

AO DRAFT COMMENT PROCEDURES

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

DRAFT ADVISORY OPINION 2008-22 is available for public comments under this procedure. It was requested by Marc E. Elias, Esq., on behalf of Senator Frank Lautenberg and Lautenberg for Senate.

Draft Advisory Opinion 2008-22 is scheduled to be on the Commission's agenda for its public meeting of Thursday, January 29, 2009.

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 12:00pm noon (Eastern Time) on January 28, 2009.

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 AO 2008-22, 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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FEDERAL ELECTION COMMISSION
Washington, DC 20463

AGENDA ITEM
For Meeting of: 1-29-09

SUBMITTED LATE

MEMORANDUM

TO: The Commission

FROM: Thomasenia P. Duncan *TPD*
General Counsel

Rosemary C. Smith *RC*
Associate General Counsel

Robert M. Knop *RMK*
Assistant General Counsel

Joanna S. Waldstreicher *JSW*
Attorney

Subject: Draft AO 2008-22

Attached is a proposed draft of the subject advisory opinion. We request that this draft be placed on the agenda for January 29, 2009.

Attachment

1 **ADVISORY OPINION 2008-22**

2 **Marc E. Elias, Esq.**
3 **Perkins Coie LLP**
4 **607 Fourteenth Street NW**
5 **Washington, DC 20005-2003**

DRAFT

6 **Dear Mr. Elias:**

7 **We are responding to your advisory opinion request on behalf of Senator Frank**
8 **Lautenberg and his principal campaign committee, Lautenberg for Senate, concerning the**
9 **application of the Federal Election Campaign Act of 1971, as amended (“the Act”), and**
10 **Commission regulations to the Committee’s repayment of several personal loans made by**
11 **Senator Lautenberg to Lautenberg for Senate using funds raised for Senator Lautenberg’s**
12 **2008 and 2014 re-election campaigns. The Commission concludes that (1) Lautenberg**
13 **for Senate may use contributions raised for the 2008 and 2014 campaigns to repay**
14 **personal loans from Senator Lautenberg of any amount for the 2002 campaign; and (2)**
15 **Lautenberg for Senate may use contributions received for the 2008 general election to**
16 **repay personal loans from Senator Lautenberg of up to \$250,000 for the 2008 primary**
17 **campaign.**

18 ***Background***

19 **The facts presented in this advisory opinion are based on your letter received on**
20 **December 12, 2008 and publicly available materials, including reports filed with the**
21 **Commission.**

22 **Lautenberg for Senate (the “Committee”) is Senator Frank Lautenberg’s principal**
23 **campaign committee for the 2002 and 2008 Senate elections. Senator Lautenberg**
24 **anticipates filing a Statement of Candidacy for 2014 designating the Committee as his**
25 **principal campaign committee for the 2014 Senatorial race. Senator Lautenberg made**

1 personal loans totaling \$1,510,000 to the Committee for the 2002 general election,
2 between October 6 and October 17, 2002. \$1,090,000 of that debt remains outstanding.
3 Senator Lautenberg also loaned the Committee a total of \$1,650,000 for the 2008 primary
4 election, of which \$250,000 remains outstanding and \$1,400,000 has been converted to
5 contributions from Senator Lautenberg. See Lautenberg for Senate 2008 30-day Post-
6 General Election Report, transmittal cover page and Schedule C.

7 ***Questions Presented***

8 *(1) May the Committee use contributions received for the 2008 general election to*
9 *repay up to \$250,000 owed to Senator Lautenberg for personal loans made to the*
10 *Committee for the 2008 primary election?*

11 *(2) May the Committee use contributions received for the 2008 and 2014 elections*
12 *to repay \$1,090,000 owed to Senator Lautenberg for personal loans made to the*
13 *Committee for the 2002 election?*

14 ***Legal Analysis and Conclusions***

15 *(1) May the Committee use contributions received for the 2008 general election to*
16 *repay up to \$250,000 owed to Senator Lautenberg for personal loans made to the*
17 *Committee for the 2008 primary election?*

18 Yes, the Committee may use contributions received for the 2008 general election
19 after the date of the 2008 primary election to repay up to \$250,000 of Senator
20 Lautenberg's personal loans to the Committee for the primary election.

21 The Bipartisan Campaign Reform Act of 2002 ("BCRA") limited the extent to
22 which candidates' personal loans to their authorized committees can be repaid after their
23 elections. Up to \$250,000 of personal loans may be repaid with contributions received

1 before, on, or after the date of the election. 2 U.S.C. 441a(j); 11 CFR 116.11(b)(3); 11
2 CFR 116.12(a). For personal loans that exceed \$250,000, a committee may only repay
3 the portion above \$250,000 using contributions made on or before the date of the
4 election. 2 U.S.C. 441a(j); 11 CFR 116.11(b)(2).

5 The regulation specifies that it “applies separately to each election.” 11 CFR
6 116.12(b). Accordingly, the Explanation and Justification (“E&J”) states that this means
7 that the \$250,000 limit on repayment applies separately to the primary election and the
8 general election. *Increased Contribution and Coordinated Party Expenditure Limits for*
9 *Candidates Opposing Self-Financed Candidates; Interim Final Rules, Explanation and*
10 *Justification* 68 FR 3970, 3974, 3975 (Jan. 27, 2003). As an illustration of this point, the
11 E&J discusses an example in which a candidate made personal loans to her authorized
12 committee of \$250,000 for the primary election and \$250,000 for the general election, a
13 set of facts that is somewhat analogous to the Committee’s situation. The E&J indicates
14 that in the example, the authorized committee is permitted to use “contributions received
15 before, during, or after the primary election” to repay both the primary election loan and
16 the general election loan. *Id.*

17 The Committee may therefore use general election contributions received after the
18 2008 primary election to repay the outstanding \$250,000 in personal loans made by
19 Senator Lautenberg for the primary election.

20 (2) *May the Committee use contributions received for the 2008 and 2014 elections*
21 *to repay \$1,090,000 owed to Senator Lautenberg for personal loans made to the*
22 *Committee for the 2002 election?*

23 Yes, the Committee may use contributions received for the 2008 election or that

1 will be received for the 2014 election to repay the entire outstanding amount of Senator
2 Lautenberg's personal loan to the Committee for the 2002 election.

3 The \$250,000 limit imposed by BCRA on repayment of personal loans from post-
4 election contributions does not apply to loans made before the November 6, 2002
5 effective date of the legislation. 2 U.S.C 441a(j); Pub. L. 107-155, Sec. 402, Mar. 27,
6 2002. The E&J for the regulations implementing the statute explains that "the limitations
7 on repayment of personal loans from contributions made after the respective election do
8 not apply to personal loans made before this date. Consequently, any outstanding loan
9 balances of candidate loans that were made before November 6, 2002, may be repaid
10 with contributions made after this date subject to the provisions concerning net debts
11 outstanding in 11 CFR 110.1(b)(3)." 68 FR at 3974; *see also* Advisory Opinion 2003-30
12 (Fitzgerald). Because Senator Lautenberg made the loans for his 2002 election in
13 October 2002, prior to the statute's effective date, BCRA does not limit the amount of
14 personal loans for that election that the Committee can repay using contributions received
15 after the 2002 election.

16 The Commission has previously permitted candidates' authorized committees to
17 use otherwise lawful campaign contributions to repay debts outstanding from previous
18 elections. For example, in Advisory Opinion 1989-22 (Nagle), the Commission
19 concluded that Representative Nagle's authorized committee could use contributions
20 made with respect to the 1990 primary election campaign to retire outstanding debts
21 incurred by his 1988 campaign committee, including a bank loan for which

1 Representative Nagle was the guarantor.¹ The Commission noted that this use of
2 contributions “does not require that they be counted against the limits applicable to the
3 previous election unless there are facts and circumstances indicating that the
4 contributions were actually solicited to pay the debts remaining from the previous
5 election, or that contributors gave to the current campaign with knowledge that the funds
6 would be applied only to debt retirement.” Advisory Opinion 1989-22 (Nagle).² More
7 recently, in Advisory Opinion 2003-30 (Fitzgerald), the Commission concluded that
8 Senator Fitzgerald’s principal campaign committee could use contributions made with
9 respect to the 2004 primary election to repay loans made to the committee in connection
10 with the 1998 election, including personal loans from Senator Fitzgerald. Similarly, the
11 Committee may use contributions made in connection with Senator Lautenberg’s 2008
12 and 2014 elections to repay outstanding debts from the 2002 election, including personal
13 loans from Senator Lautenberg.³

14 The Commission notes that the Committee, in preparing its reports, should clearly
15 identify which loans are being repaid with contributions made in connection with the
16 2008 and 2014 elections. Specifically, the loan repayment should be itemized on
17 Schedule B of FEC Form 3 for the appropriate line number (19(a)). For the “Purpose of
18 Disbursement” line item on Schedule B, the Committee should briefly describe why it

¹ The Commission notes that Advisory Opinion 1989-22 was not directly implicated by the subsequent enactment of the \$250,000 limit in 2 U.S.C. 441a(j) because the loan amount was under \$250,000. However, that advisory opinion should not be relied upon in situations where BCRA requires a different result.

² The Commission notes that Senator Lautenberg has not yet filed a Statement of Candidacy for the 2014 Senate race, and assumes that he intends to do so at the appropriate time.

³ The Committee’s use of contributions received for the 2014 general election to repay debts from any previous election is conditioned on Senator Lautenberg’s actual candidacy in that election. *See* 11 CFR 110.1(b)(3)(i) (providing that “if a candidate is not a candidate in the general election, all contributions made for the general election shall be either returned or refunded to the contributors or redesignated . . . or reattributed . . .”).

1 made the disbursement. The loan repayment also should be noted in the “Cumulative
2 Payment to Date” column on Schedule C.

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

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On behalf of the Commission,

Steven T. Walther
Chairman