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AOR 2010-14

June 24, 2010

BY HAND DELIVERY

Thomasenia P. Duncan, Esq.
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Federal Election Commission
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2010 JUN 24 PM 3:25
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Re: Advisory Opinion Request

Dear Ms. Duncan:

Pursuant to 2 U.S.C. § 437f, we seek an advisory opinion on behalf of the Democratic Senatorial Campaign Committee (the "DSCC"), concerning the application of the Federal Election Campaign Act of 1971, as amended (the "Act") and Commission regulations (the "regulations") to the DSCC's recount fund. Specifically, the DSCC seeks confirmation that it may make disbursements from its recount fund before November 4, 2010, to pay for certain recount activities. The DSCC also seeks confirmation that its recount fund may reimburse its principal campaign account for certain pre-election expenses that are attributable, in part, to recount activities.

FACTUAL DISCUSSION

In the last decade, the country witnessed two of the longest election contests in American history. The 2000 presidential election ended when a divided Supreme Court halted the counting of ballots and pronounced George W. Bush as the winner. In 2008 – extending into 2009 – Senator Al Franken and then-Senator Norm Coleman waged a legal battle in the Minnesota Supreme Court, ending in Senator Franken being seated as the 60th Democratic vote in the United States Senate.

Recounts and election contests are fast-moving, complex legal processes. Because the law in this area is often arcane and ambiguous, preparing for a recount requires a significant amount of legal and logistical preparation, and must begin well before the election. An effective team

needs experienced attorneys in each state and trained staff who are prepared in advance for a potential recount. Not only are these recount activities expensive, but the fundraising costs associated with raising recount funds are significant.

The DSCC would like to build an effective post-election program for potential recounts. To do so, it needs to start investing in the program prior to the election. The DSCC wants to make disbursements from its recount fund before November 2, 2010, to pay for the following expenses:

- Fees for attorneys and staff to prepare for the post-election period;
- Recount related research in states where recounts are most likely; *and*
- The costs associated with soliciting donations into the recount fund.

The DSCC also wants to allocate the cost of certain expenses, which are attributable to both recount activities and campaign activities:

- Fundraising expenses attributable to the solicitation of both recount funds and campaign funds; *and*
- The salary and benefits of staffers who spend a substantial portion of their time on recount activities and some of their time on other non-recount related activities.

The DSCC wants confirmation that it can use its recount funds to pay for these expenses.

LEGAL ANALYSIS

The regulations provide that donations to a recount fund are *not* "contributions," but stipulate that corporations, labor unions, and foreign nationals may not make such donations.¹ The regulations also provide that disbursements from a recount fund are *not* "expenditures."² Other than these two provisions, the regulations say nothing more about recount funds. In two recent advisory opinions, however, the Commission determined that a recount is "in connection with an election for Federal office."³ Consequently, donations to the fund are subject to the Act's amount

¹ See 11 C.F.R. § 100.91.

² See *id.* § 100.151.

³ See FEC Adv. Ops. 2006-24, 2009-4. Because it is not "in connection with the general election campaign of a candidate for Federal office," the coordinated expenditure limits do not apply. See FEC Adv. Op. 2006-24.

limits, source prohibitions, and reporting requirements, and are subject to other generally applicable provisions in the regulations.

The Commission has yet to address when recount funds may be spent *or* whether expenses attributable to recount activities and campaign activities may be allocated. The regulations, however, generally permit national party committees to spend lawfully-raised donations at any time and to allocate expenses attributable to more than one purpose. If it applied the regulations' general principles to these questions, therefore, the Commission would have to conclude that recount funds may be spent before the election and that mixed-use expenses may be allocated. The DSCC seeks confirmation that these general principles apply to recount funds and, if so, that it may make the disbursements that it proposes to make.

A. Recount funds may be raised and disbursed at any time, provided that they are spent on recount activities.

Although the Act and the regulations restrict *how* committees may spend lawfully-raised funds (*e.g.*, funds may not be converted to personal use), they generally do not restrict *when* these funds may be spent. Unless there is a specific provision stating otherwise, a committee may spend its lawfully-raised donations at any time.

1. *The regulations do not restrict when recount funds may be raised or spent.*

The two provisions specifically governing recount funds do *not* restrict when these funds may be raised or spent. The first provision – 11 C.F.R. § 100.91 – provides that a "gift, subscription, loan, advance, or deposit of money or anything of value made with respect to a recount of the results of a Federal election, or an election contest concerning a Federal election is not a contribution."⁴ The Commission has never hinted that this provision restricts when recount funds may be raised. For example, when the Commission issued Advisory Opinion 2006-24 – one month before the 2006 midterm elections – it did not require committees to wait a month before raising funds.⁵ If § 100.91 cannot be read to include such a restriction, then its sister provision – 11 C.F.R. § 100.151 – should not be read that way. The latter provision establishes that a "purchase, payment, distribution, loan, advance, or deposit of money or anything of value made with respect to the recount of the results of a Federal election, or an election contest concerning a Federal election is not an expenditure."⁶ Since it is a "normal rule of statutory interpretation that identical words used in different parts of the same statute are generally

⁴ See 11 C.F.R. § 100.91.

⁵ See FEC Adv. Op. 2006-24.

⁶ See 11 C.F.R. § 100.151

presumed to have the same meaning," disbursements from the recount fund should be treated in the same way as donations to the fund.⁷

Likewise, 11 C.F.R. § 102.9(e)(3) – the only provision in the regulations that explicitly restricts *when* campaign funds may be spent – does not apply to a recount fund established by a national party committee. 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]."⁸ Because of this obligation to refund, candidates may not spend general election funds before the primary election.⁹ This restriction is a prophylactic measure, which ensures that candidates have enough money to refund contributions in the event that they do not qualify for the later election.¹⁰

However, recount funds raised by national party committees are not refundable under § 102.9(e)(3). First, a recount is not an "election."¹¹ Second, even if a recount were treated as an "election" for this purpose, there is no way for a national party committee to qualify (or not qualify) for it. In fact, the inability of a national party committee to qualify for elections is a principal reason why it is subject to an annual contribution limit, rather than a per-election contribution limit.

Where there is no prospect of a post-election refund, there is no basis to restrict pre-election spending. For example, if there is a special election and general election on the same day, and a candidate is a candidate in both elections (thereby obviating any prospect of a refund), "contributions legally made and accepted with respect to these two elections *may be expended for either election or both elections.*"¹² Likewise, a national party committee may make "coordinated expenditures" pursuant to 2 U.S.C. § 441a(d) prior to the general election, even though the expenditure is "in connection with the general election campaign of [a] candidate[] for federal office."¹³

⁷ IBP, Inc. v. Alvarez, 546 U.S. 21, 34 (2005).

⁸ See 11 C.F.R. § 102.9(e)(3) (emphasis added).

⁹ See FEC Adv. Op. 1986-17. Likewise, the Commission has also determined that funds raised for a potential primary election may not be spent prior to a party caucus (which has the authority to select a nominee). See FEC Adv. Op. 1982-49.

¹⁰ See 11 C.F.R. § 102.9(e)(2), (3).

¹¹ See id. § 100.2.

¹² See FEC Adv. Op. 1986-31 (emphasis added).

¹³ See 2 U.S.C. § 441a(d)(1).

2. *The Commission has consistently approved the type of disbursements that the DSCC proposes to make.*

The Commission has consistently approved the type of disbursements that the DSCC proposes to make. For example, even where 11 C.F.R. § 102.9(e)(3) applies, the Commission allows candidates to spend general election funds prior to the primary "where it is necessary to make advance payments or deposits to vendors for services that will be rendered ... to [the] committee after [the candidacy has been] established ... with respect to the general election."¹⁴ The DSCC's first proposed disbursement – to retain the services of attorneys and staff for a potential recount – is exactly that type of expense.

The DSCC's second proposed disbursement – to pay for research necessary to be prepared for recounts and election contests – is slightly different, in that the services will be rendered *before* November 2, 2010. However, this distinction is insignificant. For example, even though lawyers would provide the services before the election, the DSCC would only *benefit* from them after the election. A legal memorandum written in October, which details the recount and election contest procedures, is useful to the DSCC only after November 2, 2010.

Finally, the DSCC's third proposed disbursement – to use recount funds to pay for the *fundraising costs* associated with soliciting donations to the fund – is consistent with the general principle that the proceeds of fundraising activities may be used to defray the costs of those activities. Before a joint fundraising representative distributes the proceeds from an event, for example, the representative first deducts each committee's allocable share of the expenses.¹⁵ Similarly, a publicly-funded presidential candidate may use donations to its General Election Legal and Accounting Compliance ("GELAC") fund to fully "defray the cost of soliciting contributions to the GELAC."¹⁶ Allowing the DSCC to defray the cost of soliciting contributions to the recount fund is consistent with these analogous provisions.

B. Expenses attributable to recount activities and campaign activities are allocable.

When a disbursement is attributable to more than one purpose, the regulations generally allow for that disbursement to be allocated.¹⁷

¹⁴ See FEC Adv. Op. 1986-17.

¹⁵ See 11 C.F.R. § 102.17(c)(7)(i)(A).

¹⁶ See *id.* § 9003.3(a)(2)(i)(E).

¹⁷ See, e.g. *id.* §§ 106.1 – 106.8.

The Commission, for example, allows campaigns to allocate the cost of a durable good across multiple elections within a single cycle. In Advisory Opinion 1996-36, a campaign committee received computer equipment before the party caucus. The value of the computer equipment exceeded the per-election contribution limit. However, the Commission recognized that "the computer equipment ... will be used throughout all three elections in the Utah election cycle and may perform functions related to each election" and allowed it to be allocated across the three elections in the cycle.¹⁸

The Commission also permits publicly-funded presidential candidates to allocate certain expenses between their publicly-funded campaign account and their GELAC fund.¹⁹ Some expenses may be paid entirely from the GELAC fund (*e.g.*, legal and accounting services to ensure compliance with the Act, and salary, overhead, and computer expenses from the period beginning 30 days after the election).²⁰ Other expenses, meanwhile, may be allocated between the principal account and the GELAC fund (*e.g.*, computer services expenses, and payroll and overhead expenditures of the campaign's national headquarters and state offices).²¹

Although the GELAC allocation percentages are generally prescribed by regulation, the Commission has authorized allocations via the advisory opinion process as well. In 2004, the Commission determined that GELAC funds could be used to pay 100% of recount expenses, even though a significant chunk of the expenses would be incurred *before* the GELAC "winding down" period began (30 days after the election).²² Three years later, the Commission allowed the GELAC fund to reimburse the principal account for 5% of the cost for broadcasting advertisements, due to the fact that the campaign had to dedicate 4 seconds in each advertisement to legal compliance.²³

The DSCC would like to allocate two types of expenses: (1) fundraising costs attributable to the solicitation of both recount funds and campaign funds and (2) salaries for staff that spend part of

¹⁸ See FEC Adv. Op. 1996-29.

¹⁹ Like the GELAC fund, the recount fund is a separate pool of money that may *only* be used to pay for *particular expenses*. Both the recount fund and the GELAC fund are subject to the source and amount limitations of the Act, and disbursements from the funds are "in connection with the election of a Federal candidate."

²⁰ See General Election Supplement to the Financial Control and Compliance Manual (June 2000), 18-19.

²¹ See 11 C.F.R. § 9003.3(a)(2)(ii)(A), (D).

²² See FEC Adv. Op. 2004-35.

²³ See FEC Adv. Op. 2007-9.

their time on recount activities.²⁴ Both types of expenses can be allocated based on existing principles in the regulations. The regulations provide that "[i]n the case of a fundraising program or event where funds are collected by one committee for more than one clearly identified candidate, the attribution shall be determined by *the proportion of funds received*."²⁵ Similarly, the DSCC's fundraising costs can be allocated using the same "funds received" method. The regulations allow State, district, and local party committees to pay a certain share of staff salaries with non-federal funds, provided that the staffers "keep a monthly log of the percentage of time each employee spends" in connection with a Federal election.²⁶ Likewise, if DSCC staffers maintained such a log, the DSCC should be able to use recount funds to pay for the staff time attributable to recount activities.

QUESTIONS PRESENTED

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

1. May the DSCC make disbursements from its recount fund prior to Election Day?
 - a. May the DSCC use recount funds to retain the services of attorneys and staff for possible recounts and election contests?
 - b. May the DSCC use recount funds to pay for legal and other research in preparation for a recount and/or election contest?
 - c. May the DSCC use recount funds to defray the costs of soliciting donations to the recount fund?
2. May the DSCC allocate expenses that are attributable to both recount activities and campaign activities?
 - a. May the DSCC allocate expenses that are attributable to the solicitation of recount funds and campaign funds, based on the "funds received" formula in 11 C.F.R. § 106.1(a)?
 - b. May the DSCC allocate the salary and benefits of staffers who spend some of their time on recount activities and some of their time on campaign activities?

²⁴ If allowed to allocate, the DSCC would pay for the expenses from its principal campaign account and then reimburse that account from the recount fund. This is consistent with the Commission's practice with federal and non-federal accounts. See 11 C.F.R. §§ 106.5 – 106.7.

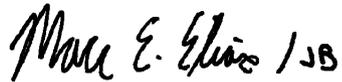
²⁵ See 11 C.F.R. § 106.1(a) (emphasis added).

²⁶ See *id.* § 106.7(d)(1).

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Please do not hesitate to call us should you have any additional questions.

Very truly yours,

Handwritten signature of Marc E. Elias in black ink, followed by the initials JSB.

Marc E. Elias
Jonathan S. Berkon
Counsel to the Democratic Senatorial Campaign Committee



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07/06/2010 10:13 AM

Subject DSCC Recount Fund Advisory Opinion Request

History: This message has been forwarded.

Ms. Rothstein,

Below please find answers to your questions from last week. If you need any further clarification or have any more questions, please do not hesitate to get in touch.

1) Does the DSCC have only one recount fund? If so, is it candidate-specific or does it operate on behalf of all Democratic Senate candidates?

The DSCC has one recount fund and it is not candidate specific at this time.

2) Does the AOR ask whether the DSCC may raise money before Election Day? Or only whether it may spend it?

As we write in the Request, "[t]he Commission has never hinted that [the regulations] restrict when recount funds may be raised." We believe that to be the case and welcome the Commission reaffirming this to be the case. Our primary question, however, relates to the timing of spending recount funds.

3) What will the DSCC do with excess funds in its recount fund, once any recount ends (or, if there are no recounts)?

The current plan is to carry the funds forward to pay for recount activities in connection with future elections.

4) Does the first category of proposed recount expenses - "fees for attorney and staff to prepare for the post-election period" - cover only retainer fees or does it also include legal (and staff) services provided before Election Day?

The first category of proposed recount expenses includes legal and staff services provided before Election Day, in addition to retainer fees paid to attorneys.

5) Is the second category of proposed recount expenses - "recount related research in states where recounts are most likely" - encompassed in the first category? If not, how does it differ?

The activities described in Question 1(b) are probably encompassed by the activities described in Question 1(a). However, we wanted to be explicit.

6) Does the DSCC intend to set up formal joint fundraising committees to raise funds for the DSCC's campaign fund and recount fund, or is the citation to 102.17(c)(7)(I)(A) merely an analogy? Does the DSCC intend to have joint fundraising events, at which it will raise funds for the recount fund and some other fund - such as its own campaign fund or the campaign fund of another candidate?

The DSCC does not intend to set up a joint fundraising committee; since the DSCC is a single committee, there is no need for one.

The DSCC may have events at which money is raised for its principal account and its recount fund.

We cite to 102.17(c)(7)(i)(A) to demonstrate the general principle that the proceeds of fundraising activities may be used to defray the costs of those activities.

7) Does the AOR's reference to the "funds received" method refer to 11 CFR 106.1 or 106.7?

We do not see any difference relevant to this advisory opinion between the "funds received" method outlined at 106.1 and 106.7.

8) Will the DSCC employ the 25% threshold or any of the other fixed percentages described in 11 CFR 106.7(d)(1)? Or will the DSCC allocate staffers' salaries and benefits based purely on the amount of time spent doing each activity?

The DSCC intends to allocate the salaries and benefits of staffers who spend some of their time on recount activities and some of their time on other DSCC activities, based on the amount of time spent performing each type of activity. The DSCC will not employ the 25% threshold or any of the other fixed percentages described at 106.7(d)(1).

9) Will the DSCC only use recount funds before the election for the five specific activities described in the AOR? Generally speaking, how do these "recount activities" differ from regular pre-election preparations?

The five activities described in the Request are the only activities we are asking about at this time. Each of these activities involves preparing for events (e.g., recounts and election contests) that occur *after* the election (or raising funds to pay for such activities). This distinguishes the proposed activities from most pre-election preparation activities, such as GOTV, which involve preparing for Election Day itself.

Regards,

Jonathan S. Berkon ; Perkins Coie LLP

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Rosemary Smith <rsmith@fec.gov>, <mjohnson@fec.gov>
bcc
Subject Re: DSCC AOR

Correct.

From: <JBlume@fec.gov>
Date: Fri, 9 Jul 2010 14:02:34 -0400
To: Marc Elias <meli@perkinscoie.com>
Cc: "Berkon, Jonathan (Perkins Coie)" <JBerkon@perkinscoie.com>, <ARothstein@fec.gov>, Rosemary Smith <rsmith@fec.gov>, <mjohnson@fec.gov>
Subject: DSCC AOR

Dear Mr. Elias:

In our telephone conversation yesterday, you provided us with additional information regarding the request by the DSCC for an advisory opinion. We have set out below our understanding of certain points that you made during the conversation. Please review the statements below and either confirm their accuracy or correct any misperceptions.

1. The recount-related activities described in the advisory opinion request will be dedicated solely to post-election recounts or election contests, and will not be usable for pre-election campaign activity.

2. Examples of recount-related activities include researching State laws regarding recounts and election contests, developing plans and budgets for anticipated recounts and election contests, and recruiting volunteers to engage in recounts. By contrast, examples of campaign-related activities include get out the vote activity, voter registration activity, and polling.

We would appreciate your response by email. This email and your response may become a supplement to your advisory opinion request and, if so, will be made available to the public by the Commission.

Thank you very much for your cooperation.

Sincerely,

Joshua Blume
Attorney, Policy Division
Federal Election Commission

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