

**AGENDA DOCUMENT NO. 10-70**



FEDERAL ELECTION COMMISSION  
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2010 NOV 10 P 4:44

November 10, 2010

**AGENDA ITEM**

**For Meeting of 11-18-10**

**MEMORANDUM**

TO: The Commission

FROM: Christopher Hughey *pch*  
Acting General Counsel

Rosemary C. Smith *RCS*  
Associate General Counsel

Robert M. Knop *RMK*  
Assistant General Counsel

Allison T. Steinle *ATS*  
Attorney

Subject: Draft AO 2010-27 (Obama for America and Biden for President)

Attached is a proposed draft of the subject advisory opinion. We request that this draft be placed on the agenda for November 18, 2010.

Attachment

1 ADVISORY OPINION 2010-27

2

3 Judith L. Corley, Esq.  
4 Rebecca H. Gordon, Esq.  
5 Counsel to Obama for America  
6 Perkins Coie LLP  
7 607 14<sup>th</sup> St. NW, Suite 800  
8 Washington, DC 20004

**DRAFT**

9

10 William J. Farah, Esq.  
11 Counsel to Biden for President  
12 Oldaker, Belair & Wittie, LLP  
13 818 Connecticut Ave. NW, Suite 1100  
14 Washington, DC 20006

15

16 Dear Ms. Corley, Ms. Gordon, and Mr. Farah:

17

We are responding to your advisory opinion request on behalf of Obama for  
18 America (“OFA”) and Biden for President (“BFP”) concerning the application of the  
19 Federal Election Campaign Act of 1971, as amended (“the Act”), and Commission  
20 regulations to the transfer of funds by OFA to BFP to cover BFP’s net debts, or, in the  
21 alternative, OFA’s direct payment of BFP’s debts. The Commission concludes that OFA  
22 may transfer funds to BFP to cover BFP’s nets debts pursuant to 11 CFR 110.3(c)(4).

23

***Background***

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The facts presented in this advisory opinion are based on your letter received on  
25 October 1, 2010, and your email received on October 22, 2010, as well as publicly  
26 available information, including reports filed with the Commission.

27

BFP was former Senator Joseph Biden’s principal campaign committee for the  
28 2008 Democratic nomination for President. Then-Senator Biden and BFP filed a  
29 Statement of Candidacy and a Statement of Organization with the Commission on  
30 January 31, 2007. The Commission determined on December 3, 2007 that former  
31 Senator Biden was eligible to receive public financing. BFP received a total of

1 \$2,033,472 in matching funds from the U.S. Treasury between January 1 and November  
2 30, 2008. On January 3, 2008, former Senator Biden announced that he was dropping out  
3 of the presidential primary race and would no longer campaign for the Democratic  
4 Party's presidential nomination.

5 OFA was former Senator Barack Obama's principal campaign committee for the  
6 2008 Democratic nomination for President. Then-Senator Obama and OFA filed a  
7 Statement of Candidacy and a Statement of Organization with the Commission on  
8 February 12, 2007.

9 On August 27, 2008, delegates to the Democratic National Convention formally  
10 nominated former Senator Obama for President and former Senator Biden for Vice  
11 President. OFA filed an amended Statement of Organization on September 10, 2008,  
12 listing former Senators Obama and Biden as the candidates on whose behalf OFA would  
13 operate. On September 17, 2008, the two candidates filed a joint Statement of  
14 Candidacy, designating OFA as their principal campaign committee and authorizing OFA  
15 to accept contributions and make expenditures on their behalf. OFA did not elect to  
16 receive public financing for the 2008 presidential primary or general elections. On  
17 November 4, 2008, former Senators Obama and Biden won the general election.

18 Following the 2008 presidential election, the Commission conducted a mandatory  
19 audit of BFP pursuant to 2 U.S.C. 9038(a) and 11 CFR 9038.1(a). On July 16, 2010, the  
20 Commission considered and approved findings in the Audit Division's proposed Final  
21 Audit Report ("FAR"), but declined to issue the FAR and sent it back to the Audit  
22 Division to make certain changes. The Commission approved two findings that will  
23 require BFP to make \$133,105 in payments to the U.S. Treasury within 30 days of

1 issuance of the FAR. *See* 11 CFR 9038.1(f)(3). The Commission also approved a  
2 finding that BFP failed to resolve \$85,900 in stale-dated checks. Commission regulations  
3 require that BFP make a payment to the U.S. Treasury for the full amount of these stale-  
4 dated checks, which it has not yet done. *See* 11 CFR 9038.6. The Commission's final  
5 issuance of the FAR remains pending.

6 BFP currently estimates that it has \$93,000 in cash on hand and nearly \$231,000  
7 in total outstanding debts and obligations, including the expected payments to the U.S.  
8 Treasury. OFA and BFP propose a transfer of \$138,000 from OFA to BFA, which would  
9 be sufficient to cover this net debt. OFA states it would use the accounting method set  
10 forth at 11 CFR 110.3(c)(4) to ensure that any funds transferred to BFA would consist  
11 only of presidential general election funds.

## 12 ***Questions Presented***

- 13 1. *May OFA transfer \$138,000 to BFP pursuant to 11 CFR 110.3(c)(4)?*
- 14 2. *In the alternative, may OFA pay the debts incurred by former Senator Biden's*  
15 *primary campaign pursuant to 11 CFR 110.1(b)(3)(iv)?*
- 16 3. *Will the Commission toll the running of BFP's 30-day deadline to make the*  
17 *payments to the U.S. Treasury?*

## 18 ***Legal Analysis and Conclusions***

- 19 1. *May OFA transfer \$138,000 to BFP pursuant to 11 CFR 110.3(c)(4)?*

20 Yes, OFA may transfer funds to BFP pursuant to 11 CFR 110.3(c)(4) to cover  
21 BFP's net debts, including expected payments to the U.S. Treasury that BFP must make  
22 within 30 days of issuance of BFP's FAR.

1           Section 441a of the Act states that nothing in that section limits the transfer of  
2 funds between the principal campaign committees of a candidate seeking nomination or  
3 election to more than one Federal office so long as: (1) such a transfer is not made when  
4 the candidate is actively seeking nomination or election to both such offices; (2) the  
5 contribution limitations are not exceeded by such a transfer; and (3) the candidate has not  
6 elected to receive public financing. 2 U.S.C. 441a(a)(5)(C). Commission regulations  
7 implement this provision by setting forth two sets of rules for transfers between a Federal  
8 candidate's authorized Federal campaign committees.

9           One set of rules applies to a candidate who has not concurrently sought election to  
10 more than one Federal office in the same or overlapping election cycles. 11 CFR  
11 110.3(c)(4). Such a candidate may make unlimited transfers between a previous Federal  
12 campaign committee and a current Federal campaign committee, or between two  
13 previous Federal campaign committees. *Id.*

14           The other set of rules applies to a candidate who is concurrently a candidate for  
15 more than one Federal office in the same or overlapping election cycles. 11 CFR  
16 110.3(c)(5) and 9034.4(d)(1). These transfers are commonly known as dual-candidacy  
17 transfers. A dual candidate may only make transfers between his or her authorized  
18 campaign committee if: (1) the candidate is no longer actively seeking nomination or  
19 election to more than one Federal office; (2) the limitations on contributions are not  
20 exceeded by the transfer; and (3) the candidate has not elected to receive public financing  
21 under 26 U.S.C. 9006 or 9037 for either election. *Id.*

22           The first question is which set of rules applies to the proposed transfer. The  
23 answer depends on whether then-Senator Biden was concurrently a candidate for election

1 to more than one Federal office in the same or overlapping election cycles when he first  
2 ran in the presidential primary election and was subsequently nominated as the vice  
3 presidential candidate in the general election.<sup>1</sup>

4       Former Senator Biden's candidacies were not concurrent, even if his authorized  
5 principal campaign committees were concurrent.<sup>2</sup> Former Senator Biden publicly  
6 announced his withdrawal from the presidential primary race on January 3, 2008, thereby  
7 ending his candidacy for President. His vice presidential candidacy did not begin until  
8 August 27, 2008, when he received the nomination of the delegates to the Democratic  
9 National Convention. Accordingly, the dual-candidacy transfer rules at 11 CFR  
10 110.3(c)(5) do not apply.

11       Instead, the Commission concludes that 11 CFR 110.3(c)(4) applies to the  
12 proposed transfer. As noted above, 11 CFR 110.3(c)(4) permits unlimited transfers so

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<sup>1</sup> Then-Senator Biden was also a candidate for Senate during the 2008 election cycle, and had a separate principal campaign committee, Citizens for Biden, registered with the Commission. His Senate candidacy, however, is not relevant because he does not seek to transfer any funds to or from Citizens for Biden. The transfer rules govern only transfers between the transferor and transferee committees. *See* Explanation and Justification for Final Rules on Affiliated Committees, Transfers, Prohibited Contributions, Annual Contribution Limitations and Earmarked Contributions, 54 FR 34098, 34102-03 (Aug. 17, 1989) (discussing the transfer rules in the context of only the transferor and transferee committees). Thus, the fact that then-Senator Biden was concurrently a candidate for Senate does not affect whether he meets the definition of a dual candidate with respect to a transfer from OFA to BFP.

<sup>2</sup> The Act and Commission regulations generally prohibit candidates from designating political committees that support or have supported more than one candidate as their authorized committees except in the case of joint fundraising. 2 U.S.C. 432(e)(3)(A); 11 CFR 102.13(c)(1). The Act and Commission regulations provide an exception to this rule, however, for joint presidential and vice presidential campaign committees. The regulation at 11 CFR 9002.1(a) states that if a party has nominated a presidential and vice presidential candidate, they will share an authorized committee. In addition, non-publicly financed presidential and vice presidential candidates of the same political party may share a single authorized committee so long as they are the nominees of that party. *See* 2 U.S.C. 432(e)(1); 11 CFR 101.1(a) and 103.4; *see also* Advisory Opinion 1992-31 (Bevel) (concluding that that the Vice Presidential running mate of an independent candidate for President was required to designate his own principal campaign committee because neither candidate was the nominee of any major or minor party). Because OFA's candidates were the nominees of the Democratic Party, then-Senators Obama and Biden properly filed a joint Statement of Candidacy, and OFA properly filed a joint Statement of Organization, OFA served as the authorized committee of both candidates notwithstanding 11 CFR 102.13(c)(1). *See id.*

1 long as they are between a previous Federal campaign committee and a current Federal  
2 campaign committee, or between two previous Federal campaign committees.  
3 Commission regulations define a previous Federal campaign committee as a “principal  
4 campaign committee, or other authorized committee, that was organized to further a  
5 candidate’s campaign in a Federal election that has already been held.” 11 CFR  
6 110.3(c)(4)(i). Both BFP and OFA meet this definition, as they were organized to further  
7 then-Senator Biden’s campaign for the 2008 presidential primary election and his  
8 campaign for the 2008 vice presidential general election that was held on November 4,  
9 2008, respectively.

10 Because OFA was former Senator Biden’s principal campaign committee only for  
11 his candidacy in the 2008 presidential general election, OFA must be able to demonstrate  
12 that the transferred funds consist only of general election funds. Moreover, OFA must be  
13 able to demonstrate that the transferred funds do not include contributions made in  
14 violation of the Act. 11 CFR 110.3(c)(4). Unlike the dual-candidacy transfer rules,  
15 however, the contributions that make up the transferred funds need not be aggregated  
16 with contributions to BFP from the same contributor and excluded to the extent they  
17 would exceed the contribution limits of 11 CFR 110.1 and 110.2.<sup>3</sup> *See id.*; Explanation  
18 and Justification for Final Rules on Affiliated Committees, Transfers, Prohibited  
19 Contributions, Annual Contribution Limitations and Earmarked Contributions, 54 FR

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<sup>3</sup> Under 11 CFR 110.3(c)(4)(iii), however, contributions that make up the transferred funds would still need to be aggregated with contributions from the same contributor for the next election unless the contributions were designated for the previous election, or were designated for another election, and the candidate has no debts outstanding for the election so designated.

1 34098, 34103 (Aug. 17, 1989). The Commission will consider the cash on hand from  
2 which the transfer is made to consist of the funds most recently received by OFA.  
3 11 CFR 110.3(c)(4).

4 2. *In the alternative, may OFA pay the debts incurred by former Senator Biden's*  
5 *primary campaign pursuant to 11 CFR 110.1(b)(3)(iv)?*

6 Because OFA may transfer funds to BFP to pay the debts incurred by the  
7 presidential primary campaign, the Commission need not address Question 2.

8 3. *Will the Commission toll the running of BFP's 30-day deadline to make the*  
9 *payments to the U.S. Treasury?*

10 This question is moot because the Commission has not yet issued the FAR and  
11 BFP's 30-day time period to make the payments to the U.S. Treasury has not yet begun.  
12 *See* 11 CFR 9038.1(f)(3).

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

1 All cited advisory opinions are available on the Commission's website at  
2 <http://saos.nictusa.com/saos/searchao>.

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On behalf of the Commission,

Matthew S. Petersen  
Chairman