The Commission permits the submission of written public comments on draft advisory opinions when on the agenda for a Commission meeting.

DRAFT ADVISORY OPINION 2008-04 is available for public comments under this procedure. It was requested by Marc E. Elias, Esq., and Brian Svoboda, Esq., on behalf of Chris Dodd for President, Inc.

Draft Advisory Opinion 2008-04 is scheduled to be on the Commission's agenda for its public meeting of Thursday, August 21, 2008.

Please note the following requirements for submitting comments:

1) Comments must be submitted in writing to the Commission Secretary with a duplicate copy to the Office of General Counsel. Comments in legible and complete form may be submitted by fax machine to the Secretary at (202) 208-3333 and to OGC at (202) 219-3923.

2) The deadline for the submission of comments is 9:00 am (Eastern Time) on August 21, 2008.

3) No comments will be accepted or considered if received after the deadline. Late comments will be rejected and returned to the commenter. Requests to extend the comment period are discouraged and unwelcome. An extension request will be considered only if received before the comment deadline and then only on a case-by-case basis in special circumstances.

4) All timely received comments will be distributed to the Commission and the Office of General Counsel. They will also be made available to the public at the Commission's Public Records Office.
CONTACTS

Press inquiries: Robert Biersack (202) 694-1220
Commission Secretary: Mary Dove (202) 694-1040

Other inquiries:

To obtain copies of documents related to 2008-04, contact the Public Records Office at (202) 694-1120 or (800) 424-9530 or visit the Commission’s website at www.fec.gov.

For questions about comment submission procedures, contact Rosemary C. Smith, Associate General Counsel, at (202) 694-1650.

MAILING ADDRESSES

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Rosemary C. Smith
Associate General Counsel
Office of General Counsel
Federal Election Commission
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MEMORANDUM

TO: The Commission
FROM: Thomasenia P. Duncan
        General Counsel
        Rosemary C. Smith RCS
        Associate General Counsel
        Amy L. Rothstein AR
        Assistant General Counsel
        Joanna S. Waldstreicher AR for JSW
        Attorney

Subject: Draft AO 2008-04

August 20, 2008

We have been asked to circulate the attached alternative draft B of the subject 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, notwithstanding the Presidential Committee’s acceptance of primary election public matching funds under the Matching Payment Act, the Presidential Committee may issue refunds or obtain redesignations and transfer contributions received for the general election into Friends of Chris Dodd (the “Senate Committee”), Senator Dodd’s Senate campaign committee. The Commission further concludes that the costs associated with issuing refunds or obtaining redesignations and transferring contributions received for the general election are properly considered “winding down costs” and therefore are “qualified campaign expenses” under 11 CFR 9034.11(a), which may be paid with presidential primary election funds. The Commission notes that, ordinarily, the Presidential Committee would have to issue refunds or obtain written redesignations for contributions received for the general election within 60 days from the date Senator Dodd withdrew from the presidential campaign.
However, in view of the fact that the advisory opinion request – which asked for guidance on a novel question – was made 54 days after Senator Dodd’s withdrawal, the Commission, consistent with prior precedent, 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 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, which has applied for and received primary election public matching funds under the Matching Payment Act, issue refunds and obtain redesignations for contributions designated for the presidential general election?

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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.
2. May the Presidential Committee consider the costs associated with issuing refunds and obtaining 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?

3. What is the deadline by which the Presidential Committee must issue refunds and obtain redesignations of its contributions received for the general election?

Legal Analysis and Conclusions

Question 1: May the Presidential Committee, which has applied for and received primary election public matching funds under the Matching Payment Act, issue refunds and obtain redesignations for contributions designated for the presidential general election?

Yes, the Presidential Committee may issue refunds and obtain redesignations for contributions 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, advisory opinions, and other rulings.

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 reiterated these general rules in the context of a presidential campaign. See 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. Id. 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.

Accordingly, a presidential candidate receiving general election funds prior to becoming the party’s nominee, and who does not become the party’s nominee, may refund any general election funds received from contributors. See 11 CFR 102.9(e)(3); Advisory Opinion 2007-03 (Obama). Alternatively, the presidential candidate in such a situation may obtain redesignations for a different election in accordance with 11 CFR 110.1(b)(5) or 110.2. See 11 CFR 102.9(e)(3).

Unlike the requestor in AO 2007-03 (Obama), who did not request public primary matching funds, Senator Dodd’s presidential campaign has applied for and received public matching funds under the Matching Payment Act. As a result, the Presidential Committee is subject to certain limitations on its expenditures after January 3, 2008, the Presidential Committee’s date of ineligibility. See 11 CFR 9034.4(b)(3) (“[e]xcept for winding down costs ... and certain convention expenses . . ., any expenses incurred after a candidate’s date of ineligibility . . . are not qualified campaign expenses”). Accordingly, the requestor is concerned that any expenses that the Senate Committee
incurs using funds transferred from the Presidential Committee may not constitute
“qualified campaign expenses” under 11 CFR 9034.4(b)(3). However, because those
transferred funds would be from the private contributions that the Presidential Committee
received for the general election (and assuming that the Presidential Committee properly
redesignates such contributions as discussed herein), they are not subject to the 11 CFR
9034.4(b)(3) post-ineligibility limitations.

Question 2: May the Presidential Committee consider the costs associated with issuing
refunds and obtaining 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 contributions received for the general election with funds received for
the primary election because the refund and redesignation of general election funds
would qualify as “winding down costs” under 11 CFR 9034.11(a), and therefore are
“qualified campaign expenses” under 11 CFR 9034.4(a) and are not subject to the
prohibition on “post-ineligibility expenditures” under 11 CFR 9034.4(b)(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 redesignating 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. Id. Consequently, subject to the limitations of 11 CFR
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1 9034.11(b), the costs associated with obtaining redesignations, transferring, and
2 refunding general election contributions constitute “qualified campaign expenses” under
3 26 U.S.C. 9032(9) and 11 CFR 9034.4(a) and may be paid with presidential primary
4 funds.

5 Question 3: What is the deadline by which the Presidential Committee must issue refunds and
6 obtain redesignations of its contributions received for the general election?

7 In Advisory Opinion 1992-15, the Commission held that the 60-day period for a
8 candidate to obtain redesignations begins to run from the date the candidate has actual
9 notice of the need to obtain the redesignations. Advisory Opinion 1992-15 (Russo). In
10 Advisory Opinion 1992-15, that period began to run on the date the candidate lost the
11 primary election. Applying the logic of Advisory Opinion 1992-15 here, the Commission
12 concludes that the 60-day period began to run when Senator Dodd withdrew from the
13 presidential campaign.

14 Moreover, in Advisory Opinion 1992-15, the Commission concluded that the
15 committee in question, which submitted its advisory opinion request 37 days after the
16 candidate lost the primary, had 23 days from receipt of the Commission’s advisory
17 opinion to obtain redesignations or make refunds, and in effect tolled the 60 day rule
18 because of the novel legal question being considered by the Commission. The same logic

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3 Notwithstanding the plain text of the Commission’s regulations, which requires committees to refund,
redesignate or reattribute contributions within 60 days of their receipt of the contributions (see 11 CFR
110.1(b)(3)(i) and (b)(5); 110.2(b)(3)(i) and (b)(5); 103.3(b)(3)), Advisory Opinion 1992-15 allowed for a
more flexible approach. Relatedly, the Commission in several recent audit matters has permitted
authorized candidate committees to obtain redesignations and/or reattributions of contributions after the 60-
day period had elapsed. See, e.g., Report of the Audit Division on Cynthia McKinney for Congress,
January 1, 2005 – December 31, 2006; Report of the Audit Division on the Citizens for Arlen Specter,
January 1, 2003 – December 31, 2004; Report of the Audit Division on Martinez for Senate, January 5,
April 30, 2004; Report of the Audit Division on DeMint for Senate Committee, Inc., January 14, 2003 –
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 http://saos.nictusa.com/saos/searchao.

For the Commission,

Donald F. McGahn II
Chairman

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4 The Commission notes that, at the time the requestor submitted his request, the Commission was in a state of unprecedented dormancy of the agency for approximately the first six months of the year, in which the Commission was unable to act on such requests.