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FEDERAL ELECTION COMMISSION
Washington, DC 20463

2007 FEB 22 P 12: 17

February 22, 2007

MEMORANDUM

AGENDA ITEM

For Meeting of: 03-01-07

TO: The Commission

FROM: Thomasenia Duncan *TD*
Acting General Counsel

Rosemary C. Smith *RCS*
Associate General Counsel

Amy L. Rothstein *ALR*
Acting Assistant General Counsel

Ron B. Katwan *RBK*
Attorney

Subject: Draft AO 2007-03

Attached is a proposed draft of the subject advisory opinion. We request that this draft be placed on the agenda for March 1, 2007.

Attachment

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DRAFT

1 ADVISORY OPINION 2007-03

2

3 Robert F. Bauer, Esq.
4 Rebecca Gordon, Esq.
5 Perkins Coie LLP
6 607 Fourteenth St., NW
7 Washington, DC 20005

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9 Dear Mr. Bauer and Ms. Gordon:

10 We are responding to your advisory opinion request on behalf of Senator Barack
11 Obama and Obama for America, formerly known as the Obama Exploratory Committee
12 (the "Committee"),¹ requesting whether, Senator Obama may, under the Presidential
13 Election Campaign Fund Act (the "Fund Act"), as amended, the Federal Election
14 Campaign Act of 1971, as amended ("FECA"), and Commission regulations, solicit and
15 receive private contributions for the 2008 presidential general election while retaining the
16 option of refunding the contributions and receiving public funds for the general election
17 if he receives his party's nomination for President.²

18 The Commission concludes that Senator Obama may solicit and receive private
19 contributions for the 2008 presidential general election without losing his eligibility to
20 receive public funding if he receives his party's nomination for President, if he (1)
21 deposits and maintains all private contributions designated for the general election in a
22 separate account, (2) refrains from using these contributions for any purpose, and (3)
23 refunds the private contributions in full if he ultimately decides to receive public funds.

¹ Since filing the request for an advisory opinion, the name of Senator Obama's principal campaign committee has been changed to Obama for America. See Obama for America Amended Statement of Organization, FEC Form 1, available at <http://query.nictusa.com/cgi-bin/fecimg/?C00431445> (filed Feb. 12, 2007); see also <http://www.barackobama.com> (the "Obama Website") (last visited 02/15/07).

² For purposes of this Advisory Opinion, references to financial activity by Senator Obama include references to the activity by the Committee. With certain limited exceptions not relevant here, the presidential candidate of a major party must certify that he or she has not accepted and will not accept any private contributions in order to receive payments of public funds from the Presidential Election Campaign Fund for the general election under 26 U.S.C. 9006. See 26 U.S.C. 9003(b)(2); 11 CFR 9003.2(a)(2).

1 ***Background***

2 The facts presented in this advisory opinion are based on your letter received on
3 February 1, 2007, your telephone conversation with Commission staff on February 6,
4 2007, and the Obama Website.

5 Senator Barack Obama is a United States Senator from Illinois, elected in 2004,
6 who is a candidate seeking the nomination of the Democratic Party for the office of
7 President of the United States in the 2008 election. The Committee is his principal
8 campaign committee.

9 Press reports indicate that certain candidates and potential candidates for the 2008
10 presidential election have decided that, if they become their parties' nominees, they will
11 choose not to receive public funds in the general election but will, instead, fund their
12 campaigns exclusively with private contributions within the confines of FECA.

13 Accordingly, the Committee has begun soliciting contributions via the Obama Website,³
14 not only for the primary election but also for the general election. Nevertheless, if he
15 receives the Democratic nomination for President, Senator Obama has represented that he
16 will consider opting to receive public funds for his general election campaign if the
17 Republican candidate agrees, or independently decides, to receive public funds.

18 To retain the option of accepting public funds for his general election campaign,
19 Senator Obama proposes to deposit all private contributions designated for the general
20 election in a separate account immediately upon receipt. You represent that only the
21 Committee's treasurer and its chief operating officer will have access to the account.
22 Funds in the account would not be commingled with funds from other accounts and

³ See <https://donate.barackobama.com/page/contribute/main?source=homenavbar> (last visited 02/15/07).

1 would not be used for any purpose whatsoever, including operating expenses, unless and
2 until Senator Obama decides not to receive public funds for the general election. If he
3 decides to receive public funds, Senator Obama would immediately refund all private
4 contributions designated for the general election in full.

5 ***Question Presented***

6 *May Senator Obama solicit and receive contributions for the 2008 presidential*
7 *general election without losing his eligibility to receive public funds for the general*
8 *election if he receives his party's nomination for President?*

9 ***Legal Analysis and Conclusions***

10 Yes, Senator Obama may solicit and receive private contributions for the 2008
11 presidential general election without losing his eligibility to receive public funding if he
12 receives his party's nomination for President, if he (1) deposits and maintains all private
13 contributions designated for the general election in a separate account, (2) refrains from
14 using these contributions for any purpose, and (3) refunds the private contributions in full
15 if he ultimately decides to receive public funds.

16 Candidates may accept contributions that are specifically designated by
17 contributors for the general election before the candidates have won their primary
18 elections, or in the case of presidential elections, before the candidates have received
19 their parties' nomination. *See* 11 CFR 110.1(b)(2)(i) and 110.2(b)(2)(i). Upon receiving
20 such contributions, a candidate's authorized committee must employ an acceptable

1 accounting method to distinguish between contributions designated for the primary
2 election and contributions designated for the general election.⁴ *See* 11 CFR 102.9(e)(1).

3 To be eligible to receive payments of public funds from the Presidential Election
4 Campaign Fund for the general election under 26 U.S.C. 9003, however, the presidential
5 candidate of a major party must certify that the candidate and the candidate's authorized
6 committee have not accepted and will not accept any contributions to defray qualified
7 campaign expenses, with certain limited exceptions not relevant here. *See* 26 U.S.C.
8 9003(b)(2); 11 CFR 9003.2(a)(2).

9 Here, Senator Obama wishes to raise contributions designated for the 2008
10 presidential general election before receiving his party's nomination, without waiving his
11 eligibility to receive public funds for the general election. Under your proposal, Senator
12 Obama would deposit all private contributions designated for the general election in a
13 separate escrow account, would restrict access to the account, and would refrain from
14 using any funds in that account until he has decided whether to receive public funds for
15 the general election. If Senator Obama becomes a candidate in the general election and
16 decides to receive public funds, he would refund all private contributions from the
17 separate account in full.

18 The proposed arrangement is in some respects similar to the permissible practice
19 of fundraising for the general election by Federal candidates who have not yet won their
20 primary elections or, in the case of presidential candidates, received their parties' general
21 election nomination, as discussed above. If a candidate fails to qualify for the general
22 election, any contributions designated for the general election that have been received

⁴ Presidential candidates must regularly disclose the receipt of all contributions on FEC Form 3-P.

1 from contributors who have already reached their contribution limit for the primary
2 election would exceed FECA's contribution limits. *See* Advisory Opinion 2003-18 (Bob
3 Smith for U.S. Senate)⁵ (a candidate failing to qualify for the general election must not
4 treat contributions received during the primary election period that were specifically
5 designated for the general election as permissible campaign funds). The knowing
6 acceptance of excessive contributions is prohibited. *See* 2 U.S.C. 441a(f); 11 CFR 110.9.
7 A candidate in these circumstances is not considered to have accepted excessive
8 contributions, however, so long as the candidate refunds the contributions designated for
9 the general election within 60 days of the date such funds become impermissible.⁶ *See* 11
10 CFR 102.9(e)(3), 103.3(b)(3), 110.1(b)(3)(i), (b)(5), 110.2(b)(3)(i), (b)(5), and Advisory
11 Opinion 2003-18. Thus, a candidate who fails to run in the general election may avoid a
12 violation of FECA's contribution limits by refunding all contributions designated for the
13 general election.

14 Just as Senator Obama would not be considered to have accepted excessive
15 contributions if he failed to qualify for the general election and refunded the full amount
16 of any contributions designated for the general election, he will also not be considered to
17 have accepted private contributions, which otherwise would have resulted in a waiver of
18 his eligibility to receive public funds under 26 U.S.C. 9003(b)(2) and 11 CFR
19 9003.2(a)(2), so long as he refunds the full amount of contributions designated for the

⁵ A copy of this advisory opinion may be found on the Commission's website at www.fec.gov.

⁶ Candidates may also obtain redesignations of those contributions for a different election in accordance with 11 CFR 110.1(b)(5) and 110.2(b)(5), or a combination of reattributions to other joint contributors and redesignations of the contributions in accordance with 11 CFR 110.1(k)(3). The request for an advisory opinion represents that if Senator Obama becomes a candidate in the general election and decides to receive public funds, he will not seek to redesignate or reattribute any of the private contributions but will refund all private contributions in full.

1 general election and implements fully and completely the other safeguards and
2 procedures included in your proposal.

3 Accordingly, the Commission concludes that Senator Obama may solicit and
4 receive private contributions for the 2008 presidential general election without waiving
5 eligibility to receive public funds for the general election under the facts presented here,
6 in which (1) all contributions designated for the general election will be kept in a separate
7 escrow account in the Committee's designated campaign depository, (2) only the
8 Committee's treasurer and its chief operating officer will have access to this account, and
9 (3) the funds in this account will not be used for any purpose.

10 If Senator Obama decides to receive public funding for the presidential general
11 election, then he must refund all contributions designated for the general election in full
12 within 60 days after Senator Obama certifies his eligibility to receive public funds under
13 11 CFR 9003.2(a)(2). *See* 11 CFR 103.3(b)(3), 110.1(b)(3)(i), (b)(5), 110.2(b)(3)(i),
14 (b)(5), and Advisory Opinion 2003-18, n.3 ("The time limit for the redesignation or
15 refund of contributions is 60 days from the date the funds become impermissible."). If
16 Senator Obama is unable to process a refund for any reason, the unrefunded funds must
17 be promptly disgorged to the U.S. Treasury. Additionally, if any contributions
18 designated for the general election are deposited in an interest-bearing account, but
19 Senator Obama later opts to receive public funds for the general election and refunds
20 those contributions, then all interest earned on such funds must be disgorged to the U.S.
21 Treasury within 60 days after Senator Obama certifies his eligibility to receive public
22 funds under 11 CFR 9003.2(a)(2).

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

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Sincerely,

Robert D. Lenhard
Chairman