FEDERAL ELECTION COMMISSION
Washington, DC 20463

July 28, 2003

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

ADVISORY OPINION 2003-18

The Honorable Bob Smith
President
American Patriot Foundation, Inc.
404 D Street, N.E.
Washington, DC 20002

Dear Senator Smith:

This responds to your letters dated May 16 and June 10, 2003, requesting an advisory opinion on behalf of Bob Smith for U.S. Senate, concerning the application of the Federal Election Campaign Act of 1971, as amended ("the Act"), and Commission regulations to the proposed transfer of funds contributed for the general election to the American Patriot Foundation ("APF"), which is a public charitable foundation that you recently established.

You were a candidate for the United States Senate from New Hampshire in 2002, and were defeated in the Republican primary held on September 10, 2002. Bob Smith for U.S. Senate ("the Committee") was your principal campaign committee. Before the primary election, the Committee accepted contributions for both the primary and general elections.

You indicate that, after the September 10, 2002 primary election, you wrote to all the general election contributors and inquired as to their desires with respect to contributions they had designated in writing for the general election. You specifically offered them an opportunity to request a refund. Refund checks were subsequently sent to every contributor (both individuals and PACs) who requested a refund or failed to respond to your letter. Each refund check bore the restriction that it must be cashed within 90 days of issuance. To date, roughly $60,000 in refund checks, which are no longer valid instruments due to the date restriction, have not been cashed. You ask whether the remaining cash on hand from these contributions designated for the general election may be donated to help establish your charitable foundation, APF.

APF was incorporated in the District of Columbia as a non-profit corporation on March 10, 2003, and subsequently filed Form 1023 with the Internal Revenue Service ("IRS") for recognition as a tax-exempt organization under 26 U.S.C. 501(c)(3) on March 18, 2003. The articles of incorporation state that APF is a "non-partisan, non-profit national foundation with the primary function of educating the American public as to the importance and relevance in today's society of" the U.S. Constitution, the Declaration of Independence, the Federalist Papers and other founding documents. APF will strive to accomplish these goals through educating and advocating the importance of patriotism to the public. You state that neither your family members nor you will be compensated by APF. At some point, APF may employ one or more of your former official staff members, but this will not occur until all the funds donated from the Committee's general election account have been lawfully expended.

You state that, if the IRS does not accord APF recognition as a section 501(c)(3) organization, the Committee would donate the general election campaign funds to some other charity that is described in 26 U.S.C. 170(c). You state that the Committee has already donated leftover funds from its primary election account to APF.[1]

Analysis and Conclusions

A candidate may accept contributions for the general election prior to the primary election if the contributions are specifically designated by the contributor for the general election. *See* 11 CFR 102.9(e), 11 CFR 110.1(b)(2)(i) and 11 CFR 110.2(b)(2)(i).[2] However, upon receiving such contributions, a candidate's authorized committee must employ an acceptable accounting method to distinguish between contributions designated for the primary and for the general election, respectively. 11 CFR 102.9(e)(1).

If a candidate properly receives and handles contributions designated for the general election, yet does not become a candidate in the general election, the disposition of these general election contributions is expressly limited by Commission regulations. A candidate who fails to qualify for the general election must either refund all such contributions, or obtain redesignations of those contributions in accordance with 11 CFR 110.1(b)(5), and 110.2(b)(5),[3] or a combination of reattributions and redesignations of the

[1] This advisory opinion addresses only the narrow question presented in your request, which is whether the Committee may donate the funds from those general election receipts that remain in the campaign's bank account because checks refunded to contributors were never cashed. This advisory opinion does not address issues pertaining to the options offered to the contributors in your post-primary letters to them (*e.g.*, redesignation), other ways in which the Committee may already have expended funds, or whether refunds were sent within the appropriate time frame. *See* 11 CFR 110.1(b), 110.2(b), and 103.3(b)(3).

[2] The regulation on which this analysis is based was amended to implement BCRA, and for other purposes, but those amendments do not change the analysis applicable to your situation.

[3] In this case, the Committee may not redesignate funds specifically designated for the general election. The time limit for the redesignation or refund of contributions is 60 days from the date the funds become impermissible. 11 CFR 110.1(b)(3)(i), 110.2(b)(3)(i), 110.1(b)(5), 110.2(b)(5), and 103.3(b)(3). Here, the general election funds became impermissible for use as campaign funds as of the date of the primary election, which was September 10, 2002. Thus, the last day to redesignate or refund the contributions was November 9, 2002. *See* Advisory Opinion 1992-15.

contributions in accordance with 11 CFR 110.1(k)(3). 11 CFR 102.9(e)(3), 110.1(b)(3)(i), and 110.2(b)(3)(i); *see also* 11 CFR 103.3(b)(3). Because you were defeated in the primary election, you were never a candidate for the general election, and consequently no separate contribution limit with respect to the general election was available to contributors. *See* 11 CFR 110.1(b) and 110.2(b).[4] Thus, the contributions received during the primary election period that were specifically designated for the general election must not be treated as permissible campaign funds, and such funds are not usable in accordance with 2 U.S.C. 439a and 11 CFR Part 113.[5] *See* Advisory Opinions 1988-41, 1986-17 and 1980-122. The funds comprised of contributions designated for the general election may not be donated to APF because such use is not among the uses permitted in 11 CFR 102.9(e)(3), 110.1(b)(3)(i), and 110.2(b)(3)(i).

The Act and Commission regulations do not specifically address the situation where an attempt to refund contributions proves unsuccessful. However, in analogous circumstances the regulations require disgorgement to the United States Treasury.[6] The regulations provide that refund checks must be *issued* once a candidate is no longer a candidate in the general election. 11 CFR 102.9(e)(3). However, the regulations do not specify a time-frame in which the refund process must be *completed*; i.e., when the refund

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[4] Advisory Opinion 1997-1, which you cited for the proposition that the general election funds may be donated to APF, is inapposite. Unlike you, the candidate in Advisory Opinion 1997-1 did not propose to use funds raised for an election in which he was not a candidate.

[5] 2 U.S.C. 439a(a)(3) and 11 CFR 113.2(b) specifically permit a candidate to transfer funds to any organization described in section 170(c) of Title 26, of the United States Code, which defines "charitable contributions" to include 501(c)(3) organizations. However, these provisions are not applicable in this situation because both 2 U.S.C. 439a and 11 CFR Part 113 are conditioned upon the permissibility of the contributions received by the committee.

[6] This conclusion conforms to the policy underlying regulations controlling the disposition of national party committee non-Federal funds, including office building account funds, under the Bipartisan Campaign Finance Reform Act ("BCRA"). 11 CFR 300.12(c) and (d) require national party committees to disgorge all impermissible non-Federal funds remaining on February 28, 2003, meaning those resulting from uncashed refund checks, to the U.S. Treasury. The Commission expressed concern that allowing the now-impermissible non-Federal funds to be directed to 501(c)(3) organizations, which might use the funds for Federal election activity, would undermine the law. "Prohibited or Excessive Contributions: Non-Federal Funds or Soft Money; Final Rule" 67 Fed. Reg. 49091-49092 (July 29, 2002). Moreover, the conclusion in this advisory opinion is consistent with the provisions in Commission regulations for stale-dated, no longer cashable, checks issued by the authorized committees of publicly funded presidential candidates in the primary or general election and by publicly funded national party convention committees. 11 CFR 9007.6, 9008.16, and 9038.6. These regulations provide that the committees must submit a check for the total amount of such outstanding checks, payable to the U.S. Treasury. Frequently, such stale dated checks are contribution refunds.

In *Fireman v. United States*, 44 Fed.Cl. 528 (1999), the court addressed a claim from a contributor to a principal campaign committee whose unlawful corporate contribution was disgorged by the committee to the U.S. Treasury rather than refunded to the contributor. The court did not defer to the Commission's conclusion in Advisory Opinion 1996-5 that allowed a committee to disgorge unlawful contributions instead of making a refund within a specified time after discovering the illegality, as required in 11 CFR 103.3(b). 44 Fed.Cl., at 538-539. Your situation is materially different, however, because the Committee has already unsuccessfully attempted to refund the contributions. Thus, the conclusion in *Fireman* does not undermine the conclusion herein.

checks must clear the campaign committee's accounts. In this case, the Committee properly issued refund checks but provided 90 days for the checks to become stale. In an analogous regulation, which deals with the refund of "excess contributions" under the so-called "Millionaire's Amendment," the refund must be issued within 50 days of the relevant election, and any refund check not cashed or deposited within six months of the check's date must be disgorged to the United States Treasury. 11 CFR 400.53; *see also* 11 CFR 400.51. Accordingly, the Commission concludes that it is appropriate to grant the Committee more time to finish the refund process already properly begun before requiring the funds in question to be disgorged to the U.S. Treasury. Therefore, the Committee may continue to complete the refund process within 90 days of the receipt of this opinion. Any unrefunded general election contributions still in the Committee's possession at the end of the 90 days must be disgorged to the U.S. Treasury on that date.

To make the disgorgement, the Committee must deliver to the Commission a check in the full amount of the undeposited or uncashed refunds, payable to the Treasury of the United States. In addition, the Committee must fully disclose the payment as a disbursement on its appropriate FEC report. 2 U.S.C. 434(b)(6)(A), 11 CFR 104.3(b)(4)(vi).

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 opinion, then the requester may not rely on that conclusion as support for its proposed activity.

Sincerely,

(signed)

Ellen L. Weintraub
Chair

Enclosures (AOs 1997-1, 1996-5, 1992-15, 1988-41, 1986-17, and 1980-122).