

## **PUBLIC COMMENTS ON DRAFT ADVISORY OPINIONS**

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

DRAFT A of ADVISORY OPINION 2011-03 is now available for comment. It was requested by Marc E. Elias, Esq., on behalf of the Democratic Senatorial Campaign Committee, Jessica Furst, Esq., on behalf of National Republican Congressional Committee, John R. Phillippe, Esq., on behalf of Republican National Committee, Brian G. Svoboda, Esq., on behalf of Democratic Congressional Campaign Committee, and Michael E. Toner, Esq., on behalf of National Republican Senatorial Committee and is scheduled to be considered by the Commission at its public meeting on Wednesday, March 16, 2011.

If you wish to comment on DRAFT A of ADVISORY OPINION 2011-03, please note the following requirements:

- 1) Comments must be in writing, and they must be both legible and complete.
- 2) Comments must be submitted to the Office of the Commission Secretary by hand delivery or fax ((202) 208-3333), with a duplicate copy submitted to the Office of General Counsel by hand delivery or fax ((202) 219-3923).
- 3) Comments must be received by noon (Eastern Time) on March 15, 2011.
- 4) The Commission will generally not accept comments received after the deadline. Requests to extend the comment period are discouraged and unwelcome. An extension request will be considered only if received before the comment deadline and then only on a case-by-case basis in special circumstances.
- 5) All timely received comments will be made available to the public at the Commission's Public Records Office and will be posted on the Commission's website at <http://saos.nictusa.com/saos/searchao>.

## **REQUESTOR APPEARANCES BEFORE THE COMMISSION**

The Commission has implemented a pilot program to allow advisory opinion requestors, or their counsel, to appear before the Commission to answer questions at the open meeting at which the Commission considers the draft advisory opinion. This program took effect on July 7, 2009.

Under the program:

- 1) A requestor has an automatic right to appear before the Commission if any public draft of the advisory opinion is made available to the requestor or requestor's counsel less than one week before the public meeting at which the advisory opinion request will be considered. Under these circumstances, no advance written notice of intent to appear is required. This one-week period is shortened to three days for advisory opinions under the expedited twenty-day procedure in 2 U.S.C. 437f(a)(2).
- 2) A requestor must provide written notice of intent to appear before the Commission if all public drafts of the advisory opinion are made available to requestor or requestor's counsel at least one week before the public meeting at which the Commission will consider the advisory opinion request. This one-week period is shortened to three days for advisory opinions under the expedited twenty-day procedure in 2 U.S.C. 437f(a)(2). The notice of intent to appear must be received by the Office of the Commission Secretary by hand delivery, email ([Secretary@fec.gov](mailto:Secretary@fec.gov)), or fax ((202) 208-3333), no later than 48 hours before the scheduled public meeting. Requestors are responsible for ensuring that the Office of the Commission Secretary receives timely notice.
- 3) Requestors or their counsel unable to appear physically at a public meeting may participate by telephone, subject to the Commission's technical capabilities.
- 4) Requestors or their counsel who appear before the Commission may do so only for the limited purpose of addressing questions raised by the Commission at the public meeting. Their appearance does not guarantee that any questions will be asked.

**FOR FURTHER INFORMATION**

Press inquiries: Judith Ingram  
Press Officer  
(202) 694-1220

Commission Secretary: Shawn Woodhead Werth  
(202) 694-1040

Comment Submission Procedure: Rosemary C. Smith  
Associate General Counsel  
(202) 694-1650

Other inquiries:

To obtain copies of documents related to Advisory Opinion 2011-03, contact the Public Records Office at (202) 694-1120 or (800) 424-9530, or visit the Commission's website at <http://saos.nictusa.com/saos/searchao>.

**ADDRESSES**

Office of the Commission Secretary  
Federal Election Commission  
999 E Street, NW  
Washington, DC 20463

Office of General Counsel  
ATTN: Rosemary C. Smith, Esq.  
Federal Election Commission  
999 E Street, NW  
Washington, DC 20463

**AGENDA DOCUMENT NO. 11-14**

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FEDERAL ELECTION COMMISSION  
Washington, DC 20463

2011 MAR -9 P 5:06

March 9, 2011

**AGENDA ITEM**

For Meeting of 3/16/11

**MEMORANDUM**

TO: The Commission

FROM: Christopher Hughey  
Acting General Counsel

*ACK for CH*

Rosemary C. Smith  
Associate General Counsel

*ACK for RWS*

Robert M. Knop  
Assistant General Counsel

*sent for RMK*

David C. Adkins  
Attorney

*DA*

Subject: AO 2011-03 (DNCC, RNC, NRCC, DCCC, and NRSC)—Draft A

Attached is a proposed draft of the subject advisory opinion. We have been asked that this draft be placed on the agenda for March 16, 2011.

Attachment

1    ADVISORY OPINION 2011-03

**DRAFT A**

2    Marc E. Elias, Esq.  
3    Counsel to the Democratic Senatorial Campaign Committee  
4    Perkins Coie LLP  
5    700 13<sup>th</sup> Street, N.W., Suite 700  
6    Washington, D.C., 20005

7  
8    Jessica Furst, Esq.  
9    National Republican Congressional Committee  
10   320 First Street, S.E.  
11   Washington, D.C., 20003

12  
13   John R. Phillippe, Esq.  
14   Republican National Committee  
15   310 First Street, S.E.  
16   Washington D.C., 20003

17  
18   Brain G. Svoboda, Esq.  
19   Counsel to the Democratic Congressional Campaign Committee  
20   Perkins Coie LLP  
21   700 13<sup>th</sup> Street, N.W., Suite 700  
22   Washington, D.C., 20005

23  
24   Michael E. Toner, Esq.  
25   Counsel to the National Republican Senatorial Committee  
26   Wiley Rein LLP  
27   1776 K Street NW  
28   Washington, D.C., 20006

29   Dear Ms. Furst and Messrs. Elias, Phillippe, Svoboda, and Toner:

30           We are responding to your advisory opinion request on behalf of the Democratic  
31    Senatorial Campaign Committee (“DSCC”), the National Republican Congressional  
32    Committee (“NRCC”), the Republican National Committee (“RNC”), the Democratic  
33    Congressional Campaign Committee (“DCCC”), and the National Republican Senatorial  
34    Committee (“NRSC”) (collectively, the “National Party Committees” or “Committees”),  
35    concerning the application of the Federal Election Campaign Act of 1971, as amended  
36    (the “Act”), and Commission regulations to the use of recount funds to finance non-

1 recount-related litigation expenses. The Commission concludes that the National Party  
2 Committees may use their recount funds for the proposed purpose.

3 ***Background***

4 The facts presented in this advisory opinion are based on your letter received on  
5 February 7, 2011.

6 In February of 2010, the National Party Committees were sued in the United  
7 States District Court for the Northern District of Texas by Ralph Janvey (the “Janvey  
8 Litigation”). Janvey was appointed receiver over property, assets, and records of Allen  
9 Sanford, Sanford’s associate James Davis, and the Sanford Financial Group, among  
10 others, who together are alleged to have run a Ponzi scheme. Janvey claims that proceeds  
11 from this scheme were donated and contributed to the National Party Committees, and he  
12 is seeking disgorgement of those donations and contributions along with the payment of  
13 interest and attorneys fees.

14 The National Party Committees have moved to dismiss the Janvey Litigation and  
15 the parties are in the midst of litigating the claims in court.

16 ***Question Presented***

17 *May the National Party Committees use recount funds to finance costs associated*  
18 *with the Janvey Litigation?*

19 ***Legal Analysis and Conclusion***

20 Yes, the National Party Committees may use recount funds to finance costs  
21 associated with the Janvey Litigation.

1           The Bipartisan Campaign Reform Act of 2002<sup>1</sup> (“BCRA”) amended the Act, in  
2 pertinent part, by prohibiting the national party committees from soliciting, receiving, or  
3 directing to another person a contribution, donation, or transfer of funds or any other  
4 thing of value, or spending any funds, that are not subject to the limitations, prohibitions  
5 and reporting requirements of the Act. 2 U.S.C. 441i(a)(1); *see also* 11 CFR 300.10(a).

6           In Advisory Opinion 2009-04 (DSCC/Franken), the Commission concluded that a  
7 national party committee could establish a recount fund, separate from its other accounts  
8 and subject to a separate limit – equivalent to its annual limit in 2 U.S.C. 441a(a)<sup>2</sup> – on  
9 amounts received. Donations to this separate recount fund were to be subject to the  
10 source prohibitions and reporting requirements of the Act, and were not aggregated with  
11 the donors’ aggregate biennial contribution limits set forth in 2 U.S.C. 441a(a)(3). The  
12 Commission permitted such funds “to pay expenses incurred in connection with recounts  
13 and election contests of Federal elections.”

14           Subsequently, in Advisory Opinion 2010-14 (DSCC), the Commission provided  
15 further guidance on the permissible uses of recount funds. In particular, the Commission  
16 concluded that a national party committee could make disbursements from its recount  
17 fund before the date of the general election for expenses related to recount preparation.<sup>3</sup>  
18 The Commission also concluded that a committee could use its recount fund to pay the

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<sup>1</sup> Pub. L. 107-155, 116 Stat. 81 (2002).

<sup>2</sup> At the time of this advisory opinion, the limits applicable to national party committees were \$30,400 from an individual and \$15,000 from a multicandidate political committee per calendar year. *See* 2 U.S.C. 441a(a)(1)(B) and 441a(a)(2)(B) (2009); 11 CFR 110.1(c) and 110.2(c) (2009).

<sup>3</sup> For purposes of that request, recount preparation expenses included payments for the services of attorneys and staff to prepare for the post-election period, such as by conducting recount-related research in States where recounts were most likely. Examples of recount-preparation activities included researching State laws on recounts and election contests, developing plans and budgets for anticipated recounts and election contests, and recruiting volunteers to engage in recounts.

1 costs associated with soliciting additional donations to the recount fund so long as the  
2 recount solicitations clearly stated the purpose of the fund and noted that no donations to  
3 the fund would be used for the purpose of influencing any Federal election.

4 The Commission further concluded that to the extent the committee engaged in  
5 dual-purpose activities – that is, joint campaign and recount preparation activities – the  
6 committee would be required to allocate the expenses associated with those activities  
7 using the “funds received” method in 11 CFR 106.1(a).

8 Finally, in Advisory Opinion 2010-18 (DFL), the Commission concluded that  
9 recount funds raised in connection with one Federal election could be used to fund  
10 recount-related activities in subsequent Federal elections.

11 The Commission’s reasoning in its three post-BCRA advisory opinions  
12 concerning recount funds has never explicitly limited the national party committees to  
13 using such funds exclusively to finance recount activities. However, the Commission has  
14 noted that certain uses of recount funds would be permissible because “none of the  
15 activities, or the results of those activities, can or will be used for campaign activities  
16 before Election Day.” Advisory Opinion 2010-14 (DSCC). Relatedly, the Commission’s  
17 “regulations explicitly exempt from the definitions of ‘contribution’ and ‘expenditure’ ‘a  
18 gift, subscription, loan, advance, or deposit of money or anything of value made with  
19 respect to a recount of the results of a Federal election, or an election contest concerning  
20 a Federal election.’” *Id.*

21 Both of these aspects that the Commission found to be salient in approving  
22 disbursements from the national party committees’ recount funds apply here. First, the  
23 National Party Committee’s proposal to use their recount funds for the Janvey Litigation



1 will not be used in any way for any campaign activities or for the purpose of influencing  
2 any Federal election. Rather, the National Party Committees represent the proposed  
3 disbursements would cover the costs of defending against litigation relating  
4 predominantly to donations the committees received in their non-Federal accounts prior  
5 to the passage of BCRA, which the donor's receiver now seeks to recover pursuant to a  
6 "fraudulent transfer" theory under state law. Second, like funds received and disbursed  
7 for recount activities, the Commission repeatedly has recognized that funds received and  
8 disbursed with respect to legal defense activities are not "contributions" or  
9 "expenditures" under the Act. *See, e.g.*, Advisory Opinions 2011-01 (Carnahan)  
10 (litigation concerning copyright infringement), 2003-15 (Majette) (litigation concerning  
11 open primary elections), 1983-37 (Massachusetts Democratic State Committee)  
12 (litigation concerning a party's ballot access rules), 1981-16 (Carter-Mondale Presidential  
13 Committee) (potential commercial contract litigation), 1981-13 (Moss) (litigation  
14 concerning slander claim), and 1980-04 (Carter-Mondale Presidential Committee)  
15 (alleged violations of the Appropriations Act and Hatch Act, and infringements of  
16 constitutional rights). Accordingly, the Commission concludes the National Party  
17 Committee's proposal to use recount funds to defend against the Jenvey Litigation is in  
18 accordance with its prior advisory opinions on recount funds.<sup>4</sup>

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<sup>4</sup> In Advisory Opinion 2010-18 (DFL), the Commission was not able to agree on whether a State party committee could convert recount funds – whether by transfer or redesignation to its main Federal campaign account – for use "in connection with the 2010 elections." Putting aside the differences between the rules governing the State and national party committees' ability to transfer funds to their Federal accounts (*see* 11 C.F.R. 300.31(b)(3)(v)), the Commission's inability to provide an answer to that question in AO 2010-18 is immaterial here because the National Party Committees' proposal to use their recount funds to defend their legal entitlement to retain certain donations is not in connection with any Federal elections. *See* Advisory Opinion 2003-15 (Majette) (litigation concerning open primary elections was not "in connection with a Federal election").

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

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16 On behalf of the Commission,  
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Cynthia L. Bauerly  
Chair