

**PUBLIC COMMENTS ON DRAFT ADVISORY OPINIONS**

Members of the public may submit written comments on draft advisory opinions.

DRAFT B of ADVISORY OPINION 2010-18 is now available for comment. It was requested by Marc E. Elias, Esq. and Jonathan S. Berkon, Esq., on behalf of the Minnesota Democratic-Farmer-Labor Party, and is scheduled to be considered by the Commission at its public meeting on Thursday, September 23, 2010.

If you wish to comment on the DRAFT B of ADVISORY OPINION 2010-18, please note the following requirements:

- 1) Comments must be in writing, and they must be both legible and complete.
- 2) Comments must be submitted to the Office of the Commission Secretary by hand deliver or fax ((202) 208-3333), with a duplicate copy submitted to the Office of General Counsel by hand delivery or fax ((202) 219-3923).
- 3) Comments must be received by noon (Eastern Time) on September 22, 2010.
- 4) The Commission will generally not accept comments received after the deadline. Requests to extend the comment period are discouraged and unwelcome. An extension request will be considered only if received before the comment deadline and then only on a case-by-case basis in special circumstances.
- 5) All timely received comments will be made available to the public at the Commission's Public Records Office and will be posted on the Commission's website at <http://saos.nictusa.com/saos/searchao>.

**FOR FURTHER INFORMATION**

Press inquiries:

Judith Ingram  
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Commission Secretary:

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Comment Submission Procedure:

Rosemary C. Smith  
Associate General Counsel  
(202) 694-1650

Other inquiries:

To obtain copies of documents related to 2010-18, contact the Public Records Office at (202) 694-1120 or (800) 424-9530, or visit the Commission's website at <http://saos.nictusa.com/saos/searchao>.

**ADDRESSES**

Office of the Commission Secretary  
Federal Election Commission  
999 E Street, NW  
Washington, DC 20463

Office of General Counsel  
ATTN: Rosemary C. Smith, Esq.  
Federal Election Commission  
999 E Street, NW  
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FEDERAL ELECTION COMMISSION  
SECRETARIAT



FEDERAL ELECTION COMMISSION  
Washington, DC 20463

2010 SEP 17 P 4:00

**AGENDA ITEM**

For Meeting of 9-23-10

September 17, 2010

**MEMORANDUM**

**SUBMITTED LATE**

TO: The Commission

FROM: Christopher Hughey *pch*  
Acting General Counsel

Rosemary C. Smith *RCS by RMK*  
Associate General Counsel

Robert M. Knop *RMK*  
Assistant General Counsel

Esther D. Heiden *EH*  
Attorney

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

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

Attachment

1 ADVISORY OPINION 2010-18

2

3 Marc E. Elias, Esq.  
4 Jonathan S. Berkon, Esq.  
5 Perkins Coie LLP  
6 607 Fourteenth Street, NW  
7 Washington, DC 20005-2003

**DRAFT B**

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9 Dear Messrs Elias and Berkon:

10 We are responding to your advisory opinion request on behalf of the Minnesota  
11 Democratic-Farmer-Labor Party (the "DFL"), concerning the application of the Federal  
12 Election Campaign Act of 1971, as amended (the "Act"), and Commission regulations to  
13 the use of recount funds, raised for a 2008 recount and election contest, for future  
14 elections and recounts.

15 The Commission concludes that the DFL may transfer funds from its recount  
16 account to its general Federal account for the 2010 election, provided that such transfers  
17 will not result in any excessive contributions under the Act. The Commission further  
18 concludes that the DFL may use recount funds raised for the 2008 recount and election  
19 contest involving Senator Al Franken and then-Senator Norm Coleman to pay for recount  
20 activities relating to future recounts.

21 ***Background***

22 The facts presented in this advisory opinion are based on your letter received on  
23 July 26, 2010.

24 The DFL is the Minnesota State party committee affiliated with the national  
25 Democratic Party. After the 2008 election, the DFL raised and deposited \$2,165,451.53  
26 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 general Federal 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 general Federal 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 general Federal 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 general Federal account. Again,  
13 the DFL will apply the "first in, first out" method to determine which donors will be  
14 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 *general Federal 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 general Federal*  
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 *general Federal account?*

6           Yes, the DFL may transfer funds remaining in the recount fund to the DFL's  
7 Federal account. Because recount funds established by a State party committee must  
8 comply with the Act's amount limitations<sup>1</sup>, source prohibitions, and reporting  
9 requirements, the transfers as proposed by the DFL will not result in circumvention of the  
10 Act's contribution limits or source prohibitions.

11           Donations made with respect to recounts of the results of a Federal election, or  
12 election contests concerning a Federal election, are subject to the Act's source  
13 prohibitions. 11 CFR 100.91. Moreover, contributions to a State, district, or local party  
14 committee's Federal account are subject to the limitations and prohibitions of the Act,  
15 regardless of whether such contributions are for use in connection with a Federal  
16 election.<sup>2</sup> 11 CFR 300.30(b)(3)(i).

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<sup>1</sup> Because they are not contributions under the Act, donations to recount accounts are not subject to the biennial contribution limit. *See* 2 U.S.C. 441a(a)(3)(B); 11 CFR 110.5. *See also* AOs 2009-04 and 2006-24.

<sup>2</sup> The Act provides that any "amount that is expended or disbursed for Federal election activity by a State, district, or local committee of a political party" must be made exclusively "from funds subject to the limitations, prohibitions, and reporting requirements of this Act." 2 U.S.C. 441i(b)(1). The Act and Commission regulations define "Federal election activity" to include voter registration, voter identification, get-out-the-vote, or generic campaign activities conducted within certain time windows; public communications that refer to a clearly identified Federal candidate and that promotes or supports or attacks or opposes a Federal candidate; as well as State, district, or local party committee employees who spend more than 25 percent of their compensated time during any month on activities in connection with a Federal election. 2 U.S.C. 431(20)(A); 11 CFR 100.24.

1           In Advisory Opinion 2006-24 (Republican and Democratic Senatorial  
2 Committees), the Commission determined that a State party's recount fund must comply  
3 with the Act's annual contribution limitations<sup>3</sup> and source prohibitions. The Commission  
4 noted, however, that the funds are not "contributions" under Commission regulations,<sup>4</sup>  
5 and therefore are not aggregated with contributions from those same persons to the State  
6 party for that calendar year. Advisory Opinion 2006-24 (Republican and Democratic  
7 Senatorial Committees) (answer to question 2(a)). Furthermore, the Commission  
8 concluded that the aggregate biennial contribution limits of 2 U.S.C. 441a(a)(3) do not  
9 apply to the individuals' donations to recount funds. *Id.* However, the Commission  
10 declined to address whether remaining recount funds must be disposed of in some  
11 manner or may be kept for future election recounts, finding that the question posed by the  
12 requestor was hypothetical.<sup>5</sup> Advisory Opinion 2006-24 (Republican and Democratic  
13 Senatorial Committees) (answer to question 4). In Advisory Opinion 2009-04  
14 (Franken/DSCC), the Commission approved the creation of a recount fund by the  
15 Democratic Senatorial Campaign Committee to pay expenses incurred in relation to  
16 recounts and election contests of Federal elections, such as the 2008 Senatorial recount

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<sup>3</sup> Under the Act, state political party committees may not receive more than \$10,000 from a person or \$5,000 from a multicandidate political committee per calendar year. *See* 2 U.S.C. 441a(a)(1)(D) and (2)(C).

<sup>4</sup> The Act and Commission regulations define the terms "contribution" and "expenditure" to include any gift, loan, or payment of money or anything of value for the purpose of influencing a Federal election. *See* 2 U.S.C. 431(8)(A)(i) and (9)(A)(i); 11 CFR 100.52(a) and 100.111(a). Commission regulations explicitly exempt from the definitions of "contribution" and "expenditure" "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," except that the prohibitions of 11 CFR 110.20 (foreign nationals) and Part 114 (corporations, labor organizations, and national banks) apply. 11 CFR 100.91 and 100.151; *see also* 2 U.S.C. 441b(a) and 441e(a)(1)(A).

<sup>5</sup> Commission regulations state that requests posing a hypothetical situation, presenting a general question of interpretation, or regarding the activities of third parties, do not qualify as advisory opinion requests. 11 CFR 112.1(b).

1 and election contest in Minnesota. Advisory Opinion 2009-04 (Franken/DSCC) (answer  
2 to question 1).

3           The DFL asks whether it may transfer some or all of the remaining funds from its  
4 recount fund to its general Federal account. As discussed above, the Commission has  
5 stated in prior advisory opinions that funds received by a State party's Federal account,  
6 like funds received by a State party's recount fund, are subject to the Act's source  
7 prohibitions and annual contribution limitations. Therefore, the funds that the DFL seeks  
8 to transfer from the recount fund to its Federal account are subject to the Act's annual  
9 contribution limits and source prohibitions. However, since funds received by a State  
10 party's recount fund are subject to an annual limit that is in addition to the annual  
11 contribution limit applicable to its general Federal account, the DFL will aggregate the  
12 donations comprising the transfer with contributions made by the same persons to the  
13 general Federal account in 2010, using the "first in, first out," accounting method, so as  
14 to avoid exceeding the contribution limit applicable to the general Federal account. Thus,  
15 the contributions that the DFL seeks to transfer to its Federal account will comply with its  
16 annual contribution limits and source prohibitions.<sup>6</sup> Consequently, there is no danger that  
17 the Act's contribution limits or source prohibitions will be circumvented by the DFL's  
18 proposed course of action.

19           Moreover, there are no legal or policy justifications for prohibiting the DFL from  
20 transferring funds remaining in its recount fund to its general Federal account to be used

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<sup>6</sup> The Commission notes that, once donations are transferred to the DFL's general Federal account, they will be considered contributions for the purposes of the donors' biennial limits. Accordingly, the DFL may wish to notify such donors of the fact of the transfers for the donors' own compliance purposes.



1 in connection with Federal elections.<sup>7</sup> The plain intent of the statutory and regulatory  
2 restrictions on State, district, and local party committees' financing of Federal election  
3 activity and activities "in connection with a Federal election," as well as the transfer  
4 provision, is to prevent funds that are impermissible under the Act from being used for  
5 such activities. *See* The Bipartisan Campaign Reform Act of 2002 – Section by Section  
6 Analysis, 148 Cong. Rec. S1992 (daily ed. Mar. 18, 2002); Explanation and Justification  
7 for Final Rules on Prohibited and Excessive Contributions: Non-Federal Funds or Soft  
8 Money, 67 FR 49064, 49065 and 49093 (Jul. 29, 2002). Because the funds that the DFL  
9 proposes to transfer into its Federal account are permissible under the Act, they may be  
10 used by the DFL's Federal account to finance activities that are "in connection with a  
11 Federal election."

12 Thus, the DFL may transfer any remaining funds from the recount fund to the  
13 DFL's federal account, so long as the transfer does not cause any contributor to exceed  
14 the limits applicable to that contributor's contributions to the State party's Federal  
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<sup>7</sup> The Commission notes that its regulation at 11 CFR 300.30(b)(3)(v) prohibits transfers into a Federal account of a State party committee from any other account maintained by a State party committee for "the purpose of financing activity in connection with Federal elections." However, the Explanation and Justification for that regulation limits its scope to prohibiting transfers into a Federal account "to pay for Federal election activity." Explanation and Justification for Final Rules on Prohibited and Excessive Contributions: Non-Federal Funds or Soft Money, 67 FR 49064, 49093-94 (Jul. 29, 2002) ("E&J"). The regulation makes exceptions for transfers for Federal election activity that take place as delineated by 11 CFR 300.33 and 300.34. The E&J mirrors the purpose of these statutory and regulatory restrictions, which is to prevent circumvention of the Act's contribution limits and source prohibitions by State, district, and local party committees. Given the language of the E&J, which clarifies the regulation, and the clear focus of the Act, 11 CFR 300.30(b)(3)(v) is not applicable to this situation, in which the recount funds are subject to the Act's contribution limits and source prohibitions.

1 account for the year in which the transfer is made.<sup>8</sup>

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

4 This question is moot given the answer to Question 1.

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

7 Yes, irrespective of the answers to Questions 1 and 2, the DFL may use the funds  
8 remaining in its recount fund to pay for recount activities relating to future Federal  
9 elections, such as any recounts arising from 2010 elections.

10 The Commission has never restricted the use of recount funds to recounts and  
11 election contests held in the calendar year in which donations to the recount fund are  
12 made, and is aware of no reason to create such a restriction at this point. Accordingly,  
13 the DFL may use all remaining amounts in its recount fund to pay for expenses incurred  
14 in relation to recounts and election contests of future Federal elections, including the  
15 2010 elections.

16 This response constitutes an advisory opinion concerning the application of the  
17 Act and Commission regulations to the specific transaction or activity set forth in your

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<sup>8</sup> This conclusion is consistent with the Commission's regulations permitting unlimited transfers between affiliated entities. See 11 CFR 102.6(a)(1); 110.3(a)(2), (c)(1), (c)(3)-(c)(5) (permitting unlimited transfers between affiliated committees that share a contribution limit, between the campaign committees of a candidate seeking election to more than one Federal office, and between a Federal candidate's committee for a previous election cycle and a committee for a current election cycle, or between previous election cycles). Unlimited transfers between affiliated committees are allowed because the transfers do not allow the recipient to take advantage of a second contribution limit for the relevant period. Although these regulatory provisions pertain to transfers of contributions, and, as discussed above, DFL's recount fund does not consist of contributions under the Act, the Commission previously has applied the "unlimited transfers" principle to other related committees. In Advisory Opinion 1991-12 (Schroeder), the Commission concluded that donations made to former Congressman Patricia Schroeder's exploratory committee for president (which were not contributions under Commission regulations) could be transferred to her principal campaign committee for Congress, provided that the transfers would not result in excessive contributions for any of the contributors.

1 request. *See* 2 U.S.C. 437f. The Commission emphasizes that, if there is a change in any  
2 of the facts or assumptions presented, and such facts or assumptions are material to a  
3 conclusion presented in this advisory opinion, then the requestor may not rely on that  
4 conclusion as support for its proposed activity. Any person involved in any specific  
5 transaction or activity which is indistinguishable in all its material aspects from the  
6 transaction or activity with respect to which this advisory opinion is rendered may rely on  
7 this advisory opinion. *See* 2 U.S.C. 437f(c)(1)(B). Please note that the analysis or  
8 conclusions in this advisory opinion may be affected by subsequent developments in the  
9 law including, but not limited to, statutes, regulations, advisory opinions, and case law.  
10 All cited advisory opinions are available on the Commission's website at  
11 <http://saos.nictusa.com/saos/searchao>.

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On behalf of the Commission,

Matthew S. Petersen  
Chairman