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**SENSITIVE**

**MEMORANDUM**

TO: The Commission

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SUBJECT: Electronic Redesignation of Contributions/Date of Withdrawal  
Hillary Clinton for President (C00431569)  
LRA #726

The Audit Division has asked the Office of General Counsel two questions pertaining to the Section 438(b) audit of Hillary Clinton for President (the "Committee" or "Presidential Committee"): (1) whether contributions originally designated to the Presidential Committee that are redesignated electronically to Hillary Clinton's ("Clinton") Senate Committee are valid redesignations; and (2) when Clinton withdrew her candidacy in the 2008 Presidential election season. While we normally do not bring these issues to the attention of the Commission prior to the issuance of comments to the interim audit report, we are doing so in this case because the answer to Audit Division's questions greatly affect the workload, and ultimately, Commission resources used in this audit. The auditors need to know these answers because the answer to each question affects the extent of sampling and reworking of the sample for excessive

contributions. Additionally, the answer to each of these questions affects the other question, and the workload associated with the other question. For example, redesignations are affected both by the validity of the electronically redesignated contributions and the timeliness of the redesignations, and the samples would need to be more extensive depending on each answer. Additionally, refunds are time sensitive. Thus, we are presenting these issues to the extent that the answers could avoid significant unnecessary work by the auditors. Our recommendations and conclusions are presented below.

## **I. ELECTRONIC REDESIGNATIONS**

### **A. Introduction**

The Audit Division asked whether contributions originally designated to the Presidential Committee that are redesignated electronically to Clinton's Senate Committee are valid redesignations. Clinton attempted to redesignate approximately \$6 million in contributions originally designated to the Committee's general election campaign to Clinton's Senate committee. For a number of these contributions, Clinton attempted to facilitate the redesignations by sending an email that directed the contributors to a website where they would redesignate their contributions using an online form. Section 110.1(b)(5)(i), however, explicitly requires that such redesignations must be written redesignations. *Explanation and Justification for 11 C.F.R. § 110.1(b)(5)*, 67 Fed. Reg. 69,928, 69,934 (Nov. 19, 2002). Nevertheless, given the Committee's efforts, and the fact that electronic technology has changed significantly since the Commission promulgated these regulations, we recommend that the Commission consider accepting the electronic redesignations here if the Committee can provide additional information.

### **B. Regulatory and Advisory Opinion Background**

The Commission has considered the use of electronic technology to complete contribution redesignations. In 2002, the Commission rejected the use of email redesignations when it considered eliminating the signature requirement for redesignations and reattributions that cannot be presumptively redesignated or reattributed. *Explanation and Justification for 11 C.F.R. § 110.1(b)(5)*, 67 Fed. Reg. 69,928, 69,934 (Nov. 19, 2002). When the Commission decided to reject the use of email redesignations in the promulgation of its 2002 regulations, the Commission appeared to be discussing emails sent from the contributors to the committees by which contributors attempt to redesignate contributions. In this case, however, the contributors did not send emails to the Committee redesignating their contributions. Rather, the Committee sent emails to individual contributors that included a website link for a contributor to click on if the contributor wanted to redesignate the contribution electronically. Additionally, the Committee initially mailed the contributor a letter that also included the website, as well as the option to return a signed redesignation.<sup>1</sup> Thus, the Committee's actions are distinguishable from

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<sup>1</sup> In some cases, the contributors opted to return a signed redesignation to the Committee. The auditors estimate that roughly half of the redesignations were completed in writing from the contributors and half were completed electronically. Since the amounts of the general election contributions were not the same from each contributor, the auditors' estimate does not necessarily result in half of the approximately \$6 million in redesignations being redesignated in writing and half electronically. Further analysis as to the projected amount

the contributor-initiated redesignations the Commission considered and rejected during its 2002 rulemaking. Nevertheless, for the contributions at issue there are still no traditional written signatures from the Commission's contributors, and the Commission's decision not to accept email redesignations was considered in the overall context of rejecting the elimination of the written signature requirement. *See id.*

The Commission has, however, been willing to interpret the Act and its regulations "consistent with contemporary technological innovations . . . where such technology would not compromise the intent of the Act or regulations." AO 1999-09 (Bradley); *see also* AO 2007-17 (DSCC); AO 2007-30 (Dodd); AO 1999-3 (Microsoft PAC); AO 1999-36 (Campaign Advantage); 1995-09 (NewtWatch). Specifically, the Commission has allowed the use of electronic signatures to authorize payroll deductions of contributions and to authorize solicitations for contributions to a separate segregated fund. AO 2001-4 (MSDW PAC); AO 1999-3 (Microsoft PAC); AO 2000-22 (Air Transportation Association). Under circumstances where the Commission has allowed electronic signatures, it has required a verification process that makes clear the contributor's intent and confirms the identity of the contributor. *See id.* While these advisory opinions do not involve the use of electronic signatures to redesignate contributions, we believe that the Committee's efforts at electronic redesignation can be considered in light of the advisory opinions based on the Committee's verification process. The same underlying interests are at stake – the contributors' identity and intent. Given that the Commission has not considered electronic redesignations since 2002, our analysis below assumes that there may be circumstances under which the Commission will accept electronic signatures for the purpose of redesignating contributions.

### **C. Committee's Electronic Redesignations Are Impermissible Because Its Verification Process Did Not Confirm Contributor Identity and Intent Under AO Standards**

We start by examining those situations where the Commission has accepted electronic signatures. In AO 2001-4, the Commission approved a verification process in which MSDW PAC confirmed the identity of its restricted class members authorizing payroll deductions through electronic signature. MSDW PAC used a process where the would-be contributors entered the web address to a specific website, logged in using a personally unique employee identification number, entered their occupation and name of employer, then through a series of screens viewed the restrictions on who can contribute, and then entered a screen that stated that by entering their full name and clicking on the website link, they agreed to authorize the contribution pledge. Finally, a screen appeared stating that a confirmation would be emailed to the contributors. Microsoft PAC used a similarly secure verification process with the use of personal passwords and an email reply notifying an "employee of its receipt of the [payroll deduction] form and to request final confirmation of the employee's intention to participate in the payroll deduction program." AO 1999-3. The Air Transportation Association also used a password protected website and email confirmations acknowledging its receipt of a contribution form as well the use of a process through which Air Transportation Association could "ensure

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redesignated in writing and electronically would require significant Commission resources to complete; however, the auditors believe that a significant portion of the \$6 million in redesignations were performed electronically.

that the electronic mail to which the executed [prior approval] form [consenting to receive solicitations] ... was sent from [a specific] representative's email address." AO 2000-22. The Commission noted that "such security measures are important to assuring that the ability to sign and return the prior approval will reside only with that representative. The Commission also assures that the Associations have the ability to verify that the electronically signed authorization came from the particular representative."

When we analyze the Committee's electronic redesignations in light of the type of the processes and precautions used in the advisory opinions to establish electronic signatures, we conclude that the Committee did not obtain an electronic signature for the redesignations. The Committee's process for obtaining redesignations did not have sufficient safeguards to verify the identity of the contributor and to ensure contributor intent – the two prerequisites, per the advisory opinions, to establishing electronic signatures. 67 Fed. Reg. at 69,934 (Nov. 19, 2002). These two requirements usually work together. If a committee cannot verify the identity of the original contributor, then it cannot be assured that a redesignation of the contribution carries out the contributor's intent.

We acknowledge that the Committee took a number of steps to obtain redesignations of Presidential general election contributions from the contributors. However, the Committee's actions fell short in two important areas identified in the advisory opinions discussed above: (1) the link/website did not restrict access through the use of a password (or other unique identifier), thus leaving open the potential for identity fraud; and (2) the Committee did not confirm the contributors' intent in a communication separate from the initial website link-based redesignation.

The Committee's efforts to obtain redesignations involved first mailing letters requesting that the contributors redesignate their general election contributions. In these mailings, the Committee provided the contributor with a form to sign and return authorizing the redesignation, and also gave the contributor an option to go to the campaign website to redesignate the contribution. Then, if the contributor responded, either by returning the signed designation letter or by going to the campaign's website, the Committee redesignated the presidential general election contribution to the 2012 Senate election(s). If the contributor did not respond, the Committee followed up with a second letter, a postcard and email(s).

The Committee states that it obtained a contributor's email address when the contributor made a contribution, and only used these email addresses in email communications. If the contributor responded to one of the follow-up mailings or emails, then the contributor no longer received the email(s) requesting redesignation. The Committee sent out its last emails to the remaining contributors on August 28, 2008, stating: "[a]ction required by midnight." Each of the emails included a link that stated: "[c]lick here to transfer your contribution" (the last email stated "[c]lick here to transfer your contribution before midnight.")<sup>2</sup> If the contributor clicked on the link, the contributor would be directed to provide information personal to the donor, including the contributor's first and last name, address, phone number, email address and

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<sup>2</sup> See *infra* Section II for a discussion of the 60-day deadline to redesignate contributions.

employer and occupation. When the Committee received the information, it generated a “receipt record” of this information provided by the donor. The Committee also retained these receipt records, which were entered into a database that it kept and produced for its auditors. Contributors would also see a message thanking them for redesignating their 2008 general election contributions in the 2012 Senate campaign after entering the information online to redesignate the contribution. The Committee provided the auditors with samples of individual contributions and associated requests for redesignations that the Committee made by postal mail and email.

The request that the contributor enter occupation and name of employer information can be a starting point for verifying the contributor’s identity, but we do not think that it is sufficient to confirm the contributor’s identity. First, there is no information that the Committee took any steps, automated or otherwise, to verify that information against information already in the Commission’s records; a contributor who had not provided the information in the first place, and had not responded to Committee requests for the information pursuant to 11 C.F.R. § 104.7, could have been providing the information for the first time. More importantly, absent a password or other unique identifier known to the contributor, there would be a heightened risk that a spouse, family member, co-worker or friend with access to the contributor’s email account might be able to effect the redesignation without the contributors’ knowledge simply because they would likely know or have access to the name, address, phone number and employer information and could enter the information into the website and complete the redesignation process.

The confirmation screen that appeared at the end of the online redesignations process did not verify the identity of the contributor. If someone other than the contributor gained access to the contributor’s email account and engaged in the Committee’s website/link-based redesignation process, then only the “impster” would see the confirmation message thanking him or her for the redesignation. Given that the Committee could not verify the identity of the original contributor, it cannot be assured that the redesignations reflected the contributors’ intent. We, therefore, recommend that the Commission not accept the Committee’s electronic redesignations based on the information it has provided at this point in the audit process. However, we believe the Commission should consider other information from the Committee, if available, on contributor intent and identity, as discussed below.

#### **D. Committee Should Be Given Opportunity to Show Sufficiency of Its Contributor Identity and Intent Verification Process**

Although the Committee did not utilize verification processes (passwords/unique identifiers and separate confirmation communications) like those in AOs 2001-4, 1999-3, and 2000-22, to definitely establish contributor identity and intent, there may be other ways for the Committee to show it has met the intent behind the requirements for signed, written redesignations. While in our view the Committee’s processes were not sufficient to provide the same degree of certainty about contributor identity and intent as was present in the electronic signature procedures approved in the AOs, they did provide some assurance that it was more likely than not that the person redesignating the contribution was the original contributor. If the Committee could show that the contributor had exclusive access to his or her email account

and/or the Committee website or link, the Committee might be able to establish that it sufficiently confirmed the contributor's identity through the use of personal information. Under those circumstances, the screen message confirmation might be sufficient to confirm contributor intent because no one but the contributor would likely have seen the message thanking him or her for the redesignation. Information confirming that the contributor had exclusive access to his or her email account would likely be in the hands of the contributor, not the Committee. For purposes of this audit, however, the Committee might be able to show that the contributor had exclusive access to his or her email account if it obtained a statement from the contributor certifying that the contributor's email was password protected or that only the contributor had access to the email account. Thus, the Committee should not be limited to showing that it confirmed contributor identity and intent in the precise ways used in AOs 2001-4, 1999-3, and 2000-22, respectively. We recommend that the Committee be permitted to establish that it resolved all concerns the Commission raised in these advisory opinions regarding identity fraud and contributor intent even though the Committee's processes differed from those in the AOs.

## II. DATE OF WITHDRAWAL OF PRESIDENTIAL CANDIDACY

### A. End of Senator Clinton's Presidential Candidacy

In addition to the question of electronic redesignations, the Commission must consider whether the electronic and written redesignations were timely. The timeliness question depends on when Clinton was no longer a candidate for the general election. Specifically, the Audit Division needs to know when Clinton decided that she would no longer be a Presidential candidate, to determine when to begin counting the 60 days that the Committee must refund, redesignate, or reattribute contributions designated for the general election. See 11 C.F.R. § 102.9(e). We recommend that the Commission conclude that on June 7, 2008, Clinton announced her withdrawal from the race for President, beginning the period of 60 days that the Committee was required to redesignate, refund, or reattribute contributions designated for the general election. *Id.* Clinton's campaign states that Clinton ended her candidacy on June 29, 2008. The impact of the June 7, 2008 date as the date Clinton ended her campaign could result in a possible finding of up to \$6 million in late redesignations, as well as a possible finding of approximately \$16 million in late refunds.<sup>3</sup>

[REDACTED] we also recommend that the Commission exercise its discretion not to pursue a finding of late redesignations or late refunds based on Clinton's June 7, 2008, withdrawal of her candidacy.

### B. Regulatory and Advisory Opinion Background

A committee may receive, prior to the date of the primary election, contributions designated for the general election. 11 C.F.R. § 102.9(e)(1); see 11 C.F.R. § 110.1(b). A committee, however, is required to take certain actions with regard to general election campaign funds during and when withdrawing his or her candidacy. These actions are designed to prevent

<sup>3</sup> A number of the redesignations may still have been timely using the June 7 date; however, a projection of the amount of timely redesignations would require the use of significant Commission resources.

the use of general election funds for primary election activities. A committee must use an acceptable accounting method to distinguish between contributions received for the primary and general elections, which may include the keeping of separate accounts or separate records for each election. 11 C.F.R. § 102.9(e)(1). Regardless of the method used, Commission regulations are designed so that a committee cannot use general election contributions for the primary in a manner that would result in excessive contributions. See 11 C.F.R. §§ 102.9(e)(1) and (2), 110.1(b). A committee "must demonstrate that, prior to the primary election, recorded cash on hand was at all times equal to or in excess of the sum of general election contributions received less the sum of general election disbursements made." 11 C.F.R. § 102.9(e)(2). Finally, if a candidate is not a candidate in the general election, general election contributions must be refunded to the contributors, or redesignated or reattributed in accordance with the redesignation or retribution regulations. 11 C.F.R. § 102.9(e)(3). The candidate has 60 days from the end of the candidacy to refund the contributions, or ask contributors to redesignate or retribute their contributions. AO 1992-15 (Russo). The issue presented in this audit is when Clinton withdrew her candidacy, which began the counting of the 60 days to redesignate, refund, or retribute contributions designated for the general election.

### **C. Senator Clinton's Presidential Candidacy Ended June 7, 2008**

There are three situations when it is clear that a candidate in a primary election will not be a candidate in the general election: (1) when a candidate is defeated for nomination in the primary election: AO 1992-15 (Russo); (2) when the candidate fails to qualify for the primary ballot (with the exception of a write-in candidate); and (3) when the candidate, sometime before the nomination, withdraws and does not reestablish candidacy whether with the same or a different political party. The question presented in this matter is when Senator Clinton withdrew her candidacy.

On June 7, 2008, Senator Clinton made the following statement: "As I suspend my campaign, I congratulate [Barack Obama] on the victory he has won and the extraordinary race he has run. I endorse him and throw my full support behind him." *NPR All Things Considered* (Pg. Unavail. Online), June 7, 2008, 2008 WLNR 10915409; *NBC News: Nightly News* (Pg. Unavail. Online), June 7, 2008, 2008 WLNR 10834310. During that speech, Clinton also said: "The way to continue our fight now, to accomplish the goals for which we stand is to take our energy, our passion, our strength, and do all we can to help elect Barack Obama, the next president of the United States." *NBC News: Nightly News* (Pg. Unavail. Online), June 7, 2008, 2008 WLNR 10834310.

Despite these comments, Clinton's Committee asserts Clinton did not make any remarks indicating that she was withdrawing from the contest on June 7, 2008 and did not withdraw her candidacy until she made a joint appearance with her opponent on June 29, 2008. See *Committee Response to RFAI*, Etext Attachment, FEC Image # 28993139834, <http://images.nictusa.com/pdf/834/28993139834/28993139834.pdf>.

Senator Clinton's explicit endorsement of her opponent on June 7, 2008 would appear to have made clear that Clinton no longer sought nomination, and thus would not be a candidate in the general election. Clinton nevertheless makes three arguments that she did not withdraw her

candidacy on June 7, 2008: (1) she “suspended” her campaign on June 7, 2008, and did not use the term “withdraw” at that time; (2) the Democratic National Committee (“DNC”) rules provide that if a candidate merely suspends his or her campaign, the individual technically is still a candidate; and (3) during the month of June, she continued contesting delegates at the state and local levels.

In her first argument, that on June 7, 2008, she “suspended” rather than “withdrew,” she admits that the term “suspend” has no legal meaning.

Clinton’s second argument is that the DNC Rules provide that if a candidate merely suspends his or her campaign, the individual technically is still a candidate. While the party’s rules may control when an individual is a candidate for the purpose of the party’s activities, the question here is not one of the party’s rules. Rather, it is when has the candidate so effectively withdrawn that it is clear she no longer seeks to be a candidate in the general election. In our view, an endorsement of the candidate’s opponent meets that threshold. Moreover, we have found nothing in the Charter and Bylaws of the Democratic Party of the United States (*as amended by the Democratic National Committee, February 3, 2007*), or in the Regulations of the Rules and Bylaws Committee for the 2008 Democratic National Convention (“DNC Regulations”) that addresses what happens when a candidate suspends his or her campaign; however, the DNC Regulations address the allocation of delegates to a presidential candidate based on whether that candidate is still a candidate. *See Democratic National Committee Regulations of the Rules & Bylaws Committee for the 2008 Democratic National Convention at Reg. 5.7., Article VII.C.1.* Thus, DNC Regulations address Clinton’s ability to retain delegates at the Democratic National Convention when she is no longer a candidate.

Finally, Clinton claims that, during the month of June, she continued contesting delegates at the state and local levels. Clinton asserts that she did not release her delegates until the Democratic National Convention, and that her campaign continued to attempt after June 7, 2008, at state conventions and elsewhere, to add to the total of delegates who would be pledged to vote for her at the convention. Even if she did undertake these activities, they would not detract from her June 7, 2008 statements clearly endorsing and supporting her opponent. *Cf. Sharpton 2004, Memorandum to Commission, Notification of Date of Ineligibility, March 22, 2004 at 2-3 and Attachment 1 (Press Release from Sharpton 2004 website, March 15, 2004); Correspondence to Rev Alfred C. Sharpton re: Date of Ineligibility, Signed by Bradley A. Smith, Chairman, March 30, 2004, Memorandum to Joseph F. Stoltz on the Preliminary Audit Report on Sharpton 2004, July 5, 2007 at 1, 2-4 n. 4 (public financing determination where the Commission found a Presidential primary candidate to be ineligible for primary matching funds due to inactive candidacy, where that candidate announced his support for another presidential primary candidate, but stated that he would remain an active candidate for the purpose of garnering delegates).<sup>4</sup>* The Committee makes no other assertions of campaign activity beyond delegate

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<sup>4</sup> We recognize that there are some limitations to using the factors for candidates receiving public funds because Clinton did not accept public funds. These factors, however, provide guidance in resolving this issue. The Commission’s regulations pertaining to the Presidential Primary Matching Payment Account Act address factors unique to presidential candidates, including delegates and the fact that there are multiple primaries. Thus, examining the regulations promulgated pursuant to the Presidential Primary Matching Payment Account Act that



activity, though such activity suggests that the Committee continued employment of at least some campaign personnel.

Considering all of the above factors, including Clinton's statements on June 7, 2008, and her actions following her statements, we recommend the Commission conclude that Clinton ended her candidacy on June 7, 2008. Clinton's statements on those dates indicated that she no longer intended to pursue her candidacy for President. As a result, the Committee would be required to refund, redesignate or reattribute contributions designated for the general election within 60 days from the date that she ended her candidacy, or August 6, 2008.

11 C.F.R. §§ 102.9(e), 110.1(b). See AO 2008-04 (Dodd) (political committee ordinarily must refund all general election contributions for which it was unable to obtain written redesignations within 60 days after the candidate withdraws from the race); AO 1992-15 (Musso) (60-day period begins to run on date committee has actual notice that it needs to obtain redesignations).

[REDACTED]

[REDACTED]

[REDACTED] we would also recommend that the Commission exercise its discretion not to pursue a finding of late redesignations or late refunds based on Clinton's June 7, 2008 withdrawal of her candidacy.

### III. RECOMMENDATIONS

1. Reject the electronic redesignations in these circumstances as invalid, but permit the Committee to respond and show whether and/or how its electronic redesignation process confirmed contributor identity and intent; and
2. Conclude that Clinton withdrew her candidacy on June 7, 2008, but do not pursue a finding of late redesignations or late refunds based on that withdrawal date.

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address whether a candidate is actively conducting campaigns also offers some factors that may be useful to take into account when considering whether Clinton was still a candidate after June 7, 2008.