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**MEMORANDUM**

**TO:** The Commission

**THROUGH:** Alec Palmer
Staff Director

**FROM:** Christopher Hughey
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**SUBJECT:** Request for Commission Consideration of a Legal Question by the Michael Williams for U.S. Senate Committee (LRA 872)

## I. INTRODUCTION

The purpose of this memorandum is to address a Request for Commission Consideration of a Legal Question by the Michael Williams for U.S. Senate Committee ("the Committee"), and make recommendations about how the Commission should direct the Reports Analysis Division ("RAD") to proceed with respect to this question.

Specifically, the Committee asks: "[W]hen a candidate raises funds for an anticipated special election that subsequently does not occur, must *all* funds raised in connection with that election be refunded or redesignated in writing, or is the candidate permitted to spend some or all of those funds in connection with the anticipated special election?" *See* Letter from Thomas J. Josefiak and Michael Bayes, Counsel to the Committee, to Commission Secretary, at 2 (Feb. 15, 2012) [hereinafter Committee Request]. We recommend that the Commission conclude that a candidate is required to refund or obtain written redesignations for contributions designated in

writing for a special election that subsequently does not occur. The practical effect of this conclusion is that a candidate may not spend these funds, or at least must otherwise retain enough funds to cover any potential refunds that would be required if the special election does not occur. We also recommend, however, that the Commission conclude that a candidate is permitted to treat contributions that were not designated in writing for any particular election, or those non-specifically designated in writing for "the next upcoming election," as contributions made in connection with the next regularly scheduled election in which the candidate is participating; and that if the candidate chooses to treat undesignated contributions as having been received in connection with the next regularly scheduled election, the candidate is required to amend the committee's reports to indicate this. A candidate may spend these funds in any manner consistent with 2 U.S.C. § 439a(a).

## II. BACKGROUND

Michael Williams filed a Statement of Candidacy with the Commission on December 16, 2008 indicating that he was a candidate for election in the anticipated 2010 Texas Senate special election, which would have occurred had Senator Kay Bailey Hutchison resigned her Senate seat to run for governor of Texas.[1] Mr. Williams actively campaigned for the special election beginning in December 2008. The Committee accepted approximately $450,000 in contributions that it reported as received in connection with the anticipated 2010 special primary election and made expenditures in connection with the anticipated special primary election.[2]

On April 1, 2010, Senator Hutchison announced that that she would not resign her Senate seat, meaning that there would be no 2010 Texas Senate special election. At that time, the Committee had spent all but $11,566 of the contributions it had received, and it had outstanding debts of $4,004 and an outstanding $100,000 loan from the candidate, causing the Committee to have a negative net outstanding balance. On April 8, 2010, Mr. Williams filed a revised Statement of Candidacy for the regularly scheduled 2012 Texas Senate election.[3] The

[1] Senator Hutchison had discussed the possibility of resigning her Senate seat during the course of her gubernatorial campaign. Although Mr. Williams filed a Statement of Candidacy for a 2010 Texas Senate special election, had Senator Hutchison resigned her seat before her term expired, a special election could have been scheduled for November 3, 2009, May 8, 2010, or November 2, 2010, depending on the timing of the resignation. *See* Texas Election Code §§ 201.023, 3.003.

[2] The Committee also accepted approximately $32,000 in contributions that it reported as designated for a "special runoff" or "special general" election. Under Texas law, a special election would not have been conducted as a party primary and all candidates would have appeared on the same ballot, but if no candidate received the majority of the vote, the special election would have been be followed by a runoff election between the two candidates with the most votes. Texas Election Code § 203.003. The Committee either refunded these contributions or reported the contributions as redesignated for the regularly scheduled 2012 Texas Senate election.

[3] On June 15, 2011, Mr. Williams filed another revised Statement of Candidacy indicating that he was now a candidate for election in the 2012 election to the U.S. House of Representatives from the 33rd Congressional District of Texas. The Committee likewise amended its Statement of Organization to change its name to Michael Williams for Congress. The Committee did not ask about, and this memorandum does not address, any issues arising from the application of the previous-to-current or current-to-current transfer rules of 11 C.F.R. § 110.3(c)(4) and (5) to these events.

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Committee has not refunded any of the contributions that it reported as received in connection with the anticipated 2010 Texas Senate special primary election, nor has it reported any of the contributions as redesignated for the 2012 Texas Senate election. It appears that the Committee only secured refunds or redesignations for contributions designated for a "special runoff" or "special general" election, and as of April 1, 2010 had already spent or obligated contributions that it reported as received in connection with the anticipated special primary election.

The Committee has stated that some of the contributions received prior to April 1, 2010 were "non-specifically designated for the 'next upcoming election.'" Letter from Thomas J. Josefiak and Michael Bayes, Counsel to the Committee, to Bradley Matheson, Senior Campaign Finance Analyst, at 2 (July 22, 2011). We are unsure whether the Committee means that these contributions were in fact contributions that were not designated in writing by the contributor for a particular election, *see* 11 C.F.R. §§ 110.1(b)(2)(ii), 110.2(b)(2)(ii), or whether it means that these contributions were designated in writing by the contributor for "the next upcoming election." The Committee, however, reported all contributions received prior to April 1, 2010 as received in connection with the anticipated 2010 Texas Senate special election, and never amended its reports to change these contributions' designations after Senator Hutchison's April 1, 2010 announcement. Accordingly, RAD has no way of determining how many contributions received during this time period were designated in writing for the 2010 Texas Senate special election, and how many were not designated in writing for any election or were designated in writing for "the next upcoming election."

The Office of General Counsel ("OGC") and the Office of Compliance ("OC") recently sought the Commission's guidance on this issue pursuant to Directive 69. *See* Memorandum to the Commission, Request for Commission Guidance on the Michael Williams for U.S. Senate Committee (LRA 872) (Dec. 13, 2011). On February 6, 2012, the Commission adopted OGC and OC's recommendation and voted to conclude that "the Committee was required to refund, redesignate, or reattribute the contributions designated in writing for the anticipated 2010 Texas Senate special election within sixty days of April 1, 2010; that the Committee was permitted to treat contributions that were not designated in writing for any particular election, or those non-specifically designated in writing for 'the next upcoming election,' as contributions made in connection with the 2012 Texas Senate primary election; and that the Committee, if it chose to treat undesignated contributions as having been received in connection with the 2012 Texas Senate primary election, was required to amend its reports to indicate this."

On February 9, 2012, RAD informed the Committee that OGC and OC had submitted a request for guidance pursuant to Directive 69, and that the Commission had voted to approve OGC and OC's recommendation on the issue. On February 15, 2012, the Committee submitted its Request for Commission Consideration of a Legal Question pursuant to the Commission's Policy Statement Regarding a Program for Requesting Consideration of Legal Questions by the Commission, 76 Fed. Reg. 45,798 (Aug. 1, 2011). RAD subsequently provided the Committee with a copy of the Directive 69 memorandum and the Commission's vote certification. The Committee, however, stated that it wished to proceed with its request. On February 23, 2012, the Commission granted the Committee's request for consideration.

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## III. ANALYSIS

The Committee asks: "[W]hen a candidate raises funds for an anticipated special election that subsequently does not occur, must *all* funds raised in connection with that election be refunded or redesignated in writing, or is the candidate permitted to spend some or all of those funds in connection with the anticipated special election?" Committee Request at 2. To address this question, it is important to define at the outset the meaning of the Committee's phrase, "raised in connection with [the anticipated special] election." The contribution limits of 2 U.S.C. § 441a(a) apply "with respect to" any election. By regulation, the Commission has provided that "with respect to any election" means:

> (i) [i]n the case of a contribution designated in writing by the contributor for a particular election, the election so designated . . . [and]
>
> (ii) [i]n the case of a contribution not designated in writing by the contributor for a particular election, the next election for Federal office after the contribution is made.

11 C.F.R. §§ 110.1(b)(2), 110.2(b)(2). Presumably, the Committee's reference to funds "raised in connection with [an anticipated special] election that subsequently does not occur" is limited to contributions designated in writing for the special election. If this is so, then we believe that the answer to the Committee's question is that those contributions must be refunded or redesignated in writing if the anticipated special election does not occur; and that a committee in that situation must keep on hand sufficient funds with which to meet any subsequent refund obligation.

In Advisory Opinion 2009-15 (White), the Commission addressed several questions by Mayor Bill White, who had filed a Statement of Candidacy for the regularly scheduled 2012 Texas Senate election, concerning the same anticipated 2010 Texas Senate special election at issue here. The Commission concluded that an undesignated contribution of $2,400 or less would be available for the White Committee to use if a 2009 or 2010 Texas Senate special election was subsequently scheduled because contributions are limited to $2,400 "with respect to any election," and a "special election that has been called would be the next Federal election after the undesignated contribution is made." *See* 2 U.S.C. §§ 441a(a)(1)(A), 441a(c); 11 C.F.R. § 110.1(b)(2). The Commission also concluded that a contributor could designate a $4,800 contribution in the alternative such that $2,400 would be for a special election if one was held, or for the regularly scheduled 2012 Texas Senate primary election if a special election was not held, and $2,400 would be for a runoff special election if one was held, or for the regularly scheduled 2012 Texas Senate general election if a special election was not held. The Commission noted that by designating contributions in the alternative, "the specific use of the contribution will be clear to both the Committee and the contributor based on circumstances that will be a matter of public record: that the Governor would have to call a special election following the resignation of Senator Hutchison." The Commission concluded that the White Committee could not presumptively redesignate contributions designated in writing for the 2012 Texas Senate primary or general elections for a special election if one was called.

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Most importantly as it pertains to this matter, however, the Commission concluded that if the White Committee raised money for the special election, and the special election did not occur, the White Committee was required to refund any contributions designated for the special election to the contributor within sixty days of the last date that a special election could be scheduled under Texas law, unless the committee received a written redesignation or combined redesignation or reattribution. The Commission noted that "contributions designated for an election that does not occur . . . must be refunded, redesignated for another election in which the candidate has participated or is participating in accordance with 11 C.F.R. § 110.1(b)(5), or redesignated and reattributed to another contributor in accordance with 11 C.F.R. § 110.1(k)(3)." Finally, the Commission noted that the White Committee would be required to file amended reports if the designation of a contribution would change depending on whether a special election was scheduled.

The Committee asks the Commission to conclude that "committees may legitimately incur expenses in connection with a special election that does not materialize, and that such expenses do not need to be recouped and refunded or redesignated, or misleadingly attributed to a future, regularly-scheduled election where the candidate was not in fact a candidate for such election." Committee Request at 6-7. However, as we noted in our Directive 69 memorandum, a conclusion that the Committee may retain contributions *designated in writing for the special election* appears contrary to the Commission's conclusion in Advisory Opinion 2009-15. Nothing in Advisory Opinion 2009-15 suggests that its conclusion that contributions designated for the special election had to be refunded or redesignated if the special election did not occur turns on the fact that Mayor White was registered with the Commission as a candidate in the regularly scheduled 2012 Texas Senate election. By permitting the White Committee to "raise money for a special election" but requiring it to refund or redesignate contributions designated for that election if the special election did not occur, it appears that the Commission concluded that committees that chose to raise and spend money designated for special elections that have not yet been scheduled do so at their own risk.

Accordingly, we recommend that the Commission conclude that the Committee was required to refund, or obtain redesignations or reattributions of, the contributions designated in writing for the special election within sixty days of Senator Hutchison's April 1, 2010 announcement that she would not resign her seat, meaning that the special election would not occur.

We also recommend, however, that the Commission conclude that the Committee could treat contributions that were not designated in writing for any particular election, or those non-specifically designated in writing for "the next upcoming election," as contributions made in connection with the regularly scheduled 2012 Texas Senate primary election. The necessary corollary to the conclusion in Advisory Opinion 2009-15 that a "special election that has been called would be the next Federal election after the undesignated contribution is made" is that if no special election is ever called, the next regularly scheduled election for that office would be the "next Federal election." While at several points the request seems to complain that treating undesignated contributions as made with respect to the regularly scheduled 2012 primary

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election would be "misleading," Committee Request at 4, 6-7, we note that Mr. Williams amended his Statement of Candidacy to declare himself a candidate in the regularly scheduled 2012 Texas Senate election within a week of Senator Hutchison's April 1, 2010 announcement. Under those circumstances, it seems both consistent with the plain language of the Commission's regulations, and equitable in terms of how Mayor White was permitted to treat undesignated contributions, to permit the Committee to treat undesignated contributions as having been made for the regularly scheduled 2012 Texas Senate primary election.[4] Under this theory, because the Committee never amended its reports to change these contributions' designations after the April 1, 2010 announcement, it would need to file amended reports designating those contributions that were non-specifically designated for the 2012 Texas Senate primary election under the guidance on reporting provided in Advisory Opinion 2009-15. The Committee could spend these funds in any manner consistent with 2 U.S.C. § 439a(a), including for expenditures made in anticipation of the special election. Based on the Commission's guidance in Advisory Opinion 2009-15, however, the Committee is not entitled to a separate contribution limit with respect to the special election because the special election did not occur. *See* Advisory Opinion 2009-15 (requiring the White Committee to refund or redesignate contributions designated for the special election if the special election did not occur).

The Committee cites to several regulations and advisory opinions for the proposition that the Commission has previously addressed special election spending without suggesting that it might be impermissible, and has permitted committees to raise and spend funds in connection with other elections that never occur. *See* Committee Request at 4-5. We note, however, that these regulations and advisory opinions do not address the exact issue that the Commission appears to have directly addressed in Advisory Opinion 2009-15: If a committee raises money for the 2010 Texas Senate special election, and the special election does not occur, whether the committee is required to refund, or obtain redesignations or reattributions of, the contributions designated in writing for the special election. *Compare* Advisory Opinion 2009-15 (White), *with* 11 C.F.R. § 110.1(j)(2)-(3) (addressing only scheduled elections in which candidates are unopposed, or that are not held because the candidate is unopposed or received the majority of the votes in a previous election), Advisory Opinion 2006-22 (Wallace) (addressing only whether a potential candidate in a special election was a candidate that could accept contributions and make expenditures after raising and spending money for that special election, not whether that candidate was entitled to retain those contributions if the special election did not occur), Advisory Opinion 1986-21 (Owens) (addressing only a scheduled election in which the candidate was unopposed), Advisory Opinion 1986-19 (DSCC) (addressing only contribution limits in states where no popular primary occurs), Advisory Opinion 1978-65 (Ireland) (addressing only a scheduled election in which the candidate's name would not be on the ballot

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[4] The Committee complains that "at least one other candidate who informed the Commission of his intention to raise funds and run in the 2010 special election appears to have escaped this same scrutiny simply by reporting that all funds raised and spent during the same time period were in connection with the 2012 regular election. This candidate terminated in November 2010, and we think it fair to conclude that he was never actually a candidate for the 2012 election." Committee Request at 6. It appears the Committee is referring to Mayor White and his committee. These facts do not, however, change the facts either that Mayor White was a candidate in the 2012 election at the time he sought AO 2009-15, or that he was permitted to treat undesignated contributions in precisely the same manner we recommend here for Mr. Williams.

because he was unopposed), Advisory Opinion 1978-41 (Solomon) (addressing only a scheduled election in which the candidate was unopposed), *and* Advisory Opinion 1975-09 (Thurmond) (same).

Accordingly, we recommend that the Commission conclude that a candidate is required to refund, redesignate, or reattribute the contributions designated in writing for a special election that subsequently does not occur. The practical effect of this conclusion is that a candidate may not spend these funds or must otherwise retain enough funds to cover any potential refunds that would result if the special election does not occur. We also recommend, however, that the Commission conclude that a candidate is permitted to treat contributions that were not designated in writing for any particular election, or those non-specifically designated in writing for "the next upcoming election," as contributions made in connection with the next regularly scheduled election in which the candidate is participating; and that if the candidate chooses to treat undesignated contributions as having been received in connection with the next regularly scheduled election, the candidate is required to amend the committee's reports to indicate this. A candidate may spend these funds in any manner consistent with 2 U.S.C. § 439a(a). The Commission may express these conclusions by reaffirming the conclusions it made in this matter on February 6, 2012.

## IV. RECOMMENDATION

Reaffirm the conclusions the Commission made in this matter on February 6, 2012.

**Attachment**

1. Letter from Thomas J. Josefiak and Michael Bayes, Counsel to the Committee, to Commission Secretary, at 6-7 (Feb. 15, 2012)

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