



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 Barry Hunsaker, Treasurer, Bill White for Texas Committee, regarding the above-captioned matter.

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

Attachment



RECEIVED
FEDERAL ELECTION
COMMISSION
SECRETARIAT

July 27, 2009

2009 JUL 27 A 11: 37

Hon. Steven T. Walther
Chairman, Federal Election Commission
999 E Street NW
Washington, DC 20463

Re: Comments on Draft Responses to AO Request 2009-15;
Agenda Document No. 95-55; Meeting of July 28, 2009

Dear Chairman Walther:

The following comments are submitted on behalf of the Bill White for Texas Committee ("the Committee") in response to the two draft responses prepared by the FEC ("the Commission") to AO Request 2009-15. The Committee received the drafts on July 23 and is providing these comments on short notice.

Summary of the Committee's Response

The Committee generally concurs with the Commission's Draft A with respect to the answers to Questions 1, 2, 4, and 5. We will focus our comments on the proposed answer to Question 3. We note that Question 3 as set out in both responses was drafted by the Commission staff and is not a question presented--in its current form--by the Committee.

The Committee disagrees with the Commission's Draft B to the extent that it departs from Draft A in all responses except the response to Question 1 and urges the Commission not to adopt it.

Discussion

When the Committee first undertook to raise political contributions at the time Mayor White became a declared candidate for the United States Senate, we were surprised to find that neither the Commission's regulations nor prior Advisory Opinions provided guidance on the electoral situation facing Mayor White and other candidates for the seat to be vacated by Senator Hutchison. It was clear that under Texas law there are numerous potential dates for a special or emergency election to replace Senator Hutchison when she resigns. In addition, it was clear--as a matter of political reality--that serious candidates in a state with as many voters and media markets as Texas will need to raise substantial sums of money to be competitive in any election called on short notice. Accordingly, the Committee decided to consult with FEC staff on the proper wording of fundraising forms as well as "presumptive redesignation" letters.

July 27, 2009

Page 2

As is discussed in the "Background" language of both drafts, the next election for the seat currently held by Senator Hutchison could be the 2012 primary, or, if Senator Hutchison resigns her seat before 2012, a special or emergency election held as early as fall 2009.* It is possible that Mayor White could be a candidate in as many as five different U.S. Senate elections between now and November 2012. Given the "real likelihood" of Senator Hutchison's resignation, as noted on page 7 of Draft A, we elected to focus on language that would permit the Committee to raise funds that could be expended--with the consent of the contributor--in either a special election and special election runoff or a 2012 primary and general election. We concluded that ignoring the "real likelihood" of both a special election and special election runoff before 2012 would hamstring any candidate that relied on contribution forms referring to designation of funds for only a future primary and general election.

The Committee's Treasurer and Finance Chairman spoke on the telephone with Commission staff of December 29, 2008 to review these questions. The participating Commission staff agreed that the standard "disclaimer" language referring to contribution limits for a primary and general election would not address a situation in which there was both a special election and a special election runoff. The Treasurer and Finance Chairman therefore raised the possibility at that time of using fundraiser disclaimer and presumptive redesignation form language that spoke to the "first election" and any "subsequent election" in which Mayor White was a candidate. Commission staff at that time could not recommend any other language that more accurately reflected the intent of the contributor to allow the campaign to expend contributions over \$2300 (later raised to \$2400) in either (1) a special election and special election runoff, (2) an emergency election and emergency election runoff, or (3) a 2012 primary election and 2012 general election.

The Committee subsequently undertook to submit an advisory opinion request to the Commission seeking guidance on this question. After extensive telephone consultations with FEC staff on the form of the request, the original AO request was submitted on April 15, 2009. After additional telephone consultations and on the advice of FEC staff, that submission was withdrawn on June 10, 2009, modified, and resubmitted to the FEC on June 11, 2009. The currently pending AO request 2009-15 is the version submitted on June 11.

The Committee provides this background to the Commission to confirm that it has been attempting diligently to obtain reliable guidance on proper fundraising disclaimers and presumptive redesignation letters since the end of 2008, during which time the Committee has raised a substantial amount of contributions, including between 400 and

* See "Perry could pick timing of election to fill rival's seat," p. B-1, *Austin American Statesman*, July 23, 2009: "Translation: The election can happen on any day the governor pleases. And should Hutchison step down, Perry would consider setting an election shortly. Perry spokeswoman Allison Castle told me, "If a vacancy were to occur, the governor would be inclined to call an election soon to ensure Texans are fully represented" in Washington.

July 27, 2009

Page 3

500 contributions in excess of the single "per election" caps that have been in place during that time period.

What Language Makes the Contributor's Intentions Clear?

From the outset, the Committee's goal, as stated orally and in writing to the Commission, has been to advise our contributors that we propose to use contributions within the "per election" cap in the first election in which Mayor White is a candidate for U.S. Senate, and to use amounts over that cap in any subsequent election for U.S. Senate in which Mayor White may be a candidate. In oral discussions with major contributors, we have always made it clear that we expect a special election and a special election runoff before 2012, but that if that does not occur then the contributions would be considered to be made for the 2012 primary and 2012 general election. We have also made it clear that contribution amounts in excess of the per-election cap would have to be refunded if Mayor White ceased to be a candidate in any subsequent election. However, we have not attempted--orally or in writing--to specifically identify every possible combination of "first" and "subsequent" election scenarios that might exist under Texas law. We think our contributors' intention to permit their contributions to be used in Mayor White's "first" and "any subsequent" election has been clear and that the forms and presumptive redesignation letters have been straightforward and unambiguous.

The Committee presumably could have adopted the "if/or/if and if/or/if" disclaimer language set out in Question 1 of our June 11 AO Request, and restated by the Commission as Question 2 of "Questions Presented" on page 3 of Draft A. However, we know from experience that explaining to contributors the various possible election scenarios described in Question 2 is more likely to leave them confused than enlightened. Contributors may be aware that there are multiple potential scenarios involving special elections, emergency elections, runoffs for special or emergency elections, 2012 primary and primary runoff elections, and 2012 general elections, but few contributors have requested or expressed any interest in a diagram of the potential sequence in which their contribution could be spent. In every case, they and the Committee have been satisfied that their intent is clear when they contribute in response to verbal or written solicitations (and presumptive redesignation letters) based on the "first election/any subsequent election" disclaimer.

If the Commission does adopt Draft A as written, the Committee would be left in a position of returning to as many as 400-500 contributors to obtain a written confirmation that they agree to a designation based on the "if/or/if and if/or/if" language in Question 2. The Committee can undertake to do that, but we believe that the affected campaigns and the Commission would not thereby obtain any greater compliance with the substantive requirements of FECA's provisions on contribution caps or greater compliance with the Commission's own regulations addressing contribution caps and "particular elections." To the contrary, we believe the contributors would have less understanding of what they are being asked to agree to, and no greater control over the future use of their contributions.

July 27, 2009

Page 4

Conclusion As to Draft A

In conclusion, with respect to Draft A we respectfully urge the Commission to direct staff to return with a new draft that reflects the practical reality of fundraising and contributor's intent in this electoral situation—a draft that would permit all committees in the current U.S. Senate race in Texas to seek contributions based on a "first election" and "subsequent election" disclaimer and presumptive redesignation letter. Once there is a special election scheduled, it presumably will be possible to return to the scenario in which contribution requests, disclaimers, and presumptive redesignation letters can refer to a known sequence of elections. To require this Committee and others to utilize the "if/or/if and if/or/if" language at this time would essentially place form over substance without furthering statutory goals or regulatory clarity.

Draft B

While the Committee believes that most of Draft A—other than the responses to Question 3—is substantially consistent with FECA and the Commission's prior policies, we submit that Draft B is consistent with neither. It would ignore the "real likelihood" of a special election discussed at page 7 of Draft A and in the cited July 23 article about a likely emergency election on short notice. It would require all committees active in the campaign for U.S. Senate from Texas to mislead contributors by advising them—by disclaimer and presumptive redesignation letter—that the fundraising is in support of a distant 2012 primary and general election. This would be both confusing to contributors and disingenuous of the campaign committees, since the newspapers and broadcast media in Texas—as well as the declared candidates—every week discuss the various special election/special election runoff and emergency election scenarios likely to unfold in the next ten months.

Draft B would place Mayor White and all other candidates in an untenable position if the Governor, upon Senator Hutchison's resignation, were to call an emergency election for the U.S. Senate on short notice, as is his option under Texas law. The Committee would likely be left with substantial sums of contributions made by its supporters with the express intent that the funds be used in the first and subsequent election in which Mayor White was a candidate, but inadequate time and opportunity to obtain written redesignations in the midst of an intense, multi-candidate statewide campaign.

In short, Draft B's fiction that the candidates to replace Senator Hutchison are really raising money for 2012 furthers no statutory purpose, will confuse contributors, and will hamper the ability of candidates to raise and spend money in the manner and amounts envisioned by FECA and intended by contributors.

Conclusion

If the Commission concludes that it will choose between Draft A and Draft B, the Committee strongly endorses Draft A as more consistent with statutory purpose,

July 27, 2009
Page 5

regulatory policy, and the realities of the current U.S. Senate race in Texas. However, we urge the Committee to modify Draft A to allow appropriate "first election/subsequent election" designations, which will be clear to the contributors, readily administered by the affected committees, and transparent to the public and the Commission.

Respectfully submitted,



Barry Hunsaker

Treasurer

Bill White for Texas Committee

cc: Mayor Bill White
cc: Scott Atlas, Finance Chairman
cc: FEC General Counsel