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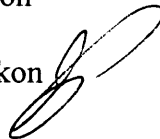
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June 4, 2004


MEMORANDUM


AGENDA ITEM
For Meeting of: 6-10-04


TO: The Commission


THROUGH: James A. Pehrkon 
Staff Director

FROM: Lawrence H. Norton
General Counsel

James A. Kahl 
Deputy General Counsel

Rosemary C. Smith 
Associate General Counsel

Brad C. Deutsch 
Assistant General Counsel

Albert J. Kiss 
Staff Attorney

Subject: Draft AO 2004-12

SUBMITTED LATE

Attached is a proposed draft of the subject advisory opinion. We request that this draft be placed on the agenda for June 10, 2004.

Attachment

1 ADVISORY OPINION 2004-12

2
3 Neil R. Reiff, Esq.
4 Sandler, Reiff & Young, P.C.
5 50 E Street, S.E., Suite 300
6 Washington, DC 20003

DRAFT

7
8 Dear Mr. Reiff:

9
10 This responds to your letters dated March 23 and April 7, 2004, on behalf of the
11 Democratic State party committees of Arizona, New Mexico, Nevada, Colorado, Utah,
12 Wyoming, Idaho, Montana and Alaska (the “Participating State Committees”), requesting an
13 advisory opinion concerning the application of the Federal Election Campaign Act of 1971, as
14 amended (the “Act”), and Commission regulations, to an entity named the Democrats for the
15 West (“DFW”), which you refer to as a “regional party organization.”

16 ***Background***

17 On March 24, 2004, the Participating State Committees announced the creation of DFW,
18 via press release. DFW is organized under section 527 of the Internal Revenue Code. 26 U.S.C.
19 527.¹

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

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

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

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

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

20 The Participating State Committees have created two ad-hoc committees to assist in the
21 development of DFW: the Founders Committee and the Steering Committee. The Founders

¹ 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.

1 Committee is composed of prominent westerners who have served as public officials and who
2 will serve as spokespersons. The Steering Committee is composed of State party officers and
3 other activists to assist in the creation of DFW.

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

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

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

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

23 ***Legal Analysis and Conclusions***

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

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

3 Under 11 CFR 100.14(a), as amended after the enactment of the Bipartisan Campaign
4 Reform Act of 2002, Pub. L. 107-155 (Mar. 27, 2002) (“BCRA”), a “State committee” is the
5 “organization that by virtue of the bylaws of a political party or the operation of State law is part
6 of the official party structure and is responsible for the day-to-day operation of the political party
7 at the State level, including an entity that is directly or indirectly established, financed,
8 maintained, or controlled by that organization, as determined by the Commission.”² *See also* 2
9 U.S.C. 431(15). Because each of the Participating State Committees is part of the official
10 Democratic Party structure and is responsible for the day-to-day operation of the Democratic
11 Party in its respective State, each committee qualifies as a “State committee” under section
12 100.14(a) of the Commission’s regulations. You state that the Participating State Committees
13 established DFW, and will provide the initial financing for DFW. Further, the Participating State
14 Committees will maintain and control DFW. Accordingly, because DFW is “an entity that is
15 directly or indirectly established, financed, maintained, or controlled by” the Participating State
16 Committees, DFW is a “State committee” under 11 CFR 100.14(a).

17

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

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

² As a threshold matter, 11 CFR 100.14(a) is applicable in this instance because the Democratic Party is a political party under 2 U.S.C. 431(16), and State Democratic Party committees regularly obtain ballot access at the State level for their candidates.

1 441a(f). For multicandidate committees, the limit on contributions to DFW's Federal account is
2 \$5,000. 2 U.S.C. 441a(a)(2)(C) and 441a(f).

3

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

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

15

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

17 Under the Act, political committees "established or financed or maintained or controlled"
18 by the same persons or group of persons are treated as a single political committee for the
19 purposes of the contributions they make or receive. 2 U.S.C. § 441a(a)(5). Commission
20 regulations interpret the Act and characterize such committees as "affiliated committees." 11
21 CFR 100.5(g), 102.2(b)(1), and 110.3. As discussed above, DFW was established, and will be
22 financed, maintained and controlled by the Participating State Committees, all of which are party

1 committees of the same political party. Accordingly, DFW is affiliated with each one of the nine
2 Participating State Committees.³

3

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

7 Yes, because DFW will be providing support to each of the nine Participating State
8 Committees, contributions from persons other than the Participating State Committees to DFW
9 will be proportionately (*i.e.*, one-ninth) attributable to each of the nine Participating State
10 Committees. Thus, for example, a \$9,000 contribution by an individual to DFW will be
11 attributed to *each* of the nine Participating State Committees as a \$1,000 contribution, and the
12 same contributor would then be permitted to contribute up to an additional \$9,000 of Federal
13 funds to one or more of the nine Participating State Committees in that calendar year, provided
14 that the individual does not exceed the \$37,500 biennial contribution limit of 2 U.S.C.
15 441a(a)(3)(B). Conversely, a person who has contributed substantial Federal funds to any one of
16 the nine Participating State Committees in a calendar year will be limited in the amount of
17 Federal funds he or she can contribute to DFW in that calendar year. For example, if a person
18 has already contributed \$9,500 to the Democratic State Party of Arizona in a calendar year, that
19 person may give no more than \$4,500 to DFW because one-ninth of the \$4,500 contribution to

³ 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 ("LLC") 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).

1 DFW would be attributable to the Democratic State Party of Arizona, thereby reaching the
2 contribution limit for that State committee. Additionally, we note that if a person has made a
3 \$10,000 contribution to any one of the Participating State Committees in a calendar year, then
4 that person would not be permitted to contribute to DFW in the same calendar year. Attribution
5 of one-ninth of each contribution to DFW to the Participating State Committees prevents
6 circumvention of the Act's amount limitations in 2 U.S.C. 441a(a)(1) and (2), and is consistent
7 with the antiproliferation objective of 2 U.S.C. 441a(a)(5)(B).

8
9 *(6) Can DFW raise funds that are not subject to the source prohibitions and amount limitations*
10 *of the Act?*

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

15
16 *(7) May DFW invite national party officers, employees or agents, or Federal candidates or*
17 *officeholders, and their agents, to appear as guests or featured speakers at DFW events?*
18 *Such events will include meetings, conferences or training for which no contributions would*
19 *be solicited. Other events may include fundraising events or regional training sessions in*
20 *which attendees may be required to make a contribution or pay a modest fee to attend.*

21 Yes, DFW may invite such persons to appear as guests or featured speakers at DFW
22 events. However, the rules applicable in particular circumstances vary. Because DFW is a State
23 party committee, Federal candidates and individuals holding Federal office may attend, speak, or

1 be featured guests at a DFW fundraising event without restriction or regulation. 11 CFR
2 300.64(b).

3 We note, however, if DFW distributes any written invitations to its fundraising events
4 that mention a Federal candidate or individual holding Federal office, then any solicitations
5 contained in the invitation would constitute a solicitation by the Federal candidate or individual
6 holding Federal office (so long as the candidate or Federal officeholder had consented or agreed
7 to be mentioned in the invitation). For example, if a Federal candidate or an individual holding
8 Federal office personally signs a solicitation or otherwise engages in pre-event activities (*e.g.*,
9 serves on a “host committee” or agreeing to be listed as a as “featured guest” in pre-event
10 invitation materials) that are outside the permissible activities flowing from a candidate or
11 officeholder’s appearance or attendance at an event, or if the candidate or officeholder asks for
12 funds in connection with a non-Federal election, then the candidate or officeholder must
13 expressly qualify or limit his or her request so that it is clear that he or she is asking only for
14 funds that comply with the Act’s amount limitations and source prohibitions. 2 U.S.C.
15 441i(e)(1)(B); 11 CFR 300.62; Advisory Opinion 2003-36 and 2003-37; *see also* Explanation
16 and Justification to Prohibited and Excessive Contributions: Non-Federal Funds or Soft Money:
17 Final Rules, 67 Fed. Reg. 49,065, 49,108 (July 29, 2002). The Commission would find the
18 following language to be an adequate disclaimer:

19 *I am asking for a donation of up to \$10,000 per year from persons other than*
20 *multicandidate committees, and up to \$5,000 per year from multicandidate*
21 *committees. I am not asking for funds from corporations, labor organizations,*
22 *foreign nationals, or other Federally prohibited sources.*
23

24 Additionally, National party committees, and officers or agents acting their behalf, may
25 not solicit, receive or direct to another person a contribution, donation, or transfer of funds or any

1 other thing of value, or spend any funds, that are not subject to the amount limitations, source
2 prohibitions and reporting requirements of the Act. 2 U.S.C. 441i(a).

3

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

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

13 If a party committee elects to allocate costs other than salaries and wages, then it must
14 allocate such disbursements pursuant to the fixed allocation percentages described at 11 CFR
15 106.7(d)(2). Items that can be allocated under section 106.7(d)(2) include administrative costs
16 such as rent, utilities, office equipment, and office supplies, except that any such expenses that
17 are directly attributable to a clearly identified Federal candidate must be paid only from the
18 Federal account. 11 CFR 106.7(c)(2). As you suggest in your letter dated March 23, 2004, and
19 under section 106.7(d)(2)(i) and (ii), because a Senate candidate will appear on the ballot in six
20 of the States represented by the Participating State Committees during *each* election year, DFW
21 must allocate at least 36 percent of its administrative expenses to DFW's Federal account in

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

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

13

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

19 Expenses incurred by State party committees directly related to programs or events
20 undertaken to raise funds to be used, in whole or in part, for activities in connection with Federal
21 and non-Federal elections that are Federal election activities pursuant to 11 CFR 100.24 must not
22 be allocated between Federal and non-Federal accounts. 11 CFR 106.7(e)(4). Except as

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

1 provided in 11 CFR 300.32(a)(4), all such disbursements must be made from a Federal account.
2 *Id.* Thus, DFW must use Federal funds to pay employees who work in excess of 25 percent in a
3 given month in connection with a Federal election. However, DFW cannot use Federal funds to
4 pay employees who work in excess of 25 percent in a given month in connection with Federal
5 elections if such Federal funds have been raised through events where the costs of such events
6 were paid for with a combination of Federal and non-Federal funds. 11 CFR 300.33(c)(3).

7
8 (10) *May DFW provide its polling and research information to State and local party*
9 *committees, or to National party committees? Under what circumstances?*

10 DFW may provide its polling and research information to State and local party
11 committees of the Democratic Party at less than the usual and normal fee, or at no charge. *Cf.*
12 11 CFR 110.3(c)(1). If polling and research information is paid for with funds that do not
13 comply with the source prohibitions, amount limitations and reporting requirements of the Act,
14 then such polling and research information can only be provided to National party committees if
15 the recipients pay DFW the usual and normal fee.

16
17 The Commission expresses no opinion regarding whether the activities proposed in your
18 letters dated March 23 and April 7, 2004 are permissible under the State laws of the Participating
19 State Committees. The Commission also expresses no opinion regarding qualification for tax-
20 exempt status under 26 U.S.C. 527 or any other ramifications of the proposed activities under the
21 Internal Revenue Code because those questions are outside the Commission's jurisdiction.

22 This response constitutes an advisory opinion concerning the application of the Act and
23 Commission regulations to the specific transaction or activity set forth in your request. *See*

1 2 U.S.C. 437f. The Commission emphasizes that, if there is a change in any of the facts or
2 assumptions presented and such facts or assumptions are material to a conclusion presented in
3 this advisory opinion, then the requester may not rely on that conclusion as support for its
4 proposed activity.

5

6

Sincerely,

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10

Bradley A. Smith
Chairman

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12

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14 Enclosures (AOs 2003-37, 2003-36, 2003-11, and 2001-07)