

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

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

DRAFT B 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 B 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-A**



FEDERAL ELECTION COMMISSION  
Washington, DC 20463

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March 11, 2011

**AGENDA ITEM**

**MEMORANDUM**

TO: The Commission

For Meeting of 3-16-11

FROM: Christopher Hughey *pch*  
Acting General Counsel

**SUBMITTED LATE**

Rosemary C. Smith *AKR for RES*  
Associate General Counsel

Robert M. Knop *RMK*  
Assistant General Counsel

David C. Adkins *DA*  
Attorney

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

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 B**

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 not 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 Stanford, Stanford’s associate James Davis, and the Stanford 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. Each of the National Party  
16 Committees maintains a recount fund and would like to draw on those funds to finance  
17 costs associated with the Janvey Litigation.

18 ***Question Presented***

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

21 ***Legal Analysis and Conclusion***

22 No, the National Party Committees may not use their recount funds to finance  
23 costs associated with the Janvey Litigation.

1           The Bipartisan Campaign Reform Act of 2002<sup>1</sup> (“BCRA”) amended the Act to  
2 prohibit national party committees, including those making this request, from soliciting,  
3 receiving, directing, or spending “any funds [] that are not subject to the limitations,  
4 prohibitions, and reporting requirements of th[e] Act,” regardless of whether those funds  
5 meet the definitions of contribution or expenditure. 2 U.S.C. 441i(a)(1); 11 CFR  
6 300.10(a). Therefore, a determination about whether amounts received or disbursed for  
7 the purpose of defending the Janvey Litigation constitute contributions or expenditures  
8 under the Act is not necessary for this advisory opinion.

9           The Commission has recognized a very limited exception to BCRA’s general rule  
10 for national party committees in the case of recounts. Specifically, in Advisory Opinion  
11 2009-04 (DSCC/Franken), the Commission concluded that a national party committee  
12 could establish a recount fund, separate from its other accounts and subject to a separate  
13 limit – equivalent to its annual limit in 2 U.S.C. 441a(a)<sup>2</sup> – on amounts received.  
14 Donations to this separate recount fund were to be subject to the source prohibitions and  
15 reporting requirements of the Act. Such funds were to be used only to pay expenses  
16 incurred in connection with recounts and election contests of Federal elections. *See* AO  
17 2009-04 (DSCC/Franken) (the proposed DSCC fund would be used “only to pay  
18 expenses incurred in connection with the 2008 Senatorial recount and election contest.”).

19           Subsequently, in Advisory Opinion 2010-14 (DSCC), the Commission provided  
20 further guidance on the permissible uses of recount funds. In particular, the Commission

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<sup>1</sup> Pub. L. No. 107-155, 116 Stat. 81 (2002).

<sup>2</sup> At the time of AO 2009-04 (DSCC/Franken), 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).

1 concluded that a national party committee could make disbursements from its recount  
2 fund before the date of the general election for expenses related to recount preparation.<sup>3</sup>  
3 The Commission also concluded that a national party committee could use its recount  
4 fund to pay the costs associated with soliciting additional donations to the recount fund so  
5 long as the recount solicitations clearly stated the purpose of the fund and noted that no  
6 donations to the fund would be used for the purpose of influencing any Federal election.

7 In short, the Commission has in recent years given national party committees  
8 narrow leave to raise a separate, limited pot of money for a single, well-defined purpose:  
9 to pay expenses incurred only in connection with recounts and election contests.  
10 Importantly, the Commission has never permitted a national party committee to raise a  
11 separate, limited pot of money for purposes other than recount- or election contest-related  
12 activity, nor has it permitted a national party committee to use its recount funds to finance  
13 activity entirely unrelated to a recount or election contest. It declines to do so here.

14 As the Commission has previously explained, recounts and election contests are  
15 unique occurrences in the electoral context. In many ways, they are similar to a runoff  
16 election, which triggers a contribution limit separate from the normal contribution limit. *See*  
17 *Advisory Opinion 2006-24 (NRSC/DSCC)* (concluding that because a recount is similar to a  
18 runoff election, recount funds are subject to a separate contribution limit and are not  
19 combined with other contributions for purposes of the biennial contribution limits of 2 U.S.C.  
20 441a(a)(3)). In that sense, allowing national party committees to raise a separate, limited

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<sup>3</sup> For purposes of the request in 2010-14 (DSCC), 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 fund is congruent with established campaign finance law and, importantly, does not  
2 undermine the purpose of the Act or Commission regulations.

3 Expenses generated by defending the National Party Committees in the Janvey  
4 Litigation, which seeks the disgorgement of donations and contributions, are not in  
5 connection with a recount or election contest. Moreover, allowing the National Party  
6 Committees to use their recount funds to finance activity unrelated to a recount or  
7 election contest would transform “recount funds,” which exist for a specific, limited  
8 purpose, to “non-Federal accounts.” These funds could then be used to finance all  
9 manners of activity, and would effectively double BCRA’s limitation on the giving of  
10 contributions, donations, or transfers of funds or any other thing of value to national party  
11 committees in express violation of the Act and Commission regulations. *See* 2 U.S.C.  
12 441i(a). Accordingly, the National Party Committees may not use their recount funds to  
13 finance costs associated with the Janvey Litigation.

14 This response constitutes an advisory opinion concerning the application of the  
15 Act and Commission regulations to the specific transaction or activity set forth in your  
16 request. *See* 2 U.S.C. 437f. The Commission emphasizes that, if there is a change in any  
17 of the facts or assumptions presented and such facts or assumptions are material to a  
18 conclusion presented in this advisory opinion, then the requester may not rely on that  
19 conclusion as support for its proposed activity. Any person involved in any specific  
20 transaction or activity which is indistinguishable in all its material aspects from the  
21 transaction or activity with respect to which this advisory opinion is rendered may rely on  
22 this advisory opinion. *See* 2 U.S.C. 437f(c)(1)(B). Please note that the analysis or

1 conclusions in this advisory opinion may be affected by subsequent developments in the  
2 law including, but not limited to, statutes, regulations, advisory opinions and case law.

3 The cited advisory opinions are available on the Commission's website,  
4 www.fec.gov, or directly from the Commission's Advisory Opinion searchable database  
5 at <http://saos.nictusa.com/saos/searchao>.

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On behalf of the Commission,

Cynthia L. Bauerly  
Chair