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February 1, 2007

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FEDERAL ELECTION
COMMISSION
OFFICE OF GENERAL
COUNSEL
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Lawrence Norton, Esq.
General Counsel
Federal Election Commission
999 E Street, NW
Washington DC 20463

Re: Advisory Opinion Request: General Election Public Funding

Dear Mr. Norton:

This request for an Advisory Opinion is filed on behalf of Senator Barack Obama and the committee, the Obama Exploratory Committee, that he established to fund his exploration of a Presidential candidacy. The question on which he seeks the Commission's guidance is whether, if Senator Obama becomes a candidate, he may provisionally raise funds for the general election but retain the option, upon nomination, of returning these contributions and accepting the public funds for which he would be eligible as the Democratic Party's nominee.

I. Background

Press reports indicate that a number of potential candidates for the Presidency have determined that, if they become their parties' nominees, they will not accept public funds in the general election but will instead raise from private sources all the funds required for their campaigns. Because of the magnitude of the fundraising task they have undertaken, these candidates—and any other candidates electing this option—would have to begin raising general election contributions immediately, at the outset of candidacy, to continue through the general election period.

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Senator Obama, fully committed to competition on the same terms as all other candidates, has decided that, if he becomes a candidate, he will also instruct his campaign to proceed with active fundraising for the general election. But the Senator would not, if the law allows, rule out the possibility of a publicly funded campaign if *both* major parties' nominees eventually decide, or even agree, on this course. Should both major party nominees elect to receive public funding, this would preserve the public financing system, now in danger of collapse, and facilitate the conduct of campaigns freed from any dependence on private fundraising.

In order for this option to be preserved, however, the nominees would need the flexibility under Commission rules to refund the general election contributions raised as a condition of qualifying for public funding. They—and the voting public—would certainly benefit from this flexibility: for example, the major party nominees could well agree that this is a choice each would make, in the interests of the kind of general election campaign they propose to offer the voters.

In preparation for a possible candidacy, Senator Obama now seeks the Commission's guidance on the question of whether a Presidential candidate would be eligible for public funding if, prior to nomination, he has received private contributions for the general election. Without a clear determination from the agency, the Senator cannot complete planning for his campaign; he cannot advise contributors and supporters of his intention in raising private funds now and of any option of refunding it and accepting private money if he becomes the nominee.

II. Law

The legal question presented under Commission regulations is whether a candidate provisionally raising general election funds, segregated from other funds and not available for expenditure until nomination, has "accepted" this money. Candidates establishing eligibility must certify that they have not accepted money for the general election. 11 C.F.R. § 9003.2(a)(2). The rules do not address the question posed here: has the candidate accepted the money if it is held in escrow and never used, allowing for these funds to be returned and for the candidate to qualify for public funding?

"Acceptance" is not separately defined under FEC rules. It is, however, significant that where the rules generally authorize pre-primary fundraising for the general election, the funds so raised and reserved for later use are deemed to have been "received", not "accepted". 11 C.F.R. § 102.9(e)(1). Similarly, candidates who retain

funds subject to a final check on their legality are treated as having “received” and not “accepted” them. 11 C.F.R. § 103.3. Acceptance of the funds denotes conclusive use of the money—deriving some benefit from the funds—rather than merely taking custody of them for possible use at a later date.

This sense of the term “accept” is one that the Commission has employed, for example, in determining when a political committee has made an in-kind contribution to a candidate by independently financing a fundraising mailing on the candidate’s behalf. Advisory Opinion 1980-46 (June 25, 1980). While the mailing may have been undertaken independently, the candidate’s subsequent acceptance of the contributions—of the benefit of the contributions—requires the candidate to treat the related costs of mailing as an in-kind contribution (“the *acceptance* of the checks by the candidate constitutes acceptance of the costs incurred...in connection with the solicitation”).

There appears no question that the Commission, on this basis, possesses full authority to construe the term “accept” so that it does not preclude provisional general election fundraising and preserves the candidate’s option to qualify for public funds.

III. Policy

The Commission is charged, of course, with administering the private and public financing statutes in a manner consistent with Congress’ intention. Congress concluded some thirty years ago that the public funding alternative provided under these statutes would serve core purposes in the public interest: limiting the escalation of campaign spending and the associated pressures on candidates to raise, at the expense of time devoted to public dialogue, ever vaster sums of money. Since both the primary and public funding systems depend on candidate choice, the Commission has previously considered and addressed as it could any disincentives to participation.

For some years, for example, the Commission recommended to the Congress elimination of the state by state spending limits which unrealistically hindered effective, publicly funded campaigns in the early primary contests. Congress did not act but the Commission proceeded by rule to alleviate some of the pressures generated by these limits.

When this proved inadequate to maintain the practical appeal of the primary, with the result that neither of the 2004 major party nominees accepted primary matching funds, individual Commissioners, the Chairman and Vice-Chairman at the time, came

together on a bipartisan basis to recommend to the Congress further adjustments "so that top-tier candidates of both major parties have incentive to participate in all aspects of the system...." Letter of February 9, 2005, from Commissioners Scott E. Thomas and Michael E. Toner, to Congressional Leaders.

The Commission, in its ruling on this Request, will have another opportunity to preserve some continuing relevance for the general election funding system. If candidates may provisionally raise general election contributions with option of refund and participation in the public funding process, a privately funded general election campaign will not be a foregone conclusion. Senator Obama believes that if there is a chance of the publicly funded alternative, it is a chance well worth protecting.

IV. Conclusion; Request for Expedited Treatment

Senator Obama respectfully requests that the Commission consider this opinion request on an expedited basis. The issue presented is one of law, requiring the Commission to construe its own rule without need of further factual inquiry.

Very truly yours,



Robert F. Bauer



Rebecca Gordon

cc: Chairman Robert Lenhard
Vice Chair David Mason
Commissioner Michael Toner
Commissioner Hans von Spakovsky
Commissioner Steven Walther
Commissioner Ellen Weintraub