MEMORANDUM

TO: The Commission

FROM: Thomasenia P. Duncan, General Counsel

Rosemary C. Smith, Associate General Counsel

Amy L. Rothstein, Assistant General Counsel

Joanna S. Waldstreicher, Attorney

Subject: Draft AO 2008-04

We have been asked to circulate the attached advisory opinion. Please place it on the agenda for August 21, 2008.

Attachment
Dear Messrs. Elias and Svoboda:

We are responding to your advisory opinion request on behalf of Chris Dodd for President, Inc. (the “Presidential Committee”), concerning the application of the Federal Election Campaign Act of 1971, as amended (the “Act”), 2 U.S.C. 431 et seq., the Presidential Primary Matching Payment Account Act (the “Matching Payment Act”), and Commission regulations to the redesignation and refund of general election contributions received by the Presidential Committee during the primary campaign.

The Commission concludes that the costs associated with refunding, obtaining redesignations of, or reattributing general election contributions are properly considered “winding down costs” under 11 CFR 9034.11(a) and may therefore be paid with presidential primary election funds. The Commission further concludes that the Presidential Committee may transfer general election contributions into Friends of Chris Dodd (the “Senate Committee”), Senator Dodd’s Senate campaign committee, provided the Presidential Committee received written redesignations for such contributions within 60 days from the date Senator Dodd withdrew from the presidential campaign.

Ordinarily, the Presidential Committee must refund all general election contributions for which it was unable to obtain written redesignations within the 60-day time period. However, in view of the fact that the advisory opinion request was made 54 days after Senator Dodd’s withdrawal, the Commission concludes that the Presidential Committee
has six days from the date of its receipt of this opinion to obtain redesignations or to
make refunds to contributors.

Background

The facts presented in this advisory opinion are based on your letters received on
February 26 and April 23, 2008, as well as publicly available information, including
reports filed with the Commission.

The Presidential Committee is the principal campaign committee for Senator
Dodd, who was a candidate for the nomination of the Democratic Party for President of
the United States. When Senator Dodd became a candidate for President, his Presidential
Committee began accepting private contributions for the general election under the
conditions set forth in Advisory Opinion 2007-03 (Obama). The Presidential Committee
has kept its general election contributions in a separate bank account from primary
election contributions, accessible only by the Presidential Committee’s Treasurer, and has
tracked them separately in its accounting database.

On November 13, 2007, the Presidential Committee applied for federal matching
funds for primary election contributions. On November 27, 2007, the Commission found
the Presidential Committee eligible for primary matching funds. On January 3, 2008,
Senator Dodd withdrew from the Presidential campaign. On January 11, 2008, Senator

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Dodd filed a Statement of Candidacy with the Secretary of the Senate indicating his candidacy for U.S. Senate in Connecticut in the 2010 election. In that statement, he designated the Senate Committee as his principal campaign committee for that election. As of February 26, 2008, the Presidential Committee had $1,706,420.30 in general election funds on hand and had refunded $36,800 in general election contributions in response to direct, unsolicited contributor requests. On February 28 and 29, 2008, the Presidential Committee sent requests via U.S. Mail to all remaining general election contributors asking them to redesignate their contributions to the Senate Committee in writing by facsimile or U.S. Mail. The Presidential Committee paid the costs associated with sending these redesignation requests with funds received for the presidential primary election. The Presidential Committee does not anticipate sending any further requests for redesignation. As of April 22, 2008, the Presidential Committee has refunded $462,762.00 in general election funds at the request of contributors and received signed redesignation letters for general election contributions totaling $67,800.

Questions Presented

1. May the Presidential Committee consider the costs associated with refunds and redesignations of general election contributions as "winding down costs" under 11 CFR 9034.11(a) and, thus, pay such costs with funds received for the presidential primary election?

2. May the Presidential Committee refund and obtain redesignations of funds designated for the presidential general election?

2 Senator Dodd had previously been a candidate for the U.S. Senate in Connecticut prior to becoming a candidate for the nomination of the Democratic Party for President, but stopped seeking Senate re-election to run for President.
Legal Analysis and Conclusions

Question 1: May the Presidential Committee consider the costs associated with refunds and redesignations of general election contributions as “winding down costs” under 11 CFR 9034.11(a) and, thus, pay such costs with funds received for the presidential primary election?

Yes, the Presidential Committee may pay the costs associated with refunds and redesignations of general election contributions with funds received for the primary election because the refund, redesignation, or reattribution of general election funds would qualify as “winding down costs” under 11 CFR 9034.11(a). If, after raising general election funds, the candidate does not become a candidate in the general election, contributions made for the general election must be refunded to the contributor or redesignated in accordance with 11 CFR 110.1(b)(5) or 110.2(b)(5). See 11 CFR 102.9(e)(3).

Winding down costs are those costs associated with the termination of a presidential candidate’s efforts to obtain his or her party’s nomination, and include “the costs of complying with the post election requirements” of the Act and the Matching Funds Act. 11 CFR 9034.11(a). Refunding and obtaining redesignations of contributions designated for the general election are clearly associated with the termination of political activity related to the primary election and are required to ensure compliance with the Act and Commission regulations. See, e.g., 11 CFR 102.9(e)(3); Advisory Opinion 1992-15 (Russo). Consequently, the costs associated with obtaining redesignations, as well as transferring and refunding general election contributions, constitute “qualified campaign
expenses” under 26 U.S.C. 9032(9) and 11 CFR 9034.4(a) and may be paid with
presidential primary funds.

Question 2: May the Presidential Committee refund and obtain redesignation of funds designated for the presidential general election?

Yes, the Presidential Committee may refund and obtain redesignation of funds designated for the presidential general election as long as the Presidential Committee complies with the requirements governing the refunding and redesignation of general election funds as set forth in Commission regulations.

As a general matter, a candidate may accept contributions for the general election prior to the primary election, or in the case of a Presidential candidate, before the candidate receives his or her party’s nomination. See 11 CFR 102.9(e)(1). A candidate receiving such general election funds must employ “an acceptable accounting method to distinguish between contributions received for the primary election and contributions received for the general election.” Id.

The Commission recently addressed the application of these general rules in the context of a presidential campaign in Advisory Opinion 2007-03 (Obama). In that Advisory Opinion, the Commission confirmed that a presidential candidate does not waive his or her ability to participate in the general election public funding program by soliciting and raising general election funds before he or she secures his or her party’s nomination. In reaching this conclusion, the Commission noted that a candidate’s decision to refund general election contributions in order to receive public funding would be analogous to a candidate who failed to qualify for the general election and refunded general election contributions in order to avoid accepting excessive contributions. Id.
Thus, a presidential candidate receiving general election funds prior to becoming the party’s nominee and who does not become the party’s nominee must refund or obtain redesignation of any general election funds received from contributors. See 11 CFR 102.9(e)(3); Advisory Opinion 2007-03 (Obama). Commission regulations limit the time period in which a committee may obtain redesignation to 60 days and require that impermissible funds be refunded within 60 days. See 11 CFR 110.1(b)(3)(i) and (b)(5); 110.2(b)(3)(i) and (b)(5); 103.3(b)(3); see also Advisory Opinion 2007-03 (Obama). On January 1, 2008 and for approximately six months thereafter, the Commission was unable to render a formal advisory opinion because it lacked the requisite quorum of commissioners. On January 3, 2008, Senator Dodd formally ended his campaign, which caused the 60-day period redesignation/refund period to commence to run. On February 26, 2006, the Presidential Committee filed its advisory opinion request, 54 days after the withdrawal of Senator Dodd from the race, with six days remaining in his 60-day redesignation/refund deadline. The mere filing of a request for an advisory opinion does not toll, and will not be considered by the Commission in the future to toll, any statutory or regulatory deadline. However, at the time the advisory opinion was requested, the Commission still lacked the requisite quorum to legally respond to the request. Under this unprecedented and unforeseen circumstance, over which the Commission had no control, the Committee may obtain redesignations or make refunds during the six day period following receipt of this opinion.

This response constitutes an advisory opinion concerning the application of the Act and Commission regulations to the specific transaction or activity set forth in your request. See 2 U.S.C. § 437f. The Commission emphasizes that, if there is a change in
any of the facts or assumptions presented, and such facts or assumptions are material to a

conclusion presented in this advisory opinion, then the requester may not rely on that

conclusion as support for its proposed activity. Any person involved in any specific

transaction or activity which is indistinguishable in all its material respects from the

transaction or activity with respect to which this advisory opinion is rendered may rely on

this advisory opinion. See 2 U.S.C. 437f(c)(1)(B). Please note the analysis or

conclusions in this advisory opinion may be affected by subsequent developments in the

law, including, but not limited to, statutes, regulations, advisory opinions and case law.

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


For the Commission,

Donald F. McGahn II
Chairman