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OFFICE OF GENERAL
COUNSEL

Christopher Hughey
Acting General Counsel
Federal Election Commission
999 E Street N.W.
Washington, D.C. 20463

AOR 2010-27

Re: Advisory Opinion Request

Dear Mr. Hughey:

Pursuant to 2 U.S.C. § 437f, we seek an advisory opinion on behalf of Obama for America ("OFA") and Biden for President ("BFP") (collectively, the "Committees"), concerning the application of the Federal Election Campaign Act of 1971, as amended (the "Act") and Commission regulations (the "regulations") to a proposed transfer. Specifically, the Committees seek confirmation that OFA, as the authorized committee for presidential candidate Barack Obama and vice presidential candidate Joseph Biden during the 2008 general election, may transfer \$138,000 to BFP, an authorized committee for presidential candidate Biden during the 2008 primary election, to assist BFP in satisfying its outstanding obligations to the U.S. Treasury and other parties. In the alternative, the Committees seek confirmation that OFA may pay BFP's debts directly.

These questions are time-sensitive, as the law requires BFP to make certain payments within 30 days of final service of the Final Audit Report (the "Report"), as discussed below. Accordingly, we are requesting that the Commission expedite this request and issue a response as soon as possible. *See* Advisory Opinion Procedure, 74 Fed. Reg. 32,160, 32,162 (July 7, 2009). BFP also asks the Commission to toll the counting of the 30-day payment deadline until it issues an opinion in response to this request.

FACTUAL DISCUSSION

On January 31, 2007, Mr. Biden announced that he would be a candidate for president. On the same day, he filed a Statement of Candidacy, designating BFP as his principal campaign committee and authorizing it to accept contributions and make expenditures on his behalf. BFP then filed a Statement of Organization. After January 3, 2008, the day he withdrew from the presidential race, Mr. Biden was no longer a candidate for president. He did not make any more campaign speeches, authorize any additional public communications, or participate in further

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presidential candidate debates.¹

More than seven months later, on August 23, 2008, then-presidential candidate Obama selected Mr. Biden as his running mate. Four days after the announcement, delegates to the Democratic National Convention nominated Mr. Biden as the Democratic nominee for vice president. In the ensuing weeks, OFA filed an amended Statement of Organization, identifying presidential candidate Obama and vice presidential candidate Biden as the candidates on whose behalf the committee would operate. The running mates then filed a joint Statement of Candidacy, designating OFA as their principal campaign committee and authorizing OFA to accept contributions and make expenditures on their behalf.

After that point and during the course of the general election campaign, OFA served as an authorized committee for vice presidential candidate Biden. All contributions that Mr. Biden solicited in connection with the presidential general election were deposited in an OFA account. Likewise, all expenditures made on behalf of his vice presidential candidacy were made from an OFA account. For example, OFA paid the salaries of Mr. Biden's full-time vice presidential campaign staff; OFA paid for television and radio commercials in which Mr. Biden promoted his vice presidential candidacy; OFA paid for travel to campaign stops at which Mr. Biden campaigned; and OFA paid the costs of preparing Mr. Biden for the vice presidential debate. On November 4, 2008, then-candidates Obama and Biden won nearly 53 percent of the national popular vote and 365 elector votes. They were sworn in on January 20, 2009.

Following the 2008 election, the Federal Election Commission (the "Commission") began its statutorily-required audit of BFP. *See* 11 C.F.R. § 9038.1(a). The Commission considered and approved the Audit Division's proposed final report on July 16, 2010.² The Report concluded that BFP had accepted \$106,216 in "excessive" contributions (*e.g.*, contributions that were not properly re-designated to the general election or re-attributed to another contributor). *See* Report of the Audit Division on Biden for President, Inc., at 4. The Report also found that BFP had failed to use the proper reimbursement rate in valuing a flight, which resulted in a \$26,889 corporate in-kind contribution. *Id.* Finally, the Report identified unresolved stale-dated checks amounting to \$85,900. *Id.* In total, the Report ordered BFP to pay \$219,005 to the U.S. Treasury.³ At least \$133,105 is due to the Treasury within 30 days of BFP's receipt of the Final

¹ From early 2003 through November 4, 2008, Mr. Biden was also a candidate for Senate in Delaware. Mr. Biden won his re-election for Senate on November 4, 2008 and subsequently resigned from the Senate on January 15, 2009.

² Final delivery of the Report to BFP was delayed to enable the Commission to make certain changes to its language.

³ BFP currently has nearly \$93,000 in its bank accounts and has nearly \$231,000 in outstanding obligations to the U.S. Treasury and to others. The amount that would be transferred would be sufficient to satisfy BFP's obligations.

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Audit Report. *See* 11 C.F.R. § 9038.1(f)(3). The Commission has yet to serve BFP with its Final Audit Report.

The Committees now seek confirmation that OFA may transfer \$138,000 to BFP, pursuant to 11 C.F.R. § 110.3(c)(4), which allows for unlimited transfers between "previous Federal campaign committees" of a Federal candidate. In the alternative, the Committees seek confirmation that OFA may pay \$138,000 to the U.S. Treasury and others, pursuant to 11 C.F.R. § 110.1(b)(3)(iv), which allows the authorized committee of a general election candidate to pay debts incurred by that candidate's committee for the primary campaign.

LEGAL ANALYSIS

When he filed his Statement of Candidacy on January 31, 2007, Mr. Biden authorized BFP to receive contributions and make expenditures on his behalf as a presidential candidate. Likewise, after becoming the Democratic nominees for president and vice president, then-candidates Obama and Biden authorized OFA to receive contributions and make expenditures on their behalf. In both instances, the candidate(s) and committee filed the necessary paperwork to establish BFP and OFA as authorized committees. Because BFP and OFA were both "authorized committee[s] ... organized to further [Mr. Biden's] campaign in a Federal election that has already been held," they may make unlimited transfers to each other. 11 C.F.R. § 110.3(c)(4).

In the alternative, section 110.1(b)(3)(iv) authorizes OFA to pay BFP's debts directly. *See id.* (allowing "a candidate who is a candidate in the general election or his or her authorized political committee(s) [to pay] primary election debts and obligations with funds which represent contributions made with respect to the general election."). As an authorized committee of Mr. Biden, OFA may use general election contributions to pay primary election debts that Mr. Biden's primary campaign incurred in the same election.

I. BFP and OFA may make unlimited transfers to each other under 11 C.F.R. § 110.3(c)(4).

Because BFP and OFA are "previous Federal campaign committees" of Mr. Biden, the two committees may make unlimited transfers to each other under section 110.3(c)(4).

The Act allows unlimited transfers "between a candidate's previous Federal campaign committee and his or her current Federal campaign committee, or between previous Federal campaign committees." *Id.* § 110.3(c)(4). Under this provision, the funds comprising the transfer do not have to be aggregated with contributions already made to the transferee committee. *See* FEC Adv. Op. 1987-4 (Glenn) (determining that section 110.3(c)(4) has "not been held to require that contributions be traced to the original donors and aggregated" but instead simply "prohibit[s]

transfers of funds which include amounts donated by entities that are barred by the Act from making any contributions.").

A. BFP and OFA are "previous Federal campaign committees" of Mr. Biden.

A "previous Federal campaign committee" is defined as "a principal campaign committee, or other authorized committee, that was organized to further the candidate's campaign in a Federal election that has already been held." 11 C.F.R. § 110.3(c)(4)(i). BFP was Mr. Biden's authorized committee when he ran for president in a prior election cycle; OFA was Mr. Biden's authorized committee when he ran for vice president in a prior cycle. As a result, both BFP and OFA are "previous Federal campaign committees" of Mr. Biden.

BFP served as Mr. Biden's authorized committee during his presidential campaign. As an authorized committee, BFP received contributions and made expenditures on Mr. Biden's behalf. *See id.* § 100.5(f)(1) (defining "authorized committee" as "the principal campaign committee or any other political committee authorized by a candidate under 11 CFR 102.13 to receive contributions or make expenditures on behalf of such candidate."). On January 31, 2007, Mr. Biden filed a Statement of Candidacy, designating BFP as his principal campaign committee and authorizing it to accept contributions and make expenditures on behalf of his presidential campaign. On the same day, BFP filed a Statement of Organization identifying Mr. Biden as the candidate on whose behalf the committee would operate. These filings established BFP as an authorized committee of Mr. Biden. *See id.* § 102.13(a)(1) (requiring that any "political committee authorized by a candidate to receive contributions or make expenditures shall be authorized in writing by the candidate.").

Likewise, OFA served as Mr. Biden's authorized committee when he was a candidate for vice president. As described above, OFA received contributions and made expenditures on Mr. Biden's behalf. *See id.* § 100.5(f)(1). On September 10, 2008, OFA filed an amended Statement of Organization identifying Mr. Obama and Mr. Biden as the candidates on whose behalf the committee would operate; on September 17, 2008, the running mates filed a Statement of Candidacy, designating OFA as their principal campaign committee and authorizing it to accept contributions and make expenditures on their behalf. These filings established that OFA was an authorized committee of Mr. Biden. *See id.* § 102.13(a)(1).

In authorizing OFA to accept contributions and make expenditures on his behalf, Mr. Biden followed the example of vice presidential candidates Cheney, Edwards, and Palin, each of whom also designated his or her running mate's principal campaign committee to accept contributions and make expenditures on behalf of their candidacies.⁴ In 2004, and again in 2007, the FEC

⁴ In 2004, the Kerry-Edwards campaign listed both John Kerry and John Edwards on its amended Form 1; however, only Mr. Kerry was listed on the amended Form 2.

acknowledged this practice. See FEC Adv. Op. 2004-35 (Kerry-Edwards) ("Kerry-Edwards 2004, Inc. ('Kerry-Edwards'), is the authorized committee of presidential and vice presidential candidates Senators Kerry and Edwards"); FEC Adv. Op. 2007-9 (Kerry-Edwards) ("KE04 is the authorized committee of 2004 presidential and vice presidential candidates Senators John F. Kerry and John R. Edwards.").

This practice is not simply a matter of convenience for vice presidential candidates. Instead, it is dictated by the Act and the regulations, which "envision that the joint campaign of two candidates for President and Vice President should be treated as a single campaign for certain reporting and related purposes ... [if] both candidates ... [are] the nominees of a political party." FEC Adv. Op. 1992-31 (Revel).

Unlike every other candidate for federal office, for example, the vice presidential nominee of a political party is not required to designate a principal campaign committee. See 2 U.S.C. § 432(e)(1); 11 C.F.R. § 102.12(a). More significantly, the regulations state that "[a]ny campaign depository designated by the principal campaign committee of a political party's candidate for President shall be *the* campaign depository for that political party's candidate for the office of Vice President", suggesting that the vice presidential nominee may not maintain a separate depository. 11 C.F.R. § 103.4 (emphasis added); see also FEC Adv. Op. 1992-31, n. 3 ("[T]he Vice Presidential nominee of a political party is required to use the same depository as the party's Presidential nominee."). Finally, the Act treats contributions made on behalf of a vice presidential nominee as contributions to the presidential nominee. See 2 U.S.C. § 441a(a)(7)(D).

B. BFP's operation during the same election cycle as OFA does not prohibit the proposed transfer.

That BFP and OFA operated during the same election cycle does not bar the proposed transfer. A separate provision in the Commission's regulations addresses transfers "between the principal campaign committees of an individual seeking nomination or election to more than one Federal office." 11 C.F.R. § 110.3(c)(5). This rule applies, however, only when a transfer is proposed between *current* campaign committees (*i.e.*, committees organized to further a candidate's campaigns in an election that has yet to occur). This rule does not apply when one – or, in this case, both – of the committee(s) is a "previous Federal campaign committee." See, *e.g.*, Affiliated Committees, Transfers, Prohibited Contributions, Annual Contribution Limitations and Earmarked Contributions, 54 Fed. Reg. 34,098, 34,103 (Aug. 17, 1989) ("These definitions are intended to distinguish transfers between previous and current campaign committees (which come within paragraph (c)(4)) from transfers between committees of dual Federal candidates (which are subject to somewhat different requirements, as set out in paragraph (c)(5)).").

Section 110.3(c)(5) only governs transfers that take place when an individual is "concurrently a candidate for more than one Federal office during the same or overlapping election cycles," and

a transfer is made from one of those campaign committees to the other. 11 C.F.R. § 110.3(c)(5). Mr. Biden first became a candidate for vice president in August 2008, seven months after he withdrew from the presidential campaign. He was never concurrently a candidate for both of those offices.⁵ Because both BFP and OFA are "previous campaign committees," and Mr. Biden was never a candidate for President and Vice President at the same time, section 110.3(c)(4) applies to permit the transfer.

The Commission reached a similar conclusion in Advisory Opinion 1987-4. In that opinion, John Glenn asked whether he could transfer excess funds from his 1986 Senate committee to his publicly-funded 1984 presidential committee to pay debts. The Commission considered – and rejected – the argument that section 110.3(c)(5) applied, even though Mr. Glenn's 1984 candidacy occurred in an overlapping cycle with his 1986 candidacy. *See* FEC Adv. Op. 1987-4 (finding that section 110.3(c)(4) rather than section 110.3(c)(5) applied, "notwithstanding that [Glenn] was a candidate for two different Federal offices in overlapping election cycles."). In doing so, the Commission pointed to the fact that Glenn was "not simultaneously seeking the 1984 presidential nomination of the Democratic Party and the nomination for election (1986) to the U.S. Senate." *Id.* (noting that Mr. Glenn had publicly withdrawn from the presidential race in March of 1984 and had registered the Senate committee in June of 1985). Based on these facts, the Commission concluded that "the transfer of funds proposed here is not a transfer between principal campaign committees of a dual candidate for two separate Federal offices. Instead, this proposed transaction is *properly viewed as a transfer between current and previous principal campaign committees of the same individual* notwithstanding that he was a candidate for two different Federal offices in overlapping election cycles." *Id.* (emphasis added). The same principles apply to the proposed transfer between OFA and BFP. Just as Mr. Glenn withdrew from the presidential race before he became a candidate for Ohio's Senate seat, Mr. Biden withdrew from the presidential race before he became a candidate for vice president.

C. Section 102.13(c)(1) is not a bar to the proposed transfer.

⁵ That Mr. Biden was also a candidate for Senate during the 2008 election cycle is not relevant here. The proposed transfer involves OFA and BFP only, and does not involve Mr. Biden's former Senate campaign committee, Citizens for Biden, which has already terminated. *See* FEC Adv. Op. 1982-39 (Cranston) (allowing for transfer between Senator Cranston's previous and current Senate committees, even while he was "testing the waters" for a presidential candidacy). *See also* FEC Adv. Op. 1993-19 (Glenn) (noting that Commission recently permitted Congressman Gephardt's 1992 congressional campaign to make unlimited transfer to his 1988 presidential campaign to retire debts); Report of the Audit Division on the Gephardt Committee (Sept. 3, 1991) (noting that Congressman Gephardt raised funds simultaneously for his 1988 congressional campaign and his 1988 presidential campaign through a joint fundraising committee). *See also* 54 Fed. Reg. at 34,103 (discussing scope of transfer rules as considering only transferor and recipient committees).

Section 102.13(c)(1) states that, except in the case of joint fundraising, "[n]o political committee which supports or has supported more than one candidate may be designated as an authorized committee." 11 C.F.R. § 102.13(c)(1). This general rule does not, however, bar a presidential candidate's campaign committee from serving as his running mate's authorized committee.

"Ordinarily, where a specific provision conflicts with a general one, the specific governs." *Edmond v. United States*, 520 U.S. 651, 657 (1997). The Act, Commission regulations, and Commission precedent show that that is the case here.

To start, the public funding statute states explicitly what is implicit in the Commission's regulations; namely that "[i]f a party has nominated a Presidential and a Vice Presidential candidate, all political committees authorized by that party's Presidential candidate shall also be authorized committees of the Vice Presidential candidate and all political committees authorized by the Vice Presidential candidate shall also be authorized committees of the Presidential candidate." 11 C.F.R. § 9002.1(a). That this provision appears in the regulations implementing Title 26, but not in the regulations implementing Title 2, likely reflects an assumption, held widely prior to 2008, that every major party presidential campaign would accept public funds for the general election.⁶

The relevant distinction in this area of the law is not between publicly and non-publicly funded nominees; instead, it is between candidates who are nominees of a political party and those who are not. In Advisory Opinion 1992-31, the Commission invoked section 102.13(c)(1) to prohibit Lyndon LaRouche for President from serving as the authorized committee of independent presidential candidate Lyndon LaRouche and his running mate, James Bevel. Instead, the Commission required Mr. Bevel to authorize a separate committee. The Commission expressly limited this decision to candidates who were not the nominees of a political party. In so doing, the Commission set forth the principle, stated previously, that "the Act and Commission regulations envision that the joint campaign of two candidates for President and Vice President should be treated as a single campaign for certain reporting and related purposes. However, the Act prescribes an important qualification in that both candidates shall be the nominees of a political party." FEC Adv. Op. 1992-31. This illustrates that section 102.13(c)(1) does not preclude a vice presidential nominee from authorizing his running mate's principal campaign committee.

Finally, applying section 102.13(c)(1) to presidential and vice presidential nominees would result in outcomes that are at odds with Commission precedent and historical practice. The Commission, for example, has already acknowledged that a presidential nominee's principal

⁶ In fact, this language is not even necessary to enforce the expenditure limits in Title 26. The Act already treats contributions and expenditures made on behalf of a vice presidential nominee as contributions and expenditures to the presidential nominee. See 2 U.S.C. §§ 441a(a)(7)(D), 441a(b)(2)(A).

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campaign committee can serve as the authorized committee of the vice presidential nominee. See FEC Adv. Ops. 2004-35, 2007-9. Significantly, if section 102.13(c)(1) applied to non-publicly funded nominees, but not publicly funded nominees, it would mean that Mr. Biden was the only Democratic or Republican nominee for any federal office *in the history of the Act* not to have had an authorized committee operating on his behalf.

II. In the alternative, because it was an authorized committee of Mr. Biden, OFA may pay BFP's debts.

In the alternative, section 110.1(b)(3)(iv) allows OFA to pay BFP's debts. This provision allows "a candidate who is a candidate in the general election or his or her authorized political committee [to pay] primary election debts and obligations with funds which represent contributions made with respect to the general election." 11 C.F.R. § 110.1(b)(3)(iv). Because Mr. Biden was a "candidate in the general election," his authorized committee for that election (OFA) may use funds received for the general election to pay the debts that Mr. Biden incurred in connection with the primary.

That Mr. Biden incurred the debts as a result of running for a different office does not bar the payments here. The regulation does not require that the candidate be seeking the same office in the general election that he sought in the primary. Allowing OFA to pay the debts advances the rationale underlying this provision. The provision provides a general election candidate with a choice. If a candidate has excess funds after the general election has been held, he may choose to apply those funds to a future election or may pay debts incurred from the primary. Likewise, by choosing to pay BFP's debts, OFA is foregoing \$138,000 that it could otherwise spend in any future elections.

The Commission's debt repayment provisions also suggest that OFA should be allowed to pay BFP's debts. Section 116.2(c)(1) provides that "[a]n authorized committee shall not settle any outstanding debts for less than the entire amount owed if any other authorized committee of the same candidate has permissible funds available to pay part or all of the amount outstanding." 11 C.F.R. § 116.2(c)(1). If BFP sought to settle any of its outstanding debts, section 116.2(c)(1) would likely *require* that OFA pay those debts. Consequently, OFA should be allowed to pay them in the first instance. See *Debts Owed by Candidates and Political Committees*, 55 Fed. Reg. 26,378, 26,380 (June 27, 1989) ("the reasons for not permitting ongoing committees to settle debts should also prevent principal campaign committees from settling debts in situations where the candidate has another committee capable of paying the amount owed.").

If the Commission allows OFA to pay BFP's debts under either of these provisions, OFA would use the "first in, first out" accounting method to ensure that it has sufficient general election funds to make the payments.

III. Tolling of 30-day deadline.

Under 11 C.F.R. § 9038.1(f)(3), BFP must pay \$133,105 within 30 days of service of the Final Audit Report; under 11 C.F.R. § 9038.6, BFP must pay an additional \$85,900 at some point after service of the Final Audit Report. The Commission has yet to serve BFP with its Final Audit Report, but BFP expects to receive service soon.

BFP requests that the Commission toll the running of the 30-day deadline until it issues an advisory opinion in response to this request. The Commission's opinion will determine whether OFA can transfer the funds and/or pay the debts directly (in which case BFP would not have to raise additional funds) or whether BFP has to raise \$138,000 on its own. The Commission has consistently tolled the running of deadlines while the resolution an advisory opinion request is pending. *Sae, e.g.*, FEC Adv. Ops. 1992-15 (Russo), 2008-4 (Dodd). BFP asks that the Commission do so again here.

QUESTIONS PRESENTED

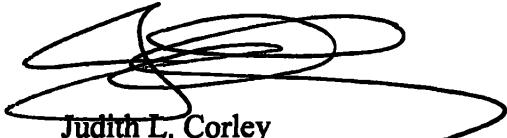
In light of these principles, OFA seeks guidance on the following:

1. May OFA transfer \$138,000 to BFP, pursuant to 11 C.F.R. § 110.3(c)(4)?
2. In the alternative, may OFA pay the debts incurred by Mr. Biden's primary campaign, pursuant to section 110.1(b)(3)(iv)?
3. Will the Commission toll the running of BFP's 30-day deadline to make the required payments to the U.S. Treasury?

If you have any questions or need additional information, please do hesitate to contact the undersigned.

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Very truly yours,



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