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July 13, 2010

AOR 2010-15

BY HAND DELIVERY

Thomasenia Duncan, Esq.
General Counsel
Federal Elections Commission
999 E Street N.W.
Washington, D.C. 20463

Re: Advisory Opinion Request on behalf of Pike for Congress

Dear Ms. Duncan:

Pursuant to 2 U.S.C. § 437f, we seek an advisory opinion on behalf of Pike for Congress, the principal campaign committee ("the Committee") for Doug Pike, who ran unsuccessfully in the 2010 Democratic primary election for the House of Representatives in Pennsylvania's Sixth Congressional District. The Committee seeks confirmation that it may refund to Mr. Pike the general election contributions that he made prior to the primary election.

I. FACTUAL DISCUSSION

On December 31, 2009, Mr. Pike deposited \$340,000 of his personal funds into the Committee's account; on March 31, 2010, he deposited an additional \$100,000 into the Committee's account. Mr. Pike decided to make the contributions *before* the primary, because he wanted to demonstrate the financial strength of his campaign to the press and to Democratic primary voters.¹ At all times, however, Mr. Pike intended that these funds be used only for the general

¹ Greg Giroux, *CQ Politics Top 10: Best-Funded House Challengers* (Apr. 20, 2010), available at, <http://blogs.cqpolitics.com/eyeon2010/2010/04/cq-politics-top-10-bestfunded-1.html> (last visited on July 3, 2010) ("Pike ... has put in nearly \$1.1 million of his own money. He'll square off against Rep. Jim Gerlach in the fall, provided he first beats physician Manan Trivedi in a Democratic primary. Gerlach has a relatively low cash-on-hand total ...").

election.²

When he made the deposits, Mr. Pike did not clearly communicate his intention to the person responsible for preparing his FEC reports. Consequently, the \$440,000 were reported as primary election contributions. But the deposits were nonetheless treated as general election contributions.³ The Committee's budget did *not* consider these funds available for the primary election. And even in the course of losing a competitive primary, the Committee kept these funds on hand. It expects to report having more than \$530,000 cash on hand in its second quarter filing, and that number does *not* include the \$77,648 in general election contributions that it has already refunded. The Committee has not refunded any contributions to Mr. Pike and has kept these funds on hand pending final determination of this request.

Mr. Pike narrowly lost the May 18 primary election. He has no plans to seek federal office in the future.

II. LEGAL DISCUSSION

Under the Federal Election Campaign Act of 1971, as amended (the "Act") and Federal Election Commission regulations (the "regulations"), campaigns generally "have complete discretion in refunding otherwise permissible contributions, since these refunds are not required or limited by the Act or the regulations."⁴ However, "refunds of excess campaign funds are subject to the prohibition on the conversion of campaign funds to personal use."⁵

Although the personal use restrictions apply to payments of excess funds to candidates, the Federal Election Commission (the "Commission") has never held that the return of personal funds to a candidate is *per se* "personal use."⁶ Moreover, the Commission has yet to reconcile the "personal use" restrictions with the strict mandate that "any contributions made for the general election" be refunded or re-designated in the event that the candidate does not qualify for the general election.⁷ On these unusual facts, where the candidate made a general election contribution before the primary, the Commission should allow the refund. While there may be

² In contrast, earlier in the election cycle, Mr. Pike deposited more than \$600,000 from his personal funds into the committee account, which he authorized to be used for the primary election, and which the Committee indeed spent.

³ The campaign will amend its FEC reports to properly report the deposits as general election contributions.

⁴ See FEC Adv. Op. 1996-52 (Andrews).

⁵ *Id.*

⁶ See FEC Adv. Ops. 2007-7 (Craig), 2006-37 (Kissin), 1997-21 (Firebaugh).

⁷ See 11 C.F.R. § 102.9(e)(3).

"personal use" concerns when a committee exercises discretion to grant a refund to a candidate – and not to its other contributors – these concerns are not present when the Committee is *compelled by law* to refund certain contributions and the candidate's contribution happens to fall within that group. Consequently, the Committee should be allowed to refund to Mr. Pike the \$440,000 in general election deposits.

A. The "personal use" rule is not a *per se* bar on the refund of contributions made from a candidate's personal funds.

The Act prohibits the conversion of campaign funds "*by any person* to personal use."⁸ The ban does not discriminate among recipients of candidate funds. It applies in the exact same way "regardless of whether the beneficiary is the candidate, a family member of the candidate, or some other person."⁹ For example, the use of campaign funds to pay for a *donor's* vacation is just as impermissible as the use of campaign funds to pay for a *candidate's* vacation.

Certain types of expenses – including household items, funeral expenses, clothing, tuition payments, mortgage or rent payments, entertainment tickets, country club fees, certain salary payments, and vacations – are considered *per se* "personal use."¹⁰ With respect to other uses of campaign funds, the regulation directs the Commission to make determinations on a "case-by-case basis."¹¹ The refund of candidate contributions is *not* among the uses listed as *per se* "personal use." There is a good reason for this. Because the personal use rule treats all beneficiaries identically, if the Commission treated the refund of candidate contributions as *per se* personal use, it would have to treat the refund of all other contributions as *per se* personal use as well. Commission precedent – and common sense – confirm that this is not the case.¹²

In addition, the proposed refund would not implicate the concerns underlying the "personal use" regulation. The "personal use" regulation serves two fundamental purposes. First, it prevents donors from enjoying the special, additional leverage that would occur if office holders relied on campaign funds to subsidize day-to-day expenses or pay for big-ticket personal items. Second, it assures donors that their contributions will further the candidate's campaign, rather than the

⁸ See 2 U.S.C. § 439a(b)(1) (emphasis added).

⁹ See Contribution and Expenditure Limitations and Prohibitions: Personal Use of Campaign Funds; Final Rule, 60 F.R. 7862, 7864 (Feb. 9, 1995). By this illogic, a candidate whose spouse donated for the general election would not be able to make the necessary refunds under § 102.9(e), because the payment to the spouse – just like the payment to the candidate – would be prohibited "personal use."

¹⁰ See 11 C.F.R. § 113.1(g)(1)(i).

¹¹ See *id.* § 113.1(g)(1)(ii).

¹² See FEC Adv. Ops. 1996-52, 1980-147 (Hunter) (approving of plans to refund contributions).

candidate's personal life. Neither concern is implicated when a former candidate, having lost his primary, seeks the return of contributions that he made to his own campaign.

Furthermore, as the Commission has recognized, the mere return of campaign funds to a candidate does not necessarily violate the "personal use" prohibition. On several occasions, the Commission has allowed committees to repay "loans" to candidates – even if the "loan" was initially reported as a "contribution" – despite the fact that the candidate could convert the funds to "personal use":

- In AO 2007-7, a former congressional candidate provided personal funds to his committee to retire campaign debt. These deposits were initially reported as "contributions." Because the candidate "intended the funds to be treated as loans," the Commission allowed the committee to raise additional contributions in an amount equaling the candidate's deposits. In the event that the committee was able to raise these additional contributions, it could pay them directly to the candidate.¹³
- In AO 2006-37, a congressional candidate provided personal funds to his campaign to pay for campaign expenditures in the primary. These deposits were initially reported as "contributions." Because the candidate "intended to be reimbursed for the ... total of both deposits to the extent funds were available after all Committee expenses were paid," the Commission allowed the committee to disburse all excess funds to the candidate.¹⁴
- In AO 1997-21, a former congressional candidate "advanced" some of her personal funds to pay off an outstanding campaign loan. This "advance" was initially reported as an "in-kind contribution." Because "[i]t was the understanding of the candidate 'at the time that the Committee would repay me, if possible,'" the Commission allowed the committee to disburse the proceeds from a vendor refund to the candidate.¹⁵
- In AO 1980-147, a former Senate candidate "donated" some of his personal funds to his campaign committee to finance a 75% refund for each of his contributors. When some contributors failed to cash their refund checks, the candidate asked whether he could be paid the Committee's remaining funds. Because the "full amount donated by [the candidate] would not have been necessary if the [c]ommittee had known that over \$5,000 of the refunds would be rejected," the Commission allowed the committee to disburse the

¹³ See FEC Adv. Op. 2007-7.

¹⁴ See FEC Adv. Op. 2006-37.

¹⁵ See FEC Adv. Op. 1997-21.

remaining funds to the candidate.¹⁶

The Commission has tried to find a statutory basis to distinguish between the refund of candidate contributions and the repayment of candidate loans. It has argued that while "debt repayment is an authorized expenditure in connection with that candidate's campaign for Federal office," the refund of contributions is not.¹⁷ Upon closer examination, the statute does not support this distinction. An "expenditure" includes "any purchase, *payment*, distribution, loan, advance, deposit, or gift of money or anything of value, made by any person for the purpose of influencing any election for Federal office."¹⁸ The term "payment," however, "*does not include the repayment by a political committee of the principal of an outstanding obligation* that is owed by such committee, except that the repayment shall be reported as a disbursements in accordance with 11 CFR 104.3(b)."¹⁹ Consequently, a loan repayment is *not* an "expenditure" under the Act. In fact, the regulations treat loan repayments and contribution refunds in the exact same way – they are permissible uses of campaign funds but are not "operating expenditures."²⁰ For "personal use" purposes, there is no difference between the mandatory repayment of a loan and the lawfully compelled refund of a general election contribution.

B. There is no "personal use" concern when the candidate's contribution is among a group of contributions that *must* be refunded.

Even though the refund of candidate contributions is not *per se* "personal use," there are some imaginable situations in which the refund of a candidate's contribution could violate the "personal use" regulation. For example, if a committee exercised discretion to make refunds to the candidate – but not to other donors – there could be a violation.

¹⁶ See FEC Adv. Op. 1980-147. In AO 1977-58, the Commission refused to allow a committee to re-characterize a "contribution" from a candidate into a loan. The Commission said that allowing the re-characterization would "contravene the obvious intent of [the statute] that debts and obligations be initially disclosed in a timely manner and be continuously reported thereafter until extinguished." But since then, the Commission has allowed for "retroactive classification[s]" even where there was "no contemporaneous evidence in the record" of the candidate's intent at the time of the deposit. See Concurring Opinion of Commissioner Scott E. Thomas, Advisory Opinion 1997-21. As a result, AO 1977-58 has been superseded by later opinions.

¹⁷ See, e.g. FEC Adv. Op. 2007-7, citing 2 U.S.C. § 439a(a)(1).

¹⁸ See 2 U.S.C. § 431(9)(A)(i) (emphasis added).

¹⁹ See 11 C.F.R. § 100.111(c) (emphasis added).

²⁰ See *id.* § 104.3(b)(2)(iii), (v). Whereas "operating expenditures" are reported on Line 17 of FEC Reports, loan repayments and contribution refunds are reported on Lines 19 and 20, respectively.

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That is not the case here.²¹ Having lost the Democratic primary, Mr. Pike is not a candidate in the general election. If "a candidate is not a candidate in the general election, any contributions made for the general election shall be refunded to the contributors, redesignated in accordance with 11 CFR 110.1(b)(5), or reattributed in accordance with 11 CFR 110.1(k)(3), as appropriate."²² This provision is mandatory. It contains no exemptions for contributions made by a candidate.²³

Since the Committee must refund all general election contributions – the \$440,000 in general election deposits made by Mr. Pike and the \$77,648 in general election contributions from other contributors – Mr. Pike would be treated no differently than any other similarly situated contributor. The Commission has regarded it as "significant" when a committee executing a refund plan "has limited its own discretion over these refunds."²⁴ Likewise, in other situations where the law compels a refund – e.g., an excessive contribution made by a family member – the Commission has mandated that it take place, even though the recipient could convert the refund to "personal use."²⁵

The absence of a written designation does not alter the nature of Mr. Pike's contribution or the Committee's obligation to refund. The regulations generally require a contributor to designate, in writing, a contribution for a particular election; otherwise, the contribution is designated for "the next election ... after the contribution is made."²⁶ This provision was enacted to "clarify that designations must be made by the contributor and not the recipient committee."²⁷ Where the contributor *is* the candidate, however, this concern is inapposite. When "determining the nature of a transaction between a candidate and the candidate's authorized committee, the Commission has taken into account not only the way in which the transaction was reported, but also affidavits

²¹ For example, the Committee is *not* proposing the return of the more than \$600,000 that Mr. Pike made for the primary campaign.

²² See *id.* § 102.9(e)(3).

²³ See FEC Adv. Op. 2003-18 (Smith) (emphasis added) ("*A candidate who fails to qualify for the general election must either refund all such contributions, or obtain re-designations of those contributions.*").

²⁴ See FEC Adv. Op. 1996-52.

²⁵ See Statement of Reasons of Commissioner Bauerly and Weintraub, MUR 5724 (Dec. 15, 2009) (noting that candidate refunded an impermissible contribution from his mother and not raising any "personal use" issues).

²⁶ See 11 C.F.R. § 110.1(b)(2)(ii).

²⁷ See Contribution and Expenditure Limitations and Prohibitions; Contributions by Persons and Multicandidate Political Committees, 52 F.R. 760, 762 (Jan. 9, 1987).

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evidencing the intent of the parties involved in the transactions."²⁸ As the attached affidavit shows, there is no doubt that the candidate intended for the \$440,000 to be used only for the general election.

If the Commission denied this request, it would result in a significant exception to 11 C.F.R. §102.9(e). Nothing in the Act or the regulations justifies the creation of such an exception. Because Mr. Pike lost the primary on May 18, and because § 102.9(e) requires refunds of general election contributions to be made by July 17, we ask the Commission to either expedite the consideration of this request, or affirm that the Committee may lawfully meet its requirements under § 102.9(e) if it refunds Mr. Pike's contributions after that date.²⁹

Please do not hesitate to call us should you have any questions.

Very truly yours,



Brian G. Svoboda
Jonathan S. Berkon
Counsel to Pike for Congress

²⁸ See FEC Adv. Op. 2007-7.

²⁹ See FEC Adv. Op. 1992-15 (Russo) (tolling the 60-day deadline on the date that candidate requested advisory opinion and re-starting the clock on the date that Commission issued opinion).

AFFIDAVIT OF DOUG PIKE

I, Doug Pike, hereby state as follows:

1. I have personal knowledge of the facts set forth herein.
2. I was a first-time candidate for the House of Representatives in the Sixth Congressional District, in the State of Pennsylvania. Pike for Congress (the "Committee") was my principal campaign committee. On May 18, I lost the Democratic primary. I have no plans to seek federal office in the future.
3. During the course of the primary campaign, I contributed more than \$600,000 to be used during the primary campaign. These contributions were spent during the primary campaign.
4. On December 31, 2009, I deposited an additional \$340,000 into the Committee's account; on March 31, 2010, I deposited an additional \$100,000 into the Committee's account.
5. When I made these deposits, I intended that they only be used in the event that I won the primary and qualified for the general election. I did not intend for them to be spent during the primary election.
6. I made these deposits on the last day of the reporting periods for the fourth quarter (2009) and first quarter (2010) respectively. I did so in order to demonstrate the financial viability of my campaign to defeat Jim Gerlach in the general election for the Sixth Congressional District.
7. I was unaware of any requirement to designate these contributions, in writing, for the general election. I also did not communicate this designation to the person responsible for preparing my FEC reports.
8. At all times, I considered these deposits to be general election contributions. My campaign did not treat these deposits as being available for the primary election and these deposits were not spent during the primary election.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed this 2nd day of July, 2010.



DOUG PIKE

CQ Politics Top 10: Best-Funded House Challengers

By Greg Groux | April 20, 2010 1:41 PM | [Permalink](#) | [Comments \(0\)](#)

It only took a few strokes of a pen for Ohio car dealer Tom Ganley (R) to become the best-funded challenger to a House incumbent thus far this cycle.

Ganley, who's challenging Rep. Betty Sutton (D) in the Democratic-leaning 13th district in and around Akron, cut his campaign a \$2 million check on March 31, the final day of the first quarter. He raised a little money from individuals and political action committees and began April with \$2.01 million to spend for his campaign against Sutton, who had \$281,000 in her campaign account.

Here's the rest of the 10 best-financed challengers to House incumbents as April began, according to a CQ Politics analysis of reports that were recently filed with the Federal Election Commission. The figure after each candidate's name is his or her cash-on-hand total.

Rob Miller (D-S.C.), \$1.7 million. Miller, an Iraq war veteran, has raised a ton of money this cycle because his opponent is Rep. Joe Wilson (of "you lie!" fame). But Wilson, who beat Miller in 2008, raised even more money and is sitting on more than \$2.1 million.

Randy Altschuler (R-N.Y.), \$1.5 million. Altschuler, a businessman who is seeking the Long Island-based 1st district, loaned his campaign \$860,000 in the first quarter. Other Republicans are seeking the nomination to oppose Rep. Timothy H. Bishop (D), who has \$1.2 million in the bank.

Doug Pike (D-Pa.), \$1.2 million. Pike, a former editorial writer for the Philadelphia Inquirer, has put in nearly \$1.1 million of his own money. He'll square off against Rep. Jim Gerlach in the fall, provided he first beats physician Manan Trivedi in a Democratic primary. Gerlach has a relatively low cash-on-hand total (\$336,000) because he announced only in January that he would seek re-election after waging a months-long campaign for governor that stalled.

Allen West (R-Fla.), \$1.1 million. West, a retired Army lieutenant colonel who is running in the 22nd district, took in \$838,000 in the first three months of this year. His November opponent, Rep. Ron Klein (D), is one of the House's top fundraisers, and he had nearly \$2.7 million on hand as April began.

Ami Bera (D-Calif.), \$977,000. Bera, a physician, has been raising money impressively as he campaigns against Rep. Dan Lungren (\$650,000) in the Sacramento-area 3rd district.

Suzan DelBene (D-Wash.), \$839,000. DelBene has a business background that includes a tenure at Microsoft. She's challenging Rep. Dave Reichert (\$716,000) in a suburban Seattle district that has been trending Democratic.

John Callahan (D-Pa.), \$831,000. Callahan is the mayor of Bethlehem, one of the population centers of Pennsylvania's 15th district, where Rep. Charlie Dent (\$825,000) is seeking a fourth term.

Matt Doheny (R-N.Y.), \$813,000. Doheny, a wealthy businessman, wants a crack at New York Rep. Bill Owens (\$383,000), who won a special election last November in the upstate 23rd district. But so does Doug Hoffman (\$263,000), who narrowly lost to Owens as the nominee of the Conservative Party after most Republican voters shunned liberal GOP nominee Dede Scozzafava.

Steve Chabot (R-Ohio), \$802,000. Chabot is challenging Rep. Steve Driehaus (\$940,000) in a rematch of a 2008 Ohio race that Driehaus won by 5 percentage points to end Chabot's 14-year run as the House member for most of Cincinnati.

