



FEDERAL ELECTION COMMISSION
Washington, DC 20463

March 20, 2009

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

ADVISORY OPINION 2009-04

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

Dear Mr. Elias:

We are responding to your advisory opinion request on behalf of Al Franken for U.S. Senate and the Democratic Senatorial Campaign Committee, concerning the application of the Federal Election Campaign Act of 1971, as amended (“the Act”), and Commission regulations to the establishment of recount and/or election contest funds by these two political committees. The Commission concludes that the DSCC may establish a recount fund subject to certain limitations and use it to pay for expenses incurred in connection with the 2008 U.S. Senate recount and election contest in Minnesota. The Commission could not approve a response by the required four affirmative votes with regard to whether the Franken Committee may establish an election contest fund, separate from its existing recount fund, and subject to a separate donation limit. See 2 U.S.C. 437c(c) and 437d(a)(7).

Background

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

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

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

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

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

Questions Presented

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

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

Legal Analysis and Conclusions

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

Yes, the DSCC may establish a recount fund, separate from its other accounts and subject to a separate limit on amounts received, and use that fund to pay expenses

incurred in connection with recounts and election contests of Federal elections, such as the 2008 Senatorial recount and election contest in Minnesota. Donations to the separate recount fund would be subject to the amount limitations, source prohibitions, and reporting requirements of the Act.

In Advisory Opinion 2006-24 (National Republican Senatorial Committee and Democratic Senatorial Campaign Committee), the Commission considered facts similar to those at issue here, and concluded that “because election recount activities are in connection with a Federal election, any recount fund established by either a Federal candidate or the State Party must comply with the amount limitations, source prohibitions, and reporting requirements of the Act.” In that Advisory Opinion, the Commission explicitly stated that national party committees “must pay for all of the recount activities they conduct using entirely [funds subject to the limitations, prohibitions and reporting requirements of the Act].” Advisory Opinion 2006-24 (answer to question 3). The Commission further concluded that donations to such recount funds would not be aggregated with contributions from the same persons for purposes of the calendar-year and aggregate biennial contribution limits.

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

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

The Commission could not approve a response by the required four affirmative votes with regard to whether the Franken Committee may establish an election contest fund, separate from its existing recount fund, and subject to a separate donation limit. *See* 2 U.S.C. 437c(c) and 437d(a)(7).

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

On behalf of the Commission,

(signed)
Steven T. Walther
Chairman