FEDERAL ELECTION COMMISSION
Washington, DC 20463

MEMORANDUM

TO: THE COMMISSION
ACTING STAFF DIRECTOR
ACTING GENERAL COUNSEL
FEC PRESS OFFICE
FEC PUBLIC DISCLOSURE

FROM: OFFICE OF THE COMMISSION SECRETARY

DATE: March 15, 2011

SUBJECT: Comment on Draft AO 2011-03
(DSCC, RNC, NRCC, DCCC, and NRSC)

Transmitted herewith is a timely submitted comment from Marc E. Elias (counsel to the DSCC), John R. Phillippe Jr. (counsel to the RNC), Jessica C. Furst (counsel to the NRCC), Brian G. Svoboda (counsel to the DCCC), and Michael E. Toner (counsel to the NRSC) regarding the above-captioned matter.

Draft Advisory Opinion 2011-03 is on the agenda for Wednesday, March 16, 2011.

Attachment

March 15, 2011

BY HAND DELIVERY

Shawn Woodhead Werth, Commission Secretary
cc: Christopher Hughey, Acting General Counsel
Federal Election Commission
999 E Street N.W.
Washington, D.C. 20463

Re: Advisory Opinion Request 2011-03

Dear Ms. Werth:

We are writing on behalf of the Democratic Senatorial Campaign Committee (the "DSCC"), the Democratic Congressional Campaign Committee (the "DCCC"), the Republican National Committee (the "RNC"), the National Republican Senatorial Committee (the "NRSC"), and the National Republican Congressional Committee (the "NRCC") (collectively, the "National Party Committees"), concerning Drafts A and B of Advisory Opinion 2011-03. We urge the Commission to adopt Draft A, because it correctly applies the principles set forth by the Commission in Advisory Opinions 2006-24 (DSCC/NRSC), 2009-4 (Franken/DSCC), 2010-14 (DSCC), and 2010-18 (Minnesota DFL) (collectively, the "recount opinions").

In these opinions, the Commission repeatedly found that recount funds *are* subject to the Bipartisan Campaign Reform Act ("BCRA"), and must comply with "the Act's limits, prohibitions, and reporting requirements." *See* Advisory Opinion 2009-4 (holding that recount funds are subject to 2 U.S.C. § 441i(a)(1)). The Commission also concluded that a national party committee may solicit and receive donations under a separate limit without running afoul of BCRA. *See id.* So long as the national party committee does not use the donations for the purpose of influencing an election, their receipt and use complies with BCRA and the Act's contribution limits. *See* Advisory Opinion 2010-14 (donations in recount fund cannot "be used to campaign for any candidates or to influence any elections" and "must have no relation to campaign activities.").

Draft A correctly sees that the National Party Committees' proposal is consistent with these principles and complies with BCRA. First, the National Party Committees propose to pay for the litigation expenses only with Federal funds that have been raised within the limitations, prohibitions, and reporting requirements of the Act. *See* Advisory Opinions 2006-24 ("a recount fund ... must be a Federal account containing only Federal funds"). The raising and spending of these funds does not violate 2 U.S.C. § 441i(a)(1). Second, the National Party Committees propose to use these Federal funds only to pay for expenses that the Commission has found not to qualify as "expenditures" under the Act. *See* Draft A, at 5 (citing advisory opinions holding

that "funds received and disbursed with respect to legal defense activities are not 'contributions' or 'expenditures' under the Act). As a result, the donations in the recount fund will not be converted to contributions, thereby maintaining the integrity of the Act's contribution limits.

Draft B does not dispute that the raising and spending of these funds complies with BCRA. Instead, Draft B claims that the legal principles articulated in the Commission's recount opinions are *sui generis* and do not apply to the payment of other types of expenses, even when their relationship to an election is still more attenuated. *See* Draft B, at 3-4. To support its claim, Draft B offers three arguments:

- Draft B tries to depict recount funds as a "limited exception to BCRA's general rule ...." Draft B, at 3. But this is wrong. The Commission has repeatedly held that recount funds are *not* exempt from BCRA. To the contrary, these funds are raised *only* under the Act's limits, restrictions and reporting requirements. *See* Advisory Opinion 2006-24 ("[A] recount fund ... must be a Federal account containing only Federal funds."); Advisory Opinion 2009-4 (recount fund are "subject to the Act's limits, prohibitions, and reporting requirements"); Advisory Opinion 2010-14 (committees must "pay for all of their recount activities using entirely Federal funds.").

- Draft B claims that recounts and election contests are "unique occurrences" and "[i]n many ways ... are similar to a runoff election, which triggers a contribution limit separate from the normal contribution limit." Draft B, at 4. But neither recounts nor election contests are in any way unique. Each election cycle sees multiple such occurrences. Certainly, both occur more commonly than the situation that yielded this request, when the National Party Committees were sued under state law to return pre-BCRA nonfederal donations that were alleged to have come from a Ponzi scheme. The logic behind the recount opinions was not that recounts were "unique occurrences," but rather that their costs – like those of non-compliance litigation defense – fall within the narrow subset of expenses that the Commission has expressly found not to be "expenditures." Because the litigation expenses at issue here are not materially distinguishable, they should be governed by the same legal rules.

- Finally, Draft B hyperbolically claims that permitting the National Party Committees to spend their recount funds to pay for these litigation expenses "would transform 'recount funds' ... into 'non-Federal accounts.'" Draft B, at 5. But this, too, is untrue. ***The National Party Committees do not propose to raise a single dollar beyond that which they may now legally raise.*** Rather, they propose to use Federal funds in existing Federal accounts for one additional, non-distinguishable purpose. Allowing the funds to be used for this limited purpose does not mean that the "funds could then be used to finance all manners of activity ...." *Id.* Rather, it means that the funds will continue not to be used to influence federal elections.

The National Party Committees' proposal does not violate BCRA, the Act, or any Commission regulation. It is wholly consistent with the Commission's previous advisory opinions. For that reason, the Commission should adopt Draft A.

Very truly yours,

Brian G. Svoboda /JB

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