



FEDERAL ELECTION COMMISSION

Washington, DC 20463

September 2, 2008

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

ADVISORY OPINION 2008-04

Marc E. Elias, Esq.
Brian G. Svoboda, Esq.
Perkins Coie LLP
607 Fourteenth Street, NW
Washington, DC 20005-2011

Dear Messrs. Elias and Svoboda:

We are responding to your advisory opinion request on behalf of Chris Dodd for President, Inc. (the "Presidential Committee"), concerning the application of the Federal Election Campaign Act of 1971, as amended (the "Act"), 2 U.S.C. 431 et seq., the Presidential Primary Matching Payment Account Act (the "Matching Payment Act"), 26 U.S.C. 9031 et seq., and Commission regulations to the redesignation and refund of general election contributions received by the Presidential Committee during the primary campaign.

The Commission concludes that the Presidential Committee may issue refunds or obtain redesignations and transfer contributions received for the general election into Friends of Chris Dodd (the "Senate Committee"), Senator Dodd's Senate campaign committee. The Commission further concludes that the costs associated with issuing refunds, obtaining redesignations and transferring contributions received for the general election are properly considered "winding down costs" and therefore are "qualified campaign expenses" under 11 CFR 9034.11(a) and may be paid with presidential primary election funds. Ordinarily, a political committee 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. However, under the particular facts and circumstances presented here, the Commission concludes that the Presidential Committee has six days from the date of its receipt of this opinion to obtain redesignations and to make refunds to contributors.

Background

The facts presented in this advisory opinion are based on your letters received on February 26 and April 23, 2008, as well as publicly available information, including reports filed with the Commission.

The Presidential Committee is the principal campaign committee for Senator Dodd, who was a candidate for the nomination of the Democratic Party for President of the United States. When Senator Dodd became a candidate for President, his Presidential Committee began accepting private contributions for the general election under the conditions set forth in Advisory Opinion 2007-03 (Obama). The Presidential Committee has kept its general election contributions in a separate bank account from primary election contributions, accessible only by the Presidential Committee's Treasurer, and has tracked them separately in its accounting database.

On November 13, 2007, the Presidential Committee applied for Federal matching funds for primary election contributions. On November 27, 2007, the Commission found the Presidential Committee eligible for primary matching funds.¹ On January 3, 2008, Senator Dodd withdrew from the presidential campaign. On January 11, 2008, Senator Dodd filed a Statement of Candidacy with the Secretary of the Senate indicating his candidacy for U.S. Senate in Connecticut in the 2010 election.² In that statement, he designated the Senate Committee as his principal campaign committee for that election.

As of February 26, 2008, the Presidential Committee had \$1,706,420.30 in general election funds on hand and had refunded \$36,800 in general election contributions in response to direct, unsolicited contributor requests. On February 28 and 29, 2008, the Presidential Committee sent requests via U.S. Mail to all remaining general election contributors asking them to redesignate their contributions to the Senate Committee in writing by facsimile or U.S. Mail. The Presidential Committee paid the costs associated with sending these redesignation requests with funds received for the presidential primary election. The Presidential Committee does not anticipate sending any further requests for redesignation. As of April 22, 2008, the Presidential Committee has refunded \$462,762.00 in general election funds at the request of contributors and received signed redesignation letters for general election contributions totaling \$67,800.

¹ Press Release, Federal Election Commission, Dodd Fourth Presidential Candidate Declared Eligible for Primary Matching Funds in 2008 Race (November 27, 2007), <http://www.fec.gov/press/press2007/20071126dodd.shtml>. On December 20, 2007, the Commission certified Senator Dodd's eligibility for \$1,447,568.09 in public matching funds. Press Release, FEC Approves Matching Funds for 2008 Candidates, <http://www.fec.gov/press/press2007/20071207cert.shtml>. To date, the Presidential Committee has received the full amount for which it was certified. See Press Release, FEC Approves Matching Funds for 2008 Presidential Candidates (July 16, 2008), <http://www.fec.gov/press/press2008/20080714matching.shtml>.

² Senator Dodd had previously been a candidate for the U.S. Senate in Connecticut prior to becoming a candidate for the nomination of the Democratic Party for President, but stopped seeking Senate re-election to run for President.

Questions Presented

1. *May the Presidential Committee issue refunds and obtain redesignations for contributions designated for the presidential general election?*
2. *May the Presidential Committee consider the costs associated with issuing refunds and obtaining redesignations of general election contributions and transferring redesignated funds as “winding down costs” under 11 CFR 9034.11(a) and thus pay such costs with funds received for the presidential primary election?*

Legal Analysis and Conclusions

Question 1: May the Presidential Committee issue refunds and obtain redesignations for contributions designated for the presidential general election?

Yes, the Presidential Committee may issue refunds and obtain redesignations for contributions designated for the presidential general election as long as the Presidential Committee complies with the requirements governing the refunding and redesignation of general election funds as set forth in Commission regulations.

As a general matter, a candidate may accept contributions for the general election prior to the primary election, or in the case of a Presidential candidate, before the candidate receives his or her party’s nomination. *See* 11 CFR 102.9(e)(1). A candidate receiving such general election funds must employ “an acceptable accounting method to distinguish between contributions received for the primary election and contributions received for the general election.” *Id.*

The Commission recently addressed the application of these general rules in the context of a presidential campaign. *See* Advisory Opinion 2007-03 (Obama). In that advisory opinion, the Commission concluded that a presidential candidate does not waive his or her ability to participate in the general election public funding program by soliciting and raising general election funds before he or she secures the party’s nomination. *Id.* In reaching this conclusion, the Commission noted that a candidate’s decision to refund general election contributions in order to receive public funding would be analogous to a candidate who failed to qualify for the general election and refunded general election contributions in order to avoid accepting excessive contributions. *Id.* Accordingly, a presidential candidate receiving general election funds prior to becoming the party’s nominee, and who does not become the party’s nominee, may refund any general election funds received from contributors. *See* 11 CFR 102.9(e)(3); Advisory Opinion 2007-03 (Obama). Alternatively, the presidential candidate in such a situation may obtain redesignations for a different election in accordance with 11 CFR 110.1(b)(5) or 11 CFR 110.2. *See* 11 CFR 102.9(e)(3). Commission regulations limit the time period in which a committee may obtain redesignation to 60 days and require that impermissible funds be refunded within 60 days. *See* 11 CFR 110.1(b)(3)(i) and (b)(5); 110.2(b)(3)(i) and (b)(5); 103.3(b)(3). The Commission has previously concluded 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],” which was the date the candidate lost the primary election in AO 1992-15 (Russo), and the date the candidate withdrew from the presidential campaign in this instance. *See* Advisory Opinion 1992-15 (Russo). The Commission also has concluded that the 60-day period begins to run on the date the “funds become impermissible,” which is the date that the candidate who raises private funds for the general presidential election “certifies [to the Commission] his eligibility to receive public funds under 11 CFR 9003.2(a)(2).” *See* Advisory Opinion 2007-03 (Obama).

On January 3, 2008, Senator Dodd withdrew from the presidential race, which caused the 60-day period for obtaining redesignations and making refunds to commence to run. On February 26, 2008, the Presidential Committee filed its advisory opinion request 54 days after Senator Dodd’s withdrawal from the race, with six days remaining in the 60-day period. The Commission concludes that, because of the particular facts and circumstances presented here, the Presidential Committee has six days (the balance of the 60-day period remaining after the advisory opinion request was filed) after receiving this advisory opinion to obtain redesignations and make refunds.³

Question 2: May the Presidential Committee consider the costs associated with issuing refunds and obtaining redesignations of general election contributions as “winding down costs” under 11 CFR 9034.11(a) and, thus, pay such costs with funds received for the presidential primary election?

Yes, the Presidential Committee may pay the costs associated with refunds and redesignations of contributions received for the general election with funds received for the primary election because the refund and redesignation of general election funds would qualify as “winding down costs” under 11 CFR 9034.11(a), and therefore are “qualified campaign expenses” under 11 CFR 9034.4(a) and are not subject to the prohibition on “post-ineligibility expenditures” under 11 CFR 9034.4(b)(3).

Winding down costs are those costs associated with the termination of a presidential candidate’s efforts to obtain his or her party’s nomination, and include “the costs of complying with the post election requirements” of the Act and the Matching Funds Act. 11 CFR 9034.11(a). Refunding and redesignating contributions designated for the general election are clearly associated with the termination of political activity related to the primary election and are required to ensure compliance with the Act and Commission regulations. *Id.* Consequently, the costs associated with obtaining redesignations, transferring, and refunding general election contributions constitute “qualified campaign expenses” under 26 U.S.C. 9032(9) and 11 CFR 9034.4(a) and may be paid with presidential primary funds. *See also* 11 CFR 9034.11(b).

³ Normally, the mere filing of an advisory opinion request does not toll any statutory or regulatory deadlines. Some Commissioners believe that the 60-day deadline for obtaining redesignations and making refunds should toll here because the requestor has presented a novel legal question regarding two potentially conflicting regulations. *See* Advisory Opinion 1992-15 (Russo). Other Commissioners believe that tolling is warranted here only because on January 1, 2008, and for approximately six months thereafter, a period during which this advisory opinion was requested and remained pending, the Commission was unable to render any advisory opinions because it lacked a quorum of Commissioners.

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 respects 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 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. The cited advisory opinions are available on the Commission's website at <http://saos.nictusa.com/saos/searchao>.

On behalf of the Commission,

(signed)
Donald F. McGahn II
Chairman