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FEDERAL ELECTION COMMISSION  
Washington, DC 20463

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October 29, 2009

**AGENDA ITEM**  
For Meeting of: 11-05-09

MEMORANDUM

TO: The Commission

FROM: Thomasenia P. Duncan *TPD*  
General Counsel

Rosemary C. Smith *RCS*  
Associate General Counsel

Robert M. Knop *NTS (for KMK)*  
Assistant General Counsel

Joshua S. Blume *JSB*  
Attorney

Subject: Draft AO 2009-25 (Jennifer Brunner Committee)

Attached are two proposed drafts of the subject advisory opinion. We request that these drafts be placed on the agenda for November 5, 2009.

Attachment

3 Mr. Patrick M. Quinn, Esq.  
4 The Brunner Firm Co., LPA  
5 545 East Town Street  
6 Columbus, OH 43215

7 Dear Mr. Quinn:

8 We are responding to your advisory opinion request on behalf of the Jennifer  
9 Brunner Committee ("Federal Committee") concerning the application of the Federal  
10 Election Campaign Act of 1971, as amended (the "Act"), and Commission regulations to  
11 a proposed donation of campaign funds representing the value of assets owned by The  
12 Brunner Firm, LPA.

13 The Commission concludes the Federal Committee may not implement its  
14 proposal to donate an amount equal to the value of the assets to charity in exchange for  
15 the assets, because doing so would result in an excessive in-kind contribution from the  
16 Landlord to the Federal Committee. The Commission also concludes, however, that the  
17 Federal Committee may purchase the computers, office equipment and supplies, and  
18 similar assets by paying the fair market value of the assets directly to the Landlord.

19 ***Background***

20 The facts presented in this advisory opinion are based on your letter dated June  
21 11, 2009, e-mails received on August 25 and September 2, 2009, telephone conversations  
22 with Commission attorneys, and information from publicly accessible websites.

23 Ms. Jennifer L. Brunner is both the current Secretary of State of Ohio and a  
24 candidate for United States Senator from Ohio in 2010. The Federal Committee is Ms.  
25 Brunner's principal campaign committee for her Senate campaign.

1 Ms. Brunner formed her now-defunct State committee ("State Committee") when  
2 she ran for Secretary of State of Ohio in 2006. She terminated the State Committee,<sup>1</sup>  
3 announced her intention to run for United States Senator, and created the Federal  
4 Committee by filing an FEC Form 1, Statement of Organization, with the Commission,  
5 on February 17, 2009.

6 On the day of its termination, the State Committee had in its possession certain  
7 assets, including computers, office equipment and supplies, which it had recently  
8 purchased with State Committee funds. These assets remained in the offices of The  
9 Brunner Firm, LPA, the State Committee's landlord (the "Landlord"), and are now, based  
10 upon your description of state property law, considered to be the property of the  
11 Landlord.

12 The Federal Committee wishes to pay for and use these assets in connection with  
13 the upcoming Federal primary election in 2010. The Federal Committee entered into an  
14 agreement with the Landlord on February 18, 2009 regarding the payment and use of  
15 these campaign assets. In exchange for the right to use the assets and for the eventual  
16 transfer of title to the assets to the Federal Committee, the Federal Committee agreed to  
17 donate \$15,000, representing the parties' assessment of the fair market value of the  
18 assets, to one or more of three enumerated charitable organizations.<sup>2</sup> *See Short Term*

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<sup>1</sup> The State Committee was terminated in reliance on Ms. Brunner's interpretation of a provision of Ohio Election Law under which a "candidate" is not allowed to have more than one "campaign committee." *See, e.g.* Ohio Rev. Code § 3517.081(A) ("Each candidate shall have no more than one campaign committee for purposes of receiving contributions and making expenditures."). The Federal Committee interprets this provision, together with other definitions in the Ohio Revised Code, to mean that a State candidate may not maintain State and Federal campaign committees at the same time.

<sup>2</sup> The three named charities all appear to be categorized as charitable organizations pursuant to 26 U.S.C. 170(c). They are listed as "Art for a Childs [sic] Safe America Foundation," "Mental Health America of

1 *Tenancy At Sufferance And Agreement To Vacate* (“Agreement”), *Consideration and*  
2 *Donation*. The donation would be \$1,000 per month, on the 28<sup>th</sup> day of each month,  
3 beginning on October 28, 2009, until the full \$15,000 has been paid. *Id.* The Federal  
4 Committee would also have the option to accelerate its payments. *Id.*

5 ***Question Presented***

6 *May the Federal Committee acquire and use certain computers, office equipment*  
7 *and supplies, and other similar assets owned by the Landlord in exchange for donating*  
8 *the fair market value of the assets to one or more section 170(c) charitable organizations*  
9 *specified by the Landlord?*<sup>3</sup>

10 ***Legal Analysis and Conclusions***

11 No, the Federal Committee may not acquire and use the Landlord’s computers,  
12 office equipment and supplies, and similar assets in exchange for donating the fair market  
13 value of those assets to one or more section 170(c) charitable organizations specified by  
14 the Landlord. As described below, however, it may purchase the computers, office  
15 equipment and supplies, and similar assets by paying the fair market value of the assets  
16 directly to the Landlord.

17 The Commission’s regulations permit a Federal campaign committee to purchase  
18 office supplies and equipment so long as the Federal campaign committee pays the “usual

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Franklin County, Inc.,” and “Columbus and Central Ohio Childrens [sic] Chorus Foundation” in the Internal Revenue Service’s Publication 78, found online at <http://www.irs.gov/app/pub-78> (last visited Sept. 14, 2009).

<sup>3</sup> The request asks whether the proposed transaction would violate 11 CFR 110.3(d), which prohibits the transfer of funds or assets from a candidate’s non-Federal campaign to her Federal campaign committee, except through a sale of the assets for fair market value. 11 CFR 110.3(d); *Explanation and Justification for Transfer of Funds from State to Federal Campaigns*, 58 FR 3473 (Jan. 8, 1993). However, because Ms. Brunner’s State committee no longer exists and is not a party to the transaction described in the request, 11 CFR 110.3(d) does not apply.

1 and normal charge” for such supplies and equipment. 11 CFR 100.52(d)(1). *See also*  
2 2 U.S.C. 431(8)(A)(i) and 441b(b)(2). If goods are provided to a political committee for  
3 free or for less than the usual and normal charge (a.k.a. “fair market value”) for such  
4 goods, then the provider is deemed to have made a contribution to the political committee  
5 of the difference between the usual and normal charge for the goods and the amount  
6 actually charged by the provider. 11 CFR 100.52(d).

7 For purposes of this opinion, the Commission accepts the requestor’s  
8 representation that the proposed purchase price for the assets owned by the Landlord  
9 reflects the fair market value of the assets.<sup>4</sup> The Commission concludes that the Federal  
10 Committee may not use the Landlord’s computers, office equipment and supplies, and  
11 similar assets in exchange for donating the fair market value of those assets to one or  
12 more section 170(c) charitable organizations specified by the Landlord rather than by  
13 purchasing them from the Landlord itself. In order for the Federal Committee to avoid  
14 receipt of an excessive in-kind contribution from the Landlord under the Commission’s  
15 regulations, the Landlord itself must receive payment from the Federal Committee at the  
16 usual and normal charge in exchange for the assets.<sup>5</sup> There would be no difference  
17 between the transaction as currently structured and the Landlord giving \$17,400 (\$15,000  
18 of which represents the fair market value of the equipment and the remaining \$2,400 of  
19 which represents the maximum allowable contribution for an election) directly to the  
20 Federal Committee with the proviso that the Federal Committee donate the excessive

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<sup>4</sup> The Commission expresses no opinion whether the Committee's determination of fair market value is valid and consistent with usual trade practices since you have not presented that question for Commission review.

<sup>5</sup> Once in receipt of payment from the Federal Committee, the Landlord may, of course, dispose of that payment as it wishes, including donating it to charity.

1 \$15,000 portion to charity. Both would still represent unlawful excessive contributions to  
2 the Federal Committee.<sup>6</sup>

3 For the above reasons, the Commission concludes that the Federal Committee  
4 may not acquire and use the Landlord's computers, office equipment and supplies, and  
5 similar assets in exchange for donating the fair market value of those assets to one or  
6 more section 170(c) charitable organizations specified by the Landlord. The Federal  
7 Committee may, however, acquire the assets by paying an amount equal to their fair  
8 market value directly to the Landlord.

9 This response constitutes an advisory opinion concerning the application of the  
10 Act and Commission regulations to the specific transaction or activity set forth in your  
11 request. *See* 2 U.S.C. 437f. The Commission emphasizes that, if there is a change in any  
12 of the facts or assumptions presented and such facts or assumptions are material to a  
13 conclusion presented in this advisory opinion, then the requester may not rely on that  
14 conclusion as support for its proposed activity. Any person involved in any specific  
15 transaction or activity which is indistinguishable in all its material aspects from the  
16 transaction or activity with respect to which this advisory opinion is rendered may rely on  
17 this advisory opinion. *See* 2 U.S.C. 437f(c)(1)(B). Please note the analysis or conclusions  
18 in this advisory opinion may be affected by subsequent developments in the law  
19 including, but not limited to, statutes, regulations, advisory opinions and case law. All

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<sup>6</sup> As a general matter, private parties may construct an exchange of goods and services under terms to which they agree. When a contract intersects with campaign finance laws, additional considerations may be required to ensure compliance with the Act. *See, e.g.*, 11 CFR 100.52 (d)(2) (defining "usual and normal charge for goods"); 100.54 (governing compensation for personal services); 100.78 (governing sale of food and beverages by a vendor); 100.82 (governing bank loans); 100.83 (governing brokerage loans and lines of credit); 100.93 (governing travel); 109.21(d)(4) & (5) (governing common vendors and former employees or independent contractors); and 116.3 (governing extension of credit by commercial vendors).

1 cited advisory opinions are available on the Commission's website at

2 <http://saos.nictusa.com/saos/searchao>.

3 On behalf of the Commission,

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Steven T. Walther  
Chairman

1 ADVISORY OPINION 2009-25

2 **DRAFT B**

3 Mr. Patrick M. Quinn, Esq.  
4 The Brunner Firm Co., LPA  
5 545 East Town Street  
6 Columbus, OH 43215

7 Dear Mr. Quinn:

8 We are responding to your advisory opinion request on behalf of the Jennifer  
9 Brunner Committee ("Federal Committee") concerning the application of the Federal  
10 Election Campaign Act of 1971, as amended (the "Act"), and Commission regulations to  
11 a contract for the purchase of certain office equipment and supplies.

12 The Commission concludes the Federal Committee may enter into the proposed  
13 transaction.

14 ***Background***

15 The facts presented in this advisory opinion are based on your letter dated June  
16 11, 2009, e-mails received on August 25 and September 2, 2009, and telephone  
17 conversations with Commission attorneys.

18 Ms. Jennifer L. Brunner is both the current Secretary of State of Ohio and a  
19 candidate for United States Senator from Ohio in 2010. The Federal Committee is Ms.  
20 Brunner's principal campaign committee for her Senate campaign. The Federal  
21 Committee asks about the permissibility of entering into an agreement for the acquisition  
22 of certain office supplies and equipment. Specifically, the Federal committee seeks to  
23 fulfill the terms of an agreement with its landlord to acquire use of and title to office  
24 equipment currently in the landlord's possession.

1           According to information provided by the Requestor, The Brunner Firm Co., LPA  
2 (“the Landlord”), previously had a sub-lease agreement with the prior tenant, which was  
3 a state campaign committee formed by Ms. Brunner when she ran for Secretary of State  
4 of Ohio in 2006. The state committee left behind certain property on the premises when  
5 it went out of existence.<sup>1</sup> According to the sub-lease agreement (submitted with the  
6 request) between the Landlord and the Requestor, the Landlord has taken the position that  
7 the property, which includes computers, office equipment and supplies, and similar assets  
8 (hereinafter “assets”), was abandoned, and that the Landlord is the legal owner of the  
9 property. *See Short Term Tenancy At Sufferance And Agreement To Vacate*  
10 (“Agreement”) at 2 (“Landlord can and does claim as abandoned property” “valuable  
11 personal property formerly owned by the Defunct Tenant”).

12           The Federal Committee proposes to enter into such Agreement with the Landlord,  
13 pursuant to which the Federal Committee would pay \$15,000, the full and fair market  
14 value of the assets<sup>2</sup> to one or more specified charitable entities recognized under Section  
15 170(c) of the Internal Revenue Code, in return for acquisition of legal title to the assets.  
16 *See id.* Under the terms of the Agreement, the Federal Committee would transfer \$1,000  
17 per month to the recipient entity or entities until the total purchase price of \$15,000 has

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<sup>1</sup> On February 17, 2009, Ms. Brunner announced her intention to run for United States Senator, and created the Federal Committee by filing an FEC Form 1, Statement of Organization, with the Commission. On that same date, in reliance on Ms. Brunner’s interpretation of a provision of Ohio Election Law under which a “candidate” is not allowed to have more than one State “campaign committee,” the state committee was terminated. Ohio Rev. Code § 3517.081(A) (“Each candidate shall have no more than one campaign committee for purposes of receiving contributions and making expenditures.”). According to the Requestor, the state committee “went out of existence with its property, physical and electronic, still on the premises... and without vacation [*sic*] the subject premises,” and that the Landlord, “views this property as abandoned and an obstruction to its use of its personal and real property.”

<sup>2</sup> In issuing an Advisory Opinion, the Commission takes as true the facts as presented by the Requestor. In this matter, the Requestor has represented that the fair market value of the property is \$15,000.

1 been made in full, with the option to accelerate the payments at the Federal Committee's  
2 discretion. *Id.*

3 The Federal Committee asks about whether the proposed transaction is prohibited  
4 by the Act.

5 ***Question Presented***

6 *May the Federal Committee purchase and use certain computers, office*  
7 *equipment and supplies, and other similar assets owned by the Landlord in exchange for*  
8 *paying, as consideration for such use and purchase, the fair market value of the assets to*  
9 *one or more section 170(c) charitable organizations specified by the Landlord?*

10 ***Legal Analysis and Conclusions***

11 Yes, the Federal Committee may purchase and use certain computers, office  
12 equipment and supplies, and other similar assets owned by the Landlord in exchange for  
13 paying, as consideration for such use and purchase, the fair market value of the assets to  
14 one or more section 170(c) charitable organizations specified by the Landlord.

15 Neither the Act nor the Commission's regulations prohibit a Federal campaign  
16 committee from entering into a written contract or agreement to purchase office supplies  
17 and equipment, nor do they prohibit a seller of such supplies and equipment from  
18 assigning to a third party its rights to payment under such a transaction.<sup>3</sup> Moreover,  
19 provided that the committee pays the "usual and normal charge" for such supplies and

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<sup>3</sup> Requestor asks specifically whether the proposed transaction would violate 11 C.F.R. 110.3(d), which prohibits the transfer of funds or assets from a candidate's non-federal campaign to her Federal campaign committee, except through a sale of the assets for fair market value. 11 C.F.R. 110.3(d); Explanation and Justification for Transfer of Funds From State to Federal Campaigns, 58 FR 3474 (Jan. 8, 1993). However, since Ms. Brunner's state committee no longer exists and is not a party to the transaction described in the request, and the assets involved are now solely the property of the Landlord, 11 C.F.R. 110.3(d) does not apply.

