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**SENSITIVE**

MEMORANDUM

TO: The Commission

FROM: Lisa J. Stevenson *LJS*  
Deputy General Counsel - Law

Lorenzo Holloway *LH*  
Assistant General Counsel  
Compliance Advice

Margaret J. Forman *MJF*  
Attorney

SUBJECT: Request for Consideration of a Legal Question – Elizabeth Crowley for Congress (LRA 932)

I. INTRODUCTION

On May 7, 2013, the Commission received a Request for Consideration of a Legal Question (“Request”) from counsel on behalf of Elizabeth Crowley for Congress (the “Committee”) (C00517359), the principal campaign committee of Elizabeth Crowley.<sup>1</sup> Attachment.

The Request addresses a determination by the Reports Analysis Division (RAD), based on informal guidance provided by the Office of General Counsel (OGC), that the Federal Election Campaign Act and the Commission’s regulations do not allow for redesignation of contributions received for the general election to a non-federal committee if the candidate does not participate in the general election. After the candidate lost the 2012 New York primary election, the Committee

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<sup>1</sup> At least two Commissioners agreed to consider this Request pursuant to the Policy Statement Regarding a Program for Requesting Consideration of Legal Questions by the Commission, 76 Fed. Reg. 45798-45799 (Aug. 1 2011). The Committee’s request was technically not timely, but nevertheless, we recommended that the Commission consider it. Although the request was postmarked within 15 business days of the determination of corrective action, the request was not received by the Commission within the 15 business days, as required pursuant to the Commission’s policy. *Id.* at 45799.

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redesignated \$19,950 in general election contributions to the candidate's non-federal committees. When RAD first inquired about these transactions, the Committee responded that the Commission's failure to reach a conclusion on the issue in Advisory Opinion 2012-06 (Rick Perry.org) means that such activity is not prohibited and that, as a matter of policy, the redesignation regulations "should be construed broadly to encompass any future election," including a non-federal election. Elizabeth Crowley for Congress Miscellaneous Text, Image # 12963777032 (Dec. 20, 2012). RAD then sought guidance from OGC as to the Committee's response. In addition to concluding that the Committee cannot redesignate the contributions to a non-federal committee, the Office of General Counsel advised RAD that the Committee cannot, as a legal matter, rely on an advisory opinion to the extent that the Commission has not reached a conclusion on an issue.

The issue presented in the Request is whether "11 C.F.R. [§] 110.1(b)(5) permits the redesignation of contributions received in connection with the 2012 General Election by the authorized campaign committee of a candidate for the House of Representatives, after losing the Primary Election, to non-federal campaign committees of the same candidate upon obtaining authorization from contributors." Attachment at 1. Consistent with our informal advice to the Reports Analysis Division, we conclude that 11 C.F.R. §§ 102.9(e), 110.1(b)(3)(i) and (5) do not permit the redesignation of contributions received by an authorized committee for the general election to a candidate's non-federal campaign committee.

## II. CONTRIBUTIONS MADE FOR A GENERAL ELECTION IN WHICH THE CANDIDATE DID NOT PARTICIPATE MAY NOT BE REDESIGNATED TO A CANDIDATE'S NON-FEDERAL COMMITTEE

The Commission's regulations provide that "[i]f the candidate is not a candidate in the general election, all contributions made for the general election shall be either returned or refunded to the contributors or redesignated in accordance with [11 C.F.R. § 110.1(b)(5) or 11 C.F.R. § 110.2(b)(5)]." 11 C.F.R. §§ 110.1(b)(3)(i). Consistent with certain conditions, the redesignation regulations allow treasurers of authorized committees to "request a written redesignation of a contribution by the contributor" – but only "for a different *election*."<sup>2</sup> 11 C.F.R. § 110.1(b)(5)(i) (emphasis added).

Commission regulations define "election" as "the process by which individuals . . . seek nomination for election, or election, to *Federal office*." 11 C.F.R. § 100.2(a) (emphasis added). Some of the core provisions of the Federal Election Campaign Act and the Commission's regulations focus on the use of money or anything of value to influence *Federal* elections. See 2 U.S.C. § 431(8) ("contribution" includes . . . anything of value made by any person for the purpose of influencing any election for *Federal office*) (emphasis added);

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<sup>2</sup> The Commission established these "procedures [to allow] political committees [to] seek and obtain from contributors redesignations . . . of certain contributions that would otherwise be illegal." Explanation and Justification for Final Rules on Contribution and Expenditure Limitations and Prohibitions; Contributions by Persons and Multicandidate Committees, 52 Fed. Reg. 760 (Jan. 9, 1987). "[B]y allowing redesignation, the Commission [was] attempting to encourage candidates to pay their campaign debts by eliminating the need to refund impermissible contributions and then solicit contributions for another election." *Id.* at 763.

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2 U.S.C. § 441a(a)(1)(A) (limits the amount that may be contributed 'with respect to any election for *Federal office*') (emphasis added); see also 11 C.F.R. § 100.3(a) (limiting the definition of "candidate" to those seeking "nomination for election, or election, to Federal office"); 11 C.F.R. § 110.1(b) ("no person shall make contributions to any candidate ... with respect to any election for federal office that, in the aggregate, exceed \$2,000"); 11 C.F.R. § 110.1(b)(2)(ii) ("with respect to any election means ... in a case of a contribution not designated in writing by the contributor for a particular election, the next election for that Federal office after the contribution is made"); Hillary Clinton for President audit, Memorandum to the Commission on Electronic Redesignation of Contributions/Date of Withdrawal (LRA 726) (Feb. 4, 2010); and Commission Certification of Electronic Redesignation of Contributions/Date of Withdrawal, Hillary Clinton for President (C00431569) (LRA 726) (Apr. 27, 2010) (determining that an authorized committee could redesignate general election contributions of a candidate who was unsuccessful in the primary election to another authorized federal committee of that candidate);

Here, the Committee cannot redesignate the contributions because Ms. Crowley is not a candidate for a different Federal election, nor does the Committee have net debts outstanding in its primary election accounts from the previous election. 11 C.F.R. §§ 100.2(a), 110.1(b)(5). Similarly, reattribution of the contributions under 11 CFR § 110.1(k) would encounter the same *Federal* election limitations. Accordingly, the only remaining legal means available to the Committee of disposing of the contributions in the general election account is to refund them. As the Commission previously explained, these contributions, if not redesignated or reattributed within the meaning of 11 CFR 110.1(b)(5) and (k), are "not ... permissible campaign funds" and therefore must be refunded. Advisory Opinion 2003-18 (Smith) at 3 (addressing contributions received during the primary election that were specifically designated for the general election by a candidate who did not participate in the general election); see 11 C.F.R. § 110.1(b)(5). Because Ms. Crowley was defeated in the primary election, she never became a candidate for the general election, and consequently, no separate contribution limit with respect to the general election was available to contributors.<sup>3</sup> AO 2003-18 (Smith) at 3.

The Committee seems not to dispute that the funds must be refunded, redesignated or reattributed. Indeed, it undertook the process to gain contributor authorization to move the funds to Ms. Crowley's non-federal campaign committees. The Committee explained that it was "efficiently [combining] the process of issuing refunds of all General Election contributions and resoliciting new [nonfederal] election contribution from those same contributors. It is very clear that had those steps not been combined into one that the Committee would not be subject to the current compliance inquiry." Attachment at 3. But refunding the contributions is significantly different from the act of redesignating the contributions. When a contribution is refunded it has the potential of no longer influencing a Federal election, while a reattribution or redesignation of a

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<sup>3</sup> The Committee received contributions designated for the general election from contributors who had made their aggregate allowable contribution to the candidate with respect to the primary election. Accordingly, because no separate contribution limit with respect to the general election was available to contributors, the general election contributions became excessive contributions and the Committee was required to refund them within 60 days of the primary election date. Advisory Opinion 1992-15 (Russo); Advisory Opinion 2003-18 (Smith).

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contribution still influences a Federal election.<sup>4</sup> 2 U.S.C. §§ 431(8), 441a(a)(1)(A); *Cf.* Explanation and Justification for Contributions to candidates; designations; and redesignations, 52 Fed. Reg. 760, 761 (Jan. 9, 1987) (“The approach [in applying the net debts rule] embodied in §110.1(b)(3) is based on the Commission’s interpretation of specific statutory language ... [including] ‘contribution’ as being ‘for the purpose of influencing any election for federal office.’ 2 U.S.C. § 431(8)). As discussed above, the only legal option available to the Committee to dispose of the contributions in the general election account was to refund them. 11 C.F.R. §§ 102.9(e), 110.1(b)(3)(i) and (5). We conclude, therefore, that to the extent that the Committee redesignated contributions received for the general election to any non-federal committee, it has accepted campaign funds that were impermissible under the Act.

Finally, the Committee asserts that it “relied on ... Advisory Opinion 2012-06 which addressed a materially indistinguishable set of facts.” Attachment at 3. The Committee cannot rely on Advisory Opinion 2012-06 (RickPerry.org) because, in that advisory opinion, the Commission “could not approve a response [to whether an authorized committee could redesignate its general election contributions to a non-federal campaign committee] by the required four affirmative votes.” Advisory Opinion 2012-06 at 4.<sup>5</sup> The protections of 2 U.S.C. § 437f(c) are conditioned on an advisory opinion being “rendered by the Commission under 11 C.F.R. part 112.” 11 C.F.R. § 112.5(a). A written response by the Commission that it was unable to approve an advisory opinion by the required four affirmative votes is not a written advisory opinion in accordance with 11 C.F.R. part 112. 11 C.F.R. §§ 112.4(a), (e).

### III. RECOMMENDATION

The Office of the General Counsel recommends that the Commission conclude that 11 C.F.R. §§ 102.9(e), 110.1(b)(3)(i) and (5) do not permit the redesignation of contributions received by an authorized committee for the general election in which a candidate does not participate to a candidate’s non-federal campaign committee.

#### Attachment

Request for Legal Consideration from Elizabeth Crowley for Congress.

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<sup>4</sup> The contributor who receives a refund may use the refund amount for any purpose, including making a contribution to a candidate’s federal or non-federal committee to the extent permitted by law. To the extent that a contributor uses the refund proceeds to make another federal contribution, the contributor is influencing a federal election. 2 U.S.C. § 431(8).

<sup>5</sup> During the Commission’s consideration of Advisory Opinion 2012-06 in open session, some Commissioners discussed a possible rulemaking that would allow redesignations to non-federal committees. FEC Open Session, March 22, 2012, *audio link available at* <http://www.fec.gov/agenda/2012/agenda20120322.shtml>. To date, however, the Commission has not opened a rulemaking on this issue.

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Attorneys at Law

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April 29, 2013

Via Certified Mail

Commission Secretary  
Federal Election Commission  
999 F. Street, NW  
Washington, DC 20463

**Re: Elizabeth Crowley for Congress  
Request for Consideration of a Legal Question**

Dear Commissioners:

We submit this Request for Consideration of a Legal Question on behalf of Elizabeth Crowley for Congress ("Committee") regarding certain redesignations of contributions received in connection with the 2012 General Election for New York's 6<sup>th</sup> Congressional District.

We request consideration by the Federal Election Commission ("FEC" or "Commission") of the following legal question:

*Whether FEC regulation 11 CFR 110.1 (b)(5) permits the redesignation of contributions received in connection with the 2012 General Election by the authorized campaign committee of a candidate for the House of Representatives, after losing the Primary Election, to non-federal campaign committees of the same candidate upon obtaining authorization from contributors?*

Ms. Crowley was a candidate for the 2012 Primary Election for the 6<sup>th</sup> Congressional District of New York. While a candidate for the House of Representatives, Ms. Crowley was also an elected Member of the New York City Council in New York City's 30<sup>th</sup> Council District and the elected female District Leader in New York State's 38<sup>th</sup> Assembly District. Prior to beginning her congressional candidacy, Ms. Crowley had anticipated running for reelection as both Member of the New York City Council (in the 2013 elections) and District Leader (in the 2012 elections); in order to support of both of those candidacies, Ms. Crowley had previously established local campaign committees, that were registered with and reported to local campaign finance regulatory bodies.

Attachment, page 1 of 5

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In order to support her federal candidacy, Ms. Crowley's authorized campaign committee accepted contributions for both the 2012 Primary and General Elections, in accordance with the restrictions imposed on such contributions by the Federal Campaign Finance Act ("FECA") and FEC's regulations. After losing the Primary Election, Ms. Crowley terminated her federal candidacy, and the Committee undertook a winding down of its operations. One part of such winding down was the disposition of contributions accepted by the Committee for the General Election.

Pursuant to FEC Regulation 11 CFR 102.9(e)(3), once Ms. Crowley lost the Primary Election, she was prevented from being a candidate for 6th Congressional District in the General Election, and the contributions she received in anticipation of that candidacy needed to be refunded, redesignated in accordance with 11 CFR 110.1(b)(5), or reattributed in accordance with 11 CFR 110.1(k)(3).

With respect to the contributions the Committee had received for the General Election, the Committee:

- 1) contacted each contributor;
- 2) notified the contributor of the impending termination of the Committee; and
- 3) offered the contributor the option of a refund of his or her contribution or the ability to redesignate the contribution to a different (New York State) election.

As previously indicated, Ms. Crowley, at the time of the refunds and redesignations, was a candidate for New York State district leader in the September, 2012 New York State democratic primary election and was an incumbent Member of the New York City Council, eligible for reelection in 2013. For contributors that chose to redesignate their contributions to a different election, the Committee obtained signed authorization forms that expressly authorize such redesignations.

Indeed, several of the instant redesignated contributions were in fact contributions, originally made to Ms. Crowley's New York City Council campaign account that were refunded from that account to the contributors and then resolicited for contribution to the federal campaign account. After the Ms. Crowley's defeat in the Primary Election, those contributions were redesignated to those very same contributors, after obtaining their authorization. Clearly, both from the fact that several of the redesignated contributions were originally made to the non-federal campaign accounts to which they were redesignated subsequent to the Primary Election, and from the fact that the campaign obtained authorization from each contributor before redesignating his or her contribution to one of Ms. Crowley's non-federal campaign account, the campaign never converted contributions it received for the General Election to a use not anticipated or authorized by the contributors.

The Committee never treated the contributions designated for the General Election as the Committee's funds. At all times, General Election funds were segregated from Primary Election funds, not used in connection with the Primary Election, and not converted to personal use. Indeed, by contacting contributors, offering them a refund, and seeking affirmative authorization of any redesignation, the Committee believed itself to be in full compliance with FEC regulations. Ultimately, contributions totaling \$16,252 were refunded to contributors that have requested refunds. Eight contributions, totaling \$19,950 were redesignated to different state and local election campaign accounts of Ms. Crowley.

In effect the Committee took steps to efficiently combine the process of issuing refunds of all General Election contributions and resoliciting new state and local election contributions from those same contributors. It is very clear that had those steps not been combined into one that the Committee would not be subject to the current compliance inquiry. Attached to this submission is a chart ("Exhibit A") that shows which contributions were refunded and which contributions were redesignated to the candidate's state and local campaign committee accounts. Should you need any additional backup documentation demonstrating the refunds, written authorizations for redesignation, and transfer of funds, the Committee is happy to provide it.

Should the Commission determine that the redesignations were not permissible; the Committee would request the ability to reverse the transactions and cure anything that the Commission believes to be a violation. Ms. Crowley was a first time candidate that acted in good faith in attempting to adhere to FEC regulations. Indeed, in its effort to comply with the law and regulations, the Committee relied upon FEC Advisory Opinion 2012-06 which addressed a materially indistinguishable set of facts. The Opinion was in response to a request from Rickperry.org. In Advisory Opinion 2012-06, the FEC, considering redesignations of contributions accepted for the Presidential General Election to Governor Perry's state campaign committee, chose not to prohibit the course of action. Beyond the FEC's Advisory Opinion 2012-06, we believe the procedure implemented by the Committee comports with FECA and FEC regulations, as well as the policy that governs them. The FEC has expressly acknowledged that redesignations to federal campaign committees for future elections for federal office are permissible. See Advisory Opinion 2008-04. There is nothing in FECA or in FEC regulations that requires a redesignation to a campaign committee for state office be treated differently.

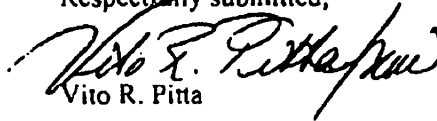
FEC regulation 11 CFR 102.9(e)(3) provides, "If a candidate is not a candidate in the general election, any contributions made for the general election shall be refunded to the contributors, redesignated in accordance with 11 CFR 110.1(b)(5) or 110.2(b)(5), or reattributed in accordance with 11 CFR 110.1(k)(3), as appropriate." Although FEC regulations define election as one for federal office, the rationale for the above-cited regulation suggests that, in the context of a redesignation (i.e. obtaining the express authorization of the original contributor to use funds contributed for a different election), "election" should be construed broadly to encompass any future election.

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Federal Election Commission  
April 29, 2013  
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Thank you in advance for your consideration of this matter.

Respectfully submitted,

  
Vito R. Pitta

VRP/mw  
Encl.

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**EXHIBIT A**

<i>Refunded Contributions Made</i>
\$1,500 to Mr. John Farrell
\$500 to IUPAT PAC
\$1,752 to Mr. Brendan Murray
\$2,500 to UFA Federal FIREPAC
\$5,000 to NYS Laborers PAC
\$2,500 to Sheet Metal Workers Local 28 PAC
\$2,500 to Sheet Metal Workers International Union PAC

<i>Contributions Redesignated to Friends of Elizabeth Crowley</i>
\$4,500 from IUPAT PAC
\$2,500 from UFA Federal FIREPAC
\$1,000 from Metal Lathers Local 46 PAC

<i>Contributions Redesignated to Elizabeth Crowley 2013</i>	
\$2,500 from Mr. James Nederlander	
\$2,500 from Mr. James Bell	Contributor had previously contributed to NYC Council campaign account and \$2,500 was refunded to contributor and resolicited by FEC campaign account.
\$2,500 from Mrs. Margaret Bell	Contributor had previously contributed to NYC Council campaign account and \$2,500 was refunded to contributor and resolicited by FEC campaign account.
\$1,000 from Mr. John Farrell	Contributor had previously contributed to NYC Council campaign account and \$2,500 was refunded to contributor and resolicited by FEC campaign account.
\$1,500 from Mr. John Rappaport	
\$1,950 from Metal Lathers Local 46 PAC	Contributor had previously contributed to NYC Council campaign account and \$2,500 was refunded to contributor and resolicited by FEC campaign account.

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