



FEDERAL ELECTION COMMISSION
Washington, DC 20463

July 15, 2021

ADVISORY OPINION 2021-06

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Dear Messrs. Borden and Brown:

We are responding to your advisory opinion request on behalf of United States Representative Robin Kelly and the Democratic Party of Illinois (“the state party”) concerning the application of the Federal Election Campaign Act, 52 U.S.C. §§ 30101-45 (the “Act”), and Commission regulations to Congresswoman Kelly’s election to serve as chair of the Democratic State Central Committee (“central committee”), which governs the state party. The requestors ask whether adopting any one of three proposed governance structures during Congresswoman Kelly’s tenure as chair would permit the state party to raise and spend funds through its non-federal account in amounts and from sources prohibited by the Act but permitted under Illinois law. The requestors further ask whether the Congresswoman’s name and title as chair may be included on the letterhead of solicitations for the non-federal account.

The Commission concludes that the state party may raise funds in amounts and from sources prohibited by the Act but permitted under Illinois law through its non-federal account if the non-federal account is administered by a special committee without the review or approval of Congresswoman Kelly and Congresswoman Kelly has no role in the appointment of any member of the special committee. Under those circumstances, the non-federal account would not be directly or indirectly established, financed, maintained or controlled by, or acting on behalf of, Congresswoman Kelly. The Commission further concludes that Congresswoman Kelly’s name and title as chair must not be included on the letterhead of any solicitation that solicits funds in amounts and from sources prohibited by the Act because using her name and title in that manner

would identify the solicitation as being sent on Congresswoman Kelly's behalf in violation of the Act's soft money prohibition.

Background

The facts presented in this advisory opinion are based on your letter dated May 5, 2021, email dated May 16, 2021, and the central committee bylaws provided with your letter.

The Democratic Party of Illinois is the state political party for the Democratic Party in Illinois. Advisory Opinion Request ("AOR") at AOR001. The state party is governed by the central committee, which consists of 36 members, two from each of the state's 18 congressional districts, directly elected by the voters in those districts. AOR001, AOR011. Among other responsibilities, the central committee is required to: (1) "promote, and aid and assist in, the election of all candidates for public office on the ticket of the Democratic Party in all general elections in the State," (2) develop and maintain public relations for the party, (3) "devise and execute ways and means of financing all activities and to cooperate and work with other segments of Party organization at national and local levels in the development of an integrated and coordinated finance plan for the Party," and (4) plan and conduct the state convention and consider the state convention platform. AOR011-12.

On March 3, 2021, Congresswoman Robin Kelly, a member of the U.S. House of Representatives, was elected chair of the central committee. AOR001. Under central committee bylaws, all other officers are members of the central committee and designated by the chair. AOR013. Under the bylaws, the chair is "chief executive officer" for the central committee with "full authority to exercise the executive powers" of the central committee. *Id.* She is authorized to appoint and dismiss "any and all personnel or staff" of the central committee. *Id.* Among other duties, the chair presides over all central committee meetings and, under current bylaws, "serve[s] ex-officio on all committees of the Central Committee with the right to vote." *Id.* The chair is authorized to establish standing committees, determine the number of appointments for the standing committees, and appoint the members of such committees from the membership of the central committee. AOR014.

The state party maintains both a federal account, subject to the Act's contribution limits, source prohibitions, and reporting requirements, and a non-federal account. AOR003.¹ The non-federal account "long predates" Congresswoman Kelly's election as chair. AOR004 n.20. Illinois law allows the non-federal account to receive contributions that exceed the Act's contribution limits and permits the non-federal account to receive contributions from corporations and labor unions, which are prohibited from making

¹ The state party first registered its federal account with the Commission in 1983. See <https://www.fec.gov/data/committee/C00167015/?tab=filings&cycle=1984>.

contributions under the Act. 10 ILCS 5/9-8.5(c), (g); *see* State of Illinois Board of Elections, Contributions Limits Per Election Cycle at 1 (Jan. 1, 2021);² AOR003.

The Act prohibits a federal officeholder or an “entity directly or indirectly established, financed, maintained or controlled by or acting on behalf of 1 or more . . . individuals holding federal office” from soliciting, receiving, directing, transferring, or spending funds in connection with “any election other than an election for Federal office,” unless the funds do not exceed the Act’s contribution limits and are not from sources prohibited by the Act. 52 U.S.C. § 30125(e)(1)(B). Given this prohibition, the state party and Congresswoman Kelly propose alternate “governance structures” intended to provide that the congresswoman is “appropriately insulated” from the state party’s non-federal account activities. AOR001-02. Requestors ask whether adopting any one of the proposed structures would be sufficient to permit Congresswoman Kelly to serve in her position as chair of the central committee while still allowing the state party to raise and spend funds through its non-federal account in amounts and from sources prohibited by the Act but permitted under Illinois law. AOR002.

For each proposal, the central committee would amend its bylaws to reflect the limits on the chair’s authority, and Congresswoman Kelly would be required to annually certify compliance with those restrictions on her conduct. AOR007-08. Policies would also require annual training and establish recordkeeping requirements for the individuals charged with administering the governance structure adopted. AOR008.

For all of the proposed options, Congresswoman Kelly would not supervise or review the work of any officer or employee with respect to that person’s work on non-federal account matters and would be prohibited from terminating an individual’s employment, or otherwise taking adverse employment action against an officer or employee of the state party, for reasons related to that person’s non-federal account work. AOR007-08. Congresswoman Kelly would retain the general authority granted by the bylaws to hire staff and appoint officers to the central committee and dismiss staff who work on the non-federal account for reasons unrelated to their non-federal account work. AOR007-08, AOR013-14.

Under all three proposed options, Congresswoman Kelly would not make any contributions or transfers to the non-federal account from her personal funds or her congressional campaign and would not solicit or receive funds on behalf of the non-federal account. AOR007-08; AOR Supplement (“AOR Supp.”) at 001. She would have “no role” with respect to non-federal account “fundraising or spending, and would be prevented from exercising oversight or influence over” the non-federal account’s management or governance. AOR009. Congresswoman Kelly would, however, solicit funds on behalf of the state party’s federal account. AOR Supp. at 001. Under all of the proposals, Congresswoman Kelly would retain authority to endorse and campaign for non-federal candidates. *Id.*

² <https://www.elections.il.gov/downloads/campaigndisclosure/pdf/contributionssummary.pdf>

A. Option One: Special Committee

Under proposed option one, the state party would establish a special committee, consisting of individuals who are not federal candidates or officeholders, to administer the non-federal account. AOR007. The special committee “would be responsible for the [non-federal account]’s fundraising (including solicitations), and spending (including decisions related to contributions by the [non-federal account], advertising on behalf of candidates, and transfers),” without review or approval by Congresswoman Kelly. *Id.* The special committee would further be authorized to delegate responsibilities to individuals associated with the state party who are not federal candidates or officeholders. *Id.*

B. Option Two: Vice Chair

Under proposed option two, a vice chair would administer the non-federal account and have “complete responsibility for the [non-federal account]’s operations and activities, without the review or approval of Congresswoman Kelly.” *Id.* The vice chair “would be responsible for the [non-federal account]’s fundraising (including solicitations), and spending (including decisions related to contributions by the [non-federal account], advertising on behalf of candidates, and transfers).” AOR008.

C. Option Three: Recusal

Under proposed option three, Congresswoman Kelly would recuse herself from matters involving the non-federal account, including: “fundraising, including solicitations” and “spending, including decisions related to contributions by the [non-federal account], advertising on behalf of candidates, and transfers.” AOR008.

Questions Presented

1. *Would option one be sufficient to permit Congresswoman Kelly to serve in her position as chair of the central committee without precluding the state party from raising and spending non-federal funds through the non-federal account? If not, would option one be sufficient if the bylaws provided that a majority of special committee members would not be appointed to the special committee by the chair, but instead would automatically be members of the special committee by virtue of holding a specific office not appointed by the chair (e.g., President or Minority Leader of the Illinois State Senate, or the Speaker or Minority Leader of the Illinois House of Representatives, as applicable)?*

2. *Would option two be sufficient to permit Congresswoman Kelly to serve in her position as chair of the central committee without precluding the state party from raising and spending non-federal funds through the non-federal account?*

3. *Would option three be sufficient to permit Congresswoman Kelly to serve in her position as chair of the central committee without precluding the state party from raising and spending non-federal funds through the non-federal account?*

4. *If the Commission finds that one of the three options is sufficient to permit Congresswoman Kelly to serve in her position as chair without precluding the state party from raising and spending non-federal funds through the non-federal account, may the chair be included on state party letterhead for solicitations on behalf of the non-federal account, or would the state party be required to have separate letterheads for the federal and non-federal accounts?*

Legal Analysis

1. *Would option one be sufficient to permit Congresswoman Kelly to serve in her position as chair of the central committee without precluding the state party from raising and spending non-federal funds through the non-federal account? If not, would option one be sufficient if the bylaws provided that a majority of special committee members would not be appointed to the special committee by the chair, but instead would automatically be members of the special committee by virtue of holding a specific office not appointed by the chair (e.g., President or Minority Leader of the Illinois State Senate, or the Speaker or Minority Leader of the Illinois House of Representatives, as applicable)?*

Under the circumstances proposed, the non-federal account would not be an entity directly or indirectly established, financed, maintained or controlled by, or acting on behalf of, Congresswoman Kelly if the non-federal account is administered by a special committee without the review or approval of Congresswoman Kelly and Congresswoman Kelly has no role in the appointment of any member of the special committee. Under those circumstances, the Congresswoman would have no control over the appointment of members of the special committee who administer the non-federal account and no personnel control over any officer or employee related to their work on the non-federal account. As a result, the state party could continue to raise and spend funds through its non-federal account in amounts and from sources prohibited by the Act but permitted under Illinois law.

Under the Act, as amended by the Bipartisan Campaign Reform Act of 2002 (“BCRA”), a federal officeholder or an “entity directly or indirectly established, financed, maintained or controlled by or acting on behalf” of a federal officeholder shall not:

- (B) solicit, receive, direct, transfer, or spend funds in connection with any election other than an election for Federal office or disburse funds in connection with such an election unless the funds—
 - (i) are not in excess of the amounts permitted with respect to contributions to candidates and political committees . . . and
 - (ii) are not from sources prohibited by [the] Act from making contributions in connection with an election for Federal office.

52 U.S.C. § 30125(e)(1)(B); *see also* 11 C.F.R. § 300.62. This “soft money” prohibition was one of the “central” provisions of BCRA and “designed to address Congress’ concerns about the increasing use of soft money . . . to influence federal elections.” *Shays v. FEC*, 528 F.3d 914, 918 (D.C. Cir. 2008) (“*Shays III*”) (internal quotations omitted).³

To determine whether a federal officeholder directly or indirectly established, finances, maintains, or controls an entity, the Commission examines a non-exclusive list of ten factors set forth in 11 C.F.R. § 300.2(c)(2).⁴ Relevant here, the Commission considers whether a federal officeholder, directly or through an agent, does any of the following: (1) “has the authority or ability to direct or participate in the governance of the entity through provisions of constitutions, bylaws, contracts, or other rules, or through formal or informal practices or procedures”; (2) “has the authority or ability to hire, appoint, demote, or otherwise control the officers, or other decision-making employees or members of the entity”; (3) “provides funds or goods in a significant amount or on an ongoing basis to the entity, such as through direct or indirect payments for administrative, fundraising, or other costs”; (4) “causes or arranges for funds in a significant amount or on an ongoing basis to be provided to the entity”; or (5) “had an active or significant role in the formation of the entity.” *Id.*⁵ The Commission considers the regulatory factors “in the context of the overall relationship between the sponsor and the entity to determine whether the presence of any factor or factors is evidence that the sponsor directly or indirectly established, finances, maintains, or controls the entity.” *Id.*

In other circumstances involving BCRA’s soft money prohibition, the Commission determined that a federal candidate may serve as honorary chair of publicly funded state candidates’ campaigns where the campaigns would not engage in any further fundraising. Advisory Opinion 2007-21 (Holt) at 3. On the other hand, where a federal officeholder established a political organization that undertakes activity in connection with an election other than an election for federal office, the political organization “must not solicit, receive, direct, transfer, spend, or disburse funds in excess of the amounts permitted with respect to contributions to candidates and political committees or from prohibited sources under the Act.” Advisory Opinion 2003-12 (Stop Taxpayer Money for Politicians Committee *et al.*) at 11. The prohibition “applies regardless of whether [a fund] is established as a separate bank account of a candidate’s authorized committee or a separate entity.” Advisory Opinion 2006-24 (National Republican Senatorial Committee

³ The statute sets forth three exceptions to the soft money prohibition, none of which apply to this request. *See* 52 U.S.C. § 30125(e)(2)-(4).

⁴ These factors are adapted from the Commission’s regulation at 11 C.F.R. § 100.5(g), which provides factors for determining whether committees are affiliated. *See* Prohibited and Excessive Contributions: Non-Federal Funds or Soft Money, 67 Fed. Reg. 49,064, 49,083-84 (July 29, 2002) (explaining Commission’s decision to adopt affiliation factors).

⁵ Other regulatory factors, such as “[w]hether a sponsor, directly or through its agent, owns controlling interest in the voting stock or securities of the entity,” 11 C.F.R. § 300.2(c)(2)(i), are not relevant to the circumstances of this request.

et al.) at 4 (recount fund established by federal officeholder subject to soft money prohibition).

The Commission has not previously considered under what circumstances a federal officeholder controls the non-federal account of a state political party.⁶ The Commission concludes, based on the overall relationship between Congresswoman Kelly and the state party and the specific proposals provided by requestors, that if the non-federal account is administered by a special committee without the review or approval of Congresswoman Kelly and Congresswoman Kelly has no role in the appointment of any member of the special committee then the non-federal account is not an entity directly or indirectly established, financed, maintained or controlled by, or acting on behalf of, Congresswoman Kelly.

This conclusion applies only to the circumstance presented by this advisory opinion request: the election of a federal officeholder to serve as the chair of a state party and the party's adoption of the specific governance structure discussed below. This advisory opinion does not address and is not applicable to the activities of other types of committees or entities, including, but not limited to, federal hybrid political action committees.

A. Governance

The first relevant factor is whether Congresswoman Kelly, or her agent, “has the authority or ability to direct or participate in the governance of the [non-federal account] through provisions of constitutions, bylaws, contracts, or other rules, or through formal or informal practices or procedures.” 11 C.F.R. § 300.2(c)(2)(ii). Authority under bylaws to appoint those who oversee an entity, such as a board of directors, is relevant to this element. Advisory Opinion 2016-02 (Enable Midstream Services) at 7. Under this proposed option, the bylaws would be amended to remove Congresswoman Kelly's authority to directly oversee the non-federal account. AOR007. Instead, a special committee “consisting entirely of individuals who are not Federal candidates or officeholders . . . would have complete responsibility” for the non-federal account's activities “without the review or approval of Congresswoman Kelly.” *Id.*

This request concerns the appointment — by a federal officeholder who is prohibited by the Act from directly or indirectly managing a non-federal account — of special committee members to govern the non-federal account. Given Congresswoman Kelly's control over the state party generally, the Commission concludes that the governance factor weighs against finding Congresswoman Kelly controls the non-federal

⁶ Although requestors ask the Commission to evaluate their request using precedent specific to the Act's foreign national prohibition, *see* AOR008, the Commission is bound to evaluate the request under the regulations it has adopted to implement the soft money prohibition. The courts have made clear that the Commission lacks authority to create additional exceptions to the soft money prohibition beyond those explicitly included in the statute. *See Shays III*, 528 F.3d at 933 (“when Congress wanted to create an exception to the ban on federal candidates soliciting soft money, it did so explicitly”).

account only if Congresswoman Kelly has no role in the appointment of any member of the special committee that administers the non-federal account. If, on the other hand, the congresswoman retains the authority to appoint even a minority of the members of the special committee then this factor weighs in favor of finding that Congresswoman Kelly exercises indirect control over the non-federal account.⁷

B. Personnel

The second relevant factor is whether Congresswoman Kelly, or her agent, “has the authority or ability to hire, appoint, demote, or otherwise control the officers, or other decision-making employees or members of the” non-federal account. 11 C.F.R. § 300.2(c)(2)(iii). Under this option, the bylaws would be amended to prevent Congresswoman Kelly from supervising the work of any central committee officer or employee with respect to that person’s work on non-federal account matters, and she would further be prohibited from terminating an employee’s employment or otherwise taking adverse action based on an employee’s work on such matters. AOR007. Because Congresswoman Kelly would be restricted from supervising or taking adverse personnel actions against any officer or employee related to their work on the non-federal account, this factor weighs against finding that Congresswoman Kelly controls the non-federal account.

C. Provision of Funds or Goods or Arranging Provision of Funds or Goods

The third and fourth relevant factors are whether Congresswoman Kelly, or her agent, “provides funds or goods in a significant amount or on an ongoing basis to the [non-federal account], such as through direct or indirect payments for administrative, fundraising, or other costs,” 11 C.F.R. § 300.2(c)(2)(vii), or “causes or arranges for funds in a significant amount or on an ongoing basis to be provided to the [non-federal account],” *Id.* § 300.2(c)(2)(viii).

Congresswoman Kelly would not make contributions or transfers to the non-federal account from her personal funds or her congressional campaign account and would not solicit or receive funds on behalf of the non-federal account; AOR007; AOR Supp. at 001. These factors weigh against finding that Congresswoman Kelly finances the non-federal account.

⁷ In the corporate context, the Commission has determined that authority to appoint a minority of the members of a board of directors does not weigh heavily in favor of finding affiliation between two entities. *See* Advisory Opinion 2016-02 (Enable Midstream Services) at 7. Because the request by Congresswoman Kelly and the state party concerns the appointment of special committee members by an individual who is prohibited by the Act from directly or indirectly managing a non-federal account, the Commission determines it is appropriate to give greater weight to the authority to appoint a minority of the members who direct the entity in this context.

D. Formation

The fifth relevant factor is whether Congresswoman Kelly, or her agent, “had an active or significant role in the formation of the [non-federal account].” 11 C.F.R. § 300.2(c)(2)(ix). Because the non-federal account “long predates” Congresswoman Kelly’s election as chair, AOR004 n.20, this factor weighs against finding that Congresswoman Kelly established the non-federal account.

E. Overall Relationship

The Commission considers the foregoing factors in light of the “overall relationship between sponsor and the entity to determine whether the presence of any factor or factors is evidence that the sponsor directly or indirectly established, finances, maintains, or controls the entity.” 11 C.F.R. § 300.2(c)(2). If Congresswoman Kelly has no role in the appointment of members of the special committee, then all relevant factors weigh against concluding that Congresswoman Kelly established, finances, maintains, or controls the non-federal account. As a result, under those circumstances, the state party may continue to raise and spend funds through its non-federal account in amounts and from sources prohibited by the Act but permitted under Illinois law.

If, on the other hand, Congresswoman Kelly retains the authority provided by the current bylaws to appoint some or all of the members of the special committee, AOR014, then the analysis of the “governance” factor would change significantly. In that circumstance, Congresswoman Kelly would have authority to select individuals who would make decisions about the raising and spending of non-federal funds through the non-federal account, decisions Congresswoman Kelly is barred by the Act from making directly or indirectly, and that factor would weigh heavily in favor of finding that Congresswoman Kelly would continue to exert at least indirect control over the non-federal account. Accordingly, if Congresswoman Kelly retains this authority, then the non-federal account would be directly or indirectly established, financed, maintained, or controlled by her. As a result, the non-federal account would be prohibited from soliciting, receiving, directing, transferring, or spending funds in excess of the Act’s contribution limits and from prohibited sources.

2. *Would option two be sufficient to permit Congresswoman Kelly to serve in her position as chair of the central committee without precluding the state party from raising and spending non-federal funds through the non-federal account?*

This question is moot given the Commission’s response to question one.

3. *Would option three be sufficient to permit Congresswoman Kelly to serve in her position as chair of the central committee without precluding the state party from raising and spending non-federal funds through the non-federal account?*

This question is moot given the Commission’s response to question one.

4. *If the Commission finds that one of the three options is sufficient to permit Congresswoman Kelly to serve in her position as chair without precluding the state party from raising and spending non-federal funds through the non-federal account, may the chair be included on state party letterhead for solicitations on behalf of the non-federal account, or would the state party be required to have separate letterheads for the federal and non-federal accounts?*

Congresswoman Kelly's name and title of chair must not appear on the letterhead of any solicitation soliciting funds in amounts and from sources prohibited by the Act because using her name and title in that manner would identify the solicitation as being sent on Congresswoman Kelly's behalf in violation of the Act's soft money prohibition.

As discussed above, federal officeholders "may solicit . . . funds in connection with any non-Federal election, only in amounts and from sources that are consistent with State law, and that do not exceed the Act's contribution limits or come from prohibited sources under the Act." 11 C.F.R. § 300.62; *see also* 52 U.S.C. § 30125(e)(1)(B). This request is unlike Advisory Opinion 2007-21 (Holt), in which the Commission concluded that a federal candidate could be included on letterhead as an "honorary chairman" in communications sent by state candidates' campaigns where the campaigns were publicly funded and no further fundraising would be conducted. Advisory Opinion 2007-21 (Holt) at 3. Instead, here, requestors ask whether Congresswoman Kelly's name and title as elected "chair" of the central committee could be included on the letterhead of solicitations seeking non-federal funds for the non-federal account. A solicitation identifying Congresswoman Kelly as "chair" of the central committee, which governs the state party, would indicate that the solicitation by the state party was being sent on Congresswoman Kelly's behalf. Accordingly, under 52 U.S.C. § 30125(e)(1)(B), Congresswoman Kelly's name and title as chair must not appear on the letterhead of any solicitation soliciting funds in amounts and from sources prohibited by the Act.⁸

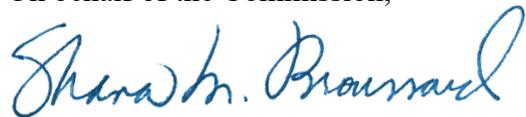
⁸ Section 300.64 of the Commission's regulations addresses the use of a federal officeholder's name and likeness in publicity for a non-federal fundraising event. That section provides that for event publicity "that contains a solicitation of funds outside the amount limitations and source prohibitions of the Act," a federal officeholder may consent to the use of her name and likeness only if the "officeholder is identified as a featured guest, honored guest, special guest, featured speaker, or honored speaker, or in any other manner not specifically related to fundraising"; and the publicity contains "a clear and conspicuous disclaimer that the solicitation is not being made by the Federal candidate or officeholder." 11 C.F.R. § 300.64(c)(3)(i). On the other hand, a federal officeholder must not be "identified as serving in a position specifically related to fundraising, such as honorary chairperson or member of a host committee . . . even if the communication contains a written disclaimer." *Id.* at § 300.64(c)(3)(v)(A). Section 300.64 only covers publicity for fundraising events, while the requestors ask about solicitations generally, and so that regulation does not directly apply to the circumstances presented. Even if it did apply, however, the position of "chair" is a position that is specifically related to fundraising. As a result, Congresswoman Kelly's name and title could not appear on the letterhead for solicitations soliciting funds in amounts and from sources prohibited by the Act even if section 300.64 did apply.

Conclusions

The Commission concludes that the state party may raise funds in amounts and from sources prohibited by the Act but permitted under Illinois law through its non-federal account if the non-federal account is administered by a special committee without review or approval by Congresswoman Kelly and Congresswoman Kelly has no role in the appointment of any member of the special committee.⁹ The Commission further concludes that Congresswoman Kelly's name and title as chair must not be included on the letterhead of any solicitation that solicits funds in amounts and from sources prohibited by the Act because using her name and title in that manner would identify the solicitation as being sent on Congresswoman Kelly's behalf.

This response constitutes an advisory opinion concerning the application of the Act and Commission regulations to the specific transaction or activity set forth in your request. *See* 52 U.S.C. § 30108. The Commission emphasizes that, if there is a change in any of the facts or assumptions presented, and such facts or assumptions are material to a conclusion presented in this advisory opinion, then the requestors may not rely on that conclusion as support for its proposed activity. Any person involved in any specific transaction or activity that is indistinguishable in all its material aspects from the transaction or activity with respect to which this advisory opinion is rendered may rely on this advisory opinion. *See* 52 U.S.C. § 30108(c)(1)(B). Please note that the analysis or conclusions in this advisory opinion may be affected by subsequent developments in the law including, but not limited to, statutes, regulations, advisory opinions, and case law. Any advisory opinions cited herein are available on the Commission's website.

On behalf of the Commission,



Shana M. Broussard
Chair

⁹ As with all advisory opinions, the Commission is opining on the facts as you have presented them in your request and in your oral representations to the Commission. The Commission concludes only that the method described here does not violate the Act and does not opine on the permissibility of other organizational methods that a state party might use and that are not presented here.