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FEDERAL ELECTION COMMISSION
Washington, DC 20463

AGENDA DOCUMENT NO. 19-10-A
AGENDA ITEM
For meeting of March 28, 2019

March 21, 2019

MEMORANDUM

TO: The Commission

FROM: Lisa J. Stevenson *LJS*
Acting General Counsel

Neven F. Stipanovic *NFS*
Acting Associate General Counsel

Robert M. Knop *RMK*
Acting Assistant General Counsel

Joseph P. Wenzinger *JPW*
Attorney

Subject: Draft AO 2019-02 (Bill Nelson for Senate) Draft A

Attached is a proposed draft of the subject advisory opinion.

Members of the public may submit written comments on the draft advisory opinion. We are making this draft available for comment until 12:00 pm (Eastern Time) on March, 27, 2019.

Members of the public may also attend the Commission meeting at which the draft will be considered. The advisory opinion requestor may appear before the Commission at this meeting to answer questions.

For more information about how to submit comments or attend the Commission meeting, go to <https://www.fec.gov/legal-resources/advisory-opinions-process/>.

Attachment

1 ADVISORY OPINION 2019-02

2

3 Marc E. Elias, Esq.
4 Rachel L. Jacobs, Esq.
5 Perkins Coie LLP
6 700 13th Street, NW, #600
7 Washington, DC 20005

DRAFT A

8

9 Dear Mr. Elias and Ms. Jacobs:

10 We are responding to your advisory opinion request on behalf of Bill Nelson for Senate
11 (the “Committee”), concerning the application of the Federal Election Campaign Act, 52 U.S.C.
12 §§ 30101-45 (the “Act”), and Commission regulations to its proposal to donate excess recount
13 funds to a charitable organization or transfer the funds to a national party committee’s separate,
14 segregated account for election recounts, contests, and other legal proceedings. The Commission
15 concludes that the Committee’s proposed donation or transfer would be consistent with the Act
16 and Commission regulations.

17 ***Background***

18 The facts presented in this advisory opinion are based on your letter received on January
19 30, 2019 and publicly available information.

20 During the 2017-2018 election cycle, Senator Bill Nelson ran for re-election to Florida’s
21 seat in the United States Senate, and the Committee is his principal campaign committee.¹

22 See Advisory Opinion Request at AOR001.

23 In the days following the election, between Saturday, November 10 and Sunday,
24 November 18, Senator Nelson participated in a machine recount and a hand recount under
25 Florida law, as well as more than a dozen lawsuits “directly related to the counting and

¹ Bill Nelson for US Senate, Statement of Organization, Amend., FEC Form 1 (Oct. 18, 2018), <http://docquery.fec.gov/pdf/529/201810189125623529/201810189125623529.pdf>.

1 recounting of ballots.” AOR001. To fund those recounts and lawsuits, the Committee
2 established a separate bank account that accepted only funds subject to the limits, source
3 restrictions, and reporting requirements of the Act. *Id.*

4 You state that the Committee now has excess funds in its recount account, that Senator
5 Nelson is winding down the Committee’s operations, and that the Committee would like to
6 donate the excess funds to a charity or transfer them to a national party committee. Regarding
7 the proposed charity donation, the Committee would donate funds to an organization that does
8 not pay any compensation to Senator Nelson and that is “prohibited from participating or
9 intervening in any political campaign” under section 501(c)(3) of the Internal Revenue Code.
10 AOR003. The Committee also proposes to transfer excess recount funds to the Democratic
11 Senatorial Campaign Committee’s separate segregated account for “election recounts and
12 contests and other legal proceedings” (the “DSCC recount account”).² *See* AOR001-002.
13 According to the request, the DSCC recount account was established under the Consolidated and
14 Further Continuing Appropriations Act, 2015, Pub. L. 113-235, 101, 128 Stat. 2130, 2772-73
15 (2014) (“Appropriations Act”) (codified as 52 U.S.C. § 30116(a)(9)(C)), which permits national
16 party committees (including a national congressional campaign committee) to establish a
17 “separate, segregated account” to “defray expenses incurred with respect to the preparation for
18 and conduct of election recounts and contests and other legal proceedings.” *See* AOR002.

² The Democratic Senatorial Campaign Committee (“DSCC”) is registered with the Commission as a national congressional campaign committee of the Democratic Party. *See* DSCC, Statement of Organization, Amend., FEC Form 1 (Aug. 16, 2018) at 2, <http://docquery.fec.gov/pdf/747/201808160200690747/201808160200690747.pdf>.

1 ***Questions Presented***

- 2 1. *May the Committee donate excess recount funds to a charitable organization from which*
3 *Senator Nelson will receive no compensation?*
- 4 2. *May the Committee transfer excess recount funds to the DSCC’s account for recounts,*
5 *contests, and other legal proceedings established under 52 U.S.C. § 30116(a)(9)(C)?*

6 ***Legal Analysis and Conclusions***

7 Yes, the Committee may donate excess recount funds to a charitable organization from
8 which Senator Nelson will receive no compensation, and the Committee may transfer excess
9 recount funds to the DSCC recount account.

10 The Act and Commission regulations define the term “contribution” and “expenditure” to
11 include any gift, loan, or payment of money or anything of value for the purpose of influencing a
12 federal election. 52 U.S.C. §§ 30101(8)(A)(i), 30101(9)(A)(i); 11 C.F.R. §§ 100.52(a),
13 100.111(a). Commission regulations expressly except from its definitions of contribution and
14 expenditure funds raised and spent for recounts and contests concerning federal elections.
15 *See* 11 C.F.R. §§ 100.91, 100.151.

16 Although recount funds are neither contributions nor expenditures, under the Bipartisan
17 Campaign Reform Act (“BCRA”), federal candidates may not raise or spend funds “in
18 connection with an election for federal office” unless the funds are subject to the limitations,
19 prohibitions, and reporting requirements of the Act. 52 U.S.C. § 30125(e). The Commission has
20 concluded that BCRA applies to federal candidates’ recount funds because such funds would be
21 raised or spent “in connection with” a federal election. Advisory Opinion 2006-24 (National
22 Republican Senate Committee *et al.*) (“NRSC”) at 6. But “donations to a [f]ederal candidate’s

1 ‘recount fund’ [are] not . . . aggregated with contributions from those persons to the [f]ederal
2 candidate for the general election.” *Id.* Rather, federal candidates may establish a separate
3 recount account — subject to a separate contribution limit — that may be used to pay for certain
4 activities related to recounts and election contests. *See, e.g.*, Advisory Opinion 2006-24 (NRSC)
5 at 2 (stating that recount funds may be used for expenses “resulting from a recount, election
6 contest, counting of provisional and absentee ballots and ballots cast in polling places,” and
7 “post-election litigation and administrative-proceeding expenses concerning the casting and
8 counting of ballots during the [f]ederal election, fees for the payment of staff assisting the
9 recount or election contest efforts, and administrative and overhead expenses in connection with
10 recounts and election contests”); *see also* Advisory Opinion 2010-18 (Minnesota Democratic-
11 Farmer-Labor Party) at 1 (concluding that state party committee may use recount funds “to pay
12 for recount activities relating to future recounts”).

13 The Commission has explained that recount activities paid for by the recount fund “must
14 have no relation to campaign activities,” and that “any resulting surplus of funds may not be used
15 in any manner that would constitute a contribution or expenditure under the Act or regulations.”
16 *See* Advisory Opinion 2010-14 (DSCC) at 5 (quoting Advisory Opinion 1978-92 (Miller)). The
17 Commission, however, has not previously addressed whether a candidate may dispose of excess
18 recount funds by donating the funds to a charity or transferring the funds to a national party
19 committee. Under the circumstances presented here, the Commission concludes that the
20 proposed use of excess recount funds is consistent with the Act for two reasons: (1) the donated
21 or transferred funds would not be used for the purpose of influencing a federal election, and thus
22 would not constitute a contribution or expenditure under the Act or Commission regulations, and

1 (2) the excess recount funds would be disposed of in a manner similar to how candidates may
2 permissibly dispose of excess campaign funds under the Act.

3 First, neither the proposed donation to a 501(c)(3) charity nor the transfer to the DSCC
4 recount account would be used for the purpose of influencing a federal election, and thus would
5 not violate the prohibition on using recount funds for contributions and expenditures as
6 explained above. Regarding the proposed charitable donation, because the Committee would
7 transfer excess recount funds exclusively to charitable organizations that are prohibited from
8 participating or intervening in any political campaign under section 501(c)(3) of the Internal
9 Revenue Code, *see* 26 U.S.C. § 501(c)(3), the excess recount funds donated to such charitable
10 organizations could not be used to influence a federal election. Similarly, the DSCC recount
11 account may be used only for certain purposes, namely expenses related to election recounts,
12 contests, and other legal proceedings. 52 U.S.C. § 30116(a)(9)(C). Statements by House and
13 Senate leaders at the time of enactment of section 30116(a)(9)(C) indicate that “Commission
14 precedent” on raising and spending of recount funds would apply to national party committee
15 accounts such as the DSCC’s recount account. *See* 160 Cong. Rec. H9286 (daily ed. Dec. 11,
16 2014) (statement of Rep. Boehner); 160 Cong. Rec. S6814 (daily ed. Dec. 13, 2014) (statement
17 of Sen. Reid). Given that Commission precedent prohibits the use of recount funds for campaign
18 activities, *see* Advisory Opinion 2010-14 (DSCC) at 5, any funds that the Committee transfers to
19 the DSCC recount account also could not be used for the purpose of influencing a federal
20 election.

21 Second, the proposed donation and transfer of excess recount funds would be consistent
22 with how candidates may dispose of excess campaign funds under the Act. The Act provides

1 that a “contribution accepted by a candidate” may be donated “to an organization described in
2 section 170(c) of title 26,” including certain organizations under 501(c)(3) of the Internal
3 Revenue Code, 52 U.S.C. § 30114(a)(3); *see* 11 C.F.R. § 113.2(b), “unless the candidate receives
4 compensation from the organization before the organization has expended the entire amount
5 donated for purposes unrelated to his or her personal benefit,” 11 C.F.R. § 113.1(g)(2).
6 Similarly, federal candidates may transfer campaign funds without limit to a national party
7 committee such as the DSCC. *See* 52 U.S.C. § 30114(a)(4); 11 C.F.R. § 113.2(c). Here, the
8 Committee plans to donate funds to a 501(c)(3) charity from which Senator Nelson would
9 receive no compensation; Senator Nelson thus would not personally benefit from the proposed
10 transaction. The proposed transfer to the DSCC recount account also would be consistent with
11 the Act’s long recognized permission for candidates to transfer unlimited funds to national party
12 committees. Given that Congress has expressly allowed federal candidates to dispose of excess
13 campaign funds in similar circumstances, the Commission discerns no reason to apply a different
14 standard here.

15 In sum, because the excess recount funds donated to a 501(c)(3) charity or transferred to
16 the DSCC recount account would not be used for the purpose of influencing a federal election,
17 and the donation or transfer would be consistent with how candidates may dispose of excess
18 campaign funds in similar circumstances, the Commission concludes that the Committee’s
19 proposed donation or transfer would be consistent with the Act and Commission regulations.

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

22 *See* 52 U.S.C. § 30108. The Commission emphasizes that, if there is a change in any of the facts

1 or assumptions presented, and such facts or assumptions are material to a conclusion presented in
2 this advisory opinion, then you may not rely on that conclusion as support for its proposed
3 activity. Any person involved in any specific transaction or activity which is indistinguishable in
4 all its material aspects from the transaction or activity with respect to which this advisory
5 opinion is rendered may rely on this advisory opinion. *See* 52 U.S.C. § 30108(c)(1)(B). Please
6 note that the analysis or conclusions in this advisory opinion may be affected by subsequent
7 developments in the law including, but not limited to, statutes, regulations, advisory opinions,
8 and case law. Any advisory opinions cited herein are available on the Commission's website.

9 On behalf of the Commission,

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12
13 Ellen L. Weintraub
14 Chair