



FEDERAL ELECTION COMMISSION  
Washington, DC 20463

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June 23, 2004

MEMORANDUM

TO: The Commission

THROUGH: James A. Pehrkon  
Staff Director

FROM: Lawrence H. Norton  
General Counsel

Rosemary C. Smith  
Associate General Counsel

Brad C. Deutsch  
Assistant General Counsel

Jonathan M. Levin  
Senior Attorney

SUBJECT: Reconsideration of AO 2004-12

Commissioner Thomas has moved for reconsideration of Advisory Opinion 2004-12 (attached) at the June 24 Open Session.<sup>1</sup> Commission Directive 10 ("Rules of Procedure of the Federal Election Commission Pursuant to 2 U.S.C. 437c(e)") sets forth procedures applicable to such motions. Specifically, it states that the "effect of the adoption of a motion to reconsider is to place before the Commission again the question on which the vote to reconsider was taken in the *exact position* in which it was before the original vote." Section E.7(d) (emphasis added).

The attached advisory opinion reflects the language approved by the Commission on June 10, and, hence, reflects the "exact position" in which the Commission was immediately prior to the vote that is now the subject of Commissioner Thomas' motion for reconsideration.

This Office asks the Commission to include Advisory Opinion 2004-12 as a document for the June 24 Open Session agenda so that if Commissioner Thomas' motion

<sup>1</sup> Advisory Opinion 2004-12 was approved by the Commission at the June 10, 2004, Open Session.

**AGENDA ITEM**  
For Meeting of: 6-24-04  
**SUBMITTED LATE**

Memorandum to the Commission  
Reconsideration of AO 2004-12  
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for reconsideration is adopted, the document will then be before the Commission for further deliberations.

Attachment



FEDERAL ELECTION COMMISSION  
WASHINGTON, D.C. 20463

June 14, 2004

CERTIFIED MAIL  
RETURN RECEIPT REQUESTED

ADVISORY OPINION 2004-12

Neil R. Reiff, Esq.  
Sandler, Reiff & Young, P.C.  
50 E Street, S.E., Suite 300  
Washington, DC 20003

Dear Mr. Reiff:

This responds to your letters dated March 23 and April 7, 2004, on behalf of the Democratic State party committees of Arizona, New Mexico, Nevada, Colorado, Utah, Wyoming, Idaho, Montana and Alaska (the "Participating State Committees"), requesting an advisory opinion concerning the application of the Federal Election Campaign Act of 1971, as amended (the "Act"), and Commission regulations, to an entity named the Democrats for the West ("DFW"), which you refer to as a "regional party organization."

***Background***

On March 24, 2004, the Participating State Committees announced the creation of DFW, *via* press release. DFW is organized under section 527 of the Internal Revenue Code. 26 U.S.C. 527.<sup>1</sup>

The Participating State Committees established DFW as a "regional party organization . . . in order to provide the participating party committees with a regional entity to develop regional strategy and research and to assist the [Participating State] Committees in developing regional thematic message[s] and campaign tactics for electoral activity at both the federal and non-federal levels." You state that DFW will allow the Participating State Committees to build an organizational infrastructure to help ensure a stronger and more vital Democratic Party in the Western states through research, issue and tactical polling, training and periodic conferences

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<sup>1</sup> You indicate that DFW intends to register as a political committee with the Commission once it has met the definition of political committee at 2 U.S.C. 431(4)(A). To date, DFW has not filed a statement of organization with the Commission.

among and between the Participating State Committees. Training will be of a general nature only, and will be available to anyone who wants to attend, including candidates and their employees and agents.

DFW will not disseminate any public communications that expressly advocate the election or defeat of any Federal candidate or "promotes or supports or attacks or opposes" any Federal candidate. DFW also will not: (1) undertake any other direct electoral activity, including voter registration, voter identification or get-out-the-vote activity; (2) direct, solicit or make any contribution to, or expenditure on behalf of, any Federal candidate; or (3) make any transfers or contributions to any other Federal political committee or party committee other than the Participating State Committees. DFW will not pay for the republication of any campaign materials prepared by any Federal candidate, nor will DFW pay for any public communication that refers to any Federal candidate within 120 days of an election.

DFW will not assume any responsibilities performed by any other party committee or organization and is not intended to supplant any other existing infrastructure or committee within the national or State Democratic Party structure.

You indicate that DFW was established, and will be maintained and controlled solely by the Participating State Committees, and that no officer, agent or employee acting on behalf of any other organization, including any other State or National party committee, was involved in the establishment of, or will maintain or control, the organization.

The Participating State Committees have created two ad-hoc committees to assist in the development of DFW: the Founders Committee and the Steering Committee. The Founders Committee is composed of prominent westerners who have served as public officials and who will serve as spokespersons. The Steering Committee is composed of State party officers and other activists to assist in the creation of DFW.

DFW's Federal account will be financed initially by transfers of Federal funds (*i.e.*, funds subject to the source prohibitions, amount limitations and reporting requirements of the Act) from the Participating State Committees. DFW expects that such transfers will represent a modest portion of the total funds DFW eventually raises. As its primary source of Federal revenue, DFW wishes to solicit contributions from sources (*e.g.*, individuals, Federal political committees) that are permissible under the Act.

DFW would also like to establish non-Federal accounts and solicit donations from sources that are not permissible under the Act. No officer, employee or agent acting on behalf of any National committee will solicit non-Federal funds on behalf of DFW, nor will any Federal candidate or officeholder.

You state that DFW may maintain a small, full-time staff to administer the organization but that the Participating State Committees will also play a direct role in administering the organization. DFW will incur administrative expenses, including, but not limited to, rent, office supplies, computers, furniture, and utilities. DFW will likely retain professional consultants to undertake fundraising, polling, training and strategic functions.

Any of DFW's work product with respect to its research and polling would either: (1) be shared solely with the Participating State Committees; (2) if permissible, be shared with other State or local party committees or National party committees of the Democratic Party; or (3) be publicized through press releases, or through a publicly available website maintained by DFW.

### ***Legal Analysis and Conclusions***

*(1) Is DFW a "State committee" of a political party under 11 CFR 100.14(a)?*

Yes, DFW is a State committee of a political party.

Under 11 CFR 100.14(a), as amended after the enactment of the Bipartisan Campaign Reform Act of 2002, Pub. L. 107-155 (Mar. 27, 2002) ("BCRA"), a "State committee" is the "organization that by virtue of the bylaws of a political party or the operation of State law is part of the official party structure and is responsible for the day-to-day operation of the political party at the State level, including an entity that is directly or indirectly established, financed, maintained, or controlled by that organization, as determined by the Commission." *See also* 2 U.S.C. 431(15). You state that the Participating State Committees established DFW, and will provide the initial financing for DFW. Further, the Participating State Committees will maintain and control DFW. Accordingly, because DFW is "an entity that is directly or indirectly established, financed, maintained, or controlled by" the Participating State Committees, DFW is a "State committee" under 11 CFR 100.14(a).

*(2) What is the limit on contributions from persons to DFW's Federal account?*

As a State committee, the limit on contributions from persons other than multicandidate committees to DFW's Federal account is \$10,000 per calendar year. 2 U.S.C. 441a(a)(1)(D) and 441a(f). For multicandidate committees, the limit on contributions to DFW's Federal account is \$5,000. 2 U.S.C. 441a(a)(2)(C) and 441a(f).

*(3) Are unlimited transfers of Federal funds from the Participating State Committees to DFW permitted by 11 CFR 102.6(a)(i) and (ii), as well as section 110.3(c)(1)? Are unlimited transfers of Federal funds from other National and State Committees to DFW permitted by the same rules?*

Yes, unlimited transfers of Federal funds from the Participating State Committees, or from other National and State committees that are party committees of the same political party, to DFW, are permissible because these committees are party committees of the same political party. 2 U.S.C. 441a(a)(4); 11 CFR 102.6(a)(ii) and 110.3(c)(1). Additionally, as discussed below, unlimited transfers of Federal funds between DFW and the Participating State Committees are also permissible because DFW and the Participating State Committees are "affiliated committees." *Id.*; 11 CFR 102.6(a)(i).

*(4) Is DFW affiliated with the Participating State Committees?*

Under the Act, political committees “established or financed or maintained or controlled” by the same persons or group of persons are treated as a single political committee for the purposes of the contributions they make or receive. 2 U.S.C. § 441a(a)(5). Commission regulations interpret the Act and characterize such committees as “affiliated committees.” 11 CFR 100.5(g), 102.2(b)(1), and 110.3. As discussed above, DFW was established, and will be financed, maintained and controlled by the Participating State Committees, all of which are party committees of the same political party. Accordingly, DFW is affiliated with each one of the nine Participating State Committees.<sup>2</sup>

*(5) Will each contribution to DFW be proportionally attributable to each participating State Committee’s contribution limit? That is, will each contribution count against the limit of each Participating State Committee?*

Yes. Because DFW will be providing support to each of the nine Participating State Committees, contributions from persons other than the Participating State Committees to DFW will be proportionately (*i.e.*, one-ninth) attributable to each of the nine Participating State Committees. Thus, for example, a \$9,000 contribution by an individual to DFW would be attributed to *each* of the nine Participating State Committees as a \$1,000 contribution, and the same contributor would then be permitted to contribute up to an additional \$9,000 of Federal funds to one or more of the nine Participating State Committees in that calendar year, provided that the individual does not exceed the \$37,500 biennial contribution limit of 2 U.S.C. 441a(a)(3)(B).<sup>3</sup> As an alternative, DFW may be able to set up procedures following the joint fundraising rules at 11 CFR 102.17 to handle contributions that cause an excessive contribution regarding one or more of the Participating State Committees. This would require advance approval of a written fundraising agreement, an appropriate fundraising notice, distribution of the joint fundraising proceeds, and proper reporting by all committees involved.

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<sup>2</sup> DFW’s situation is materially different from that presented in Advisory Opinion 2001-07, in which the Commission concluded that the political committee of a joint venture limited liability company owned in equal shares by five independent utility corporations was not affiliated with the separate segregated funds (“SSF”) of the sponsoring companies because “the ownership, control and decisionmaking authority [was] divided and diffused” among the five corporations. Here, the Participating State Committees are not independent corporations with separate SSFs. Rather, the Participating State Committees are all party committees of the same political party and are already entitled by law to make unlimited transfers of funds between and amongst themselves. 2 U.S.C. 441a(a)(4); 11 CFR 110.3(c)(1).

<sup>3</sup> Under this approach, a person who had contributed substantial Federal funds to any one of the nine Participating State Committees in a calendar year would be limited in the amount of Federal funds he or she could contribute to DFW in that calendar year. For example, if a person had already contributed \$9,500 to the Democratic State Party of Arizona in a calendar year, that person could then give no more than \$4,500 to DFW because one-ninth of the \$4,500 contribution to DFW would be attributable to the Democratic State Party of Arizona, thereby reaching the contribution limit for that State committee. Additionally, we note that if a person had made a \$10,000 contribution to any one of the Participating State Committees in a calendar year, then that person would not be permitted to contribute to DFW in the same calendar year.

*(6) Can DFW raise funds that are not subject to the source prohibitions and amount limitations of the Act?*

DFW can raise funds from corporations and labor organizations (*see* 2 U.S.C. 441b) and from Federal government contractors (*see* 2 U.S.C. 441c), and DFW can raise funds in excess of the contribution limitations of 2 U.S.C. 441a(a). In such cases, DFW must deposit the funds in its non-Federal account. *See generally* 11 CFR 102.5 and 106.7.

*(7) May DFW invite national party officers, employees or agents, or Federal candidates or officeholders, and their agents, to appear as guests or featured speakers at DFW events? Such events will include meetings, conferences or training for which no contributions would be solicited. Other events may include fundraising events or regional training sessions in which attendees may be required to make a contribution or pay a modest fee to attend.*

Yes, DFW may invite such persons to appear as guests or featured speakers at DFW events. However, the rules applicable in particular circumstances vary. Because DFW is a State party committee, Federal candidates and individuals holding Federal office may attend, speak, or be featured guests at a DFW fundraising event without restriction or regulation. 11 CFR 300.64(b). Accordingly, Federal candidates and officeholders are not required to issue any disclaimers during their appearances at such events. *See* Explanation and Justification to Prohibited and Excessive Contributions: Non-Federal Funds or Soft Money: Final Rules, 67 Fed. Reg. 49,065, 49,108 (July 29, 2002).

*(8) How may DFW pay for its ordinary day-to-day operational activities? For research and polling? For meetings and conferences? For employee salaries and wages (including fringe benefits)?*

Party committees that make disbursements of certain items in connection with Federal and non-Federal elections are permitted to make such disbursements in one of two ways: they may make them entirely from funds raised subject to the prohibitions and limitations of the Act; or, if they have established separate Federal and non-Federal accounts pursuant to 11 CFR 102.5, they may allocate them between these accounts. 11 CFR 106.7(b). In the situation you describe, DFW will establish separate Federal and non-Federal accounts pursuant to 11 CFR 102.5.

If a party committee elects to allocate costs other than salaries and wages, then it must allocate such disbursements pursuant to the fixed allocation percentages described at 11 CFR 106.7(d)(2). Items that can be allocated under section 106.7(d)(2) include administrative costs such as rent, utilities, office equipment, and office supplies, except that any such expenses that are directly attributable to a clearly identified Federal candidate must be paid only from the Federal account. 11 CFR 106.7(c)(2). As you suggest in your letter dated March 23, 2004, and under section 106.7(d)(2)(i) and (ii), because a Senate candidate will appear on the ballot in six of the States represented by the Participating State Committees during *each* election year, DFW must allocate at least 36 percent of its administrative expenses to DFW's Federal account in

Presidential election years, and at least 21 percent of its administrative expenses to DFW's Federal account in non-Presidential election years.<sup>4</sup> 11 CFR 106.7(d)(2)(i)-(ii).

Party committees must keep a monthly log of the percentage of time each employee spends in connection with a Federal election. 11 CFR 106.7(d)(1). Where a party committee pays salaries and wages for employees who spend 25 percent or less of their compensated time in a given month on Federal election activities or on activities in connection with a Federal election, the party committee must pay such salaries and wages from funds that comply with State law. *Id.* Salaries and wages (including fringe benefits) paid for employees who spend more than 25 percent of their compensated time in a given month on Federal election activities or on activities in connection with a Federal election must be paid only from a Federal account. *Id.*; see also Advisory Opinion 2003-11 (addressing a State committee's provision of "fringe benefits" to its employees).

(9) *How may DFW pay for the costs of fundraising events? Is it permissible for DFW to use Federal funds to pay employees who work in excess of 25 percent in a given month in connection with Federal elections if such Federal funds had been raised through events where the costs of such events had been paid for with a combination of Federal and non-Federal funds through the use of the "funds received" method?*

Yes. DFW may pay employees with Federal funds raised through events where Federal and non-Federal funds are raised when the costs of such events have been properly allocated using the "funds received" method. Expenses incurred by State party committees directly related to programs or events undertaken to raise funds to be used, in whole or in part, for activities in connection with Federal and non-Federal elections that are Federal election activities pursuant to 11 CFR 100.24 must not be allocated between Federal and non-Federal accounts. 11 CFR 106.7(e)(4). Except as provided in 11 CFR 300.32(a)(4), all such disbursements must be made from a Federal account. *Id.* Thus, DFW must use exclusively Federal funds to pay employees who work in excess of 25 percent in a given month in connection with a Federal election.

(10) *May DFW provide its polling and research information to State and local party committees, or to National party committees? Under what circumstances?*

DFW may provide its polling and research information to State and local party committees of the Democratic Party at less than the usual and normal fee, or at no charge. *Cf.* 11 CFR 110.3(c)(1). If polling and research information is paid for with funds that do not comply with the source prohibitions, amount limitations and reporting requirements of the Act, then such polling and research information can only be provided to National party committees if the recipients pay DFW the usual and normal fee.

The Commission expresses no opinion regarding whether the activities proposed in your letters dated March 23 and April 7, 2004 are permissible under the State laws of the Participating State Committees. The Commission also expresses no opinion regarding qualification for tax-

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<sup>4</sup> In either situation, the required allocation also applies to the preceding year. 11 CFR 106.7(d)(2)(i), (ii).



exempt status under 26 U.S.C. 527 or any other ramifications of the proposed activities under the Internal Revenue Code because those questions are outside the Commission's jurisdiction.

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.

Sincerely,

A handwritten signature in cursive script that reads "Ellen L. Weintraub". The signature is written in black ink and includes a horizontal flourish at the end.

Ellen L. Weintraub  
Vice Chair

Enclosures (AOs 2003-11 and 2001-07)