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For meeting of August 31, 2022

August 24, 2022

MEMORANDUM

TO: The Commission

FROM: Lisa J. Stevenson *NFS for LJS*
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Subject: Draft AO 2022-16 (DSCC/DNC) 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 August 30, 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 2022-16

2

3

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12

13 Dear Counsel:

DRAFT A

14 We are responding to your advisory opinion request on behalf of the Democratic
15 Senatorial Campaign Committee and the Democratic National Committee Services
16 Corporation/Democratic National Committee (collectively, the “Committees”),
17 concerning the application of the Federal Election Campaign Act, 52 U.S.C. §§ 30101-45
18 (the “Act”), and Commission regulations to the Committees’ proposed retention and use
19 of contributions that were untimely deposited into the Committees’ bank accounts by the
20 Committees’ “contribution caging vendor” (the “Vendor”).

21 The Commission concludes that the Committees may retain and use the late-
22 deposited contributions because the delay in depositing them resulted from events that
23 were outside of the Committees’ and the Vendor’s control, the Committees took prompt
24 remedial action after discovering the untimely deposits, and there was no evidence of ill
25 intent on the part of the Vendor.

26 ***Background***

27 The facts presented in this advisory opinion are based on your letter received on
28 June 28, 2022.

1 The Committees are national party committees.¹ For over 12 years, the
2 Committees have each contracted with and received services from the “Vendor”.² Under
3 the Committees’ contracts with the Vendor,³ the Vendor directly receives and processes
4 contributions designated for the Committees and electronically deposits them into the
5 Committees’ designated bank accounts. The contracts further require the Vendor to
6 comply with the Act and Commission regulations, including the requirement to deposit
7 all contributions within 10 days of receipt.⁴ The contracts contain safeguards designed to
8 ensure the Vendor’s timely deposit of the Committees’ contributions. The Vendor is
9 required to check the Committees’ designated mailbox every business day and to deposit
10 all contributions promptly, for which service the Committees pay the Vendor “premium
11 rates.”⁵

12 Over the course of their working relationship, the Committees say they regularly
13 engaged with the Vendor’s personnel to ensure the Vendor met its legal and contractual
14 obligations. The Committees assert that they closely monitored the timing of the
15 Vendor’s deposits of their contributions and “took every reasonable step” to ensure
16 timeliness.⁶ According to the Committees, “over the many years that the Committees

¹ See DSCC current Statement of Organization (FEC Form 1) (July 1, 2022) [202207019517782620.pdf \(fec.gov\)](#) and DNC current Statement of Organization (FEC Form 1) (June 20, 2022) [202206209515068550.pdf \(fec.gov\)](#) (last visited July 18, 2022,

² Advisory Opinion Request (“AOR”) at AOR001.

³ “The relevant terms of the agreements between (1) DSCC and Vendor and (2) DNC and Vendor are identical for purposes of this request.” *Id.*

⁴ 11 C.F.R. § 103.3(a).

⁵ AOR001, 6.

⁶ AOR006.

1 have worked with [the] Vendor, there has never previously been a significant issue of
2 late-deposited contributions.”⁷

3 Beginning in April 2022, however, the Vendor began experiencing “severe
4 delays” in processing and depositing the Committees’ contributions.⁸ As a result, the
5 Vendor deposited many contributions in the Committee’s bank accounts more than 10
6 days after receipt.⁹ The Committees assert that these “late deposits occurred without
7 [the] Committees’ authorization.”¹⁰

8 Upon learning of the issue, the Committees acted “promptly” to assess and correct
9 the problem.¹¹ They frequently communicated with the Vendor’s personnel and engaged
10 counsel in order to ensure that the Vendor complies with its contractual and legal
11 obligations.¹² The Committees assert that the Vendor is no longer processing or
12 depositing the Committee’s contributions more than 10-days after receipt. In addition,
13 the Committees have segregated the late-deposited contributions to prevent their being
14 used pending the Commission’s decision in this advisory opinion.

15 According to the Committees, the Vendor attributed its late deposit of their
16 contributions to a variety of factors over which the Committees had no control. These
17 factors included turnover in the Vendor’s staff, Vendor staff unavailability due to Covid-

7 AOR002.

8 *Id.*

9 *Id.* The Committees state that all such contributions were deposited within 32 days after receipt.

10 *Id.*

11 *Id.*

12 *Id.*

1 19 infections, and a significant increase in the Vendor’s contribution-processing
2 workload for its other clients “due to global events (e.g. the war in Ukraine).”¹³ The
3 Committees state that they “did not have adequate notice from [the] Vendor of the[se]
4 issues.”¹⁴

5 ***Question Presented***

6 “May [the] Committees retain and use the contributions that the Vendor failed to
7 deposit within 10 days of receipt when the delay was not the responsibility or fault of
8 [the] Committees under the circumstances presented here?”¹⁵

9 ***Legal Analysis and Conclusions***

10 Yes, the Committees may retain and use the contributions that the Vendor failed
11 to deposit within ten days of receipt under the circumstances presented here.

12 Commission regulations require all receipts by a political committee to be
13 deposited in an account established by the committee at its campaign depository within
14 10 days of receipt by the committee’s treasurer.¹⁶ Political committees may also return
15 contributions within ten days of receipt without depositing them.¹⁷

¹³ *Id.*

¹⁴ *Id.*

¹⁵ AOR003.

¹⁶ 11 C.F.R. § 103.3(a). *See also* 52 U.S.C. § 30102(h)(1). Because in this case the Vendor received the contributions on behalf of the Committees, the 10-day deposit period began to run at the time of receipt by the Vendor. *See, e.g.*, Advisory Opinion 1989-21 (Create-a-Craft) (concluding that an entrepreneur contracted to receive contributions on behalf of several committees must deposit all contributions within 10 days of receipt).

¹⁷ 11 C.F.R. § 103.3(a).

1 The Commission has considered the 10-day deposit timeframe in several advisory
2 opinions in which contributions were not timely deposited for various reasons. In certain
3 situations, the Commission has interpreted the Act and Commission regulations as
4 allowing political committees to deposit and use such contributions.

5 For example, in Advisory Opinion 1999-23 (Arkansas Bankers) and Advisory
6 Opinion 1992-42 (Lewis for Congress), the Commission concluded that two political
7 committees that had been prevented from receiving or depositing contribution checks
8 because the checks had been lost in the mail could obtain and deposit replacement checks
9 and, further, should report them as if the original contribution checks had been timely
10 received and deposited. Similarly, in Advisory Opinion 1993-05 (Fields for Congress),
11 the Commission concluded that a political committee that had been prevented from
12 timely depositing contribution checks because postal service personnel had removed the
13 checks from the committee's post office box without notifying the committee could, after
14 obtaining possession of the checks, deposit and report the checks as having been timely
15 received and deposited. In these cases, the committees were prevented from complying
16 with the regulatory 10-day deposit requirement by circumstances beyond their control,
17 and they acted reasonably promptly to remedy the noncompliance after discovering it.¹⁸

18 In two other advisory opinions, even though the late-deposited contributions were
19 in the control of the requestors or their separate segregated fund ("SSF"), the
20 Commission allowed the requestors to acquire replacement checks but required them to

¹⁸ See also Advisory Opinion 2001-11 (Democratic Party of Virginia) (concluding that state party committee could timely transfer funds from its non-federal account to its federal account to cover allocable expenses after committee's bank failed to comply with timely instructions to transfer funds, even though transfer occurred after regulatory deadline).

1 take the remedial action of amending all previously filed FEC reports and include an
2 explanation and a reference to the advisory opinion. In Advisory Opinion 1999-33
3 (MediaOne PAC), a branch office retained payroll deduction contributions on its general
4 ledger instead of forwarding them to the corporation's SSF. Two years later when the
5 error was discovered, the Commission stated that the funds were entirely under the
6 control of the corporation or its regional offices and concluded that the requestor must
7 take remedial action.

8 Further, in Advisory Opinion 2000-11 (Georgia-Pacific), the corporation collected
9 and timely forwarded payroll deductions to its SSF. Upon the arrival of a new treasurer
10 at the SSF, it was found that some two-to-three-year-old checks had not been deposited.
11 The previous treasurer had no explanation as to why they had not been deposited, as she
12 had regularly done earlier during her several-year tenure as treasurer. Most of the
13 missing checks were found after searching her office. After discovering the undeposited
14 checks, Georgia-Pacific conducted an internal audit of the SSF's accounts, resulting in
15 comprehensive amendments to the SSF's reports to be filed with the Commission. The
16 SSF also promptly adopted policies of conducting an annual audit, monthly reporting to
17 senior management of the corporation and the SSF's board, requiring all documents to be
18 reviewed and approved by the treasurer and the assistant treasurer, and requested an
19 advisory opinion. The Commission concluded that the failure to deposit the contributions
20 in a timely manner did not appear to be intentional, stating that "although the treasurer
21 must have known that she had received checks and they were supposed to be deposited in

1 the PAC’s account, her failure to deposit does not appear to have been for the purpose of
2 self-enrichment or any other improper disposition.”¹⁹

3 According to the request, the Committees’ noncompliance with the 10-day
4 contribution deposit requirement was due to several factors, including turnover in the
5 Vendor’s staff, Vendor staff unavailability due to Covid-19 infections, and a significant
6 increase in the Vendor’s contribution-processing workload on behalf of its other clients.
7 Each of these causes was outside of the Committees’ and the Vendor’s control.

8 Further, the Committees had taken reasonable precautions to ensure that their
9 contributions would be deposited in a timely manner, including by contractually requiring
10 the vendor to check the Committees’ mailboxes each business day and to process and
11 deposit their contributions promptly. The Committees also monitored the Vendor’s
12 actions and the timing of their deposits.

13 Additionally, the Committees acted promptly to avoid future noncompliance after
14 learning about the Vendor’s untimely deposits. The Committees maintained frequent
15 contact with the Vendor’s personnel, engaged counsel, and segregated the late-deposited
16 contributions to prevent their being used pending the Commission’s decision in this
17 advisory opinion.²⁰

18 Under these circumstances, and consistent with its prior advisory opinions, the
19 Commission concludes that the Committees may retain and use the contributions in
20 question. The Committees should report them as if the original contribution checks had
21 been timely received and deposited and should amend any previously filed reports

¹⁹ Advisory Opinion 2000-11 (Georgia-Pacific), note 4.

²⁰ AOR002.

