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**FEDERAL ELECTION COMMISSION**  
999 E Street, N.W.  
Washington, D.C. 20463

**FIRST GENERAL COUNSEL'S REPORT**

**CELA**

RR: 12L-26  
DATE OF REFERRAL: June 11, 2012  
DATE OF NOTIFICATION: June 14, 2012  
LAST RESPONSE RECEIVED: September 7, 2012  
DATE ACTIVATED: September 11, 2012

EXPIRATION OF SOL: August 15, 2016

**RESPONDENTS:** Friends of Weiner and Nelson Braff in his official capacity as treasurer

**RELEVANT STATUTES AND REGULATIONS:**  
2 U.S.C. § 441a(a)  
2 U.S.C. § 441a(f)  
11 C.F.R. § 102.9(e)  
11 C.F.R. § 110.1(b)  
11 C.F.R. § 110.1(j)

**INTERNAL REPORTS CHECKED:** Disclosure Reports

**FEDERAL AGENCIES CHECKED:** None

**I. INTRODUCTION**

The Reports Analysis Division ("RAD") referred this matter to the Office of General Counsel ("OGC") for enforcement. Friends of Weiner and Nelson Braff in his official capacity as treasurer (the "Committee") is the principal campaign committee of former Representative Anthony D. Weiner. The matter was referred because, after Weiner withdrew from the 2012 House race, the Committee failed to refund \$66,700 in contributions that it received for the general election.<sup>1</sup> In response to the referral, the Committee requested transfer to the Alternative Dispute Resolution ("ADR") Office or "pre-reason to believe conciliation" because the

Committee is no longer active, will terminate soon, and has limited resources.<sup>2</sup> We recommend that the Commission find reason to believe that the Committee violated 2 U.S.C. § 441a(f) and authorize pre-probable cause conciliation.

## II. FACTS

Weiner was an incumbent candidate for the 2012 election in New York's 9<sup>th</sup> Congressional District. On June 16, 2011, prior to the 2012 primary, Weiner withdrew his candidacy. The Committee's 2011 April Quarterly and 2011 July Quarterly Reports disclosed that, prior to Weiner's withdrawal, the Committee received general election contributions from 27 individuals totaling \$66,700.<sup>3</sup>

On January 31, 2012, RAD sent the Committee a Request for Additional Information ("RFAI") regarding the Committee's 2011 October Quarterly Report.<sup>4</sup> The RFAI noted that the Act requires that the Committee refund or redesignate all general election contributions within 60 days of a candidate's announcement not to seek election and requested that the Committee take corrective action with respect to the general election contributions it reported in its prior disclosure reports.<sup>5</sup>

On February 23, 2012, the Committee filed a Miscellaneous Electronic Document ("Form 99") in response to the RFAI, which states, in part, that no general election contributions were used to promote Weiner's election, the Committee refunded contributions to all those who requested a refund, and that the Committee properly used funds in its campaign account, as permitted under 11 C.F.R. § 113.2, to pay "the ordinary and necessary expenses incurred in

<sup>2</sup> See Committee Resp. (Aug. 20, 2012).

<sup>3</sup> See RAD Referral, Attach. 2, 3.

<sup>4</sup> See *id.* at 2.

<sup>5</sup> *Id.*

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1 connection with the Congressman's duties as holder of federal office including costs associated  
2 with the winding down of the Congressional office."<sup>6</sup> In March and April 2012, RAD had  
3 several discussions with the Committee's counsel regarding the 2012 general election  
4 contributions. RAD explained that pursuant to Commission regulations at 11 C.F.R.  
5 110.1(b)(3)(C) and other guidance, including Advisory Opinions, contributions designated for a  
6 general election from which a candidate withdraws must be redesignated or refunded within 60  
7 days of the candidate's withdrawal from the race.<sup>7</sup> In response, Counsel again asserted the  
8 Committee's legal arguments concerning the permissible uses of campaign funds.<sup>8</sup> Counsel also  
9 noted that the Committee was planning to terminate and did not have the resources available to  
10 refund the contributions.<sup>9</sup>

11 In response to the Commission's notification that the matter had been referred to OGC  
12 for enforcement, counsel argued that, given that the Committee is no longer active, will  
13 terminate soon, and has limited resources, the matter should be transferred to the Alternative  
14 Dispute Resolution ("ADR") Office or handled in pre-reason to believe conciliation for  
15 expeditious resolution.<sup>10</sup> Counsel also said that the Committee would "concede that its actions

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<sup>6</sup> *Id.*

<sup>7</sup> *Id.* at 2-4. Among other Advisory Opinions, RAD mentioned Advisory Op. 2003-18 (Fitzgerald) (contributions received during the primary election that were designated for the general election in which a candidate did not participate may not be treated as permissible campaign funds under 11 C.F.R. Part 113 and must be refunded, redesignated, or reattributed) and Advisory Op. 1992-15 (Russo) (candidate who lost the primary election must refund, redesignate, or reattribute contributions made for the general election).

<sup>8</sup> Counsel argued that Commission regulations pertaining to the permissible uses of campaign funds (at 11 C.F.R. §§ 113.1, 113.2) are inconsistent with the provisions requiring the refund of general election contributions when a candidate does not participate in that election (at 11 C.F.R. §§ 102.9(e)(3) and 110.1(b)(3)(C)), and noted that the Campaign Guide indicates that "campaign funds may be used for such purposes" not "some campaign funds may be used" when discussing permissible uses of funds. *Id.* at 4. Counsel also asserted that candidates running in a primary election often use general election funds to pay for expenses related to the general election. *Id.* at 3.

<sup>9</sup> *Id.* at 4.

<sup>10</sup> See Committee Resp. (Aug. 20, 2012) at 1.

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1 were contrary to the Commission regulation at 11 C.F.R. §110.1(b)(3)(C)" if the matter was  
2 satisfactorily resolved in ADR or in pre-RTB conciliation.<sup>11</sup> Counsel also stated that he hoped  
3 the Commission would take the Committee's limited resources and inactive status into account  
4 in conciliation.

5 **III. LEGAL ANALYSIS**

6 Under the Federal Election Campaign Act of 1971, as amended, ("the Act") an individual  
7 may not make a contribution to a candidate with respect to any election in excess of the limits at  
8 2 U.S.C. § 441a(a)(1)(A). Candidates and political committees are prohibited from knowingly  
9 accepting excessive contributions.<sup>12</sup> The contribution limits are applied separately with respect  
10 to each election.<sup>13</sup> A primary election and general election are each considered an "election."<sup>14</sup>

11 The Commission's regulations permit a candidate's committee to receive contributions  
12 for the general election prior to the primary election.<sup>15</sup> If, however, the candidate does not  
13 become a candidate in the general election, the committee must: (1) refund the contributions  
14 designated for the general election; (2) redesignate such contributions in accordance with  
15 11 C.F.R. §§ 110.1(b)(5) or 110.2(b)(5); or (3) reattribute such contributions in accordance with  
16 11 C.F.R. § 110.1(k)(3).<sup>16</sup> The committee must do so within 60 days of the date that the

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<sup>11</sup> *Id.*

<sup>12</sup> *See* 2 U.S.C. § 441a(f).

<sup>13</sup> *See* 2 U.S.C. § 441a(a)(6); 11 C.F.R. § 110.1(j).

<sup>14</sup> *See* 2 U.S.C. § 431(1)(A); 11 C.F.R. § 100.2.

<sup>15</sup> *See* 11 C.F.R. § 102.9(e)(1). The committee must employ an acceptable accounting method to distinguish between primary and general election contributions. *Id.* The committee's records must demonstrate that prior to the primary election, the committee's recorded cash on hand was at all times equal to or in excess of the sum of general election contributions received less the sum of general election disbursements made. *See* 11 C.F.R. § 102.9(e)(2).

<sup>16</sup> *See* 11 C.F.R. §§ 102.9(e)(3), 110.1(b)(3)(i), 110.2(b)(3)(i). *See also* Advisory Op. 1992-15 (Russo for Congress Committee) at 2 ("Nonetheless, the Commission concludes that for losing primary candidates, like Mr.

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1 committee has actual notice of the need to obtain redesignations or refund the contributions, such  
2 as the date the candidate loses the primary or withdraws from the campaign.<sup>17</sup>

3 In this matter, the Committee accepted contributions totaling \$66,700 that were  
4 designated for the 2012 general election but were not redesignated, reattributed or refunded  
5 within 60 days after the candidate's withdrawal from the primary.<sup>18</sup> A review of the  
6 Committee's disclosure reports shows that each general election contributor had already  
7 contributed the maximum amount allowable for the primary election, and therefore these  
8 contributions became excessive when the candidate withdrew from the primary.<sup>19</sup>

9 Prior to the referral, the Committee had argued that 11 C.F.R. § 113.2(a) permits a  
10 campaign to use any funds in its campaign accounts, including funds that do not comply with the  
11 limits of the Act, to pay "the ordinary and necessary expenses incurred in connection with the  
12 Congressman's duties as holder of federal office including the costs associated with the winding  
13 down of the Congressional office."<sup>20</sup> The Commission has previously rejected this argument.  
14 The Commission has decided that "contributions received during the primary election period that  
15 were specifically designated for the general election must not be treated as permissible campaign  
16 funds, and such funds are not usable in accordance with 2 U.S.C. 439a and 11 CFR Part 113."<sup>21</sup>

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Russo, who receive contributions before the primary election that are designated for the general election, redesignation within 60 days of the primary election date would be permissible."); Advisory Op. 2007-03 (Obama for America) at 3 ("If a candidate fails to qualify for the general election, any contributions designated for the general election that have been received from contributors who have already reached their contribution limit for the primary election would exceed FECA's contribution limits.").

<sup>17</sup> See Advisory Op. 1992-15 (Dodd); Advisory Op. 1992-15 (Russo).

<sup>18</sup> See 11 C.F.R. § 102.9(e)(3).

<sup>19</sup> See 11 C.F.R. § 110.1(b)(5)(iii).

<sup>20</sup> See RAD Referral at 2.

<sup>21</sup> See Advisory Op. 2003-18 (Smith) at 3.

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1           The Committee now "concede[s] that its actions were contrary to the Commission  
2 regulation at 11 C.F.R. §110.1(b)(3)(C)."<sup>20</sup> We agree and therefore recommend that the  
3 Commission find reason to believe the Committee violated 2 U.S.C. § 441a(f) by knowingly  
4 accepting excessive contributions.

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17 **V. RECOMMENDATIONS**

- 18           1. Open a MUR in RAD Referral 12L-26;  
19           2. Find reason to believe that Friends of Weiner and Nelson Braff in his official capacity  
20           as treasurer violated 2 U.S.C. § 441a(f);  
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<sup>20</sup> See Committee Resp. (Aug. 20, 2012) at 1.

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3. Enter into conciliation with Friends of Weiner and Nelson Braff in his official capacity as treasurer prior to a finding of probable cause to believe;
4. Approve the attached Factual and Legal Analysis;
- 5.
6. Approve the appropriate letters.

Anthony Herman  
General Counsel

12-10-12  
Date

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Kathleen Guith  
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