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FEDERAL ELECTION COMMISSION
Washington, DC 20463

2009 MAR 19 P 2:00

March 19, 2009

MEMORANDUM

AGENDA ITEM
For Meeting of: 03-19-09

TO: The Commission

FROM: Thomasenia P. Duncan *JPD*
General Counsel

Rosemary C. Smith *RCS*
Associate General Counsel

Robert M. Knop *RMK*
Assistant General Counsel

Joanna S. Waldstreicher *JW*
Attorney

Subject: AO 2009-04 (Franken/DSCC) – Revised Draft B

SUBMITTED LATE

Attached is a proposed draft of the subject advisory opinion, which we have been asked to circulate. We request that this draft be placed on the agenda for March 19, 2009.

Attachment

1 ADVISORY OPINION 2009-04

2 Marc E. Elias, Esq.
3 Perkins Coie LLP
4 607 Fourteenth Street NW
5 Washington, DC 20005-2003

WHITE DRAFT B

6 Dear Mr. Elias:

7 We are responding to your advisory opinion request on behalf of Al Franken for
8 U.S. Senate and the Democratic Senatorial Campaign Committee, concerning the
9 application of the Federal Election Campaign Act of 1971, as amended (“the Act”), and
10 Commission regulations to the establishment of recount and/or election contest funds by
11 these two political committees. The Commission concludes that the DSCC may establish
12 a recount fund subject to certain limitations and use it to pay for expenses incurred in
13 connection with the 2008 U.S. Senate recount and election contest in Minnesota. The
14 Commission also concludes that the Franken Committee may establish an election
15 contest fund separate from its existing recount fund and that donations to the election
16 contest fund will not be aggregated with donations to the recount fund for purposes of the
17 Act.

18 ***Background***

19 The facts presented in this advisory opinion are based on your letter received on
20 February 18, 2009 and your e-mail received on February 20, 2009, and publicly available
21 materials, including reports filed with the Commission.

22 Al Franken for U.S. Senate (the “Franken Committee”) is Al Franken’s principal
23 campaign committee for the 2008 Senate election in Minnesota. The Democratic
24 Senatorial Campaign Committee (“DSCC”) is a national committee of the Democratic
25 Party.

1 Mr. Franken was the Democratic candidate for the U.S. Senate for Minnesota in
2 2008, facing Senator Norm Coleman, the Republican candidate. In your request, you
3 present the following facts: “A statewide manual recount in Minnesota has been
4 conducted and concluded, giving a 225-vote lead to Democratic candidate Al Franken.
5 But in January, Republican candidate Norm Coleman filed a lawsuit to contest the
6 recount, and the two candidates remain locked in a protracted legal battle.” Therefore, no
7 final winner has been conclusively determined or seated in the Senate. The Franken
8 Committee has already established a recount fund to pay for expenses incurred in
9 connection with the recount, and thus far this fund has also been used to pay expenses
10 related to the election contest. The DSCC, however, has not yet established any such
11 account.

12 The DSCC proposes to establish a recount fund, separate from its other accounts
13 and subject to a separate limit on amounts received, and use that fund only to pay
14 expenses incurred in connection with the 2008 Senatorial recount and election contest in
15 Minnesota. Donations to the separate recount fund would be subject to the amount
16 limitations, source prohibitions, and reporting requirements of the Act.

17 The Franken Committee proposes to establish an election contest fund that would
18 also be subject to the amount limitations, source prohibitions, and reporting requirements
19 of the Act. This proposed fund would also be separate from the Franken Committee’s
20 other existing accounts, and would be subject to a separate limit for amounts received.
21 However, unlike the proposed DSCC recount fund, the Franken Committee’s proposed
22 election contest fund would only be used to pay expenses incurred in connection with the
23 election contest, not those incurred in connection with the recount.

1 **Questions Presented**

2 (1) *May the DSCC establish a recount fund, separate from any of the DSCC's*
3 *other accounts and subject to a separate limit on amounts received, and use that fund to*
4 *pay expenses related to both the 2008 Senatorial recount and the election contest in*
5 *Minnesota?*

6 (2) *May the Franken Committee establish an election contest fund, separate from*
7 *its existing recount fund and subject to a separate limit on amounts received, and use that*
8 *fund to pay expenses related to the 2008 Senatorial election contest in Minnesota?*

9 **Legal Analysis and Conclusions**

10 (1) *May the DSCC establish a recount fund, separate from any of the DSCC's*
11 *other accounts and subject to a separate limit on amounts received, and use that fund to*
12 *pay expenses related to both the 2008 Senatorial recount and the election contest in*
13 *Minnesota?*

14 Yes, the DSCC may establish a recount fund, separate from its other accounts and
15 subject to a separate limit on amounts received, and use that fund to pay expenses
16 incurred in connection with recounts and election contests of Federal elections, such as
17 the 2008 Senatorial recount and election contest in Minnesota. Donations to the separate
18 recount fund would be subject to the amount limitations, source prohibitions, and
19 reporting requirements of the Act. In Advisory Opinion 2006-24 (National Republican
20 Senatorial Committee and Democratic Senatorial Campaign Committee), the
21 Commission considered facts similar to those at issue here. The Commission concludes
22 that the advice provided by Advisory Opinion 2006-24 also applies to a national party
23 committee such as the DSCC. Thus, per the DSCC's request, the DSCC may establish a

1 recount fund subject to the Act's limits, prohibitions, and reporting requirements to be
2 used for expenses incurred in connection with recounts and election contests of Federal
3 elections, such as the 2008 Senatorial recount and election contest in Minnesota. The
4 limits applicable to national party committees for 2009 are \$30,400 from an individual
5 and \$15,000 from a multicandidate political committee per calendar year for any recounts
6 and election contests during that year. *See* 2 U.S.C. 441a(a)(1)(B) and 441a(a)(2)(B);
7 11 CFR 110.1(c) and 110.2(c). , Additionally, donations to recount funds are not
8 aggregated with contributions from those individuals for purposes of the calendar year
9 contribution limits set forth in 2 U.S.C. 441a(a)(1)(B), and that the aggregate biennial
10 contribution limits of 2 U.S.C. 441a(a)(3), limiting an individual's total contributions to
11 all candidates and political committees over a two-year period, do not apply to donations
12 to recount funds. *See* Advisory Opinion 2006-24. Also, per the DSCC's request, the
13 DSCC's recount fund will also be subject to the source prohibitions and reporting
14 requirements of the Act. *Id.*

15 (2) *May the Franken Committee establish an election contest fund, separate from*
16 *its existing recount fund and subject to a separate limit on amounts received, and use that*
17 *fund to pay expenses related to the 2008 Senatorial election contest in Minnesota?*

18 Yes, the Franken Committee may establish an election contest fund in addition to
19 its existing recount fund and subject to a separate limit on amounts received, and may use
20 that fund to pay expenses related to the 2008 Senatorial election contest in Minnesota.

21 Commission regulations exclude from the definitions of "contribution" and
22 "expenditure" amounts given or used "with respect to a recount of the results of a Federal
23 election, or an election contest concerning a Federal election." 11 CFR 100.91 and

1 11 CFR 100.151. Minnesota law, applicable to the election at issue, specifically provides
2 for both recounts and election contests as separate procedures, either of which may take
3 place with or without the occurrence of the other. *See* Minn. Stat. § 204C.35 (2008)
4 (recounts); Minn. Stat. §§ 209.2, 209.021 (2008) (election contests).

5 These regulations and state statutes distinguish between a recount and an election
6 contest. Therefore the Franken Committee may establish an election contest fund in
7 addition to its existing recount fund.¹ As you described in your advisory opinion request,
8 the Franken Committee's election contest fund will be subject to the amount limitations,
9 source prohibitions, and reporting requirements of the Act. The limits applicable to
10 candidate committees for the 2008 election cycle are \$2,300 from an individual and
11 \$5,000 from a multicandidate political committees. *See* 2 U.S.C. 441a(a)(1) and (2).

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 requester 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 11 CFR 100.91 and 100.151 only reference recounts and election contests. Accordingly, regardless of state law, these regulations do not permit candidates to create funds for any other proceedings that would be exempt from the definition of contribution.

1 law including, but not limited to, statutes, regulations, advisory opinions and case law.
2 The cited advisory opinion is available on the Commission's website at
3 <http://saos.nictusa.com/saos/searchao>.

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On behalf of the Commission,

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Steven T. Walther
Chairman

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