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Office of General Counsel
attn.: Adav Noti, Esq., Acting Associate General Counsel for Policy
Federal Election Commission
999 E Street N.W.
Washington, DC 20463

Re: Advisory Opinion Request

Dear Mr. Noti:

Pursuant to 2 U.S.C. § 437f, we seek an advisory opinion on behalf of the Democratic Senatorial Campaign Committee (the "DSCC"), the Democratic Congressional Campaign Committee (the "DCCC"), the National Republican Congressional Committee (the "NRCC"), and the National Republican Senatorial Committee (the "NRSC") (collectively, the "Committees" and singularly, the "Committee"). The Committees seek confirmation that they may defray office building expenses using funds from the same segregated Federal accounts from which they can pay for recounts, legal defense, and other disbursements that are not made for the purpose of influencing any particular election for Federal office. See Advisory Opinion 2009-04 (Franken/DSCC), Advisory Opinion 2011-03 (DSCC, DCCC, RNC, NRSC, and NRCC).

FACTUAL DISCUSSION

The Committees are national committees within the meaning of 2 U.S.C. § 431(14). Each is a registered committee with the Federal Election Commission ("FEC"). Each Committee uses a headquarters office building to carry out its day-to-day operations at the national level. None of the Committees uses its office building for the purpose of influencing the election of a particular candidate for office in any particular Federal election. Rather, each Committee uses its office building to sustain the general functioning of the party, which entails the support of most or all of the party's candidates over a number of years.

Each Committee has incurred, and expects to continue to incur, various costs related to the purchase, construction, repair, and maintenance of its headquarters office building ("building expenses"). Such building expenses may include payments on the principal and interest of mortgage loan debt for existing office buildings; paying for necessary building repairs, renovations, capital improvements and vital improvements to the physical and life safety systems for existing office buildings; and costs for the purchase or construction of new office buildings.

Each Committee maintains a segregated Federal account to pay for recount costs, legal defense, and other expenses pursuant to Advisory Opinions 2006-24, 2009-04, 2010-14, 2010-18, and

2011-03. Each Committee's segregated Federal account consists solely of Federal funds that comply with the source restrictions, amount limitations, and reporting requirements of the Federal Election Campaign Act (the "Act"). The National Party Committees seek to pay for some or all of their building expenses from their segregated Federal accounts.

LEGAL ANALYSIS

The Committees do *not* seek to raise *any* non-Federal funds. Nor do they seek the ability to raise additional Federal funds. They simply seek confirmation that they may use Federal funds in their existing segregated Federal accounts to pay for building expenses, which are not made for the purpose of any particular federal election.

I. The Committees' ability to raise funds is not implicated by this request

Under current law, each Committee may raise \$32,400 per calendar year from each federally permissible source into its segregated Federal account. It may not raise any money from prohibited sources, such as corporations or labor unions. It must report these donations and their sources on Line 17 of its FEC reports.

If the Commission granted this request, each Committee would still be able to raise \$32,400 per calendar year from each federally permissible source into its segregated Federal account. It would still be unable to raise any money from prohibited sources, such as corporations or labor unions. And it would still be required to report these donations and their sources on Line 17 of its FEC reports.

Likewise, if the Commission denied this request, each Committee would be able to raise \$32,400 per calendar year from each federally permissible source into its segregated Federal account. It would not be able to raise any money from prohibited sources, such as corporations or labor unions. It would have to report these donations and their sources on Line 17 of its FEC reports.

II. Funds in the segregated Federal account are Federal funds

The Commission's regulations define the term "Federal funds" to mean "funds that comply with the limitations, prohibitions, and reporting requirements of the Act." 11 C.F.R. § 300.2(g). The funds in each Committee's segregated Federal account are subject to the contribution limitations found in 2 U.S.C. § 441a(a)(1)(B); the source prohibitions found in 2 U.S.C. §§ 441b, 441c and 441e; and the reporting requirements of 2 U.S.C. § 434. Consequently, the funds that each Committee raises into this account are Federal funds. The Commission has confirmed this on several occasions. See Advisory Opinion 2006-24 (NRSC/DSCC) ("[A] recount fund established by the State Party to conduct recount activities in support of the party's Federal candidates must be a Federal account containing only Federal funds."); Advisory Opinion 2010-14 (DSCC) ("[N]ational party committees must pay for all of their recount activities using entirely Federal funds.")

III. Section 441i of the Act does not restrict the spending of Federal funds in each Committee's segregated Federal account

The Bipartisan Campaign Reform Act ("BCRA") makes it illegal for "[a] national party committee (including a national congressional campaign committee of a political party) ... [to] *solicit, receive, or direct* to another person a contribution, donation, or transfer of funds or any other thing of value, or *spend* any funds, that are not subject to the limitations, prohibitions, and reporting requirements of this Act." 2 U.S.C. § 441i(a) (emphasis added). Or, as the Commission put it when explaining its new regulation, "BCRA prohibits national party committees from *raising and spending* non-Federal funds, that is, funds that are not subject to the prohibitions, limitations, and reporting requirements of the Act." *Prohibited and Excessive Contributions: Non-Federal Funds or Soft Money*, 67 Fed. Reg. 49,064, 49,087 (July 29, 2002) (emphasis added).

The prohibition on the *spending* of soft money, therefore, is not any broader than the prohibition on the *raising* of soft money. Instead, the bans are coextensive with each other. In other words, if section 441i bars the raising of a particular type of funds – e.g. those that do not comply with federal limits, prohibitions, and reporting requirements – it also bars the spending of this type of funds. Conversely, if section 441i permits the raising of a particular type of funds – e.g. those that comply with federal limits, prohibitions, and reporting requirements – it poses no bar to the spending of these funds. Because section 441i permits the raising of Federal funds into each Committee's segregated Federal account, it imposes no restriction on the spending of these Federal funds.

IV. Funds in the segregated Federal account may be used to pay for expenses that are not made for the purpose of influencing any particular election for Federal office

Ever since the Commission first authorized the raising and spending of so-called "recount funds" in Advisory Opinion 2006-24, it set two core conditions: (1) that they be federal funds raised within the source restrictions, amount limitations and reporting requirements of the Act; and (2) that they not otherwise be used for campaign activity. *See, e.g.,* Advisory Opinion 2010-14 (holding that the funds may not be used to "campaign for any candidates or to influence any elections" and must "have no relation to campaign activities.").

In Advisory Opinion 2011-03, the Commission approved a request from the Committees (along with the Republican National Committee) to use Federal funds these accounts to pay for legal expenses and settlement costs arising from a non-recount litigation. Three of the four commissioners who voted to approve the request agreed that "[t]he Commission's reasoning ... concerning recount funds has never explicitly limited the national party committees to using such funds exclusively to finance recount activities" and that the threshold issue was whether the funds would be used "in any way for campaign activities or for the purpose of influencing any Federal election." Advisory Opinion 2011-3, Agenda Document No. 11-14.

These precedents lead to one conclusion: that the Committees may use Federal funds in their

segregated Federal accounts to pay for expenses that are not made to influence any particular Federal election. It is the federal character of these funds that makes their raising permissible; it is their lack of a specific election-influencing purpose, and not the existence of a particular regulatory exemption, that makes their spending permissible.

V. Building expenses are not made to support any particular Federal candidacy

Prior to passage of BCRA, donations made to national party committees to “defray any cost for construction or purchase of any office facility” were exempt from the definition of “contribution.” See Prohibited and Excessive Contributions: Non-Federal Funds or Soft Money, 67 Fed. Reg. 49,064, 49,100 (July 29, 2002) (citing 2 U.S.C. 431(8)(B)(i) (repealed 2002)). Because such funds were “not acquired for the purpose of influencing the election of any candidate in any particular election for Federal office,” they were outside the Act’s restrictions. *Id.*

Accordingly, it was well-settled in Commission guidance that disbursements made in connection with national committee office buildings did not influence federal elections:

Because such a facility would be used, at least in part, for Federal election activity, Congress could have decided that the purchase or construction of such facility was for the purpose of influencing a Federal election. Instead, it took the affirmative step of deleting the receipt and disbursement of funds for such activity from the specific proscriptions of the Act.

Advisory Opinion 1991-5 (Tennessee Democrats). See also Advisory Opinion 1998-07 (Pennsylvania Democratic Party) (a donation to an office building fund “is not considered to be a contribution or expenditure.”); Advisory Opinion 1993-09 (Michigan Republican State Committee) (“The Act and Commission regulations specifically address building fund donations and clearly permit them.”) Under this reasoning, the Commission allowed state and national party committees to make a wide variety of office building-related disbursements. See, e.g., Advisory Opinions 1998-08 (Iowa Democratic Party) and 1993-09 (approving the use of a building fund to pay the mortgage on a new office building); Advisory Opinion 1998-07 (approving use of a building fund for a new roof, wiring, and expansion of an existing party office building); Advisory Opinion 2001-01 (North Carolina Democratic Party) (approving use of a building fund to pay for management expenses and architectural fees for the construction of a new building, and for the salary and other expenses related to raising office building funds).

When Congress removed the building funds exception from the definitions of “contribution” and “expenditure” in BCRA, it did *not* do so based on a finding that building expenses had somehow come to influence Federal elections when they previously did not. Rather, Congress merely sought to prevent national party committees from spending *non-Federal funds* on building expenses. See 148 Cong. Reg. S2,143 (2002) (statement of Sen. Feingold) (“[A]s part of the soft money ban, the legislation deletes language in the current law expressly excluding donations to a national or state party committee specifically to finance” office buildings); 148 Cong. Rec.

S1,993 (2002) (“Accounts to raise money for office buildings were one of the original soft money accounts[.]”); *Id.* at S1,995 (“No soft money may be spent on office buildings or facilities after the effective date.”).¹ Of course, that is not at issue in this request, as the Committees do not seek to raise or spend non-Federal funds.

Congress codified this intention when it expressly authorized state and local party committees to continue to spend nonfederal funds on office building expenses. 2 U.S.C. § 453(b) (“[A] State or local committee of a political party may, subject to State law, use exclusively funds that are not subject to the prohibitions, limitations, and reporting requirements of the Act for the purchase or construction of an office building[.]”) *See also* 11 C.F.R. § 300.35(a). The Commission agreed, going so far as to incorporate language from the previous statute to ensure that state parties could continue to spend nonfederal funds on office buildings. The Commission recognized that:

The exemptions from Federal limits and prohibitions are premised on the idea that the building is not purchased or constructed for the purpose of any particular Federal candidacy. The building is purchased or constructed for the functioning of the party, which entails the support of most or all of the party's candidates over a number of years; **this concept did not change with the repeal of 2 U.S.C. § 431(8)(B)(viii) and the enactment of 2 U.S.C. § 453(b).**

Prohibited and Excessive Contributions: Non-Federal Funds or Soft Money, 67 Fed. Reg. 35,654, 35,668 (May 20, 2002) (emphasis added).

State and local party committees' continuing ability to use nonfederal funds for office buildings stands in stark contrast to the restrictions BCRA and Commission regulations place on Federal Election Activity (“FEA”) by those same committees. Congress expressly determined that certain activities such as voter registration and get-out-the-vote operations influence Federal elections. *See* 148 Cong. Rec. S2,139 (2002) (statement of Sen. McCain) (noting that “get-out-the-vote and voter registration drives ... are designed to, and do have an unmistakable impact on both Federal and non-Federal elections”). Accordingly, Congress restricted the funds that State, district, and local party committees could use for FEA, such as voter registration and get-out-the-vote drives. 2 U.S.C. § 441i(b)(1). *See also* *McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 167 (2003) (BCRA regulates those contributions to State and local parties which can be used to directly benefit federal candidates.)

The difference in BCRA's treatment of building expenses and FEA is telling. If Congress had

¹ The Commission's regulations at 11 C.F.R. §§ 100.56 and 100.114 on national party committee building funds merely implement Congress's intent of allowing the national party committees to raise and spend only federal funds for this purpose. *See, e.g.*, 65 Fed. Reg. at 35,668 (“The receipt and use of funds for the purchase of a national party committee's office building would be addressed in proposed section 300.10, which would allow only federal funds to be used for such purpose.”). So does 11 C.F.R. § 104.3(g), which confirms that receipts used to defray the costs of building expenses are subject to the limitations and prohibitions of the Act. They do not reflect a judgment that these expenses somehow influence particular elections when incurred by national parties, and yet not when incurred by state parties.

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determined that a party committee's building expenses were for the purpose of influencing particular federal elections, it would have prohibited state parties from using non-Federal funds to defray these costs. That it chose not to do so suggests that Congress did not intend to change the understanding that building expenses are not made to influence particular federal elections and thus may be paid from the same Federal account used to pay for other expenses that do not influence particular Federal elections.

Because it is permissible for the Committees to use Federal funds from their segregated accounts to pay for expenses that do not influence particular Federal elections and because building expenses do *not* influence particular Federal elections, the Commission should confirm that the Committees may use the Federal funds in their segregated Federal accounts to pay for building expenses.

We appreciate the Commission's prompt consideration of this request.

Very truly yours,



Megan Sowards
General Counsel, National Republican Senatorial Committee



Jessica Furst Johnson
Deputy Executive Director and General Counsel, National Republican Congressional Committee



Marc E. Elias
Brian G. Svoboda
General Counsel, Democratic Senatorial Campaign Committee and Democratic Congressional Campaign Committee