed the per-election contribution limit may be presumptively redesignated
9 between the 2012 primary and general elections, then the answer is contingent on
10 whether a special and/or runoff election are called, since the redesignation language
11 contained in the notice attached as Appendix D of the Request is contingent on that fact.
12 In the event the special and runoff elections are not called, the form letter would
13 constitute an effective presumptive redesignation pursuant to 11 CFR 110.1(b)(5)(ii)(B)
14 and (C), since the letter states that the White Committee is designating a certain amount
15 to the primary election (in the event a special election is not called) and a certain amount
16 to the general election (in the event a runoff election does not occur).

17 *(d) If the notice of redesignation is effective as to the 2012 primary and general*
18 *elections, may the White Committee use the contribution for a special election*
19 *and, if one is required, a runoff election if special election is called before the*
20 *2012 primary election occurs?*

21 If the White Committee wishes to use contributions that have been designated for
22 the 2012 primary and general elections for a 2009 or 2010 special election or runoff once
23 the special election is called, the White Committee must first obtain written contributor

1 redesignations for the special election or runoff in accordance with 11 CFR

2 110.1(b)(5)(ii)(A)(1) and (2).

3 4. *If the White Committee raises money for a special election, and for a*
4 *runoff following a special election, and the special election or runoff does not occur,*
5 *what may the Committee do with the money?*

6 If the White Committee raises money for a special election, and the special
7 election does not occur, contributions designated for the special election must be
8 refunded to the contributor within sixty days of the last date that a special election may be
9 scheduled under Texas law, unless the White Committee receives a written redesignation
10 or combined redesignation and reattribution. 11 CFR 110.1(b)(3)(i)(C); *see* Advisory
11 Opinion 1992-15 (Russo) (concluding that the 60-day period begins to run on the date
12 that the committee “has actual notice of the need to obtain redesignations . . . or refund
13 the contribution[s]”).

14 Similarly, although the Committee may accept contributions designated for the
15 runoff once it is apparent that a special election will occur, it may not use those
16 contributions unless Mayor White participates in the runoff as a candidate. *See* Advisory
17 Opinion 1982-49 (Weicker) (recognizing that accepting contributions for an election at a
18 time before the necessity of such an election is determined is analogous to accepting
19 general election contributions before the primary election). Contributions designated for
20 an election that does not occur, or in which a person is not a candidate (for example,
21 where a candidate has lost the primary and is hence not running in the general election),
22 must be refunded, redesignated for another election in which the candidate has
23 participated or is participating in accordance with 11 CFR 110.1(b)(5), or redesignated

1 and reattributed to another contributor in accordance with 11 CFR 110.1(k)(3). *See*
2 11 CFR 102.9(e)(3), 110.1(b)(3)(i), and 103.3(b)(3), and Advisory Opinions 1992-25
3 (Owens), 1986-17 (Green), and 1982-49 (Weicker). Thus, if Mayor White loses the
4 special election, or if any candidate receives a majority in the special election (and
5 therefore there is no special runoff election), contributions designated for the special
6 election runoff must be refunded to the contributor within sixty days of the special
7 election unless the White Committee receives a written redesignation or combined
8 redesignation and reattribution. 11 CFR 110.1(b)(3)(i)(C).

9 5. *How should the White Committee report designated contributions if the*
10 *answer to Question 2 is yes, and redesignated contributions if the answer to Question 3 is*
11 *yes?*

12 In reporting contributions accompanied by the written statements described in
13 question 2 that are received before a special election is scheduled, the White Committee
14 must check a box on Schedule A indicating either a “Primary” contribution or a
15 “General” contribution for the 2012 elections and include a memo text stating either
16 (1) “Designated for special or emergency election if scheduled before 2012” or
17 (2) “Designated for special or emergency election runoff if scheduled before 2012.”
18 Such reporting reflects the use of the contributions as they are intended by the contributor
19 at the time the contribution is made. If Senator Hutchison announces her resignation, and
20 Mayor White becomes a candidate in a special election called by the Governor, the White
21 Committee must inform the Commission that the contributions are considered to be
22 designated for the special election or the runoff election. Normally, when the designation
23 of a contribution has been changed, the political committee must disclose the

1 redesignation on the report covering the period in which it received the redesignation,
2 including a memo entry for each contribution that indicates when the Committee received
3 a new designation from the contributor. *See* 11 CFR 104.8(d); *see also Instructions for*
4 *FEC Form 3 and Related Schedules*, p. 9. Under the circumstances presented, where the
5 White Committee is attempting to deal with uncertainty as to the proper way to designate
6 contributions in an unusual electoral situation, the Commission considers it to be
7 sufficient for the White Committee to file amended reports, simply indicating the proper
8 designations of the contributions. The Commission recommends that to avoid any
9 confusion, the White Committee include memo text specifically referencing this advisory
10 opinion.

11 Further, the Commission must also be informed of any changes to the potential
12 use of undesignated contributions received pursuant to question 1. The White Committee
13 should similarly file amended reports for these contributions once a special election is
14 called.

15 Contributions received using the forms described in question 3 must be reported
16 as contributions designated for the 2012 primary election or 2012 general election.

17 This response constitutes an advisory opinion concerning the application of the
18 Act and Commission regulations to the specific transaction or activity set forth in your
19 request. *See* 2 U.S.C. 437f. The Commission emphasizes that, if there is a change in any
20 of the facts or assumptions presented, and such facts or assumptions are material to a
21 conclusion presented in this advisory opinion, then the requester may not rely on that
22 conclusion as support for its proposed activity. Any person involved in any specific
23 transaction or activity which is indistinguishable in all its material aspects from the

1 transaction or activity with respect to which this advisory opinion is rendered may rely on
2 this advisory opinion. *See* 2 U.S.C. 437f(c)(1)(B). Please note that the analysis or
3 conclusions in this advisory opinion may be affected by subsequent developments in the
4 law including, but not limited to, statutes, regulations, advisory opinions and case law.

5 All cited advisory opinions are available on the Commission's website at

6 <http://saos.nictusa.com/saos/searchao>.

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On behalf of the Commission,

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Steven T. Walther

Chairman

1 ADVISORY OPINION 2009-15

2

3 Barry Hunsaker, Treasurer

4 Bill White for Texas

5 P.O. Box 131197

6 Houston, TX 77219 - 1197

7

8 Dear Mr. Hunsaker:

DRAFT B

9 We are responding to your advisory opinion request, on behalf of Bill White for

10 Texas (the "White Committee"), concerning the application of the Federal Election

11 Campaign Act of 1971, as amended (the "Act"), and Commission regulations to the

12 raising and acceptance of contributions for a special election that may not occur. The

13 Commission concludes that the White Committee may accept contributions for the

14 Senatorial primary and general elections to be held in 2012 in Texas, but may not

15 currently accept contributions for a special or emergency election, or runoff, in 2009 or

16 2010 that has not been scheduled and may not occur.

17 ***Background***

18 The facts presented in this advisory opinion are based on your letter received on

19 June 12, 2009, and on reports filed with the Commission.

20 Bill White is currently the mayor of Houston, Texas. The White Committee is

21 Mayor White's principal campaign committee for election to the United States Senate

22 from Texas. It registered with the Commission on December 12, 2008. On

23 December 15, 2008, Mayor White filed a Statement of Candidacy with respect to the

24 2012 Senate race. If a special or emergency election is called before 2012 to fill a

25 vacancy in the Senate seat, Mayor White intends to be a candidate in that election.

26 Currently, Senator Kay Bailey Hutchison holds the Senate seat that will be

27 contested in the 2012 primary and general elections. However, Senator Hutchison has

1 stated publicly that she will not be a candidate for re-election in 2012¹, and she has
2 formed a committee under Texas law to raise funds to run for Governor of Texas in the
3 2010 March primary and November general elections. Ms. Hutchison has discussed the
4 possibility of resigning from the Senate during the course of her gubernatorial campaign.²

5 Under the Texas Election Code (the “Election Code”), if Senator Hutchison
6 resigns from the Senate before her term expires, a “special election” to fill that seat may
7 be scheduled for November 3, 2009, May 8, 2010, or November 2, 2010, depending on
8 the timing of the resignation. Election Code §§210.023 and 3.003. It is also possible that
9 the Governor may schedule an “emergency election” on another date to fill the vacancy if
10 the Governor determines that an emergency exists. Election Code §41.0011. The
11 Governor has considerable discretion in deciding whether to call such an election, and it
12 is not currently possible to predict whether he would do so.³

13 A special election to fill a U.S. Senate seat would not be conducted as a party
14 primary, but as an election in which candidates from all parties appear on the same ballot,
15 with party affiliation indicated. Election Code §203.003. If no candidate receives a
16 majority, that election is followed by a runoff election between the two candidates
17 receiving the most votes in the first election.

18 Regularly scheduled party primary and general elections for the Senate seat will
19 be held in 2012. If no candidate receives a majority in the party primary, a runoff will be
20 held. It is thus conceivable that Mayor White could be a candidate in up to five elections
21 for the same U.S. Senate seat between now and November 2012: a special election in

¹ Gamboa, Suzanne, “Texas senator won't run for re-election,” *USA Today*. October 16, 2007.

² *Id.*

³ The term “special election” is used throughout the remainder of this advisory opinion to refer to either a special or emergency election.

1 2009 or 2010, a runoff for that election, the 2012 Democratic party primary, a primary
2 runoff, and a general election in November 2012.

3 ***Questions Presented⁴***

4 1. *If a contributor makes an undesignated contribution to the White Committee of*
5 *\$2,400 or less, and a special Senate election is subsequently scheduled after that*
6 *contribution is made but before the March 2012 Senate primary election, would that*
7 *undesignated contribution be available to the White Committee to use for the special*
8 *Senate election?*

9 2. *May the White Committee accept a contribution of up to \$4,800 from an*
10 *individual before a special Senate election is scheduled if the contributor (i) designates*
11 *up to \$2,400 for a special Senate election if one is held, or for the 2012 primary election*
12 *if there is no special Senate election; and (ii) designates up to \$2,400 for either a runoff*
13 *election following the special Senate election if a runoff is held, or to the 2012 general*
14 *election if there is no such runoff?*

15 3. *With respect to a contribution that exceeds \$2,400 and that is made before any*
16 *special election is scheduled:*

17 *(a) Is the contribution properly designated if the contributor uses a form*
18 *stating that "Federal Election Law allows individuals to donate up to*
19 *\$4,800; \$2,400 for the first election and \$2,400 for any subsequent*
20 *election" and there is no other designation language provided?*

⁴ These questions use the \$2,400 per person per election contribution limit in place for the 2009-2010 election cycle. That amount may be adjusted for inflation in the 2011-2012 election cycle. See generally, 2 U.S.C. 441a(b).

1 (b) Is the contribution properly redesignated if the White Committee
2 provides the contributor a form stating that the White Committee is
3 designating \$2,400 for "the first election" and the remaining amount for
4 "the second election in which [Mayor White] participates"?

5 (c) If the notice of redesignation relating to a special election and possible
6 runoff election is not effective, will the notice of redesignation
7 nevertheless be effective as to the primary and general elections of 2012?

8 (d) If the notice of redesignation is effective as to the 2012 primary and
9 general elections, may the White Committee use the contribution for a
10 special election and, if one is required, a runoff election if special election
11 is called before the 2012 primary election occurs?

12 4. If the White Committee raises money for a special election, and for a runoff
13 following a special election, and the special election or runoff does not occur, what may
14 the Committee do with the money?

15 5. How should the White Committee report designated contributions if the answer to
16 Question 2 is yes, and redesignated contributions if the answer to Question 3 is yes?

17 **Legal Analysis and Conclusions**

18 1. If a contributor makes an undesignated contribution to the White Committee of
19 \$2,400 or less, and a special Senate election is subsequently scheduled after that
20 contribution is made but before the March 2012 Senate primary election, would that
21 undesignated contribution be available to the White Committee to use for the special
22 Senate election?

1 Yes, an undesignated contribution of up to \$2,400 would be available to the
2 White Committee to use for the Senate special election that is called after the contribution
3 is made.

4 Contributions by a person other than a multicandidate committee to a Federal
5 candidate's authorized committees are limited to \$2,400 "with respect to any election."
6 11 CFR 110.1(b); 2 U.S.C. 441a(a)(1)(A) and 441a(c). Commission regulations state that
7 "with respect to any election" means: (1) in the case of a contribution designated in
8 writing by the contributor for a particular election, the election so designated; and (2) in
9 the case of a contribution not designated in writing by the contributor, the next election
10 for the Federal office after the contribution is made. 11 CFR 110.1(b)(2). Under the
11 circumstances described, a special election that has been called would be the next Federal
12 election after the undesignated contribution is made. Therefore, the undesignated
13 contribution may be used for that election. If the contributor then wished to contribute
14 additional funds for the March 2012 primary before the special election occurs, the
15 contributor would have to designate that subsequent contribution in writing for the 2012
16 primary. *See* 11 CFR 110.1(b)(2)(i) and (4).

17 Any funds left over from undesignated contributions made before the special
18 election may be used for the succeeding Senatorial election in which Mayor White is a
19 candidate, such as the runoff or (if Mayor White is not a runoff candidate or those

1 undesignated funds are still left over from the runoff) the 2012 primary election.

2 See 11 CFR 110.3(c)(3) and (4).

3 2. *May the White Committee accept a contribution of up to \$4,800 from an*
4 *individual before a special Senate election is scheduled if the contributor (i) designates*
5 *up to \$2,400 for a special Senate election if one is held, or for the 2012 primary election*
6 *if there is no special Senate election; and (ii) designates up to \$2,400 for either a runoff*
7 *election following the special Senate election if a runoff is held, or to the 2012 general*
8 *election if there is no such runoff?*

9 The White Committee may accept up to \$2,400 from an individual contributor for
10 the 2012 primary and \$2,400 from that contributor for the general election in 2012. The
11 White Committee may not accept any contributions for a special election that has not yet
12 been scheduled, or for a runoff for a not-yet-declared special election. The special
13 election may never occur and, unlike a runoff following a regularly scheduled election,
14 there is no previous election that could trigger its occurrence.

15 Commission regulations allow for (and encourage) the designation of a
16 contribution for “a particular election.” See 11 CFR 110.1(b)(2), (3), and (4). Such a
17 contribution must not cause the contributor to exceed the contribution limits at 2 U.S.C.
18 441a(a)(1) with respect to the particular election, and contributions designated for an
19 election that has already occurred may only be accepted to the extent such contributions
20 do not exceed the committee’s net debts outstanding. See 11 CFR 110.1(b)(1) and (3)(i).
21 For the White Committee to accept a contribution of \$4,800, which is \$2,400 in excess of
22 the limit, the contributor must clearly state in writing that \$2,400 is designated for the
23 2012 primary election and \$2,400 is designated for the 2012 general election, either on

1 the check (or other negotiable instrument) or in a writing accompanying the contribution.
2 11 CFR 110.1(b)(4)(i) and (ii). The White Committee must use an acceptable accounting
3 method to distinguish between the contributions received for each of the elections, *e.g.*,
4 by designating separate bank accounts for each election or maintaining separate books
5 and records for each election. 11 CFR 102.9(e)(1).

6 The requirement that a contributor designate contributions for “a particular
7 election” is satisfied where the contributor completes a form containing specific
8 references to either the 2012 primary or 2012 general election. The 2012 Senate
9 elections will, in fact, occur, and the contributor designations accompanying the
10 contributions would clearly specify those particular elections.

11 The Commission concludes that the White Committee may not currently accept
12 contributions for a special election that has not been scheduled, or the runoff to such an
13 election. As indicated above, the Commission has allowed for the designation of
14 contributions to elections where the candidate’s participation is contingent on the results
15 of a prior election in which the candidate is in fact participating, such as the designation
16 of a contribution to a general election when a candidate is participating in the primary. In
17 addition, the Commission has allowed designation of a contribution to an election, such
18 as a primary runoff, whose actual occurrence is contingent upon the outcome of a

1 previous election. (In either case, a candidate who does not participate in such an
2 election cannot use such contributions absent a permissible redesignation.⁵) *See*
3 Advisory Opinions 2007-03 (Obama), 1996-29 (Cannon), 1992-25 (Owens), and 1986-17
4 (Green).

5 However, the Commission distinguishes those situations from a special election
6 that may not occur and that is contingent on possible events other than elections for the
7 Federal office sought. For example, Senator Hutchison may decide to stay in the U.S.
8 Senate while running for governor, or she may in fact decide not to run for governor.

9 Commission regulations governing designation for a particular election were
10 implemented for the purpose of preventing excessive contributions and ensuring that the
11 contributions within the per election limits are available for use by a candidate's
12 authorized committees only in elections in which the candidate participates. To permit a
13 candidate to raise funds for an election that may not occur and is not contingent on the
14 outcome of a previous election could enable circumvention of the contribution limits by
15 permitting a candidate to raise funds for an election whose occurrence is overly
16 speculative while also raising funds for the regularly scheduled primary.

⁵ A political committee may request a contributor's written redesignation of a contribution for a different election in two situations possible applicable here: (A) the contribution was designated in writing for a particular election and would cause the contributor to exceed the contribution limits; or (B) the contribution was not designated in writing and it exceeds the contribution limitations. 11 CFR 110.5(b)(1)(A) and (C). A contribution is considered redesignated if the committee treasurer requests the contributor to provide a written redesignation and informs the contributor that he or she may request a refund instead and, within 60 days of the treasurer's receipt of the contribution, the committee receives the redesignation. If no written redesignation is received, the Committee must refund the contribution within that 60-day period. *See* 11 CFR 110.1(b)(5)(ii)(A)(1) and (2).

1 3. *With respect to a contribution that exceeds \$2,400 and that is made before any*
2 *special election is scheduled:*

3 *(a) Is the contribution properly designated if the contributor uses a form*
4 *stating that "Federal Election Law allows individuals to donate up to*
5 *\$4,800; \$2,400 for the first election and \$2,400 for any subsequent*
6 *election" and there is no other designation language provided?*

7 *(b) Is the contribution properly redesignated if the White Committee*
8 *provides the contributor a form stating that the White Committee is*
9 *designating \$2,400 for "the first election" and the remaining amount for*
10 *"the second election in which [Mayor White] participates"?*

11 No, the wording on the forms described in questions 3(a) and 3(b) would not
12 properly designate or redesignate a portion of the contribution for either the 2012 primary
13 or general elections, or for a special election or runoff election that occurs prior to 2012.
14 Similarly, a contribution would not be properly designated or redesignated for a
15 particular election if it is accompanied by a form that only refers to "\$2,400 for the first
16 election" and "\$2,400 for any subsequent election" or "for the second election." The
17 "first election" could mean a 2009 or 2010 special election or a 2012 primary. The
18 "second election" and "any subsequent election" could mean a 2009 or 2010 runoff, a
19 2012 primary, a 2012 primary runoff, or a 2012 general election. If the Governor calls an
20 election prior to 2012, the first election would be the special election and the second
21 election could be a runoff to that election or the 2012 primary. If the Governor does not
22 call a special election, the first election would be the 2012 primary and the second

1 election could be a runoff or the 2012 general election. The Commission notes that the
2 contributor's intent cannot be ascertained.⁶

3 *(c) If the notice of redesignation relating to a special election and possible*
4 *runoff election is not effective, will the notice of redesignation*
5 *nevertheless be effective as to the primary and general elections of 2012?*

6 No, these notices do not properly effectuate redesignations for the same reasons
7 as explained in response to questions 3(a) and 3(b).

8 *(d) If the notice of redesignation is effective as to the 2012 primary and*
9 *general elections, may the White Committee use the contribution for a*
10 *special election and, if one is required, a runoff election if special election*
11 *is called before the 2012 primary election occurs?*

12 Given that the Commission has already concluded that the notice of redesignation
13 would not be effective as to the 2012 primary and general elections, this question is moot.

14 Generally, if the White Committee wishes to use contributions that were
15 accompanied by the designations described in question 3 for the special election or the
16 runoff to that election, the Committee must first obtain from the contributors written
17 designations of the contributions or parts thereof for the particular election. Such funds
18 may not be used for the runoff until Mayor White is a candidate in the runoff. Moreover,
19 the contributor may not redesignate any contribution or part thereof for the special

⁶ None of the situations presented in this advisory opinion request would allow the White Committee to presumptively redesignate contributions from the 2012 elections to the pre-2012 elections or *vice versa*. See 11 CFR 110.1(b)(5)(ii)(B) and (C). Most notably, presumptive redesignation is only applicable for elections in the same "election cycle." Under 11 CFR 100.3(b), the special election and the runoff to that election would not be considered as part of the same "election cycle" as the 2012 primary and general elections. See *Contribution Limitations and Prohibitions: Final Rule, Explanation and Justification*, 67 FR 69928, 69933-34 (Nov. 19, 2002).

1 election if the redesignated amount combined with any undesignated contribution from
2 the contributor would aggregate in excess of \$2,400 for that special election.

3 4. *If the White Committee raises money for a special election, or for a runoff*
4 *following a special election, and a special election or runoff does not occur, what may*
5 *the Committee do with the money?*

6 Given that the Commission has already concluded in answering question 2 above
7 that the White Committee may not accept a contribution designated for a special or runoff
8 election that is not held, this question is moot.

9 5. *How should the White Committee report designated contributions if the answer to*
10 *Question 2 is yes, and redesignated contributions if the answer to Question 3 is yes?*

11 The Commission has concluded that the Committee may not currently accept
12 contributions for any special or runoff election prior to 2012 before such election has
13 been scheduled. Accordingly, the White Committee must report all contributions it
14 receives as being made for the 2012 primary or 2012 general election.

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

1 conclusions in this advisory opinion may be affected by subsequent developments in the
2 law including, but not limited to, statutes, regulations, advisory opinions and case law.

3 All cited advisory opinions are available on the Commission's website at
4 <http://saos.nictusa.com/saos/searchao>.

5 On behalf of the Commission,

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Steven T. Walther
Chairman