



FEDERAL ELECTION COMMISSION
Washington, DC 20463

January 30, 2009

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

ADVISORY OPINION 2008-22

Marc E. Elias, Esq.
Perkins Coie LLP
607 Fourteenth Street NW
Washington, DC 20005-2003

Dear Mr. Elias:

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

Background

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

Lautenberg for Senate (the “Committee”) is Senator Frank Lautenberg’s principal campaign committee for the 2002 and 2008 Senate elections. Senator Lautenberg anticipates filing a Statement of Candidacy for 2014 designating the Committee as his principal campaign committee for the 2014 Senatorial race. Senator Lautenberg made personal loans totaling \$1,510,000 to the Committee for the 2002 general election,

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

Questions Presented

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

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

Legal Analysis and Conclusions

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

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

The Bipartisan Campaign Reform Act of 2002 ("BCRA") limited the extent to which candidates' personal loans to their authorized committees can be repaid after their elections. Up to \$250,000 of personal loans may be repaid with contributions received before, on, or after the date of the election. 2 U.S.C. 441a(j); 11 CFR 116.11(b)(3); 11 CFR 116.12(a). For personal loans that exceed \$250,000, a committee may only repay the portion above \$250,000 using contributions made on or before the date of the election. 2 U.S.C. 441a(j); 11 CFR 116.11(b)(2).

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

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

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

Yes, the Committee may use contributions received for the 2008 election or that will be received for the 2014 election to repay the entire outstanding amount of Senator Lautenberg's personal loan to the Committee for the 2002 election.

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

The Commission has previously permitted candidates' authorized committees to use otherwise lawful campaign contributions to repay debts outstanding from previous elections. For example, in Advisory Opinion 1989-22 (Nagle), the Commission concluded that Representative Nagle's authorized committee could use contributions made with respect to the 1990 primary election campaign to retire outstanding debts incurred by his 1988 campaign committee, including a bank loan for which Representative Nagle was the guarantor.¹ The Commission noted that this use of contributions "does not require that they be counted against the limits applicable to the previous election unless there are facts and circumstances indicating that the contributions were actually solicited to pay the debts remaining from the previous election, or that contributors gave to the current campaign with knowledge that the funds would be applied only to debt retirement." Advisory Opinion 1989-22 (Nagle).² More recently, in Advisory Opinion 2003-30 (Fitzgerald), the Commission concluded that Senator Fitzgerald's principal campaign committee could use contributions made with

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.

respect to the 2004 primary election to repay loans made to the committee in connection with the 1998 election, including personal loans from Senator Fitzgerald. Similarly, the Committee may use contributions made in connection with Senator Lautenberg's 2008 and 2014 elections to repay outstanding debts from the 2002 election, including personal loans from Senator Lautenberg.³

The Commission notes that the Committee, in preparing its reports, should clearly identify which loans are being repaid with contributions made in connection with the 2008 and 2014 elections. Specifically, the loan repayment should be itemized on Schedule B of FEC Form 3 for the appropriate line number (19(a)). For the "Purpose of Disbursement" line item on Schedule B, the Committee should briefly describe why it made the disbursement. The loan repayment also should be noted in the "Cumulative Payment to Date" column on Schedule C.

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 aspects 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 that 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>.

On behalf of the Commission,

(signed)
Steven T. Walther
Chairman

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 "[i]f the 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 . . .").