



FEDERAL ELECTION COMMISSION
Washington, DC 20463

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October 1, 2001

MEMORANDUM

TO: The Commission

THROUGH: James A. Pehrkon *JAP*
Staff Director

FROM: Lawrence H. Norton *LHN*
General Counsel

N. Bradley Litchfield *NBL*
Associate General Counsel

Michael Marinelli *MM*
Staff Attorney

SUBJECT: Final Draft Advisory Opinion 2001-12

AGENDA ITEM

For Meeting of: 10-11-01

Attached is the final draft of the subject opinion for circulation on tally vote, with a 72 hour deadline.

The changes in this draft are made pursuant to the Commission's discussion and motion on September 20, 2001, with reference to Agenda Document No. 01-47. The Commission directed this office to prepare a revised final draft that would be circulated on tally vote.

The most significant changes to the draft, as considered on September 20, are found on pages 7 through 10. They are marked with bold font text in the main body and in footnotes 7 and 8.

The 60 day due date for this opinion has been extended from October 5 to October 27. Accordingly, if this draft is not approved on tally circulation, OGC requests that it placed on the agenda for October 11.

Attachment

1 **ADVISORY OPINION 2001-12**

2
3 **Linda Honold, Chairperson**
4 **Democratic Party of Wisconsin**
5 **222 State Street,**
6 **Suite 400**
7 **Madison, WI 53703**

8
9 **Dear Ms. Honold:**

10
11 **This refers to your letter dated August 2, 2001, as supplemented with an undated**
12 **letter received on August 13, and a letter dated September 18 from counsel, on behalf**
13 **of the Democratic Party of Wisconsin concerning the application of the Federal Election**
14 **Campaign Act of 1971, as amended ("the Act"), and Commission regulations to the use**
15 **of an office building fund, maintained by the party, for various purposes related to the**
16 **renovation or construction of the party's office building.**

17 **You are the Chairperson of the Democratic Party of Wisconsin ("DPW"). You**
18 **explain that DPW plans to establish a building fund (or several such funds) that it may**
19 **use to construct, or to purchase and renovate, an office building to serve as its**
20 **headquarters. DPW seeks an opinion regarding the Act's preemption of Wisconsin**
21 **statutes relating to donations for the establishment and operations of the building fund.**
22 **You indicate that current Wisconsin law limits and in some cases prohibits contributions,**
23 **disbursements, and obligations to candidates and political parties. See *Wis. State ANN. §***
24 ***11.00, et seq. (West 2000).***¹

¹ For example, *Wis. State ANN. § 11.26 (4)* provides that "no individual may make any contribution or contributions ... to any individuals who or committees which are subject to a registration requirement under § 11.05, including legislative campaign committees and committees of a political party, to the extent of more than a total of \$10,000 in any calendar year." Section 11.38(1)(a) states that "No foreign or domestic corporation, or association organized under ch. 185, may make any contribution or disbursement, directly or indirectly, either independently or through any political party, committee, group, candidate or individual for any purpose other than to promote or defeat a referendum. Further, no political party,

1

2 You state that DPW is engaged in both Federal and non-Federal election activity.

3 DPW plans to undertake one or all of the following activities:

4 (1) Establish a building fund to purchase, renovate or construct a building to serve as new
5 headquarters for its Federal and non-Federal activities.

6 (2) Establish a building fund to pay-off the balance of its current lease on the building
7 which presently serves as a headquarters for its Federal and non-Federal activities.²

8 (3) Establish a building fund to pay the salary or fees and other expenses of an employee
9 or consultant whose sole and exclusive responsibility is to raise funds for the building
10 fund.

11 (4) Establish a building fund to pay for the principal and interest for a mortgage for the
12 purchase, renovation and/or construction of the building.

13 (5) Establish a building fund to pay for any capital improvements to the office facility as
14 defined by the Internal Revenue Code.

15 DPW, you state, will use the new or renovated facility to influence Federal and
16 non-Federal elections in a general way, but the described building funds will not be used
17 for the purpose of influencing any particular elections. Furthermore, DPW, in its capacity
18 as a registered entity with the Commission, intends to take the following actions and
19 observe the following conditions:

committee, group, candidate or individual may accept any contribution or disbursement made to or on behalf of such individual or entity which is prohibited by Section 11.38." *Wis. State ANN. § 11.38(b)*.

² According to your request, the DPW originally entered into a five-year lease with the owner of the building property currently being used by the party as a headquarters. This lease expired in 1997. Since then, the party has exercised the one-year option contained in the agreement each year to renew the lease. Currently, the DPW pays rent in the monthly amount of \$1,549. In August 22 and 23 phone conversations with the Office of General Counsel, the Executive Director of DPW indicated that the current one-year lease period will expire on April 14, 2002 and that, because of its inconvenient location, it is unlikely that the DPW will purchase or remain in its current office facility.

- 1 (1) It will solicit and accept corporate contributions designated for the building fund(s).
- 2 (2) It will advise all potential corporate contributors that all corporate contributions will
3 be used for the building fund(s).
- 4 (3) It will establish a "separate segregated" bank account in which only corporate
5 contributions designated for the building fund(s) will be deposited.
- 6 (4) It will disburse the corporate funds deposited in such separate account(s) to purchase,
7 renovate and construct a new headquarters, and pay off the remaining amount owed on its
8 current lease at its existing headquarters.
- 9 (5) It will not use any corporate funds received for the purpose of influencing particular
10 Federal, State, or local elections, or transfer such corporate funds to a bank account used
11 to influence particular Federal, State, or local elections.
- 12 (6) It will not limit, other than on a voluntary basis, the amount of the corporate
13 contributions, individually or collectively, to the building fund(s).
- 14 (7) It will not report the corporate contributions to the building fund(s), other than on a
15 voluntary basis, to the Commission.

16 The request also explains that DPW plans to apply the funds only for the
17 purchase, renovation or construction of a new headquarters, and to pay-off the remaining
18 amount owed on its current lease at its existing headquarters. It will not use the building
19 fund to pay ongoing costs, such as property taxes and assessments.

20 The September 18 letter, provided by counsel, further indicates that the
21 "DPW intends to use the building funds for the cost of the acquisition, construction,
22 or erection of a building for the party headquarters and for any necessary repairs
23 and improvements to the building. This may include but is not limited to

1 **construction of a new roof, the installation of electrical and telephone wiring,**
2 **plumbing and any expansion of the size of the building and the number of rooms**
3 **within the building.” Counsel’s letter continues, “DPW intends to use building fund**
4 **monies to hire an architect’s services and a construction manager. DPW also**
5 **intends to use funds from the building fund for the purchase of office machinery,**
6 **equipment, furniture and fixtures and similar property.” The letter states, however,**
7 **that the DPW will not use building fund monies to pay for building maintenance,**
8 **utility, office equipment expenses and other administrative expenses of the party**
9 **headquarters.**

10 ***ACT AND COMMISSION REGULATIONS***

11
12 **Under the Act and Commission regulations, a gift, subscription, loan, advance, or**
13 **deposit of money or anything of value made to a national committee or a State committee**
14 **of a political party, that is specifically designated to defray the costs incurred for**
15 **construction or purchase of an office facility, is not considered to be a contribution or**
16 **expenditure, provided that the facility is not acquired for the purpose of influencing the**
17 **election of any candidate in any particular election for Federal office. 2 U.S.C.**
18 **§431(8)(B)(viii); 11 CFR 100.7(b)(12), 100.8(b)(13), and 114.1(a)(2)(ix). The**
19 **Commission has applied these provisions to permit State party committees (and national**
20 **party committees) to accept corporate and labor union donations to office building funds**
21 **or accounts established and used for the purpose of purchasing or constructing an office**
22 **facility by the cited party committees. Advisory Opinions 2000-01, 1997-14, 1993-9,**
23 **1991-5, 1986-40, and 1983-8; see also Advisory Opinions 1998-8, 1998-7 and 1996-8.**

1 The Act states that its provisions and the rules prescribed thereunder “supersede
2 and preempt any provision of State law with respect to election to Federal office.” 2
3 U.S.C. §453; 11 CFR 108.7(a). The House committee that approved this provision
4 explained its meaning in sweeping terms, stating that it is intended “to make certain that
5 the Federal law is construed to occupy the field with respect to elections to Federal office
6 and that the Federal law will be the sole authority under which such elections will be
7 regulated.” *H.R. Rep. No. 93-1239, 93d Cong., 2d Sess. 10 (1974)*. According to the
8 Conference Committee report on the 1974 Amendments to the Act, “Federal law
9 occupies the field with respect to criminal sanctions relating to limitations on campaign
10 expenditures, the sources of campaign funds used in Federal races, the conduct of Federal
11 campaigns, and similar offenses, but does not affect the States' rights” as to other election
12 related conduct such as voter fraud and ballot theft. *H.R. Rep. No. 93-1438, 93d Cong.,*
13 *2d Sess. 69 (1974)*. The Conference report also states that Federal law occupies the field
14 with respect to reporting and disclosure of political contributions to and expenditures by
15 Federal candidates and political committees, but does not affect State laws as to the
16 manner of qualifying as a candidate, or the dates and places of elections. *Id.* at 100-101.

17 When the Commission promulgated regulations at 11 CFR 108.7 to clarify and
18 explain the scope of the Act’s preemption of State law, it stated that the regulations
19 follow section 453 and that, specifically, Federal law supersedes State law with respect to
20 the organization and registration of political committees supporting Federal candidates,
21 disclosure of receipts and expenditures by Federal candidates and political committees,
22 and the limitations on contributions and expenditures regarding Federal candidates and
23 political committees. *Federal Election Commission Regulations, Explanation and*

1 *Justification, House Document No. 95-44, at 51; 11 CFR 108.7(b).* In past opinions, the
2 Commission has summarized the legislative history of 2 U.S.C. §453 as showing that
3 “the central aim of the clause is to provide a comprehensive, uniform Federal scheme that
4 is the sole source of regulation of campaign financing . . . for election to Federal office.”
5 Advisory Opinions 2000-23 and 1999-12..

6 ***APPLICATION TO PARTY PROPOSAL***

7 ***Pre-emption of State law***

8 In five opinions that were issued to State parties, the Commission has previously
9 concluded that the Act and Commission regulations preempt and supersede the
10 application of any State law that purports to prohibit corporate donations to a State party
11 office building fund. See Advisory Opinions 1998-8, 1997-14, 1993-9, 1991-5, and
12 1986-40. Two of the opinions noted that, in addressing the building fund donations and
13 the entities receiving them, Congress explicitly decided not to place restrictions on the
14 subject, even though it could have determined that the purchase or construction of such a
15 facility was for the purpose of influencing a Federal election. The opinions explain that
16 Congress, instead, took the affirmative step of exempting (or making exceptions for) the
17 receipt and disbursement of funds for such activity from the specific proscriptions of the
18 Act, and that there is no indication of Congressional intent to limit the preemptive effect
19 to some allocable portion of the purchase (or construction) costs. Advisory Opinions
20 1998-8, 1998-7, 1993-9 and 1991-5; see also Advisory Opinions 1997-14 and 1986-40.

21 DPW's situation is materially indistinguishable from those described in the four
22 cited opinions. See 2 U.S.C. §437f(c)(1)(B). Consistent with these opinions, the
23 Commission concludes that the Act and Commission regulations preempt the

1 contribution limitations and prohibitions of Wisconsin State law with respect to donations
2 made to the building fund established by DPW. Accordingly, DPW is not prohibited
3 from accepting corporate donations or other donations in excess of the State limits for the
4 purposes described in this opinion to the extent they are consistent with the lawful uses of
5 the building fund (see discussion below).³

6 ***Uses of building fund(s)***

7 The DPW proposal to establish a building fund(s), with the conditions described
8 herein, for the most part falls within the parameters established by the opinions cited
9 above. For example, the Commission has approved the use of a building fund to pay the
10 mortgage on a new office building. Advisory Opinions 1998-8 and 1993-9. Drawing a
11 parallel to the description and treatment of capital expenditures in the Internal Revenue
12 Code and related IRS regulations, the Commission also has concluded that certain
13 specified capital expenditures may be paid from a building fund. See Advisory
14 Opinions 2001-01 and 1998-7.⁴ Most recently, the Commission has approved the use of
15 a building fund to pay the salary and certain other expenses that were solely related to the
16 raising of funds for the office building fund. Advisory Opinion 2001-01. Therefore, with
17 two important exceptions, most of the expenses described in the request are among the
18 permissible purposes for which the DPW building funds may be used. However, the two

³ However, while the Commission has construed the Act and Congressional intent to require disclosure of office building fund activity by the national party committees in reports they file with the Commission (see 11 CFR 104.8(f) and 104.9(d)), it has also concluded that any State level disclosure requirements regarding a State party office building fund are not preempted or superseded by the Act or Commission regulations. See Advisory Opinions 2001-01, 1997-14 and 1991-5.

⁴ In Advisory Opinion 2001-01, the Commission approved the use of funds for management expenses and architectural fees relating to the construction of a party office building. In Advisory Opinion 1998-7, the Commission approved the use of the building fund for the construction of a new roof, new electrical wiring and room expansion for an extant party office building.

1 **exceptions are lease payments for the current party facility and the payment of**
2 **expenses to acquire office machinery, equipment or furniture.**

3 The Commission notes that the building fund exemption specifically applies to
4 costs directly relating to the purchase, construction or renovation of an office building,
5 not the leasing of such facilities.⁵ Therefore, the fund could not have been used for the
6 initial lease of these facilities. Furthermore, unlike the above costs, there is no
7 connection between the payment of the current lease and the construction or purchase and
8 renovation of a new office building. The payment of the lease would not result in the
9 acquisition of any property rights or interest in land that could otherwise be sold and used
10 to finance the purchase.⁶ Accordingly, DPW's office building fund may not be used to
11 pay the described lease expenses.

12 The September 18 letter from counsel also states that DPW intends to use
13 the building fund "for the purchase of office machinery, equipment, furniture and
14 fixtures and similar property." The Commission, however, concludes that the
15 building fund exemption does not allow payments for the purchase of office
16 machines, equipment or furniture. These expenses, although sometimes treated as
17 "capital expenditures" under the Internal Revenue Code, are not directly connected

⁵ The Commission notes previous opinions stating restrictions as to the use of the building fund. For example, in Advisory Opinion 1983-8, the Commission concluded that the office building fund exception did not apply to donations to pay for the costs of the property taxes, assessments, charges and other expenses incurred by a trust that administered a party's office facilities. In Advisory Opinion 1988-12, the Commission similarly concluded that the office building fund exception did not cover rent, building maintenance, utility, office equipment expenses and other administrative expenses of a party headquarters.

⁶ The Commission notes that your situation can be compared to and distinguished from the situation in Advisory Opinion 1993-9. In that opinion, a State party wished to use the office building fund to pay off the balance of its land contract on the building that served as its headquarters. It proposed to sell the headquarters and use the proceeds to purchase a new building. The Commission, in approving the proposal, noted that the funds could have been used for the initial purchase of the land contract. It also noted that raising funds by selling the fully acquired legal title to its current office was "materially indistinguishable from the receipt of donations for the new headquarters."

1 to the party committee's construction or purchase or renovation of an office
2 building. Therefore, payments for such items are not included within the scope of
3 the Act's exemption for the construction or purchase of an office facility. DPW
4 may, however, use the building fund to pay for fixtures that are attached
5 permanently to the structural features of its office building, whether the fixtures are
6 attached to the party's existing office building, or to one that is purchased and
7 renovated or newly constructed.⁷

8 **The Commission acknowledges that parts of the legal analysis and**
9 **conclusions in Advisory Opinions 2001-01 and 1998-7 indicated or implied that any**
10 **acquisition of office equipment, machines or furniture, which occurred concurrently**
11 **with the purchase or construction of an office facility, would be within the building**
12 **fund exemption if payment for any such item qualified as a "capital expenditure"**
13 **under the Internal Revenue Code. The Commission emphasizes that those opinions**
14 **should be read as holding only that certain specific expenditures described therein**
15 **would come within the building fund exemption. (See footnote 4 describing those**
16 **expenditures.) Furthermore, to the extent that any legal analysis or conclusion**
17 **stated in Advisory Opinions 2001-01 and 1998-7 is inconsistent with the conclusions**

⁷ Black's Law Dictionary defines the term "fixture" in part as:

Personal property that is attached to land or a building and that is regarded as an irremovable part of the real property, such as a fireplace built into a home. — Also termed permanent fixture. Cf. IMPROVEMENT.

"A fixture can best be defined as a thing which, although originally a movable chattel, is by reason of its annexation to, or association in use with land, regarded as a part of the land.... The law of fixtures concerns those situations where the chattel annexed still retains a separate identity in spite of annexation, for example a furnace or a light fixture. Where the chattel annexed loses such identity, as in the case of nails, boards, etc., the problem becomes one of accession." Ray Andrews Brown, *The Law of Personal Property* S 137, at 698 & n.1 (2d ed. 1955). *Black's Law Dictionary* 575 (7th ed. 1999) (citation in original).

1 **of this opinion, the prior opinions should be considered as superseded and modified**
2 **by this opinion.³**

3 This response constitutes an advisory opinion concerning the application of the
4 Act, or regulations prescribed by the Commission, to the specific transaction or activity
5 set forth in your request. *See* 2 U.S.C. §437f.

6 Sincerely,

7
8 Danny L. McDonald
9 Chairman

10
11 Enclosures: (AOs 2001-01, 2000-23, 1999-12, 1998-8, 1998-7, 1997-14, 1996-8, 1993-9,
12 1991-5, 1988-12, 1986-40 and 1983-8)
13

³ The Commission understands that other State (or national) political party committees may have made purchases or incurred debt in reliance on the broader interpretation of the two cited opinions, and may have, accordingly, used their building funds to acquire office equipment, machines or furniture in conjunction with the purchase, construction or renovation of an office building facility. The Commission concludes that if a national or State party committee has already acquired and made payment for these items using the building fund, or has incurred a long term debt for an office building that included the purchase of these items, then no reimbursement to the building fund or revisions to the debt financing terms are required, provided the situation of such a committee is "indistinguishable in all its material aspects from the transaction or activity" presented in Advisory Opinions 2001-01 and 1998-7. *See* 2 U.S.C. §437f(c)(1).

