

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

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

DRAFT ADVISORY OPINION 2011-01 is now available for comment. It was requested by Marc E. Elias, Esq., Ezra W. Reese, Esq., and Jonathan S. Berkon, Esq., on behalf of Robin Carnahan for Senate, and is scheduled to be considered by the Commission at its public meeting on Thursday, February 17, 2011.

If you wish to comment on DRAFT ADVISORY OPINION 2011-01, 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 February 16, 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 2011-01, 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



FEDERAL ELECTION COMMISSION  
Washington, DC 20463

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2011 FEB 11 P 4: 28

February 11, 2011

**AGENDA ITEM**

For Meeting of 2-17-11

**MEMORANDUM**

TO: The Commission

FROM: Christopher Hughey *CH (RCS)*  
Acting General Counsel

Rosemary C. Smith *RCS*  
Associate General Counsel

Robert M. Knop *JSB for RMK*  
Assistant General Counsel

Joanna S. Waldstreicher *JSW*  
Attorney

Subject: Draft AO 2011-01 (Robin Carnahan for Senate)

**SUBMITTED LATE**

Attached is a proposed draft of the subject advisory opinion. We request that this draft be placed on the agenda for February 17, 2011.

Attachment

1 ADVISORY OPINION 2011-01

2 Marc E. Elias, Esq.  
3 Ezra W. Reese, Esq.  
4 Jonathan S. Berkon, Esq.  
5 Perkins Coie, LLP  
6 607 Fourteenth Street N.W.  
7 Washington, DC 20005-2003

**DRAFT**

8 Dear Messrs. Elias, Reese, and Berkon:

9 We are responding to your advisory opinion request on behalf of Robin Carnahan for  
10 Senate (the "Committee"), concerning the application of the Federal Election Campaign Act of  
11 1971, as amended (the "Act"), and Commission regulations to the establishment of a legal  
12 defense fund and the sources of money such a fund may accept and use to defray the  
13 Committee's legal costs. The Commission concludes that amounts received and spent by the  
14 Fund would not be "contributions" or "expenditures" as defined in the Act and Commission  
15 regulations where these amounts are used to defend a copyright infringement and  
16 misappropriation lawsuit. Thus, no provision of the Act or Commission regulations prohibits the  
17 establishment of such a legal defense fund to defray the Committee's legal costs.

18 ***Background***

19 The facts presented in this advisory opinion are based on your letter received on January 6,  
20 2011, your February 1, 2011 email confirmation of a telephone conversation between you and  
21 attorneys in the Commission's Office of General Counsel, and publicly available reports filed by  
22 the Committee with the Commission and court documents.

23 The Committee is the principal campaign committee for Ms. Carnahan, who was a  
24 candidate in the 2010 election for the U.S. Senate in Missouri.<sup>1</sup> On September 15, 2010, Fox  
25 News Network, LLC and Chris Wallace filed a complaint against the Committee in U.S. District

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<sup>1</sup> Ms. Carnahan lost the 2010 general election. She is no longer a candidate for any Federal office nor does she hold any Federal office.

1 Court for the Western Division of Missouri, alleging that an advertisement aired by the  
2 Committee that contained footage of a Fox News interview infringed Fox News' copyright,  
3 invaded Mr. Wallace's rights of privacy and publicity, and misappropriated his likeness and  
4 persona (the "Fox News lawsuit"). The litigation was recently settled by the parties. The  
5 Committee's costs to defend the lawsuit have exceeded \$85,000 and may continue to accrue until  
6 the settlement is finalized.

7 The Committee proposes that a separate legal defense fund ("the Fund") be established  
8 to defray the Committee's legal costs.<sup>2</sup> The Fund would be independent from the Committee and  
9 would not be administered or controlled by the Committee, nor would the Committee be  
10 involved in soliciting donations to the Fund. None of the individuals involved in establishing,  
11 administering, operating, or soliciting on behalf of the Fund would be Federal candidates or  
12 Federal officeholders. Solicitations for the Fund, either in person or in writing, would be  
13 accompanied by a letter stating the purpose of the Fund and noting that no amounts given to the  
14 Fund would be used for the purpose of influencing any Federal election. Solicitations for the  
15 Fund would be conducted separately from any solicitations for the Committee or any other  
16 Federal political committee. The Fund would accept unlimited amounts from individuals,  
17 political committees, corporations, and labor organizations. The Fund would terminate once all  
18 legal costs were paid, and any excess funds would be refunded or donated to a charity.

19 ***Questions Presented***

20 1. *May a separate legal defense fund be established to defray the Committee's costs of*  
21 *defending against the Fox News lawsuit?*

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<sup>2</sup> The Requestor represents that the Fund would not reimburse the Committee for any costs.

1           2. *If so, may the Fund accept unlimited donations from individuals, political committees,*  
2 *corporations, and labor unions, and use those funds to defray the Committee's costs of defending*  
3 *against the Fox News lawsuit?*

4           3. *If the Fund may not accept unlimited donations from individuals, political*  
5 *committees, corporations, and labor unions, which types of funds may it accept and use to defray*  
6 *the Committee's costs of defending against the Fox News lawsuit?*

7 ***Legal Analysis and Conclusions***

8           1. *May a separate legal defense fund be established to defray the Committee's costs of*  
9 *defending against the Fox News lawsuit?*

10           2. *If so, may the Fund accept unlimited donations from individuals, political committees,*  
11 *corporations, and labor unions, and use those funds to defray the Committee's costs of defending*  
12 *against the Fox News lawsuit?*

13           Taking the first two questions together, the Commission concludes that, because the  
14 amounts received and disbursed by the Fund would not be "contributions" or "expenditures" as  
15 defined in the Act and Commission regulations, no provision of the Act or Commission  
16 regulations prohibits the establishment of such a legal defense fund to defray the Committee's  
17 legal costs. Thus, amounts received and disbursed by the Fund are not subject to the source  
18 prohibitions, amount limitations, or reporting requirements of the Act and Commission  
19 regulations.

20           The term "contribution" is defined in the Act and Commission regulations, in relevant  
21 part, as "any gift, subscription, loan, advance, or deposit of money or anything of value made by  
22 any person for the purpose of influencing any election for Federal office." 2 U.S.C. 431(8)(A);  
23 11 CFR 100.52(a). Similarly, the term "expenditure" is defined in part as "any purchase,

1 payment, distribution, loan, advance, deposit, or gift of money or anything of value, made by any  
2 person for the purpose of influencing any election for Federal office.” 2 U.S.C. 431(9)(A);  
3 11 CFR 100.111(a).

4 The Commission has previously concluded that amounts received or disbursed for the  
5 purpose of defending against certain types of lawsuits are not “contributions” or “expenditures.”  
6 *See, e.g.*, 1981-16 (Carter-Mondale Presidential Committee) (potential commercial contract  
7 litigation), 1981-13 (Moss) (claim of slander), and 1980-04 (Carter-Mondale Presidential  
8 Committee) (alleged violations of the Appropriations Act and Hatch Act, and infringements of  
9 constitutional rights).

10 In the circumstances described in your request, the amounts received and disbursed by  
11 the Fund would be strictly for the purpose of paying the Committee’s legal costs in connection  
12 with the Fox News lawsuit. Specifically, this money would compensate the Committee’s  
13 counsel for legal services that enabled the Committee to present a defense to a civil complaint in  
14 a lawsuit alleging copyright infringement, invasion of privacy and right of publicity, and  
15 misappropriation of likeness and identity, and to settle the case. The circumstances presented  
16 here are similar to those presented in Advisory Opinion 1980-04, where a complaint named  
17 various Cabinet members and White House staff members as well as the Carter/Mondale  
18 Presidential Committee as defendants. In its opinion, the Commission concluded that there is no  
19 “basis under the Act for treating donated legal services to defend against a civil action as services  
20 rendered for the purpose of influencing the election for any person to Federal office. In this  
21 situation, the Committee has no choice but to defend itself or admit the violations alleged by the  
22 plaintiff. Thus the donated legal services do not present the Committee with anything of value  
23 that may be utilized for the purpose of influencing any election for Federal office.” Advisory

1 Opinion 1980-04 (Carter/Mondale Presidential Committee); *see also* Advisory Opinion 1981-16  
2 (Carter/Mondale Presidential Committee) (concluding that funds raised or spent exclusively for  
3 commercial litigation involving Committee contracts and similar liabilities would not be  
4 “contributions” or “expenditures” under the Act, but that costs of post-election litigation in  
5 connection with compliance actions of the Commission and Commission audits “clearly emanate  
6 not only out of the election, but also from matters clearly within the scope of the Act”); *cf.*  
7 Advisory Opinion 1993-15 (Tsnngas) (further delineating between costs of defending against an  
8 investigation relating to “activities clearly within the scope of the Act” and “donations and  
9 disbursements made for the purpose of defending a Federal officeholder with respect to activities  
10 unrelated to compliance with the Act”). Because the proposed Fund would be established and  
11 administered entirely separately and independently from the Committee, solicitations for the  
12 Fund would be conducted separately from any solicitation for the Committee, and all amounts  
13 received by the Fund will be held separately from the Committee’s funds, no amounts given to  
14 the Fund could be used for the purpose of influencing any Federal election.

15 Therefore such receipts and disbursements would not be “contributions” to, or  
16 “expenditures” by the Fund, as defined in the Act and Commission regulations, nor would they  
17 be in-kind “contributions” from the Fund to the Committee. Accordingly, the Commission  
18 concludes that nothing in the Act or Commission regulations would limit or prohibit the Fund  
19 from receiving donations from those sources described in your request.<sup>3</sup> Nor would the Fund be  
20 required to register or file disclosure reports under the Act or Commission regulations.

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<sup>3</sup> Section 441i(e)(1)(A) of the Act, which places certain limitations on fundraising by Federal candidates and officeholders, does not apply here.

1           3.     *If the Fund may not accept unlimited donations from individuals, political*  
2     *committees, corporations, and labor unions, which types of funds may it accept and use to defray*  
3     *the Committee's costs of defending against the Fox News lawsuit?*

4           This question is moot, given the answers to Questions 1 and 2, above.

5           The Commission expresses no opinion regarding the possible applicability of Federal or  
6     State tax or other laws that are not within its jurisdiction.

7           This response constitutes an advisory opinion concerning the application of the Act and  
8     Commission regulations to the specific transaction or activity set forth in your request.

9     *See 2 U.S.C. 437f.* The Commission emphasizes that, if there is a change in any of the facts or  
10    assumptions presented and such facts or assumptions are material to a conclusion presented in  
11    this advisory opinion, then the requester may not rely on that conclusion as support for its  
12    proposed activity. Any person involved in any specific transaction or activity which is  
13    indistinguishable in all its material aspects from the transaction or activity with respect to which  
14    this advisory opinion is rendered may rely on this advisory opinion. *See 2 U.S.C. 437f(c)(1)(B).*  
15    Please note that the analysis or conclusions in this advisory opinion may be affected by  
16    subsequent developments in the law including, but not limited to, statutes, regulations, advisory  
17    opinions and case law. The cited advisory opinions are available on the Commission's website,

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1 **www.fec.gov, or directly from the Commission's Advisory Opinion searchable database at**  
2 **<http://saos.nictusa.com/saos/searchao>.**

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**On behalf of the Commission,**

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**Cynthia L. Bauerly**  
**Chair**

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