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MEMORANDUM

TO: The Commission
FROM: Chair Ellen L. Weintraub *ew*
DATE: 12/17/2003
SUBJECT: AO 2003-30 (Fitzgerald)

AGENDA ITEM
For Meeting of: 12-18-03

SUBMITTED LATE

Attached are my proposed amendments to Agenda Document 03-102.

1 **ADVISORY OPINION 2003-30**

2 **Benjamin L. Ginsberg, Esq.**
3 **Glenn M. Willard, Esq.**
4 **Patton Boggs, LLP**
5 **2550 M Street, NW**
6 **Washington, DC 20037-1350**

7
8 **Dear Messrs. Ginsberg and Willard:**

9 **This responds to your letters dated June 24, September 26, and December 5, 2003,**
10 **requesting an advisory opinion on behalf of Fitzgerald for Senate Committee ("the**
11 **Committee") and Senator Peter Fitzgerald, concerning the application of the Federal**
12 **Election Campaign Act of 1971, as amended ("the Act"), and Commission regulations to**
13 **the permissible uses of contributions designated for or attributed to the 2004 primary**
14 **election, for which Senator Fitzgerald is no longer a candidate.**

15 ***Background***

16 **You state that on April 15, 2003, Senator Fitzgerald announced that he would not**
17 **seek re-election to the United States Senate from Illinois in 2004. The Committee is**
18 **Senator Fitzgerald's principal campaign committee, which has been fundraising since the**
19 **1998 general election for the Senator's re-election in 2004. Since the 1998 general**
20 **election, the Committee has raised approximately \$2.7 million for 1998 primary election**
21 **debt retirement, 1998 general election debt retirement, 2004 primary election expenses,**
22 **and 2004 general election expenses.¹**

¹ Of the \$2.7 million raised since the 1998 general election, \$302,000 was contributed for 1998 primary debt retirement, \$334,000 was contributed for 1998 general election debt retirement, and \$312,000 was contributed for the 2004 general election. \$1.7 million was contributed for or attributed to the 2004 primary election.

1 You state that as of April 15, 2003, the Committee had \$984,812.09 in total cash-
2 on-hand and \$2.9 million in net liabilities. You state that the Committee wishes to use
3 approximately \$526,000 of the total cash-on-hand² for one or more of four contemplated
4 purposes: (1) Contributions to an organization described in section 170(c) of the Internal
5 Revenue Code; (2) transfers to a national, State, or local political party committee; (3)
6 repayment of debt incurred in the 1998 primary and general elections, and 2004 primary
7 election; and (4) refunds to individuals who contributed for the 2004 primary election.

8 You state that the Committee's net liabilities breakdown as follows: \$2.1 million
9 owed to La Salle Bank, N.A. for credit extended for the 1998 elections; \$772,000 owed to
10 Senator Fitzgerald for the 1998 general election; \$45,525 in disputed debt for the 1998
11 general election; and \$36,639.86 for the 2004 primary election.

12 You state that the \$526,000 cash-on-hand for one or more of the contemplated
13 purposes is from individuals, political committees, and interest accrual. The breakdown of
14 the cash-on-hand is approximately: \$334,000 from individuals, of which \$73,000 is from
15 individuals who have reached the contribution limits from the 1998 elections; \$187,000
16 from political committees, of which \$10,500 is from political committees who have
17 reached the contribution limits from the 1998 elections; and \$5,000 from interest. You ask
18 a series of questions about the permissible uses of the \$526,000 cash-on-hand.

² You explained by phone on October 16, 2002-2003 that some of the \$984,812.09 cash-on-hand on April 15, 2003 will be, or was used as follows: \$312,000 was refunded because it was composed of contributions for the 2004 general election and Senator Fitzgerald will not be a candidate in that election, and \$147,000 is allotted for administrative costs, including campaign-related legal expenses.

1 ***Legal Analysis and Conclusions***

2 For the reasons stated below, the Commission finds that the four purposes that you
3 propose all are permissible uses of the Committee's \$526,000 cash on hand under the Act
4 and Commission regulations.

5 Under the Act, there are four categories of permissible uses of campaign funds: (1)
6 otherwise authorized expenditures in connection with the candidate's campaign for Federal
7 office; (2) ordinary and necessary expenses incurred in connection with the duties of the
8 individual as a holder of Federal office; (3) contributions to organizations described in 26
9 U.S.C. 170(c); and (4) transfers, without limitation, to national, State or local political
10 party committees. 2 U.S.C. 439a(a); see also 11 CFR 113.2. Such uses are permitted
11 provided that they do not result in campaign funds being converted to personal use by any
12 person. 2 U.S.C. 439a(b)(1). The Commission's regulations define personal use as "any
13 use of funds in a campaign account of a present or former candidate to fulfill a
14 commitment, obligation or expense of any person that would exist irrespective of the
15 candidate's campaign or duties as a Federal officeholder."³

16 Congress, in the Bipartisan Campaign Reform Act of 2002 ("BCRA"), amended
17 section 439a by deleting the condition that funds used under this section be "in excess of

³ 11 CFR 113.1(g). See also 2 U.S.C. 439a(b)(2) and Advisory Opinions 1996-9, 1997-1 (the latter permitting donation of former principal campaign committee's cash balance to proposed charitable organization provided that none of the donated funds would be distributed as compensation to the candidate, his family, or any entity controlled by or employing the candidate or a member of his family, which would constitute personal use). To the extent that this and other previous advisory opinions relied on the statutory characterization of campaign funds as "excess" funds, the advisory opinions are still reliable authority. Whether campaign funds could be used for one of the pre-BCRA permissible purposes depended on the candidate's discretion, and the Act did not require any other determination that the funds were in fact excess funds. 11 CFR 113.1(e) (2002); *see generally Explanation & Justification for Disclaimers, Fraudulent Solicitations, Civil Penalties, and Personal Use of Campaign Funds; Final Rule, 67 Fed. Reg. 76962, 76970-71 (Dec. 13, 2002).*

1 any amount necessary to defray [the candidate's] expenditures." Before BCRA, section
2 439a also included "any other lawful purpose" within the list of permissible uses. 2 U.S.C.
3 439a (2001). In BCRA, Congress deleted "any other lawful purpose." The current list of
4 permissible uses of campaign funds is thus exhaustive. *See Explanation & Justification for*
5 *Disclaimers, Fraudulent Solicitations, Civil Penalties, and Personal Use of Campaign*
6 *Funds; Final Rule, 67 Fed. Reg. 76962, 76970 (Dec. 13, 2002) (explaining the significance*
7 *of the change).*

8 *Questions 1 and 2*

9 *May the Committee donate cash-on-hand to an organization described in section*
10 *170(c) of the Internal Revenue Code?*

11 *May the Committee transfer cash-on-hand to a national, State, or local political*
12 *party committee?*

13 ~~The Act provides that a candidate may use campaign funds for a number of~~
14 ~~permissible non-campaign purposes, including "for contributions to an organization~~
15 ~~described in section 170(e) of the Internal Revenue Code of 1986," 2 U.S.C. 439a(a)(3),~~
16 ~~and "for transfers, without limitation, to a national, State, or local committee of a political~~
17 ~~party," 2 U.S.C. 439a(a)(4), provided that neither of these uses would result in campaign~~
18 ~~funds being converted to personal use by any person. 2 U.S.C. 439a(b)(1). The~~
19 ~~Commission's regulations define personal use as "any use of funds in a campaign account~~
20 ~~of a present or former candidate to fulfill a commitment, obligation or expense of any~~
21 ~~person that would exist irrespective of the candidate's campaign or duties as a Federal~~

1 officesholder." 11 CFR 113.1(g); see, e.g., Advisory Opinion 1996-9⁴ (use of an office in a
2 library facility purchased by a State party committee with excess funds contributed by a
3 Senator's principal campaign committee constituted personal use under 11 CFR 113.1(g)).

4 As noted above, these uses of campaign funds are explicitly authorized under 2
5 U.S.C. 439a(a). Thus, the Committee may use some or all of the \$526,000 cash-on-hand
6 for contributions to a 170(c) organization or for transfers to a national, State, or local
7 committee of a political party, provided that such contributions or transfers do not convert
8 the cash-on-hand into personal use by Senator Fitzgerald. See, e.g., Advisory Opinion
9 1997-1 (permitting donation of former principal campaign committee's cash balance to
10 proposed charitable organization provided that none of the donated funds would be
11 distributed as compensation to the candidate, his family, or any entity controlled by or
12 employing the candidate or a member of his family, which would constitute personal use);
13 11 CFR 113.1(g)(3).

14 *Question 3*

15 *May the Committee use cash-on-hand to repay debts owed to:*

16 (a) *LaSalle Bank, N.A. for obligations incurred in the 1998 primary and*
17 *general elections?*

18 (b) *Senator Fitzgerald for loans he made to the Committee with respect to the*
19 *1998 primary and general elections?*

⁴ To the extent that this and other previous advisory opinions relied on the statutory characterization of campaign funds as "excess" funds, the advisory opinions are still reliable authority. Whether campaign funds could be used for one of the pre-BCRA permissible purposes depended on the candidate's discretion, and the Act did not require any other determination that the funds were in fact excess funds. 11 CFR 113.1(e) (2002); see generally *Explanation & Justification for Disclaimers, Fraudulent Solicitations, Civil Penalties, and Personal Use of Campaign Funds: Final Rule*, 67 Fed. Reg. 76962, 76970-71 (Dec. 13, 2002).

1 (c) ***Non-bank, non-candidate creditors for obligations incurred in the 1998***
2 ***primary and general elections; and for which the amount of debt is***
3 ***disputed?***

4 (d) ***Non-bank, non-candidate creditors for obligations incurred for the 2004***
5 ***primary?***

6 Some or all of the Committee's \$526,000 cash-on-hand may be used to repay debts
7 the committee owes to a) LaSalle Bank, N.A. for loans incurred in the 1998 primary and
8 general election; b) Senator Fitzgerald for loans he made to the Committee in connection
9 with the 1998 elections; c) non-bank, non-candidate creditors for disputed debts incurred in
10 connection with the 1998 elections; and d) expenses incurred for the 2004 primary
11 election. Repayment of debts listed in a), b), c) and d) is a permissible use of the cash-on-
12 hand since the cash-on-hand consists of contributions lawfully made for the 2004 primary
13 election for which Senator Fitzgerald was a candidate and debt repayment is an authorized
14 expenditure in connection with Senator Fitzgerald's campaign for Federal office. See 2
15 U.S.C. 431(9)(A); 11 CFR 100.111; Advisory Opinion 1989-22.

16 The Commission notes that when a political committee has a significant amount of
17 debt, use of cash-on-hand for purposes other than debt repayment may affect the
18 committee's future ability to terminate and to go through the debt settlement process. The
19 Commission also notes that bank loans and lines of credit⁵ are not subject to debt
20 settlement or forgiveness because bank loan debt settlement may result in prohibited
21 contributions from banks, except in certain rare situations not relevant here. See

⁵-The Commission treats lines of credit from lending institutions in the same manner as bank loans. See *Explanation & Justification: Loans from Lending Institutions to Candidates and Political Committees*, 56 Fed. Reg. 67118, 67119 (Dec. 27, 1991).

1 *Explanation & Justification: Debts Owed by Candidates and Political Committees, 55*
2 *Fed. Reg. 26378, 26384 (June 27, 1990); Explanation & Justification: Loans from*
3 *Lending Institutions to Candidates and Political Committees, 56 Fed. Reg. 67118, 67121*
4 *(Dec. 27, 1991).*

5 *Question 4*

6 *May the Committee use cash-on-hand to refund contributions made for the 2004*
7 *primary?*

8 Under the Act, authorized expenditures in connection with a campaign for Federal
9 office is a permissible use of campaign funds. 2 U.S.C. 439a(a)(1). Refunding
10 ~~contributions to contributors who made them is not only an authorized expenditure made~~
11 ~~explicitly lawful but in certain circumstances required by in the Commission's regulations,~~
12 ~~requiring refunds. See e.g. 11 CFR 103.3 and 102.9(e)(3).~~ Therefore, using the cash-on-
13 hand to make refunds to contributors of contributions designated for or attributed to the
14 2004 primary is permissible. Further, Commission regulations require refunding, or
15 redesignation, of all contributions made for a general election in which the candidate to
16 whom the contributions were made does not qualify as a candidate, as you state you have
17 already done with respect to the 2004 general election, since Senator Fitzgerald is not
18 running for re-election and will not qualify as a candidate in that election. 11 CFR
19 102.9(e)(3) and 110.1(b)(3); see also Advisory Opinion 2003-18.

20 *Question 5*

21 *Do the Commission's post-Bipartisan Campaign Reform Act ("BCRA")*
22 *regulations at 11 CFR 116.11 pertaining to repayment of personal loans from the*

1 *candidate apply to the retirement of the Committee's debt owed to Senator Fitzgerald*
2 *incurred in the pre-BCRA 1998 primary and general elections?*

3 The Commission's post-BCRA regulations at 11 CFR 116.11 pertaining to
4 repayment of certain personal loans from the candidate do not apply to the retirement of
5 the Committee's debt owed to Senator Fitzgerald incurred in connection with a pre-BCRA
6 elections. BCRA added section 441a(j) to the Act, which limits the amount of a
7 candidate's personal loan that may be repaid with contributions to the candidate or the
8 candidate's authorized committee where the contributions were made after the election.
9 The Commission in promulgating new section 116.11 noted that 2 U.S.C. 441a(j)
10 specifically states that it applies only to personal loans from candidates that are made after
11 November 6, 2002 and "[t]hus, the limitations on repayment of personal loans from
12 contributions made after the respective election do not apply to personal loans made before
13 this date." *Explanation & Justification: Increased Contribution and Coordinated Party*
14 *Expenditure Limits for Candidates Opposing Self-Financed Candidates; Interim Final*
15 *Rule, 68 Fed. Reg. 3970, 3974 (Jan. 27, 2003). The Committee's 1998 primary and*
16 *general election debt to Senator Fitzgerald was incurred May 12, 1997 and April 16, 1998,*
17 *before November 6, 2002, and therefore new 11 CFR 116.11 does not apply here. The*
18 *Committee is not limited in the amount of its debt owed to Senator Fitzgerald that it may*
19 *repay with 2004 primary contributions, even those contributions received after November*
20 *6, 2002.*

21 This response constitutes an advisory opinion concerning the application of the Act
22 and Commission regulations to the specific transaction or activity set forth in your request.

1 *See* 2 U.S.C. 437f. The Commission emphasizes that, if there is a change in any of the
2 facts or assumptions presented, and such facts or assumptions are material to a conclusion
3 presented in this advisory opinion, then the requestor may not rely on that conclusion as
4 support for its proposed activity.

5 ~~The Commission notes that this advisory opinion analyzes the Act, as amended by~~
6 ~~the Bipartisan Campaign Reform Act of 2002, and Commission regulations, including~~
7 ~~those promulgated to implement the BCRA amendments, as they pertain to your proposed~~
8 ~~activities. On May 2, 2003, a three judge panel of the United States District Court for the~~
9 ~~District of Columbia ruled that a number of BCRA provisions are unconstitutional and~~
10 ~~issued an order enjoining the enforcement, execution, or other application of these~~
11 ~~provisions. *McCannell v. FEC*, 251 F.Supp. 2d 176 (D.D.C. 2003); *prob. juris. noted*, 123~~
12 ~~S.Ct. 2268 (U.S. argued Sept. 8, 2003). Subsequently, the district court stayed its order~~
13 ~~and injunction in *McCannell v. FEC*, 253 F. Supp. 2d 18 (D.D.C. 2003), pending review~~
14 ~~by the Supreme Court. The Commission has determined that your request for advice is not~~
15 ~~affected by *McCannell v. FEC* because the provisions of the Act underlying this advisory~~
16 ~~opinion are not challenged in that litigation.~~

17 Sincerely,

18
19 Ellen L. Weintraub

20 Chair

21
22 Enclosures (AOs 2003-18, 1997-1, 1996-9, 1989-22)