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FEDERAL ELECTION COMMISSION  
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**AGENDA DOCUMENT NO. 18-36-A**  
**AGENDA ITEM**  
**For meeting of August 2, 2018**

July 25, 2018

**MEMORANDUM**

TO: The Commission

FROM: Lisa J. Stevenson *LJS*  
Acting General Counsel

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Attorney

Subject: AO 2018-08 (Issa) Draft A

Attached is a proposed draft of the subject advisory opinion.

Members of the public may submit written comments on the draft advisory opinion. We are making this draft available for comment until 12:00 pm (Eastern Time) on August 1, 2018.

Members of the public may also attend the Commission meeting at which the draft will be considered. The advisory opinion requestor may appear before the Commission at this meeting to answer questions.

For more information about how to submit comments or attend the Commission meeting, go to <https://www.fec.gov/legal-resources/advisory-opinions-process/>

Attachment

1 ADVISORY OPINION 2018-08

2

3 Charles H. Bell, Esq.

4 Terry J. Martin, Esq.

5 Bell, McAndrews & Hiltachk, LLP

6 455 Capitol Mall, Suite 600

7 Sacramento, California 95814

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9 Dear Messrs. Bell and Martin:

**DRAFT A**

10 We are responding to your advisory opinion request on behalf of Congressman Darrell  
11 Issa, concerning the application of the Federal Election Campaign Act, 52 U.S.C. §§ 30101-45  
12 (the “Act”), and Commission regulations to his proposal to transfer funds from his principal  
13 campaign committee to his previous, administratively terminated Senate campaign committee, to  
14 repay part of a loan from then-Senate candidate Issa to that committee. The Commission  
15 concludes that Congressman Issa’s principal campaign committee may transfer campaign funds  
16 as proposed. However, because the transferred funds would be used to repay a campaign debt,  
17 the transfer may not include any recount funds raised in connection with Congressman Issa’s  
18 2016 general election.

19 ***Background***

20 The facts in this advisory opinion are based on your letter received on May 23, 2018,  
21 your email received on June 5, 2018, and disclosure reports filed with the Commission.

22 Congressman Issa represents California’s 49th Congressional District in the United States  
23 House of Representatives. He has served in the United States House of Representatives  
24 continuously since 2001, and Issa for Congress (“House committee”) is his principal campaign  
25 committee.<sup>1</sup> See Advisory Opinion Request at AOR001. In 2016 and 2017, the House

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<sup>1</sup> Issa for Congress, Statement of Organization, Amendment 2, FEC Form 1 (Aug. 8, 2017), <http://docquery.fec.gov/pdf/091/201708089070301091/201708089070301091.pdf>.

1 committee raised and spent recount funds in connection with the 2016 general election.<sup>2</sup> In early  
2 2018, Congressman Issa announced that he would not seek reelection. AOR001 n.1. The House  
3 committee has a cash-on-hand balance of \$752,000, including \$110,118 in recount funds. *Id.*

4 In 1998, before serving in the United States House of Representatives, Congressman Issa  
5 ran for his party's nomination for the United States Senate. AOR001. Issa for US Senate  
6 ("Senate committee") was his principal campaign committee for that primary election.<sup>3</sup> During  
7 that campaign, Congressman Issa loaned more than \$9 million in personal funds to the Senate  
8 committee, no portion of which was intended to be used, or was actually used, to finance any  
9 recount activity. AOR001, AOR005. The Senate committee's last filed report — in 2004 —  
10 disclosed an outstanding debt to Congressman Issa of \$9,438,014 and reported no other activity  
11 or cash on hand. *See* AOR001.<sup>4</sup> In early 2005, the Commission administratively terminated the  
12 Senate committee's reporting obligations.<sup>5</sup> Although the Senate committee was administratively  
13 terminated, it was not relieved "of any legal responsibility for the payment of any outstanding  
14 debt or obligation," such as the debt owed to Congressman Issa.<sup>6</sup>

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<sup>2</sup> *See* Issa for Congress, April Quarterly Report, FEC Form 3 at 95 (Apr. 15, 2017), <http://docquery.fec.gov/pdf/471/201704159052254471/201704159052254471.pdf> (reporting disbursement for "recount"); Issa for Congress, Amended Year-End Report, FEC Form 3 (Apr. 3, 2017), <http://docquery.fec.gov/pdf/491/201704039051982491/201704039051982491.pdf> (itemizing several receipts for "recount funds").

<sup>3</sup> Issa for US Senate, About This Committee, FEC, <https://www.fec.gov/data/committee/C00327007/?cycle=1998&tab=about-committee> (identifying Issa for US Senate as principal campaign committee of Darrell Issa's Senate candidacy in California).

<sup>4</sup> Issa for US Senate, October Quarterly Report, FEC Form 3 (Oct. 14, 2004), <http://docquery.fec.gov/pdf/330/24020892330/24020892330.pdf>.

<sup>5</sup> Letter from John D. Gibson, Assistant Staff Director, FEC, to Justin S. Lee, Treasurer, Issa for US Senate (Dec. 9, 2004) ("Termination Letter"), <http://docquery.fec.gov/pdf/141/24038662141/24038662141.pdf>.

<sup>6</sup> *Id.* at 1.

1           Congressman Issa wishes to “reactivate” his administratively terminated Senate  
2 committee, transfer the remaining funds in his House committee account to the Senate committee  
3 to partially repay the debt owed to him, and then wind up the operations of both committees.  
4 AOR001.

5 ***Questions Presented***

6 1.       *May the Senate committee be reactivated?*

7 2.       *May the House committee transfer funds to the Senate committee for the purpose of*  
8 *partially repaying the Senate committee’s debt to Congressman Issa?*

9 3.       *May the Senate committee repay the candidate above the \$250,000 limit imposed by the*  
10 *Bipartisan Campaign Reform Act (“BCRA”)?*

11 4.       *If the transfer is permissible, how should the Senate committee report the loan*  
12 *repayment?*

13 ***Legal Analysis and Conclusions***

14 1.       *May the Senate committee be reactivated?*

15           Yes, the Senate committee may be reactivated so that it may accept and report a transfer  
16 from the House committee for the purpose of partially repaying the debt owed to Congressman  
17 Issa. As a result of reactivation, the Senate committee also will be required to begin filing  
18 regular reports, as described further in response to Question 4.

19           Under the Act and Commission regulations, a candidate’s principal campaign committee  
20 must report “the amount and nature of outstanding debts and obligations owed by or to such  
21 political committee.” 52 U.S.C. § 30104(b)(8); *see* 11 C.F.R. § 104.3(d) (providing rules for  
22 reporting debts and obligations). A principal campaign committee generally may not terminate

1 its reporting obligations until all of its debts or obligations have been extinguished, and it files a  
2 termination report that is accepted by the Commission. 11 C.F.R. §§ 102.3(a), 102.3(b). The  
3 Commission, however, may “administratively terminate” a political committee’s reporting  
4 obligations if, among other factors, the primary purpose for filing its reports has been to disclose  
5 outstanding debts and obligations. 11 C.F.R. § 102.4(a)(4); *see* 52 U.S.C. § 30103(d)(2)  
6 (granting Commission authority to establish procedures for administrative termination);  
7 Advisory Opinion 1990-15 (Kramer) at 2 (explaining that Commission “has authority to  
8 terminate the reporting status of a political committee by administrative decision even if it has  
9 unpaid debts and obligations”); H.R. Rep. No. 96-422, 96th Cong., 1st Sess. 15 (1979)  
10 (explaining that Commission has “authority to determine that a committee will not be able to pay  
11 its outstanding debts . . . and, thereby, terminate the committee’s reporting obligation”).

12 The Commission has allowed administratively terminated political committees to  
13 reactivate for the purpose of repaying a debt owed to a candidate. *See* Advisory Opinion 1985-  
14 02 (Shaffer) at 1, 3 (permitting administratively terminated principal campaign committee to  
15 accept transfer “[t]o retire part of the debt that [the] committee owes” candidate). The  
16 Commission also has allowed reactivation of a committee that was terminated by its own request  
17 under 11 C.F.R. § 102.3. *See* Advisory Opinion 1997-28 (Bius) at 3 (finding reactivation  
18 permissible where candidate revoked forgiveness of debt owed to him by committee); Advisory  
19 Opinion 1980-114 (Calabrese) (concluding that terminated committee could pay unexpected  
20 refund to candidate as partial repayment for loan).

21 For several years prior to its administrative termination, the Senate committee was  
22 continuously filing reports only to report its outstanding debt owed to Congressman Issa. As in

1 Advisory Opinion 1985-02 (Shaffer), the Senate committee now seeks to be reactivated for the  
2 purpose of repaying a portion of this outstanding debt. Accordingly, the Commission concludes  
3 that the Senate committee may be reactivated for the purpose of accepting and reporting a  
4 transfer of funds to partially repay its debt.

5 2. *May the House committee transfer funds to the Senate committee for the purpose of*  
6 *partially repaying the Senate committee's debt to Congressman Issa?*

7 The House committee may transfer campaign funds to the Senate committee for the  
8 purpose of partially repaying the Senate committee's debt to Congressman Issa, but it may not  
9 transfer recount funds for that purpose because recount funds may not be used to retire debt  
10 incurred to finance non-recount, campaign activities.

#### 11 Transfer of Non-Recount Funds

12 The Act and Commission regulations permit unlimited transfers between a candidate's  
13 "previous [f]ederal campaign committees," as long as the candidate is not a candidate for more  
14 than one federal office at the same time, and provided that the funds transferred do not include  
15 contributions that would be in violation of the Act. *See* 52 U.S.C. § 30116(a)(5)(C); 11 C.F.R.  
16 § 110.3(c)(4). A "previous [f]ederal campaign committee" is defined as a principal campaign  
17 committee or other authorized committee organized to further the candidate's campaign in a  
18 federal election that has already been held. 11 C.F.R. § 110.3(c)(4)(i). As the Commission has  
19 previously explained, funds transferred between previous federal campaign committees need not  
20 be aggregated with contributions to the transferee committee from the same contributor under 11  
21 C.F.R. § 110.3(c)(4) unless a candidate was concurrently a candidate for more than one federal  
22 office in the same or overlapping election cycles. Advisory Opinion 2010-27 (Obama for

1 America *et al.*) at 5. A transfer between a candidate’s authorized committees is permissible only  
2 if the transferor committee has no net debts outstanding at the time of the transfer. 11 C.F.R.  
3 § 116.2(c)(2); Advisory Opinion 1997-10 (Hoke for Congress Committee *et al.*) at 2.

4 The Senate committee and House committee are both “previous federal campaign  
5 committees” that were organized for federal elections that have already been held — the 1998  
6 Senate primary election, in the case of the Senate committee, and the 2018 Congressional  
7 primary election, in the case of the House committee. Moreover, Congressman Issa was never a  
8 candidate for both offices at the same time, nor would the House committee have net debts  
9 outstanding at the time of the transfer. AOR002. Accordingly, as long as the transferred funds  
10 do not include contributions that would be in violation of the Act, the proposed transfer is  
11 permissible under 11 C.F.R. § 110.3(c)(4) and the transferred non-recount funds need not be  
12 aggregated with any contributions from the same contributor.

### 13 Transfer of Recount Funds

14 The Act and Commission regulations define the terms “contribution” and “expenditure”  
15 to include any gift, loan, or payment of money or anything of value for the purpose of  
16 influencing a federal election. 52 U.S.C. §§ 30101(8)(A)(i), 30101(9)(A)(i); 11 C.F.R.  
17 §§ 100.52(a), 100.111(a). Commission regulations expressly except from its definitions of  
18 “contribution” and “expenditure” funds raised and spent for recounts or contests in federal  
19 elections. *See* 11 C.F.R. §§ 100.91, 100.151.

20 In BCRA, however, Congress provided that a federal candidate, officeholder, agent of  
21 either, or entity directly or indirectly established, financed, maintained, or controlled by or acting  
22 on behalf of a federal candidate or officeholder, may not solicit, receive, direct, transfer, or spend

1 funds in connection with an election for federal office unless such funds are subject to the Act's  
2 limitations, prohibitions, and reporting requirements. 52 U.S.C. § 30125(e); 11 C.F.R. § 300.61.  
3 Accordingly, while recount funds raised by federal candidates are subject to the Act's  
4 limitations, prohibitions, and reporting requirements, "donations to a [f]ederal candidate's  
5 recount fund will not be aggregated with contributions from those persons to the [f]ederal  
6 candidate for the general election." Advisory Opinion 2006-24 (National Republican Senatorial  
7 Committee *et al.*) ("NRSC") at 5.

8         The Commission has explained that recount funds may be used to pay expenses  
9 "resulting from a recount, election contest, counting of provisional and absentee ballots and  
10 ballots cast in polling places," and "post-election litigation and administrative-proceeding  
11 expenses concerning the casting and counting of ballots during the [f]ederal election, fees for the  
12 payment of staff assisting the recount or election contest efforts, and administrative and overhead  
13 expenses in connection with recounts and election contests." Advisory Opinion 2006-24  
14 (NRSC) at 2; *see also* Advisory Opinion 2010-18 (Minnesota Democratic-Farmer-Labor Party)  
15 at 1 (concluding that state party committee may use recount funds "to pay for recount activities  
16 relating to future recounts"). The Commission has also concluded that recount funds may not be  
17 used to pay for campaign activities before election day. *See* Advisory Opinion 2010-14  
18 (Democratic Senatorial Campaign Committee) ("DSCC") at 3 (concluding that disbursements  
19 from recount funds may be made before the date of the general election for expenses related to  
20 recount activities, "provided that none of the activities, or the results of those activities, can or  
21 will be used for campaign activities before Election Day"); Advisory Opinion 2006-24 (NRSC)  
22 at 2 (concluding that national party committees may establish recount funds provided that no

1 recount funds would “be used to pay for pre-election or Election Day expenses, such as  
2 administrative costs, get-out-the-vote activities or communication expenses”).<sup>7</sup> Indeed, the  
3 Commission expressly stated that “recount activities paid for by the recount fund must have no  
4 relation to campaign activities,” and that because of “the special treatment and exemption  
5 accorded funds received and spent for recount purposes, any resulting surplus of funds may not  
6 be used in any manner that would constitute a contribution or expenditure under the Act or  
7 regulations.” Advisory Opinion 2010-14 (DSCC) at 5 (quoting Advisory Opinion 1978-92  
8 (Miller)).

9         Here, the transferred recount funds would be used to repay a campaign debt that was  
10 incurred for the purpose of influencing Congressman Issa’s Senate campaign rather than for  
11 recount-related activities. Accordingly, the proposed transfer of recount funds would constitute a  
12 contribution under the Act and Commission regulations. Because the Commission has long  
13 viewed such use of recount funds as prohibited, the proposed transfer from the House committee  
14 to the Senate committee may not include recount funds.

15         In sum, the House committee may transfer any portion of its cash on hand that does not  
16 include recount funds to the Senate committee for the purposes of partially repaying the debt to  
17 Congressman Issa, but it may not transfer recount funds for that purpose.

18 3.         *May the Senate committee repay the candidate above the \$250,000 limit imposed by the*  
19 *Bipartisan Campaign Reform Act (“BCRA”)?*

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<sup>7</sup>         The Commission notes that it issued this advisory opinion before Congress expressly permitted national party committees to establish a separate, segregated account for recounts and contests and other legal proceedings, *see* Consolidated and Further Continuing Appropriations Act, 2015, Pub. L. No. 113-235, 128 Stat. 2130 (Dec. 16, 2014), and here the Commission is not expressing any opinion regarding such statutory recount accounts.

1 Yes, the Senate committee may repay the candidate above the \$250,000 limit imposed by  
2 BCRA because the candidate's loans were made before BCRA's effective date.

3 Under BCRA, post-election contributions aggregating above \$250,000 may not be used  
4 to repay personal loans by a candidate "who incurs personal loans made after the effective date  
5 of [BCRA] in connection with the candidate's campaign for election." 52 U.S.C. § 30116(j);  
6 BCRA, Pub. L. No. 107-155, § 304, 116 Stat. 81, 97 (2002); *see* 11 C.F.R. § 116.11(b)(3)  
7 (implementing BCRA); Increased Contribution and Party Expenditure Limits for Candidates  
8 Opposing Self-Financed Candidates, 68 Fed. Reg. 3970, 3975 (Jan. 27, 2003) (explaining that  
9 BCRA's limit does not apply to personal loans made before effective date). The Commission  
10 has expressly recognized that the "\$250,000 limit imposed by BCRA on repayment of personal  
11 loans from post-election contributions does not apply to loans made before the November 6,  
12 2002 effective date of the legislation." Advisory Opinion 2008-22 (Lautenberg) at 3. Here, the  
13 request states that all loans at issue were made before November 6, 2002. AOR004.  
14 Accordingly, the loan-repayment limit established by BCRA does not apply, and the Senate  
15 committee may repay the candidate more than \$250,000 from post-election contributions.

16 4. *If the transfer is permissible, how should the Senate committee report the loan*  
17 *repayment?*

18 The Senate committee must report the receipt of loan repayment funds on FEC Form 3 as  
19 described below.

20 Because the fund transfer will reactivate the Senate committee's reporting obligations,  
21 the Senate committee must begin to file regular reports with the appropriate office after the  
22 transfer. Should the transfer occur before September 30, 2018, the Senate Committee's next

1 report due will be its October 15, 2018 quarterly report, *see* 11 C.F.R. § 104.5(a), and that report  
2 must include any receipts and disbursements made since its last previous report, *see* Advisory  
3 Opinion 1985-02 (Shaffer) at 3; Termination Letter at 1 (explaining that, in the event that  
4 committee must begin filing reports after the voiding of administrative termination, the “first  
5 such report will include any activity since the date of the last report filed by the committee”).  
6 The Senate committee’s Form 3 must itemize the payment from the House committee as a  
7 transfer receipt on line 12. *See* 11 C.F.R. § 104.3(a)(4)(iii)(A). The Senate Committee need not  
8 itemize the donations included in the transfer as memo entries as the request proposes because,  
9 as explained above, the donations making up the transferred funds need not be aggregated with  
10 any contributions to the Senate committee. *See* Advisory Opinion 1987-04 (Glenn) at 3.  
11 Moreover, the loan repayment must be disclosed on lines 19(a) and (c) and on Schedule C of  
12 Form 3. *See* 52 U.S.C. § 30104(b)(4)(D); 11 C.F.R. § 104.3(a)(3)(vii)(B). Last, the Senate  
13 committee must continue reporting the remaining portion of the outstanding debt until either the  
14 Senate committee settles the entire debt owed to Congressman Issa or the Commission  
15 administratively terminates the Senate committee.

16       This response constitutes an advisory opinion concerning the application of the Act and  
17 Commission regulations to the specific transaction or activity set forth in your request.  
18 *See* 52 U.S.C. § 30108. The Commission emphasizes that, if there is a change in any of the facts  
19 or assumptions presented, and such facts or assumptions are material to a conclusion presented in  
20 this advisory opinion, then the requestor may not rely on that conclusion as support for its  
21 proposed activity. Any person involved in any specific transaction or activity which is  
22 indistinguishable in all its material aspects from the transaction or activity with respect to which

1 this advisory opinion is rendered may rely on this advisory opinion. *See* 52 U.S.C.  
2 § 30108(c)(1)(B). Please note that the analysis or conclusions in this advisory opinion may be  
3 affected by subsequent developments in the law including, but not limited to, statutes,  
4 regulations, advisory opinions, and case law. Any advisory opinions cited herein are available  
5 on the Commission's website.

6 On behalf of the Commission,

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Caroline C. Hunter  
Chair