



FEDERAL ELECTION COMMISSION
Washington, DC 20463

December 19, 2003

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

ADVISORY OPINION 2003-30

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

Dear Messrs. Ginsberg and Willard:

This responds to your letters dated June 24, September 26, and December 5, 2003, requesting an advisory opinion on behalf of Fitzgerald for Senate Committee (“the Committee”) and Senator Peter Fitzgerald, concerning the application of the Federal Election Campaign Act of 1971, as amended (“the Act”), and Commission regulations to the permissible uses of contributions designated for or attributed to the 2004 primary election, for which Senator Fitzgerald is no longer a candidate.

Background

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

¹ 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.

You state that as of April 15, 2003, the Committee had \$984,812.09 in total cash-on-hand and \$2.9 million in net liabilities. You state that the Committee wishes to use approximately \$526,000 of the total cash-on-hand² for one or more of four contemplated purposes: (1) Contributions to an organization described in section 170(c) of the Internal Revenue Code; (2) transfers to a national, State, or local political party committee; (3) repayment of debt incurred in the 1998 primary and general elections, and 2004 primary election; and (4) refunds to individuals who contributed for the 2004 primary election.

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

You state that the \$526,000 cash-on-hand for one or more of the contemplated purposes is from individuals, political committees, and interest accrual. You ask a series of questions about the permissible uses of the \$526,000 cash-on-hand.

Legal Analysis and Conclusions

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

Under the Act, there are four categories of permissible uses of campaign funds: (1) otherwise authorized expenditures in connection with the candidate's campaign for Federal office; (2) ordinary and necessary expenses incurred in connection with the duties of the individual as a holder of Federal office; (3) contributions to organizations described in 26 U.S.C. 170(c); and (4) transfers, without limitation, to national, State or local political party committees. 2 U.S.C. 439a(a); *see also* 11 CFR 113.2. Such uses are permitted provided that they do not result in campaign funds being converted to personal use by any person. 2 U.S.C. 439a(b)(1). The Commission's regulations define personal use as "any use of funds in a campaign account of a present or former candidate to fulfill a

² You explained by phone on October 16, 2003 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 administrative costs, including campaign-related legal expenses.

commitment, obligation or expense of any person that would exist irrespective of the candidate's campaign or duties as a Federal officeholder.”³

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

Questions 1 and 2

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

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

As noted above, these uses of campaign funds are explicitly authorized under 2 U.S.C. 439a(a). Thus, the Committee may use some or all of the \$526,000 cash-on-hand for contributions to a 170(c) organization or for transfers to a national, State, or local committee of a political party, provided that such contributions or transfers do not convert the cash-on-hand into personal use by Senator Fitzgerald.

Question 3

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

- (a) *LaSalle Bank, N.A. for obligations incurred in the 1998 primary and general elections?*

³ 11 CFR 113.1(g). *See also* 2 U.S.C. 439a(b)(2) and Advisory Opinion 1996-9, 1997-1 (the latter permitting donation of former principal campaign committee’s cash balance to proposed charitable organization provided that none of the donated funds would be distributed as compensation to the candidate, his family, or any entity controlled by or employing the candidate or a member of his family, which would constitute personal use). 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 and Justification for Disclaimers, Fraudulent Solicitations, Civil Penalties, and Personal Use of Campaign Funds; Final Rule; 67 Fed. Reg. 76962, 76970-71 (Dec. 13, 2002).

- (b) *Senator Fitzgerald for loans he made to the Committee with respect to the 1998 primary and general elections?*
- (c) *Non-bank, non-candidate creditors for obligations incurred in the 1998 primary and general elections, and for which the amount of debt is disputed?*
- (d) *Non-bank, non-candidate creditors for obligations incurred for the 2004 primary?*

Some or all of the Committee's \$526,000 cash-on-hand may be used to repay debts the committee owes to a) LaSalle Bank, N.A. for loans incurred in the 1998 primary and general election; b) Senator Fitzgerald for loans he made to the Committee in connection with the 1998 elections; c) non-bank, non-candidate creditors for disputed debts incurred in connection with the 1998 elections; and d) expenses incurred for the 2004 primary election. Repayment of debts listed in a), b), c) and d) is a permissible use of the cash-on-hand since the cash-on-hand consists of contributions lawfully made for the 2004 primary election for which Senator Fitzgerald was a candidate and debt repayment is an authorized expenditure in connection with Senator Fitzgerald's campaign for Federal office. *See* 2 U.S.C. 431(9)(A); 11 CFR 100.111; Advisory Opinion 1989-22.

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

Question 4

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

Under the Act, authorized expenditures in connection with a campaign for Federal office is a permissible use of campaign funds. 2 U.S.C. 439a(a)(1). Refunding contributions is not only authorized but in certain circumstances required by Commission regulations. *See e.g.* 11 CFR 103.3 and 102.9(e)(3). Therefore, using the cash-on-hand to make refunds to contributors of contributions designated for or attributed to the 2004 primary is permissible. Further, Commission regulations require refunding, or redesignation, of all contributions made for a general election in which the candidate to whom the contributions were made does not qualify as a candidate, as you state you have

already done with respect to the 2004 general election, since Senator Fitzgerald is not running for re-election and will not qualify as a candidate in that election. 11 CFR 102.9(e)(3) and 110.1(b)(3); *see also* Advisory Opinion 2003-18.

Question 5

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

The Commission's post-BCRA regulations at 11 CFR 116.11 pertaining to repayment of certain personal loans from the candidate do not apply to the retirement of the Committee's debt owed to Senator Fitzgerald incurred in connection with pre-BCRA elections. BCRA added section 441a(j) to the Act, which limits the amount of a candidate's personal loan that may be repaid with contributions to the candidate or the candidate's authorized committee where the contributions were made after the election. The Commission in promulgating new section 116.11 noted that 2 U.S.C. 441a(j) specifically states that it applies only to personal loans from candidates that are made after November 6, 2002 and "[t]hus, the limitations on repayment of personal loans from contributions made after the respective election do not apply to personal loans made before this date." *Explanation & Justification: Increased Contribution and Coordinated Party Expenditure Limits for Candidates Opposing Self-Financed Candidates; Interim Final Rule*, 68 *Fed. Reg.* 3970, 3974 (Jan. 27, 2003). The Committee's 1998 primary and general election debt to Senator Fitzgerald was incurred May 12, 1997 and April 16, 1998, before November 6, 2002, and therefore new 11 CFR 116.11 does not apply here. The Committee is not limited in the amount of its debt owed to Senator Fitzgerald that it may repay with 2004 primary contributions, even those contributions received after November 6, 2002.

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 requestor may not rely on that conclusion as support for its proposed activity.

Sincerely,

(signed)

Ellen L. Weintraub
Chair

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