

PUBLIC COMMENTS ON DRAFT ADVISORY OPINIONS

Members of the public may submit written comments on draft advisory opinions.

DRAFT ADVISORY OPINION 2010-17 is now available for comment. It was requested by Christopher M. Marston of Election CFO, on behalf of Stutzman for Congress, and is scheduled to be considered by the Commission at its public meeting on Thursday, September 23, 2010.

If you wish to comment on the DRAFT ADVISORY OPINION 2010-17, please note the following requirements:

- 1) Comments must be in writing, and they must be both legible and complete.
- 2) Comments must be submitted to the Office of the Commission Secretary by hand deliver or fax ((202) 208-3333), with a duplicate copy submitted to the Office of General Counsel by hand delivery or fax ((202) 219-3923).
- 3) Comments must be received by noon (Eastern Time) on Wednesday, September 22, 2010.
- 4) The Commission will generally not accept comments received after the deadline. Requests to extend the comment period are discouraged and unwelcome. An extension request will be considered only if received before the comment deadline and then only on a case-by-case basis in special circumstances.
- 5) All timely received comments will be made available to the public at the Commission's Public Records Office and will be posted on the Commission's website at <http://saos.nictusa.com/saos/searchao>.

REQUESTOR APPEARANCES BEFORE THE COMMISSION

The Commission has implemented a pilot program to allow advisory opinion requestors, or their counsel, to appear before the Commission to answer questions at the open meeting at which the Commission considers the draft advisory opinion. This program took effect on July 7, 2009.

Under the program:

- 1) A requestor has an automatic right to appear before the Commission if any public draft of the advisory opinion is made available to the requestor or requestor's counsel less than one week before the public meeting at which the advisory opinion request will be considered. Under these circumstances, no advance written notice of intent to appear is required. This one-week period is shortened to three days for advisory opinions under the expedited twenty-day procedure in 2 U.S.C. 437f(a)(2).**

- 2) A requestor must provide written notice of intent to appear before the Commission if all public drafts of the advisory opinion are made available to requestor or requestor's counsel at least one week before the public meeting at which the Commission will consider the advisory opinion request. This one-week period is shortened to three days for advisory opinions under the expedited twenty-day procedure in 2 U.S.C. 437f(a)(2). The notice of intent to appear must be received by the Office of the Commission Secretary by hand delivery, email (Secretary@fec.gov), or fax ((202) 208-3333), no later than 48 hours before the scheduled public meeting. Requestors are responsible for ensuring that the Office of the Commission Secretary receives timely notice.**

- 3) Requestors or their counsel unable to appear physically at a public meeting may participate by telephone, subject to the Commission's technical capabilities.**

- 4) Requestors or their counsel who appear before the Commission may do so only for the limited purpose of addressing questions raised by the Commission at the public meeting. Their appearance does not guarantee that any questions will be asked.**

FOR FURTHER INFORMATION

Press inquiries: Judith Ingram
Press Officer
(202) 694-1220

Commission Secretary: Shawn Woodhead Werth
(202) 694-1040

Comment Submission Procedure: Rosemary C. Smith
Associate General Counsel
(202) 694-1650

Other inquiries:

To obtain copies of documents related to 2010-17, contact the Public Records Office at (202) 694-1120 or (800) 424-9530, or visit the Commission's website at <http://saos.nictusa.com/saos/searchao>.

ADDRESSES

Office of the Commission Secretary
Federal Election Commission
999 E Street, NW
Washington, DC 20463

Office of General Counsel
ATTN: Rosemary C. Smith, Esq.
Federal Election Commission
999 E Street, NW
Washington, DC 20463

AGENDA DOCUMENT NO. 10-58

RECEIVED
FEDERAL ELECTION
COMMISSION
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AGENDA ITEM



FEDERAL ELECTION COMMISSION
Washington, DC 20463

For Meeting of 9-23-10

September 17, 2010

MEMORANDUM

SUBMITTED LATE

TO: The Commission

FROM: Christopher Hughey *pch*
Acting General Counsel

Rosemary C. Smith *RCS by RMK*
Associate General Counsel

Robert M. Knop *RMK*
Assistant General Counsel

Joanna S. Waldstreicher *JSW*
Attorney

Subject: Draft AO 2010-17 (Stutzman for Congress)

Attached is a proposed draft of the subject advisory opinion. We have been asked to place this draft on the agenda for September 23, 2010.

Attachment

1 ADVISORY OPINION 2010-17

2
3 Christopher M. Marston
4 Election CFO
5 P.O. Box 26141
6 Alexandria, VA 22313
7

DRAFT

8 Dear Mr. Marston:

9 We are responding to your advisory opinion request on behalf of Stutzman for
10 Congress (the "Committee"), concerning the application of the Federal Election
11 Campaign Act of 1971, as amended (the "Act"), and Commission regulations to the
12 treatment of undesignated contributions when the general election and the special
13 election for the same Federal office are held on the same day.

14 The Commission concludes that, in the unusual circumstances presented in this
15 request, the Committee may treat undesignated contributions as made with respect to the
16 general election or the special election, or divided between the two elections, without
17 obtaining contributor redesignations or presumptively redesignating the excessive
18 portions.

19 ***Background***

20 The facts presented in this advisory opinion are based on your letter received on
21 July 23, 2010, email received on July 29, 2010, and publicly available information.

22 Marlin Stutzman is an Indiana State Senator and a candidate for the U.S. House of
23 Representatives in 2010. The Committee is his principal campaign committee.

24 The State of Indiana held primary elections on May 4, 2010. The incumbent,
25 Representative Mark Souder, won the Republican Party primary for the U.S. House of

1 Representatives in Indiana's Third Congressional District.¹ Shortly after the primary
2 election, however, Representative Souder resigned from office. The Governor of the
3 State of Indiana scheduled a special election to fill the vacancy created by Representative
4 Souder's resignation. *See* Ind. Exec. Order 10-03, May 28, 2010. The special election
5 will be held on November 2, 2010, the same day as the general election. *Id.* The
6 candidate elected in the special election will serve the remainder of Representative
7 Souder's term of office. *Id.* The candidate elected in the general election will serve the
8 next full two-year term of office. *Id.*

9 The Republican Party held a caucus to nominate a candidate for the special
10 election and also to nominate a new candidate for the general election. State Senator
11 Stutzman was nominated as the Republican Party's candidate for both elections.²

12 State Senator Stutzman is campaigning in both elections and the Committee
13 anticipates receiving undesignated contributions from contributors that exceed the Act's
14 contribution limits for a single election. The Committee plans to redesignate the
15 excessive portion of those contributions from the general election to the special election
16 without seeking written redesignations from the contributors.

17 ***Question Presented***

18 *When a general election and a special election are held on the same day, may the*
19 *principal campaign committee of a Federal candidate in both elections treat*
20 *undesignated contributions as contributions made with respect to either the general*

¹ *See* Indiana Primary Election Results, available at http://www.in.gov/apps/sos/primary/sos_primary10 (last visited Aug. 11, 2010).

² *See* Marlin Stutzman Wins Third District Republican Nomination, available at <http://indianapublicmedia.org/election/marlin-stutzman-wins-district-republican-caucus> (last visited Aug. 11, 2010).

1 *election or the special election, without obtaining contributor redesignations or*
2 *presumptively redesignating the excessive portion of such contributions?*

3 ***Legal Analysis and Conclusions***

4 Yes, the Committee may treat undesignated contributions as contributions made
5 for the general election or for the special election held on the same day, or divided
6 between the two elections, as long as those contributions do not exceed the contributor's
7 combined limit for both elections. If the combined contribution limits for both elections
8 are not exceeded, no redesignation is necessary.

9 The Act prohibits any person from making contributions to candidates and their
10 authorized political committees "with respect to any election for Federal office" that in
11 the aggregate exceed \$2,400. 2 U.S.C. 441a(a)(1)(A); 11 CFR 110.1(b)(1). These
12 contributions limits "apply separately with respect to each election." 2 U.S.C.
13 441a(a)(6); 11 CFR 110.1(j)(1). A general election and a special election are both
14 included in the definition of an "election." 2 U.S.C. 431(1)(A); 11 CFR 100.2.
15 Commission regulations define a special election as an election that is held to fill a
16 vacancy in a Federal office. 11 CFR 100.2(f). A general election is defined as either
17 (1) an election held in even numbered years on the Tuesday following the first Monday in
18 November or (2) a special election that is intended to result in the final selection of a
19 single individual to the office at stake. 11 CFR 100.2(b).

20 A contribution that is not designated in writing (*i.e.*, an "undesignated
21 contribution") by the contributor for a particular election is deemed to be a contribution
22 for the next election for that Federal office after the contribution is made. 11 CFR
23 110.1(b)(2)(ii). In the present circumstance, although the Federal office sought by State

1 Senator Stutzman is the same in both elections, each election will fill a vacancy for a
2 different term of that office. The Commission previously concluded that in this situation
3 each election is subject to a separate contribution limit. *See* Advisory Opinion 1984-42
4 (Perkins) (State of Kentucky held a special election for a Congressional district seat on
5 the same day as the general election). The Committee, therefore, may accept
6 contributions with respect to both elections. Because both elections will occur on the
7 same day, under the Commission's regulations either election would be considered "the
8 next election" for purposes of treating undesignated contributions.

9 The Commission addressed a nearly identical situation in Advisory Opinion 1986-
10 31 (Democratic Senatorial Campaign Committee). In 1986, the State of North Carolina
11 held a special election on the same day as the general election for the same Senate seat
12 after the incumbent Senator John East died in office. The general election was held for
13 the full six-year term, while the special election was held for the remainder of Senator
14 East's term. The Commission concluded that the candidate's authorized committee may
15 treat undesignated contributions as made with respect to either election or divided
16 between the two elections as long as the contributor did not exceed the combined
17 contribution limits for both elections. *See* Advisory Opinion 1986-31 (Democratic
18 Senatorial Campaign Committee) at 3. The Commission also concluded that "[t]he
19 committee need not seek redesignations from the contributors in this special
20 circumstance." *Id.*

21 The Commission similarly concludes here that the Committee may treat
22 undesignated contributions as made with respect to either election or divided between the
23 two elections. This means that undesignated contributions up to the contributor's

1 combined \$4,800 limit for both elections (\$2,400 for the special election and \$2,400 for
2 the general election) will not be excessive contributions. Accordingly, the Committee
3 does not have to seek written designations or redesignations for these contributions from
4 the contributors. However, undesignated contributions that exceed the contributor's
5 combined contribution limits for both elections are prohibited to the extent they exceed
6 the combined limits.

7 This response constitutes an advisory opinion concerning the application of the
8 Act and Commission regulations to the specific transaction or activity set forth in your
9 request. *See* 2 U.S.C. 437f. The Commission emphasizes that, if there is a change in any
10 of the facts or assumptions presented, and such facts or assumptions are material to a
11 conclusion presented in this advisory opinion, then the requestor may not rely on that
12 conclusion as support for its proposed activity. Any person involved in any specific
13 transaction or activity which is indistinguishable in all its material aspects from the
14 transaction or activity with respect to which this advisory opinion is rendered may rely on
15 this advisory opinion. *See* 2 U.S.C. 437f(c)(1)(B). Please note the analysis or
16 conclusions in this advisory opinion may be affected by subsequent developments in the
17 law including, but not limited to, statutes, regulations, advisory opinions, and case law.
18 The cited advisory opinions are available on the Commission's Web site at
19 <http://saos.nictusa.com/saos/searchao>.

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On behalf of the Commission,

Matthew S. Petersen
Chairman