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For meeting of Oct. 20, 2022

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October 18, 2022

MEMORANDUM

TO: The Commission

FROM: Lisa J. Stevenson *NFS for LJS*
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Subject: Draft AO 2022-21 (DSCC, *et al.*) - Draft B

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 9:00 am (Eastern Time) on September 20, 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 2022-21

2
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DRAFT B

11 Dear Counsel:

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

24 The Commission concludes that the DSCC may use funds from the Legal
25 Proceedings Account to pay for television advertisements described in Solicitation 1
26 because, under the circumstances proposed, disbursements from the Legal Proceedings
27 Account for Solicitation 1 would not be for the purpose of influencing a federal election.
28 The Commission further concludes that the Candidate Committees may coordinate

Solicitation 1 with the DSCC because limitations on coordinated expenditures by a national party committee do not apply to disbursements from a separate, segregated account established under 52 U.S.C. § 30116(a)(9)(C). Finally, the Commission concludes that the DSCC may use funds from the Legal Proceedings Account to pay for the television advertisements described in Solicitation 2, provided that the advertisements do not expressly advocate the election or defeat of a clearly identified candidate, because the disbursements would not be for the purpose of influencing a federal election in that circumstance. If, however, those advertisements contain express advocacy, such disbursements would be for the purpose of influencing a federal election, and the DSCC may not use funds in the Legal Proceedings Account to pay for Solicitation 2.

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

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/>.

1 senator from Washington state.³ Both senators are seeking re-election in the November
2 2022 general election.

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

16 For Solicitation 1, the advertisements purchased using funds from the Legal
17 Proceedings Account would feature one or more candidates, including Senator Bennet
18 and Senator Murray. The ads would air “in states across the country,” including

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.

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

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

17 For Solicitation 2, the advertisements purchased using funds from the Legal
18 Proceedings Account would feature “a single candidate seeking re-election . . . in the

⁷ AOR002.

⁸ AOR002.

⁹ AOR002.

¹⁰ AOR006.

¹¹ AOR002.

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 positions.”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 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?

¹² AOR003.

¹³ AOR003.

¹⁴ AOR003.

¹⁵ AOR003.

1 2a. *May the DSCC use funds in its Legal Proceedings Account to pay for*
2 *television advertisements following the description for Solicitation 2?*

3 2b. *May the Candidate Committees coordinate with the DSCC on such*
4 *communications by having input on the content, timing, and placement of the*
5 *communications for Solicitation 2?*

6 ***Legal Analysis***

7 1a. *May the DSCC use funds in its Legal Proceedings Account to pay for*
8 *television advertisements following the description for Solicitation 1?*

9 Yes, the DSCC may use funds in its Legal Proceedings Account to pay for
10 television advertisements following the description for Solicitation 1 because, under the
11 circumstances proposed, disbursements from the Legal Proceedings Account for
12 Solicitation 1 would not be for the purpose of influencing a federal election.

13 As added to the Act by the Consolidated and Further Continuing Appropriations
14 Act, 2015 (“Appropriations Act”), 52 U.S.C. § 30116(a)(9)(C) authorizes a national party
15 committee, including a national congressional campaign committee, to establish a
16 “separate, segregated account” to “defray expenses incurred with respect to the
17 preparation for and conduct of election recounts and contests and other legal
18 proceedings.”¹⁶ In advisory opinions issued before enactment of the Appropriations Act,
19 the Commission consistently stated that funds donated to a separate, segregated recount
20 account, including an account established by a national political party committee, could
21 not be used for the purpose of influencing a federal election, including for any “campaign

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

activities.”¹⁷ Consistent with that longstanding approach, the Commission explained in Advisory Opinion 2019-02 (Bill Nelson for Senate) that funds in the DSCC’s Legal Proceedings Account established under 52 U.S.C. § 30116(a)(9)(C) “could not be used for the purpose of influencing a federal election.”¹⁸ Similarly, Commission advisory opinions predating the Appropriations Act also indicate that funds in the Legal Proceedings Account may be used to solicit donations to that fund, explaining 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.”¹⁹

In the Appropriations Act, which authorized separate, segregated national party accounts “used to defray expenses incurred with respect to the preparation for and the conduct of election recounts and contests and other legal proceedings” under 52 U.S.C. § 30116(a)(9)(C), Congress also authorized two additional separate, segregated national party committee accounts, codified at 52 U.S.C. § 30116(a)(9)(A) and (B).²⁰ Congress limited those two additional accounts to be “*used solely*” for the statutorily listed purposes related to the payment of expenses for presidential nominating conventions and

¹⁷ See, e.g., Advisory Opinion 2010-14 (DSCC) at 3, 5 (“[N]one of [DSCC’s] proposed recount activities can or will be used to campaign for any candidates or to influence any elections. Instead, recount activities paid for by the recount fund must have no relation to campaign activities.”) (citing Advisory Opinion 1978-92 (Miller) at 3 (“[I]n view 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.”)).

¹⁸ Advisory Opinion 2019-02 (Bill Nelson for Senate) at 4.

¹⁹ 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.”)

²⁰ Consolidated and Further Continuing Appropriations Act of 2015, Pub. L. No. 113-235, § 101, 128 Stat. 2130, 2772-73 (2014).

1 party headquarters buildings.²¹ Congress did not, however, include similar limiting
2 language for accounts established under 52 U.S.C. § 30116(a)(9)(C) to be used for
3 election recounts, contests, and other legal proceedings. This omission suggests that
4 Congress intended a wider scope of permissible uses for funds in accounts established
5 under subsection (C) and did not intend to strictly limit the use of funds in an account
6 authorized by that subsection to solely the listed legal expenses. Accordingly, the
7 Commission concludes that funds in the Legal Proceedings Account are not limited
8 solely to expenses for election recounts, contests, and other legal proceedings, and may
9 be used for other purposes, subject to the limitation that funds in such accounts may not
10 be used for the purpose of influencing a federal election as explained in prior
11 Commission advisory opinions.

12 Here, the DSCC may use funds in its Legal Proceedings Account to pay for
13 television advertisements following the description for Solicitation 1 because, under the
14 circumstances presented in the request, the advertisements would be for the purpose of
15 soliciting donations to the Legal Proceedings Account and not for the purpose of
16 influencing a federal election. Although Solicitation 1 would feature federal candidates,
17 the solicitation would “focus on the issue of voter suppression” and would not contain
18 any express advocacy or mention any political party.²² In addition, the advertisements
19 would provide a clear solicitation for the Legal Proceedings Account. Under these
20 circumstances, the advertisement would be for the purpose of soliciting donations to the

²¹ *Id.*; 52 U.S.C. § 30116(a)(9)(A), (B).

²² AOR002, 6.

1 Legal Proceedings Account and not for the purpose of influencing a federal election.

2 Because funds in the Legal Proceedings Account may be used to pay for solicitations for
3 donations to that account,²³ the proposal is permissible.

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

7 Yes, the Candidate Committees may coordinate with the DSCC on the content,
8 timing, and placement of the advertisements for Solicitation 1.

9 The Act limits coordinated expenditures by a national party committee on behalf
10 of a federal candidate of that party.²⁴ However, the Act expressly provides that those
11 limitations “shall not apply” to disbursements from a national party committee’s separate,
12 segregated account established under 52 U.S.C. § 30116(a)(9)(C).²⁵ In addition, as
13 discussed above, given the description of the DSCC’s proposed Solicitation 1, the
14 DSCC’s disbursements from the Legal Proceedings Account for Solicitation 1 would not
15 be for the purpose of influencing a federal election and so no expenditure would result
16 from the proposed activity.²⁶ Because the Act expressly excludes disbursements from an

²³ See Advisory Opinion 2010-14 (DSCC) at 5.

²⁴ 52 U.S.C. § 30116(d)(3).

²⁵ 52 U.S.C. § 30116(d)(5). .

²⁶ See 52 U.S.C. § 30101(9)(A)(i) (defining expenditure to include “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”); see also Advisory Opinion 2006-24 (National Republican Senatorial Committee, *et. al*) at 9 (concluding that state party committee could coordinate recount activities funded by state party committee’s recount account with federal candidate because “the limitations on coordinated spending by the State Party for a particular candidate are not applicable to a State Party’s recount fund” given that state party committee’s proposed recount activity was not in connection with a federal election and recount account funds could not be used for campaign activity).

1 account established under 52 U.S.C. § 30116(a)(9)(C) from the limitations on a national
2 party committee’s coordinated expenditures on behalf of candidates, and because the
3 proposed activity would not result in an expenditure, the proposal is permissible.

4 2a. *May the DSCC use funds in its Legal Proceedings Account to pay for*
5 *television advertisements following the description for Solicitation 2?*

6 The request states that Solicitation 2 “[m]ight in some circumstances expressly
7 advocate the election or defeat of a clearly identified candidate for federal office.”²⁷
8 Provided that the advertisements do not contain express advocacy,²⁸ the DSCC may use
9 funds in the Legal Proceedings Account to fund Solicitation 2 because the disbursements
10 would not be for the purpose of influencing a federal election. If, however, the
11 advertisements contain express advocacy, then the DSCC may not use funds in its Legal
12 Proceedings Account to pay for television advertisements following the description for
13 Solicitation 2 because disbursements from the Legal Proceedings Account for Solicitation
14 2 would be for the purpose of influencing a federal election in that circumstance.

15 As discussed above, funds the Legal Proceedings Account may not be used for the
16 purpose of influencing a federal election. Solicitation 2 would feature a single federal
17 candidate in the jurisdiction where the television ad is disseminated and would “either
18 discuss a Democratic candidate and promote or support the candidate and the
19 [candidate’s] policy position(s), or discuss a Republican candidate and attack or oppose

²⁷ AOR003.

²⁸ See 11 C.F.R. § 100.22.

1 the candidate and the [candidate's] policy position(s).”²⁹ As explained above, the
2 absence of restrictive language in 52 U.S.C. § 30116(a)(9)(C) suggests that Congress did
3 not intend to limit the use of funds in a legal proceedings account to solely use in
4 recounts, contests, and other legal proceedings. Accordingly, provided that the
5 advertisements described in Solicitation 2 do not expressly advocate the election or defeat
6 of a clearly identified candidate for federal office, the DSCC may use the Legal
7 Proceedings Account to fund the proposed solicitation of donations to the Legal
8 Proceedings Account because such advertisements would not be for the purpose of
9 influencing a federal election. However, if the advertisement expressly advocates the
10 election or defeat of a clearly identified candidate for federal office, then the DSCC may
11 not use the Legal Proceedings Account to fund Solicitation 2 because the disbursements
12 would be for the purpose of influencing a federal election.

13 *2b. May the Candidate Committees coordinate with the DSCC on such*
14 *communications by having input on the content, timing, and placement of the*
15 *communications for Solicitation 2?*

16 If Solicitation 2 does not contain express advocacy, then the Candidate
17 Committees may coordinate with the DSCC on the content, timing, and placement of the
18 communications for Solicitation 2 for the reasons explained in response to question 1b.
19 If Solicitation 2 contains express advocacy, then this question is moot given the
20 Commission's response to question 2a.

²⁹

AOR003.

