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FEDERAL ELECTION COMMISSION  
Washington, DC 20463

**AGENDA DOCUMENT NO. 22-51-A**  
**AGENDA ITEM**  
**For meeting of Oct. 20, 2022**

**SUBMITTED LATE**

October 18, 2022

**MEMORANDUM**

TO: The Commission

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

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Subject: Draft AO 2022-21 (DSCC, *et al.*) - Draft A

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 A**

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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

1 Solicitation 1 with the DSCC because limitations on coordinated expenditures by a  
2 national party committee do not apply to disbursements from a separate, segregated  
3 account established under 52 U.S.C. § 30116(a)(9)(C). Finally, the Commission  
4 concludes that the DSCC may not use funds from the Legal Proceedings Account to pay  
5 for the television advertisements described in Solicitation 2 because, under the  
6 circumstances proposed, disbursements from the Legal Proceedings Account for  
7 Solicitation 2 would be for the purpose of influencing a federal election.

8 ***Background***

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

12       The DSCC is a national political party committee whose purpose is electing  
13 Democrats to the U.S. Senate.<sup>1</sup> Bennet for Colorado is the principal campaign committee  
14 of Michael Bennet, the sitting Democratic senator from Colorado,<sup>2</sup> and People for Patty  
15 Murray is the principal campaign committee of Patty Murray, the sitting Democratic  
16 senator from Washington state.<sup>3</sup> Both senators are seeking re-election in the November  
17 2022 general election.

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

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

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

1           The DSCC established the Legal Proceedings Account under 52 U.S.C.  
2   § 30116(a)(9)(C), and it represents that the account is used to pay for expenses in  
3   connection with recounts, contests, and other legal proceedings.<sup>4</sup> Requestors provide two  
4   alternate proposals under which the DSCC would use this Legal Proceedings Account to  
5   pay for television advertisements soliciting donations to the Legal Proceedings Account;  
6   the advertisements would feature Senators Bennet and Murray and other federal  
7   candidates. Under both proposals, the requestors represent that all advertisements would  
8   “comply fully” with the disclaimer requirements of 52 U.S.C. § 30120 and 11 C.F.R.  
9   § 110.11.<sup>5</sup> Further, under both proposals, if any donation exceeded a donor’s limit to the  
10   Legal Proceedings Account, the DSCC would refund the excess portion of the donation.  
11   Any funds raised through either proposed solicitation “would be spent exclusively on  
12   legal proceedings that comply with the permissible uses of the Legal Proceedings  
13   Account.”<sup>6</sup>

14           For Solicitation 1, the advertisements purchased using funds from the Legal  
15   Proceedings Account would feature one or more candidates, including Senator Bennet  
16   and Senator Murray. The ads would air “in states across the country,” including  
17   Colorado and Washington, and may air in the jurisdiction in which the featured  
18   candidate(s) are candidate(s) for re-election as well as in other jurisdictions where the  
19   featured candidate(s) are not candidates.<sup>7</sup> Solicitation 1 would “[i]nclude a clear

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<sup>4</sup>       Advisory Opinion Request (“AOR”) at AOR001.

<sup>5</sup>       AOR006.

<sup>6</sup>       AOR006.

<sup>7</sup>       AOR002.

1 solicitation asking viewers to donate to the Legal Proceedings Account so that [the]  
2 DSCC can protect the right to vote in court and prepare for potential recounts and  
3 election contests.”<sup>8</sup> The solicitation included in these advertisements would be both oral  
4 and written, with the written solicitation appearing as an easily readable weblink. The  
5 weblink would direct viewers to a contribution page, which would clearly state that  
6 donations would be allocated to the DSCC’s Legal Proceedings Account.

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

14         For Solicitation 2, the advertisements purchased using funds from the Legal  
15 Proceedings Account would feature “a single candidate seeking re-election . . . in the  
16 jurisdiction where the advertisement is disseminated” and would be “coordinated,  
17 including the timing, content, and placement with the Democratic Senate candidate  
18 whose race is featured” in the ad.<sup>12</sup> Each ad would focus on “one or more policy issues

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<sup>8</sup> AOR002.

<sup>9</sup> AOR002.

<sup>10</sup> AOR006.

<sup>11</sup> AOR002.

<sup>12</sup> AOR003.

1 central to the . . . general election in the jurisdiction of distribution” and “would either  
2 discuss a Democratic candidate and promote or support the candidate and [the  
3 candidate’s] policy position(s), or discuss a Republican candidate and attack or oppose  
4 the candidate and [the candidate’s] policy positions.”<sup>13</sup> The advertisement would not  
5 publish or republish candidate materials, but “[m]ight in some circumstances expressly  
6 advocate the election or defeat of a clearly identified candidate for federal office.”<sup>14</sup> The  
7 advertisements would not mention the Legal Proceedings Account or any legal  
8 proceedings, but would include a written link to an online webpage such as  
9 dsc.org/urgent and that website would “clearly state that all funds accepted through the  
10 page are allocated to [the] DSCC’s Legal Proceedings Account.”<sup>15</sup>

11 ***Questions Presented***

12 *1a. May the DSCC use funds in its Legal Proceedings Account to pay for*  
13 *television advertisements following the description for Solicitation 1?*

14 *1b. May the Candidate Committees coordinate with the DSCC on such*  
15 *communications by having input on the content, timing, and placement of the*  
16 *communications for Solicitation 1?*

17 *2a. May the DSCC use funds in its Legal Proceedings Account to pay for*  
18 *television advertisements following the description for Solicitation 2?*

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<sup>13</sup> AOR003.

<sup>14</sup> AOR003.

<sup>15</sup> AOR003.

1           2b.     *May the Candidate Committees coordinate with the DSCC on such*  
2     *communications by having input on the content, timing, and placement of the*  
3     *communications for Solicitation 2?*

4     ***Legal Analysis***

5           1a.     *May the DSCC use funds in its Legal Proceedings Account to pay for*  
6     *television advertisements following the description for Solicitation 1?*

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

11           As added to the Act by the Consolidated and Further Continuing Appropriations  
12    Act, 2015 (“Appropriations Act”), 52 U.S.C. § 30116(a)(9)(C) authorizes a national party  
13    committee, including a national congressional campaign committee, to establish a  
14    “separate, segregated account” to “defray expenses incurred with respect to the  
15    preparation for and conduct of election recounts and contests and other legal  
16    proceedings.”<sup>16</sup> Statements by House and Senate leaders at the time 52 U.S.C.  
17    § 30116(a)(9)(C) was enacted explained that “Commission precedent” on the raising and  
18    spending of recount funds would continue to apply to national party committee accounts

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

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

3 In advisory opinions issued before enactment of the Appropriations Act, the  
4 Commission consistently stated that funds donated to a separate, segregated recount  
5 account, including an account established by a national political party committee, could  
6 not be used for the purpose of influencing a federal election, including for any “campaign  
7 activities.”<sup>18</sup> Consistent with legislative history indicating that Congress intended the  
8 Commission’s conclusions in prior advisory opinions on recount accounts to continue to  
9 apply to separate, segregated national party committee funds established under 52 U.S.C.  
10 § 30116(a)(9)(C), the Commission explained in Advisory Opinion 2019-02 (Bill Nelson  
11 for Senate) that funds in the DSCC’s Legal Proceedings Account established under  
12 52 U.S.C. § 30116(a)(9)(C) “could not be used for the purpose of influencing a federal  
13 election.”<sup>19</sup> Similarly, the legislative history of the Appropriations Act and Commission  
14 advisory opinions predating the Appropriations Act also indicate that funds in the Legal  
15 Proceedings Account may be used to solicit donations to that fund.<sup>20</sup>

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<sup>17</sup> 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).

<sup>18</sup> 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.”)).

<sup>19</sup> Advisory Opinion 2019-02 (Bill Nelson for Senate) at 4.

<sup>20</sup> 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); Advisory Opinion 2010-14 (DSCC) at 5 (“The DSCC may also use recount funds to defray the costs of

1           Accordingly, the DSCC may use funds in its Legal Proceedings Account to pay  
2 for television advertisements following the description for Solicitation 1 because, under  
3 the circumstances presented in the request, the advertisements would be for the purpose  
4 of soliciting donations to the Legal Proceedings Account and not for the purpose of  
5 influencing a federal election. Although Solicitation 1 would feature federal candidates,  
6 the solicitation would “focus on the issue of voter suppression” and would not contain  
7 any express advocacy or mention any political party.<sup>21</sup> The Commission assumes that  
8 Solicitation 1 would also not promote or support, or attack or oppose, any federal  
9 candidate because that information is included only in requestors’ description of  
10 Solicitation 2.<sup>22</sup> In addition, the advertisements would provide a clear solicitation for the  
11 Legal Proceedings Account. Under these circumstances, the advertisement would be for  
12 the purpose of soliciting donations to the Legal Proceedings Account and not for the  
13 purpose of influencing a federal election. Because funds in the Legal Proceedings

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soliciting donations to the recount fund. Commission regulations generally permit (and in some cases require) the proceeds of fundraising activities to be used to defray the costs of those activities.”)

<sup>21</sup> AOR002, 6.

<sup>22</sup> AOR003. The Act and Commission regulations define “Federal election activity” to include “a public communication that . . . promotes or supports . . . or attacks or opposes [a clearly identified candidate for federal office] (regardless of whether the communication expressly advocates a vote for or against a candidate)”. 52 U.S.C. § 30101(20)(A)(iii); 11 C.F.R. § 100.24(b)(3). However, prior advisory opinions have stated that activities paid for with recount funds “must have no relation to campaign activities.” Advisory Opinion 2010-14 (DSCC) at 3, 5; *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 may be used to pay for solicitations for donations to that account,<sup>23</sup> the proposal  
2 is permissible.

3 *Ib. 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 1?*

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

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

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<sup>23</sup> See 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); see also Advisory Opinion 2010-14 (DSCC) at 5.

<sup>24</sup> 52 U.S.C. § 30116(d)(3).

<sup>25</sup> 52 U.S.C. § 30116(d)(5). The conclusion that these limitations do not apply to an account established under 52 U.S.C. § 30116(a)(9)(C) is also supported by the Appropriation Act’s legislative history. 160 Cong. Rec. H9286 (daily ed. Dec. 11, 2014) (statement of Rep. Boehner) (“[I]t is the intent of the amendments contained herein that expenditures made from the accounts described in [52 U.S.C. § 30116(a)(9)], many of which (such as recount and legal proceeding expenses) are not for the purpose of influencing federal elections, do not count against the coordinated party expenditure limits.”); 160 Cong. Rec. S6814 (daily ed. Dec. 13, 2014) (statement of Sen. Reid) (same).

<sup>26</sup> 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 Footnote 22.

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       No, the DSCC may not use funds in its Legal Proceedings Account to pay for  
7 television advertisements following the description for Solicitation 2 because  
8 disbursements from the Legal Proceedings Account for Solicitation 2 would be for the  
9 purpose of influencing a federal election under the circumstances proposed.

10       As discussed above, funds the Legal Proceedings Account may not be used for the  
11 purpose of influencing a federal election, including for any campaign activities. Under  
12 the circumstances presented here, Solicitation 2 would be for the purpose of influencing a  
13 federal election. Solicitation 2 would feature a single federal candidate in the jurisdiction  
14 where the television ad is disseminated and would “either discuss a Democratic candidate  
15 and promote or support the candidate and the [candidate’s] policy position(s), or discuss a  
16 Republican candidate and attack or oppose the candidate and the [candidate’s] policy  
17 position(s).”<sup>27</sup> Solicitation 2 also may expressly advocate for the election or defeat of a  
18 clearly identified federal candidate “in some circumstances.”<sup>28</sup> Such an advertisement,  
19 which the DSCC proposes to run in the month preceding the federal election, would be

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<sup>27</sup> AOR003.

<sup>28</sup> AOR003.

1 for the purpose of influencing a federal election and thus cannot be funded using the  
2 Legal Proceedings Account. Accordingly, the proposal is not permissible.

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 This question is moot given the Commission’s response to question 2a.

7 This response constitutes an advisory opinion concerning the application of the  
8 Act and Commission regulations to the specific transaction or activity set forth in your  
9 request.<sup>29</sup> The Commission emphasizes that, if there is a change in any of the facts or  
10 assumptions presented, and such facts or assumptions are material to a conclusion  
11 presented in this advisory opinion, then the requestors may not rely on that conclusion as  
12 support for its proposed activity. Any person involved in any specific transaction or  
13 activity that is indistinguishable in all its material aspects from the transaction or activity  
14 with respect to which this advisory opinion is rendered may rely on this advisory  
15 opinion.<sup>30</sup> Please note that the analysis or conclusions in this advisory opinion may be  
16 affected by subsequent developments in the law including, but not limited to, statutes,  
17 regulations, advisory opinions, and case law. Any advisory opinions cited herein are  
18 available on the Commission’s website.

19 On behalf of the Commission,

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<sup>29</sup> See 52 U.S.C. § 30108.

<sup>30</sup> See 52 U.S.C. § 30108(c)(1)(B).

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Allen J. Dickerson

Chairman