

AGENDA DOCUMENT NO. 10-58

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**AGENDA ITEM**



FEDERAL ELECTION COMMISSION  
Washington, DC 20463

For Meeting of 9-23-10

September 17, 2010

MEMORANDUM

**SUBMITTED LATE**

TO: The Commission

FROM: Christopher Hughey *pch*  
Acting General Counsel

Rosemary C. Smith *RCS by RMK*  
Associate General Counsel

Robert M. Knop *RMK*  
Assistant General Counsel

Joanna S. Waldstreicher *JSW*  
Attorney

Subject: Draft AO 2010-17 (Stutzman for Congress)

Attached is a proposed draft of the subject advisory opinion. We have been asked to place this draft on the agenda for September 23, 2010.

Attachment

1 ADVISORY OPINION 2010-17

2

3 Christopher M. Marston

4 Election CFO

5 P.O. Box 26141

6 Alexandria, VA 22313

7

**DRAFT**

8 Dear Mr. Marston:

9 We are responding to your advisory opinion request on behalf of Stutzman for  
10 Congress (the "Committee"), concerning the application of the Federal Election  
11 Campaign Act of 1971, as amended (the "Act"), and Commission regulations to the  
12 treatment of undesignated contributions when the general election and the special  
13 election for the same Federal office are held on the same day.

14 The Commission concludes that, in the unusual circumstances presented in this  
15 request, the Committee may treat undesignated contributions as made with respect to the  
16 general election or the special election, or divided between the two elections, without  
17 obtaining contributor redesignations or presumptively redesignating the excessive  
18 portions.

19 ***Background***

20 The facts presented in this advisory opinion are based on your letter received on  
21 July 23, 2010, email received on July 29, 2010, and publicly available information.

22 Marlin Stutzman is an Indiana State Senator and a candidate for the U.S. House of  
23 Representatives in 2010. The Committee is his principal campaign committee.

24 The State of Indiana held primary elections on May 4, 2010. The incumbent,  
25 Representative Mark Souder, won the Republican Party primary for the U.S. House of

1 Representatives in Indiana's Third Congressional District.<sup>1</sup> Shortly after the primary  
2 election, however, Representative Souder resigned from office. The Governor of the  
3 State of Indiana scheduled a special election to fill the vacancy created by Representative  
4 Souder's resignation. *See* Ind. Exec. Order 10-03, May 28, 2010. The special election  
5 will be held on November 2, 2010, the same day as the general election. *Id.* The  
6 candidate elected in the special election will serve the remainder of Representative  
7 Souder's term of office. *Id.* The candidate elected in the general election will serve the  
8 next full two-year term of office. *Id.*

9 The Republican Party held a caucus to nominate a candidate for the special  
10 election and also to nominate a new candidate for the general election. State Senator  
11 Stutzman was nominated as the Republican Party's candidate for both elections.<sup>2</sup>

12 State Senator Stutzman is campaigning in both elections and the Committee  
13 anticipates receiving undesignated contributions from contributors that exceed the Act's  
14 contribution limits for a single election. The Committee plans to redesignate the  
15 excessive portion of those contributions from the general election to the special election  
16 without seeking written redesignations from the contributors.

17 ***Question Presented***

18 *When a general election and a special election are held on the same day, may the*  
19 *principal campaign committee of a Federal candidate in both elections treat*  
20 *undesignated contributions as contributions made with respect to either the general*

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<sup>1</sup> *See* Indiana Primary Election Results, available at [http://www.in.gov/apps/sos/primary/sos\\_primary10](http://www.in.gov/apps/sos/primary/sos_primary10) (last visited Aug. 11, 2010).

<sup>2</sup> *See* Marlin Stutzman Wins Third District Republican Nomination, available at <http://indianapublicmedia.org/election/marlin-stutzman-wins-district-republican-caucus> (last visited Aug. 11, 2010).

1 *election or the special election, without obtaining contributor redesignations or*  
2 *presumptively redesignating the excessive portion of such contributions?*

3 ***Legal Analysis and Conclusions***

4 Yes, the Committee may treat undesignated contributions as contributions made  
5 for the general election or for the special election held on the same day, or divided  
6 between the two elections, as long as those contributions do not exceed the contributor's  
7 combined limit for both elections. If the combined contribution limits for both elections  
8 are not exceeded, no redesignation is necessary.

9 The Act prohibits any person from making contributions to candidates and their  
10 authorized political committees "with respect to any election for Federal office" that in  
11 the aggregate exceed \$2,400. 2 U.S.C. 441a(a)(1)(A); 11 CFR 110.1(b)(1). These  
12 contributions limits "apply separately with respect to each election." 2 U.S.C.  
13 441a(a)(6); 11 CFR 110.1(j)(1). A general election and a special election are both  
14 included in the definition of an "election." 2 U.S.C. 431(1)(A); 11 CFR 100.2.  
15 Commission regulations define a special election as an election that is held to fill a  
16 vacancy in a Federal office. 11 CFR 100.2(f). A general election is defined as either  
17 (1) an election held in even numbered years on the Tuesday following the first Monday in  
18 November or (2) a special election that is intended to result in the final selection of a  
19 single individual to the office at stake. 11 CFR 100.2(b).

20 A contribution that is not designated in writing (*i.e.*, an "undesignated  
21 contribution") by the contributor for a particular election is deemed to be a contribution  
22 for the next election for that Federal office after the contribution is made. 11 CFR  
23 110.1(b)(2)(ii). In the present circumstance, although the Federal office sought by State

1 Senator Stutzman is the same in both elections, each election will fill a vacancy for a  
2 different term of that office. The Commission previously concluded that in this situation  
3 each election is subject to a separate contribution limit. *See* Advisory Opinion 1984-42  
4 (Perkins) (State of Kentucky held a special election for a Congressional district seat on  
5 the same day as the general election). The Committee, therefore, may accept  
6 contributions with respect to both elections. Because both elections will occur on the  
7 same day, under the Commission's regulations either election would be considered "the  
8 next election" for purposes of treating undesignated contributions.

9 The Commission addressed a nearly identical situation in Advisory Opinion 1986-  
10 31 (Democratic Senatorial Campaign Committee). In 1986, the State of North Carolina  
11 held a special election on the same day as the general election for the same Senate seat  
12 after the incumbent Senator John East died in office. The general election was held for  
13 the full six-year term, while the special election was held for the remainder of Senator  
14 East's term. The Commission concluded that the candidate's authorized committee may  
15 treat undesignated contributions as made with respect to either election or divided  
16 between the two elections as long as the contributor did not exceed the combined  
17 contribution limits for both elections. *See* Advisory Opinion 1986-31 (Democratic  
18 Senatorial Campaign Committee) at 3. The Commission also concluded that "[t]he  
19 committee need not seek redesignations from the contributors in this special  
20 circumstance." *Id.*

21 The Commission similarly concludes here that the Committee may treat  
22 undesignated contributions as made with respect to either election or divided between the  
23 two elections. This means that undesignated contributions up to the contributor's

