



FEDERAL ELECTION COMMISSION  
Washington, DC 20463

**MEMORANDUM**

**TO:** THE COMMISSION  
STAFF DIRECTOR  
GENERAL COUNSEL  
CHIEF COMMUNICATIONS OFFICER  
FEC PRESS OFFICE  
FEC PUBLIC DISCLOSURE

**FROM:** COMMISSION SECRETARY *MWD*

**DATE:** July 27, 2009

**SUBJECT:** COMMENT ON DRAFT AO 2009-15  
Bill White for Texas

Transmitted herewith is a timely submitted comment from Messrs. Thomas J. Joseflak, Jason Torchinsky, and Michael Bayes, regarding the above-captioned matter.

Proposed Advisory Opinion 2009-15 is on the agenda for Tuesday, July 28, 2009.

**Attachment**

**HOLTZMAN VOGEL PLLC**  
*Attorneys at Law*

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COMMISSION  
SECRETARIAT

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July 27, 2009

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**VIA FACSIMILE: (202) 208-3333 & (202) 219-3923**

**Re: Comments on Draft Advisory Opinion 2009-15 (White)**

Dear Commission Secretary:

We submit these comments on the above-referenced matter, which is scheduled to be considered by the Commission on Tuesday, July 28, 2009. We write to you in our individual capacities, and not on behalf of any client, to urge the Commission to adopt Draft A of Advisory Opinion 2009-15. Draft A correctly interprets the law, allows an appropriate flexibility to candidates faced with an uncertain electoral situation, and presents absolutely no risk of permitting circumvention of applicable contribution limits.

Drafts A and B reach the same conclusion with respect to Question #1, indicating that "an undesignated contribution of up to \$2,400 would be available to the White Committee to use for the Senate special election that is called after the contribution is made." We agree with this conclusion, and urge the Commission to adopt this response even if the Commission finds itself unable to reach a four-vote response to other questions contained in the Advisory Opinion Request.

We urge the Commission to reject the inflexible and impractical approach that Draft B takes with respect to Question #2. As both drafts recognize, FEC regulations allow contributions to be designated for "a particular election." This phrase is not defined in either the statute or regulations. Nevertheless, Draft B concludes that the phrase is limited to currently scheduled and declared elections only. Draft B's approach – which is absolutely not required by the statute

or regulations – would needlessly hamstring the impacted candidates. The Requestor's proposed designation language is fully consistent with the "particular election" requirement and should be approved.

Draft B asserts that "Commission regulations governing designation for a particular election were implemented for the purpose of preventing excessive contributions and ensuring that the contributions within the per election limits are available for use by a candidate's authorized committees only in elections in which the candidate participates. To permit a candidate to raise funds for an election could enable circumvention of the contribution limits by permitting a candidate to raise funds for an election whose occurrence is overly speculative while also raising funds for the regularly scheduled primary."

This appears to be a *post hoc* rationalization of the designation regulations. The relevant Explanation and Justification states:

*Written designations ensure that the contributor's intent is clearly conveyed to the recipient candidate or committee. Moreover, written designations promote consistency in reporting by the recipient committee and the contributor, where the contributor is a political committee subject to the limitations of § 110.1.*

*Final Rule on Contribution and Expenditure Limitations and Prohibitions; Contributions by Persons and Multicandidate Political Committees, 52 Fed. Reg. 760, 761 (Jan. 9, 1987) (emphasis added).*

Of the two drafts, Draft A is far more responsive to "the contributor's intent" in making a contribution to a candidate who may be running in an expected, but as yet unannounced, special election. It is also worth noting that a central result of the 1987 designation rulemaking was to promote efficiency by "allow[ing] political committees to seek redesignation, reattribution, or a combination of both in a single written request to a contributor." *Id.* at 760. This is not surprising, given that the Commission has historically sought to promote flexibility and efficiency for political committees where the statute does not mandate a clear result. It is disconcerting that the Commission would abandon that approach in this matter.

Additionally, the request presents absolutely no possibility of any "circumvention of the contribution limits." The Requestor does not ask to accept contributions exceeding the individual limits for any election, and Draft A would not permit him to do so. In fact, the request indicates the potential candidate wishes to solicit maximum individual contributions for two elections, *i.e.*, up to \$4,800 – an amount that does not "circumvent" the contribution limits under any of the contemplated circumstances. Draft B simply assumes that the Requestor does not intend to do as he states. Were Draft A to be adopted, no contributed funds could be used for any election in which the candidate does not run, and any such funds would be returned, or redesignated according to existing rules (see Draft A, Response to Question #4: "Thus, if Mayor White loses the special election, or if any candidate receives a majority in the special election (and therefore there is not special runoff election), contributions designated for the special election runoff must be refunded to the contributor within sixty days of the special election

unless the White Committee receives a written redesignation or combined redesignation and reattribution.”). No prospect of circumvention exists.

Draft B also represents bad policy, insofar as it undermines the FEC’s stated intention to encourage contributors to designate their contributions. The 1987 Explanation and Justification indicates that “written designations are strongly encouraged.” However, the effect of Draft B is to encourage the candidate to seek undesignated contributions, because only undesignated contributions will be immediately available for use in a special election (see Draft B, response to Question #1). If, on the other hand, a candidate seeks designated contributions – as the FEC encourages – the designation may only be for the 2012 primary and/or general (see Draft B, response to Question #2). If a special election is called before the 2012 primary election, the candidate is required to obtain a redesignation of those funds in order to use them in the special election (see Draft B, response to Question #3(d)). Given this choice, any rational campaign would encourage donors not to designate their contributions. Fear of an impossible “circumvention of the contribution limits” cannot justify reversing course on encouraging contributor designations and forcing an unnecessary round of redesignation paperwork, especially where the contributor’s intent was clear all along (see proposed solicitation designation language).

We have concerns with Draft A’s response to Question #5, which instructs the White Committee to report two different designations for each contribution (see Draft A, Response to Question #5, page 12, lines 12 – 17). The prospect of filing amended reports after a special election is called with respect to undesignated contributions is likewise unappealing (see Draft A, Response to Question #5, page 13, lines 11 – 14). The FEC’s own software requires that each contribution be designated for either the primary or general. To manually enter the text suggested by the OGC draft for each contribution received by candidates who anticipate facing a special election is an unnecessary and burdensome exercise that does nothing to ensure compliance with the limits, prohibitions and reporting requirements of the Act. Contributions denoted as primary contributions should by default be presumed, unless otherwise noted, to be for the next election – whether that be a primary, special or special runoff.

We appreciate the opportunity to provide comments in this matter.

Sincerely,

/s/  
Tom Josefiak

  
Jason Torchinsky

/s/  
Michael Bayes