

### **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.

Two alternative DRAFTS of DRAFT ADVISORY OPINION 2009-15 are available for public comments under this procedure. It was requested by Barry Hunsaker, Treasurer, on behalf of Bill White for Texas.

The two alternative DRAFTS of Draft Advisory Opinion 2009-15 are scheduled to be on the Commission's agenda for its public meeting of Tuesday, July 28, 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 July 27, 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: Judith Ingram (202) 694-1220

Commission Secretary: Mary Dove (202) 694-1040

Other inquiries:

To obtain copies of documents related to AO 2009-15, contact the Public Records Office at (202) 694-1120 or (800) 424-9530 or visit the Commission's website at [www.fec.gov](http://www.fec.gov).

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

**MAILING ADDRESSES**

Commission Secretary  
Federal Election Commission  
999 E Street, NW  
Washington, DC 20463

Rosemary C. Smith  
Associate General Counsel  
Office of General Counsel  
Federal Election Commission  
999 E Street, NW  
Washington, DC 20463

RECEIVED  
FEDERAL ELECTION  
COMMISSION  
SECRETARIAT



FEDERAL ELECTION COMMISSION  
Washington, DC 20463

2009 JUL 23 P 3:20

## AGENDA ITEM

For Meeting of: 07-28-09

### SUBMITTED LATE

### MEMORANDUM

TO: The Commission

FROM: Thomasenia P. Duncan *JPD*  
General Counsel

Rosemary C. Smith *RCS*  
Associate General Counsel

Robert M. Knop *RMK*  
Assistant General Counsel

Anthony T. Buckley *ATB*  
Attorney

Subject: Draft AO 2009-15 (Bill White for Texas)

Attached are two proposed drafts of the subject advisory opinion. We request that these drafts be placed on the agenda for July 28, 2009.

Attachment

1 ADVISORY OPINION 2009-15

2

3 Barry Hunsaker, Treasurer  
4 Bill White for Texas  
5 P.O. Box 131197  
6 Houston, TX 77219 - 1197

**DRAFT A**

7

8 Dear Mr. Hunsaker:

9

We are responding to your advisory opinion request, on behalf of Bill White for

10

Texas (the "White Committee"), concerning the application of the Federal Election

11

Campaign Act of 1971, as amended (the "Act"), and Commission regulations to the

12

raising and acceptance of contributions for a special election that may not occur. The

13

Commission concludes that the White Committee may accept contributions for the

14

Senatorial primary and general elections to be held in 2012 in Texas, and may currently

15

accept contributions for a special or emergency election or runoff in 2009 or 2010 that

16

has not been scheduled and may not occur.

17

***Background***

18

The facts presented in this advisory opinion are based on your letter received on

19

June 12, 2009, and on reports filed with the Commission.

20

Bill White is currently the mayor of Houston, Texas. The White Committee is

21

Mayor White's principal campaign committee for election to the United States Senate

22

from Texas. The White Committee registered with the Commission on December 12,

23

2008. On December 15, 2008, Mayor White filed a Statement of Candidacy with respect

24

to the 2012 Senate race. If a special or emergency election is called before 2012 to fill a

25

vacancy in the Senate seat, Mayor White intends to be a candidate in that election.

26

Currently, Senator Kay Bailey Hutchison holds the Senate seat that will be

27

contested in the 2012 primary and general elections. However, Senator Hutchison has

1 stated publicly that she will not be a candidate for re-election in 2012,<sup>1</sup> and she has  
2 formed a committee under Texas law to raise funds to run for Governor of Texas in the  
3 2010 March primary and November general elections. Senator Hutchison has discussed  
4 the possibility of resigning from the Senate during the course of her gubernatorial  
5 campaign.<sup>2</sup>

6 Under the Texas Election Code (the "Election Code"), if Senator Hutchison  
7 resigns from the Senate before her term expires, a "special election" to fill that seat may  
8 be scheduled for November 3, 2009, May 8, 2010, or November 2, 2010, depending on  
9 the timing of the resignation. Election Code §§210.023 and 3.003. It is also possible that  
10 the Governor may schedule an "emergency election" on another date to fill the vacancy if  
11 the Governor determines that an emergency exists. Election Code §41.0011. The  
12 Governor has considerable discretion in deciding whether to call such an election, and it  
13 is not currently possible to predict whether he would do so.<sup>3</sup>

14 A special election to fill a U.S. Senate seat would not be conducted as a party  
15 primary, but as an election in which candidates from all parties appear on the same ballot,  
16 with party affiliation indicated. Election Code §203.003. If no candidate receives a  
17 majority, that election is followed by a runoff election between the two candidates  
18 receiving the most votes in the first election.

19 Regularly scheduled party primary and general elections for the Senate seat will  
20 be held in 2012. If no candidate receives a majority in the party primary, a runoff will be  
21 held. It is thus conceivable that Mayor White could be a candidate in up to five elections

---

<sup>1</sup> Gamboa, Suzanne, "Texas senator won't run for re-election," *USA Today*, October 16, 2007.

<sup>2</sup> *Id.*

<sup>3</sup> The term "special election" is used throughout the remainder of this advisory opinion to refer to either a special or emergency election.

1 for the same U.S. Senate seat between now and November 2012: a special election in  
2 2009 or 2010, a runoff for that election, the 2012 Democratic party primary, a primary  
3 runoff, and a general election in November 2012.

4 ***Questions Presented***<sup>4</sup>

5 1. *If a contributor makes an undesignated contribution to the White Committee of*  
6 *\$2,400 or less, and a special Senate election is subsequently scheduled after that*  
7 *contribution is made but before the March 2012 Senate primary election, would that*  
8 *undesignated contribution be available to the White Committee to use for the special*  
9 *Senate election?*

10 2. *May the White Committee accept a contribution of up to \$4,800 from an*  
11 *individual before a special Senate election is scheduled if the contributor (i) designates*  
12 *up to \$2,400 for a special Senate election if one is held, or for the 2012 primary election*  
13 *if there is no special Senate election; and (ii) designates up to \$2,400 for either a runoff*  
14 *election following the special Senate election if a runoff is held, or to the 2012 general*  
15 *election if there is no such runoff?*

16 3. *With respect to a contribution that exceeds \$2,400 and that is made before any*  
17 *special election is scheduled:*

18 *(a) Is the contribution properly designated if the contributor uses a form stating*  
19 *that "Federal Election Law allows individuals to donate up to \$4,800; \$2,400 for*  
20 *the first election and \$2,400 for any subsequent election" and there is no other*  
21 *designation language provided?*

---

<sup>4</sup> These questions use the \$2,400 per person per election contribution limit in place for the 2009-2010 election cycle. That amount may be adjusted for inflation in the 2011-2012 election cycle. See generally, 2 U.S.C. 441a(b).

1           ***(b) Is the contribution designated to the 2012 primary and/or 2012 general***  
2           ***election pursuant to a form described in question 3(a) properly redesignated to***  
3           ***the special and/or runoff election if the White Committee provides the contributor***  
4           ***a form letter, such as the one attached as Appendix D in the Request, stating that***  
5           ***the White Committee is designating \$2,400 for "the first election" and the***  
6           ***remaining amount for "the second election in which Mayor White participates"?***

7           ***(c) If the notice of redesignation described in question 3(b) relating to a special***  
8           ***election and possible runoff election is not effective as to a special election and***  
9           ***possible runoff election, will the notice of redesignation nevertheless be effective***  
10           ***as to the primary and general elections of 2012?***

11           ***(d) If the notice of redesignation is effective as to the 2012 primary and general***  
12           ***elections, may the White Committee use the contribution for a special election***  
13           ***and, if one is required, a runoff election if special election is called before the***  
14           ***2012 primary election occurs?***

15    4.       ***If the White Committee raises money for a special election, and for a runoff***  
16       ***following a special election, and the special election or runoff does not occur, what may***  
17       ***the Committee do with the money?***

18    5.       ***How should the White Committee report designated contributions if the answer to***  
19       ***Question 2 is yes, and redesignated contributions if the answer to Question 3 is yes?***

20           ***Legal Analysis and Conclusions***

21    1.       ***If a contributor makes an undesignated contribution to the White Committee of***  
22       ***\$2,400 or less, and a special Senate election is subsequently scheduled after that***  
23       ***contribution is made but before the March 2012 Senate primary election, would that***

1 *undesignated contribution be available to the White Committee to use for the special*  
2 *Senate election?*

3 Yes, an undesignated contribution of up to \$2,400 would be available to the  
4 White Committee to use for the Senate special election that is called after the contribution  
5 is made.

6 Contributions by a person other than a multicandidate committee to a Federal  
7 candidate's authorized committees are limited to \$2,400 "with respect to any election."  
8 11 CFR 110.1(b); 2 U.S.C. 441a(a)(1)(A) and 441a(c). Commission regulations state that  
9 "with respect to any election" means: (1) in the case of a contribution designated in  
10 writing by the contributor for a particular election, the election so designated; and (2) in  
11 the case of a contribution not designated in writing by the contributor, the next election  
12 for the Federal office after the contribution is made. 11 CFR 110.1(b)(2). Under the  
13 circumstances described, a special election that has been called would be the next Federal  
14 election after the undesignated contribution is made. Therefore, the undesignated  
15 contribution may be used for that election (but is subject to the reporting requirements set  
16 forth in the answer to question 5).

17 2. *May the White Committee accept a contribution of up to \$4,800 from an*  
18 *individual before a special Senate election is scheduled if the contributor (i) designates*  
19 *up to \$2,400 for a special Senate election if one is held, or for the 2012 primary election*  
20 *if there is no special Senate election; and (ii) designates up to \$2,400 for either a runoff*  
21 *election following the special Senate election if a runoff is held, or to the 2012 general*  
22 *election if there is no such runoff?*

1           Yes, contributions may be designated in the alternative, under the circumstances  
2 as set forth in question 2. The White Committee may accept up to \$2,400 from an  
3 individual contributor for the 2012 primary or, in the alternative, a special election that  
4 has not yet been scheduled. The White Committee may also accept up to \$2,400 from  
5 that same individual contributor for the general election in 2012 or, in the alternative, for  
6 a runoff for a not-yet-declared special election.

7           Commission regulations provide for the designation of a contribution for “a  
8 particular election.” See 11 CFR 110.1(b)(2), (3), and (4). Such a designated  
9 contribution must not cause the contributor to exceed the contribution limits at 2 U.S.C.  
10 441a(a)(1) with respect to the particular election, and contributions designated for an  
11 election that has already occurred may only be accepted to the extent such contributions  
12 do not exceed the committee’s net debts outstanding. See 11 CFR 110.1(b)(1) and (3)(i).  
13 Thus, for an authorized committee to accept a designated contribution of \$4,800, which is  
14 \$2,400 in excess of the per election limit, the contributor must clearly state in writing that  
15 \$2,400 is designated for one particular election and \$2,400 is designated for another  
16 particular election, either on the check (or other negotiable instrument) or in a writing  
17 accompanying the contribution.

18           The Commission concludes that designations for the special election and for the  
19 runoff would qualify as references to “a particular election.” Although the designations  
20 present these particular elections in the alternative (*i.e.*, (1) the special election if held  
21 before 2012 and, if not so held, the 2012 primary; or (2) the special election runoff if  
22 held before 2012 and, if not so held, the 2012 general election), the specific use of the  
23 contribution will be clear to both the Committee and the contributor based on

1 circumstances that will be a matter of public record: that the Governor would have to call  
2 a special election following the resignation of Senator Hutchinson.

3 Moreover, the likelihood of the occurrence of a special election is sufficiently real  
4 in this situation. Based on statements from Senator Hutchinson and her agents, Mayor  
5 White is presented with a strong possibility that Senator Hutchinson will resign before the  
6 gubernatorial primary or gubernatorial general election as well as a certainty that she will  
7 resign by the end of 2010 if she is elected Governor.<sup>5</sup>

8 Thus, the White Committee may use the described designations to accept up to  
9 \$2,400 for the special election and up to \$2,400 for the runoff to that election. The White  
10 Committee must use an acceptable accounting method to distinguish between the  
11 contributions received for each of the two elections, *e.g.*, by designating separate bank  
12 accounts for each election or maintaining separate books and records for each election.  
13 11 CFR 102.9(e)(1).<sup>6</sup>

14 The designations described in question 2 would be treated as designations for the  
15 special election or the runoff to that election at the point that Senator Hutchinson  
16 announces her resignation and Mayor White becomes a candidate in a special election  
17 called by the Governor. At that point, the contributions can no longer be considered to be  
18 designated for the 2012 regularly scheduled elections. After the end of any pre-2012  
19 elections (special or runoff) in which Mayor White actually participates as a candidate,

---

<sup>5</sup> See Advisory Opinion 2006-22 (Wallace) (where the Commission concluded that an individual raising and spending funds for his candidacy was considered a Federal candidate even at a time when the question of whether the relevant special nominating process would be held was subject to court rulings that had not yet been made).

<sup>6</sup> The Committee must not spend funds designated for the runoff election unless Mayor White participates in the runoff as a candidate. See 11 CFR 102.9(e)(3).

1 the White Committee may use unused surplus funds (as determined by use of a  
2 reasonable accounting method under 11 CFR 110.3(c)(4)) for the 2012 primary election.

3 3. *With respect to a contribution that exceeds \$2,400 and that is made before any  
4 special election is scheduled:*

5 *(a) Is the contribution properly designated if the contributor uses a form  
6 stating that "Federal Election Law allows individuals to donate up to  
7 \$4,800; \$2,400 for the first election and \$2,400 for any subsequent  
8 election" and there is no other designation language provided?*

9 Yes, any such contribution is properly designated. If at the time the contribution  
10 is made Senator Hutchison has not resigned, no special or runoff election has been called,  
11 and the possibility of a special or runoff election is not even mentioned in the forms,  
12 current contributors who use the form described in question 3(a) must conclude that the  
13 "first election" referenced in the forms means the 2012 primary, and the "second  
14 election" means the 2012 general election. Accordingly, barring any further instruction  
15 from a contributor, the first \$2,400 contributed would be designated for the 2012 primary  
16 election. Any remaining amount up to \$2,400 would likewise be considered designated  
17 for the 2012 general election. See 11 CFR 110.1(b)(2) and (4).

18 *(b) Is the contribution designated to the 2012 primary and/or 2012 general  
19 election pursuant to a form described in question 3(a) properly redesignated to  
20 the special and/or runoff election if the White Committee provides the contributor  
21 a form letter, such as the one attached as Appendix D in the Request, stating that  
22 the White Committee is designating \$2,400 for "the first election" and the*

1           *remaining amount for “the second election in which [Mayor White]*  
2           *participates”?*

3           No, any contributions designated for the 2012 primary and/or general election are  
4 not properly redesignated to the special and/or runoff election by the form letter  
5 described in question 3(b). Once a contribution is designated to a particular election, it  
6 cannot be presumptively redesignated to another election, which is what the form letter  
7 attached as Appendix D in the Request purports to do. *See* 11 CFR 110.1(b)(5)(ii)(B)(2)  
8 and (C)(2). Thus, in order to use funds received in response to the wording of the form  
9 described in question 3(a) for a 2009 or 2010 special election or runoff, the White  
10 Committee must first obtain written redesignations from the contributors for the special  
11 election or runoff in accordance with 11 CFR 110.1(b)(5)(ii)(A)(1) and (2).<sup>7</sup>

12           *(c) If the notice of redesignation described in question 3(b) relating to a special*  
13           *election and possible runoff election is not effective, will the notice of*  
14           *redesignation nevertheless be effective as to the primary and general elections of*  
15           *2012?*

16           Given that the Commission has already concluded in answering question 3(a)  
17 above that the language in the forms would result in the proper designation of the  
18 contributions for the 2012 primary and general elections, this question is moot. The  
19 White Committee would not need to redesignate contributions that already are properly  
20 designated. If the Request is asking whether the White Committee may use the notice of

---

<sup>7</sup> Although Commission regulations only specifically address redesignation of excessive contributions, nothing in the Commission’s regulations is intended to suggest that political committees may not seek redesignation of contributions that are *within* the contribution limitations and restrictions. *See* 11 CFR 110.1(b)(5)(i)(A)-(D).

1 redesignation described in question 3(b), such as the one attached as Appendix D in the  
2 Request, to redesignate contributions that already are designated, the answer remains the  
3 same as the answer to question 3(b). Contributions that already are designated must be  
4 redesignated by obtaining a writing from the contributor; simply issuing a notice to the  
5 contributor, such as the one attached as Appendix D, will not suffice. *See* 11 CFR  
6 110.1(b)(5)(ii)(A)(1) and (2).

7       If, on the other hand, the Request is asking whether undesignated contributions  
8 that exceed the per-election contribution limit may be presumptively redesignated  
9 between the 2012 primary and general elections, then the answer is contingent on  
10 whether a special and/or runoff election are called, since the redesignation language  
11 contained in the notice attached as Appendix D of the Request is contingent on that fact.  
12 In the event the special and runoff elections are not called, the form letter would  
13 constitute an effective presumptive redesignation pursuant to 11 CFR 110.1(b)(5)(ii)(B)  
14 and (C), since the letter states that the White Committee is designating a certain amount  
15 to the primary election (in the event a special election is not called) and a certain amount  
16 to the general election (in the event a runoff election does not occur).

17       *(d) If the notice of redesignation is effective as to the 2012 primary and general*  
18       *elections, may the White Committee use the contribution for a special election*  
19       *and, if one is required, a runoff election if special election is called before the*  
20       *2012 primary election occurs?*

21       If the White Committee wishes to use contributions that have been designated for  
22 the 2012 primary and general elections for a 2009 or 2010 special election or runoff once  
23 the special election is called, the White Committee must first obtain written contributor

1 redesignations for the special election or runoff in accordance with 11 CFR  
2 110.1(b)(5)(ii)(A)(1) and (2).

3           4.       *If the White Committee raises money for a special election, and for a*  
4 *runoff following a special election, and the special election or runoff does not occur,*  
5 *what may the Committee do with the money?*

6           If the White Committee raises money for a special election, and the special  
7 election does not occur, contributions designated for the special election must be  
8 refunded to the contributor within sixty days of the last date that a special election may be  
9 scheduled under Texas law, unless the White Committee receives a written redesignation  
10 or combined redesignation and reattribution. 11 CFR 110.1(b)(3)(i)(C); *see* Advisory  
11 Opinion 1992-15 (Russo) (concluding that the 60-day period begins to run on the date  
12 that the committee “has actual notice of the need to obtain redesignations . . . or refund  
13 the contribution[s]”).

14           Similarly, although the Committee may accept contributions designated for the  
15 runoff once it is apparent that a special election will occur, it may not use those  
16 contributions unless Mayor White participates in the runoff as a candidate. *See* Advisory  
17 Opinion 1982-49 (Weicker) (recognizing that accepting contributions for an election at a  
18 time before the necessity of such an election is determined is analogous to accepting  
19 general election contributions before the primary election). Contributions designated for  
20 an election that does not occur, or in which a person is not a candidate (for example,  
21 where a candidate has lost the primary and is hence not running in the general election),  
22 must be refunded, redesignated for another election in which the candidate has  
23 participated or is participating in accordance with 11 CFR 110.1(b)(5), or redesignated

1 and reattributed to another contributor in accordance with 11 CFR 110.1(k)(3). *See*  
2 11 CFR 102.9(e)(3), 110.1(b)(3)(i), and 103.3(b)(3), and Advisory Opinions 1992-25  
3 (Owens), 1986-17 (Green), and 1982-49 (Weicker). Thus, if Mayor White loses the  
4 special election, or if any candidate receives a majority in the special election (and  
5 therefore there is no special runoff election), contributions designated for the special  
6 election runoff must be refunded to the contributor within sixty days of the special  
7 election unless the White Committee receives a written redesignation or combined  
8 redesignation and reattribution. 11 CFR 110.1(b)(3)(i)(C).

9       5.       *How should the White Committee report designated contributions if the*  
10 *answer to Question 2 is yes, and redesignated contributions if the answer to Question 3 is*  
11 *yes?*

12       In reporting contributions accompanied by the written statements described in  
13 question 2 that are received before a special election is scheduled, the White Committee  
14 must check a box on Schedule A indicating either a "Primary" contribution or a  
15 "General" contribution for the 2012 elections and include a memo text stating either  
16 (1) "Designated for special or emergency election if scheduled before 2012" or  
17 (2) "Designated for special or emergency election runoff if scheduled before 2012."  
18 Such reporting reflects the use of the contributions as they are intended by the contributor  
19 at the time the contribution is made. If Senator Hutchison announces her resignation, and  
20 Mayor White becomes a candidate in a special election called by the Governor, the White  
21 Committee must inform the Commission that the contributions are considered to be  
22 designated for the special election or the runoff election. Normally, when the designation  
23 of a contribution has been changed, the political committee must disclose the

1 redesignation on the report covering the period in which it received the redesignation,  
2 including a memo entry for each contribution that indicates when the Committee received  
3 a new designation from the contributor. *See* 11 CFR 104.8(d); *see also Instructions for*  
4 *FEC Form 3 and Related Schedules*, p. 9. Under the circumstances presented, where the  
5 White Committee is attempting to deal with uncertainty as to the proper way to designate  
6 contributions in an unusual electoral situation, the Commission considers it to be  
7 sufficient for the White Committee to file amended reports, simply indicating the proper  
8 designations of the contributions. The Commission recommends that to avoid any  
9 confusion, the White Committee include memo text specifically referencing this advisory  
10 opinion.

11 Further, the Commission must also be informed of any changes to the potential  
12 use of undesignated contributions received pursuant to question 1. The White Committee  
13 should similarly file amended reports for these contributions once a special election is  
14 called.

15 Contributions received using the forms described in question 3 must be reported  
16 as contributions designated for the 2012 primary election or 2012 general election.

17 This response constitutes an advisory opinion concerning the application of the  
18 Act and Commission regulations to the specific transaction or activity set forth in your  
19 request. *See* 2 U.S.C. 437f. The Commission emphasizes that, if there is a change in any  
20 of the facts or assumptions presented, and such facts or assumptions are material to a  
21 conclusion presented in this advisory opinion, then the requester may not rely on that  
22 conclusion as support for its proposed activity. Any person involved in any specific  
23 transaction or activity which is indistinguishable in all its material aspects from the

1 transaction or activity with respect to which this advisory opinion is rendered may rely on  
2 this advisory opinion. *See* 2 U.S.C. 437f(c)(1)(B). Please note that the analysis or  
3 conclusions in this advisory opinion may be affected by subsequent developments in the  
4 law including, but not limited to, statutes, regulations, advisory opinions and case law.  
5 All cited advisory opinions are available on the Commission's website at  
6 <http://saos.nictusa.com/saos/searchao>.

7 On behalf of the Commission,

8  
9  
10  
11

Steven T. Walther  
Chairman

1 ADVISORY OPINION 2009-15

2  
3  
4  
5  
6  
7  
8

Barry Hunsaker, Treasurer  
Bill White for Texas  
P.O. Box 131197  
Houston, TX 77219 - 1197

**DRAFT B**

Dear Mr. Hunsaker:

9           We are responding to your advisory opinion request, on behalf of Bill White for  
10 Texas (the "White Committee"), concerning the application of the Federal Election  
11 Campaign Act of 1971, as amended (the "Act"), and Commission regulations to the  
12 raising and acceptance of contributions for a special election that may not occur. The  
13 Commission concludes that the White Committee may accept contributions for the  
14 Senatorial primary and general elections to be held in 2012 in Texas, but may not  
15 currently accept contributions for a special or emergency election, or runoff, in 2009 or  
16 2010 that has not been scheduled and may not occur.

17           ***Background***

18           The facts presented in this advisory opinion are based on your letter received on  
19 June 12, 2009, and on reports filed with the Commission.

20           Bill White is currently the mayor of Houston, Texas. The White Committee is  
21 Mayor White's principal campaign committee for election to the United States Senate  
22 from Texas. It registered with the Commission on December 12, 2008. On  
23 December 15, 2008, Mayor White filed a Statement of Candidacy with respect to the  
24 2012 Senate race. If a special or emergency election is called before 2012 to fill a  
25 vacancy in the Senate seat, Mayor White intends to be a candidate in that election.

26           Currently, Senator Kay Bailey Hutchison holds the Senate seat that will be  
27 contested in the 2012 primary and general elections. However, Senator Hutchison has

1 stated publicly that she will not be a candidate for re-election in 2012<sup>1</sup>, and she has  
2 formed a committee under Texas law to raise funds to run for Governor of Texas in the  
3 2010 March primary and November general elections. Ms. Hutchison has discussed the  
4 possibility of resigning from the Senate during the course of her gubernatorial campaign.<sup>2</sup>

5 Under the Texas Election Code (the “Election Code”), if Senator Hutchison  
6 resigns from the Senate before her term expires, a “special election” to fill that seat may  
7 be scheduled for November 3, 2009, May 8, 2010, or November 2, 2010, depending on  
8 the timing of the resignation. Election Code §§210.023 and 3.003. It is also possible that  
9 the Governor may schedule an “emergency election” on another date to fill the vacancy if  
10 the Governor determines that an emergency exists. Election Code §41.0011. The  
11 Governor has considerable discretion in deciding whether to call such an election, and it  
12 is not currently possible to predict whether he would do so.<sup>3</sup>

13 A special election to fill a U.S. Senate seat would not be conducted as a party  
14 primary, but as an election in which candidates from all parties appear on the same ballot,  
15 with party affiliation indicated. Election Code §203.003. If no candidate receives a  
16 majority, that election is followed by a runoff election between the two candidates  
17 receiving the most votes in the first election.

18 Regularly scheduled party primary and general elections for the Senate seat will  
19 be held in 2012. If no candidate receives a majority in the party primary, a runoff will be  
20 held. It is thus conceivable that Mayor White could be a candidate in up to five elections  
21 for the same U.S. Senate seat between now and November 2012: a special election in

---

<sup>1</sup> Gamboa, Suzanne, “Texas senator won’t run for re-election,” *USA Today*. October 16, 2007.

<sup>2</sup> *Id.*

<sup>3</sup> The term “special election” is used throughout the remainder of this advisory opinion to refer to either a special or emergency election.

1 2009 or 2010, a runoff for that election, the 2012 Democratic party primary, a primary  
2 runoff, and a general election in November 2012.

3 *Questions Presented*<sup>4</sup>

4 1. *If a contributor makes an undesignated contribution to the White Committee of*  
5 *\$2,400 or less, and a special Senate election is subsequently scheduled after that*  
6 *contribution is made but before the March 2012 Senate primary election, would that*  
7 *undesignated contribution be available to the White Committee to use for the special*  
8 *Senate election?*

9 2. *May the White Committee accept a contribution of up to \$4,800 from an*  
10 *individual before a special Senate election is scheduled if the contributor (i) designates*  
11 *up to \$2,400 for a special Senate election if one is held, or for the 2012 primary election*  
12 *if there is no special Senate election; and (ii) designates up to \$2,400 for either a runoff*  
13 *election following the special Senate election if a runoff is held, or to the 2012 general*  
14 *election if there is no such runoff?*

15 3. *With respect to a contribution that exceeds \$2,400 and that is made before any*  
16 *special election is scheduled:*

17 *(a) Is the contribution properly designated if the contributor uses a form*  
18 *stating that "Federal Election Law allows individuals to donate up to*  
19 *\$4,800; \$2,400 for the first election and \$2,400 for any subsequent*  
20 *election" and there is no other designation language provided?*

---

<sup>4</sup> These questions use the \$2,400 per person per election contribution limit in place for the 2009-2010 election cycle. That amount may be adjusted for inflation in the 2011-2012 election cycle. See generally, 2 U.S.C. 441a(b).

1           ***(b) Is the contribution properly redesignated if the White Committee***  
2           ***provides the contributor a form stating that the White Committee is***  
3           ***designating \$2,400 for "the first election" and the remaining amount for***  
4           ***"the second election in which [Mayor White] participates"?***

5           ***(c) If the notice of redesignation relating to a special election and possible***  
6           ***runoff election is not effective, will the notice of redesignation***  
7           ***nevertheless be effective as to the primary and general elections of 2012?***

8           ***(d) If the notice of redesignation is effective as to the 2012 primary and***  
9           ***general elections, may the White Committee use the contribution for a***  
10           ***special election and, if one is required, a runoff election if special election***  
11           ***is called before the 2012 primary election occurs?***

12   4.       ***If the White Committee raises money for a special election, and for a runoff***  
13   ***following a special election, and the special election or runoff does not occur, what may***  
14   ***the Committee do with the money?***

15   5.       ***How should the White Committee report designated contributions if the answer to***  
16   ***Question 2 is yes, and redesignated contributions if the answer to Question 3 is yes?***

17           ***Legal Analysis and Conclusions***

18   1.       ***If a contributor makes an undesignated contribution to the White Committee of***  
19   ***\$2,400 or less, and a special Senate election is subsequently scheduled after that***  
20   ***contribution is made but before the March 2012 Senate primary election, would that***  
21   ***undesignated contribution be available to the White Committee to use for the special***  
22   ***Senate election?***

1           Yes, an undesignated contribution of up to \$2,400 would be available to the  
2 White Committee to use for the Senate special election that is called after the contribution  
3 is made.

4           Contributions by a person other than a multicandidate committee to a Federal  
5 candidate's authorized committees are limited to \$2,400 "with respect to any election."  
6 11 CFR 110.1(b); 2 U.S.C. 441a(a)(1)(A) and 441a(c). Commission regulations state that  
7 "with respect to any election" means: (1) in the case of a contribution designated in  
8 writing by the contributor for a particular election, the election so designated; and (2) in  
9 the case of a contribution not designated in writing by the contributor, the next election  
10 for the Federal office after the contribution is made. 11 CFR 110.1(b)(2). Under the  
11 circumstances described, a special election that has been called would be the next Federal  
12 election after the undesignated contribution is made. Therefore, the undesignated  
13 contribution may be used for that election. If the contributor then wished to contribute  
14 additional funds for the March 2012 primary before the special election occurs, the  
15 contributor would have to designate that subsequent contribution in writing for the 2012  
16 primary. *See* 11 CFR 110.1(b)(2)(i) and (4).

17           Any funds left over from undesignated contributions made before the special  
18 election may be used for the succeeding Senatorial election in which Mayor White is a  
19 candidate, such as the runoff or (if Mayor White is not a runoff candidate or those

1 undesignated funds are still left over from the runoff) the 2012 primary election.

2 *See* 11 CFR 110.3(c)(3) and (4).

3 2. *May the White Committee accept a contribution of up to \$4,800 from an*  
4 *individual before a special Senate election is scheduled if the contributor (i) designates*  
5 *up to \$2,400 for a special Senate election if one is held, or for the 2012 primary election*  
6 *if there is no special Senate election; and (ii) designates up to \$2,400 for either a runoff*  
7 *election following the special Senate election if a runoff is held, or to the 2012 general*  
8 *election if there is no such runoff?*

9 The White Committee may accept up to \$2,400 from an individual contributor for  
10 the 2012 primary and \$2,400 from that contributor for the general election in 2012. The  
11 White Committee may not accept any contributions for a special election that has not yet  
12 been scheduled, or for a runoff for a not-yet-declared special election. The special  
13 election may never occur and, unlike a runoff following a regularly scheduled election,  
14 there is no previous election that could trigger its occurrence.

15 Commission regulations allow for (and encourage) the designation of a  
16 contribution for “a particular election.” *See* 11 CFR 110.1(b)(2), (3), and (4). Such a  
17 contribution must not cause the contributor to exceed the contribution limits at 2 U.S.C.  
18 441a(a)(1) with respect to the particular election, and contributions designated for an  
19 election that has already occurred may only be accepted to the extent such contributions  
20 do not exceed the committee’s net debts outstanding. *See* 11 CFR 110.1(b)(1) and (3)(i).  
21 For the White Committee to accept a contribution of \$4,800, which is \$2,400 in excess of  
22 the limit, the contributor must clearly state in writing that \$2,400 is designated for the  
23 2012 primary election and \$2,400 is designated for the 2012 general election, either on

1 the check (or other negotiable instrument) or in a writing accompanying the contribution.  
2 11 CFR 110.1(b)(4)(i) and (ii). The White Committee must use an acceptable accounting  
3 method to distinguish between the contributions received for each of the elections, *e.g.*,  
4 by designating separate bank accounts for each election or maintaining separate books  
5 and records for each election. 11 CFR 102.9(e)(1).

6 The requirement that a contributor designate contributions for “a particular  
7 election” is satisfied where the contributor completes a form containing specific  
8 references to either the 2012 primary or 2012 general election. The 2012 Senate  
9 elections will, in fact, occur, and the contributor designations accompanying the  
10 contributions would clearly specify those particular elections.

11 The Commission concludes that the White Committee may not currently accept  
12 contributions for a special election that has not been scheduled, or the runoff to such an  
13 election. As indicated above, the Commission has allowed for the designation of  
14 contributions to elections where the candidate’s participation is contingent on the results  
15 of a prior election in which the candidate is in fact participating, such as the designation  
16 of a contribution to a general election when a candidate is participating in the primary. In  
17 addition, the Commission has allowed designation of a contribution to an election, such  
18 as a primary runoff, whose actual occurrence is contingent upon the outcome of a

1 previous election. (In either case, a candidate who does not participate in such an  
2 election cannot use such contributions absent a permissible redesignation.<sup>5</sup>) *See*  
3 *Advisory Opinions 2007-03 (Obama), 1996-29 (Cannon), 1992-25 (Owens), and 1986-17*  
4 *(Green).*

5         However, the Commission distinguishes those situations from a special election  
6 that may not occur and that is contingent on possible events other than elections for the  
7 Federal office sought. For example, Senator Hutchison may decide to stay in the U.S.  
8 Senate while running for governor, or she may in fact decide not to run for governor.

9         Commission regulations governing designation for a particular election were  
10 implemented for the purpose of preventing excessive contributions and ensuring that the  
11 contributions within the per election limits are available for use by a candidate's  
12 authorized committees only in elections in which the candidate participates. To permit a  
13 candidate to raise funds for an election that may not occur and is not contingent on the  
14 outcome of a previous election could enable circumvention of the contribution limits by  
15 permitting a candidate to raise funds for an election whose occurrence is overly  
16 speculative while also raising funds for the regularly scheduled primary.

---

<sup>5</sup> A political committee may request a contributor's written redesignation of a contribution for a different election in two situations possible applicable here: (A) the contribution was designated in writing for a particular election and would cause the contributor to exceed the contribution limits; or (B) the contribution was not designated in writing and it exceeds the contribution limitations. 11 CFR 110.5(b)((i)(A) and (C). A contribution is considered redesignated if the committee treasurer requests the contributor to provide a written redesignation and informs the contributor that he or she may request a refund instead and, within 60 days of the treasurer's receipt of the contribution, the committee receives the redesignation. If no written redesignation is received, the Committee must refund the contribution within that 60-day period. *See* 11 CFR 110.1(b)((5)(ii)(A)(1) and (2).

1 3. *With respect to a contribution that exceeds \$2,400 and that is made before any*  
2 *special election is scheduled:*

3 *(a) Is the contribution properly designated if the contributor uses a form*  
4 *stating that "Federal Election Law allows individuals to donate up to*  
5 *\$4,800; \$2,400 for the first election and \$2,400 for any subsequent*  
6 *election" and there is no other designation language provided?*

7 *(b) Is the contribution properly redesignated if the White Committee*  
8 *provides the contributor a form stating that the White Committee is*  
9 *designating \$2,400 for "the first election" and the remaining amount for*  
10 *"the second election in which [Mayor White] participates"?*

11 No, the wording on the forms described in questions 3(a) and 3(b) would not  
12 properly designate or redesignate a portion of the contribution for either the 2012 primary  
13 or general elections, or for a special election or runoff election that occurs prior to 2012.  
14 Similarly, a contribution would not be properly designated or redesignated for a  
15 particular election if it is accompanied by a form that only refers to "\$2,400 for the first  
16 election" and "\$2,400 for any subsequent election" or "for the second election." The  
17 "first election" could mean a 2009 or 2010 special election or a 2012 primary. The  
18 "second election" and "any subsequent election" could mean a 2009 or 2010 runoff, a  
19 2012 primary, a 2012 primary runoff, or a 2012 general election. If the Governor calls an  
20 election prior to 2012, the first election would be the special election and the second  
21 election could be a runoff to that election or the 2012 primary. If the Governor does not  
22 call a special election, the first election would be the 2012 primary and the second

1 election could be a runoff or the 2012 general election. The Commission notes that the  
2 contributor's intent cannot be ascertained.<sup>6</sup>

3 *(c) If the notice of redesignation relating to a special election and possible*  
4 *runoff election is not effective, will the notice of redesignation*  
5 *nevertheless be effective as to the primary and general elections of 2012?*

6 No, these notices do not properly effectuate redesignations for the same reasons  
7 as explained in response to questions 3(a) and 3(b).

8 *(d) If the notice of redesignation is effective as to the 2012 primary and*  
9 *general elections, may the White Committee use the contribution for a*  
10 *special election and, if one is required, a runoff election if special election*  
11 *is called before the 2012 primary election occurs?*

12 Given that the Commission has already concluded that the notice of redesignation  
13 would not be effective as to the 2012 primary and general elections, this question is moot.

14 Generally, if the White Committee wishes to use contributions that were  
15 accompanied by the designations described in question 3 for the special election or the  
16 runoff to that election, the Committee must first obtain from the contributors written  
17 designations of the contributions or parts thereof for the particular election. Such funds  
18 may not be used for the runoff until Mayor White is a candidate in the runoff. Moreover,  
19 the contributor may not redesignate any contribution or part thereof for the special

---

<sup>6</sup> None of the situations presented in this advisory opinion request would allow the White Committee to presumptively redesignate contributions from the 2012 elections to the pre-2012 elections or *vice versa*. See 11 CFR 110.1(b)(5)(ii)(B) and (C). Most notably, presumptive redesignation is only applicable for elections in the same "election cycle." Under 11 CFR 100.3(b), the special election and the runoff to that election would not be considered as part of the same "election cycle" as the 2012 primary and general elections. See *Contribution Limitations and Prohibitions; Final Rule, Explanation and Justification*, 67 FR 69928, 69933-34 (Nov. 19, 2002).

1 election if the redesignated amount combined with any undesignated contribution from  
2 the contributor would aggregate in excess of \$2,400 for that special election.

3 4. *If the White Committee raises money for a special election, or for a runoff*  
4 *following a special election, and a special election or runoff does not occur, what may*  
5 *the Committee do with the money?*

6 Given that the Commission has already concluded in answering question 2 above  
7 that the White Committee may not accept a contribution designated for a special or runoff  
8 election that is not held, this question is moot.

9 5. *How should the White Committee report designated contributions if the answer to*  
10 *Question 2 is yes, and redesignated contributions if the answer to Question 3 is yes?*

11 The Commission has concluded that the Committee may not currently accept  
12 contributions for any special or runoff election prior to 2012 before such election has  
13 been scheduled. Accordingly, the White Committee must report all contributions it  
14 receives as being made for the 2012 primary or 2012 general election.

15 This response constitutes an advisory opinion concerning the application of the  
16 Act and Commission regulations to the specific transaction or activity set forth in your  
17 request. *See* 2 U.S.C. 437f. The Commission emphasizes that, if there is a change in any  
18 of the facts or assumptions presented, and such facts or assumptions are material to a  
19 conclusion presented in this advisory opinion, then the requester may not rely on that  
20 conclusion as support for its proposed activity. Any person involved in any specific  
21 transaction or activity which is indistinguishable in all its material aspects from the  
22 transaction or activity with respect to which this advisory opinion is rendered may rely on  
23 this advisory opinion. *See* 2 U.S.C. 437f(c)(1)(B). Please note that the analysis or

1 conclusions in this advisory opinion may be affected by subsequent developments in the  
2 law including, but not limited to, statutes, regulations, advisory opinions and case law.  
3 All cited advisory opinions are available on the Commission's website at  
4 <http://saos.nictusa.com/saos/searchao>.

5 On behalf of the Commission,

6  
7  
8 Steven T. Walther  
9 Chairman