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FEDERAL ELECTION COMMISSION
Washington, DC 20463

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February 1, 2007

MEMORANDUM

AGENDA ITEM
For Meeting of: 02-08-07

TO: The Commission

FROM: Lawrence H. Norton *LHN*
General Counsel

Rosemary C. Smith *PCS*
Associate General Counsel

J. Duane Pugh *JDP*
Acting Assistant General Counsel

Robert M. Knop *RMK*
Attorney

Subject: Draft AO 2006-38

Attached is a proposed draft of the subject advisory opinion. We request that this draft be placed on the agenda for February 8, 2007.

Attachment

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DRAFT

1 **ADVISORY OPINION 2006-38**

2

3 **Marc E. Elias, Esq.**

4 **Caroline P. Goodson, Esq.**

5 **Perkins Coie LLP**

6 **607 Fourteenth St., N.W.**

7 **Washington, DC 20005**

8

9 **Dear Mr. Elias and Ms. Goodson:**

10 **We are responding to your advisory opinion request on behalf of Senator Robert**
11 **P. Casey, Jr. and his State campaign committee (the "State Committee") concerning the**
12 **application of the Federal Election Campaign Act of 1971, as amended (the "Act"), and**
13 **Commission regulations to the use of funds remaining in the State Committee's campaign**
14 **account. The Commission concludes that the State Committee must use a reasonable**
15 **accounting method to identify the portion of its surplus that consists of federally**
16 **permissible funds. Once it does so, the State Committee may donate its federally**
17 **permissible funds to State and local candidates or State and local Democratic party**
18 **organizations. It may also use those funds for travel expenses solely in connection with**
19 **State and local campaign events.**

20 ***Background***

21 **The facts presented in this advisory opinion are based on your letter received on**
22 **December 12, 2006.**

23 **Senator Casey was elected on November 7, 2006 to represent the Commonwealth**
24 **of Pennsylvania in the United States Senate. Before then, Senator Casey was the State**
25 **Treasurer of Pennsylvania. He was elected to that position in November of 2004 and**
26 **became a candidate for the United States Senate on March 11, 2005. Senator Casey filed**
27 **a Statement of Candidacy for re-election in 2012 on December 21, 2006.**

1 The State Committee was established by Senator Casey when he was a candidate
2 for State Treasurer in the 2004 State-wide election. The State Committee has surplus
3 funds in its non-Federal campaign account that it wishes to disburse to State and local
4 candidates in Pennsylvania and for other related purposes, as described more fully below.

5 While the State Committee's surplus funds are from sources and in amounts
6 permitted under Pennsylvania law, some of those funds are from sources that are
7 prohibited by the Act's source restrictions, and some of those funds were received in
8 amounts in excess of the Act's amount limitations. *See* 2 U.S.C. 441a, 441b, 441c, 441e,
9 and 441f. The State Committee intends to use a reasonable accounting method to
10 identify the portion of its surplus that consists of donations of federally permissible
11 funds.¹ Once it has identified its federally permissible funds, the State Committee
12 intends to use those funds for any or all of the following purposes, as permitted by
13 Pennsylvania law. The State Committee may donate the funds to State or local
14 candidates or to the nonfederal account of a State or local Democratic party organization.
15 It may also use the funds to pay for travel by Senator Casey or one of his agents solely in
16 connection with campaign events for State or local candidates or for other events that are
17 solely in connection with State or local elections. None of the State Committee's funds
18 will be used in connection with any Federal election, including Senator Casey's 2012 re-
19 election.

¹ Federally permissible funds are funds that do not exceed the amounts permitted with respect to contributions to Federal candidates under 2 U.S.C. 441a(a)(1), (2), and (3), and are not from sources prohibited by the Act from making contributions in connection with an election for Federal office. 2 U.S.C. 441i(e)(1)(B); 11 CFR 300.62; *see also* 2 U.S.C. 441a, 441b, 441c, 441e, and 441f. As currently adjusted for inflation, the Act limits contributions from individuals and non-multicandidate political committees to Federal candidates to \$2,300. The amount limitation on contributions from multicandidate Federal political committees to Federal candidates is \$5,000. *See* 2 U.S.C. 441a(a)(1)(A) and (2)(A).

1 The portion of the State Committee's remaining balance that consists of non-
2 federally permissible funds will also be disbursed in accordance with Pennsylvania law,
3 but will not be used in connection with any Federal or non-Federal election.

4 ***Questions Presented***

- 5 1. ***May the State Committee use a reasonable accounting method to identify***
6 ***federally permissible funds in its 2004 campaign account?***
7
8 2. ***May the State Committee use its federally permissible funds to make***
9 ***donations to State and local candidates and the nonfederal accounts of***
10 ***State and local Democratic party organizations, in accordance with State***
11 ***law?***
12
13 3. ***May the State Committee use its federally permissible funds to pay for***
14 ***travel by Senator Casey or one of his agents that is undertaken solely in***
15 ***connection with campaign events for State or local candidates or for other***
16 ***events that are solely in connection with State or local elections, as***
17 ***permitted by State law?***
18

19 ***Legal Analysis and Conclusions***

20 ***Question 1: May the State Committee use a reasonable accounting method to identify***
21 ***federally permissible funds in its 2004 campaign account?***

22 The State Committee must use a reasonable accounting method to identify
23 federally permissible funds in its 2004 campaign account.

24 In two recent advisory opinions, the Commission has identified certain accounting
25 methods as reasonable. In Advisory Opinion 2006-6 (Busby), the Commission identified
26 the method described in 11 CFR 110.3(c)(4), which is known as the "first in, first out"
27 method, as a reasonable accounting method. In Advisory Opinion 2004-45 (Salazar), the
28 Commission determined that the "last in, first out" accounting method was reasonable.

1 *Question 2: May the State Committee use its federally permissible funds to make*
2 *donations to State and local candidates and the nonfederal accounts of State and local*
3 *Democratic party organizations, in accordance with State law?*

4 Yes, the State Committee may use its federally permissible funds to make
5 donations to State and local candidates and the nonfederal accounts of State and local
6 Democratic party organizations, in accordance with State law.

7 As amended by the Bipartisan Campaign Reform Act of 2002 ("BCRA"),² the
8 Act regulates certain actions of Federal candidates and officeholders, their agents, and
9 entities directly or indirectly established, financed, maintained, or controlled by, or acting
10 on behalf of, Federal candidates or officeholders, when they raise or spend funds in
11 connection with either Federal or non-Federal elections. 2 U.S.C. 441i(e); 11 CFR
12 300.60 through 300.65. In pertinent part, BCRA, and the Commission regulations
13 implementing BCRA, prohibit those subject to section 441i(e) from soliciting, receiving,
14 directing, transferring, spending, or disbursing funds in connection with any non-Federal
15 election unless the funds do not exceed the amounts permitted with respect to
16 contributions to Federal candidates under 2 U.S.C. 441a(a)(1), (2), and (3), and are not
17 from sources prohibited by the Act from making contributions in connection with an
18 election for Federal office. 2 U.S.C. 441i(e)(1)(B); 11 CFR 300.62; *see also* 2 U.S.C.
19 441a, 441b, 441c, 441e, and 441f. Commission regulations also require the soliciting,
20 receiving, directing, transferring, spending, or disbursing of such funds to be consistent
21 with State law. 11 CFR 300.62.

² Pub. L. No. 107-155, 116 Stat. 81 (Mar. 27, 2002).

1 **Senator Casey is a Federal officeholder and candidate. Additionally, the State**
2 **Committee is an entity directly established, financed, maintained, or controlled by him.**
3 **Donating to a State or local candidate or to the non-Federal account of any State or local**
4 **Democratic party organization would involve transferring, spending, or disbursing funds**
5 **in connection with a non-Federal election. Therefore, any funds transferred, spent, or**
6 **disbursed must not be in excess of the amounts permitted with respect to contributions to**
7 **Federal candidates, must not be from prohibited sources, and must be consistent with**
8 **State law. See 2 U.S.C. 441i(e)(1)(B) and 11 CFR 300.62; see also Advisory Opinion**
9 **2005-5 (LaHood). You represent that the State Committee plans to donate only federally**
10 **permissible funds to State and local candidates and the nonfederal accounts of State and**
11 **local Democratic party organizations and that such donations are consistent with**
12 **Pennsylvania law. Accordingly, the Act and Commission regulations permit the State**
13 **Committee to donate any amount of federally permissible funds remaining in its 2004**
14 **campaign account to State and local candidates or to the non-Federal accounts of State**
15 **and local Democratic party organizations without further restriction under 2 U.S.C.**
16 **441i(e)(1)(B) and 11 CFR 300.62, provided that such donations are consistent with**
17 **Pennsylvania law. Thus, for example, because the Commonwealth of Pennsylvania**
18 **allows unlimited donations from State candidate committees to State candidates, the State**
19 **Committee may donate any amount of federally permissible funds remaining in its 2004**
20 **campaign account to State candidates.**

21 *Question 3: May the State Committee use its federally permissible funds to pay for travel*
22 *by Senator Casey or one of his agents that is undertaken solely in connection with*

1 *campaign events for State or local candidates or for other events that are solely in*
2 *connection with State or local elections, as permitted by State law?*

3 Yes, the State Committee may use its federally permissible funds to pay for travel
4 by Senator Casey or one of his agents that is undertaken solely in connection with
5 campaign events for State or local candidates or for other events that are solely in
6 connection with State or local elections, as permitted by State law.

7 As explained above in the answer to Question 2, the State Committee may only
8 use federally permissible funds in connection with non-Federal elections. *See* 2 U.S.C.
9 441i(e)(1)(B) and 11 CFR 300.62. In addition, such use of funds must comply with
10 applicable State law. *See* 11 CFR 300.62. You have represented that the State
11 Committee would use federally permissible funds to pay for any travel expenses incurred
12 by Senator Casey or any of his agents solely in connection with campaign events or other
13 events on behalf of State and local candidates and that, in doing so, the State Committee
14 would comply with Pennsylvania law. You have also represented that none of the State
15 Committee's funds will be used in connection with any Federal election. Accordingly,
16 the State Committee may use the federally permissible funds remaining in its 2004
17 campaign account for the travel expenses you describe.

18 This response constitutes an advisory opinion concerning the application of the
19 Act and Commission regulations to the specific transaction or activity set forth in your
20 request. *See* 2 U.S.C. 437f. All cited advisory opinions are available on the
21 Commission's web site at www.fec.gov. The Commission emphasizes that, if there is a
22 change in any of the facts or assumptions presented, and such facts or assumptions are

1 material to a conclusion presented in this advisory opinion, then the requestor may not
2 rely on that conclusion as support for its proposed activity.

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Sincerely,

Robert D. Lenhard
Chairman