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AGENDA ITEM
For Meeting of: 08-21-08

SUBMITTED LATE

MEMORANDUM

TO: The Commission

FROM:

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Associate General Counsel

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Assistant General Counsel

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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

1 **ADVISORY OPINION 2008-04**

2 **Marc E. Elias, Esq.**
3 **Brian G. Svoboda, Esq.**
4 **Perkins Coie LLP**
5 **607 Fourteenth Street, NW**
6 **Washington, DC 20005-2011**

Draft

7 **Dear Messrs. Elias and Svoboda:**

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

14 **The Commission concludes that the costs associated with refunding, obtaining**
15 **redesignations of, or reattributing general election contributions are properly considered**
16 **“winding down costs” under 11 CFR 9034.11(a) and may therefore be paid with**
17 **presidential primary election funds. The Commission further concludes that the**
18 **Presidential Committee may transfer general election contributions into Friends of Chris**
19 **Dodd (the “Senate Committee”), Senator Dodd’s Senate campaign committee, provided**
20 **the Presidential Committee received written redesignations for such contributions within**
21 **60 days from the date Senator Dodd withdrew from the presidential campaign.**

22 **Ordinarily, the Presidential Committee must refund all general election contributions for**
23 **which it was unable to obtain written redesignations within the 60-day time period.**

24 **However, in view of the fact that the advisory opinion request was made 54 days after**
25 **Senator Dodd’s withdrawal, the Commission concludes that the Presidential Committee**

1 has six days from the date of its receipt of this opinion to obtain redesignations or to
2 make refunds to contributors.

3 ***Background***

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

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

15 On November 13, 2007, the Presidential Committee applied for federal matching
16 funds for primary election contributions. On November 27, 2007, the Commission found
17 the Presidential Committee eligible for primary matching funds.¹ On January 3, 2008,
18 Senator Dodd withdrew from the Presidential campaign. On January 11, 2008, Senator

¹ Press Release, Federal Election Commission, Dodd Fourth Presidential Candidate Declared Eligible for Primary Matching Funds in 2008 Race (November 27, 2007), <http://www.fec.gov/press/press2007/20071126dodd.shtml>. On December 20, 2007, the Commission certified Senator Dodd's eligibility for \$1,447,568.09 in public matching funds. Press Release, FEC Approves Matching Funds for 2008 Candidates, <http://www.fec.gov/press/press2007/20071207cert.shtml>. To date, the Presidential Committee has received the full amount for which it was certified. See Press Release, FEC Approves Matching Funds for 2008 Presidential Candidates (July 16, 2008), <http://www.fec.gov/press/press2008/20080714matching.shtml>.

1 Dodd filed a Statement of Candidacy with the Secretary of the Senate indicating his
2 candidacy for U.S. Senate in Connecticut in the 2010 election.² In that statement, he
3 designated the Senate Committee as his principal campaign committee for that election.

4 As of February 26, 2008, the Presidential Committee had \$1,706,420.30 in
5 general election funds on hand and had refunded \$36,800 in general election
6 contributions in response to direct, unsolicited contributor requests. On February 28 and
7 29, 2008, the Presidential Committee sent requests via U.S. Mail to all remaining general
8 election contributors asking them to redesignate their contributions to the Senate
9 Committee in writing by facsimile or U.S. Mail. The Presidential Committee paid the
10 costs associated with sending these redesignation requests with funds received for the
11 presidential primary election. The Presidential Committee does not anticipate sending
12 any further requests for redesignation. As of April 22, 2008, the Presidential Committee
13 has refunded \$462,762.00 in general election funds at the request of contributors and
14 received signed redesignation letters for general election contributions totaling \$67,800.

15 ***Questions Presented***

- 16 1. *May the Presidential Committee consider the costs associated with refunds and*
17 *redesignations of general election contributions as "winding down costs" under*
18 *11 CFR 9034.11(a) and, thus, pay such costs with funds received for the*
19 *presidential primary election?*
- 20 2. *May the Presidential Committee refund and obtain redesignations of funds*
21 *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.

1 ***Legal Analysis and Conclusions***

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

6 **Yes, the Presidential Committee may pay the costs associated with refunds and**
7 **redesignations of general election contributions with funds received for the primary**
8 **election because the refund, redesignation, or reattribution of general election funds**
9 **would qualify as “winding down costs” under 11 CFR 9034.11(a). If, after raising**
10 **general election funds, the candidate does not become a candidate in the general election,**
11 **contributions made for the general election must be refunded to the contributor or**
12 **redesignated in accordance with 11 CFR 110.1(b)(5) or 110.2(b)(5). See 11 CFR**
13 **102.9(e)(3).**

14 **Winding down costs are those costs associated with the termination of a**
15 **presidential candidate’s efforts to obtain his or her party’s nomination, and include “the**
16 **costs of complying with the post election requirements” of the Act and the Matching**
17 **Funds Act. 11 CFR 9034.11(a). Refunding and obtaining redesignations of contributions**
18 **designated for the general election are clearly associated with the termination of political**
19 **activity related to the primary election and are required to ensure compliance with the Act**
20 **and Commission regulations. See, e.g., 11 CFR 102.9(e)(3); Advisory Opinion 1992-15**
21 **(Russo). Consequently, the costs associated with obtaining redesignations, as well as**
22 **transferring and refunding general election contributions, constitute “qualified campaign**

1 expenses” under 26 U.S.C. 9032(9) and 11 CFR 9034.4(a) and may be paid with
2 presidential primary funds.

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

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

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

15 The Commission recently addressed the application of these general rules in the
16 context of a presidential campaign in Advisory Opinion 2007-03 (Obama). In that
17 Advisory Opinion, the Commission confirmed that a presidential candidate does not
18 waive his or her ability to participate in the general election public funding program by
19 soliciting and raising general election funds before he or she secures his or her party’s
20 nomination. In reaching this conclusion, the Commission noted that a candidate’s
21 decision to refund general election contributions in order to receive public funding would
22 be analogous to a candidate who failed to qualify for the general election and refunded
23 general election contributions in order to avoid accepting excessive contributions. *Id.*

1 Thus, a presidential candidate receiving general election funds prior to becoming the
2 party's nominee and who does not become the party's nominee must refund or obtain
3 redesignation of any general election funds received from contributors. See 11 CFR
4 102.9(e)(3); Advisory Opinion 2007-03 (Obama). Commission regulations limit the time
5 period in which a committee may obtain redesignation to 60 days and require that
6 impermissible funds be refunded within 60 days. See 11 CFR 110.1(b)(3)(i) and (b)(5);
7 110.2(b)(3)(i) and (b)(5); 103.3(b)(3); see also Advisory Opinion 2007-03 (Obama). On
8 January 1, 2008 and for approximately six months thereafter, the Commission was unable
9 to render a formal advisory opinion because it lacked the requisite quorum of
10 commissioners. On January 3, 2008, Senator Dodd formally ended his campaign, which
11 caused the 60-day period redesignation/refund period to commence to run. On February
12 26, 2006, the Presidential Committee filed its advisory opinion request, 54 days after the
13 withdrawal of Senator Dodd from the race, with six days remaining in his 60-day
14 redesignation/refund deadline. The mere filing of a request for an advisory opinion does
15 not toll, and will not be considered by the Commission in the future to toll, any statutory
16 or regulatory deadline. However, at the time the advisory opinion was requested, the
17 Commission still lacked the requisite quorum to legally respond to the request. Under
18 this unprecedented and unforeseen circumstance, over which the Commission had no
19 control, the Committee may obtain redesignations or make refunds during the six day
20 period following receipt of this opinion.

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

1 any of the facts or assumptions presented, and such facts or assumptions are material to a
2 conclusion presented in this advisory opinion, then the requester may not rely on that
3 conclusion as support for its proposed activity. Any person involved in any specific
4 transaction or activity which is indistinguishable in all its material respects from the
5 transaction or activity with respect to which this advisory opinion is rendered may rely on
6 this advisory opinion. *See* 2 U.S.C. 437f(c)(1)(B). Please note the analysis or
7 conclusions in this advisory opinion may be affected by subsequent developments in the
8 law, including, but not limited to, statutes, regulations, advisory opinions and case law.
9 All cited advisory opinions are available on the Commission's website at
10 <http://saos.nictusa.com/saos/searchao>.

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For the Commission,

Donald F. McGahn II
Chairman