

RECEIVED  
FED MAIL CENTER

700 13<sup>th</sup> Street, NW  
Suite 600  
Washington, DC 20005-3960

+1.202.654.6200  
+1.202.654.6211  
perkinscoie.com

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Marc Erik Elias  
MElias@perkinscoie.com  
D. +1.202.434.1609  
F. +1.202.654.9126

**BY HAND DELIVERY**

Lisa J. Stevenson  
Acting General Counsel  
Office of General Counsel  
Federal Election Commission  
1050 First Street NE  
Washington, DC 20463

2019 JAN 30 PM 2:02  
OFFICE OF  
GENERAL COUNSEL

**Re: Advisory Opinion Request**

Dear Ms. Stevenson:

Pursuant to 52 U.S.C. § 30108, we seek an advisory opinion on behalf of Senator Bill Nelson and his authorized committee, Bill Nelson for Senate (the “Committee”). The Committee seeks confirmation that it may use excess funds in its recount account (its “excess recount funds”) to make a donation to a charitable organization and/or a transfer to the DSCC’s recount/legal proceedings account established pursuant to 52 U.S.C. § 30116(a)(9)(C).

**A. Factual Discussion**

Senator Bill Nelson was the Democratic candidate for the Florida Senate seat in 2018. On election night, the race between Senator Nelson and his Republican opponent, Governor Rick Scott, was too close to call.<sup>1</sup> Pursuant to Florida law, between Saturday, November 10, 2018 and Sunday, November 18, 2018, Senator Nelson participated in both machine and hand recounts as well as more than a dozen lawsuits directly related to the counting and recounting of ballots. Pursuant to Federal Election Commission (“Commission” or “FEC”) Advisory Opinion 2006-24, Senator Nelson established a separate account of the Committee to pay for the costs associated with the two recounts in his race.<sup>2</sup> The Committee raised separate funds into this account, subject to the limits, source restrictions, and reporting requirements of the Federal Election Campaign Act of 1971, as amended (the “Act”). The Committee now has excess recount funds in its account and Senator Nelson is currently winding up the Committee’s operations. The Committee would like to use its excess recount funds to make a donation to a charitable organization and/or

<sup>1</sup> See Steve Contorno, *Scott-Nelson Race for U.S. Senate Seat Could Be Headed for a Recount*, Miami Herald (Nov. 7, 2018).

<sup>2</sup> FEC Adv. Op. 2006-24.

a transfer to the DSCC's recount/legal proceedings account. The Committee would not donate to a charitable organization from which Senator Nelson would receive any compensation.

The DSCC's recount/legal proceedings account was created pursuant to federal law and is used to "defray expenses incurred with respect to the preparation for and the conduct of election recounts and contests and other legal proceedings."<sup>3</sup>

## **B. Legal Analysis**

Neither the Act nor the FEC's regulations expressly addresses how an authorized candidate committee may use excess recount funds. In 1978, the FEC opined that because of "the special treatment and exemption accorded funds received and spent for recount purposes, any resulting surplus of funds may not be used in any manner that would constitute a contribution or expenditure under the Act or regulations."<sup>4</sup> However, "[s]uch funds could be used for purposes unrelated to Federal elections subject to any other applicable Federal or State statutes."<sup>5</sup> In Advisory Opinion 2006-24, when the requestors asked whether "a Federal candidate...[may] retain excess funds in the recount funds for future elections, or [whether] the funds [must] be disposed of in some manner,"<sup>6</sup> the Commission declined to answer the question, finding that it was "speculative" and "hypothetical."<sup>7</sup> The Commission encouraged candidates with excess recount funds to resubmit the question with specific plans on how to use the funds.<sup>8</sup> Since then, the FEC has not opined on how a candidate may spend excess recount funds.<sup>9</sup>

The Committee now seeks confirmation that it may use its excess recount funds to make a donation to a charitable organization that will not compensate Senator Nelson and/or a transfer to the DSCC's recount/legal proceedings account.

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<sup>3</sup> 52 U.S.C. § 30116(9)(C).

<sup>4</sup> FEC Adv. Op. 1978-92 (superseded in part on other grounds).

<sup>5</sup> *Id.*

<sup>6</sup> FEC Adv. Op. 2006-24.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> In 2009, a congressional candidate submitted an advisory opinion request with specific plans to dispose of excess recount funds by refunding the money to the donors, but the candidate withdrew his request before the Commission issued an opinion. FEC Adv. Op. Request 2009-05 (withdrawn). In 2018, a congressional candidate asked whether one of his principal campaign committees could transfer excess recount funds to a revived former principal campaign committee to repay an outstanding debt that the revived committee owed to the candidate. The FEC did not approve the draft opinion with the required four affirmative votes. *See* FEC Adv. Op. Request 2018-08; Letter to Messrs. Bell and Martin from Neven F. Stipanovic, Acting Associate General Counsel, FEC Adv. Op. Request 2018-08 (Aug. 2, 2018).

**1. The Committee may donate its excess recount funds to a charitable organization from which Senator Nelson will not receive compensation.**

The Commission's regulations expressly permit "funds in a campaign account" or in "an account of the officeholder's principal campaign committee or other authorized committee" to be donated to a charity.<sup>10</sup> Similarly, the Commission's personal use regulations permit "campaign funds" or "assets" to be donated to a charitable organization "unless the candidate receives compensation from the organization before the organization has expended the entire amount donated for purposes unrelated to his or her personal benefit."<sup>11</sup>

When the Commission approved the use of recount funds that were subject to the Act's limitations, prohibitions, and reporting requirements created by the Bipartisan Campaign Reform Act, it explained that "a [f]ederal candidate [could] establish a recount fund as...a separate bank account of the candidate's authorized committee."<sup>12</sup> The Committee's account is a separate bank account of Senator Nelson's authorized committee and thus, is "an account of [Senator Nelson's] principal campaign committee." The funds in that account are precisely "funds in a campaign account." As a result, it is permissible for the Committee to donate excess recount funds to a charitable organization from which Senator Nelson will not receive compensation.

Further, the Committee's proposed use of its excess recount funds to make a charitable donation is consistent with the FEC's guidance regarding the use of recount funds. As noted above, the FEC has explained that surplus recount funds "may not be used in any manner that would constitute a contribution or expenditure under the Act or regulations" and that "[s]uch funds could be used for purposes unrelated to Federal elections subject to any other applicable Federal or State statutes."<sup>13</sup> Both a "contribution" and an "expenditure" include any gift, loan, or payment of money, or anything of value for the purpose of influencing a federal election.<sup>14</sup> Because a charitable organization is prohibited from participating or intervening in any political campaign, donating excess recount funds to such an organization is not "for the purpose of influencing an election" or a contribution or expenditure. Further, because of the restriction on a charitable organization participating or intervening in any political campaign, donating excess recount funds to such an organization is also for purposes unrelated to federal elections.<sup>15</sup>

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<sup>10</sup> 11 C.F.R. § 113.2(b), 113.3(a).

<sup>11</sup> *Id.* § 113.1(g)(2).

<sup>12</sup> FEC Adv. Op. 2006-24.

<sup>13</sup> FEC Adv. Op. 1978-92 (superseded in part on other grounds).

<sup>14</sup> 52 U.S.C. § 30101(8)(A)(i), (9)(A)(i); 11 C.F.R. §§ 100.52(a), 100.111(a).

<sup>15</sup> 26 U.S.C. § 501(c)(3).

The Committee's proposal to donate excess recount funds to a charitable organization that will not compensate Senator Nelson is consistent with the basic principles in the Act, regulations, and Commission guidance, and thus, the FEC should approve it.

**2. The Committee may transfer its excess recount funds to the DSCC's recount/legal proceedings account.**

Similar to the regulation language discussed above for charitable donations, Commission regulations also expressly permit "funds in a campaign account" or in "an account of the officeholder's principal campaign committee or other authorized committee" to be used to make unlimited transfers to a national political party committee.<sup>16</sup> Because the Committee's excess recount funds are "funds in a campaign account," they can be used to make a transfer to the DSCC's recount/legal proceedings account.

Additionally, the Committee's proposal to transfer its excess recount funds to the DSCC's recount/legal proceedings account is harmonious with the purposes for which the funds were originally donated: to pay for recount-related expenses. The FEC's guidance outlines many proposed uses for recount funds, including to pay for:

- "[E]xpenses resulting from a recount, election contest, counting of provisional and absentee ballots and ballots cast in polling places;"<sup>17</sup>
- "[P]ost-election litigation and administrative-proceeding expenses concerning the casting and counting of ballots during the Federal election, fees for the payment of staff assisting the recount or election contest efforts, and administrative and overhead expenses in connection with recounts and election contests;"<sup>18</sup>
- Preparation expenses related to recounts and election contests such as "services of attorneys and staff who will prepare for the post-election period [by] conducting recount-related research;"<sup>19</sup>
- Expenses for "developing plans and budgets for anticipated recounts and election contents, and recruiting volunteers to engage in recounts;"<sup>20</sup>

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<sup>16</sup> 11 C.F.R. § 113.2(c), 113.3(a).

<sup>17</sup> FEC Adv. Op. 2006-24.

<sup>18</sup> *Id.*

<sup>19</sup> FEC Adv. Op. 2010-14.

<sup>20</sup> *Id.*

- Fundraising costs for soliciting donations to the recount fund;<sup>21</sup> and
- Other litigation unrelated to a recount.<sup>22</sup>

The FEC's guidance does not restrict the use of recount funds to one specific recount, or to the recount of the candidate for whose recount the funds were initially raised. Further, the FEC has said that recount funds raised in one election cycle may be used in subsequent election cycles.<sup>23</sup>

The DSCC's recount/legal proceedings account may also be used for all of these purposes from one election cycle to the next. Specifically, the DSCC's recount/legal proceedings account may be used to "defray expenses incurred with respect to the preparation for and the conduct of election recounts and contests and other legal proceedings."<sup>24</sup> In 2014, when drafting the law permitting the DSCC to create its recount account, Congress did "not intend[] to modify Federal Election Commission precedent permitting the raising and spending of funds by campaign or State or national party committees."<sup>25</sup> Thus, the FEC's guidance on recount funds applies equally to candidate recount funds, created pursuant to Commission advisory opinions, and the DSCC's recount/legal proceedings account, created pursuant to 52 U.S.C. § 30116(a)(9)(C). Because the accounts may be used for the same purposes, the Committee's proposal to transfer excess recount funds to the DSCC's recount/legal proceedings account should be permissible.

Additionally, similar to how the funds raised into a recount fund are exempt from the definition of "contribution" because they are not for the purpose of influencing a federal election, funds raised in the DSCC's recount/legal proceedings account are not subject to the coordinated party expenditure limits under the Act.<sup>26</sup> Congress exempted the DSCC's recount/legal proceedings account from those limits specifically because "recount and legal proceeding expenses[] are not for the purpose of influencing Federal elections."<sup>27</sup> Thus, Congress intended the principles underlying the FEC's decisions in the advisory opinions on recount funds to apply to the DSCC's recount/legal proceedings account as well. Because both accounts may not be used for the purpose of influencing a federal election, a transfer from the Committee's recount fund to the

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<sup>21</sup> *Id.*

<sup>22</sup> FEC Adv. Op. 2011-03. In this advisory opinion, the FEC said the requesters (national party committees) could use their recount funds to pay for the costs of a lawsuit seeking disgorgement of funds under Texas law that were considered to be proceeds of a Ponzi scheme. *Id.*; Concurring Statement of Commissioner Ellen L. Weintraub, FEC Adv. Op. 2011-03 (Apr. 11, 2011).

<sup>23</sup> See FEC Adv. Op. 2010-18.

<sup>24</sup> 52 U.S.C. § 30116(a)(9)(C).

<sup>25</sup> 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).

<sup>26</sup> 52 U.S.C. § 30116(d)(5).

<sup>27</sup> 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).

Lisa J. Stevenson  
January 29, 2019  
Page 6

DSCC's recount/legal proceedings account would also be clearly for purposes unrelated to federal elections.<sup>28</sup>

For similar reasons, the Committee's proposal to transfer its excess recount funds to the DSCC's recount/legal proceedings account is not considered a contribution or expenditure under the Act. Additionally, the provision of the Act and the FEC's regulations discussing a committee's transfer of funds to a national party committee specifically uses the term "transfer" rather than contribution or expenditure. Thus, the Committee's proposal to transfer its excess recount funds, which may not be used for the purpose of influencing federal elections, is permissible.<sup>29</sup>

Because the Committee's proposed use of its excess recount funds is consistent with the FEC's treatment of excess funds for general accounts and the permissible uses and purposes of recount funds as outlined in the Commission's guidance, the Committee should be able to use its excess recount funds to make a donation to a charitable organization that does not compensate Senator Nelson and/or a transfer to the DSCC's recount/legal proceedings account.

### **C. Conclusion**

We respectfully request that the Commission confirm that the Committee may use excess recount funds to make a charitable donation to any entity that does not compensate Senator Nelson and/or a transfer to the DSCC's recount/legal proceedings account.

Very truly yours,



Marc E. Elias  
Rachel L. Jacobs

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<sup>28</sup> See FEC Adv. Op. 1978-92 (superseded in part on other grounds).

<sup>29</sup> See *id.*