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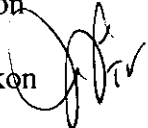
November 13, 2003

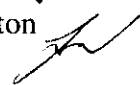
## AGENDA ITEM


For Meeting of: 11-20-03

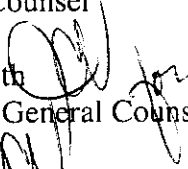
### Memorandum

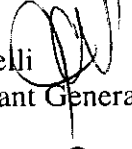
**To:** The Commission


**Through:** James A. Pehrkon 

**From:** Lawrence H. Norton  
General Counsel 

James A. Kahl   
Deputy General Counsel

Rosemary C. Smith   
Acting Associate General Counsel

John C. Vergelli   
Acting Assistant General Counsel

Esa L. Sferra   
Law Clerk

**Subject:** Draft AO 2003-30

Attached is a proposed draft of the subject advisory opinion. We request that this draft be placed on the agenda for November 20, 2003.

Attachment

1 ADVISORY OPINION 2003-30

2 Benjamin L. Ginsberg, Esq.  
3 Glenn M. Willard, Esq.  
4 Patton Boggs, LLP  
5 2550 M Street, NW  
6 Washington, DC 20037-1350

**DRAFT**

7  
8 Dear Messrs. Ginsberg and Willard:

9 This responds to your letters dated June 24 and September 26, 2003, requesting an  
10 advisory opinion on behalf of Fitzgerald for Senate Committee (“the Committee”) and  
11 Senator Peter Fitzgerald, concerning the application of the Federal Election Campaign Act  
12 of 1971, as amended (“the Act”), and Commission regulations to the permissible uses of  
13 contributions designated for or attributed to the 2004 primary election, for which Senator  
14 Fitzgerald is no longer a candidate.

15 ***Background***

16 You state that on April 15, 2003, Senator Fitzgerald announced that he would not  
17 seek re-election to the United States Senate from Illinois in 2004. The Committee is  
18 Senator Fitzgerald’s principal campaign committee, which has been fundraising since the  
19 1998 general election for the Senator’s re-election in 2004. Since the 1998 general election,  
20 the Committee has raised approximately \$2.7 million for 1998 primary election debt  
21 retirement, 1998 general election debt retirement, 2004 primary election expenses, and  
22 2004 general election expenses.<sup>1</sup>

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<sup>1</sup> Of the \$2.7 million raised since the 1998 general election, \$302,000 was contributed for 1998 primary debt retirement, \$334,000 was contributed for 1998 general election debt retirement, and \$312,000 was contributed for the 2004 general election. \$1.7 million was contributed for or attributed to the 2004 primary election.

1           You state that as of April 15, 2003, the Committee had \$984,812.09 in total cash-  
2 on-hand and \$2.9 million in net liabilities. You state that the Committee wishes to use  
3 approximately \$526,000 of the total cash-on-hand<sup>2</sup> for one or more of four contemplated  
4 purposes: (1) Contributions to an organization described in section 170(c) of the Internal  
5 Revenue Code; (2) transfers to a national, State, or local political party committee; (3)  
6 repayment of debt incurred in the 1998 primary and general elections, and 2004 primary  
7 election; and (4) refunds to individuals who contributed for the 2004 primary election.

8           You state that the Committee's net liabilities breakdown as follows: \$2.1 million  
9 owed to La Salle Bank, N.A. for credit extended for the 1998 elections; \$772,000 owed to  
10 Senator Fitzgerald for the 1998 general election; \$45,525 in disputed debt for the 1998  
11 general election; and \$36,639.86 for the 2004 primary election.

12           You state that the \$526,000 cash-on-hand for one or more of the contemplated  
13 purposes is from individuals, political committees, and interest accrual. The breakdown of  
14 the cash-on-hand is approximately: \$84,000 from individuals who have reached the  
15 contribution limits from the 1998 elections; \$250,000 from individuals who have not met  
16 the contribution limits from the 1998 elections; \$187,000 from political committees who  
17 have not met the contribution limits from the 1998 elections; and \$5,000 from interest.  
18 You ask a series of questions about the permissible uses of the \$526,000 cash-on-hand.

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<sup>2</sup> You explained by phone on October 16, 2002 that some of the \$984,812.09 cash-on-hand on April 15, 2003 will be, or was used as follows: \$312,000 was refunded because it was composed of contributions for the 2004 general election and Senator Fitzgerald will not be a candidate in that election, and \$147,000 is allotted for campaign-related legal expenses.

1 *Legal Analysis and Conclusions*

2 For the reasons stated below, the Commission finds that the four purposes that you  
3 propose all are permissible uses of the Committee's \$526,000 cash on hand under the Act  
4 and Commission regulations.

5 Under the Act, there are four categories of permissible uses of campaign funds: (1)  
6 otherwise authorized expenditures in connection with the candidate's campaign for Federal  
7 office; (2) ordinary and necessary expenses incurred in connection with the duties of the  
8 individual as a holder of Federal office; (3) contributions to organizations described in 26  
9 U.S.C. 170(c); and (4) transfers, without limitation, to national, State or local political  
10 party committees. 2 U.S.C. 439a(a); *see also* 11 CFR 113.2.

11 Congress, in the Bipartisan Campaign Reform Act of 2002 ("BCRA"), amended  
12 section 439a by deleting the condition that funds used under this section be "in excess of  
13 any amount necessary to defray [the candidate's] expenditures." Before BCRA, section  
14 439a also included "any other lawful purpose" within the list of permissible uses. 2 U.S.C.  
15 439a (2001). In BCRA, Congress deleted "any other lawful purpose." The current list of  
16 permissible uses of campaign funds is thus exhaustive. *See Explanation & Justification for*  
17 *Disclaimers, Fraudulent Solicitations, Civil Penalties, and Personal Use of Campaign*  
18 *Funds; Final Rule, 67 Fed. Reg. 76962, 76970 (Dec. 13, 2002) (explaining the significance*  
19 *of the change).*

20 *Questions 1 and 2*

21 *May the Committee donate cash-on-hand to an organization described in section*  
22 *170(c) of the Internal Revenue Code?*

1           *May the Committee transfer cash-on-hand to a national, State, or local political*  
2 *party committee?*

3           The Act provides that a candidate may use campaign funds for a number of  
4 permissible non-campaign purposes, including “for contributions to an organization  
5 described in section 170(c) of the Internal Revenue Code of 1986,” 2 U.S.C. 439a(a)(3),  
6 and “for transfers, without limitation, to a national, State, or local committee of a political  
7 party,” 2 U.S.C. 439a(a)(4), provided that neither of these uses would result in campaign  
8 funds being converted to personal use by any person. 2 U.S.C. 439a(b)(1). The  
9 Commission’s regulations define personal use as “any use of funds in a campaign account  
10 of a present or former candidate to fulfill a commitment, obligation or expense of any  
11 person that would exist irrespective of the candidate’s campaign or duties as a Federal  
12 officeholder.” 11 CFR 113.1(g); *see, e.g.*, Advisory Opinion 1996-9<sup>3</sup> (use of an office in a  
13 library facility purchased by a State party committee with excess funds contributed by a  
14 Senator’s principal campaign committee constituted personal use under 11 CFR 113.1(g)).

15           The Committee may use some or all of the cash-on-hand for contributions to a  
16 170(c) organization or for transfers to a national, State, or local committee of a political  
17 party, provided that such contributions or transfers do not convert the cash-on-hand into  
18 personal use by Senator Fitzgerald. *See, e.g.*, Advisory Opinion 1997-1 (permitting  
19 donation of former principal campaign committee’s cash balance to proposed charitable

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<sup>3</sup> To the extent that this and other previous advisory opinions relied on the statutory characterization of campaign funds as “excess” funds, the advisory opinions are still reliable authority. Whether campaign funds could be used for one of the pre-BCRA permissible purposes depended on the candidate’s discretion, and the Act did not require any other determination that the funds were in fact excess funds. 11 CFR 113.1(e) (2002); *see generally Explanation & Justification for Disclaimers, Fraudulent Solicitations, Civil Penalties, and Personal Use of Campaign Funds; Final Rule*, 67 Fed. Reg. 76962, 76970-71 (Dec. 13, 2002).

1 organization provided that none of the donated funds would be distributed as compensation  
2 to the candidate, his family, or any entity controlled by or employing the candidate or a  
3 member of his family, which would constitute personal use); 11 CFR 113.1(g)(2).

4 *Question 3*

5 *May the Committee use cash-on-hand to repay debts owed to:*

- 6 (a) *LaSalle Bank, N.A. for obligations incurred in the 1998 primary and*  
7 *general elections?*
- 8 (b) *Senator Fitzgerald for loans he made to the Committee with respect to the*  
9 *1998 primary and general elections?*
- 10 (c) *Non-bank, non-candidate creditors for obligations incurred in the 1998*  
11 *primary and general elections, and for which the amount of debt is*  
12 *disputed?*
- 13 (d) *Non-bank, non-candidate creditors for obligations incurred for the 2004*  
14 *primary?*

15 Some or all of the Committee's cash-on-hand may be used to repay debts the  
16 committee owes to a) LaSalle Bank, N.A. for loans incurred in the 1998 primary and  
17 general election; b) Senator Fitzgerald for loans he made to the Committee in connection  
18 with the 1998 elections; c) non-bank, non-candidate creditors for disputed debts incurred in  
19 connection with the 1998 elections; and d) expenses incurred for the 2004 primary.  
20 Repayment of debts listed in a), b), c) and d) is a permissible use of the cash-on-hand since  
21 the cash-on-hand consists of contributions lawfully made for the 2004 primary for which  
22 Senator Fitzgerald was a candidate and debt repayment is an authorized expenditure in

1 connection with Senator Fitzgerald's campaign for Federal office. *See* 2 U.S.C. 431(9)(A);  
2 11 CFR 100.111; Advisory Opinion 1989-22.

3         The Commission notes that when a political committee has a significant amount of  
4 debt, use of cash-on-hand for purposes other than debt repayment may affect the  
5 committee's future ability to terminate and to go through the debt settlement process. The  
6 Commission also notes that bank loans and lines of credit<sup>4</sup> are not subject to debt  
7 settlement or forgiveness because bank loan debt settlement may result in prohibited  
8 contributions from banks, except in certain rare situations not relevant here. *See*  
9 *Explanation & Justification: Debts Owed by Candidates and Political Committees*, 55  
10 *Fed. Reg.* 26378, 26384 (June 27, 1990); *Explanation & Justification: Loans from*  
11 *Lending Institutions to Candidates and Political Committees*, 56 *Fed. Reg.* 67118, 67121  
12 (Dec. 27, 1991).

13 *Question 4*

14         *May the Committee use cash-on-hand to refund contributions made for the 2004*  
15 *primary?*

16         Under the Act, authorized expenditures in connection with a campaign for Federal  
17 office is a permissible use of campaign funds. 2 U.S.C. 439a(a)(1). Refunding  
18 contributions to contributors who made them is an authorized expenditure made explicitly  
19 lawful in the Commission's regulations requiring refunds. *See e.g.* 11 CFR 103.3 and  
20 102.9(e)(3). Therefore, using the cash-on-hand to make refunds to contributors of  
21 contributions designated for or attributed to the 2004 primary is permissible. Further,

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<sup>4</sup> The Commission treats lines of credit from lending institutions in the same manner as bank loans. *See* *Explanation & Justification: Loans from Lending Institutions to Candidates and Political Committees*, 56 *Fed. Reg.* 67118, 67119 (Dec. 27, 1991).

1 Commission regulations require refunding, or redesignation, of all contributions made for a  
2 general election in which the candidate to whom the contributions were made does not  
3 qualify as a candidate, as you state you have already done with respect to the 2004 general  
4 election, since Senator Fitzgerald is not running for re-election and will not qualify as a  
5 candidate in that election. 11 CFR 102.9(e)(3) and 110.1(b)(3); *see also* Advisory Opinion  
6 2003-18.

7 *Question 5*

8 *Do the Commission's post-Bipartisan Campaign Reform Act ("BCRA")*  
9 *regulations at 11 CFR 116.11 pertaining to repayment of personal loans from the*  
10 *candidate apply to the retirement of the Committee's debt owed to Senator Fitzgerald*  
11 *incurred in the pre-BCRA 1998 primary and general elections?*

12 The Commission's post-BCRA regulations at 11 CFR 116.11 pertaining to  
13 repayment of certain personal loans from the candidate do not apply to the retirement of  
14 the Committee's debt owed to Senator Fitzgerald incurred in connection with a pre-BCRA  
15 elections. BCRA added section 441a(j) to the Act, which limits the amount of a  
16 candidate's personal loan that may be repaid with contributions to the candidate or the  
17 candidate's authorized committee where the contributions were made after the election.  
18 The Commission in promulgating new section 116.11 noted that 2 U.S.C. 441a(j)  
19 specifically states that it applies only to personal loans from candidates that are made after  
20 November 6, 2002 and "[t]hus, the limitations on repayment of personal loans from  
21 contributions made after the respective election do not apply to personal loans made before  
22 this date." *Explanation & Justification: Increased Contribution and Coordinated Party*



1 *Expenditure Limits for Candidates Opposing Self-Financed Candidates; Interim Final*  
2 *Rule*, 68 *Fed. Reg.* 3970, 3974 (Jan. 27, 2003). The Committee's 1998 primary and  
3 general election debt to Senator Fitzgerald was incurred May 12, 1997 and April 16, 1998,  
4 before November 6, 2002, and therefore new 11 CFR 116.11 does not apply here. The  
5 Committee is not limited in the amount of its debt owed to Senator Fitzgerald that it may  
6 repay with 2004 primary contributions, even those contributions received after November  
7 6, 2002.

8         This response constitutes an advisory opinion concerning the application of the Act  
9 and Commission regulations to the specific transaction or activity set forth in your request.  
10 *See* 2 U.S.C. 437f. The Commission emphasizes that, if there is a change in any of the  
11 facts or assumptions presented, and such facts or assumptions are material to a conclusion  
12 presented in this advisory opinion, then the requestor may not rely on that conclusion as  
13 support for its proposed activity.

14         The Commission notes that this advisory opinion analyzes the Act, as amended by  
15 the Bipartisan Campaign Reform Act of 2002, and Commission regulations, including  
16 those promulgated to implement the BCRA amendments, as they pertain to your proposed  
17 activities. On May 2, 2003, a three-judge panel of the United States District Court for the  
18 District of Columbia ruled that a number of BCRA provisions are unconstitutional and  
19 issued an order enjoining the enforcement, execution, or other application of those  
20 provisions. *McConnell v. FEC*, 251 F.Supp. 2d 176 (D.D.C. 2003); *prob. juris. noted*, 123  
21 S.Ct. 2268 (U.S. argued Sept. 8, 2003). Subsequently, the district court stayed its order  
22 and injunction in *McConnell v. FEC*, 253 F. Supp. 2d 18 (D.D.C. 2003), pending review

1 by the Supreme Court. The Commission has determined that your request for advice is not  
2 affected by *McConnell v. FEC* because the provisions of the Act underlying this advisory  
3 opinion are not challenged in that litigation.

4 Sincerely,

5

6 Ellen L. Weintraub

7 Chair

8

9 Enclosures (AOs 2003-18, 1997-1, 1996-9, 1989-22)