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FEDERAL ELECTION COMMISSION
Washington, DC 20463

AGENDA DOCUMENT NO. 22-18-B
AGENDA ITEM
For meeting of June 23, 2022
Submitted Late

June 17, 2022

MEMORANDUM

TO: The Commission

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

Neven F. Stipanovic *ALR for NFS*
Associate General Counsel

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Assistant General Counsel

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Attorney

Subject: Draft AO 2022-05 (DSCC) Draft B

Attached is a proposed draft of the subject advisory opinion. We have been asked to place this draft on the Agenda by one or more Commissioners.

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 June 22, 2022.

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 2022-05

2

3 Jacquelyn K. Lopez, Esq.
4 Zachary P. Morrison, Esq.
5 Elias Law Group
6 10 G Street NE, Suite 600
7 Washington, DC 20002

DRAFT B

8 Dear Ms. Lopez and Mr. Morrison:

9 We are responding to your request for an advisory opinion on behalf of DSCC
10 concerning the application of the Federal Election Campaign Act, 52 U.S.C. §§ 30101-45
11 (the “Act”), and Commission regulations to DSCC’s proposed purchase of a research
12 book for its own use and for provision to two candidates’ authorized committees. The
13 Commission concludes that the value paid by DSCC for the research book may be
14 allocated equally to DSCC and each authorized committee, if that allocation reasonably
15 reflects the benefit derived.

16 ***Background***

17 The facts presented in this advisory opinion are based on your letter received on
18 March 31, 2022.

19 DSCC is a national party committee “dedicated to electing Democrats to the U.S.
20 Senate.”¹ DSCC plans to hire a consultant to write a research book (the “book”) about a
21 sitting Republican U.S. senator from “State A” for a fee of \$30,000.² DSCC states that it
22 will own the book’s copyright and will therefore be able to use the book in any way it
23 chooses without incurring an additional charge.³ DSCC intends to use the book to inform

¹ Advisory Opinion Request (“AOR”) at 001.

² *Id.*

³ *Id.*

1 its own political strategy in State A; after receiving and reviewing the book, DSCC also
2 intends to provide it “in full” to two candidates for the Democratic nomination for the
3 U.S. Senate in State A.⁴ Both candidates will be able to use the book in whole or in part
4 for their own political purposes, at their discretion and without restriction.⁵

5 DSCC plans to offer each candidate’s authorized committee the choice of
6 (i) paying DSCC for the value of the book; (ii) treating the value of the book as an in-
7 kind contribution from DSCC to the authorized committee; or (iii) treating the value of
8 the book as a coordinated party expenditure, subject to the limit for the U.S. Senate in
9 State A.⁶

10 ***Question Presented***

11 *Is the value of the research book that will be purchased by DSCC for \$30,000*
12 *and used by DSCC for its own purposes, and then provided to two Democratic primary*
13 *campaigns for U.S. Senate, \$10,000 per campaign?*

14 ***Legal Analysis and Conclusion***

15 Yes, the value of the research book that will be purchased by DSCC for \$30,000
16 and used by DSCC for its own purposes, and then provided to two Democratic primary
17 campaigns for U.S. Senate, may be allocated \$10,000 to each committee if that allocation
18 reasonably reflects the benefit derived.

⁴ *Id.*

⁵ *Id.*

⁶ AOR001-02. According to DSCC, the Democratic National Committee has assigned its full coordinated party spending authority for the 2022 U.S. Senate election in State A to DSCC. AOR002; *see also* 52 U.S.C. § 30116(d); 11 C.F.R. §§ 109.32(b), 109.33. The Commission notes that coordinated party expenditures may be made only in connection with a general election. *See* 52 U.S.C. § 30116(d)(1).

1 A contribution includes “any gift, subscription, loan, advance, or deposit of
2 money or anything of value made by any person for the purpose of influencing any
3 election for Federal office.”⁷ The term “anything of value” includes all in-kind
4 contributions, such as goods or services provided without charge or at less than the usual
5 and normal charge.⁸ The “usual and normal charge” for goods is the price of those goods
6 in the market from which they ordinarily would have been purchased at the time of the
7 contribution, and the “usual and normal charge” for services is the commercially
8 reasonable rate prevailing at the time the services were rendered.⁹

9 Here, DSCC proposes to commission a research book for its own political use,
10 and then to give the book, in its entirety, to two candidates’ authorized committees for
11 their individual use. Accordingly, the research book will be an in-kind contribution from
12 DSCC to the authorized committees, unless DSCC treats it as a coordinated party
13 expenditure or the authorized committees pay DSCC for the value of the book.

14 As noted above, the value of an in-kind contribution is ordinarily determined by
15 the usual and normal charge.¹⁰ But when a political committee makes an expenditure on
16 behalf of more than one clearly identified federal candidate, special allocation rules

⁷ 52 U.S.C. § 30101(8)(A)(i); *see also* 11 C.F.R. § 100.52(a). Similarly, an expenditure includes “any purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value, made by any person for the purpose of influencing any election for Federal office.” 52 U.S.C. § 30101(9)(A)(i); *see also* 11 C.F.R. § 100.111(a).

⁸ 11 C.F.R. § 100.52(d)(1) (definition of contribution); *see also id.* § 100.111(e)(1) (definition of expenditure).

⁹ *Id.* § 100.52(d)(2) (definition of contribution); *see also id.* § 100.111(e)(2) (definition of expenditure).

¹⁰ *Id.* § 100.52(d)(1) (definition of contribution); *see also id.* § 100.111(e)(1) (definition of expenditure).

1 apply. Expenditures that can be readily divided according to the time or space devoted to
2 each candidate must be allocated among them “according to the benefit reasonably
3 expected to be derived.”¹¹ For example, expenditures for publications and broadcast
4 communications made on behalf of more than one candidate must be allocated according
5 to the proportion of the communication’s time or space that pertains to each candidate,
6 and expenditures for phone banks must be allocated according to the proportion of
7 statements or questions devoted to each candidate.¹²

8 The research book at issue here, however, will not be about DSCC or the
9 candidates with whom it will be shared. You state that the book will, instead, be about a
10 single incumbent Republican senator from State A, and it will be used by DSCC and two
11 Democratic candidates for Senate from State A to inform their respective strategies in
12 State A. If the book does not devote time or space to any of the candidates that will use
13 it, then expenditures for the book would not be allocable under the time or space method.

14 Although the Commission’s regulations do not directly address the allocation of
15 expenditures for a research book like the one at issue here, the rules for allocating polling
16 costs are instructive. Like the research book, a poll may be commissioned by a party
17 committee for its own use and for use by candidate committees. The poll may cover
18 issues or opposition candidates, and its value to the recipient committees will depend on

¹¹ *Id.* § 106.1(a)(1).

¹² *Id.* § 106.1(a). The same principle underlies the joint fundraising regulations, which specify that expenses for joint fundraising activities are to be allocated according to the proportion of the proceeds that each candidate will receive. *Id.* § 102.17(c)(7).

1 the information that it yields. Both a poll and the research book can be provided in full to
2 multiple recipients, with the recipients deriving varying degrees of benefit from it.

3 In the polling context, the Commission’s regulations accommodate this variability
4 by permitting political committees to choose an allocation method that reflects the
5 candidates’ respective uses of and benefit from the information. When a political
6 committee shares poll results with candidates, the committees may split the cost of the
7 poll equally (by dividing the cost of the poll by the number of committees);
8 proportionally (based on the proportion of poll questions pertaining to each committee);
9 according to the polling firm’s cost allocation formula (if purchased from a polling firm);
10 or by “any other method which reasonably reflects the benefit derived.”¹³ The political
11 committee that shares the results is responsible for maintaining records sufficient to
12 support the valuation, and to inform the recipients of that value.¹⁴

13 Given the similarities between polling results and the research book, the
14 Commission has decided to use the polling allocation regulations as a model here. DSCC
15 may allocate the cost of the research book with the two candidate committees by any
16 method that “reasonably reflects the benefit derived,” which would include dividing the
17 cost of the book by the number of committees.¹⁵ Accordingly, the Commission
18 concludes that the amount paid by DSCC — \$30,000 — may be allocated equally to each
19 of the three committees receiving the research book for a value of \$10,000 per
20 committee, if that allocation reasonably reflects the benefit derived.

¹³ *Id.* § 106.4(e).

¹⁴ *Id.* § 106.4(h).

¹⁵ *Id.* § 106.4(e)(4).

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

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On behalf of the Commission,

Allen J. Dickerson
Chairman