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FEDERAL ELECTION COMMISSION
Washington, DC 20463

March 19, 2009

AGENDA ITEM
For Meeting of: 03-19-09

SUBMITTED LATE

MEMORANDUM

TO: The Commission

FROM: Thomasenia P. Duncan TPD
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Subject: AO 2009-04 (Franken/DSCC) – Revised Draft C

Attached is a proposed draft of the subject advisory opinion, which we have been asked to circulate. We request that this draft be placed on the agenda for March 19, 2009.

Attachment

ADVISORY OPINION 2009-04

Marc E. Elias, Esq. **REVISED DRAFT C**
Perkins Coie LLP
607 Fourteenth Street NW
Washington, DC 20005-2003

Dear Mr. Elias:

We are responding to your advisory opinion request on behalf of Al Franken for U.S. Senate (the "Franken Committee") and the Democratic Senatorial Campaign Committee ("DSCC"), concerning the application of the Federal Election Campaign Act of 1971, as amended ("the Act"), and Commission regulations to the establishment of recount and/or election contest funds by these two political committees. The Commission concludes that the DSCC may not establish a recount fund to accept donations which would not aggregate with the DSCC's calendar-year contribution limits with respect to the same donors or contributors ($30,400 per person, $15,000 per multicandidate committee for the 2009-2010 election cycle), regardless of whether the DSCC establishes it as a "separate" fund. The Commission also concludes that the Franken Committee may establish an election contest fund separate from its existing recount fund, and donations to the election contest and recount funds are not subject to the limitations of the Act (but are subject to the source prohibitions on corporate, foreign nationals, and labor unions).

Background

The facts presented in this advisory opinion are based on your letter received on February 18, 2009, and your e-mail received on February 20, 2009, and publicly available materials, including reports filed with the Commission.

The Franken Committee is Al Franken's principal campaign committee for the 2008 Senate election in Minnesota. The DSCC is a national committee of the Democratic

Party.

Mr. Franken was the Democratic candidate for the U.S. Senate in Minnesota in 2008, facing Senator Norman Coleman, the Republican incumbent. In your request, you present the following facts: "A statewide manual recount in Minnesota has been conducted and concluded, giving a 225-vote lead to Democratic candidate Al Franken. But in January, Republican candidate Norm Coleman filed a lawsuit to contest the recount, and the two candidates remain locked in a protracted legal fight." Therefore no final winner has been conclusively determined or seated in the Senate. The Franken Committee has already established a recount fund to pay for expenses incurred for the recount, and thus far this fund has also been used to pay expenses related to the election contest. The DSCC, however, has not yet established any such account.

The DSCC proposes to establish a recount fund, separate from its other accounts and subject to a separate limit on amounts received, and to use that fund only to pay expenses incurred in connection with the 2008 Senatorial recount and election contest in Minnesota. The DSCC proposes that donations to the separate recount fund would be subject to the amount limitations, source prohibitions, and reporting requirements of the Act.

The Franken Committee proposes to establish an election contest fund, which the request stipulates also would be subject to the amount limitations, source prohibitions, and reporting requirements of the Act. Per the request, this proposed fund also would be separate from the Franken Committee's other existing accounts, and would be subject to a separate limit for amounts received. However, unlike the proposed DSCC recount fund, the Franken Committee's proposed election contest fund would be used only to pay

expenses incurred in connection with the election contest, not those incurred in connection with the recount.

Questions Presented

(1) May the DSCC establish a recount fund, separate from any of the DSCC's other accounts and subject to a separate limit on amounts received, and use that fund to pay expenses related to both the 2008 Senatorial recount and the election contest in Minnesota?

(2) May the Franken Committee establish an election contest fund, separate from its existing recount fund and subject to a separate limit on amounts received, and use that fund to pay expenses related to the 2008 Senatorial election contest in Minnesota?

Legal Analysis and Conclusions

(1) May the DSCC establish a recount fund, separate from any of the DSCC's other accounts and subject to a separate limit on amounts received, and use that fund to pay expenses related to both the 2008 Senatorial recount and the election contest in Minnesota?

No, any amount that the DSCC receives would aggregate with the DSCC's per-calendar-year contribution limits with respect to the same donors or contributors ($30,400 per person, $15,000 per multicandidate committee for the 2009-2010 election cycle), regardless of whether the DSCC establishes it as a "separate" fund.

This conclusion flows from the plain language of the Bipartisan Campaign Reform Act of 2002 ("BCRA"), which provides that:

> A national committee of a political party (including a national congressional campaign committee of a political party) may not 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)(1) (emphasis added); *see also* 11 CFR 300.10(a).

Therefore, the DSCC must use only funds that are subject to the limitations, source prohibitions, and reporting requirements of the Act to pay for any recount activities in which it engages, and any recount fund it establishes may only accept donations that comply with the Act.

The Act defines a "contribution" as "any gift, subscription, loan, advance, or deposit of money or anything of value made by any person for the purpose of influencing any election for Federal office." 2 U.S.C. § 431(8)(A)(i).[1] The Commission's regulations exclude from the definition of "contributions" any "gifts, subscription, loan, advance, or deposit of money or anything of value made with respect to a recount of the results of a Federal election, or an election contest concerning a Federal election." 11 CFR § 100.91. Nonetheless, the regulation specifies that the Act's contribution source prohibitions on corporations, labor organizations, national banks, and foreign nationals still apply to such recount or election contest donations. *Id.*

Notwithstanding the regulations' exclusion of recount and election fund donations from the definition of "contributions," national party committees still "may not solicit, receive, or direct a contribution, *donation*. . . or spend any funds," for whatever purpose, that are not subject to the Act's "limitations." 2 U.S.C. § 441i(a)(1) (emphasis added).

[1] Although not directly relevant to the narrow question about recount and election contest funds at issue in this advisory opinion, the term "contribution" also includes "the payment by any person of compensation for the personal services of another person which are rendered to a political committee without charge for any purpose." 2 U.S.C. § 431(8)(A)(ii).

Accordingly, any donations to a national party committee's recount and election contest funds must be subject to the same limits pursuant to which the national party committee otherwise operates, and such donations aggregate for the purposes of each donor's or contributor's contribution limit with respect to that party committee. Unlike the per-election contribution limits for authorized candidate committees, the contribution limits for national party committees apply per donor or contributor, *per calendar year*, without regard to how many elections each committee participates in, and without regard to the purpose for which the funds are given. Accordingly, national party committees may not solicit any funds, for whatever purpose, exceeding their per-donor / contributor, per-calendar-year, contribution limits, nor may they receive or spend any funds, for whatever purpose, not within the Act's limitations.

With respect to the Act's biennial limits on "contributions," 11 C.F.R. § 100.91 excludes donations to recount and election contest funds from being considered as "contributions." Thus, concerning the individual donor, donations to a national party committee's recount and election contest funds do not aggregate with respect to the individual's biennial contribution limit, which applies only to "contributions." 2 U.S.C. § 441a(a)(3). This is in contrast to the national party committees, to which the per-donor, per-calendar-year limits apply to all donations whatsoever, regardless of whether such funds constitute "contributions" under the Act.

In Advisory Opinion 2006-24 (NRSC-DSCC), the Commission addressed the question of what limits apply to donations to a state party's recount fund for Federal races, rather than the question presented in this request (*i.e.*, donations to a national party's recount fund). In AO 2006-24, the Commission concluded that a state party

committee may solicit, receive, and spend funds that are donated to a separate recount fund, and that such funds do not aggregate with respect to state parties' calendar-year contribution limits. AO 2006-24 is distinguishable from the question presented here because the Act's "soft money" restrictions distinguish between state and national party committees. The Act subjects funds solicited, received, and spent by national party committees to the limitations, prohibitions, and reporting requirements of the Act, no matter what purpose those funds are used for. 2 U.S.C. § 441i(a). In contrast, funds given to state party committees are subject to the contribution limits only if, under the Act, such funds constitute "contributions," would be used for "expenditures," or are "expended or disbursed for Federal election activity." 2 U.S.C. §§ 441a(a)(1)(D) and 441i(b). Because recount and election contest funds are neither "contributions" (11 C.F.R. § 100.91) nor "expenditures" (11 C.F.R. § 100.151), and the scope of "federal election activity" does not include recounts and election contests and, in fact, ends on the date of the election (*i.e.*, before any recounts and election contests take place) (*see* 2 U.S.C. § 431(20); 11 C.F.R. § 100.24[2]), a state party's recount fund for Federal races, unlike a national party committee's fund, is not subject to the aggregate contribution limit that applies to the same donors to the state party under the Act.

[2] In *Shays v. FEC*, 528 F.3d 914 (D.C. Cir. 2008) ("*Shays III*"), the court held that the definition of "Federal election activity" at 11 C.F.R. § 100.24 was impermissibly narrow with respect to the regulation's treatment of get-out-the-vote and voter registration activity. The court did not otherwise question the validity of the regulation's scope in any respect pertaining to the issues presented in this advisory opinion.

(2) May the Franken Committee establish an election contest fund, separate from its existing recount fund and subject to a separate limit on amounts received, and use that fund to pay expenses related to the 2008 Senatorial election contest in Minnesota?

Yes, the Franken Committee may establish an election contest fund in addition to its existing recount fund to pay expenses related to the 2008 Senatorial election contest in Minnesota. Neither fund is subject to the Act's amount limitations.

This conclusion flows from the plain language of the Commission's long-standing regulation at 11 C.F.R. § 100.91, as discussed below. Unlike the Act's limits applicable to national party committees, which, as discussed above, apply regardless of the purpose for which the parties solicit, receive, and spend funds, the limits applicable to Federal candidates and their authorized committees apply only if they solicit, receive, or spend funds "in connection with an election for Federal office" or "in connection with any election other than an election for Federal office." 2 U.S.C. § 441i(e)(1). *Cf.* Advisory Opinions 2003-20 (Hispanic College Fund) (solicitation of donations by a Federal officeholder to a scholarship fund are not subject to the Act's limits because they are not in connection with any election); 2004-14 (Davis) (solicitation of donations by a Federal officeholder to charities are not subject to the Act's limits because they are not in connection with any election); 2005-10 (Berman) (solicitation of donations by Federal officeholders to committees supporting or opposing state ballot initiatives are not subject to the Act's limits because they are not in connection with any election). Question Two thus hinges on whether recount and election contest funds are "in connection with" any election.

A) Recounts and Election Contests are not "Elections"

Under the Act, as amended by BCRA, Federal candidates and officeholders may not solicit, receive, direct, transfer, or spend funds "in connection with an *election* for Federal office" unless the funds are subject to the limitations, prohibitions, and reporting requirements of the Act ("Federal funds"). 2 U.S.C. § 441i(e)(1)(A) (emphasis added); *see also* 11 CFR § 300.2(g). As discussed above, Commission regulations exclude from the definitions of "contribution" and "expenditure" amounts given or used "with respect to a recount of the results of a Federal election, or an election contest concerning a Federal election." 11 CFR § 100.91 and 11 CFR § 100.151.

Because recounts and election contests are not "elections" under the Act, and donations to recount and election contest funds are not "in connection with an election for Federal office," a Federal candidate's recount and election contest funds are not subject to the Act's contribution limits, but nonetheless are barred from accepting funds from corporations, labor organizations, national banks, and foreign nationals under 11 C.F.R. § 100.91. Because 11 C.F.R. § 100.91 excludes from the definition of "contribution" donations to recount and election contest funds, the aggregate biennial contribution limits of 2 U.S.C. § 441a(a)(3) also do not apply to an individual's donations to such funds.

The recount and election contest regulations at 11 C.F.R. §§ 100.91 (exclusions applicable to contributions) and 100.151 (exclusions applicable to expenditures) are premised on the Commission's interpretation of the statutory term "election" to exclude recounts. *See* 2 U.S.C. 431(1); *see also* 11 CFR 100.2. The Act defines elections to include, *inter alia,* primary, general, special and runoff elections, but it does not include recounts or election contests. *See* 2 U.S.C. § 431(1); 11 C.F.R. § 100.2. The Commission

explained this exclusion when it first promulgated the recount regulations in 1977: "Also excluded from the definition of contribution is a donation to cover the costs of recounts..., since, though they are related to elections, [they] are not Federal elections as defined by the Act." *See* Explanation and Justification for 1977 Amendments to Federal Election Campaign Act of 1971, H.R. Doc. No. 95-44, 95th Cong., 1st Sess. 40 (1977). [3]

On two occasions prior to BCRA, the Commission has applied the regulations' exclusions for recount and election contest funds. In Advisory Opinion 1978-92 (Miller), the Commission concluded that any funds received by a separate organizational entity established by a Federal candidate's authorized committee solely for the purposes of funding an election recount effort would not be subject to the contribution limitations of 2 U.S.C. § 441a, and would not trigger political committee status or reporting obligations for the separate election recount entity. The Commission also concluded that the separate recount entity could not accept funds from corporations, labor organizations, and national banks, which were included in 11 C.F.R. § 100.4(b)(15).[4] The Commission noted that involvement of current officers and staff of the authorized committee as organizers and principals in a separate election recount entity would not change these conclusions.

In Advisory Opinion 1998-26 (Landrieu), the Commission considered a candidate's principal campaign committee that established, as a wholly separate entity, a contested election trust fund. The Commission concluded that the trust fund was not

[3] Prior to 1980, similar provisions appeared at 11 C.F.R. §§ 100.4(b)(15) and 100.7(b)(17). *See* 45 Fed. Reg. 15080 (Mar. 7, 1980). From 1980 to 2002, these regulations appeared at 11 C.F.R. §§ 100.7(b)(20) and 100.8(b)(20).

[4] Advisory Opinion 1978-92 (Miller) cited the then-current recount regulations found at 11 C.F.R. §§ 100.4(b)(15) and 100.7(b)(17). In the 1980 recodification of 11 C.F.R. §§ 100.4(b)(15) and 100.7(b)(17) as 11 C.F.R. §§ 100.7(b)(20) and 100.8(b)(20), respectively, the prohibition on funds from foreign nationals was added to the regulation. *See* 45 Fed. Reg. 15080, 15102 (Mar. 7, 1980).

subject to reporting requirements and could accept amounts in excess of the contribution limitations in 2 U.S.C. § 441a, but could not accept funds from prohibited sources, as specified in the predecessors to the recount regulations, 11 C.F.R. §§ 100.7(b)(20) and 100.8(b)(20).[5]

BCRA took effect after these advisory opinions were issued. Under BCRA, candidates and Federal officeholders may not solicit, receive, direct, transfer, or spend funds "in connection with an *election* for Federal office" unless the funds are subject to the limitations, prohibitions, and reporting requirements of the Act ("Federal funds"). 2 U.S.C. § 441i(e)(1)(A) (emphasis added); *see also* 11 C.F.R. § 300.2(g). BCRA also imposes limitations on the funds Federal candidates may solicit, receive, direct, transfer, or spend "in connection with any *election* other than an election for Federal office." 2 U.S.C. 441i(e)(1)(B) (emphasis added).

The Commission's treatment of recount funds over the past 30 years, based on the rationale that recounts are not "elections," was well known to Congress. That treatment was first expressed in the 1977 regulations, applied in Advisory Opinion 1978-92, recodified in 1980, and applied again in Advisory Opinion 1998-26. At no point in this period did Congress act to alter the Commission's approach, although it amended the Act several times. In 2002, BCRA was enacted with no amendment to the definition of "election" to include recounts. The legislative history offers no indication that Section 441i(e)(1) was intended to apply to recounts. When Congress is aware of an agency's

[5] As discussed below, AO 2006-24 (NRSC-DSCC) incorrectly superseded AOs 1978-92 and 1998-26 by imposing a contribution limit on federal candidates' recount and election contest funds. The Commission now believes AO 2006-24 was wrongly decided. In any event, the Commission's conclusion in AO 2006-24 does not change the fact that the Commission's treatment of recount and election contest funds in AOs 1978-92 and 1998-26 was known at the time Congress considered and passed BCRA in 2002.

interpretation of a statute and does not amend that statute, Congress is presumed to accept that interpretation as correct. *See, e.g., Lorillard v. Pons*, 434 U.S. 575 (1978) ("Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change.").

Following the enactment of BCRA, the Commission recodified its recount regulations, and specifically reaffirmed that recounts are not "elections." When the Commission reorganized its regulations regarding "contributions" and "expenditures" during the BCRA rulemakings, one "commenter advocated the complete, or at least partial, elimination of the exception to the definitions of 'contribution' and 'expenditure' for recounts and election contests, on the basis that recounts and election contests, which are not Federal elections as defined by the Act, *see generally Federal Election Regulations*, H.R. Doc. No. 44, 95th Cong., 1st Sess. at 40 (1977) . . . 'serve as an avenue for the use of soft money to influence federal elections,' as evidenced by unregulated contributions used to pay for the 2000 Florida recount." *Explanation and Justification for Final Rules on Reorganization of Regulations on "Contribution" and "Expenditure,"* 67 Fed. Reg. 50582, 50584 (Aug. 5, 2002). In response to this commenter, the Commission specifically stated that "[t]his change is beyond the scope of this rulemaking dealing only with nonsubstantive changes . . . ." *Id.*[6] This regulatory history demonstrates two key points. First, the Commission explicitly reaffirmed, post-BCRA, its view that recounts are not "elections" under the law, citing its original 1977 regulation.

[6] Approximately one week earlier, the Commission noted in a different rulemaking that "[t]he exemption for recounts is addressed in the Commission's current rules at 11 C.F.R. 100.7(b)(20) . . . ." *Final Rule on Prohibited and Excessive Contributions: Non-Federal Funds or Soft Money*, 67 Fed. Reg. 49064, 49085 (July 29, 2002). The Commission specifically declined to alter that regulation when promulgating the "soft money" rules.

Second, in reorganizing its regulations, the recount regulation was recodified without substantive change.

Finally, in its 2004 Legislative Recommendations to Congress, the Commission asked Congress to clarify whether recounts should be subject to 2 U.S.C. § 441i(e)(1).[7] Congress did not act on this request.

In light of the foregoing, the Commission finds its recount regulations at 11 C.F.R. §§ 100.91 and 100.151 to be valid and enforceable and unaffected by BCRA. To conclude otherwise would constitute rewriting our regulation, which, of course, may not be done via the advisory opinion process. *See* 2 U.S.C. § 437f(b) ("Any rule of law which is not stated in this Act or in chapter 95 or chapter 96 of title 26 may be initially proposed by the Commission only as a rule or regulation pursuant to procedures established in section 438(d) of this title."); 11 CFR 112.4(e).[8]

Thus, recounts are not "elections" under the Act, *see* 2 U.S.C. § 431(1), and funds solicited, received and spent in connection with a recount are not funds solicited, received or spent in connection with an election, and are therefore not subject to 2 U.S.C. § 441i(e)(1). There is no evidence that Congress intended through BCRA to implicitly overturn either the Commission's longstanding rules or advisory opinions on the

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[7] *See Legislative Recommendations 2004*, available at http://www.fec.gov/pages/legislative_recommendations_2004.htm#441ie (visited September 28, 2006) ("The Commission recommends that Congress amend 2 U.S.C. 441i(e)(1) to clarify the circumstances in which recall elections, referenda and initiatives, recounts, redistricting, legal defense funds, and related activities fall within the scope of activities that are "in connection with a Federal election" and are thus subject to the 441i(e)(1) restrictions.").

[8] *See also* Advisory Opinion 1999-11, Concurring Opinion of Wold, Elliott, and Mason ("[A]dvisory opinions are clearly not rules or regulations. Advisory opinions may address only "the application of [the FECA] . . . or a rule or regulation prescribed by the Commission. . . . Subsection 437f(b) is an extraordinary restatement of a restriction which is clear from the plain reading of subsections 437f(a) and 438(d): the Commission may not establish a rule of general applicability through the advisory opinion process. . . .").

treatment of recount funds, and in fact, there is substantial evidence of legislative acquiescence to the Commission's longstanding treatment of recount funds. Consequently, BCRA's restrictions at 2 U.S.C. § 441i(e)(1) on Federal candidates soliciting, receiving, directing, transferring, or spending funds in connection with either Federal or non-Federal elections do not alter the Commission's prior treatment of funds raised and spent by Federal candidates for recounts and recount funds.

B) Recounts and Election Contests are not "In Connection With" an Election

Although it is clear that recounts and election contests are not in themselves "elections," the question remains whether they are nonetheless "*in connection with*" an election. The Commission concludes they are not for two reasons.

1. *If "In Connection With" Encompasses Recounts and Election Contests, the Reasoning in AO 2006-24 Would be Incomprehensible.*

Assuming, *arguendo*, that recount and election contest funds are to be considered "in connection with" an election and thus subject to the Act's contribution limits, this begs the fundamental question: in connection with *which election* are such donations given? They must be given in connection with the election that is the subject of the recount or the election contest (e.g., the Minnesota general election for U.S. Senate held on November 4, 2008).[9] Thus, although AO 2006-24 suggested that recount and election contests are "in connection with" an election, its conclusion that donations to a Federal candidate's fund to conduct a recount of general election results do not aggregate with

[9] When the Act and Commission regulations discuss an "election," the term generally refers not to the office sought, but rather to the different and discrete elections (e.g., primary, general, runoff, special) that are held in order to determine the ultimate holder of that office. *See* 2 U.S.C. § 441a(a)(6); 11 C.F.R. § 100.2. Neither the Act nor the Commission's regulations suggest that recounts and election contests may be treated in and of themselves as "elections," however. Thus, if recount fund donations are subject to the contribution limits because they are given "in connection with an election for Federal office," they must be given "in connection with" the election that is being challenged.

contributions from the same donors to that candidate's general election fund is incomprehensible. To wit, all of those funds would have to be considered to be given "in connection with" the same general election and subject to the same aggregate limit under the Act.

The better reading of 2 U.S.C. § 441i(e)(1)(A), which we adopt here, is that recounts and election contests are not in themselves "elections," and thus donations given to fund such recounts and election contests are not given "in connection with" any election. Moreover, neither courts nor the Commission, prior to AO 2006-24, have ever interpreted "in connection with" to cover any post-election activities (with the limited exception of winding down costs for "GELAC" funds, *see* 11 C.F.R. § 9003.3) or litigation. Because donations that are not given "in connection with" an election are not subject to the Act's limits (*see* AOs 2003-20, 2004-14, 2005-10, *supra*), donations to recount and election contest funds also are not subject to the Act's limits.

2. *Reading "In Connection With" as Not Encompassing Recounts and Election Contests is More Consistent with Judicial Opinion and Prior Commission Interpretation.*

Although BCRA does not define the phrase "in connection with an election for Federal office," the Act's corporate contribution provision, which pre-dates BCRA, uses substantially the same language, and the Supreme Court has limited that language to apply only to activities that seek to influence a voter's choice in the run-up to an actual election, rather than post-election activity.

In *FEC v. Massachusetts Citizens for Life* ("*MCFL*"), the Court was asked to interpret the Act's prohibition at 2 U.S.C. § 441b on corporations and labor organizations

from making "a contribution or expenditure in connection with any [Federal] election." 479 U.S. 238, 247-248 (1986). The Court explained that the effect and intent of this language "is to prohibit the use of union or corporate funds for *active electioneering directed at the general public* on behalf of a candidate in a federal election." *Id.* (citing 117 Cong. Rec. 43,379 (1971) (emphasis added). The use of the term "active electioneering" makes clear that, at least in the context of Section 441b, a contribution or expenditure made "in connection with" an election is limited to pre-election activity. There is, of course, no "active electioneering" involved in recount or election contest activities, since the election has already occurred – only recounting, re-tallying, or litigation over the votes already cast in the election to ensure that every eligible vote has been accurately counted.

As the Supreme Court also has stated, "A fundamental canon of statutory construction is that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning." *Perrin v. United States*, 444 U.S. 37, 42 (1979) (citing *Burns v. Alcala*, 420 U.S. 575, 580-81 (1975)). Since the Court did not suggest in *MCFL* that its interpretation of Section 441b of the Act ("in connection with any [Federal] election") was anything other than ordinary, contemporary, or common, Congress is presumed to have intended the same meaning when it adopted the "in connection with an election for Federal office" and "in connection with any election other than an election for Federal office" at Section 441i(e)(1) of the Act.

In its rulemaking implementing this section of BCRA, the Commission has adopted the same interpretation as the Court in *MCFL* in defining Section 431(20)(A)(ii) of the Act ("Federal election activity," or "FEA"), which addresses "voter identification,

get-out-the-vote activity, or generic campaign activity conducted *in connection with an election* in which a candidate for Federal office appears on the ballot." The Commission's regulations defining FEA's "in connection with an election" language in terms of a time period ending on the date of the general election or any general runoff election, but does not include any post-election activity such as recounts or election contests. *See* 11 C.F.R. § 100.24(a)(1).[10]

Similarly, in its post-BCRA Advisory Opinion 2003-15, the Commission was asked to decide whether a lawsuit, filed by supporters of former Rep. Cynthia McKinney, seeking a special primary and special general election in 2003, and thereby essentially overturning the primary and general elections that Rep. Denise Majette won in 2002, was "in connection with" any election, and whether Rep. Majette could raise funds to pay for her legal expenses in monitoring and potentially defending against this litigation.[11] Although the Commission noted that the litigation involving Rep. Majette "challeng[ed] the lawfulness of the conduct of the election," the Commission concluded that the lawsuits were not "in connection with" any election, and thus the contribution limits of the Act, as amended by BCRA, did not apply at all.

Notably, the commission stated: "There is no indication in the legislative history of BCRA that Congress intended section 441i(e)(1)(A) to change an area that is both well-familiar to members of Congress and subject of longstanding interpretation through

[10] *See* n.1, *supra*. With respect to the proper interpretation of "in connection with" with an election, the *Shays III* court notably did not question the Commission's limitation of the regulation's temporal scope to pre-election activity. Thus, the *Shays III* court did not hold that the Commission interpreted the "in connection with" language of 2 U.S.C. § 431(20)(A)(ii) too narrowly.

[11] The lawsuit initially challenged Georgia's open primary election system in general. After Rep. Majette won the primary and general elections in 2002, the complaint was amended to seek a special primary and general election, thereby effectively invalidating the results of the 2002 elections. Rep. Majette was initially named as a defendant but was later excluded. Nonetheless, the possibility remained that she could be named again in the proceedings as a defendant.

statements of Congressional policy and Commission Advisory Opinions."

The question presented in this Advisory Opinion 2009-04 is identical in all material respects to the question presented in AO 2003-15. To wit, Mr. Coleman's recount and election contest requests, against which Mr. Franken is defending, challenged the "lawfulness of the conduct" of the November 4, 2008 election. *See* Notice of Contest, *Coleman v. Franken*, No. 62-CV-09-56 (Ramsey County Dist. Ct., 2nd Jud. Dist.), *available at* http://moritzlaw.osu.edu/electionlaw/litigation/documents/Notice_of_Contest.pdf (alleging, *inter alia*, double-counting of ballots; counting of ballots lacking the proper chain of custody; counting of ineligible absentee ballots; counting of mutilated, defaced, or obliterated ballots; and challenges to ballots that were improperly rejected or upheld by election officials; all in violation of Minnesota state election law). The Commission does not see any distinction between the recount and election contests concerning the results of Minnesota's 2008 general election for U.S. Senate at issue in this opinion,[12] and the lawsuits concerning Georgia's 2002 primary and general elections and proposed special primary and general elections in 2003 for Georgia's 4th District seat in the U.S. House of Representatives at issue in AO 2003-15.

The Commission thus concludes that the Franken Committee's existing recount fund and proposed election contest fund are not subject to the Act's limits because they are neither contributions nor funds given "in connection with" any election for the

[12] Although, under this opinion, it makes no practical difference with respect to the question of donation limits to the Franken Committee's recount and election contest funds, the Commission notes that the recount and election contest are separate procedures specifically established under Minnesota law. The law permits either a recount or election contest to take place with or without the occurrence of the other. *See* Minn. Stat. § 204C.35 (2008) (recounts); Minn. Stat. §§ 209.2, 209.021 (2008) (election contests).

purposes of 2 U.S.C. §§ 441a(a)(1)(A) and 441i(e)(1), but the Act's source prohibitions, and reporting requirements nonetheless apply pursuant to 11 C.F.R. § 100.91. To the extent that Advisory Opinion 2006-24 differs from this result, it is superseded.

With respect to the Act's biennial limits, those limits apply only to "contributions" and only to individuals, and do not apply to party and candidate committees. 2 U.S.C. § 441a(a)(3). As discussed above with respect to national party committees, because 11 C.F.R. § 100.91 excludes donations to recount and election contest funds from being considered as "contributions," donations to a Federal candidate's recount and election contest funds also do not aggregate with respect to an individual's biennial contribution limit.

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

law including, but not limited to, statutes, regulations, advisory opinions and case law. The cited advisory opinion is available on the Commission's website at http://saos.nictusa.com/saos/searchao.

On behalf of the Commission,

Steven T. Walther
Chairman