



FEDERAL ELECTION COMMISSION

Washington, DC 20463

MEMORANDUM

TO: The Commission

FROM: Commission Secretary's Office ^{DCB}

DATE: March 28, 2019

SUBJECT: Comments on Draft AO 2019-02 Draft A
(Bill Nelson for Senate)

Attached are comments received from Marc E. Elias, Esq., Graham M. Wilson, and Rachel L. Jacobs, Esq. on behalf of the requestor. This matter is on today's March 28, 2019 Open Meeting Agenda.

Attachment

March 27, 2019

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The Honorable Ellen L. Weintraub
Federal Election Commission
1050 First Street NE
Washington, DC 20463

Re: Advisory Opinion Request 2019-02, Draft A and Comments on Advisory Opinion Request 2019-02, Draft A by the Campaign Legal Center

Dear Chairwoman Weintraub,

We write as counsel to Bill Nelson for Senate (the “Committee”) to urge the Commission to adopt Draft Advisory Opinion A (“Draft A”) in Advisory Opinion Request 2019-02 (the “Request”) and to respond to comments submitted today by the Campaign Legal Center (the “CLC”).

Draft A concludes that the Committee may make a donation of excess funds in its recount account (its “excess recount funds”) to a charitable organization or transfer such funds to the DSCC’s recount/legal proceedings account. This is the correct approach, mandated by the Federal Election Campaign Act of 1971, as amended (the “Act”), and Commission regulations and guidance. The CLC agrees that the Committee may donate its excess recount funds to a charitable organization but questions Draft A’s conclusion that the Committee may also transfer its excess recount funds to the DSCC’s recount/legal proceedings account. CLC’s objections are absolutely without merit, ignore clear legislative intent, and rely on facts that are completely inapposite to the Committee’s request.

As Commission advisory opinions have explained, the funds in the Committee’s recount account “may be used to pay for certain activities related to recounts and election contests”¹ and surplus funds “may not be used in any manner that would constitute a contribution or expenditure under the Act or regulations.”² The legislative history of the law creating the DSCC’s recount/legal proceedings account clearly confirms that the law did not roll back any of this permissible activity. That law is also clear that expenditures out of the recount/legal proceedings account “are not for the purpose of influencing Federal elections.”³ Accordingly, a transfer of excess recount funds into the DSCC’s recount/legal proceedings account “would not violate the

¹ Draft A at page 4 (citing Adv. Op. 2004-24, 2010-18).

² Draft A at page 4 (citing Adv. Op. 2010-14).

³ 160 Cong. Rec. S6814 (daily ed. Dec. 13, 2014) (statement of Sen. Reid); 160 Cong. Rec. H9286 (daily ed. Dec. 11, 2014) (statement of Rep. Boehner).

prohibition on using recount funds for contributions and expenditures.”⁴ The Committee’s proposed transfer of its surplus of recount funds is absolutely consistent with precedent.

The CLC apparently takes issue with Congress’s decision to create the recount/legal proceedings account. The CLC says “[t]he statutory language suggests that funds in the legal proceedings account might be used for purposes beyond recount activities, including ‘other legal proceedings.’”⁵ Indeed, this is exactly what the statutory language clearly states. When drafting the law creating this account, Congress made clear that it may “also” be used “for costs, fees, and disbursements associated with other legal proceedings.”⁶ As stated above, Congress also plainly noted that that all expenditures made from this account — be it for recount expenses or other legal proceedings expenses— “are not for the purpose of influencing Federal elections.”⁷ This is precisely why Congress exempted these expenses from the coordinated party expenditure limits under the law.⁸ Congress intended to permit the recount/legal proceedings account to be used to make expenditures for “other legal proceedings,” some of which may extend beyond recounts and election contests, and in doing so, also clearly indicated that such expenditures are not “for the purpose of influencing an election.”⁹

The CLC also questions whether the funds in the recount/legal proceedings account of the National Republican Senatorial Committee (the “NRSC”), National Republican Congressional Committee (the “NRCC”), the Republican National Committee (the “RNC”), and the Democratic National Committee (the “DNC”) are being spent in compliance with the statute. This question has nothing to do with the Committee’s Request. Even if the question of whether a national political party committee is properly spending out of its recount/legal proceedings account is at all relevant to the Request, which it is not, the CLC’s comment does not make any reference to how the DSCC makes its expenditures in its recount/legal proceedings account. Instead, the CLC points to examples of spending that it deems questionable by the NRSC, NRCC, RNC, and DNC. Undersigned counsel cannot speak to the nature of the NRSC, NRCC, and RNC expenditures, though many appear to be for fundraising expenses for the recount/legal proceeds account, but the DNC informed the Committee that all of the expenditures questioned by the CLC were for either canvassing of the recounts of the 2016 presidential election or litigation work product and thus, absolutely are permissible expenditures by the DNC.

⁴ Draft A at page 5.

⁵ Comment by Campaign Legal Center, Adv. Op. 2019-02 Draft A (Mar. 27, 2019).

⁶ 160 Cong. Rec. S6814 (daily ed. Dec. 13, 2014) (statement of Sen. Reid); 160 Cong. Rec. H9286 (daily ed. Dec. 11, 2014) (statement of Rep. Boehner).

⁷ 160 Cong. Rec. S6814 (daily ed. Dec. 13, 2014) (statement of Sen. Reid); 160 Cong. Rec. H9286 (daily ed. Dec. 11, 2014) (statement of Rep. Boehner).

⁸ 160 Cong. Rec. S6814 (daily ed. Dec. 13, 2014) (statement of Sen. Reid); 160 Cong. Rec. H9286 (daily ed. Dec. 11, 2014) (statement of Rep. Boehner); *see* 52 U.S.C. § 30116(d).

⁹ 160 Cong. Rec. S6814 (daily ed. Dec. 13, 2014) (statement of Sen. Reid); 160 Cong. Rec. H9286 (daily ed. Dec. 11, 2014) (statement of Rep. Boehner).

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If the Commission would like to provide additional guidance on the permissible scope of expenditures of the party recount/legal proceeding account, it has numerous options at its disposal to do so. In fact, undersigned counsel submitted a request on January 8, 2016 specifically requesting that the Commission adopt new, and revise its current, regulations to implement amendments to the Act that established the authority of the national political party committees to create recount/legal proceedings accounts.¹⁰ However, the advisory opinion process to a campaign committee is not the forum for the Commission to do so. The specific CLC's proposal supported by the CLC is, moreover, contrary to the very clear statute and Congressional intent.

The Committee is entitled to an advisory opinion from the Commission based on the current law, regulations, and Commission precedent. For the reasons stated above and, in the Request, the Commission should adopt Draft A, which accurately applies the Act and Commission regulations and guidance to the Committee's proposed actions.

Very truly yours,

/s/

Marc E. Elias
Graham M. Wilson
Rachel L. Jacobs

¹⁰ See Petition for Rulemaking from Marc E. Elias on behalf of Perkins Coie LLP (Jan. 8, 2016).

From: [Jacobs, Rachel L. \(Perkins Coie\)](#)
To: [AQ](#)
Cc: [Elias, Marc \(Perkins Coie\)](#); [Wilson, Graham M. \(Perkins Coie\)](#); [CommissionerPetersen \(External\)](#); [Steven T. Walther](#); [CommissionerHunter \(External\)](#); [FEC Chair Ellen L. Weintraub](#); [Joseph Wenzinger](#); [Neven Stipanovic](#); [Robert Knop](#)
Subject: Comments on Advisory Opinion 2019-02, Draft A
Date: Wednesday, March 27, 2019 11:12:44 PM
Attachments: [Bill Nelson for Senate AOR 2019-2 Comments.pdf](#)
[ATT00001.htm](#)

Dear Commissioners,

Please find attached comments on behalf of Bill Nelson for Senate regarding Draft A for Advisory Opinion 2019-02.

Thanks.

Rachel Jacobs | Perkins Coie LLP

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