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FEDERAL ELECTION COMMISSION
Washington, DC 20463

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AGENDA ITEM
For Meeting of: 10-12-00

October 5, 2000

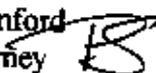
MEMORANDUM

TO: The Commission

THROUGH: James A. Pehrkon 
Staff Director

FROM: Lawrence M. Noble 
General Counsel

N. Bradley Litchfield 
Associate General Counsel

Paul S. Sanford 
Staff Attorney

Subject: Draft AO 2000-25

Attached is a proposed draft of the subject advisory opinion. We request that this draft be placed on the agenda for October 12, 2000.

Attachment

1 ADVISORY OPINION 2000-25
2

3 Allan W. Weinblatt
4 Weinblatt & Gaylord
5 1616 Pioneer Building
6 336 North Robert Street
7 St. Paul, MN 55101

DRAFT

8 Dear Mr. Weinblatt:

9 This responds to your letter of September 7, 2000, requesting an advisory opinion on
0 behalf of the Minnesota House of Representatives Democratic Farmer-Labor Caucus ("House
1 DFL Caucus" or "Caucus") concerning the application of the Federal Election Campaign Act
2 of 1971, as amended ("the Act"), and Commission regulations, to a proposed transfer of
3 funds from the Caucus' existing nonfederal account to a newly created Federal political
4 committee.

5 Your request states that the House DFL Caucus has historically been involved only in
6 nonfederal election activity, specifically, assisting DFL candidates in their campaigns for
7 election or re-election to the Minnesota House of Representatives. Toward that end, the
8 Caucus has raised and spent significant funds in various coordinated nonfederal activities.
9 To date, it has done so through a nonfederal account, *i.e.*, an account that is not registered
0 with the Commission as a Federal political committee.

1 However, the Caucus has determined that the future success of Minnesota House DFL
2 candidates depends, in part, on the success of DFL candidates for the United States House of
3 Representatives. Consequently, the Caucus would like to provide assistance to these
4 candidates. You indicate that the Caucus has created a separate Federal account for this
5 purpose, and has taken the initial steps toward registering that account as a Federal political
6 committee.

1 The Caucus would like to fund the Federal account by transferring a significant
2 portion of the balance in its nonfederal account to the Federal committee. You state that the
3 Caucus proposes to transfer:

4 all contributions that [the Caucus] has received from individuals who are
5 United States citizens, or persons who are lawfully admitted to permanent
6 residence in the United States, and whose contributions in the aggregate total
7 of one hundred dollars (\$100) or less.

8
9 The moneys that the Caucus proposes to transfer would not include any corporate or labor
0 organization funds, or funds from any other source that is impermissible under the Act. The
1 total amount of the transfer would exceed \$5000.

2 Your request also states that, in raising its funds, the nonfederal account has
3 maintained records of the name and address of each person that donated \$100 or less to the
4 nonfederal account. The Caucus is prepared to send written requests to these persons for
5 redesignations of their donations to the newly created Federal account. These requests would
6 explain that, if the donor consents in writing to the redesignation, the transferred funds would
7 be used in connection with Federal elections, and that contributions used for this purpose are
8 subject to the prohibitions and limitations of the Act. The advisory opinion request includes
9 a copy of this proposed communication.

0 You ask whether the transfer of funds from the nonfederal account to the Federal
1 account described in your request would be permissible under the Act.

2 The request indicates that the Caucus is making the transition from being an
3 organization involved exclusively in nonfederal election-related activity to being an
4 organization involved in both nonfederal and Federal election-related activity. Section
5 102.5(a)(1) of the Commission's regulations governs organizations that intend to finance

1 political activity in connection with both Federal and nonfederal elections. Generally, section
2 102.5(a)(1) only allows transfers of nonfederal funds into a Federal account in accordance
3 with the procedures for payment of allocated expenses set out in 11 CFR 106.5(g) and
4 106.6(e).¹

5 However, section 102.6(a) states that transfers of funds may be made without limit on
6 amount between affiliated committees whether or not they are political committees under 11
7 CFR 100.5, so long as these transfers are made only from funds which are permissible under
8 the Act. Section 100.5(g)(2) states that “[a]ll committees . . . established, financed,
9 maintained or controlled by the same corporation, labor organization, person or group of
0 persons . . . are affiliated.” The two committees described in the request are both controlled
1 by the House DFL Caucus. Thus, these two committees are affiliated committees under the
2 Act, and can make unlimited transfers so long as the funds transferred are permissible under
3 the Act.²

4 Your request describes the funds that have been designated for transfer to the Caucus’
5 Federal committee. The funds are donations received from individuals who are United States
6 citizens (or persons lawfully admitted for permanent U.S. residence) and whose donations in

¹ Section 102.5(a)(1)(i) states that no transfers may be made to a Federal account established under that section from any nonfederal account, except as provided in 11 CFR 106.5(g) and 106.6(e). Sections 106.5 and 106.6 require organizations that finance activity in connection with both Federal and nonfederal elections to allocate the expenses incurred in four types of activities between their Federal and nonfederal accounts. Sections 106.5(g) and 106.6(e) describe the procedures to be used for paying these allocated expenses. One of the two procedures requires a committee to pay the full amount of the allocated expense from its Federal account, and transfer funds from its nonfederal account to its Federal account to reimburse the Federal account for the nonfederal portion of the allocable expense.

² This result is also consistent with past advisory opinions that have similarly allowed transfers of funds from nonfederal accounts to Federal accounts when the funds being transferred were permissible under the Act, and when the committees involved provided the original donors appropriate notice and an opportunity to object to the transfer. See Advisory Opinions 1990-29, 1990-16, 1984-31 and 1981-34.

1 the aggregate total \$100 or less. These funds would be permissible contributions under the
2 Act, and thus can be transferred to the Federal committee.

3 However, in order to ensure that the funds transferred are, in fact, the funds
4 designated in its request, the Caucus should review the cash on hand in its nonfederal account
5 using a "first in-first out" analysis ("FIFO"). Under the FIFO analysis, the cash on hand in
6 the nonfederal account is presumed to be composed of those contributions most recently
7 received into the account. 11 CFR 104.12. The Caucus must be able to demonstrate that the
8 cash on hand contains a sufficient amount of the permissible funds described above to cover
9 the amount transferred to the Federal committee.

0 In addition, prior to transferring funds from its nonfederal account, the Caucus must
1 ensure that those funds may permissibly be deposited in the Federal account under section
2 102.5(a)(2). Section 102.5(a)(2) states that only contributions that have been designated for
3 the Federal account, or that result from a solicitation which expressly states that the
4 contribution will be used in connection with a Federal election, or that are from contributors
5 who have been informed that all contributions are subject to the prohibitions and limitations
6 of the Act, may be deposited in the Federal account established under 11 CFR 102.5(a)(1).
7 You indicate that the Caucus intends to send written requests seeking written redesignations
8 from the original donors, informing them that, if they agree to redesignate, the funds so
9 transferred would be used in connection with Federal elections and would be subject to the
0 prohibitions and limitations of the Act. This communication, along with the receipt of donor
1 redesignations, would ensure that the transferred funds could permissibly be deposited in a
2 Federal account under section 102.5(a)(2) of the regulations.

1 Under these circumstances, the Commission concludes that the transfer described in
2 your request would be permissible. The Caucus must, however, take additional steps to
3 ensure full compliance with the reporting requirements of the Act.

4 You indicate that the Caucus intends to transfer more than \$5000 to the newly created
5 Federal committee, and would be making the transfer in order to assist Federal candidates.
6 Under the Act, any gift, payment, distribution, advance, or deposit of money or anything of
7 value "for the purpose of influencing any election for Federal office" is an "expenditure."
8 2 U.S.C. §§431(9)(A)(i), 11 CFR 100.8(a)(1). Section 102.6(a)(2) states that organizations
9 or committees making transfers under 11 CFR 102.6(a)(1) shall count these transfers against
0 the reporting thresholds of the Act for determining whether an organization or committee is a
1 political committee under 11 CFR 100.5. An organization that makes expenditures in excess
2 of \$1,000 during a calendar year is a political committee. 2 U.S.C. §431(4), 11 CFR
3 100.5(a). Thus, by making these transfers, the Caucus' nonfederal account would become a
4 Federal political committee.

5 A nonfederal account that becomes a Federal political committee must register and
6 report as such with the Commission. In its report, the committee must disclose the source of
7 the funds in its cash on hand at the time it becomes a committee. 11 CFR 104.12. As
8 explained above, the source of the funds in the committee's cash on hand is determined using
9 a FIFO analysis. Thus, the balance is presumed to be composed of the funds most recently
0 received by the committee. The committee's report must itemize the funds in its cash on
1 hand to the extent required by the Act and Commission regulations. See 2 U.S.C. §434(b),
2 11 CFR 104.3(a).

1 In most instances, a nonfederal account that becomes Federal political committee is
2 also required to exclude, *i.e.* remove from its cash on hand, any funds that are not permissible
3 under the Act. 11 CFR 104.12. However, this requirement does not apply to a nonfederal
4 account that makes a one-time transfer of permissible funds to an affiliated Federal political
5 committee, so long as the nonfederal account registers as a Federal political committee,
6 transfers the funds, and then promptly files a termination report to end its Federal committee
7 status. *See, e.g.*, Advisory Opinion 1987-12.³ Therefore, if the nonfederal account transfers
8 more than \$5000 to the Federal political committee, the nonfederal account must register
9 with the Commission as a Federal political committee. In addition, the nonfederal account
0 must review the balance of its cash on hand at the time of registration using the FIFO analysis
1 described above.

2 If the nonfederal account intends to continue operating as a Federal political
3 committee, it must remove any impermissible funds from its cash on hand at the time of
4 registration. Alternatively, if the nonfederal account will make only a one-time transfer and
5 will then be used exclusively for nonfederal election activity, the nonfederal account must
6 register as a Federal political committee, but need not remove the impermissible funds from
7 its cash on hand. Instead, when the nonfederal account submits its first disclosure report to
8 the Commission, it must exclude all nonfederal funds from the amount reported in its cash on
9 hand at the time of registration. In addition, the committee's first report must also be a
0 termination report. *See* 11 CFR 102.3.

³ The Commission's conclusion in Advisory Opinion 1987-12 regarding the transferability of funds from a candidate's campaign committee for a nonfederal election to an authorized committee of the same candidate for a Federal election has been superseded by Commission regulations at 11 CFR 110.3(d) which is not applicable in the situation presented here. However, the opinion's guidance relating to submission of a registration

