

FEDERAL ELECTION
COMMISSION
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FEDERAL ELECTION COMMISSION
Washington, DC 20463

AGENDA ITEM

September 23, 2010

For Meeting of 9-23-10

MEMORANDUM

TO: The Commission

FROM: Christopher Hughey *pch*
Acting General Counsel

Rosemary C. Smith *RCS*
Associate General Counsel

Robert M. Knop *RMK*
Assistant General Counsel

Esther D. Heiden *EDH*
Attorney

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

SUBMITTED LATE

Attached is Draft C of the subject advisory opinion. We have been asked to place this draft on the agenda for September 23, 2010.

Attachment

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3 **ADVISORY OPINION 2010-18**
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5 Marc E. Elias, Esq.
6 Jonathan S. Berkon, Esq.
7 Perkins Coie LLP
8 607 Fourteenth Street, NW
9 Washington, DC 20005-2003
10

DRAFT C

11 Dear Messrs Elias and Berkon:

12 We are responding to your advisory opinion request on behalf of the Minnesota
13 Democratic-Farmer-Labor Party (the “DFL”), concerning the application of the Federal
14 Election Campaign Act of 1971, as amended (the “Act”), and Commission regulations to
15 the use of recount funds, raised for a 2008 recount and election contest, for future
16 elections and recounts. The Commission concludes that the DFL may request, in writing,
17 that donors to the recount fund redesignate their donations as contributions to the Federal
18 campaign account for the 2010 election. The Commission further concludes that the DFL
19 may use recount funds raised for the 2008 recount and election contest involving Senator
20 Al Franken and then-Senator Norm Coleman to pay for recount activities relating to
21 future recounts.

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 Federal campaign 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 campaign account. *See* 11 CFR
7 110.3(c)(4). The DFL will then aggregate the donations comprising the transfer with
8 contributions made by the same persons to the Federal campaign account in 2010. If the
9 transfer causes any contributor to exceed its 2010 limits, the excessive portion will
10 remain in the recount funds.

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

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

17 ***Questions Presented***

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

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

1 (3) *Irrespective of the answers to Questions 1 and 2, may the DFL use funds*
2 *remaining in the recount fund to pay for recount activities relating to the 2010 elections?*

3 ***Legal Analysis and Conclusions***

4 (1) *May the DFL transfer funds remaining in the recount fund to the DFL's*
5 *Federal campaign account to be used in connection with the 2010 elections?*

6 The Commission considered this question, but could not approve a response by
7 the required four affirmative votes. 2 U.S.C. 437c(c) and 11 CFR 112.4(a).

8 (2) *In the alternative, may the DFL request that donors to the recount fund*
9 *redesignate their donations in writing as contributions to the DFL's Federal campaign*
10 *account?*

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

14 Although there are no regulations governing redesignations of permissible recount
15 donations,¹ there are several Commission regulations that cover the redesignation of
16 excessive contributions received by candidates and authorized committees. 11 CFR
17 102.9(e)(3) (redesignation by authorized committees of contributions made for a general
18 election in which the candidate does not participate); 103.3(b)(3) (redesignation of
19 excessive contributions); 104.8(d)(2) (reporting of redesignated contributions by
20 authorized committees); and 110.1(b) and 110.2(b) (redesignations by candidates and

¹ 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 authorized committees of impermissible contributions). As the Commission noted in
2 Advisory Opinion 1992-15 (Russo), the redesignation regulations set out specific
3 circumstances under which candidates and authorized committees may redesignate
4 certain otherwise impermissible contributions, as an alternative to refunding the
5 contribution to the contributor. Advisory Opinion 1992-15 (Russo).

6 Unlike the situations governed by the redesignation regulations, because the
7 remaining donations in the recount fund are permissible and may remain in the recount
8 fund for use in future recounts, DFL is not required to redesignate or refund these
9 donations. Furthermore, as the DFL is a State party committee, it is not covered by the
10 Commission's existing redesignation regulations, which apply only to candidates and
11 authorized committees. *See* 11 CFR 102.9(e)(3), 103.3(b)(3), 104.8(d)(2), 110.1(b) and
12 110.2(b). However, the redesignation regulations establish a set of procedures for
13 voluntarily requesting and obtaining redesignations of permissible recount funds.

14 Section 110.1(b)(5)(ii)(A) requires that a treasurer of a recipient authorized
15 committee must request that the contributor provide a written redesignation of the
16 contribution, and must inform the contributor that the contributor may request the refund
17 of the contribution as an alternative to providing a written redesignation. 11 CFR
18 110.1(b)(5)(ii)(A)(1). The regulation also requires that the contributor provide the
19 treasurer with a written redesignation of the contribution, signed by the contributor.
20 11 CFR 110.1(b)(5)(ii)(A)(2). DFL may use the written redesignation requirement in
21 11 CFR 110.1(b)(5)(ii)(A) by analogy, pursuant to which a recount donation will be
22 considered to be redesignated if (a) the donor is informed that the donor may request a
23 refund, or if the donor neither redesignates the donation nor requests a refund, that the

1 donation will remain in the recount fund for future use and (b) the donor provides the
2 treasurer with a written redesignation of the donation as a contribution, signed by the
3 donor. The DFL indicates that it already plans to request redesignations in writing.

4 Furthermore, any donation that is redesignated in writing as a contribution must
5 be aggregated with any other contributions made by the same contributor for the purpose
6 of adhering to the contribution limits. As stated in the request, the DFL will use the “first
7 in, first out” accounting method to determine which donations remain in the recount fund,
8 and therefore which donors will be contacted to request a redesignation. No
9 redesignation will be permitted if the donor has already made the maximum contribution
10 permitted by law to the DFL for 2010. *See* 2 U.S.C. 441a(a)(1)(D), (2)(C); 11 CFR
11 110.1(c)(5), 110.2(d).²

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

² The Commission notes that, once donations are redesignated to the DFL's Federal campaign account, they will be considered contributions for the purposes of the donors' biennial limits. *See* 11 C.F.R., 110.5. Accordingly, the DFL may wish to notify such donors of the fact of the transfers for the donors' own compliance purposes.

1 entry must disclose all of the information for the contribution as it was originally reported
2 on Schedule A, as well as all of the information for the contribution as it was
3 redesignated by the contributor, including the election for which the contribution was
4 redesignated and the date on which the redesignation was received.

5 Because donations to a State party for a recount are already reported on Form 3X
6 – Schedule A, the Commission concludes that redesignations of recount donations as
7 contributions to the DFL’s Federal campaign account must be reported in a memo entry
8 on Schedule A of Form 3X in accordance with 11 CFR 104.8(d)(2)(i). The memo entry
9 for any redesignations of recount donations as contributions must include all of the
10 information for the recount donation as it was originally reported on Schedule A, as well
11 as all of the information for the contribution as it was redesignated by the donor,
12 including that the donation was redesignated as a contribution to the DFL’s general
13 Federal account and the date on which the redesignation was received.

14 Lastly, the DFL asks whether it must request redesignation of donations within
15 sixty days of the receipt of the donation, or within sixty days of date on which the
16 Commission issues this advisory opinion. Under 11 CFR 110.1(b)(5)(ii)(A)(2), cited in
17 the advisory opinion request, contributions must be redesignated within sixty days of the
18 receipt of the contribution by an authorized committee. This sixty-day period, however,
19 applies only to contributions that must be promptly refunded if they are not redesignated.

20 As noted in the answer to question 1, above, the DFL may keep remaining recount
21 donations in its recount account to use for expenses incurred with future recounts.

22 Because the DFL is not required to redesignate or refund those donations, the DFL is not
23 required to seek redesignations within a sixty-day timeframe.

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

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

6 **The Commission has never restricted the use of recount funds to recounts and**
7 **election contests held in the calendar year in which donations to the recount fund are**
8 **made, and is aware of no reason to create such a restriction at this point. Accordingly,**
9 **the DFL may use all remaining amounts in its recount fund to pay for expenses incurred**
10 **in relation to recounts and election contests of future Federal elections, including the**
11 **2010 elections.**

12 **This response constitutes an advisory opinion concerning the application of the**
13 **Act and Commission regulations to the specific transaction or activity set forth in your**
14 **request. See 2 U.S.C. 437f. The Commission emphasizes that, if there is a change in any**
15 **of the facts or assumptions presented, and such facts or assumptions are material to a**
16 **conclusion presented in this advisory opinion, then the requestor may not rely on that**
17 **conclusion as support for its proposed activity. Any person involved in any specific**
18 **transaction or activity which is indistinguishable in all its material aspects from the**
19 **transaction or activity with respect to which this advisory opinion is rendered may rely on**
20 **this advisory opinion. See 2 U.S.C. 437f(c)(1)(B). Please note that the analysis or**
21 **conclusions in this advisory opinion may be affected by subsequent developments in the**

1 law including, but not limited to, statutes, regulations, advisory opinions, and case law.

2 All cited advisory opinions are available on the Commission's website at

3 <http://saos.nictusa.com/saos/searchao>.

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On behalf of the Commission,

Matthew S. Petersen
Chairman