March 13, 2009

AO DRAFT COMMENT PROCEDURES

The Commission permits the submission of written public comments on draft advisory opinions when on the agenda for a Commission meeting.

Three alternative DRAFTS of ADVISORY OPINION 2009-04 are available for public comments under this procedure. The advisory opinion was requested by Marc E. Elias, Esq., on behalf of Al Franken for U.S. Senate and the Democratic Senatorial Campaign Committee.

The three alternative drafts of Advisory Opinion 2009-04 are scheduled to be on the Commission's agenda for its public meeting of Thursday, March 19, 2009.

Please note the following requirements for submitting comments:

1) Comments must be submitted in writing to the Commission Secretary with a duplicate copy to the Office of General Counsel. Comments in legible and complete form may be submitted by fax machine to the Secretary at (202) 208-3333 and to OGC at (202) 219-3923.

2) The deadline for the submission of comments is 12:00pm noon (Eastern Time) on March 18, 2009.

3) No comments will be accepted or considered if received after the deadline. Late comments will be rejected and returned to the commenter. 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.

4) All timely received comments will be distributed to the Commission and the Office of General Counsel. They will also be made available to the public at the Commission's Public Records Office.

CONTACTS

Press inquiries: Judith Ingram (202) 694-1220

Commission Secretary: Mary Dove (202) 694-1040

Other inquiries:

To obtain copies of documents related to AO 2009-04, contact the Public Records Office at (202) 694-1120 or (800) 424-9530 or visit the Commission's website at www.fec.gov.

For questions about comment submission procedures, contact Rosemary C. Smith, Associate General Counsel, at (202) 694-1650.

MAILING ADDRESSES

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AGENDA DOCUMENT NO. 09-13

FEDERAL ELECTION COMMISSION
Washington, DC 20463

March 13, 2009

AGENDA ITEM
For Meeting of: 03-19-09

SUBMITTED LATE

MEMORANDUM

TO: The Commission

FROM: Thomasenia P. Duncan TPD by RCS
General Counsel

Rosemary C. Smith RCS
Associate General Counsel

Robert M. Knop RMK by ATB
Assistant General Counsel

Joanna S. Waldstreicher JSW by ATB
Attorney

Subject: AO 2009-04 (Franken/DSCC) – Drafts A, B & C

Attached are three alternative proposed drafts of the subject advisory opinion. We request that these drafts be placed on the agenda for March 19, 2009.

Attachment

ADVISORY OPINION 2009-04

DRAFT A

Marc E. Elias, Esq.
Perkins Coie LLP
607 Fourteenth Street NW
Washington, DC 20005-2003

Dear Mr. Elias:

We are responding to your advisory opinion request on behalf of Al Franken for U.S. Senate (the "Franken Committee") and the Democratic Senatorial Campaign Committee (the "DSCC"), concerning the application of the Federal Election Campaign Act of 1971, as amended (the "Act"), and Commission regulations to the establishment of recount and/or election contest funds by these two political committees. The Commission concludes that the DSCC may establish a recount fund and use it to pay for expenses incurred in connection with recounts and election contests of Federal elections, such as the 2008 U.S. Senate recount and election contest in Minnesota, subject to certain limitations. The Commission also concludes that the Franken Committee may not establish a separate election contest fund subject to a limit that is separate from and in addition to its existing recount fund.

Background

The facts presented in this advisory opinion are based on your letter received on February 18, 2009 and your e-mail received on February 20, 2009, and publicly available materials, including reports filed with the Commission.

The Franken Committee is Al Franken's principal campaign committee for the 2008 Senate election in Minnesota. The DSCC is a national committee of the Democratic Party.

Mr. Franken was the Democratic candidate for U.S. Senator from Minnesota in 2008, facing incumbent Norman Coleman, the Republican candidate. The close results of that election led to a statewide recount under Minnesota law. The recount has been concluded, with Mr. Franken certified as the winner by the Minnesota State Canvassing Board. However, Mr. Coleman has filed a lawsuit in Minnesota state court to contest the results of the recount, in accordance with Minnesota procedure for contesting an election. The litigation is still ongoing, and as of the date of this Advisory Opinion no final winner has been conclusively determined or seated in the Senate.[1] The Franken Committee has already established a recount fund to pay for expenses incurred in connection with the recount, including expenses related to the election contest. The DSCC, however, has not yet established any such account.

The DSCC proposes to establish a recount fund, separate from any of its other accounts and subject to a separate limit on amounts received, and to use that fund "to pay recount, election contest and other post-election litigation costs resulting from Federal elections." Donations to the separate recount fund would be subject to the amount limitations, source prohibitions, and reporting requirements of the Act.

The Franken Committee already maintains a recount fund that it now uses to pay for expenses incurred in connection with both pre-certification and post-certification activities but proposes to establish what it describes as a separate election contest fund that would also be subject to the amount limitations, source prohibitions, and reporting requirements of the Act. This proposed fund would also be separate from any of the

[1] *See Franken v. Coleman*, No. A09-64 (Minn. filed March 6, 2009); *Coleman v. Franken*, No. A08-2169 (Minn. filed March 6, 2009).

Franken Committee's other existing accounts. However, unlike the proposed DSCC recount fund discussed above, the Franken Committee's proposed election contest fund would only be used to pay expenses incurred in connection with the ongoing post-certification election contest.

Questions Presented

(1) May the DSCC establish a recount fund, separate from any of the DSCC's other accounts and subject to a separate limit on amounts received, and use that fund to pay expenses related to both the 2008 Senatorial recount and the election contest in Minnesota?

(2) May the Franken Committee establish an election contest fund, separate from its existing recount fund and subject to a separate limit on amounts received, and use that fund to pay expenses related to the 2008 Senatorial election contest in Minnesota?

Legal Analysis and Conclusions

(1) May the DSCC establish a recount fund, separate from any of the DSCC's other accounts and subject to a separate limit on amounts received, and use that fund to pay expenses related to both the 2008 Senatorial recount and the election contest in Minnesota?

Yes, the DSCC may establish a recount fund, separate from its other accounts and subject to a separate limit on amounts received, and use that fund only to pay expenses incurred in connection with recounts and election contests of Federal elections, such as the 2008 Senatorial recount and election contest in Minnesota. Donations to the separate recount fund would be subject to the amount limitations, source prohibitions, and reporting requirements of the Act.

The Act and Commission regulations define the terms "contribution" and "expenditure" to include any gift, loan, or payment of money or anything of value for the purpose of influencing a Federal election. *See* 2 U.S.C. 431(8)(A)(i) and (9)(A)(i); 11 CFR 100.52(a) and 100.111(a). Since 1977, the Commission's regulations have provided an exception to the cited definitions, for gifts, loans, or payments made with respect to a recount of the results of a Federal election, or an election contest concerning a Federal election. 11 CFR 100.91 and 100.151.[2] Nonetheless, in recognition of the Act's prohibitions on corporations, labor organizations, national banks, and foreign nationals making contributions or donations "in connection with" Federal elections, *see* 2 U.S.C. 441b(a) and 441e(a)(1)(A), and the Act's prohibition on foreign nationals making contributions or donations to committees of political parties, *see* 2 U.S.C. 441e(1)(B), these recount regulations expressly bar the receipt or use of funds prohibited by 11 CFR 110.20 (foreign nationals)[3] and Part 114 (corporations, labor organizations, and national banks). 11 CFR 100.91 and 100.151.

Prior to the passage of the Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 (2002) ("BCRA"), the practical consequence of the exception to the definitions of "contribution" and "expenditure" that applied to any recount or election contest activity was that any funds received solely for purposes related to an election recount effort were not subject in any way whatsoever to the contribution limitations of

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[2] Prior to 1980, similar provisions appeared at 11 CFR 100.4(b)(15) and 100.7(b)(17). *See* 45 Fed. Reg. 15080 (Mar. 7, 1980). In 2002, these regulations were recodified without substantive change from 11 CFR 100.7(b)(20) and 100.8(b)(20), effective November 6, 2002. *See* 67 Fed. Reg. 50582 (Aug. 5, 2002). These recount regulations recognize that the Act's definition of "election" does not specifically include recounts. *See* 2 U.S.C. 431(1); *see also* 11 CFR 100.2.

[3] In the 1980 recodification of 11 CFR 100.4(b)(15) and 100.7(b)(17) as 11 CFR 100.7(b)(20) and 100.8(b)(20), respectively, the prohibition on funds from foreign nationals was added to the regulation. *See* 45 Fed. Reg. 15080, 15102 (Mar. 7, 1980).

2 U.S.C. 441a, and did not trigger political committee status or reporting obligations for a separate election recount entity.[4]

However, with the passage of BCRA, a national party committee, such as the DSCC, may not solicit, receive, direct, or spend "any funds [] that are not subject to the limitations, prohibitions, and reporting requirements of th[e] Act." 2 U.S.C. 441i(a)(1); 11 CFR 300.10(a). This restriction applies irrespective of whether the funds are "contributions" or "expenditures" under the Act and Commission regulations. Therefore, with the passage of BCRA, the DSCC may only use funds that comply with the amount limitations, source prohibitions, and reporting requirements of the Act to pay for any recount activities in which it engages, and any recount fund it establishes may only accept donations that comply with the amount limitations, source prohibitions, and reporting requirements of the Act.

In Advisory Opinion 2006-24 (National Republican Senatorial Committee and Democratic Senatorial Campaign Committee), the Commission considered facts similar to those at issue here as they related to Federal candidates and a State party committee. In that Advisory Opinion, the Commission concluded that "because election recount activities are in connection with a Federal election, any recount fund established by either a Federal candidate or the State Party must comply with the amount limitations, source prohibitions, and reporting requirements of the Act." In Advisory Opinion 2006-24, the Commission further concluded that donations to such recount funds would not be aggregated with contributions from the same persons for purposes of the calendar-year and aggregate biennial contribution limits.

[4] *See* Advisory Opinions 1998-26 (Landrieu) and 1978-92 (Miller).

The Commission concludes that its opinions and rationales set forth in Advisory Opinion 2006-24 also apply to a national party committee such as the DSCC. Thus, the DSCC may establish a recount fund to be used only for expenses incurred in connection with recounts and election contests of Federal elections, such as the 2008 Senatorial recount and election contest in Minnesota. Under the limits applicable to national party committees for 2009, the DSCC's recount fund may not receive more than $30,400 from a person or $15,000 from a multicandidate political committee per calendar year, regardless of the number of recounts and election contests for which it wishes to pay expenses in 2009.[5] *See* 2 U.S.C. 441a(a)(1)(B) and 441a(a)(2)(B); 11 CFR 110.1(c) and 110.2(c). However, because section 441i(a)(1) does not convert the donations into "contributions" for purposes of 2 U.S.C. 441a, the DSCC may advise prospective donors that donations to recount funds will not be aggregated with contributions from those individuals for purposes of the calendar year contribution limits set forth in 2 U.S.C. 441a(a)(1)(B), and that the aggregate biennial contribution limits of 2 U.S.C. 441a(a)(3), limiting an individual's total contributions to all candidates and political committees over a two-year period, do not apply to donations to recount funds. The DSCC's recount fund will also be subject to the source prohibitions and reporting requirements of the Act.

Additionally, because any amounts that the DSCC spends out of its recount fund are also subject to the amount limitations of the Act, the DSCC may only give up to the current contribution limit of $42,600 from its recount fund to the recount fund of any

[5] These are the contribution limits for individuals and multicandidate committees, respectively, for 2009-2010, the period in which the DSCC's proposed recount fund would be established and any donations to it would presumably be made.

single Senate candidate.[6]

(2) May the Franken Committee establish an election contest fund, separate from its existing recount fund and subject to a separate limit on amounts received, and use that fund to pay expenses related to the 2008 Senatorial election contest in Minnesota?

No. the Franken Committee may not establish an election contest fund subject to a limit that is separate from and in addition to its existing recount fund. Accordingly, if the Franken Committee chooses to establish a separate election contest fund, the Franken Committee would need to aggregate all donations received by the election contest fund with donations received from the same donors for its existing recount fund.

As discussed above, the Act and Commission regulations define the terms "contribution" and "expenditure" to include any gift, loan, or payment of money or anything of value for the purpose of influencing a Federal election. *See* 2 U.S.C. 431(8)(A)(i) and (9)(A)(i); 11 CFR 100.52(a) and 100.111(a). Commission regulations make exceptions from the cited definitions, for gifts, loans, or payments made with respect to a recount of the results of a Federal election, or an election contest concerning a Federal election. 11 CFR 100.91 and 100.151. Further, in recognition of the Act's prohibitions on corporations, labor organizations, national banks, and foreign nationals making contributions or donations "in connection with" Federal elections, see 2 U.S.C. 441b(a) and 441e(a)(1)(A), these recount regulations expressly bar the receipt or use of funds prohibited by 11 CFR 110.20 (foreign nationals) and Part 114 (corporations, labor organizations, and national banks). 11 CFR 100.91 and 100.151.

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[6] This is a shared limit between the national party committee (in this instance the Democratic National Committee) and the Senate campaign committee (*i.e.*, the DSCC). 2 U.S.C. 441a(h); 11 CFR 110.2(e); *See* Price Index Increases for Contribution and Expenditure Limitations and Lobbyist Bundling Disclosure Threshold, 74 Fed. Reg. 7435 (Feb. 17, 2009).

As discussed above with respect to national party committees, prior to the passage of BCRA, the exceptions to the definitions of "contribution" and "expenditure" that applied to recount and election contest activities meant that any donations received by candidates solely for the purpose of funding an election recount effort were not subject to the Act's contribution limitations. However, with the passage of BCRA, Federal candidates and officeholders are not permitted to "solicit, receive, direct, transfer, or spend funds in connection with an election for Federal office . . . unless the funds are subject to the limitations, prohibitions, and reporting requirements of th[e] Act." *See* 2 U.S.C. 441i(e)(1)(A); *see also* 11 CFR 300.2(g).

Accordingly, because recounts and election contests are "in connection with an election for Federal office," Federal candidates and officeholders may not solicit, receive, direct, transfer, or spend funds for recounts and election contests unless the funds are subject to the limitations, prohibitions, and reporting requirements of the Act. *See* Advisory Opinion 2006-24; 2 U.S.C. 441i(e)(1)(A); *see also* 11 CFR 300.2(g).

Although the Franken Committee wishes to establish what it describes as an election contest fund, separate from its existing recount fund and subject to a separate limit on amounts received, the Commission's regulations, since 1977, have only provided for a single exception to the definitions of "contribution" and "expenditure" for all recount activity, and it is clear that in promulgating the rule that contains that exception, the Commission intended a single exemption to apply to all aspects of recount activity, whether such activity is "with respect to the recount of the results of a Federal election, or an election contest concerning a Federal election." *See* 11 CFR 100.4(b)(15)(1977) and 11 C.F.R. 100.91 (2009).

In referring to a recount and an election contest in the same provision in this way, the regulations indicate that these two elements of the post-election process are two possible steps in determining the outcome of an uncertain election. The use of both terms in the regulations was intended to encompass a wide variety of possible post-election procedures that might be employed to determine the outcome of an election, depending on various states' laws, not to imply a distinction between them. The Act and Commission regulations regularly use lists of similar words (e.g., "a gift, subscription, loan, advance, or deposit of money or anything of value") in this way, not to distinguish between them but to group them together as similar concepts to be treated in the same manner and to ensure that variations of a concept are included.

Prior to the passage of BCRA, there was no reason for the regulatory exception to make such a distinction because funds for all recount activities were exempted from any contribution limits whatsoever. Accordingly, no support can be found for an argument that the regulation draws a meaningful distinction between recounts, on the one hand, and election contests, on the other, based on the grammatical structure of the rule.

Further, in Advisory Opinion 2006-24, the Commission listed a number of types of post-election expenses to which it contemplated a single donation limit would apply: "'expenses resulting from a recount, election contest, counting of provisional and absentee ballots and ballots cast in polling places,' as well as 'post-election litigation and administrative-proceeding expenses concerning the casting and counting of ballots during the Federal election, fees for the payment of staff assisting the recount or election contest efforts, and administrative and overhead expenses in connection with recounts and election contests.'" When all of such post-election expenses are "in connection with" the

same election, as they are in the Minnesota recount and election contest at issue here, there is nothing in the Act or Commission regulations to justify separate donation limits for different steps in the post-election process.

With the passage of BCRA, Congress sought to prevent the actual or apparent corruption of Federal candidates and officeholders by limiting candidates and officeholders in their solicitation and acceptance of any funds "in connection with a Federal election."[7] 2 U.S.C. 441i(a)(1). Were the Commission to permit Federal candidates and officeholders to establish not only a recount fund, with a separate donation limit in addition to the general election contribution limit, but also an election contest fund with yet another separate donation limit, candidates and officeholders would be able to solicit and accept twice as much money for the post-election phase alone as they are permitted to solicit and accept for the entire general election.

Moreover, recount activity related to Federal elections often involves several separate proceedings related to the recount or the election contest in a variety of different venues such as State courts, State and local election commissions or boards, as well as other administrative agencies. If the Commission were to allow Federal candidates and officeholders to solicit funds subject to separate donation limits for each of these matters, the Commission would effectively nullify the anti-corruptive goal behind the limitation placed on Federal candidates and officeholders by BCRA.

The Commission therefore concludes that the Franken Committee may only establish an election contest fund in addition to its existing recount fund if donations to

[7] In upholding the restrictions contained in BCRA, the Supreme Court recognized that the primary purpose of the Act is to "to limit the actuality and appearance of corruption resulting from large individual financial contributions." *See McConnell v. FEC*, 540 U.S. 93 (2003) (citing *Buckley v. Valeo*, 424 U.S. 1 (1976)).

the election contest fund are aggregated with donations to the recount fund from the same persons for purposes of the applicable amount limitations.

This response constitutes an advisory opinion concerning the application of the Act and Commission regulations to the specific transaction or activity set forth in your request. *See* 2 U.S.C. 437f. The Commission expresses no opinion regarding the application of any rules of the U.S. Senate to the activity because those issues are not within its jurisdiction. The Commission emphasizes that, if there is a change in any of the facts or assumptions presented and such facts or assumptions are material to a conclusion presented in this advisory opinion, then the requester may not rely on that conclusion as support for its proposed activity. Any person involved in any specific transaction or activity which is indistinguishable in all its material aspects from the transaction or activity with respect to which this advisory opinion is rendered may rely on this advisory opinion. *See* 2 U.S.C. 437f(c)(1)(B). Please note that the analysis or conclusions in this advisory opinion may be affected by subsequent developments in the law including, but not limited to, statutes, regulations, advisory opinions and case law. The cited advisory opinion is available on the Commission's website at http://saos.nictusa.com/saos/searchao.

On behalf of the Commission,

Steven T. Walther
Chairman

ADVISORY OPINION 2009-04

Marc E. Elias, Esq. **DRAFT B**
Perkins Coie LLP
607 Fourteenth Street NW
Washington, DC 20005-2003

Dear Mr. Elias:

We are responding to your advisory opinion request on behalf of Al Franken for U.S. Senate and the Democratic Senatorial Campaign Committee, concerning the application of the Federal Election Campaign Act of 1971, as amended ("the Act"), and Commission regulations to the establishment of recount and/or election contest funds by these two political committees. The Commission concludes that the DSCC may establish a recount fund and use it to pay for expenses incurred in connection with the 2008 U.S. Senate recount and election contest in Minnesota, subject to certain limitations. The Commission also concludes that the Franken Committee may establish an election contest fund separate from its existing recount fund and that donations to the election contest fund will not be aggregated with donations to the recount fund for purposes of the Act.

Background

The facts presented in this advisory opinion are based on your letter received on February 18, 2009 and your e-mail received on February 20, 2009, and publicly available materials, including reports filed with the Commission.

Al Franken for U.S. Senate (the "Franken Committee") is Al Franken's principal campaign committee for the 2008 Senate election in Minnesota. The Democratic Senatorial Campaign Committee ("DSCC") is a national committee of the Democratic Party.

Mr. Franken was the Democratic candidate for U.S. Senator from Minnesota in 2008, facing incumbent Norman Coleman, the Republican candidate. The close results of that election led to a statewide recount under Minnesota law. The recount has been concluded, with Mr. Franken certified as the winner by the Minnesota State Canvassing Board. However, Mr. Coleman has filed a lawsuit in Minnesota state court to contest the results of the recount, in accordance with Minnesota procedure for contesting an election. The litigation is still ongoing, several months following the election and the conclusion of the recount, and therefore no final winner has been conclusively determined or seated in the Senate. The Franken Committee has already established a recount fund to pay for expenses incurred in connection with the recount, and thus far this fund has also been used to pay expenses related to the election contest. The DSCC, however, has not yet established any such account.

The DSCC proposes to establish a recount fund, separate from its other accounts and subject to a separate limit on amounts received, and use that fund only to pay expenses incurred in connection with the 2008 Senatorial recount and election contest in Minnesota. Donations to the separate recount fund would be subject to the amount limitations, source prohibitions, and reporting requirements of the Act.

The Franken Committee proposes to establish an election contest fund that would also be subject to the amount limitations, source prohibitions, and reporting requirements of the Act. This proposed fund would also be separate from the Franken Committee's other existing accounts, and would be subject to a separate limit for amounts received. However, unlike the proposed DSCC recount fund, the Franken Committee's proposed

election contest fund would only be used to pay expenses incurred in connection with the election contest, not those incurred in connection with the recount.

Questions Presented

(1) May the DSCC establish a recount fund, separate from any of the DSCC's other accounts and subject to a separate limit on amounts received, and use that fund to pay expenses related to both the 2008 Senatorial recount and the election contest in Minnesota?

(2) May the Franken Committee establish an election contest fund, separate from its existing recount fund and subject to a separate limit on amounts received, and use that fund to pay expenses related to the 2008 Senatorial election contest in Minnesota?

Legal Analysis and Conclusions

(1) May the DSCC establish a recount fund, separate from any of the DSCC's other accounts and subject to a separate limit on amounts received, and use that fund to pay expenses related to both the 2008 Senatorial recount and the election contest in Minnesota?

Yes, the DSCC may establish a recount fund, separate from its other accounts and subject to a separate limit on amounts received, and use that fund only to pay expenses incurred in connection with recounts and election contests of Federal elections, such as the 2008 Senatorial recount and election contest in Minnesota. Donations to the separate recount fund would be subject to the amount limitations, source prohibitions, and reporting requirements of the Act.

A national party committee, including the DSCC, may not solicit, receive, direct, or spend "any funds [] that are not subject to the limitations, prohibitions, and reporting

requirements of th[e] Act." 2 U.S.C. 441i(a)(1); 11 CFR 300.10(a). Therefore, the DSCC must use Federal funds to pay for any recount activities in which it engages, and any recount fund it establishes may only accept donations that comply with the amount limitations, source prohibitions, and reporting requirements of the Act.

The Act and Commission regulations define the terms "contribution" and "expenditure" to include any gift, loan, or payment of money or anything of value for the purpose of influencing a Federal election. *See* 2 U.S.C. 431(8)(A)(i) and (9)(A)(i); 11 CFR 100.52(a) and 100.111(a). Commission regulations make exceptions from the cited definitions, for gifts, loans, or payments made with respect to a recount of the results of a Federal election, or an election contest concerning a Federal election. 11 CFR 100.91 and 100.151.[1] Nonetheless, in recognition of the Act's prohibitions on corporations, labor organizations, national banks, and foreign nationals making contributions or donations "in connection with" Federal elections, *see* 2 U.S.C. 441b(a) and 441e(a)(1)(A), and the Act's prohibition on foreign nationals making contributions or donations to committees of political parties, *see* 2 U.S.C. 441e(1)(B), these recount regulations expressly bar the receipt or use of funds prohibited by 11 CFR 110.20 (foreign nationals) and Part 114 (corporations, labor organizations, and national banks). 11 CFR 100.91 and 100.151.

In Advisory Opinion 2006-24 (National Republican Senatorial Committee and Democratic Senatorial Campaign Committee), the Commission considered facts similar to those at issue here, and concluded that "because election recount activities are in

[1] These recount regulations recognize that the Act's definition of "election" does not specifically include recounts. *See* 2 U.S.C. 431(1); *see also* 11 CFR 100.2.

connection with a Federal election, any recount fund established by either a Federal candidate or the State Party must comply with the amount limitations, source prohibitions, and reporting requirements of the Act." The Commission further concluded that donations to such recount funds would not be aggregated with contributions from the same persons for purposes of the calendar-year and aggregate biennial contribution limits.

The Commission concludes that its decisions and rationales set forth in Advisory Opinion 2006-24 also apply to a national party committee such as the DSCC. Thus, the DSCC may establish a recount fund to be used only for expenses incurred in connection with recounts and election contests of Federal elections, such as the 2008 Senatorial recount and election contest in Minnesota. Under the limits applicable to national party committees for 2009, the DSCC's recount fund may not receive more than $30,400 from a person or $15,000 from a multicandidate political committee per calendar year, regardless of the number of recounts and election contests for which it wishes to pay expenses in 2009.[2] *See* 2 U.S.C. 441a(a)(1)(B) and 441a(a)(2)(B); 11 CFR 110.1(c) and 110.2(c). However, because section 441i(a)(1) does not convert the donations into "contributions" for purposes of 2 U.S.C. 441a, the DSCC may advise prospective donors that donations to recount funds will not be aggregated with contributions from those individuals for purposes of the calendar year contribution limits set forth in 2 U.S.C. 441a(a)(1)(B), and that the aggregate biennial contribution limits of 2 U.S.C. 441a(a)(3), limiting an individual's total contributions to all candidates and

[2] These are the contribution limits for individuals and multicandidate committees, respectively, for 2009-2010, the period in which the DSCC's proposed recount fund would be established and any donations to it would presumably be made.

political committees over a two-year period, do not apply to donations to recount funds. The DSCC's recount fund will also be subject to the source prohibitions and reporting requirements of the Act.

(2) May the Franken Committee establish an election contest fund, separate from its existing recount fund and subject to a separate limit on amounts received, and use that fund to pay expenses related to the 2008 Senatorial election contest in Minnesota?

Yes, the Franken Committee may establish an election contest fund in addition to its existing recount fund and subject to a separate limit on amounts received, and may use that fund to pay expenses related to the 2008 Senatorial election contest in Minnesota.

Commission regulations exclude from the definitions of "contribution" and "expenditure" amounts given or used "with respect to a recount of the results of a Federal election, or an election contest concerning a Federal election." 11 CFR 100.91 and 11 CFR 100.151. Minnesota law, applicable to the election at issue, specifically provides for both recounts and election contests as separate procedures, either of which may take place with or without the occurrence of the other. *See* Minn. Stat. § 204C.35 (2008) (recounts); Minn. Stat. §§ 209.2, 209.021 (2008) (election contests).

The Commission concludes that the intent of the regulations is to distinguish between a recount and an election contest, and that therefore the Franken Committee may establish an election contest fund in addition to its existing recount fund. As described in the advisory opinion request, the Franken Committee's election contest fund will be subject to the amount limitations, source prohibitions, and reporting requirements of the Act. Under the limits applicable to candidate committees for the 2008 election cycle, the election contest fund may not receive more than $2,300 from any person who may

lawfully donate, except multicandidate political committees. These committees may donate up to $5,000 to the election contest fund. *See* 2 U.S.C. 441a(a)(1) and (2).

This response constitutes an advisory opinion concerning the application of the Act and Commission regulations to the specific transaction or activity set forth in your request. *See* 2 U.S.C. 437f. The Commission emphasizes that, if there is a change in any of the facts or assumptions presented and such facts or assumptions are material to a conclusion presented in this advisory opinion, then the requester may not rely on that conclusion as support for its proposed activity. Any person involved in any specific transaction or activity which is indistinguishable in all its material aspects from the transaction or activity with respect to which this advisory opinion is rendered may rely on this advisory opinion. *See* 2 U.S.C. 437f(c)(1)(B). Please note that the analysis or conclusions in this advisory opinion may be affected by subsequent developments in the law including, but not limited to, statutes, regulations, advisory opinions and case law. The cited advisory opinion is available on the Commission's website at http://saos.nictusa.com/saos/searchao.

On behalf of the Commission,

Steven T. Walther
Chairman

ADVISORY OPINION 2009-04

Marc E. Elias, Esq. **DRAFT C**
Perkins Coie LLP
607 Fourteenth Street NW
Washington, DC 20005-2003

Dear Mr. Elias:

We are responding to your advisory opinion request on behalf of Al Franken for U.S. Senate (the "Franken Committee") and the Democratic Senatorial Campaign Committee ("DSCC"), concerning the application of the Federal Election Campaign Act of 1971, as amended ("the Act"), and Commission regulations to the establishment of recount and/or election contest funds by these two political committees. The Commission concludes that any funds the DSCC solicits, including any funds the DSCC solicits for any recount fund it establishes (whether separate or not from the committee's general funds), are not subject to a separate donation limit apart from the DSCC's aggregate calendar-year contribution limits, which apply to the party committee generally. The Commission also concludes that the Franken Committee may establish an election contest fund separate from its existing recount fund, and donations to the election contest and recount funds are not subject to the limitations of the Act.

Background

The facts presented in this advisory opinion are based on your letter received on February 18, 2009, and your e-mail received on February 20, 2009, and publicly available materials, including reports filed with the Commission.

The Franken Committee is Al Franken's principal campaign committee for the 2008 Senate election in Minnesota. The DSCC is a national committee of the Democratic Party.

Mr. Franken was the Democratic candidate for the U.S. Senate in Minnesota in 2008, facing Senator Norman Coleman, the Republican incumbent. The close results of that election led to a statewide recount under Minnesota law. The recount has been concluded, with Mr. Franken certified as having a 225-vote lead by the Minnesota State Canvassing Board. Mr. Coleman has filed a lawsuit in Minnesota state court to contest the results of the recount, in accordance with Minnesota procedure for contesting an election. The litigation is ongoing, several months following the election and the conclusion of the recount, and therefore no final winner has been conclusively determined or seated in the Senate. The Franken Committee has already established a recount fund to pay for expenses incurred in connection with the recount, and thus far this fund has also been used to pay expenses related to the election contest. The DSCC, however, has not yet established any such account.

The DSCC proposes to establish a recount fund, separate from its other accounts and subject to a separate limit on amounts received, and to use that fund only to pay expenses incurred in connection with the 2008 Senatorial recount and election contest in Minnesota. The DSCC proposes that donations to the separate recount fund would be subject to the amount limitations, source prohibitions, and reporting requirements of the Act.

The Franken Committee proposes to establish an election contest fund, which the request stipulates also would be subject to the amount limitations, source prohibitions, and reporting requirements of the Act. Per the request, this proposed fund also would be separate from the Franken Committee's other existing accounts, and would be subject to a separate limit for amounts received. However, unlike the proposed DSCC recount fund,

the Franken Committee's proposed election contest fund would be used only to pay expenses incurred in connection with the election contest, not those incurred in connection with the recount.

Questions Presented

(1) May the DSCC establish a recount fund, separate from any of the DSCC's other accounts and subject to a separate limit on amounts received, and use that fund to pay expenses related to both the 2008 Senatorial recount and the election contest in Minnesota?

(2) May the Franken Committee establish an election contest fund, separate from its existing recount fund and subject to a separate limit on amounts received, and use that fund to pay expenses related to the 2008 Senatorial election contest in Minnesota?

Legal Analysis and Conclusions

(1) May the DSCC establish a recount fund, separate from any of the DSCC's other accounts and subject to a separate limit on amounts received, and use that fund to pay expenses related to both the 2008 Senatorial recount and the election contest in Minnesota?

No. the DSCC may not establish a recount fund to accept donations which would not aggregate with the DSCC's calendar-year contribution limits with respect to the same donors or contributors ($30,400 per person. $15,000 per multicandidate committee for the 2009-2010 election cycle). regardless of whether the DSCC establishes it as a "separate" fund.

A national party committee, including the DSCC. may not solicit, receive, direct, or spend "any funds [] that are not subject to the limitations, prohibitions, and reporting

requirements of th[e] Act." 2 U.S.C. 441i(a)(1); 11 CFR 300.10(a). Therefore, the DSCC must use Federal funds to pay for any recount activities in which it engages, and any recount fund it establishes may only accept donations that comply with the amount limitations, source prohibitions, and reporting requirements of the Act.

The Commission's regulations exclude from the definition of "contributions" any "gifts, subscription, loan, advance, or deposit of money or anything of value made with respect to a recount of the results of a Federal election, or an election contest concerning a Federal election." 11 CFR § 100.91. Nonetheless, the regulation specifies that the Act's contribution source prohibitions on corporations, labor organizations, national banks, and foreign nationals still apply to such recount or election contest donations. *Id.*

Notwithstanding the regulations' exclusion of recount and election fund donations from the definition of "contributions," national party committees still "may not solicit, receive, or direct . . . or spend any funds," for whatever purpose, that are not subject to the Act's "limitations." Accordingly, any donations to a national party committee's recount and election contest funds must be subject to the same limits pursuant to which the national party committee otherwise operates, and such donations aggregate for the purposes of each donor's or contributor's contribution limit with respect to that party committee. Unlike the per-election contribution limits for authorized candidate committees, the contribution limits for national party committees apply per donor or contributor, *per calendar year*, without regard to how many elections each committee participates in. Accordingly, national party committees may not solicit any funds exceeding their per donor / contributor, per calendar year, contribution limits, nor may

they receive or spend any funds, for whatever purpose, that were not given in accordance with the Act's limits.

With respect to the Act's biennial limits on "contributions," those limits apply only to individuals and not to party and candidate committees. 2 U.S.C. § 441a(a)(3). Because 11 C.F.R. § 100.91 excludes donations to recount and election contest funds from being considered as "contributions," donations to a national party committee's recount and election contest funds do not aggregate with respect to an individual's biennial contribution limit, notwithstanding the limits applicable to the party committee in soliciting, receiving, and spending such donations.

In Advisory Opinion 2006-24 (National Republican Senatorial Committee and Democratic Senatorial Campaign Committee), the Commission addressed the question of what limits apply to donations to a state party's recount fund for Federal races, rather than the question presented in this request (*i.e.*, donations to a national party's recount fund). In AO 2006-24, the Commission concluded that a state party committee may solicit, receive, and spend funds that are donated to a separate recount fund, and that such funds do not aggregate with respect to state party's calendar-year contribution limits. AO 2006-24 is distinguishable from the question presented here because the Act's "soft money" restrictions distinguish between state and national party committees. The Act subjects funds solicited, received, and spent by national party committees to the limitations, prohibitions, and reporting requirements of the Act, no matter what purpose those funds are used for. 2 U.S.C. § 441i(a). In contrast, funds given to state party committees are only subject to the contribution limits only if such funds constitute "contributions" under the Act and are "expended or disbursed for Federal election

activity." 2 U.S.C. §§ 441a(a)(1)(D) and 441i(b). Because the scope of federal election activity does not include recounts and election contests and, in fact, ends on the date of the election (*i.e.*, before any recounts and election contests take place) (*see* 2 U.S.C. § 431(20); 11 C.F.R. § 100.24[1]), a state party's recount fund for Federal races, unlike a national party committee's fund, is not subject to the aggregate contribution limit that applies to the same donors to the state party under the Act.

(2) May the Franken Committee establish an election contest fund, separate from its existing recount fund and subject to a separate limit on amounts received, and use that fund to pay expenses related to the 2008 Senatorial election contest in Minnesota?

Yes, the Franken Committee may establish an election contest fund in addition to its existing recount fund to pay expenses related to the 2008 Senatorial election contest in Minnesota. Neither fund is subject to the Act's limitations. Unlike the Act's limits applicable to national party committees, which, as discussed above, apply regardless of the purpose for which the parties solicit, receive, and spend funds, the limits applicable to Federal candidates and their authorized committees apply only if they solicit, receive, or spend them "in connection with an election for Federal office" or "in connection with any election other than an election for Federal office." 2 U.S.C. § 441i(e)(1). *Cf.* Advisory Opinions 2003-20 (Hispanic College Fund) (solicitation of donations by a Federal officeholder to a scholarship fund are not subject to the Act's limits because they are not in connection with any election); 2004-14 (Davis) (solicitation of donations by a Federal officeholder to charities are not subject to the Act's limits because they are not in

[1] In *Shays v. FEC*, 528 F.3d 914 (D.C. Cir. 2008) ("*Shays III*"), the court held that the definition of "Federal election activity" at 11 C.F.R. § 100.24 was impermissibly narrow with respect to the regulation's treatment of get-out-the-vote and voter registration activity. The court did not otherwise question the validity of the regulation's scope in any respect pertaining to the issues presented in this advisory opinion.

connection with any election); 2005-10 (Berman) (solicitation of donations by Federal officeholders to committees supporting or opposing state ballot initiatives are not subject to the Act's limits because they are not in connection with any election). Question Two thus hinges on whether recount and election contest funds are "in connection with" any election.

A) Recounts and Election Contests are not "Elections"

Under the Act, as amended by the Bipartisan Campaign Reform Act of 2002 ("BCRA"), Federal candidates and officeholders may not solicit, receive, direct, transfer, or spend funds "in connection with an *election* for Federal office" unless the funds are subject to the limitations, prohibitions, and reporting requirements of the Act ("Federal funds"). 2 U.S.C. § 441i(e)(1)(A) (emphasis added); *see also* 11 CFR § 300.2(g). As discussed above, Commission regulations exclude from the definitions of "contribution" and "expenditure" amounts given or used "with respect to a recount of the results of a Federal election, or an election contest concerning a Federal election." 11 CFR § 100.91 and 11 CFR § 100.151.

Because recounts and election contests are not "elections" under the Act, and donations to recount and election contest funds are not "in connection with an election for Federal office," a Federal candidate's recount and election contest funds are not subject to the Act's contribution limits, but nonetheless are barred from accepting funds from corporations, labor organizations, national banks, and foreign nationals under 11 C.F.R. § 100.91. Because 11 C.F.R. § 100.91 excludes from the definition of "contribution" donations to recount and election contest funds, the aggregate biennial contribution limits of 2 U.S.C. § 441a(a)(3) also do not apply to an individual's donations to such funds.

The recount and election contest regulations at 11 C.F.R. §§ 100.91 (exclusions applicable to contributions) and 100.151 (exclusions applicable to expenditures) are premised on the Commission's interpretation of the statutory term "election" to exclude recounts. *See* 2 U.S.C. 431(1); *see also* 11 CFR 100.2. The Act defines elections to include, *inter alia*, primary, general, special and runoff elections, but it does not include recounts or election contests. *See* 2 U.S.C. § 431(1); 11 C.F.R. § 100.2. The Commission explained this exclusion when it first promulgated the recount regulations in 1977. "Also excluded from the definition of contribution is a donation to cover the costs of recounts . . . since, though they are related to elections, [they] are not Federal elections as defined by the Act." *See* Explanation and Justification for 1977 Amendments to Federal Election Campaign Act of 1971, H.R. Doc. No. 95-44, 95th Cong., 1st Sess. 40 (1977). [2]

On two occasions prior to BCRA, the Commission has applied the regulations' exclusions for recount and election contest funds. In Advisory Opinion 1978-92 (Miller), the Commission concluded that any funds received by a separate organizational entity established by a Federal candidate's authorized committee solely for the purposes of funding an election recount effort would not be subject to the contribution limitations of 2 U.S.C. § 441a, and would not trigger political committee status or reporting obligations for the separate election recount entity. The Commission also concluded that the separate recount entity could not accept funds from corporations, labor organizations, and national banks, which were included in 11 C.F.R. § 100.4(b)(15).[3] The Commission noted that

[2] Prior to 1980, similar provisions appeared at 11 C.F.R. §§ 100.4(b)(15) and 100.7(b)(17). *See* 45 Fed. Reg. 15080 (Mar. 7, 1980). From 1980 to 2002, these regulations appeared at 11 C.F.R. §§ 100.7(b)(20) and 100.8(b)(20).

[3] Advisory Opinion 1978-92 (Miller) cited the then-current recount regulations found at 11 C.F.R. §§ 100.4(b)(15) and 100.7(b)(17). In the 1980 recodification of 11 C.F.R. §§ 100.4(b)(15) and 100.7(b)(17) as

involvement of current officers and staff of the authorized committee as organizers and principals in a separate election recount entity would not change these conclusions.

In Advisory Opinion 1998-26 (Landrieu), the Commission considered a candidate's principal campaign committee that established, as a wholly separate entity, a contested election trust fund. The Commission concluded that the trust fund was not subject to reporting requirements and could accept amounts in excess of the contribution limitations in 2 U.S.C. § 441a, but could not accept funds from prohibited sources, as specified in the predecessors to the recount regulations, 11 C.F.R. §§ 100.7(b)(20) and 100.8(b)(20).

BCRA took effect after these advisory opinions were issued. Under BCRA, candidates and Federal officeholders may not solicit, receive, direct, transfer, or spend funds "in connection with an *election* for Federal office" unless the funds are subject to the limitations, prohibitions, and reporting requirements of the Act ("Federal funds"). 2 U.S.C. § 441i(e)(1)(A) (emphasis added); *see also* 11 C.F.R. § 300.2(g). BCRA also imposes limitations on the funds Federal candidates may solicit, receive, direct, transfer, or spend "in connection with any *election* other than an election for Federal office." 2 U.S.C. 441i(e)(1)(B) (emphasis added).

The Commission's treatment of recount funds over the past 30 years, based on the rationale that recounts are not "elections," was well known by Congress. That treatment was first expressed in the 1977 regulations, applied in Advisory Opinion 1978-92, recodified in 1980, and applied again in Advisory Opinion 1998-26. At no point in this

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11 C.F.R. §§ 100.7(b)(20) and 100.8(b)(20), respectively, the prohibition on funds from foreign nationals was added to the regulation. *See* 45 Fed. Reg. 15080, 15102 (Mar. 7, 1980).

period did Congress act to alter the Commission's approach, although it amended the Act several times. In 2002, BCRA was enacted with no amendment to the definition of "election" to include recounts. The legislative history offers no indication that Section 441i(e)(1) was intended to apply to recounts. When Congress is aware of an agency's interpretation of a statute and does not amend that statute, Congress is presumed to accept that interpretation as correct. *See, e.g., Lorillard v. Pons*, 434 U.S. 575 (1978) ("Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change.").

Following the enactment of BCRA, the Commission recodified its recount regulations, and specifically reaffirmed that recounts are not "elections." When the Commission reorganized its regulations regarding "contributions" and "expenditures" during the BCRA rulemakings, one "commenter advocated the complete, or at least partial, elimination of the exception to the definitions of 'contribution' and 'expenditure' for recounts and election contests, on the basis that recounts and election contests, which are not Federal elections as defined by the Act, *see generally Federal Election Regulations*, H.R. Doc. No. 44, 95th Cong., 1st Sess. at 40 (1977) . . . 'serve as an avenue for the use of soft money to influence federal elections,' as evidenced by unregulated contributions used to pay for the 2000 Florida recount." *Explanation and Justification for Final Rules on Reorganization of Regulations on "Contribution" and "Expenditure,"* 67 Fed. Reg. 50582, 50584 (Aug. 5, 2002). In response to this commenter, the Commission specifically stated that "[t]his change is beyond the scope of this rulemaking

dealing only with nonsubstantive changes . . . ." *Id.*[4] This regulatory history demonstrates two key points. First, the Commission explicitly reaffirmed, post-BCRA, its view that recounts are not "elections" under the law, citing its original 1977 regulation. Second, in reorganizing its regulations, the recount regulation was recodified without substantive change.

Finally, in its 2004 Legislative Recommendations to Congress, the Commission asked Congress to clarify whether recounts should be subject to 2 U.S.C. § 441i(e)(1).[5] Congress did not act on this request.

In light of the foregoing, the Commission finds its recount regulations at 11 C.F.R. §§ 100.91 and 100.151 to be valid and enforceable and unaffected by BCRA. To conclude otherwise would constitute rewriting our regulation, which, of course, may not be done via the advisory opinion process. *See* 2 U.S.C. § 437f(b) ("Any rule of law which is not stated in this Act or in chapter 95 or chapter 96 of title 26 may be initially proposed by the Commission only as a rule or regulation pursuant to procedures established in section 438(d) of this title."); 11 CFR 112.4(e).[6]

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[4] Approximately one week earlier, the Commission noted in a different rulemaking that "[t]he exemption for recounts is addressed in the Commission's current rules at 11 C.F.R. 100.7(b)(20) . . . ." *Final Rule on Prohibited and Excessive Contributions: Non-Federal Funds or Soft Money*, 67 Fed. Reg. 49064, 49085 (July 29, 2002). The Commission specifically declined to alter that regulation when promulgating the "soft money" rules.

[5] *See Legislative Recommendations 2004*, available at http://www.fec.gov/pages/legislative_recommendations_2004.htm#441ie (visited September 28, 2006) ("The Commission recommends that Congress amend 2 U.S.C. 441i(e)(1) to clarify the circumstances in which recall elections, referenda and initiatives, recounts, redistricting, legal defense funds, and related activities fall within the scope of activities that are "in connection with a Federal election" and are thus subject to the 441i(e)(1) restrictions.").

[6] *See also* Advisory Opinion 1999-11, Concurring Opinion of Wold, Elliott, and Mason ("[A]dvisory opinions are clearly not rules or regulations. Advisory opinions may address only "the application of [the FECA] . . . or a rule or regulation prescribed by the Commission. . . . Subsection 437f(b) is an extraordinary restatement of a restriction which is clear from the plain reading of subsections 437f(a) and 438(d): the Commission may not establish a rule of general applicability through the advisory opinion process. . . .").

Thus, recounts are not "elections" under the Act, *see* 2 U.S.C. § 431(1), and funds solicited, received and spent in connection with a recount are not funds solicited, received or spent in connection with an election, and are therefore not subject to 2 U.S.C. § 441i(e)(1). There is no evidence that Congress intended through BCRA to implicitly overturn either the Commission's longstanding rules or advisory opinions on the treatment of recount funds, and in fact, there is substantial evidence of legislative acquiescence to the Commission's longstanding treatment of recount funds. Consequently, BCRA's restrictions at 2 U.S.C. § 441i(e)(1) on Federal candidates soliciting, receiving, directing, transferring, or spending funds in connection with either Federal or non-Federal elections do not alter the Commission's prior treatment of funds raised and spent by Federal candidates for recounts and recount funds.

B) Recounts and Election Contests are not "In Connection With" an Election

Although it is clear that recounts and election contests are not in themselves "elections," the question remains whether they are nonetheless "*in connection with*" an election. The Commission concludes they are not for two reasons.

1. *Interpreting "In Connection With" to Encompass Recounts and Election Contests Would Require the Commission to Supersede AO 2006-24, and the Commission Declines to do so.*

Assuming, *arguendo*, that recount and election contest funds are to be considered "in connection with" an election and thus subject to the Act's contribution limits, in connection with *which election* are such donations given? They must be given in connection with the election that is the subject of the recount or the election contest (e.g.,

the Minnesota general election for U.S. Senate held on November 4, 2008).[7] If that is true, then AO 2006-24 could not have concluded correctly that donations to a Federal candidate's fund to conduct a recount of general election results do not aggregate with contributions from the same sources to that candidate's general election fund, since those funds would all be considered to be given "in connection with" the same general election and subject to the same aggregate limit under the Act. Unless the Commission supersedes AO 2006-24, this interpretation of "in connection with" an election cannot be correct.[8]

The alternative reading of 2 U.S.C. § 441i(e)(1)(A), which we adopt here, is that because recounts and election contests are not in themselves "elections," donations given to fund such recounts and election contests are not given "in connection with" any election. Because donations that are not given "in connection with" an election are not subject to the Act's limits (*see* AOs 2003-20, 2004-14, 2005-10, *supra*), donations to recount and election contest funds also are not subject to the Act's limits.[9]

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[7] When the Act and Commission regulations discuss an "election," the term generally refers not to the office sought, but rather to the different and discrete elections (e.g., primary, general, runoff, special) that are held in order to determine the ultimate holder of that office. *See* 2 U.S.C. § 441a(a)(6); 11 C.F.R. § 100.2. Thus, if recount fund donations are subject to the contribution limits because they are given "in connection with an election for Federal office," they must be given "in connection with" the election that is being challenged.

[8] Although advisory opinions only provide guidance and protection against enforcement actions to parties involved in specific transactions or activities which are indistinguishable in all material aspects from the transactions or activities at issue in the advisory opinions, the Commission avoids superseding its advisory opinions where, as here, it is unnecessary to do so and the public has relied on AO 2006-24 since its issuance. Superseding AO 2006-24 in this case is unnecessary because there is a reasonable alternative interpretation of the Act and regulations that permits the transactions in question. Numerous candidate committees (including the Franken Committee) also already have established recount funds under the assumption that donations thereto are not subject to the same aggregate limit as contributions to their general election funds.

[9] The Commission interprets AO 2006-24 as establishing the proposition that Federal candidates' recount funds may solicit and receive donations subject to a limit that is, at a minimum, the same limit permitted under the Act.

2. *Reading "In Connection With" as Not Encompassing Recounts and Election Contests is More Consistent with Judicial Opinion and Prior Commission Interpretation.*

Although BCRA does not define the phrase "in connection with an election for Federal office," the Act's corporate contribution provision, which pre-dates BCRA, uses substantially the same language, and the Supreme Court has limited that language to apply only to activities that seek to influence a voter's choice in the run-up to an actual election, rather than post-election activity.

In *FEC v. Massachusetts Citizens for Life* ("*MCFL*"), the Court was asked to interpret the Act's prohibition at 2 U.S.C. § 441b on corporations and labor organizations from making "a contribution or expenditure in connection with any [Federal] election." 479 U.S. 238, 247-248 (1986). The Court explained that the effect and intent of this language "is to prohibit the use of union or corporate funds for *active electioneering directed at the general public* on behalf of a candidate in a federal election." *Id.* (citing 117 Cong. Rec. 43,379 (1971) (emphasis added). The use of the term "active electioneering" makes clear that, at least in the context of Section 441b, a contribution or expenditure made "in connection with" an election is limited to pre-election activity. There is, of course, no "active electioneering" involved in recount or election contest activities, since the election has already occurred – only recounting, re-tallying, or litigation over the votes already cast in the election to ensure that every eligible vote has been accurately counted.

As the Supreme Court also has stated, "A fundamental canon of statutory construction is that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning." *Perrin v. United States*, 444 U.S. 37, 42

(1979) (citing *Burns v. Alcala*, 420 U.S. 575, 580-81 (1975)). Since the Court did not suggest in *MCFL* that its interpretation of Section 441b of the Act ("in connection with any [Federal] election") was anything other than ordinary, contemporary, or common, Congress is presumed to have intended the same meaning when it adopted the "in connection with an election for Federal office" and "in connection with any election other than an election for Federal office" at Section 441i(e)(1) of the Act.

In its rulemaking implementing *BCRA*, the Commission has adopted the same interpretation as the Court in *MCFL* in defining Section 431(20)(A)(ii) of the Act ("Federal election activity," or "FEA"), which addresses "voter identification, get-out-the-vote activity, or generic campaign activity conducted *in connection with an election* in which a candidate for Federal office appears on the ballot." The Commission's regulations defining FEA's "in connection with an election" language in terms of a time period ending on the date of the general election or any general runoff election, but does not include any post-election activity such as recounts or election contests. *See* 11 C.F.R. § 100.24(a)(1).[10]

Similarly, in its post-BCRA Advisory Opinion 2003-15, the Commission was asked to decide whether a lawsuit, filed by supporters of former Rep. Cynthia McKinney, seeking a special primary and special general election in 2003, and thereby essentially overturning the primary and general elections that Rep. Denise Majette won in 2002, was "in connection with" any election, and whether Rep. Majette could raise funds to pay for

[10] *See* n.1, *supra*. With respect to the proper interpretation of "in connection with" with an election, the *Shays III* court notably did not question the Commission's limitation of the regulation's temporal scope to pre-election activity. Thus, the *Shays III* court did not hold that the Commission interpreted the "in connection with" language of 2 U.S.C. § 431(20)(A)(ii) too narrowly.

her legal expenses in monitoring and potentially defending against this litigation.[11] Although the Commission noted that the litigation involving Rep. Majette "challeng[ed] the lawfulness of the conduct of the election," the Commission concluded that the lawsuits were not "in connection with" any election, and thus the contribution limits of the Act, as amended by BCRA, did not apply at all.

Notably, the commission stated: "There is no indication in the legislative history of BCRA that Congress intended section 441i(e)(1)(A) to change an area that is both well-familiar to members of Congress and subject of longstanding interpretation through statements of Congressional policy and Commission Advisory Opinions."

The question presented in this Advisory Opinion 2009-04 is identical in all material respects to the question presented in AO 2003-15. To wit, Mr. Coleman's recount and election contest requests, against which Mr. Franken is defending, challenged the "lawfulness of the conduct" of the November 4, 2008 election. *See* Notice of Contest, *Coleman v. Franken*, No. 62-CV-09-56 (Ramsey County Dist. Ct., 2nd Jud. Dist.), *available at* http://moritzlaw.osu.edu/electionlaw/litigation/documents/Notice_of_Contest.pdf (alleging, *inter alia*, double-counting of ballots; counting of ballots lacking the proper chain of custody; counting of ineligible absentee ballots; counting of mutilated, defaced, or obliterated ballots; and challenges to ballots that were improperly rejected or upheld by election officials; all in violation of Minnesota state election law). The Commission

[11] The lawsuit initially challenged Georgia's open primary election system in general. After Rep. Majette won the primary and general elections in 2002, the complaint was amended to seek a special primary and general election, thereby effectively invalidating the results of the 2002 elections. Rep. Majette was initially named as a defendant but was later excluded. Nonetheless, the possibility remained that she could be named again in the proceedings as a defendant.

does not see any distinction between the recount and election contests concerning the results of Minnesota's 2008 general election for U.S. Senate at issue in this opinion,[12] and the lawsuits concerning Georgia's 2002 primary and general elections and proposed special primary and general elections in 2003 for Georgia's 4th District seat in the U.S. House of Representatives at issue in AO 2003-15.

The Commission thus concludes that the Franken Committee's existing recount fund and proposed election contest fund are not subject to the Act's limits because they are neither contributions nor funds given "in connection with" any election for the purposes of 2 U.S.C. §§ 441a(a)(1)(A) and 441i(e)(1), but the Act's source prohibitions, and reporting requirements nonetheless apply pursuant to 11 C.F.R. § 100.91.

With respect to the Act's biennial limits, those limits apply only to "contributions" and only to individuals, and do not apply to party and candidate committees. 2 U.S.C. § 441a(a)(3). As discussed above with respect to national party committees, because 11 C.F.R. § 100.91 excludes donations to recount and election contest funds from being considered as "contributions," donations to a Federal candidate's recount and election contest funds also do not aggregate with respect to an individual's biennial contribution limit.

This response constitutes an advisory opinion concerning the application of the Act and Commission regulations to the specific transaction or activity set forth in your request. *See* 2 U.S.C. 437f. The Commission emphasizes that, if there is a change in any

[12] Although, under this opinion, it makes no practical difference with respect to the question of donation limits to the Franken Committee's recount and election contest funds, the Commission notes that the recount and election contest are separate procedures specifically established under Minnesota law. The law permits either a recount or election contest to take place with or without the occurrence of the other. *See* Minn. Stat. § 204C.35 (2008) (recounts); Minn. Stat. §§ 209.2, 209.021 (2008) (election contests).

of the facts or assumptions presented and such facts or assumptions are material to a conclusion presented in this advisory opinion, then the requester may not rely on that conclusion as support for its proposed activity. Any person involved in any specific transaction or activity which is indistinguishable in all its material aspects from the transaction or activity with respect to which this advisory opinion is rendered may rely on this advisory opinion. *See* 2 U.S.C. 437f(c)(1)(B). Please note that the analysis or conclusions in this advisory opinion may be affected by subsequent developments in the law including, but not limited to, statutes, regulations, advisory opinions and case law. The cited advisory opinion is available on the Commission's website at http://saos.nictusa.com/saos/searchao.

On behalf of the Commission,

Steven T. Walther
Chairman