

AGENDA DOCUMENT NO. 11-43



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AGENDA ITEM

MEMORANDUM

For Meeting of 7-21-11

TO: The Commission

FROM: Christopher Hughey *pch*
Acting General Counsel

Rosemary C. Smith *PCS*
Associate General Counsel

Robert M. Knop *RMK*
Assistant General Counsel

Jessica Selinkoff *JS*
Attorney

Subject: Draft AO 2011-13 (DSCC)

Attached is a proposed draft of the subject advisory opinion. We request that this draft be placed on the agenda for July 21, 2011.

Attachment

1 ADVISORY OPINION 2011-13

2
3 Marc E. Elias, Esq.
4 Jonathan S. Berkon, Esq.
5 Perkins Coie LLP
6 700 Thirteenth Street, N.W., Suite 600
7 Washington, D.C. 20005-3960

DRAFT

8
9 Dear Messrs. Elias and Berkon:

10 We are responding to your advisory opinion request on behalf of the Democratic
11 Senatorial Campaign Committee (“DSCC”) concerning the application of the Federal
12 Election Campaign Act of 1971, as amended (the “Act”), and Commission regulations to
13 DSCC’s proposal to revise the disclaimers on its standard and mobile fundraising
14 solicitation webpages. The Commission concludes that DSCC may revise its disclaimers
15 as proposed.

16 ***Background***

17 The facts presented in this advisory opinion are based on your letter received on
18 May 27, 2011.

19 DSCC is a national committee of the Democratic Party. DSCC solicits credit card
20 contributions on its website, www.dsc.org/donate, and on the mobile version of its
21 website – the version that appears on smartphones, personal digital assistants, and other
22 mobile devices – www.dsc.org/mobile/donate (collectively, “solicitation webpages”).

23 On its solicitation webpages, DSCC asks donors to provide identifying
24 information including name, address, email, employer, and occupation, in addition to
25 credit card information. DSCC’s solicitation webpages also include several statements

1 and disclaimers intended to comply with requirements of the Act and Commission
2 regulations.¹ These include a statement that:

3 Federal law requires us to use our best efforts to collect and report the name,
4 mailing address, occupation and name of employer of individuals whose
5 contributions exceed \$200 in a calendar year.
6

7 Additionally, the solicitation webpages include the following statement:

8 The DSCC does not accept contributions earmarked for a particular candidate.
9 Contributions will be spent for DSCC activities and programs as the Committee
10 determines within its sole discretion.
11

12 The solicitation webpages also include the following disclaimer:

13 Paid for by the Democratic Senatorial Campaign Committee,
14 <http://www.dsc.org>, and not authorized by any candidate or candidate's
15 committee.
16

17 DSCC does not propose altering or eliminating any of the above statements and
18 disclaimers.

19 DSCC's solicitation webpages also ask contributors to check a box "to confirm
20 that the following is true" before clicking a button labeled "Support Democrats" to
21 complete the contribution:

22 1) This contribution is made from my own funds, and not those of another.
23 2) This contribution is not made from the general treasury funds of a corporation,
24 labor organization or national bank. 3) I am not a foreign national who lacks
25 permanent resident status in the United States. 4) This contribution is not made
26 from the treasury of an entity or person who is a federal contractor (does not
27 apply to personal contributions by subcontractors, employees, partners,
28 shareholders or officers of federal contractors). 5) This contribution is made on a
29 personal credit or debit card for which I have legal obligation to pay, and is made
30 neither on a corporate or business entity card nor on the card of another. 6) I am
31 at least 18 years old.

¹ DSCC's solicitation webpages also include a disclaimer concerning Internal Revenue Service regulations at 26 CFR 6113(a). The Commission expresses no opinion regarding the application of Federal tax law to DSCC's proposal.

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2 If the check box is not checked, the contributor is prompted to check the box before the
3 transaction can continue.

4 DSCC proposes to modify its solicitation webpages to eliminate the requirement
5 that contributors check the box to affirm their eligibility to contribute according to the six
6 criteria now listed. Instead, DSCC proposes to add language below the “Support
7 Democrats” button that contributors click to complete their contributions that would read:

8 By clicking this button, I certify that I am at least 18 years old and am making this
9 contribution on a personal credit or debit card with my own personal funds – not
10 those of another person or entity – and that I meet the eligibility requirements set
11 forth below:

- 12 • I am not a foreign national.
 - 13 • I am not a federal contractor.
- 14

15 Next to each of the bulleted statements, DSCC would also include a “click for more info”
16 link that would direct contributors to a more comprehensive definition of each term at the
17 bottom of the solicitation webpages.

18 ***Questions Presented***

19 1. *May DSCC make the proposed revisions to the version of its fundraising*
20 *solicitation webpage that appears on smartphones, personal digital assistants, and other*
21 *mobile devices?*

22 2. *May DSCC make the proposed revisions to the version of its fundraising*
23 *solicitation webpage that appears on other devices with Internet access (e.g., desktop and*
24 *laptop computers)?*

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1 ***Legal Analysis and Conclusions***

2 Both questions require analysis of the same legal authority and, therefore, will be
3 answered together. The Commission concludes that DSCC may revise the disclaimers on
4 its solicitation webpages as proposed.

5 The Act and Commission regulations require certain political committee
6 communications, including those soliciting contributions, to include disclaimers.
7 *See* 2 U.S.C. 441d(a); 11 CFR 110.11(a). All “Internet websites of political committees,”
8 if not authorized by a candidate, an authorized committee of a candidate, or an agent of
9 either, must “clearly state the full name and permanent street address, telephone number,
10 or World Wide Web address of the person who paid for the communication, and that the
11 communication is not authorized by any candidate or candidate’s committee.”
12 11 CFR 110.11(a), (b)(3); *see also* 2 U.S.C. 441d(a)(3). Every disclaimer “must be
13 presented in a clear and conspicuous manner, to give the reader, observer, or listener
14 adequate notice of the identity” of the person who paid for the communication.
15 11 CFR 110.11(c)(1).

16 In addition to this disclaimer requirement, the Act and Commission regulations
17 require political committees to keep account of and report the identification of any person
18 who makes a contribution or contributions aggregating more than \$200 during a calendar
19 year. 2 U.S.C. 432(c), 434(b); 11 CFR 102.9(a), 104.3(a)(4). This includes the name,
20 address, occupation and employer of the contributor, as well as date and full amount of
21 contribution. For contributions in excess of \$50 that aggregate to \$200 or less for the
22 calendar year, a record of the same information, except occupation and employer’s name,

1 must be kept. 2 U.S.C. 432(c), 11 CFR 102.9. Commission regulations provide that any
2 report shall be considered to be in compliance with the Act when the treasurer of the
3 political committee “shows that best efforts have been used to obtain, maintain and
4 submit the information required by the Act.” 11 CFR 104.7; *see also* 2 U.S.C. 432(i).
5 With respect to the identification of persons whose total contributions exceed \$200 in a
6 calendar year, the treasurer and political committee will only be deemed to have
7 exercised best efforts if, among other actions, written solicitations include a clear and
8 conspicuous “request for the contributor’s full name, mailing address, occupation and
9 name of employer, and include an accurate statement of Federal law regarding the
10 collection and reporting of individual contributor identifications.” 11 CFR 104.7(b).
11 Commission regulations provide examples this type of “best efforts” statement. *See* 11
12 CFR 104.7(b)(1)(i).

13 The statements and disclaimers that DSCC intends to continue including on its
14 solicitation webpages appear to satisfy the disclaimer and best efforts statement
15 provisions under 2 U.S.C. 441d(a), 11 CFR 110.11, and 11 CFR 104.7.

16 In addition to the disclaimer and best efforts statement, Commission regulations
17 require committee treasurers to examine “all contributions received for evidence of
18 illegality and for ascertaining whether contributions received, when aggregated with
19 other contributions from the same contributor, exceed the contribution limitations.”
20 11 CFR 103.3(b). This requirement applies to contributions once they have been
21 *received* by the committee. The Act and Commission regulations do not, however,
22 prescribe a particular method for a national party committee to ensure, at the time

1 contributions are *solicited*, that it will not accept contributions which are prohibited by
2 the Act, such as contributions from corporations, labor organizations, national banks,
3 Federal contractors, foreign nationals, or contributions in the name of another.²
4 *See* 2 U.S.C. 441a(a)(1)(B), 441b, 441e, 441f. In several advisory opinions, the
5 Commission has addressed language political committees proposed to use in soliciting
6 contributions to ensure that contributions are not accepted from prohibited sources,
7 including a box for contributors to check. *See, e.g.*, Advisory Opinions 2007-30 (Chris
8 Dodd for President), 1995-35 (Alexander for President), 1995-09 (NewtWatch PAC). In
9 approving the proposals in these advisory opinions, the Commission has noted that no
10 particular notice of this type is required by the Act and Commission regulations but,
11 nonetheless, indicated that the proposed notices were advisable as “an appropriate
12 safeguard” against receiving prohibited contributions. Advisory Opinion 1995-35
13 (Alexander for President). DSCC’s check box on its current solicitation webpages is an
14 example of this type of safeguard. Because DSCC is not required to provide a box for
15 contributors to check, but does so as a safeguard, DSCC may revise its solicitation
16 webpages as proposed.

17 This response constitutes an advisory opinion concerning the application of the
18 Act and Commission regulations to the specific transaction or activity set forth in your
19 request. *See* 2 U.S.C. 437f. The Commission emphasizes that, if there is a change in any
20 of the facts or assumptions presented, and such facts or assumptions are material to a

² Commission regulations provide that contributions may only be deposited in a political committee’s Federal account if the contributions meet one of three conditions, including that contributors are “informed that all contributions are subject to the prohibitions and limitations of the Act.” 11 CFR 102.5(a)(2)(iii). However, this section of the regulations does not apply to national party committees, including the DSCC. *See* 11 CFR 102.5(a), (c).

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

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On behalf of the Commission,

Cynthia L. Bauerly
Chair