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FEDERAL ELECTION COMMISSION  
Washington, DC 20463

2009 NOV -2 P 5:00

November 2, 2009

MEMORANDUM

**AGENDA ITEM**  
For Meeting of: 11-05-09

TO: The Commission

FROM: Thomasenia P. Duncan *pch for*  
General Counsel

Rosemary C. Smith *ACS*  
Associate General Counsel

Robert M. Knop *NFS (for RMK)*  
Assistant General Counsel

Joshua S. Blume *JSB*  
Attorney

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

**SUBMITTED LATE**

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

Attachment

2 **DRAFT C**

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 a proposed donation of campaign funds representing the value of assets previously owned  
12 by a now-defunct State committee (“State Committee”).

13 The Commission concludes the Federal Committee may implement its proposal to  
14 donate an amount equal to the fair market value of the assets to charity as a means of  
15 enabling it to acquire and use the assets.

16 ***Background***

17 The facts presented in this advisory opinion are based on your letter dated June  
18 11, 2009, e-mails received on August 25 and September 2, 2009, telephone conversations  
19 with Commission attorneys, and information from publicly accessible websites.

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

1 Ms. Brunner formed the State Committee when she ran for Secretary of State of  
2 Ohio in 2006. She terminated the State Committee,<sup>1</sup> announced her intention to run for  
3 United States Senator, and created the Federal Committee by filing an FEC Form 1,  
4 Statement of Organization, with the Commission, on February 17, 2009.

5 On the day of its termination, the State Committee had in its possession certain  
6 assets, including computers, office equipment and supplies, which it had recently  
7 purchased with State Committee funds. These assets remained in the offices of the State  
8 Committee's landlord, The Brunner Law Firm, LPA, a law firm whose sole partner is  
9 Rich Brunner, Secretary Brunner's husband. The landlord claims the assets because it  
10 avers that they were abandoned by the State Committee

11 The Federal Committee wishes to use these assets in connection with the  
12 upcoming Federal primary election in 2010. In order to do so without violating 11 CFR  
13 110.3(d), which prohibits transfers of assets from State committees to Federal  
14 committees, the Federal Committee entered into an agreement with the landlord on  
15 February 18, 2009 regarding the acquisition of these campaign assets. Under the  
16 agreement, in exchange for the right to use the assets and for the eventual transfer of title  
17 to the assets to the Federal Committee, the Federal Committee agreed to donate \$15,000,  
18 representing the stated fair market value of the assets,<sup>2</sup> to one or more of three

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<sup>1</sup> The State Committee was terminated in reliance on Ms. 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. The Commission has not been asked to and does not express any opinion on this interpretation.

<sup>2</sup> In issuing an Advisory Opinion, the Commission takes as true the facts as presented by the Requestor. In this matter, the Requestor has represented that the fair market value of the property is \$15,000.

1 enumerated charitable organizations.<sup>3</sup> *See Short Term Tenancy At Sufferance And*  
2 *Agreement To Vacate* (“Agreement”), *Consideration and Donation*. The donation would  
3 be \$1,000 per month, on the 28<sup>th</sup> day of each month, beginning on October 28, 2009, until  
4 the full \$15,000 has been paid. *Id.* The Federal Committee would also have the option to  
5 accelerate its payments. *Id.*

6 The Federal Committee asks whether the proposed transaction is prohibited by the  
7 Act.

8 ***Question Presented***

9 *May the Federal Committee obtain and use computers, office equipment and*  
10 *other campaign supplies, and similar assets formerly owned by the State Committee if it*  
11 *donates the fair market value of the assets to one or more charitable 170(c) organizations*  
12 *specified by the Landlord?*

13 ***Legal Analysis and Conclusions***

14 Yes, the Federal Committee may obtain and use assets formerly owned by the  
15 State Committee if it donates the fair market value of the assets to section 170(c)  
16 charitable organizations.

17 A State campaign committee may sell assets to a Federal campaign committee for  
18 the fair market value of the assets, without violating the prohibition on transfers of funds

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<sup>3</sup> The three named charities all appear to be categorized as charitable organizations pursuant to 26 U.S.C. 170(c). They are listed as “Art for a Childs [sic] Safe America Foundation,” “Mental Health America of Franklin County, Inc.,” and “Columbus and Central Ohio Childrens [sic] Chorus Foundation” in the Internal Revenue Service’s Publication 78, found online at <http://www.irs.gov/app/pub-78> (last visited Sept. 14, 2009). The Commission notes that Ms. Brunner and her husband appear to serve as trustees on the Board of two of the named charities. *See* <http://www.mhafc.org/about.php> and [http://www.artsafe.org/index.php?option=com\\_content&view=article&id=3&Itemid=6](http://www.artsafe.org/index.php?option=com_content&view=article&id=3&Itemid=6) (both last visited Sept. 14, 2009). The Commission assumes for the purposes of this Opinion that neither Ms. Brunner nor her husband are paid for their work as trustees and that neither Ms. Brunner nor any member of her family derives any benefit or service from any of the three named charities.

1 or assets from a candidate's campaign account for a non-Federal election to that  
2 candidate's campaign account for a Federal election. 11 CFR 110.3(d); Explanation and  
3 Justification for Transfer of Funds From State to Federal Campaigns, 58 FR 3474 (Jan. 8,  
4 1993) ("1993 E&J"). The general prohibition is intended to prevent the use of funds  
5 from non-Federal accounts in connection with Federal elections. *See* Advisory Opinion  
6 1993-11 (Dukakis-Bentsen). As noted above, the computers and other campaign assets  
7 were purchased with State Committee funds, raised under Ohio law, and Ohio law does  
8 not have the same amount limitations on contributions as the Act. *See* Ohio Rev. Code  
9 3517.102.

10 Requestor states that the State Committee could have made charitable  
11 contributions with its state campaign funds under Ohio state law. Ohio Rev. Code  
12 3517.08(G). The Federal Committee may also use its funds to make contributions to  
13 certain charitable organizations. 2 U.S.C. 439a(a)(3). As stated above, the Federal  
14 Committee could have lawfully purchased the assets from the State Committee for fair  
15 market value. If the Federal Committee were to pay the landlord, who is currently in  
16 possession of the assets, however, this could raise concerns regarding the possible  
17 conversion of campaign funds to personal use. 2 U.S.C. 439a(b).

18 In general, "the provision of any goods or services without charge or at a charge  
19 that is less than the usual and normal charge for such goods is a contribution." 11 CFR  
20 100.52(d)(1). Provided that the terms of the charitable donation (\$1,000 per month until  
21 the full amount is paid) are equivalent to the usual and normal charge for such equipment  
22 in the commercial marketplace, the Federal Committee may enter into the described  
23 transaction. However, if the terms are more favorable than the "usual and normal

1 charge,” the Federal Committee would be receiving a potentially impermissible in-kind  
2 contribution. *See* 2 U.S.C. 431(8)(A), 11 CFR 100.51, and 100.52.

3 By paying for the assets with charitable donations equivalent to the fair market  
4 value and on terms no more favorable than the “usual and normal charge,” the Federal  
5 Committee is effectively accomplishing what it could have done legally if the State  
6 Committee were still in existence. That is, the Federal Committee could have purchased  
7 the equipment from the State Committee at fair market value, and the State Committee  
8 could have donated its remaining assets to charity before terminating. Ms. Brunner  
9 terminated the State Committee before creating the Federal Committee in apparent good-  
10 faith reliance upon provisions of Ohio campaign finance law, which the State Committee  
11 interpreted as prohibiting candidates in Ohio from simultaneously maintaining State and  
12 Federal campaign committees. Nothing suggests that the purpose of 11 CFR 110.3(d)  
13 would be undermined by allowing this result in this circumstance as it is equivalent to a  
14 transaction described as permissible in the 1993 E&J. 58 FR 3475.

15 Accordingly, the Commission concludes that the Federal Committee may donate  
16 campaign funds to section 170(c) charitable organizations as a means of acquiring and  
17 using the assets in connection with Federal elections, in an amount equivalent to the fair  
18 market value of the assets and on terms no more favorable than the usual and normal  
19 charge.

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

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