AGENDA DOCUMENT NO: 10-14

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FEDERAL ELECTION COMMISSION
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AGENDA ITEM

For Meeting of 03-11-10

MEMORANDUM

TO: The Commission

FROM: Thomasenia P. Duncan TPD
General Counsel

Rosemary C. Smith RCS
Associate General Counsel

Robert M. Knop RMK
Assistant General Counsel

Jonathan M. Levin JML / by RMK
Senior Attorney

Joshua S. Blume JSB
Attorney

Subject: Two Alternative Drafts of AO 2010-02
(West Virginia Republican Party, Inc.)

Attached are two proposed alternative drafts of the subject advisory opinion. We have been asked that these drafts be placed on the agenda for March 11, 2010.

Attachment

1 ADVISORY OPINION 2010-02
2
3 Chairman Douglas E. McKinney, M.D. **DRAFT A**
4 West Virginia Republican Party, Inc.
5 636 Rivendell Drive
6 Bridgeport, West Virginia 26330-1358
7
8 Dear Dr. McKinney:

9 We are responding to your advisory opinion request, on behalf of the West
10 Virginia Republican Party, Inc. (the "State Party Committee"), concerning the application
11 of the Federal Election Campaign Act of 1971, as amended (the "Act"), and Commission
12 regulations to the use of a building fund account containing non-Federal funds either (1)
13 to make payments on a lease with an option to buy an office building, or (2) to make
14 payments on a land sale contract for that office building.

15 The Commission concludes that the State Party Committee must use an allocated
16 mixture of Federal and non-Federal funds to pay the monthly rental on the lease with an
17 option to buy the building. The State Party Committee may use a building fund account
18 containing non-Federal funds to purchase the office building if it enters into a land sale
19 contract with the building's owner. Because the State Party Committee does not yet
20 know the key terms of the eventual contract, the Commission does not have sufficient
21 information to determine if the contract will constitute a land sale contract.

22 ***Background***

23 The facts presented in this advisory opinion are based on your letter received on
24 December 1, 2009, supplementary materials received on January 6, 2010 and reports filed
25 with the Commission.

26 The State Party Committee is a political committee, and is registered with the
27 Commission as a State committee of a political party. *See* 2 U.S.C. 431(15); 11 CFR

1 100.14. The State Party Committee rents its current party headquarters under a lease with
2 an option to purchase. To pay the rent on this building, it uses funds derived from the sale
3 of its previous headquarters.

4 Shortly before November 6, 2002, the effective date of the Bipartisan Campaign
5 Reform Act[1] ("BCRA"), the West Virginia State Republican Executive Committee ("the
6 State Executive Committee"), the predecessor committee to the current State Party
7 Committee, received corporate contributions that it deposited in a Building Fund Account
8 to be used to purchase an office building to be used as the State Party's headquarters. In
9 January 2003, the State Executive Committee purchased an office building for $187,000.
10 At closing, the sellers received $120,000 in cash and a promissory note for the $67,000
11 balance, which was carried as a Deed of Trust by the seller to be paid off monthly over a
12 ten-year period. In late 2005, the State Executive Committee conveyed the property to
13 the State Party Committee, which continued to make monthly payments. All payments
14 on the Deed of Trust were made from the Federal accounts of the State Executive
15 Committee or the State Party Committee.

16 In February 2008, the State Party Committee sold the building for $140,000. The
17 sale proceeds were used to pay off the promissory note and realtor's fees, and the balance
18 of the proceeds was placed in a bank account and certificates of deposit (collectively
19 "building fund account"). The building fund account is segregated from the State Party
20 Committee's Federal account. The State Party Committee occupied the building until
21 August 2009 and used funds from its Federal account to pay rent on the building.

[1] Pub. L. No. 107-155, 116 Stat.81 (2002)

1 On September 1, 2009, the State Party Committee began to lease a different office
2 building located in Charleston, West Virginia. The lease includes an option to purchase
3 the building for $750,000. Pursuant to the lease, the State Party Committee has been
4 paying $2,500 per month.[2] The requestor indicates that $2,500 is the "usual and
5 customary" monthly rental amount, without a purchase option, for a comparable office
6 building in this location. None of the rent is for the purpose of keeping the purchase
7 option available, and the State Party Committee is making no extra payment in return for
8 that option.[3] The current lease ends on December 31, 2010, and is automatically
9 renewable for an additional two-year period (that is, until December 31, 2012). Under
10 the lease, any rental payments made before the exercise of the option would be applied to
11 the purchase price for the building. Although the lease does not state so explicitly, the
12 requestor indicates that the State Party Committee may exercise the option to purchase at
13 any time before the expiration of the current lease or the renewed lease up to December
14 31, 2012. The building may not be sold to a third party so long as the State Party
15 Committee makes its monthly payments until December 31, 2010, and, if the lease is
16 renewed, until December 31, 2012. If the State Party Committee exercises the option to
17 buy, the current owner will decline third party offers to purchase.
18 *State Party Committee's Proposal*

[2] As of January 13, 2010, the State Party Committee had paid a total of $12,500 for the security deposit and four months' rent. At that point, $77,500 remained from the proceeds of the sale of the previous headquarters building.

[3] During preliminary negotiations over the lease, the State Party Committee made a one-time $500 payment from its Federal account to preserve the opportunity to enter into the lease.

1 The State Party Committee proposes to use the proceeds from the sale of its
2 previous headquarters building (plus the accrued interest on the proceeds) to pay the rent
3 on the current lease. If the Commission decides that the State Party Committee may not
4 use solely non-Federal funds from the sales proceeds to pay for such rent, the State Party
5 Committee would exercise the option to purchase and enter into a land sales contract with
6 the building's owner. The State Party Committee would use the remaining proceeds in
7 the building fund account to make payments on the land sales contract.
8 Under the land sale contract, the State Party Committee would hold the equitable
9 title to the property, and the seller would retain legal title to the property until the final
10 payment on the contract is made. The State Party Committee would forfeit the equitable
11 title and all rights to the property if it fails to make a payment, and the building would
12 revert to the seller. The State Party Committee cannot provide additional information
13 about the possible land sale contract because the terms of the contract have not yet been
14 negotiated with the owner of the building.
15 ***Questions Presented***
16 *1. May the State Party Committee use only the proceeds from the sale of its previous*
17 *office building, which consist of non-Federal funds, to make payments on its lease with*
18 *an option to buy its current office building?*
19 *2. May the State Party Committee use only the proceeds from the sale of its previous*
20 *office building, which consist of non-Federal funds, to make the payments on a land sales*
21 *contract on the current office building?*
22

1 ***Legal Analysis and Conclusions***

2 *1. May the State Party Committee use only the proceeds from the sale of its previous*
3 *office building, which consist of non-Federal funds, to make payments on its lease with*
4 *an option to buy its current office building?*

5 No, the State Party Committee may not use only the proceeds from the sale of its
6 previous headquarters, which were deposited in its non-Federal account, to make the
7 rental payments on its lease with an option to buy its current office building.[4] The State
8 Party Committee must also use an allocable portion of funds from its Federal account to
9 make the payments.

10 Before the effective date of BCRA, a gift, subscription, loan, advance, or deposit
11 of money or anything of value received by a national or State party committee that was
12 specifically designated for the cost of the purchase or construction of its "office facility"
13 was exempt from the definition of "contribution" and "expenditure," provided that the
14 building was not acquired for the purpose of influencing the election of any candidate in
15 any particular election for Federal office. *See* 2 U.S.C. 431(8)(B)(viii)(2001); 11 CFR
16 100.7(b)(12), 100.8(b)(13), and 114.1(a)(2)(ix) (2001). This was known as the "building
17 fund exemption." The Commission interpreted former 2 U.S.C. 453 and 11 CFR 108.7 to
18 preempt State law as to the use of funds for the purchase or construction of such a
19 building. *See, e.g.* Advisory Opinions 2001-12 (Democratic Party of Wisconsin)
20 (andadvisory opinions cited therein).

[4] The funds used to purchase the previous office building were non-Federal funds because they included corporate contributions. Hence, the proceeds of the sale of that building are also non-Federal funds and were deposited in a non-Federal account.

1 BCRA amended the Act's provisions regarding the purchase by a State party of
2 its office building by repealing former 2 U.S.C. 431(8)(B)(viii). BCRA also amended the
3 Act's preemption provision by adding 2 U.S.C. 453(b). This section states:

4 Notwithstanding any other provision of this Act, a State or local
5 committee of a political party may, subject to State law, use exclusively
6 funds that are not subject to the prohibitions, limitations, and reporting
7 requirements of the Act for the purchase or construction of an office
8 building for such State or local committee.
9
10 Commission regulations at 11 CFR 300.35(a) state that a State party committee
11 may spend Federal funds or non-Federal funds (so long as such funds are not donated by
12 a foreign national) for the purchase or construction of its office building. If non-Federal
13 funds are used, those funds are also subject to State law. With respect to the use of non-
14 Federal funds, Federal law does not preempt or supersede State law as to (1) the source of
15 funds used, (2) the permissibility of the disbursements, or (3) the reporting of the receipt
16 and disbursement of such funds, except as otherwise provided by 11 CFR 300.35(a).[5]
17 11 CFR 300.35(a) and (b)(1). *See also* Explanation and Justification for Soft Money
18 Rules, 67 Fed. Reg. 49064 (July 29, 2002) ("Explanation and Justification") as to Federal
19 preemption with respect to the use of Federal funds.
20 Neither 2 U.S.C. 453(b) nor 11 CFR 300.35 defines or provides examples of the
21 "purchase" of a State office building. The Explanation and Justification for section

[5] Under 11 CFR 300.35(d), State party committees were permitted to accept funds into a building fund account under the building fund exemption at repealed 2 U.S.C. 431(8)(B)(viii) until November 5, 2002, the day before BCRA's effective date. Once BCRA took effect, such funds could not be used for any Federal or Levin account purposes, but could be used for any non-Federal purpose that is permitted under State law.

Like the repealed exemption, the new exemptions from Federal limits and prohibitions apply only if the office building is not being purchased or constructed for the purpose of influencing the election of any particular Federal candidate but rather for the functioning of the party, which would entail the support of most or all of the party's candidates over a number of years. Explanation and Justification for Soft Money Rules, 67 Fed. Reg. 49064, 49101 (July 29, 2002).

1 300.35 indicated that although this term was not being defined explicitly in the
2 regulation, the revisions to 2 U.S.C. 453(b) did not evidence any Congressional intent to
3 "narrow or otherwise change the scope of the activities . . . for which building fund
4 monies may be donated or spent" and that the pre-BCRA advisory opinions explaining
5 that scope "remain in force and effect." Explanation and Justification at 49102.
6 Accordingly, the question of whether a particular transaction constitutes a "purchase" for
7 purposes of FECA is for the Commission to decide, and is not a matter of State law.
8 Under the allocation regulations at 11 CFR 106.7(b), a State party political
9 committee that establishes Federal and non-Federal accounts may make disbursements
10 for administrative expenses using either entirely Federal funds or using at least a fixed
11 minimum proportion of Federal funds. Rent is one type of administrative cost listed in
12 11 CFR 106.7(c)(2). Consequently, rent payments must include at least a required
13 minimum percentage of Federal funds. *Id.*
14 In Advisory Opinion 2001-12 (Democratic Party of Wisconsin), the Commission
15 stated that the "building fund exemption specifically applies to costs directly relating to
16 the purchase, construction or renovation of an office building, not the leasing of such
17 facilities." In that advisory opinion, the Commission noted that there was "no
18 connection" between the requestor's payments on its current building lease and costs of
19 construction, purchase, or renovation. Hence, "[t]he payment of the lease would not
20 result in the acquisition of any property rights or interest in land that could otherwise be
21 sold and used to finance the purchase." Advisory Opinion 2001-12. *See also* Advisory

1 Opinion 1988-12 (Empire Bank) (stating that rent and other administrative costs are not
2 covered by the building fund exemption).
3 Currently, the State Party Committee has not yet exercised its option to purchase
4 the building. The State Party Committee merely pays the usual and normal charge it
5 would otherwise pay for renting a comparable building where the lease does not include a
6 purchase option. There is no provision in the lease for any additional payments to keep
7 the purchase option available, and no such additional payment has been or will be made.
8 Thus, there is no need for the Commission to determine if any such hypothetical
9 additional payments could be paid with entirely non-Federal funds. Under the
10 circumstances presented, the Commission concludes that the monthly payments on the
11 lease are merely rent.
12 Under 11 CFR 106.7(c)(2), the State Party Committee must pay at least an
13 allocable portion of each monthly rental payment from its Federal account in accordance
14 with the percentages in 11 CFR 106.7(d). Permissible sources of funds for the allocable
15 non-Federal payments for rent are governed by West Virginia law. Thus, West Virginia
16 law will determine whether the funds from the proceeds of the sale of the previous
17 headquarters may be used lawfully for the non-Federal portion of the State Party
18 Committee's rent.
19
20 2. *May the State Party Committee use only the proceeds from the sale of its previous*
21 *office building, which consists of non-Federal funds, to make the payments on a land*
22 *sales contract on the current office building?*

1 Yes, the State Party Committee may use the building fund account, containing
2 non-Federal funds, to make the payments required on a land sales contract on the current
3 office building. As explained in the answer to question one, the Act and Commission
4 regulations permit a State party committee to use exclusively non-Federal funds to
5 purchase an office building, provided that the use of such funds is permitted under State
6 law. *See* 2 U.S.C. 453(b) and 11 CFR 300.35. Although the word "purchase" is not
7 defined in the Act or Commission regulations, in Advisory Opinion 1993-09 (Michigan
8 Republican State Committee), the Commission treated a land sale contract as a contract
9 to purchase a building.
10 Here, the State Party Committee has not yet entered into a contract. In the
11 absence of a specific contract or more details, the Commission cannot make a definitive
12 conclusion as to whether an eventual contract between the current owner and the State
13 Party Committee would qualify as a purchase for the purposes of 2 U.S.C. 453(b) and 11
14 CFR 300.35.
15 This response constitutes an advisory opinion concerning the application of the
16 Act and Commission regulations to the specific transaction or activity set forth in your
17 request. *See* 2 U.S.C. 437f. The Commission emphasizes that, if there is a change in any
18 of the facts or assumptions presented, and such facts or assumptions are material to a
19 conclusion presented in this advisory opinion, then the requester may not rely on that
20 conclusion as support for its proposed activity. Any person involved in any specific
21 transaction or activity which is indistinguishable in all its material aspects from the
22 transaction or activity with respect to which this advisory opinion is rendered may rely on

1 this advisory opinion. *See* 2 U.S.C. 437f(c)(1)(B). Please note that the analysis or
2 conclusions in this advisory opinion may be affected by subsequent developments in the
3 law including, but not limited to, statutes, regulations, advisory opinions and case law.
4 The cited advisory opinions are available on the Commission's website at
5 http://saos.nictusa.com/saos/searchao.

6 On behalf of the Commission,

7

8 Matthew S. Petersen
9 Chairman
10

1 ADVISORY OPINION 2010-02
2
3 Chairman Douglas E. McKinney, M.D. **DRAFT B**
4 West Virginia Republican Party, Inc.
5 636 Rivendell Drive
6 Bridgeport, West Virginia 26330-1358
7
8 Dear Dr. McKinney:

9 We are responding to your advisory opinion request, on behalf of the West
10 Virginia Republican Party, Inc. (the "State Party Committee"), concerning the application
11 of the Federal Election Campaign Act of 1971, as amended (the "Act"), and Commission
12 regulations to the use of non-Federal funds either (1) to make payments on a lease with
13 an option to buy an office building, or (2) to make payments on a land sale contract for
14 that office building.

15 The Commission concludes that the State Party Committee may use entirely non-
16 Federal funds, including its building fund account, to pay the monthly payment on the
17 lease with an option to buy the building, subject to State law. The State Party Committee
18 also may use entirely non-Federal funds, including its building fund account, to purchase
19 the office building if it enters into a land sale contract with the building's owner, subject
20 to State law.

21 ***Background***

22 The facts presented in this advisory opinion are based on your letter received on
23 December 1, 2009, conversations with Commission attorneys, supplementary materials
24 received on January 6, 2010, and reports filed with the Commission.

25 The State Party Committee is a political committee, and is registered with the
26 Commission as a State committee of a political party. *See* 2 U.S.C. 431(15); 11 CFR
27 100.14. The State Party Committee rents its current party headquarters under a lease with

1 an option to purchase. To pay the rent on this building, it uses funds derived from the sale
2 of its previous headquarters.

3 Shortly before November 6, 2002, the effective date of the Bipartisan Campaign
4 Reform Act[1] ("BCRA"), the West Virginia State Republican Executive Committee ("the
5 State Executive Committee"), the predecessor committee to the current State Party
6 Committee, received corporate contributions that it deposited in a Building Fund Account
7 to be used to purchase an office building to be used as the State Party's headquarters. In
8 January 2003, the State Executive Committee purchased an office building for $187,000.
9 At closing, the sellers received $120,000 in cash and a promissory note for the $67,000
10 balance, which was carried as a Deed of Trust by the seller to be paid off monthly over a
11 ten-year period. In late 2005, the State Executive Committee conveyed the property to
12 the State Party Committee, which continued to make monthly payments. All payments
13 on the Deed of Trust were made from the Federal accounts of the State Executive
14 Committee or the State Party Committee.

15 In February 2008, the State Party Committee sold the building for $140,000. The
16 sale proceeds were used to pay off the promissory note and realtor's fees, and the balance
17 of the proceeds was placed in a bank account and certificates of deposit (collectively
18 "building fund account"). The building fund account is segregated from the State Party
19 Committee's Federal account. The State Party Committee occupied the building until
20 August 2009 and used funds from its Federal account to pay rent on the building.

[1] Pub. L. No. 107-155, 116 Stat.81 (2002)

1 On September 1, 2009, the State Party Committee began to lease a different office
2 building located in Charleston, West Virginia. The lease includes an option to purchase
3 the building for $750,000. Pursuant to the lease, the State Party Committee has been
4 paying $2,500 per month.[2] The requestor indicates that $2,500 is the "usual and
5 customary" amount for a comparable office building in this location. Although the State
6 Party Committee is not making a separate payment for the purchase option,[3] the requestor
7 represents that the owner claims he has entered into several prior leases with options to
8 buy, and has never asked for a separate payment to secure the option, nor has he ever
9 divided the lease payments to allot a portion for the option.
10 The current lease ends on December 31, 2010, and is automatically renewable for
11 an additional two-year period (that is, until December 31, 2012). Under the lease, any
12 rental payments made before the exercise of the option would be applied to the purchase
13 price for the building. Although the lease does not state so explicitly, the requestor
14 indicates that the State Party Committee may exercise the option to purchase at any time
15 before the expiration of the current lease or the renewed lease up to December 31, 2012.
16 The building may not be sold to a third party so long as the State Party Committee makes
17 its monthly payments until December 31, 2010, and, if the lease is renewed, until
18 December 31, 2012. If the State Party Committee exercises the option to buy, the current
19 owner will decline third party offers to purchase.

[2] As of January 13, 2010, the State Party Committee had paid a total of $12,500 for the security deposit and four months' rent. At that point, $77,500 remained from the proceeds of the sale of the previous headquarters building.

[3] During preliminary negotiations over the lease, the State Party Committee made a one-time $500 payment from its Federal account to preserve the opportunity to enter into the lease.

1 *State Party Committee's Proposal*

2 The State Party Committee proposes to use the proceeds from the sale of its
3 previous headquarters building (plus the accrued interest on the proceeds) to pay the rent
4 on the current lease. If the Commission decides that the State Party Committee may not
5 use solely non-Federal funds from the sales proceeds to pay for such rent, the State Party
6 Committee would exercise the option to purchase and enter into a land sale contract with
7 the building's owner. The State Party Committee would use the remaining proceeds in
8 the building fund account to make payments on the land sale contract.

9 Under the land sale contract, the State Party Committee would hold the equitable
10 title to the property, and the seller would retain legal title to the property until the final
11 payment on the contract is made. The State Party Committee would forfeit the equitable
12 title and all rights to the property if it fails to make a payment, and the building would
13 revert to the seller.

14 ***Question Presented***

15 *1. May the State Party Committee use entirely non-Federal funds, including the*
16 *proceeds from the sale of its previous office building, to make payments on its lease with*
17 *an option to buy its current office building?*

182. *2. May the State Party Committee use entirely non-Federal funds to make the*
19 *payments required on a land sales contract on the current office building?*

20 ***Legal Analysis and Conclusions***

1 *1. May the State Party Committee use entirely non-Federal funds, including the*
2 *proceeds from the sale of its previous office building, to make payments on its lease with*
3 *an option to buy its current office building?*

4 Yes, the State Party Committee may use entirely non-Federal funds, including the
5 proceeds from the sale of its previous headquarters, to make the payments on its lease
6 with an option to buy its current office building, subject to State law.

7 Before the effective date of BCRA, a gift, subscription, loan, advance, or deposit
8 of money or anything of value received by a national or State party committee that was
9 specifically designated for the cost of the purchase or construction of its "office facility"
10 was exempt from the definition of "contribution" and "expenditure," provided that the
11 building was not acquired for the purpose of influencing the election of any candidate in
12 any particular election for Federal office. *See* 2 U.S.C. 431(8)(B)(viii)(2001); 11 CFR
13 100.7(b)(12), 100.8(b)(13), and 114.1(a)(2)(ix) (2001). This was known as the "building
14 fund exemption." The Commission interpreted former 2 U.S.C. 453 and 11 CFR 108.7 to
15 preempt State law as to the use of funds for the purchase or construction of such a
16 building. *See, e.g.* Advisory Opinions 2001-12 (Democratic Party of Wisconsin) and the
17 advisory opinions cited therein.

18 BCRA amended the Act's provisions regarding the purchase by a State party of
19 its office building by repealing former 2 U.S.C. 431(8)(B)(viii). BCRA also amended the
20 Act's preemption provision by adding 2 U.S.C. 453(b). This section states:

21 Notwithstanding any other provision of this Act, a State or local
22 committee of a political party may, subject to State law, use exclusively
23 funds that are not subject to the prohibitions, limitations, and reporting

1 requirements of the Act for the purchase or construction of an office
2 building for such State or local committee.
3
4 Commission regulations at 11 CFR 300.35(a) provide that a State party committee
5 may spend Federal funds or non-Federal funds (so long as such funds are not donated by
6 a foreign national) for the purchase or construction of its office building. If non-Federal
7 funds are used, those funds are also subject to State law. Additionally, section 300.35(d)
8 provides that funds received by a State party committee prior to the effective date of
9 BCRA may not be used for Federal or Levin account purposes post-BCRA, but may be
10 used for any non-Federal purposes, as permitted under State law.
11 With respect to the use of non-Federal funds, Federal law does not preempt or
12 supersede State law as to (1) the source of funds used, (2) the permissibility of the
13 disbursements, or (3) the reporting of the receipt and disbursement of such funds, except
14 as otherwise provided by 11 CFR 300.35(a).[4] 11 CFR 300.35(a) and (b)(1). *See also*
15 Explanation and Justification for Soft Money Rules 67 Fed. Register 49064,
16 ("Explanation and Justification") as to Federal preemption with respect to the use of
17 Federal funds.
18 Neither 2 U.S.C. 453(b) nor 11 CFR 300.35 defines or provides examples of the
19 "purchase" of a State party office building. The Explanation and Justification for section

[4] Under 11 CFR 300.35(d), State party committees were permitted to accept funds into a building fund account under the building fund exemption at repealed 2 U.S.C. 431(8)(B)(viii) until November 5, 2002, the day before BCRA's effective date. Once BCRA took effect, such funds could not be used for any Federal or Levin account purposes, but could be used for any non-Federal purpose that is permitted under State law.

Like the repealed exemption, the new exemptions from Federal limits and prohibitions apply only if the office building is not being purchased or constructed for the purpose of influencing the election of any particular Federal candidate but rather for the functioning of the party, which would entail the support of most or all of the party's candidates over a number of years. Soft Money Rules, 67 FR at 49101 (July 29, 2002).

1 300.35 indicated that although this term was not being defined explicitly in the
2 regulation, the revisions to 2 U.S.C. 453(b) did not evidence any congressional intent to
3 "narrow or otherwise change the scope of the activities . . . for which building fund
4 monies may be donated or spent" and that the pre-BCRA advisory opinions explaining
5 that scope "remain in force and effect." Explanation and Justification at 49102.
6 Accordingly, the question of whether a particular transaction constitutes a "purchase" for
7 purposes of FECA is for the Commission to decide, and is not a matter of State law.
8 In Advisory Opinion 2001-12 (Democratic Party of Wisconsin), the Commission
9 stated that the "building fund exemption specifically applies to costs directly relating to
10 the purchase, construction or renovation of an office building, not the leasing of such
11 facilities." The Commission noted there was "no connection" between the requestor's
12 payments on its current building lease and costs of construction, purchase, or renovation.
13 Hence, "[t]he payment of the lease would not result in the acquisition of any property
14 rights or interest in land that could otherwise be sold and used to finance the purchase."
15 Advisory Opinion 2001-12.
16 The State Party Committee's lease with an option to purchase its building is
17 distinguishable from the lease at issue in AO 2001-12, in that that transaction did not
18 include a purchase option. Unlike the lease in the prior AO, there is a "connection"
19 between the State Party Committee's payments for its current lease and the purchase of
20 the office building, and the payments of the lease would result in the acquisition of a
21 property right, in that the lease payments would be applied to the purchase price when the

1 purchase option is exercised.[5] In the absence of any contrary legal authority prohibiting
2 the use of non-Federal funds under the building fund exemption for making payments on
3 a lease with an option to purchase, the Commission concludes the State Party Committee
4 may use entirely non-Federal funds, including funds in its "building fund account," for
5 this purpose.[6]

6 Notwithstanding the Commission's conclusion that the State Party Committee's
7 lease with an option to purchase constitutes a "purchase" for the purposes of the Act and
8 Commission regulations, the Commission notes that West Virginia law still will
9 ultimately determine whether the funds from the proceeds of the sale of the previous
10 headquarters may be used lawfully for this purpose. The Commission expresses no
11 opinion regarding the interpretation of State law to the proposed transaction because that
12 question is not within the Commission's jurisdiction.

13

14 2. *May the State Party Committee enter into a land sales contract to purchase its*
15 *current office building if it uses entirely non-Federal funds to make the payments*
16 *required by the contract?*

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[5] The requester also represents that the owner of its office building has entered into several prior leases with options to purchase, and has not required any payment separate from the monthly lease payments to secure the option. Thus, the building owner's contract with requester appears to have been made in its ordinary course of business and on the same terms and conditions as the owner's other leases with options to purchase involving entities that were not political committees. *See, e.g.*, Advisory Opinion 2006-01 (PAC For a Change)(reduced price for books was the usual and normal charge for bulk purchases directly from the publisher); Advisory Opinion 1994-10 (Franklin National Bank)(waiver of bank fees for political committees was permitted because it was within the bank's practice in the normal course of business regarding its commercial customers and is normal industry practice).

[6] *See U.S. v. Gourde*, 440 F.3d 1065, 1081 (9th Cir. 2006) ("There is no principle more essential to liberty, or more deeply imbued in our law, than that what is not prohibited, is permitted.").

1 Yes. the Commission previously has determined the building fund exemption
2 applies to payments made under a land sale contract of this type, and without any
3 information to the contrary, it appears the proposed transaction would qualify as a
4 purchase under 2 U.S.C. 453 (b) and 11 CFR 300.35. Therefore, the Committee may use
5 exclusively non-Federal funds, including the proceeds from the sale of its previous
6 headquarters, for such a transaction, subject to State law.

7 As explained in the answer to Question One, the Act and Commission regulations
8 permit a State party committee to use exclusively non-Federal funds to purchase an office
9 building, including funds received by a State party committee prior to the effective date
10 of BCRA. *See* 2 U.S.C. 453(b) and 11 CFR 300.35.

11 In Advisory Opinion 1993-09 (Michigan Republican State Committee), the
12 Commission treated a land sale contract as a contract to purchase a building for the
13 purposes of the building fund exemption. In doing so, the Commission recognized that
14 the Michigan Republican State Committee did not obtain legal title to the building until it
15 completed its purchase of the building.

16 Here, although the State Party Committee has not yet entered into a contract, it
17 has indicated that it will obtain equitable title to the building once payments are made,
18 and legal title once the last payment is made . Accordingly, pursuant to Advisory
19 Opinion in 1993-9, it appears that the proposed land sale contract would qualify as a
20 purchase under 2 U.S.C. 453(b) and 11 CFR 300.35, and hence the Committee, subject to
21 State law, may use exclusively non-Federal funds, including the proceeds from the sale of
22 its previous headquarters, for such a transaction.

1 The Commission expresses no opinion regarding the interpretation of State law
2 with respect to the proposed transaction because that question is not within the
3 Commission's jurisdiction.

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

17 On behalf of the Commission,

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19 Matthew S. Petersen
20 Chairman
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