



FEDERAL ELECTION COMMISSION  
Washington, DC 20463

July 29, 2009

CERTIFIED MAIL  
RETURN RECEIPT REQUESTED

ADVISORY OPINION 2009-15

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

Dear Mr. Hunsaker:

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

***Background***

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

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

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

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

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

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

Regularly scheduled party primary and general elections for the Senate seat will be held in 2012. If no candidate receives a majority in the party primary, a runoff will be held. It is thus conceivable that Mayor White could be a candidate in up to five elections for the same U.S. Senate seat between now and November 2012: a special election in 2009 or 2010, a runoff for that election, the 2012 Democratic party primary, a primary runoff, and a general election in November 2012.

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

1. *If a contributor makes an undesignated contribution to the White Committee of \$2,400 or less, and a special Senate election is subsequently scheduled after that contribution is made but before the March 2012 Senate primary election, would that undesignated contribution be available to the White Committee to use for the special Senate election?*
2. *May the White Committee accept a contribution of up to \$4,800 from an individual before a special Senate election is scheduled if the contributor (i) designates up to \$2,400 for a special Senate election if one is held, or for the 2012 primary election*

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<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.

<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).

*if there is no special Senate election; and (ii) designates up to \$2,400 for either a runoff election following the special Senate election if a runoff is held, or to the 2012 general election if there is no such runoff?*

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

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

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

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

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

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

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

#### ***Legal Analysis and Conclusions***

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

Yes, 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.

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

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

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

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

The Commission concludes that designations for the special election and for the runoff would qualify as references to "a particular election." Although the designations present these particular elections in the alternative (*i.e.*, (1) the special election if held before 2012 and, if not so held, the 2012 primary; or (2) the special election runoff if

held before 2012 and, if not so held, the 2012 general election), the specific use of the contribution will be clear to both the Committee and the contributor based on circumstances that will be a matter of public record: that the Governor would have to call a special election following the resignation of Senator Hutchinson.

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

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

The designations described in question 2 would be treated as designations for the special election or the runoff to that election at the point that Senator Hutchison announces her resignation and Mayor White becomes a candidate in a special election called by the Governor. At that point, the contributions can no longer be considered to be designated for the 2012 regularly scheduled elections. After the end of any pre-2012 elections (special or runoff) in which Mayor White actually participates as a candidate, the White Committee may use unused surplus funds (as determined by use of a reasonable accounting method under 11 CFR 110.3(c)(4)) for the 2012 primary election.

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

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

Yes, any such contribution is properly designated. If at the time the contribution is made Senator Hutchison has not resigned, no special or runoff election has been called, and the possibility of a special or runoff election is not even mentioned in the forms, current contributors who use the form described in question 3(a) must conclude that the “first election” referenced in the forms means the 2012 primary, and the “second

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<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).

election” means the 2012 general election. Accordingly, barring any further instruction from a contributor, the first \$2,400 contributed would be designated for the 2012 primary election. Any remaining amount up to \$2,400 would likewise be considered designated for the 2012 general election. *See* 11 CFR 110.1(b)(2) and (4).

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

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

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

Given that the Commission has already concluded in answering question 3(a) above that the language in the forms would result in the proper designation of the contributions for the 2012 primary and general elections, this question is moot. The White Committee would not need to redesignate contributions that already are properly designated. If the Request is asking whether the White Committee may use the notice of redesignation described in question 3(b), such as the one attached as Appendix D in the Request, to redesignate contributions that already are designated, the answer remains the same as the answer to question 3(b). Contributions that already are designated must be redesignated by obtaining a writing from the contributor; simply issuing a notice to the contributor, such as the one attached as Appendix D, will not suffice. *See* 11 CFR 110.1(b)(5)(ii)(A)(1) and (2).

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<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).

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

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

If the White Committee wishes to use contributions that have been designated for the 2012 primary and general elections for a 2009 or 2010 special election or runoff once the special election is called, the White Committee must first obtain written contributor redesignations for the special election or runoff in accordance with 11 CFR 110.1(b)(5)(ii)(A)(1) and (2).

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

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

Similarly, although the Committee may accept contributions designated for the runoff once it is apparent that a special election will occur, it may not use those contributions unless Mayor White participates in the runoff as a candidate. *See* Advisory Opinion 1982-49 (Weicker) (recognizing that accepting contributions for an election at a time before the necessity of such an election is determined is analogous to accepting general election contributions before the primary election). Contributions designated for an election that does not occur, or in which a person is not a candidate (for example, where a candidate has lost the primary and is hence not running in the general election), must be refunded, redesignated for another election in which the candidate has participated or is participating in accordance with 11 CFR 110.1(b)(5), or redesignated and reattributed to another contributor in accordance with 11 CFR 110.1(k)(3). *See*

11 CFR 102.9(e)(3), 110.1(b)(3)(i), and 103.3(b)(3), and Advisory Opinions 1992-25 (Owens), 1986-17 (Green), and 1982-49 (Weicker). Thus, if Mayor White loses the special election, or if any candidate receives a majority in the special election (and therefore there is no 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. 11 CFR 110.1(b)(3)(i)(C).

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

In reporting contributions accompanied by the written statements described in question 2 that are received before a special election is scheduled, the White Committee must check a box on Schedule A indicating either a “Primary” contribution or a “General” contribution for the 2012 elections and include a memo text stating either (1) “Designated for special or emergency election if scheduled before 2012” or (2) “Designated for special or emergency election runoff if scheduled before 2012.” Such reporting reflects the use of the contributions as they are intended by the contributor at the time the contribution is made. If Senator Hutchison announces her resignation, and Mayor White becomes a candidate in a special election called by the Governor, the White Committee must inform the Commission that the contributions are considered to be designated for the special election or the runoff election. Normally, when the designation of a contribution has been changed, the political committee must disclose the redesignation on the report covering the period in which it received the redesignation, including a memo entry for each contribution that indicates when the Committee received a new designation from the contributor. *See* 11 CFR 104.8(d); *see also Instructions for FEC Form 3 and Related Schedules*, p. 9. Under the circumstances presented, where the White Committee is attempting to deal with uncertainty as to the proper way to designate contributions in an unusual electoral situation, the Commission considers it to be sufficient for the White Committee to file amended reports, simply indicating the proper designations of the contributions. The Commission recommends that to avoid any confusion, the White Committee include memo text specifically referencing this advisory opinion.

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

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

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