

AGENDA DOCUMENT NO. 10-59

FEDERAL ELECTION
COMMISSION
SECRETARIAT



FEDERAL ELECTION COMMISSION
Washington, DC 20463

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AGENDA ITEM

September 17, 2010

For Meeting of 9-23-10

MEMORANDUM

TO: The Commission

FROM: Christopher Hughey *pch*
Acting General Counsel

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Attorney

Subject: Draft AO 2010-18 (DFL) — Draft A

SUBMITTED LATE

Attached is Draft A of the subject advisory opinion. We have been asked to place this draft on the agenda for September 23, 2010. We note that one or more additional drafts of this advisory opinion may be forthcoming.

Attachment

1 ADVISORY OPINION 2010-18

2

3 Marc E. Elias, Esq.

4 Jonathan S. Berkon, Esq.

DRAFT A

5 Perkins Coie LLP

6 607 Fourteenth Street, NW

7 Washington, DC 20005-2003

8

9 Dear Messrs Elias and Berkon:

10 We are responding to your advisory opinion request on behalf of the Minnesota
11 Democratic-Farmer-Labor Party (the “DFL”), concerning the application of the Federal
12 Election Campaign Act of 1971, as amended (the “Act”), and Commission regulations to
13 the use of recount funds, raised for a 2008 recount and election contest, for future
14 elections and recounts.

15 The Commission concludes that the DFL may use recount funds raised for the
16 2008 recount and election contest involving Senator Al Franken and then-Senator Norm
17 Coleman to pay for recount activities in connection with future recounts. The
18 Commission further concludes, however, that the DFL may not transfer funds from its
19 recount account to its Federal account for the 2010 election, but that it may request, in
20 writing, that donors to the recount fund redesignate their donations as contributions to the
21 Federal account for the 2010 election.

22 ***Background***

23 The facts presented in this advisory opinion are based on your letter received on
24 July 26, 2010.

25 The DFL is the Minnesota State party committee affiliated with the national
26 Democratic Party. After the 2008 election, the DFL raised and deposited \$2,165,451.53
27 into its recount fund to pay for the recount and election contest involving Senator Al

1 Franken and then-Senator Norm Coleman. At the time of this request, the DFL has
2 \$11,583.61 remaining in its recount fund.

3 The DFL wants to transfer some or all of the remaining money from the recount
4 fund to its general Federal account for use in connection with the 2010 elections. The
5 DFL proposes to use the “first in, first out” accounting method to identify those donors
6 whose donations will be transferred to the Federal account. *See* 11 CFR 110.3(c)(4). The
7 DFL will then aggregate the donations comprising the transfer with contributions made
8 by the same persons to the Federal account in 2010. If the transfer causes any contributor
9 to exceed its 2010 limits, the excessive portion will remain in the recount funds.

10 In the alternative, the DFL wishes to ask some of its donors to the recount fund to
11 redesignate their donations as contributions to the DFL’s Federal account. Again, the
12 DFL will apply the “first in, first out” method to determine which donors will be asked to
13 redesignate their donations.

14 Finally, the DFL wants to use any funds remaining in the recount account to pay
15 for recount activities in connection with the 2010 elections.

16 ***Questions Presented***

17 *(1) May the DFL use funds remaining in the recount fund to pay for recount*
18 *activities in connection with the 2010 elections?*

19 *(2) May the DFL transfer funds remaining in the recount fund to the DFL’s*
20 *Federal account to be used in connection with the 2010 elections?*

21 *(3) In the alternative, may the DFL request that donors to the recount fund*
22 *redesignate their donations in writing as contributions to the DFL’s Federal account?*

1 ***Legal Analysis and Conclusions***

2 (1) *May the DFL use funds remaining in the recount fund to pay for recount*
3 *activities in connection with the 2010 elections?*

4 Yes, the DFL may use the funds remaining in its recount fund to pay for recount
5 activities in connection with recounts of future Federal elections, such as any recounts
6 arising from 2010 elections.

7 The Act and Commission regulations define the terms “contribution” and
8 “expenditure” to include any gift, loan, or payment of money or anything of value for the
9 purpose of influencing a Federal election. *See* 2 U.S.C. 431(8)(A)(i) and (9)(A)(i);
10 11 CFR 100.52(a) and 100.111(a). Commission regulations explicitly exempt from the
11 definitions of “contribution” and “expenditure” “a gift, subscription, loan, advance, or
12 deposit of money or anything of value made with respect to a recount of the results of a
13 Federal election, or an election contest concerning a Federal election,” except that the
14 prohibitions of 11 CFR 110.20 (foreign nationals) and Part 114 (corporations, labor
15 organizations, and national banks) apply. 11 CFR 100.91 and 100.151; *see also*
16 2 U.S.C. 441b(a) and 441e(a)(1)(A).

17 In Advisory Opinion 2006-24 (Republican and Democratic Senatorial
18 Committees), the Commission determined that a State party’s recount fund must comply
19 with the amount limitations in the Act, and therefore may not receive more than \$10,000
20 from a person or \$5,000 from a multicandidate political committee per calendar year.
21 *See* 2 U.S.C. 441a(a)(1)(D) and (2)(C). The Commission noted, however, that the funds
22 are not “contributions” under Commission regulations, and therefore are not aggregated
23 with contributions from those same persons to the State party for that calendar year.

1 Advisory Opinion 2006-24 (Republican and Democratic Senatorial Committees) (answer
2 to question 2(a)). Furthermore, the Commission concluded that the aggregate biennial
3 contribution limits of 2 U.S.C. 441a(a)(3) do not apply to the individuals' donations to
4 recount funds. *Id.* In that advisory opinion, the Commission declined to address whether
5 remaining recount funds must be disposed of in some manner or may be kept for future
6 election recounts, finding that the question posed by the requestor was hypothetical.¹
7 Advisory Opinion 2006-24 (Republican and Democratic Senatorial Committees) (answer
8 to question 4).

9 In Advisory Opinion 2009-04 (Franken/DSCC), the Commission approved the
10 creation of a recount fund by the Democratic Senatorial Campaign Committee to pay
11 expenses incurred in connection with recounts and election contests of Federal elections,
12 such as the 2008 Senatorial recount and election contest in Minnesota. Advisory Opinion
13 2009-04 (Franken/DSCC) (answer to question 1).

14 The Commission has never restricted the use of recount funds to recounts and
15 election contests held in the calendar year in which donations to the recount fund are
16 made, and is aware of no reason to create such a restriction at this point. Accordingly,
17 the DFL may use all remaining amounts in its recount fund to pay for expenses incurred
18 in connection with recounts and election contests of future Federal elections, including
19 the 2010 elections.

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¹ Commission regulations state that requests posing a hypothetical situation, presenting a general question of interpretation, or regarding the activities of third parties, do not qualify as advisory opinion requests. 11 CFR 112.1(b).

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(2) May the DFL transfer funds remaining in the recount fund to the DFL's Federal account to be used in connection with the 2010 elections?

No, the DFL may not transfer funds remaining in the recount fund to the DFL's Federal account.

Commission regulations prohibit any transfers into a Federal account of a State party committee from any other account maintained by a State party committee for the purpose of financing activity in connection with Federal elections. 11 CFR 300.30(b)(3)(v). The only exceptions to this prohibition concern the transfer of funds from non-Federal accounts or Levin accounts for the payment of the non-Federal share of allocable expenses for Federal election activity or certain other activities not applicable here. 11 CFR 300.30(b)(3)(v); *see also* 11 CFR 106.7, 300.30(b)(3)(iv), 300.33, and 300.34.

The DFL proposes to transfer funds remaining in the recount fund to its Federal account to be used in connection with the 2010 elections. Because the recount fund is an account maintained by the DFL, a State party committee, funds from the recount fund may not be transferred to the DFL's Federal account.

(3) In the alternative, may the DFL request that donors to the recount fund redesignate their donations in writing as contributions to the DFL's Federal account?

Yes, the DFL may request that donors to the recount fund redesignate their donations as contributions to the DFL's Federal account in the manner described in the request.

1 Although there are no regulations governing redesignations of permissible recount
2 donations,² there are several Commission regulations that cover the redesignation of
3 excessive contributions received by candidates and authorized committees. 11 CFR
4 102.9(e)(3) (redesignation by authorized committees of contributions made for a general
5 election in which the candidate does not participate); 103.3(b)(3) (redesignation of
6 excessive contributions); 104.8(d)(2) (reporting of redesignated contributions by
7 authorized committees); and 110.1(b) and 110.2(b) (redesignations by candidates and
8 authorized committees of impermissible contributions). As the Commission noted in
9 Advisory Opinion 1992-15 (Russo), the redesignation regulations set out specific
10 circumstances under which candidates and authorized committees may redesignate
11 certain otherwise impermissible contributions, as an alternative to refunding the
12 contribution to the contributor. Advisory Opinion 1992-15 (Russo).

13 Unlike the situations governed by the redesignation regulations, because the
14 remaining donations in the recount fund are permissible and may remain in the recount
15 fund for use in future recounts, DFL is not required to redesignate or refund these
16 donations. Furthermore, as the DFL is a State party committee, it is not covered by the
17 Commission's existing redesignation regulations, which apply only to candidates and
18 authorized committees. *See* 11 CFR 102.9(e)(3), 103.3(b)(3), 104.8(d)(2), 110.1(b) and
19 110.2(b). However, the redesignation regulations establish a set of procedures for
20 voluntarily requesting and obtaining redesignations of permissible recount funds.

² As discussed earlier, because "donations" to a recount fund are not "contributions" under Commission regulations, such *donations* are not aggregated with *contributions* from those same persons to a State party and, likewise, they are not counted toward a person's aggregate biennial contribution limit. Any donation to a recount fund must, however, comply with the amount limitations and source prohibitions in the Act. *See* 11 CFR 100.91.

1 Section 110.1(b)(5)(ii)(A) requires that a treasurer of a recipient authorized
2 committee must request that the contributor provide a written redesignation of the
3 contribution, and must inform the contributor that the contributor may request the refund
4 of the contribution as an alternative to providing a written redesignation. 11 CFR
5 110.1(b)(5)(ii)(A)(1). The regulation also requires that the contributor provide the
6 treasurer with a written redesignation of the contribution, signed by the contributor.
7 11 CFR 110.1(b)(5)(ii)(A)(2). In the Explanation and Justification for 11 CFR
8 110.1(b)(5), the Commission explained that “written redesignations signed by the
9 contributor are required to ensure that they effectuate donor intent and to aid accurate
10 recordkeeping and reporting.” Explanation and Justification for Final Rules on
11 Contributions and Expenditure Limitations and Prohibitions; Contributions by Persons
12 and Multicandidate Political Committees, 52 FR 760, 763 (Jan. 9, 1987). Following the
13 rationale for the written redesignation requirement in 11 CFR 110.1(b)(5)(ii)(A), any
14 request for redesignation of recount donations as contributions must inform the donor that
15 the donor may request a refund, or if the donor neither redesignates the donation nor
16 requests a refund, that the donation will remain in the recount fund for future use.
17 Additionally, the donor must provide the treasurer with a written redesignation of the
18 donation as a contribution, signed by the donor. The DFL indicates that it already plans
19 to request redesignations in writing.

20 Furthermore, any donation that is redesignated in writing as a contribution must
21 be aggregated with any other contributions made by the same contributor for the purpose
22 of adhering to the contribution limits. As stated in the request, the DFL will use the “first
23 in, first out” accounting method to determine which donations remain in the recount fund,

1 and therefore which donors will be contacted to request a redesignation. No
2 redesignation will be permitted if the donor has already made the maximum contribution
3 permitted by law to the DFL for 2010 or for any portion of a redesignation that would
4 cause the donor to exceed the Act's biennial contribution limit. *See* 2 U.S.C.
5 441a(a)(1)(D), (2)(C) and (3)(B); 11 CFR 110.1(c)(5), 110.2(d), and 110.5(b).

6 Additionally, the DFL must disclose on its reports filed with the Commission all
7 redesignations that are made within the applicable reporting period. All receipts and
8 disbursements of recount funds must be reported in accordance with 2 U.S.C. 434 and
9 11 CFR 104.3. Advisory Opinions 2006-24 (Republican and Democratic Senatorial
10 Committees) (answer to question 1(b)) and 2009-04 (Franken/DSCC) (answer to question
11 1). Section 104.8(d)(2) provides a framework for reporting such funds when being
12 redesignated. A committee receiving a contribution redesignated under 11 CFR 110.1(b)
13 or 110.2(b), (discussed above), must report the redesignation in a memo entry on
14 Schedule A of the campaign finance report covering the reporting period in which the
15 redesignation is received. 11 CFR 104.8(d)(2)(i). Under section 104.8(d)(2), the memo
16 entry must disclose all of the information for the contribution as it was originally reported
17 on Schedule A, as well as all of the information for the contribution as it was
18 redesignated by the contributor, including the election for which the contribution was
19 redesignated and the date on which the redesignation was received.

20 Because donations to a State party for a recount are already reported on Form 3X
21 – Schedule A, the Commission concludes that redesignations of recount donations as
22 contributions to the DFL's Federal account must be reported in a memo entry on
23 Schedule A of Form 3X in accordance with 11 CFR 104.8(d)(2)(i). The memo entry for

1 any redesignations of recount donations as contributions must include all of the
2 information for the recount donation as it was originally reported on Schedule A, as well
3 as all of the information for the contribution as it was redesignated by the donor,
4 including that the donation was redesignated as a contribution to the DFL's general
5 Federal account and the date on which the redesignation was received.

6 Lastly, the DFL asks whether it must request redesignation of donations within
7 sixty days of the receipt of the donation, or within sixty days of date on which the
8 Commission issues this advisory opinion. Under 11 CFR 110.1(b)(5)(ii)(A)(2), cited in
9 the advisory opinion request, contributions must be redesignated within sixty days of the
10 receipt of the contribution by an authorized committee. This sixty-day period, however,
11 applies only to contributions that must be promptly refunded if they are not redesignated.
12 As noted in the answer to question 1, above, the DFL may keep remaining recount
13 donations in its recount account to use for expenses incurred with future recounts.
14 Because the DFL is not required to redesignate or refund those donations, the DFL is not
15 required to seek redesignations within a sixty-day timeframe.

16 This response constitutes an advisory opinion concerning the application of the
17 Act and Commission regulations to the specific transaction or activity set forth in your
18 request. *See* 2 U.S.C. 437f. The Commission emphasizes that, if there is a change in any
19 of the facts or assumptions presented, and such facts or assumptions are material to a
20 conclusion presented in this advisory opinion, then the requestor may not rely on that
21 conclusion as support for its proposed activity. Any person involved in any specific
22 transaction or activity which is indistinguishable in all its material aspects from the
23 transaction or activity with respect to which this advisory opinion is rendered may rely on