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FEDERAL ELECTION COMMISSION
Washington, DC 20463

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November 4, 2009

MEMORANDUM

TO: The Commission

FROM: Thomasenia P. Duncan *JPD*
General Counsel

Rosemary C. Smith *RCS*
Associate General Counsel

Robert M. Knop *RMK*
Assistant General Counsel

Joshua S. Blume *JSB*
Attorney

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

Attached is proposed Draft D of the subject advisory opinion. We request that this draft be placed on the agenda for November 5, 2009.

Attachment

AGENDA ITEM
For Meeting of: 11-05-09
SUBMITTED LATE

2
3 Mr. Patrick M. Quinn, Esq.
4 The Brunner Firm Co., LPA
5 545 East Town Street
6 Columbus, OH 43215

7 Dear Mr. Quinn:

8 We are responding to your advisory opinion request on behalf of the Jennifer
9 Brunner Committee (“Federal Committee”) concerning the application of the Federal
10 Election Campaign Act of 1971, as amended (the “Act”), and Commission regulations to
11 assets previously owned by Ms. Brunner’s now-defunct State committee (“State
12 Committee”). The Federal Committee proposes to make charitable donations of
13 campaign funds in an amount equal to the value of the assets.

14 The Commission concludes the Federal Committee may not implement its
15 proposal to donate an amount equal to the value of the assets to charity as a means of
16 enabling it to accept transfer of the assets, because doing so would result in an
17 impermissible transfer of assets to the Federal Committee.

18 ***Background***

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

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

25 Secretary Brunner formed the State Committee when she ran for Secretary of
26 State of Ohio in 2006. According to the request, the State Committee rented office space

1 from The Brunner Firm Co., LPA, a law firm whose sole partner is Rick Brunner
2 (“Brunner Law Firm/Landlord”). Rick Brunner is also Secretary Brunner’s husband.

3 Within the rented office space, the State Committee had in its possession certain
4 assets, including computers, office equipment and supplies and similar assets
5 (“Remaining Assets”), which it had purchased with State Committee funds.

6 On February 17, 2009, Secretary Brunner took the following three actions: (1)
7 she terminated her State Committee,¹ (2) she announced her intention to run for United
8 States Senator, and (3) she created her Federal Committee by filing an FEC Form 1,
9 Statement of Organization, with the Commission. When the State Committee vacated its
10 offices at the Brunner Law Firm/Landlord, it left behind the Remaining Assets, including
11 the computers that apparently had never been used by the State Committee. Although the
12 Federal Committee represents that the fair market value of the Remaining Assets is
13 \$15,000, according to the Federal Committee the Remaining Assets were “abandoned”
14 by the State Committee, and based on the Federal Committee’s understanding of Ohio
15 State property law, the Remaining Assets now belong to the Brunner Law
16 Firm/Landlord.²

17 On February 18, 2009, one day after the State Committee was terminated, and one
18 day after the State Committee vacated the office space located at the Brunner Law

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

² Ohio law prohibiting “personal use” of campaign assets may have prevented the State Committee from simply giving the assets to the Brunner Law Firm/Landlord or to the Federal Committee. *See* Ohio Rev. Code Section 3517.13 (Prohibited Activities).

1 Firm/Landlord, the Federal Committee and the Brunner Law Firm/Landlord executed a
2 “Short Term Tenancy at Sufferance and Agreement to Vacate” (“Short Term Tenancy
3 Agreement”) under which the Federal Committee became the tenant of the same space
4 formerly occupied by the State Committee and took possession of the Remaining Assets.

5 The Short Term Tenancy Agreement was executed by Rick Brunner, on behalf of
6 the Brunner Law Firm/Landlord, and by Patrick Quinn, an associate in The Brunner Firm
7 Co., LPA, on behalf of the Federal Committee. In addition to being employed by Mr.
8 Brunner’s law firm, Mr. Quinn serves as the Treasurer of Secretary Brunner’s Federal
9 Committee. Accordingly, the Short Term Tenancy Agreement has been executed by
10 attorneys associated with Mr. Brunner’s law firm representing both parties in the
11 transaction, with one of those parties (the Brunner Law Firm/Landlord) being the
12 husband’s law firm itself.

13 Pursuant to the Short Term Tenancy Agreement, the Federal Committee also
14 received the Remaining Assets, which were described as “valuable personal property”
15 ostensibly formerly owned by the State Committee “which Landlord can and does claim
16 as abandoned property” and in return for “such use and eventual purchase” the Federal
17 Committee must donate the fair market value of the Remaining Assets (*i.e.*, \$15,000) to
18 one or more of three charities identified in the Short Term Tenancy Agreement. *See*
19 *Short Term Tenancy Agreement, Consideration and Donation*. The donation would be
20 \$1,000 per month, on the 28th day of each month, beginning on October 28, 2009, until
21 the full \$15,000 has been paid. *Id.* The Federal Committee would also have the option to
22 accelerate its payments. *Id.*

1 According to the websites of these charities, Secretary Brunner and her husband
2 appear to serve as trustees on the Board of at least two of the three identified charities.³
3 The three identified charities are listed as “Art for a Child’s Safe America Foundation,”
4 “Mental Health America of Franklin County, Inc.,” and “Columbus and Central Ohio
5 Children’s Chorus Foundation” in the Internal Revenue Service’s Publication 78 and all
6 appear to be categorized as charitable organizations pursuant to 26 U.S.C. 170(c).⁴

7 The Federal Committee asks whether implementing the Short Term Tenancy
8 Agreement would entail an impermissible transfer of assets from the State Committee to
9 the Federal Committee in violation of 11 CFR 110.3(d).

10 ***Question Presented***

11 *May the Federal Committee obtain and use computers and other campaign assets*
12 *formerly owned by the State Committee if the Federal Committee donates the fair market*
13 *value of the assets to section 170(c) charitable organizations?*

14 ***Legal Analysis and Conclusions***

15 No, under the facts of this request, the Federal Committee may not obtain and use
16 computers and other campaign assets owned by the State Committee, even if the Federal
17 Committee donates the fair market value of the assets to section 170(c) charitable
18 organizations.

³ See <http://www.mhafc.org/about.php> and http://www.artsafe.org/index.php?option=com_content&view=article&id=3&Itemid=6 (both last visited Sept. 14, 2009).

⁴ Available online at <http://www.irs.gov/app/pub-78> (last visited Sept. 14, 2009).

1 Although the Federal Committee represents that the Remaining Assets were
2 ostensibly abandoned by the State Committee⁵ and now belong to the Brunner Law
3 Firm/Landlord, you also ask whether the transfer is permissible from the State Committee
4 to the Federal Committee. When the State Committee left the Remaining Assets behind
5 in the office space that it was renting from Secretary Brunner’s husband’s law firm, it
6 undoubtedly did so knowing, if not intending, that the Remaining Assets would nearly
7 immediately become available to, and the property of, the Federal Committee when the
8 Federal Committee began occupying the same space on the very next day. Accordingly,
9 it is not clear whether the Remaining Assets were truly *abandoned* by the State
10 Committee to the Brunner Law Firm/Landlord or rather were simply a *gift* from the State
11 Committee to the Federal Committee directly, given that both committees are controlled
12 by Secretary Brunner.⁶ Without opining on whether the Remaining Assets are being
13 transferred from the now-defunct State Committee or from the Brunner Law
14 Firm/Landlord, the Commission concludes that the transfer of the Remaining Assets to
15 the Federal Committee without the Federal Committee paying fair market value to the
16 transferor, pursuant to an arms-length transaction, for the assets is impermissible.

⁵ As discussed above, the State Committee is now defunct and it is not a party to this advisory opinion request. Accordingly, the State Committee has made no representation to the Commission regarding whether it abandoned the Remaining Assets to the Brunner Law Firm/Landlord.

⁶ The definition of “abandonment” in Black’s Law Dictionary is “the relinquishing of a right or interest with the intention of never again claiming it.” Black’s Law Dictionary at 2 (8th Ed., 2004). The Black’s Law Dictionary definition of “gift” is “the voluntary transfer of property to another without compensation.” *Id.* at 709. According to American Jurisprudence, the term “abandonment,” as applied to personal property and property rights, means the act of voluntarily and intentionally relinquishing a known right, absolutely, and without reference to any particular person or for any particular purpose. 1 Am. Jur. 2d Abandoned, Lost, and Unclaimed Property § 3 (2 Ed., 2009). The American Jurisprudence definition of “gift” is a voluntary transfer of property by one person to another without any consideration or compensation therefor, whereby the donor manifests an intent that there be a present and irrevocable transfer of title to the subject matter of the gift. 38 Am. Jur. 2d Gifts § 1 (2d Ed., 2009).

1 If the Remaining Assets are being transferred from the State Committee, the
2 transfer of assets from a candidate’s campaign account for a non-Federal election to that
3 candidate’s campaign account for a Federal election is prohibited by 11 CFR 110.3(d).
4 The regulation is intended to prevent the use of funds from non-Federal accounts in
5 connection with Federal elections. *See* Advisory Opinion 1993-11 (Dukakis-Bentsen).
6 This is necessary because “[m]any [S]tates allow individuals to make contributions to
7 [S]tate candidates that would exceed [the limitations under the Act] . . . [and] allow
8 corporations and labor organizations to make contributions to [S]tate candidates.” *See*
9 *Explanation and Justification for Transfer of Funds From State to Federal Campaigns*,
10 58 FR 3474 (Jan. 8, 1993) (“1993 E&J”). As noted above, the Remaining Assets were
11 purchased with State Committee funds, raised under Ohio law, and Ohio law does not
12 have the same amount limitations on contributions as the Act. *See* Ohio Rev. Code
13 § 3517.102.

14 The only exception noted in the 1993 E&J to the regulation’s otherwise absolute
15 prohibition on all transfers of assets from State to Federal campaign committees is that a
16 State campaign committee may sell assets to a Federal campaign committee for the fair
17 market value of the assets. *See* 1993 E&J, 58 FR 3475.⁷ It is impossible, however, for
18 the State Committee to sell the Remaining Assets to the Federal Committee in this case
19 because the State Committee no longer exists.

20 Therefore, were the Federal Committee to implement the Short Term Tenancy
21 Agreement, it would become the beneficiary of an impermissible transfer of assets that

⁷ The 1993 E&J also addresses the situation in which there is no recognized State committee in existence by indicating that 11 CFR 110.3(d) also prohibits transfers of funds from bank accounts of State campaigns where there are no recognized State campaign committees. *See id.*

1 had belonged to the former State Committee. The proposed donation of campaign funds
2 to charity, in accordance with the terms of the Short Term Tenancy Agreement, would
3 not cure the impermissible transfer of the State Committee's assets to the Federal
4 Committee. *See* Advisory Opinion 2003-18 (Smith) (candidate could not donate funds
5 representing contributions designated for general election in which candidate did not
6 participate, even after good-faith unsuccessful attempt to refund such contributions).⁸
7 The Commission's regulations may not be finessed by doing indirectly what cannot be
8 done directly. *See, e.g., Production Credit Ass'n of Fargo v. Ista*, 451 N.W.2d 118, 124-
9 25 (N.D.1990) ("we recognize the familiar maxim that 'the law does not permit by
10 indirection what cannot be accomplished directly.'"); *Langenes v. Bullinger*, 328 N.W.2d
11 241, 246 (N.D. 1982) (citing cases in support of the maxim).

12 Alternatively, if the Remaining Assets are being transferred from the Brunner
13 Law Firm/Landlord, the Commission concludes that the Federal Committee may not
14 acquire the Remaining Assets in exchange for donating the fair market value of those
15 assets to one or more section 170(c) charitable organizations specified by the Brunner
16 Law Firm/Landlord because acquisition of the Remaining Assets without paying fair
17 market value to the owner of the assets would constitute a receipt of an excessive in-kind
18 contribution from the Brunner Law Firm/Landlord under the Commission's regulations.
19 There would be no difference between the transaction as currently structured and the

⁸ The Commission did permit candidates to donate campaign funds representing illegal or possibly illegal contributions in previous advisory opinions in limited and unusual circumstances where the political committee could not determine the identity of the original contributor. *See* Advisory Opinions 1991-39 (D'Amato) and 1995-19 (Indian-American Leadership Investment Fund). These advisory opinions are distinguishable from the current situation because the Federal Committee is aware of the identity of the contributor as a prohibited source, and can take steps at this point to avoid accepting a prohibited contribution.

1 Brunner Law Firm/Landlord making an excessive contribution of \$17,400 (\$15,000 of
2 which the requester has stated represents the fair market value of the assets and the
3 remaining \$2,400 of which represents the maximum allowable contribution for an
4 election) directly to the Federal Committee with the proviso that the Federal Committee
5 donate the excessive \$15,000 portion to charity. Both transactions would still represent
6 unlawful excessive contributions to the Federal Committee.

7 Moreover, in this case, even if the Brunner Law Firm/Landlord does have rightful
8 ownership of the Remaining Assets, it did not obtain such ownership by purchasing the
9 assets for value from Secretary Brunner's State Committee. Rather the Brunner Law
10 Firm/Landlord obtained ownership of the Remaining Assets as a result of the State
11 Committee either "abandoning" or simply gifting the assets. Under these circumstances,
12 the Commission cannot conclude that it is possible for the Brunner Law Firm/Landlord to
13 sell the Remaining Assets to Secretary Brunner's Federal Committee pursuant to an
14 arms-length transaction.⁹

15 For these reasons, the Federal Committee may not acquire the Remaining Assets
16 either from the State Committee or from the Brunner Law Firm/Landlord in exchange for
17 donating the fair market value to charitable organizations.

18 This response constitutes an advisory opinion concerning the application of the
19 Act and Commission regulations to the specific transaction or activity set forth in your
20 request. *See* 2 U.S.C. 437f. The Commission emphasizes that, if there is a change in any
21 of the facts or assumptions presented and such facts or assumptions are material to a

⁹ Thus, this situation differs from one in which a State committee might sell its remaining equipment pursuant to an arms-length transaction for the usual and normal charge to a independent third party, who then subsequently may decide to sell the assets to another political committee in a second arms-length transaction.

1 conclusion presented in this advisory opinion, then the requester may not rely on that
2 conclusion as support for its proposed activity. Any person involved in any specific
3 transaction or activity which is indistinguishable in all its material aspects from the
4 transaction or activity with respect to which this advisory opinion is rendered may rely on
5 this advisory opinion. *See* 2 U.S.C. 437f(c)(1)(B). Please note the analysis or conclusions
6 in this advisory opinion may be affected by subsequent developments in the law
7 including, but not limited to, statutes, regulations, advisory opinions and case law.
8 All cited advisory opinions are available on the Commission's website at
9 <http://saos.nictusa.com/saos/searchao>.

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On behalf of the Commission,

Steven T. Walther
Chairman