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ADVISORY OPINION 2022-21

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Dear Counsel:

We are responding to your advisory opinion request on behalf of the DSCC, Bennet for Colorado, and People for Patty Murray concerning the application of the Federal Election Campaign Act, 52 U.S.C. §§ 30101-45 (the “Act”), and Commission regulations to requestors’ proposal for the DSCC to pay for two types of television advertisements, labeled Solicitation 1 and 2 in the request, using funds in the DSCC’s account established under 52 U.S.C. § 30116(a)(9)(C) (“Legal Proceedings Account”). The proposed television advertisements would feature federal candidates, including Senators Bennet and Murray, and solicit donations to the Legal Proceedings Account. Requestors ask whether the proposal to pay for these advertisements using the Legal Proceedings Account is permissible and whether Bennet for Colorado and People for Patty Murray (collectively “Candidate Committees”) may coordinate the timing, content, and placement of these advertisements with the DSCC.

The Commission concludes that the DSCC may pay for both Solicitation 1 and Solicitation 2, subject to reasonable cost allocation among the DSCC’s accounts, including the Legal Proceedings Account. The Candidate Committees may coordinate both Solicitation 1 and Solicitation 2 with the DSCC, provided that those costs not reasonably allocable to the Legal Proceedings Account are either consistent with the limits on coordinated expenditures by a national political party committee under 52 U.S.C. § 30116(d)(3) or the DSCC treats those costs as in-kind contributions to the candidate with whom the advertisement is coordinated.

Background

The facts presented in this advisory opinion are based on your letter dated September 20, 2022, your email dated September 23, 2022, and disclosure reports filed with the Commission.

The DSCC is a national political party committee whose purpose is electing Democrats to the U.S. Senate.¹ Bennet for Colorado is the principal campaign committee of Michael Bennet, the sitting Democratic senator from Colorado,² and People for Patty Murray is the principal campaign committee of Patty Murray, the sitting Democratic senator from Washington state.³ Both senators are seeking re-election in the November 2022 general election.

The DSCC established the Legal Proceedings Account under 52 U.S.C. § 30116(a)(9)(C), and it represents that the account is used to pay for expenses in connection with recounts, contests, and other legal proceedings.⁴ Requestors provide two alternate proposals under which the DSCC would use this Legal Proceedings Account to pay for television advertisements soliciting donations to the Legal Proceedings Account; the advertisements would feature Senators Bennet and Murray and other federal candidates. Under both proposals, the requestors represent that all advertisements would “comply fully” with the disclaimer requirements of 52 U.S.C. § 30120 and 11 C.F.R. § 110.11.⁵ Further, under both proposals, if any donation exceeded a donor’s limit to the Legal Proceedings Account, the DSCC would refund the excess portion of the donation. Any funds raised through either proposed solicitation “would be spent exclusively on legal proceedings that comply with the permissible uses of the Legal Proceedings Account.”⁶

For Solicitation 1, the advertisements purchased using funds from the Legal Proceedings Account would feature one or more candidates, including Senator Bennet and Senator Murray. The ads would air “in states across the country,” including Colorado and Washington, and may air in the jurisdiction in which the featured candidate(s) are candidate(s) for re-election as well as in other jurisdictions where the

¹ See DSCC, Statement of Organization, FEC Form 1 (Sept. 19, 2022), <https://docquery.fec.gov/cgi-bin/forms/C00042366/1630498/>.

² See Bennet for Colorado, Statement of Organization, FEC Form 1 (Aug. 17, 2022), <https://docquery.fec.gov/cgi-bin/forms/C00458398/1624593/>.

³ See People for Patty Murray, Statement of Organization, FEC Form 1 (Sept. 15, 2022), <https://docquery.fec.gov/cgi-bin/forms/C00257642/1629812/>.

⁴ Advisory Opinion Request (“AOR”) at AOR001.

⁵ AOR006.

⁶ AOR006.

featured candidate(s) are not candidates.⁷ Solicitation 1 would “[i]nclude a clear solicitation asking viewers to donate to the Legal Proceedings Account so that [the] DSCC can protect the right to vote in court and prepare for potential recounts and election contests.”⁸ The solicitation included in these advertisements would be both oral and written, with the written solicitation appearing as an easily readable weblink. The weblink would direct viewers to a contribution page, which would clearly state that donations would be allocated to the DSCC’s Legal Proceedings Account.

The DSCC “wants to include recognizable political figures in the communications because it believes [doing so would] make viewers of the communications more likely to donate to the cause.”⁹ The advertisements would “focus on the issue of voter suppression and [would] make no mention of any political party.”¹⁰ The advertisements would also not contain express advocacy or publish or republish any candidate materials. The ads, however, would “[b]e coordinated, including timing, content, and placement” with the candidates appearing in the ads.¹¹

For Solicitation 2, the advertisements purchased using funds from the Legal Proceedings Account would feature “a single candidate seeking re-election . . . in the jurisdiction where the advertisement is disseminated” and would be “coordinated, including the timing, content, and placement with the Democratic Senate candidate whose race is featured” in the ad.¹² Each ad would focus on “one or more policy issues central to the . . . general election in the jurisdiction of distribution” and “would either discuss a Democratic candidate and promote or support the candidate and [the candidate’s] policy position(s), or discuss a Republican candidate and attack or oppose the candidate and [the candidate’s] policy position(s).”¹³ The advertisement would not publish or republish candidate materials, but “[m]ight in some circumstances expressly advocate the election or defeat of a clearly identified candidate for federal office.”¹⁴ The advertisements would not mention the Legal Proceedings Account or any legal proceedings, but would include a written link to an online webpage such as

⁷ AOR002.

⁸ AOR002.

⁹ AOR002.

¹⁰ AOR006.

¹¹ AOR002.

¹² AOR003.

¹³ AOR003.

¹⁴ AOR003.

dsc.org/urgent and that website would “clearly state that all funds accepted through the page are allocated to [the] DSCC’s Legal Proceedings Account.”¹⁵

Questions Presented

1a. May the DSCC use funds in its Legal Proceedings Account to pay for television advertisements following the description for Solicitation 1?

1b. May the Candidate Committees coordinate with the DSCC on such communications by having input on the content, timing, and placement of the communications for Solicitation 1?

2a. May the DSCC use funds in its Legal Proceedings Account to pay for television advertisements following the description for Solicitation 2?

2b. May the Candidate Committees coordinate with the DSCC on such communications by having input on the content, timing, and placement of the communications for Solicitation 2?

Legal Analysis

1a. May the DSCC use funds in its Legal Proceedings Account to pay for television advertisements following the description for Solicitation 1?

The DSCC may pay for television advertisements meeting the description of Solicitation 1, subject to reasonable cost allocation among its accounts to the extent that those communications are attributable to more than one purpose. If Solicitation 1 qualifies as both a solicitation to its Legal Proceedings Account and a party coordinated communication, the DSCC’s costs for Solicitation 1 must be reasonably allocated between the Legal Proceedings Account and an account other than the Legal Proceedings Account.

As added to the Act by the Consolidated and Further Continuing Appropriations Act, 2015 (“Appropriations Act”), 52 U.S.C. § 30116(a)(9)(C) authorizes a national party committee, including a national congressional campaign committee, to establish a “separate, segregated account” to “defray expenses incurred with respect to the preparation for and conduct of election recounts and contests and other legal proceedings.”¹⁶ Statements by House and Senate leaders at the time 52 U.S.C. § 30116(a)(9)(C) was enacted explained that “Commission precedent” on the raising and spending of recount funds would continue to apply to national party committee accounts

¹⁵ AOR003.

¹⁶ Consolidated and Further Continuing Appropriations Act of 2015, Pub. L. No. 113-235, § 101, 128 Stat. 2130, 2772–73 (2014).

established under 52 U.S.C. § 30116(a)(9)(C); those statements each cited earlier Commission advisory opinions on recount accounts.¹⁷

Although the Commission has not previously addressed the issue of payment for solicitations in the context of an account established under 52 U.S.C. § 30116(a)(9)(C), the Commission has explained in previous advisory opinions that “Commission regulations generally permit (and in some cases require) the proceeds of fundraising activities to be used to defray the costs of those activities.”¹⁸ Additionally, “Commission regulations . . . generally permit (and in some cases require) the allocation of expenses attributable to more than one purpose.”¹⁹

Prior to the enactment of 52 U.S.C. § 30116(a)(9)(C), the Commission concluded in Advisory Opinion 2010-14 (DSCC) that the DSCC could allocate expenses attributable to both recount activities and campaign activities and could not allocate costs for campaign activities to its recount account.²⁰ The Commission explained in that advisory opinion that while the Commission regulations and prior advisory opinions did not address the allocation of costs between recount and campaign activities, the Commission’s allocation regulations “stand generally for the proposition that allocation is an appropriate way to fund activities with multiple purposes.”²¹

This principle applies here. Under the circumstances presented, Solicitation 1 could serve two purposes: it would include a solicitation of funds to the Legal Proceedings Account, and could contain other content that would qualify the resulting television advertisement as a party coordinated communication.²² As such, to the extent that Solicitation 1 is attributable to more than one purpose, the DSCC must use a reasonable method to allocate the costs for its solicitation of donations to its Legal Proceedings Account and allocate the costs for other purposes to other accounts from which such disbursements are permissible.

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

¹⁸ See Advisory Opinion 2010-14 (DSCC) at 5 (“The DSCC may also use recount funds to defray the costs of soliciting donations to the recount fund.”) (citing 11 C.F.R. §§ 102.17(c)(7)(i)(A), 9003.3(a)(2)(i)(E), Advisory Opinion 2003-15 (Majette)); see also 160 Cong. Rec. H9286 (daily ed. Dec. 11, 2014) (statement of Rep. Boehner) (explaining that permissible uses of funds in 52 U.S.C. § 30116(a)(9)(C) account “include[e] the costs of fundraising for this segregated account”); 160 Cong. Rec. S6814 (daily ed. Dec. 13, 2014) (statement of Sen. Reid) (same).

¹⁹ Advisory Opinion 2010-14 (DSCC) at 6 (citing 11 C.F.R. § 102.5(a), Part 106, Part 300, and § 9003.3(a)(2)(ii)).

²⁰ *Id.* at 6–7.

²¹ *Id.* at 6.

²² 11 C.F.R. § 109.37(a)(2).

Ib. *May the Candidate Committees coordinate with the DSCC on such communications by having input on the content, timing, and placement of the communications for Solicitation 1?*

The Candidate Committees may coordinate with the DSCC on the content, timing, and placement of the communications for Solicitation 1, provided that the DSCC's costs for Solicitation 1 that are not allocable to the Legal Proceedings Account are either consistent with the limitations on coordinated national party committee expenditures under 52 U.S.C. § 30116(d)(3) or those costs are treated by the DSCC as in-kind contributions to the candidate with whom Solicitation 1 is coordinated.

The Act limits coordinated expenditures by a national party committee on behalf of a federal candidate of that party.²³ While those limits do not apply to disbursements from a national party committee's separate, segregated account established under 52 U.S.C. § 30116(a)(9)(C),²⁴ they do apply to disbursements from national party committee accounts not established under 52 U.S.C. § 30116(a)(9)(C).

The Commission's regulation at 11 C.F.R. § 109.37 defines a party coordinated communication as a communication that meets certain payment, content, and conduct standards. The payment prong is met if the communication is paid for by a political party committee or its agent.²⁵ The content prong is met if the communication meets one of three standards, including if the communication is a public communication²⁶ that "expressly advocates the election or defeat of a clearly identified candidate for Federal office" or "refers to a clearly identified House or Senate candidate and is publicly distributed or otherwise publicly disseminated in the clearly identified candidate's jurisdiction 90 days or fewer before the clearly identified candidate's general . . . election."²⁷ Finally, a communication meets the conduct prong if it meets any one of six standards, including that a candidate or candidate's committee is "materially involved" in decisions regarding the "content" of the communication, the "means or mode" or "specific media outlet used" for the communication, or the "timing or frequency" of the communication.²⁸

Proposed Solicitation 1 could meet the definition of a party coordinated communication. First, because the DSCC proposes to pay for proposed Solicitation 1,

²³ 52 U.S.C. § 30116(d)(3); *see also* 11 C.F.R. § 109.32(b).

²⁴ 52 U.S.C. § 30116(d)(5).

²⁵ 11 C.F.R. § 109.37(a)(1).

²⁶ The definition of "public communication" includes a "communication by means of any broadcast, cable, or satellite communication." 11 C.F.R. § 100.26.

²⁷ 11 C.F.R. § 109.37(a)(2)(ii)–(iii).

²⁸ 11 C.F.R. §§ 109.37(a)(3), 109.21(d)(2).

that communication satisfies the payment prong.²⁹ Second, the communication would satisfy the content prong if it features a candidate seeking re-election in November 2022 in the jurisdiction where the advertisement is disseminated and airs within 90 days of that candidate's general election.³⁰ Requestors state that Solicitation 1 would feature one or more candidates, including Senator Bennet and Senator Murray, and may air in the jurisdiction in which the featured candidate(s) are candidate(s) for re-election as well as in other jurisdictions where the featured candidate(s) are not candidates.³¹ Finally, Solicitation 1 satisfies the conduct prong because the proposed television advertisements described meet one of the conduct standards: requestors state that the DSCC would coordinate the "timing, content, and placement [of the communication] with the Democratic Senate candidate appearing in the advertisement,"³² which fulfills the "material involvement" conduct standard.³³

Commission regulations provide that a party coordinated communication must be treated by the political party committee making the payment as either an "in-kind contribution . . . to the candidate with whom it is coordinated" or a "coordinated party expenditure. . . in connection with the general election campaign of the candidate with whom it was coordinated."³⁴ Accordingly, the Candidate Committees may coordinate with the DSCC on Solicitation 1 as proposed, provided that the DSCC treats costs for Solicitation 1 not allocable to the Legal Proceedings Account as either in-kind candidate contributions or coordinated party expenditures subject to the Act's limits on such contributions and coordinated expenditures.

2a. May the DSCC use funds in its Legal Proceedings Account to pay for television advertisements following the description for Solicitation 2?

The DSCC may pay for television advertisements meeting the description of Solicitation 2, subject to reasonable cost allocation among its accounts to the extent that those communications are attributable to more than one purpose. Because Solicitation 2 qualifies as both a solicitation to its Legal Proceedings Account and a party coordinated communication, the DSCC's costs for Solicitation 2 must be reasonably allocated between the Legal Proceedings Account and an account other than the Legal Proceedings Account.

Although the Commission has not previously addressed the issue of payment for solicitations in the context of an account established under 52 U.S.C. § 30116(a)(9)(C),

²⁹ 11 C.F.R. § 109.37(a)(1).

³⁰ AOR002; 11 C.F.R. § 109.37(a)(2)(iii)(A).

³¹ AOR002.

³² AOR002.

³³ 11 C.F.R. §§ 109.21(d)(2); 109.37(a)(3)

³⁴ 11 C.F.R. § 109.37(b).

the Commission has explained in previous advisory opinions that “Commission regulations generally permit (and in some cases require) the proceeds of fundraising activities to be used to defray the costs of those activities.”³⁵ Additionally, “Commission regulations . . . generally permit (and in some cases require) the allocation of expenses attributable to more than one purpose.”³⁶

Prior to the enactment of 52 U.S.C. § 30116(a)(9)(C), the Commission concluded in Advisory Opinion 2010-14 (DSCC) that the DSCC could allocate expenses attributable to both recount activities and campaign activities and could not allocate costs for campaign activities to its recount account.³⁷ The Commission explained in that advisory opinion that while the Commission regulations and prior advisory opinions did not address the allocation of costs between recount and campaign activities, the Commission’s allocation regulations “stand generally for the proposition that allocation is an appropriate way to fund activities with multiple purposes.”³⁸

This principle applies here. Under the circumstances presented, Solicitation 2 would serve two purposes: it includes both a solicitation of funds to the Legal Proceedings Account as well as other content that would qualify the resulting television advertisement as a party coordinated communication.³⁹ Specifically, Solicitation 2 would refer to a clearly identified Senate candidate in that candidate’s jurisdiction in a television advertisement publicly disseminated 90 days or fewer before that candidate’s general election⁴⁰ and might expressly advocate for the election or defeat of a clearly identified federal candidate “in some circumstances.”⁴¹ As such, to the extent that Solicitation 2 is attributable to more than one purpose, the DSCC must use a reasonable method to allocate the costs for its solicitation of donations to its Legal Proceedings Account and allocate the costs for other purposes to other accounts from which such disbursements are permissible.

³⁵ See Advisory Opinion 2010-14 (DSCC) at 5 (“The DSCC may also use recount funds to defray the costs of soliciting donations to the recount fund.”) (citing 11 C.F.R. §§ 102.17(c)(7)(i)(A), 9003.3(a)(2)(i)(E), Advisory Opinion 2003-15 (Majette)); see also 160 Cong. Rec. H9286 (daily ed. Dec. 11, 2014) (statement of Rep. Boehner) (explaining that permissible uses of funds in 52 U.S.C. § 30116(a)(9)(C) account “include[e] the costs of fundraising for this segregated account”); 160 Cong. Rec. S6814 (daily ed. Dec. 13, 2014) (statement of Sen. Reid) (same).

³⁶ Advisory Opinion 2010-14 (DSCC) at 6 (citing 11 C.F.R. § 102.5(a), Part 106, Part 300, and § 9003.3(a)(2)(ii)).

³⁷ *Id.* at 6-7.

³⁸ *Id.* at 6.

³⁹ 11 C.F.R. § 109.37(a)(2).

⁴⁰ AOR003.

⁴¹ AOR003.

2b. May the Candidate Committees coordinate with the DSCC on such communications by having input on the content, timing, and placement of the communications for Solicitation 2?

The Candidate Committees may coordinate with the DSCC on the content, timing, and placement of the communications for Solicitation 2, provided that the DSCC's costs for Solicitation 2 that are not allocable to the Legal Proceedings Account are either consistent with the limitations on coordinated national party committee expenditures under 52 U.S.C. § 30116(d)(3) or those costs are treated by the DSCC as in-kind contributions to the candidate with whom Solicitation 2 is coordinated.

The Act limits coordinated expenditures by a national party committee on behalf of a federal candidate of that party.⁴² While those limits do not apply to disbursements from a national party committee's separate, segregated account established under 52 U.S.C. § 30116(a)(9)(C),⁴³ they do apply to disbursements from national party committee accounts not established under 52 U.S.C. § 30116(a)(9)(C).

The Commission's regulation at 11 C.F.R. § 109.37 defines a party coordinated communication as one that meets certain payment, content, and conduct standards. The payment prong is met if the communication is paid for by a political party committee or its agent.⁴⁴ The content prong is met if the communication meets one of three standards, including if the communication is a public communication⁴⁵ that "expressly advocates the election or defeat of a clearly identified candidate for Federal office" or "refers to a clearly identified House or Senate candidate and is publicly distributed or otherwise publicly disseminated in the clearly identified candidate's jurisdiction 90 days or fewer before the clearly identified candidate's general . . . election."⁴⁶ Finally, a communication meets the conduct prong if it meets any one of six standards, including that a candidate or candidate's committee is "materially involved" in decisions regarding the "content" of the communication, the "means or mode" or "specific media outlet used" for the communication, or the "timing or frequency" of the communication.⁴⁷

⁴² 52 U.S.C. § 30116(d)(3); *see also* 11 C.F.R. § 109.32(b).

⁴³ 52 U.S.C. § 30116(d)(5).

⁴⁴ 11 C.F.R. § 109.37(a)(1).

⁴⁵ The definition of "public communication" includes a "communication by means of any broadcast, cable, or satellite communication." 11 C.F.R. § 100.26.

⁴⁶ 11 C.F.R. § 109.37(a)(2)(ii)–(iii).

⁴⁷ 11 C.F.R. §§ 109.37(a)(3), 109.21(d)(2). None of the exceptions in 11 C.F.R. § 109.37(a)(3) apply to proposed Solicitation 2. Proposed Solicitation 2 does not qualify for the safe harbor at 11 C.F.R. § 109.21(g)(2) for solicitations by federal candidates for contributions to political committees because Solicitation 2 would promote, support, attack, or oppose the soliciting candidate or another candidate who seeks election to the same office as the soliciting candidate. AOR003.

Proposed Solicitation 2 meets the definition of a party coordinated communication. First, because the DSCC proposes to pay for proposed Solicitation 2, that communication satisfies the payment prong.⁴⁸ Second, Requestors state that Solicitation 2 “[m]ight” expressly advocate the election or defeat of a clearly identified federal candidate,⁴⁹ in which case the communication would satisfy the content prong because it would be a public communication containing express advocacy.⁵⁰ Alternatively, even if Solicitation 2 does not contain express advocacy, it would still satisfy the content prong because it would “[f]eature a single candidate seeking re-election in November 2022 in the jurisdiction where the advertisement is disseminated” and would air within 90 days of that candidate’s general election.⁵¹ Finally, Solicitation 2 satisfies the conduct prong because the proposed television advertisements described meet one of the conduct standards: requestors state that the DSCC would coordinate the “timing, content, and placement [of the communication] with the Democratic Senate candidate whose race is featured in the advertisement,”⁵² which fulfills the “material involvement” conduct standard.⁵³

Commission regulations provide that a party coordinated communication must be treated by the political party committee making the payment as either an “in-kind contribution . . . to the candidate with whom it is coordinated” or a “coordinated party expenditure. . . in connection with the general election campaign of the candidate with whom it was coordinated.”⁵⁴ Accordingly, the Candidate Committees may coordinate with the DSCC on Solicitation 2 as proposed, provided that the DSCC treats costs for Solicitation 2 not allocable to the Legal Proceedings Account as either in-kind candidate contributions or coordinated party expenditures subject to the Act’s limits on such contributions and coordinated expenditures.

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.⁵⁵ 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

⁴⁸ 11 C.F.R. § 109.37(a)(1).

⁴⁹ AOR003.

⁵⁰ 11 C.F.R. § 109.37(a)(2)(ii).

⁵¹ AOR003; 11 C.F.R. § 109.37(a)(2)(iii)(A).

⁵² AOR003.

⁵³ 11 C.F.R. §§ 109.21(d)(2); 109.37(a)(3)

⁵⁴ 11 C.F.R. § 109.37(b).

⁵⁵ *See* 52 U.S.C. § 30108.

with respect to which this advisory opinion is rendered may rely on this advisory opinion.⁵⁶ 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,

A handwritten signature in blue ink, appearing to read "Allen J. Dickerson", written over a horizontal line.

Allen J. Dickerson
Chairman

⁵⁶ See 52 U.S.C. § 30108(c)(1)(B).