



FEDERAL ELECTION COMMISSION
Washington, DC 20463

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October 25, 2010

MEMORANDUM

TO: The Commission

FROM: Christopher Hughey *CH (RCS)*
Acting General Counsel

Rosemary C. Smith *RCS*
Associate General Counsel

Amy L. Rothstein *AR*
Assistant General Counsel

Jessica Selinkoff *JS*
Attorney

Subject: Draft AO 2010-28 (Indiana Democratic Congressional Victory Committee and Hoosiers for Hill)

Attached is a proposed draft of the subject advisory opinion. We request that this draft be considered by 24-hour tally vote on October 26, 2010.

Attachment

PUBLIC COMMENTS ON DRAFT ADVISORY OPINIONS

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

DRAFT ADVISORY OPINION 2010-28 is now available for comment. It was requested by Neil P. Reiff, Esq., on behalf of the Indiana Democratic Congressional Victory Committee and Hoosiers for Hill, and is scheduled to be considered by the Commission by tally vote on Tuesday, October 26, 2010.

If you wish to comment on DRAFT ADVISORY OPINION 2010-28, 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 delivery 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 October 26, 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>.

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 Advisory Opinion 2010-28, 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>.

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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

1 ADVISORY OPINION 2010-28

2

3 Neil P. Reiff, Esq.
4 Sandler, Reiff & Young, PC
5 300 M Street, SE, Suite 1102
6 Washington, DC 20003

DRAFT

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8 Dear Mr. Reiff:

9

We are responding to your advisory opinion request on behalf of the Indiana Democratic Congressional Victory Committee (the "State Committee") and Hoosiers for Hill concerning the application of the Federal Election Campaign Act of 1971, as amended (the "Act"), and Commission regulations to the refund of funds transferred by

~~13 Hoosiers for Hill to the State Committee. The Commission concludes that the State~~

14 Committee may refund the transferred funds to Hoosiers for Hill without making a
15 contribution subject to the amount limitations of the Act.

16 ***Background***

17 The facts presented in this advisory opinion are based on your letter received on
18 October 5, 2010 and email dated October 12, 2010.

19 The State Committee is registered with the Commission as a State committee of a
20 political party. Hoosiers for Hill is the principal campaign committee of Representative
21 Baron Hill, a candidate for the U.S. House of Representatives for the 9th Congressional
22 District of Indiana.

23 Hoosiers for Hill transferred \$34,600 to the State Committee's Federal account on
24 September 14, 2010. The State Committee received the transfer on September 17, 2010.

25 The requestors represent that the transfer was made in accordance with 2 U.S.C.

26 439a(a)(4). Hoosiers for Hill made the transfer with the understanding that the State

1 Committee would engage in general party projects on behalf of its candidates in
2 connection with the 2010 general election. Because the State Committee will not be
3 engaging in those activities, Hoosiers for Hill has requested, and the State Committee has
4 agreed, to a refund of the full amount of the transfer so that Hoosiers for Hill may itself
5 use the funds in connection with its general election campaign.

6 ***Question Presented***

7 *May the State Committee refund all or a portion of the funds transferred by*
8 *Hoosiers for Hill without making a contribution subject to the limitations of 2 U.S.C.*
9 *441a(a)(2)(A)?¹*
10

11 ***Legal Analysis and Conclusions***

12 Yes, the State Committee may refund all or a portion of the funds transferred by
13 Hoosiers for Hill without making a contribution subject to the limitations of 2 U.S.C.
14 441a(a)(2)(A).

15 The Act provides that a contribution accepted by a candidate may be used by the
16 candidate "for transfers, without limitation, to a national, State, or local committee of a
17 political party." 2 U.S.C. 439a(a)(4); *see also* 11 CFR 113.2(c). These provisions do not
18 limit the purposes that any transferred funds may be put to, nor do they restrict the amount
19 that may be transferred in any specific period of time. Advisory Opinion 2004-22
20 (Bereuter). A transfer pursuant to 2 U.S.C. 439a(a)(4) and 11 CFR 113.2(c) is not subject

¹ Section 441a(a)(2)(A) prohibits multicandidate committees from making contributions to any candidate or authorized political committee with respect to any election for Federal office which, in the aggregate, exceed \$5,000.

1 to the contribution limitation in 2 U.S.C. 441a(a)(1)(D) or 11 CFR 110.1(c)(5).²

2 Advisory Opinion 2004-22 (Bereuter).

3 Although the Act and Commission regulations provide for the refund of
4 contributions, they do not address the specific question presented here. *See* 2 U.S.C.
5 434(b)(4)(F) (requiring political committees to report contribution refunds); 2 U.S.C.
6 434(b)(5)(E) (requiring political committees to report the name and address of each
7 person who receives a contribution refund, and the date and amount of the disbursement);
8 11 CFR 103.3(b) (requiring the refund or return of illegal contributions). In Advisory
9 Opinion 2002-08 (Vitter), however, the Commission concluded that a Federal candidate's
10 State office exploratory committee could refund \$700,500 that had been transferred to it
11 from the Federal candidate's principal campaign committee, notwithstanding the fact that
12 the amount of the refund would far exceed the applicable contribution limits.³ Similarly,
13 in Advisory Opinion 1995-43 (Packwood), the Commission determined that a refund by a
14 law firm of \$150,000 in legal fees that had been paid by a Federal candidate would not be
15 a contribution to the candidate, when the scope of the services to be provided by the law
16 firm had been "materially altered" from that originally contemplated by the parties.

17 In the instant situation, the Commission concludes that the State Committee may
18 refund the transferred funds to Hoosiers for Hill without making a contribution subject to
19 the amount limitations of the Act. Hoosiers for Hill transferred the funds from its Federal

² For the purposes of this advisory opinion, the Commission presumes that the funds transferred from Hoosiers for Hill to the State Committee complied with the limitations, prohibitions, and reporting requirements of the Act. *See* 2 U.S.C. 441i(e)(1)(A); 11 CFR 300.61.

³ In Advisory Opinion 2002-08 (Vitter), the Commission determined that the refund would not implicate the prohibition on transfers of funds from a candidate's campaign committee for non-Federal office to the candidate's authorized committee for a Federal election because the Federal committee had raised the funds entirely under the limits and prohibitions of the Act; the State committee had not commingled the funds with non-Federal funds; and the State committee had never used the funds, which remained intact in a segregated bank account. *See* 11 CFR 110.3(d).

1 account to the State Committee's Federal account, and there is no indication that the
2 funds were comingled at any time with non-Federal funds. *See* Advisory
3 Opinion 2002-08 (Vitter). Moreover, the transfer was made, in part, with the
4 understanding that the State Committee would undertake certain activities, which the
5 State Committee is not, in fact, undertaking. Thus, the circumstances justifying the
6 transfer have been materially altered. *See* Advisory Opinion 1995-43 (Packwood). The
7 transfer also occurred just weeks before the requestors submitted this advisory opinion
8 request, which supports a determination that this is a refund rather than a contribution
9 subject to the amount limitations of the Act. Indeed, this short time period is well within
10 the thirty- and sixty-day periods prescribed in Commission regulations for refunding
11 contributions. *See* 11 CFR 103.3(b).

12 If the State Committee decides to refund the transferred funds to Hoosiers for
13 Hill, the transfer should be made within ten days after receiving this opinion. *Cf.* 11 CFR
14 103.3(a) (all receipts of a political committee shall be deposited in the political
15 committee's account within ten days of the treasurer's receipt of the funds); *see also*
16 Advisory Opinion 2002-08 (Vitter). The State Committee and Hoosiers for Hill must
17 maintain appropriate documentation of the refund made in accordance with this advisory
18 opinion and disclose the refund on their reports filed with the Commission covering the
19 period in which the refund is made and received. *See* 2 U.S.C. 432(c)(5); *see also*
20 11 CFR 102.9(b), 104.3(a)(3)(ix), 104.3(b)(1)(iv), and 104.3(b)(4). Because the
21 Commission's reporting forms do not provide a line for entry of the specific refund
22 presented here, the State Committee should report its refund to Hoosiers for Hill on
23 Schedule B, Line 28c of Form 3X, and Hoosiers for Hill should report its receipt of the

1 refund on Schedule A, Line 15 of Form 3. The requestors should also include memo text
2 in their reports, consistent with the conclusions of this advisory opinion, explaining the
3 circumstances of the refund. *See* Advisory Opinion 2002-08 (Vitter).

4 The Commission expresses no opinion regarding the application of the rules of
5 the U.S. House of Representatives to the proposed activities, because those rules are not
6 within the Commission's jurisdiction.

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 requestors may not rely on that
12 conclusion as support for their 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 that 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.

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1 The cited advisory opinions are available on the Commission's website at

2 <http://saos.nictusa.com/saos/searchao>.

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On behalf of the Commission,

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Matthew S. Petersen

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Chairman