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AO 2010-18

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**BY HAND DELIVERY**



Thomasenia P. Duncan, Esq.
General Counsel
Federal Election Commission
999 E Street, N.W.
Washington, D.C. 20463

**Re: Advisory Opinion Request**

Dear Ms. Duncan:

Pursuant to 2 U.S.C. § 437f, we seek an advisory opinion on behalf of the Minnesota Democratic-Farmer-Labor Party (the "DFL"), concerning the application of the Federal Election Campaign Act of 1971, as amended (the "Act") and Commission regulations (the "regulations") to the DFL's recount fund. Specifically, the DFL seeks confirmation that it may transfer excess funds in its recount fund to its federal account, to the extent that the transfer (when aggregated with 2010 contributions to the DFL's federal account) does not result in any violations of the Act's contribution limits. In addition, the DFL seeks confirmation that it may use any remaining funds in the recount fund to pay for recount activities in connection with the 2010 elections.

## FACTUAL DISCUSSION

After the 2008 election, the DFL raised $2,165,451.53 into its recount fund to pay for the recount and election contest involving Senator Al Franken and then-Senator Norm Coleman. After spending $2,153,867.92 on the recount and election contest, the DFL has a remaining balance of $11,583.61.

The DFL wants to transfer some or all of this money to its regular federal account in advance of the 2010 midterm election. To identify the individuals and other political committees who donated the remaining recount funds, the DFL proposes to use the "first in, first out" accounting

method.[1] When the transfer is made, the DFL will aggregate the contributions comprising the transfer with contributions made to its account in 2010. If the transfer causes any contributor to exceed its 2010 limits, the offending funds will remain in the recount fund.

Thus, under the DFL's proposal, no individual could contribute more than $10,000 and no political committee could contribute more than $5,000 to the DFL's federal account in 2010. For example, if the recount fund includes $10,000 in donations from Individual A and Individual A has already made $5,000 in contributions to the DFL in 2010, only $5,000 of Individual A's donations to the recount fund would be transferred to the DFL's federal account. The other $5,000 would remain in the recount fund.

In the alternative, if it is not allowed to transfer the excess recount funds, the DFL would like to ask its donors to re-designate (in writing) their recount fund donations to the DFL's federal account.

Finally, the DFL would like to use any remaining recount funds to pay for recount activities in connection with the 2010 elections.

## LEGAL ANALYSIS

Neither the Act nor the regulations specify how recount funds may be spent. Likewise, the Commission has yet to address how excess recount funds may be spent. In Advisory Opinion 2006-24, the requestors asked whether "a ... State Party [may] retain excess funds in the recount funds for future elections, or [whether] the funds [must] be disposed of in some manner."[2] Reasoning that the question was speculative and hypothetical in nature, the Commission chose not to answer it. It did not offer any further guidance in Advisory Opinion 2009-4, the only other post-BCRA opinion dealing with recount funds.

### A. Excess recount funds may be transferred to a state party's federal account, provided that the transfer does not cause any contributor to exceed its 2010 limits.

The DFL now seeks confirmation that the rules governing transfers between affiliated committees – allowing for unlimited transfers provided that the contribution limits remain intact – apply to transfers between the DFL's recount fund and its federal account.

[1] See 11 C.F.R. § 110.3(c)(4).

[2] See FEC Adv. Op. 2006-24.

Like affiliated committees, all federal accounts maintained by the DFL share a "contribution" limit of $10,000 per year.[3] In the absence of 11 C.F.R. §§ 100.91, 100.151 – which establish that a donation into the recount fund is *not* a "contribution" and that a disbursement from the recount fund is *not* an "expenditure" – the DFL would only be able to accept $10,000 per calendar year *total* into its federal account and its recount fund. Due to these two provisions, however, the DFL may accept $10,000 in "contributions" per calendar year into its federal account and an additional $10,000 in "donations" per calendar year into its recount fund.[4]

The donations remain exempt from the contribution limit only if they are spent on recount activities. If the DFL were to transfer the donations into its federal account, the donations would become "contributions" (from the original donor) and would be subject to the $10,000 per calendar year limit. Provided that such a transfer did not result in a violation of the contribution limits, however, nothing in the Act or regulations would proscribe it. In fact, the regulations generally allow for unlimited transfers between affiliated entities, *as long as the transfer does not allow the recipient to enjoy a second contribution limit for the relevant period.* This basic principle, in fact, underlies *all* of the transfer provisions in the regulations. For example:

- Since formally affiliated committees share a contribution limit, they may make unlimited transfers to each other.[5] The shared limit guarantees that the recipient committee can *never* raise more money by affiliating with another committee than it can on its own.

- When a candidate begins the election cycle as a candidate for one Federal office, and then becomes a candidate for another Federal office, the candidate may make unlimited transfers between the two committees *provided that* the transfer does not cause any contributor to exceed its limits for a *single* election.[6] For example, if a candidate's House committee consists of $2,400 in contributions from a particular donor, the candidate may transfer that contribution to her Senate committee provided that the donor has not made any contributions to the Senate committee.

- Where a candidate has leftover funds in her primary election account, she may transfer *all* of those funds to her general election account. Likewise, if a candidate has leftover funds from one election cycle, she may transfer *all* of those funds to a committee or account used in a subsequent cycle.[7] These unlimited transfers are allowed because the

[3] See 11 C.F.R. §§ 110.1(c)(5), 110.2(d).

[4] See id. §§ 100.91, 100.151; FEC Adv. Op. 2006-24.

[5] See id. §§ 102.6(a)(1), 110.3(a)(2), 110.3(c)(1).

[6] See id. § 110.3(c)(5).

[7] See id. §§ 110.3(c)(3), (4).

transfers do not allow the recipient to enjoy a second contribution limit for the relevant period.

Notably, the Commission has applied this basic principle even when the funds being transferred were *not* "contributions" at the time they were received by the donor committee. For example, donations made to a presidential exploratory committee are not "contributions" under the Act.[8] Yet in Advisory Opinion 1991-12,[9] the Commission allowed Congresswoman Pat Schroeder's former presidential exploratory committee to transfer funds (including these "non-contributions" raised during the exploratory stage) to her congressional committee, using the "first in, first out" method and excluding from the transfer any funds that would cause a contributor to exceed its limits to her congressional committee for the 1992 election.[10]

The DFL's proposal is fully consistent with these precedents. Under the DFL's proposal, no individual could contribute more than $10,000 and no political committee could contribute more than $5,000 to the DFL's federal account in 2010. If a transfer caused these limits to be exceeded, the offending funds would remain in the recount fund. Furthermore, since donations to the recount fund are subject to the source prohibitions and amount limitations of the Act, the federal account would only receive funds that it could have accepted in the first instance.

Because the DFL's proposal is consistent with the basic principle that affiliated entities may make unlimited transfers – provided that the transfer does not allow the recipient to enjoy a second contribution limit for the relevant period – the Commission should approve it.

**B. In the alternative, a state party should be able to request re-designations of the donations to the recount fund.**

If the Commission does not allow the DFL to transfer the excess funds, it should allow the DFL to request their re-designation to the federal account. Under this alternative proposal, the DFL would identify the donors using the same "first in, first out" method prescribed by 11 C.F.R. §§ 104.12, 110.3(c)(4).[11] The DFL would then contact each donor and request that the donor re-designate, in writing, its recount fund donations to the DFL's federal account.

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[8] See id. § 100.72(a).

[9] The Advisory Opinion has been superseded, in part, by the Leadership PAC regulations. However, it still stands for the proposition that funds not initially treated as "contributions" may be transferred to another account and used to fund "expenditures," provided that the contribution limits remain intact.

[10] See FEC Adv. Op. 1991-12.

[11] The Commission has approved the use of the "first in, first out" method for similar purposes. See FEC Adv. Op. 1996-52 (allowing use of "FIFO" method to identify donors eligible for refund and re-solicitation).

Political committees generally have 60 days from the date of the contribution to seek a re-designation.[12] This rule is not absolute, however. For example, where there is uncertainty as to whether a contribution needs to be refunded or re-designated – as in the case of a general election contribution received prior to a primary election – the 60-day clock begins on the day when it is certain that the re-designation is necessary.[13] Furthermore, the Commission has tolled the running of the clock even longer where, as here, there is legal uncertainty about the rules governing the re-designation.[14]

In 2006, several requestors asked the Commission how they may dispose of excess recount funds. The Commission chose not to answer the question, thereby creating legal uncertainty in the regulated community. Until the Commission provides guidance, the DFL does not know whether it is obliged to seek a re-designation of the recount funds. Therefore, if the Commission does not allow the DFL to transfer the funds, the DFL should have 60 days from the date the opinion is issued to seek re-designations from donors.

### C. Any money remaining in the recount fund may be spent on recount activities in connection with the 2010 election.

Regardless of whether the Commission allows the DFL to transfer the excess funds to its federal account or seek re-designation of the recount funds, the recount fund will likely contain some excess funds. The DFL seeks confirmation that it may spend these funds on recount activities in connection with the 2010 election. The regulations allow the DFL to accept donations into its recount fund and make disbursements on recount activities from that fund.[15] The regulations do *not* limit the time period in which these disbursements may be made. Furthermore, when the Commission authorized the requestors to raise donations into its recount fund in October 2006, it did not restrict the use of those funds to that specific calendar year nor did it even intimate that such a restriction existed.[16]

Such a restriction, in fact, would be foreign to the regulations. With one exception, the regulations do not restrict *when* a committee may spend its lawfully-received funds. Meanwhile, 11 C.F.R. § 102.9(e)(3) – the only provision in the regulations that explicitly restricts *when*

[12] See 11 C.F.R. § 110.1(b)(5)(ii)(A)(2).

[13] See FEC Adv. Ops. 1992-15, 2008-4.

[14] See FEC Adv. Ops. 1992-15 (tolling the running of the 60-day deadline during the period when Commission was considering advisory opinion request).

[15] See 11 C.F.R. §§ 100.91, 100.151.

[16] See FEC Adv. Ops. 2006-24, 2009-4.

campaign funds may be spent – does not apply to a recount fund established by a state party. The provision states that "[i]f a candidate is not a candidate in the general election, any contributions made for the general election shall be refunded to the contributors [or re-designated or re-attributed]."[17] Recount funds raised by state parties, however, are not refundable under § 102.9(e)(3), because a recount is not an "election" and, even if a recount were treated as an "election" for this purpose, there is no way for a state party to qualify (or not qualify) for it.[18]

Because nothing in the Act, the regulations, or the Commission's opinions restricts *when* a state party may disburse its recount funds, the DFL should be able to spend any excess recount funds on recount activities in connection with the 2010 election.

## QUESTIONS PRESENTED

In light of these principles, the DFL seeks guidance on the following:

1. May the DFL transfer some or all of its excess recount funds to its federal account, provided that the transfer – when aggregated with contributions to the DFL's federal account for 2010 – does not cause any contributor to exceed its 2010 limits?

2. In the alternative, may the DFL request that its donors re-designate (in writing) their recount fund donations to the DFL's federal account?

3. Irrespective of the answers to Questions 1 and 2, may the DFL spend remaining recount funds on recount activities in connection with the 2010 election?

Very truly yours,

Marc E. Elias
Jonathan S. Berkon
Counsel to the Minnesota Democratic-Farmer-Labor Party

[17] See 11 C.F.R. § 102.9(e)(3).

[18] See id. § 100.2.