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June 17, 2009

**AGENDA ITEM**  
For Meeting of: 6-18-09

MEMORANDUM

TO: The Commission

FROM: Thomasenia P. Duncan *pch*  
General Counsel *for*

Rosemary C. Smith *RCS*  
Associate General Counsel

Robert M. Knop *RMK*  
Assistant General Counsel

Joshua S. Blume *JSB*  
Attorney

Subject: AO 2009-11 (Senator John Kerry) – Draft C

**SUBMITTED LATE**

Attached is a proposed draft of the subject advisory opinion, which we have been asked to circulate. We request that this draft be placed on the agenda for June 18, 2009.

Attachment

**DRAFT C**

2

3 Mr. Marc E. Elias, Esq.  
4 Ms. Kate S. Keane, Esq.  
5 Perkins Coie LLP  
6 607 Fourteenth Street, N.W.  
7 Washington, D.C. 20005-2003

8 Dear Mr. Elias and Ms. Keane:

9         We are responding to your advisory opinion request on behalf of Senator John  
10 Kerry and his authorized committee, the John Kerry for Senate Committee (the  
11 “Committee”), concerning the application of the Federal Election Campaign Act of 1971,  
12 as amended (the “Act”), and Commission regulations to the Committee’s proposed  
13 provision of campaign funds to the White Mountain Films company (“WMF”) to help it  
14 develop a documentary film, for which Senator Kerry will serve as an uncompensated  
15 executive producer.

16         The Commission concludes that the Committee’s proposed use of campaign funds  
17 would not be a “transfer of funds for investment purposes” under 11 CFR 103.3(a). In  
18 addition, when analyzed as a “use” of campaign funds under the Act, the proposal would  
19 result in a prohibited personal use of campaign funds. Consequently, the Committee may  
20 not proceed with this proposal.

21 ***Background***

22         The facts presented in this advisory opinion are based on your letter dated  
23 March 16, 2009, an e-mail message received on April 24, 2009, telephone conversations  
24 with Commission attorneys, and information available on public websites.

1 WMF is a limited liability company (“LLC”) that is solely owned by George  
2 Butler. It is treated as a sole proprietorship for Federal income tax purposes. John Kerry  
3 is a United States Senator and the Committee is his authorized campaign committee.  
4 WMF is seeking funding to produce a documentary film tentatively titled “Keeping  
5 Faith.” The film’s subject would be soldiers in Iraq and the effects upon them of a  
6 certain type of wound. The film would not expressly advocate the election or defeat of  
7 any candidate, nor would it promote, attack, support, or oppose any candidate.

8 WMF has negotiated separate agreements with the Committee and with Senator  
9 Kerry.<sup>1</sup> The agreement with the Committee (“Committee Agreement”) concerns the  
10 Committee’s transfer of funds in the amount of \$300,000 to WMF to partly defray the  
11 film’s development expenses, which may include expenses associated with research,  
12 travel, and the preparation of a printed story proposal (“Proposal”). *Committee*  
13 *Agreement, para. 3.* If produced, the Committee will be entitled to receive a return of  
14 120% of the funds provided. *Committee Agreement, para 5.* The agreement with  
15 Senator Kerry (“Kerry Agreement”) sets out Senator Kerry’s rights and responsibilities  
16 with respect to his role as an executive producer of the film.<sup>2</sup> *See Kerry Agreement,*  
17 *para. 3; see also Committee Agreement, para. 1.* The two agreements are independent of  
18 each other in that failure to execute the Committee Agreement will not necessarily  
19 prevent the execution of the Kerry Agreement. Nonetheless, pursuant to the Committee

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<sup>1</sup> Copies of these agreements are included with the request and are available through the Commission’s website at [www.fec.gov](http://www.fec.gov) or <http://saos.nictusa.com/saos/searchao>.

<sup>2</sup> Senator Kerry’s service as an executive producer is contingent upon approval from the Senate Ethics Committee, which Senator Kerry is currently seeking.

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1 Agreement half of the Committee's proposed payment to WMF is contingent upon  
2 submission of the Proposal to Senator Kerry.<sup>3</sup>

3 The Committee Agreement provides that the Committee will pay \$300,000 to  
4 WMF in three installments. *Committee Agreement, para. 3.* Half of this sum, or  
5 \$150,000, is payable on execution of the agreement. *Id.* The second installment of  
6 \$90,000 is payable upon submission of the initial draft of the Proposal to Senator Kerry  
7 and to David Thorne, another producer. *Id.* The third and final installment of \$60,000 is  
8 payable upon submission of a completed and approved Proposal to Senator Kerry and  
9 David Thorne. *Id.* Pursuant to the Committee Agreement, Senator Kerry will not receive  
10 any fee or other compensation in exchange for the funds the Committee would provide to  
11 WMF. *Id.*

12 The Committee and WMF estimate that the overall budget for the film will be  
13 between 3 and 5 million dollars. *Committee Agreement, para. 4.* Consequently, there is  
14 a risk that the film will not be produced because of insufficient funds. *Committee*  
15 *Agreement, para. 8.* The Committee will be entitled to receive a one-time payment of  
16 \$360,000 or 120 percent of the total funds it provided to WMF if WMF raises enough  
17 money to produce the film and has actually produced the film. *Committee Agreement,*  
18 *para. 5.*<sup>4</sup> Notably, the 120 percent payment would be made before the film is distributed,  
19 and would be required even if the film is never distributed.

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<sup>3</sup> Senator Kerry and the Committee represent that if Senator Kerry does not become an executive producer, then this provision of the Committee Agreement will be amended to eliminate the reference to Senator Kerry.

<sup>4</sup> This rate of return is comparable both to the rate of return that WMF will offer to others who provide funding for this film and to the rates of return WMF typically offers to those who provide similar funding for other films.

1           The Committee will not have any right, title, or interest in or to the film, as these  
2 are held solely by WMF. *Committee Agreement, paras. 2, 6.* WMF and the Committee  
3 do have the option of forming a single-purpose LLC, however, to which WMF may  
4 assign its right, title and interest in and to the film. *Committee Agreement, para. 2.*

5           The Kerry Agreement provides that Senator Kerry will render all services  
6 customarily rendered by executive producers of first-class theatrical motion pictures  
7 subject to the instructions and directions of WMF. *Kerry Agreement, para. 3.1.*  
8 Specifically, Senator Kerry's services include, among other things: (i) making  
9 introductions with respect to potential investors; (ii) reviewing and providing comments  
10 on various written renderings of the film; (iii) helping the producers obtain interview  
11 subjects for the film; and (iv) helping to prepare the budget. *Id.* Subject to WMF's  
12 creative and business control, and together with David Thorne, Senator Kerry will have  
13 the right to approve various aspects of the film. These include: the Proposal; the  
14 treatment; the interview subjects who will appear; the investors; all paperwork to be  
15 executed by the investors; the production partners of the film, including sponsors; the  
16 budget; and the distributors of the film. *Kerry Agreement, para. 3.2.* Senator Kerry will  
17 also have the right to seek and obtain sponsors. *Kerry Agreement, para. 5.*

18           In consideration for his services, Senator Kerry will receive an executive producer  
19 credit in the film, as well as in the "billing block" of paid advertising of the film under  
20 certain conditions. *Kerry Agreement, para. 6.* Apart from this consideration, Senator  
21 Kerry will not have any right, title or interest in or to the film. *Kerry Agreement, para. 7.*  
22 However, the Kerry Agreement allows WMF and Senator Kerry to form a single-purpose

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1 LLC, to which WMF may assign its right, title, and interest in and to the film. *Kerry*  
2 *Agreement, para. 2.*

3 The Committee will report any funds it receives from WMF in a timely manner in  
4 accordance with the disclosure provisions of the Act and Commission regulations. In  
5 addition, the Committee will deposit the funds it receives from WMF in its campaign  
6 depository account before using them to make expenditures.

7 ***Question Presented***

8 *May the Committee provide campaign funds to WMF for its use in producing a*  
9 *documentary film?*

10 ***Legal Analysis and Conclusions***

11 No, the Committee may not provide campaign funds to WMF for its use in raising  
12 funds to produce a documentary film because under Commission regulations at 11 CFR  
13 103.3(a), this transaction would not be a “transfer of funds for investment purposes” from  
14 its campaign depository, and, when treated as a “use” of campaign funds under the Act,  
15 would result in the conversion of campaign contributions to personal use.

16 The Act and Commission regulations require a political committee to designate at  
17 least one State bank, Federally-chartered depository institution, or other depository  
18 institution with accounts insured by a specifically identified Federal insurance entity, as  
19 its campaign depository. 2 U.S.C. 431(h)(1) and 11 CFR 103.2. Political committees  
20 must make all their disbursements from their campaign depositories, and any funds they  
21 receive must first be deposited in their campaign depositories before they may  
22 subsequently be disbursed. 2 U.S.C. 431(h)(1) and 11 CFR 103.3(a).

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1 Commission regulations also provide that political committees may transfer funds  
2 from their campaign depositories “for investment purposes,” and such funds must be re-  
3 deposited in the campaign depositories before they may be disbursed for other purposes.  
4 11 CFR 103.3(a). Although Commission regulations do not define “investment,” the  
5 Commission has permitted political committees to transfer campaign funds to  
6 investments such as mutual funds, bond funds, money market funds, government  
7 securities, and Treasury notes. *See* Advisory Opinions 1999-08 (Specter), 1997-06  
8 (Hutchison), 1986-18 (Bevill), 1980-39 (Fluor-PAC), 1976-25 (Bevill), and  
9 1975-41 (Shuster for Congress).

10 If the proposed transfer of funds to WMF qualifies as an “investment” under  
11 Section 103.3(a), the transfer would be treated as an exchange of one form of “cash on  
12 hand” to another, and thus not a “use” of campaign funds under the Act. 11 CFR  
13 103.3(a). If, however, the provision of funds does not qualify as an “investment,” the  
14 proposed transfer of funds would then constitute a “use” of campaign funds by the  
15 Committee, and section 439a(b) of the Act prohibits the Committee from converting  
16 campaign funds to “personal use” by using the funds to “fulfill any commitment,  
17 obligation or expense of a person that would exist irrespective of the [Kerry]’s election  
18 campaign or [Kerry]’s duties as a holder of Federal office.” 2 U.S.C. 439a(b).

19 *Investment of Campaign Funds*

20 By providing campaign funds to WMF, the Committee would be actively engaged  
21 in a speculative business venture of producing a documentary film, rather than making an  
22 “investment” as that term is used in Commission’s regulations,

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1           As stated above, the Commission has previously permitted political committees to  
2 transfer campaign funds to make investments such as mutual funds, bond funds, money  
3 market funds, government securities, and Treasury notes, without treating such  
4 “investments” as a “use” of campaign funds. *See* Advisory Opinions 1999-08 (Specter),  
5 1997-06 (Hutchison), 1986-18 (Bevill), 1980-39 (Fluor-PAC), 1976-25 (Bevill), and  
6 1975-41 (Shuster for Congress). In these advisory opinions, the Commission concluded  
7 that transfers of funds from campaign depositories to these different kinds of investment  
8 accounts need not be treated as “expenditures” under the Act and Commission  
9 regulations because such transfers represent a conversion of one form of “cash on hand”  
10 to another. *See* Advisory Opinions 1999-08 (Specter), 1997-06 (Hutchison), 1980-39  
11 (Fluor-PAC), and 1975-41 (Shuster for Congress). Thus, campaign funds continue to be  
12 “cash on hand” while invested in these accounts. Under 11 CFR 104.3(a)(1), “cash on  
13 hand” includes “currency; balance on deposit in banks, savings and loan institutions, and  
14 other depository institutions; traveler’s checks owned by the committee; certificates of  
15 deposit, treasury bills and any other committee investments valued at cost.” 11 CFR  
16 104.3(a)(1).

17           Because the funds the Committee would provide to WMF do not qualify as one of  
18 the specific types of cash on hand set forth in section 104.3(a)(1), the Commission must  
19 determine whether they qualify as an “other committee investment[] valued at cost”  
20 under 11 CFR 104.3(a)(1). For the following reasons, the Commission concludes that the  
21 proposed transaction does not so qualify.

1           The nature of the proposed transaction in this case is not comparable to that of the  
2 specific kinds of investments enumerated in the regulation.<sup>5</sup> Currency, deposits in  
3 financial institutions, traveler’s checks, and savings coupons are not comparable to the  
4 development funds here. The enumerated investments are all in a “liquid” form, like  
5 balances in a campaign depository, or are readily convertible into such a form.<sup>6</sup> While  
6 such investments may fluctuate in value, they are in a form designed to be continuously  
7 available or “on hand” to the investor. In contrast, the \$300,000 the Committee would  
8 provide to WMF will be used to pay film development expenses upon receipt. These  
9 funds are not maintained in some form of ongoing “balance” with WMF for the duration  
10 of the investment, and thus would not in any recognizable sense remain “cash on hand” to  
11 the Committee after they are provided to WMF.<sup>7</sup> Further, because the funds would not  
12 remain as “cash on hand,” whether in some kind of account or similar form, they have no  
13 ongoing ascertainable “book value” as the enumerated investments do. Finally, in each  
14 type of “cash on hand” enumerated in 11 CFR 104.3(a)(1) the funds remain liquid and  
15 may be traded in an established market, whereas nothing in the contract indicates that the  
16 funds the Committee would provide WMF and the Committee’s contractual entitlement

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<sup>5</sup> The Commission does not interpret statutory or regulatory language in a vacuum, but is guided by longstanding canons of statutory construction. The relevant rule here is that of *ejusdem generis*, meaning “of the same kind.” 2A Norman J. Singer & J.D. Shambie Singer, Sutherland Statutes and Statutory Construction § 47:17 (7<sup>th</sup> ed. 2007). Under this rule, “[w]here general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words.” *Id.* See also *Hall Street Associates, L.L.C. v. Mattel, Inc.*, 128 S.Ct. 1396, 1404 (2008) (when a statute sets out a series of specific items ending with a general term, that general term is confined to covering subjects comparable to the specifics it follows.).

<sup>6</sup> Similarly, section 104.12, as noted, refers to a cash on hand “balance,” consisting of recently received contributions. 11 CFR 104.12.

<sup>7</sup> While a government bond or a certificate of deposit may have a maturation date, such an investment provides a guaranteed return. Moreover, government bonds can generally be sold to a third party or redeemed prior to a bond’s maturation date, and although certificates of deposit cannot be sold, certificates of deposit can be liquidated prior to maturity, subject to an early withdrawal penalty.

1 to receive a one-time payment of 120 percent of the total funds it provided to WMF once  
2 WMF actually produced the film would be transferable or could readily be converted  
3 back to cash for campaign use. Additionally, the Committee's contractual right to  
4 payment at some later date cannot be traded on any open market.

5         These features of the Committee's proposal suggest that, rather than making an  
6 investment, the Committee, both through its own funding and through Senator Kerry's  
7 role as an executive producer, would be actively engaged in the speculative business  
8 enterprise of promoting and producing a documentary film. Anytime a candidate  
9 committee uses its funds in a way that deprives the candidate of the use of campaign  
10 funds in the event those funds are needed for campaign purposes, such funds cannot be  
11 considered the type of investment permissible under the Commission's regulations. In  
12 the proposed arrangement, the funds cannot be easily or promptly retrieved when the  
13 campaign needs them; in fact they may be lost and never retrieved. Therefore the  
14 proposed agreement is beyond the boundaries of what the Commission has permitted in  
15 the past. For these reasons, the Commission does not consider the Committee's proposed  
16 transfer of development funds to WMF to be an "investment" under Commission  
17 regulations. Because the Committee's proposal to provide funds to WMF under these  
18 circumstances would not be an "investment" under Commission regulations, the transfer  
19 of funds to WMF would be a "use" under the Act and Commission regulations and,  
20 therefore, the Commission must determine whether the spending would a permissible use  
21 of campaign funds under 2 U.S.C. 439a.

22         *Conversion of Campaign Contributions to Personal Use*

1           The Act identifies several permissible uses of contributions accepted by a Federal  
2 candidate, including (1) for expenditures in connection with the candidate’s campaign for  
3 Federal office; (2) for ordinary and necessary expenses incurred in connection with the  
4 duties of the individual as a holder of Federal office; and (3) for any other lawful  
5 purpose. *See* 2 U.S.C. 439a(a); *see also* 2 U.S.C. 439a(b); 11 CFR 113.2. A candidate  
6 has “wide discretion over the use of campaign funds.” Final Rule and Explanation and  
7 Justification, Personal Use of Campaign Funds, 60 FR 7862, 7867 (Feb. 9, 1995)  
8 (“Personal Use E&J”). However, contributions accepted by the candidate may not be  
9 converted by any person to “personal use.” 2 U.S.C. 439a(b)(1); 11 CFR 113.1(g) and  
10 113.2(e)(5). The Act specifies that conversion to personal use occurs when a  
11 “contribution or amount is used to fulfill any commitment, obligation, or expense of a  
12 person that would exist irrespective of the candidate’s election campaign or individual’s  
13 duties as a holder of Federal office.” 2 U.S.C. 439a(b)(2).

14           Congress adopted this “irrespective test” from Commission regulations on the  
15 subject of personal use when it enacted the Bipartisan Campaign Reform Act of 2002  
16 (BCRA), Pub. L. No. 107-155, 116 Stat. 81 (Mar. 27, 2002).<sup>8</sup> In its Explanation and  
17 Justification of its Final Rules relating to Personal Use of Campaign Funds, the  
18 Commission explained that “[u]nder this definition, expenses that would be incurred even  
19 if the candidate was not a candidate or officeholder are treated as personal rather than  
20 campaign or officeholder related.” Personal Use E&J, 60 FR 7862, 7863.

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<sup>8</sup> One of BCRA’s principal sponsors explained that amended 2 U.S.C. 439a “[c]odifies FEC regulations relating to the personal use of campaign funds by candidates.” 148 Cong. Rec. S1993-4 (daily ed. March 18, 2002) (statement of Sen. Feingold).

1           The Act and Commission regulations also provide a non-exhaustive list of items  
2 that would constitute personal use. *See* U.S.C. 439a(b)(2)(A)-(I); 11 CFR  
3 113.1(g)(1)(i)(A)-(J). For items not on this list, the Commission makes a determination  
4 on a case-by-case basis whether an expense would fall within the definition of “personal  
5 use.” 11 CFR 113.1(g)(1)(ii). The list does not include payments to a film company to  
6 help raise funds for the production of a documentary film and the Commission has not  
7 previously considered whether such provision of funds would constitute personal use  
8 under the Act and Commission regulations.

9           Spending of campaign funds need not benefit the candidate or a member of the  
10 candidate’s family specifically in order to violate the personal use prohibition of  
11 section 439a. Rather, section 439a states that campaign contributions “shall not be  
12 converted *by any person* to personal use.” 2 U.S.C. 439a(b)(1) (emphasis added). *See*  
13 *also* Personal Use E&J, 60 FR at 7864 (“personal use” definition applies to any use of  
14 campaign funds, “regardless of whether the beneficiary is the candidate, a family member  
15 of the candidate, or some other person.”).

16           The Commission has long recognized that if a candidate “can reasonably show  
17 that the expense at issue resulted from campaign or officeholder activities, the  
18 Commission will not consider the use to be personal use.” Personal Use E&J, 60 FR  
19 7862, 7867. The Committee has not made such a showing here. The contract between  
20 WMF and the Committee – and the rights and obligations contained therein – bears no  
21 relationship to Senator Kerry’s campaign activities or his official duties as a United

1 States Senator.<sup>9</sup> Indeed, if the production and distribution of the film were related to  
2 Senator Kerry's campaign or official duties, the film itself might be viewed as speech on  
3 behalf of Kerry's campaign, for which any corporate funding of the film may not be  
4 permissible.<sup>10</sup> Accordingly, the Committee Agreement creates an obligation "that would  
5 exist irrespective of the candidate's election campaign or individual's duties as a holder  
6 of Federal office." 2 U.S.C. 439a(b)(2).

7 In addition, the terms of the Kerry Agreement state that in consideration for his  
8 services, Senator Kerry will be entitled to receive an executive producer credit in the  
9 film, as well as in the "billing block" of paid advertising of the film under certain  
10 conditions. These services include the identification and approval of potential investors.  
11 The executive producer credit is a benefit that would accrue to Senator Kerry if he  
12 renders these services. The Committee Agreement would obligate the Committee to  
13 provide WMF the sum of \$300,000 for WMF's use in paying development expenses to  
14 produce the film, which seemingly would be consistent with Senator Kerry's fulfillment  
15 of his obligations under the Kerry Agreement. Even in the absence of the Kerry  
16 Agreement, the transfer of funds to WMF would be for the purpose of creating a  
17 documentary film unrelated to Senator Kerry's campaign activities or official duties as an  
18 officeholder that he nonetheless desires to be made. The use of funds for this purpose

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<sup>9</sup> Senator Kerry was recently re-elected to his position in November 2008. On February 11, 2009, Senator Kerry filed a Statement of Candidacy on FEC Form 2 for the 2014 election with the Commission.

<sup>10</sup> In fact, in the advisory opinion request the Committee has stated only that the transfer of funds to WMF is an investment. As explained above, Commission regulations permit a committee to make an investment, as that term is used in Commission regulations, of its campaign funds in limited circumstances where the committee is converting one form of "cash on hand" to another. Outside of those limited circumstances, a committee must show that the use of funds is permissible under the Act and Commission regulations. Such is not the case here.

1 would be no different than payments for travel, restaurants, communications or other cash  
2 withdrawals that the Commission has previously found inconsistent with the Act's  
3 framework for permissible use. *See, e.g.*, MURs 5359 (Paul Williams for Congress) and  
4 5646 (Jesse Burchfield).

5 Thus, implementing the Committee's proposal would result in the use of  
6 campaign contributions to fulfill a contractual obligation that would exist irrespective of  
7 either Senator Kerry's or the Committee's campaign activities, or Senator Kerry's official  
8 duties. *See* 2 U.S.C. 439a(b)(2).

9 Moreover, as a result of the Kerry Agreement, Senator Kerry may eventually form  
10 a single purpose LLC, to which WMF may assign its right, title, and interest in and to the  
11 film. If Senator Kerry is to assume an ownership interest in the LLC that owns the film,  
12 in part as a result of the Committee having provided funds for development of the film,  
13 Senator Kerry would receive a direct financial benefit from the transfer of campaign  
14 funds to WMF; this too would result in an impermissible "personal use" of campaign  
15 funds under section 439a.

16 Accordingly, the Commission concludes that the arrangement proposed by  
17 Senator Kerry and the Committee would result in a prohibited conversion of campaign  
18 contributions to personal use and is therefore impermissible. 2 U.S.C. 439a(b)(1).<sup>11</sup> For  
19 these reasons, the Commission concludes that Senator Kerry and the Committee may not

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<sup>11</sup> In addition, WMF is a single-member LLC, owned and controlled by George Butler, the principal producer and director of the film. As a single-member LLC, WMF qualifies as a "person" under the Act and Commission regulations. *See* 2 U.S.C. 431(11) and 11 CFR 100.10. Since WMF's film development expenses would not be caused by Senator Kerry's campaign or officeholder activities, the proposed expenses would exist irrespective of Senator Kerry's candidacy or his official duties as a United States Senator and would therefore constitute personal use with respect to WMF as well.

