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By Office of the Commission Secretary at 11:32 am, Sep 26, 2022

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By Office of General Counsel at 12:08 pm, Sep 20, 2022

September 20, 2022

BY ELECTRONIC MAIL DELIVERY

Office of General Counsel
Attn: Lisa J. Stevenson, Esq.
Acting General Counsel
Federal Election Commission
1050 First Street NE
Washington, DC 20463

Re: Advisory Opinion Request

Dear Ms. Stevenson:

Pursuant to 52 U.S.C. § 30108, we seek an advisory opinion on behalf of DSCC, Bennet for Colorado, and People for Patty Murray. DSCC has observed an expanded use in the regulated community of the account reserved for “the preparation for and the conduct of election recounts and contests and other legal proceedings”¹ (“*Legal Proceedings Account*”) to pay for television advertisements. Accordingly, it seeks the Federal Election Commission’s (the “*FEC’s*” or “*Commission’s*”) guidance on the scope of the kinds of communications that qualify as permissible fundraising expenses for the Legal Proceedings Account. Specifically, the DSCC seeks this opinion to confirm the extent to which the Legal Proceedings Account may be used for television advertisements that feature a federal candidate, but also include a solicitation for the Legal Proceedings Account. Bennet for Colorado and People for Patty Murray seek guidance on the extent to which a federal candidate may lawfully appear in such communications and provide input on the communications. Because Senators Bennet and Murray are up for re-election in the November 8, 2022 election, which is within 60 days, we respectfully request a response within 20 days.²

I. FACTUAL DISCUSSION

DSCC is the national political party committee established pursuant to 52 U.S.C. § 30101(14) dedicated to electing Democrats to the U.S. Senate. Pursuant to federal law, DSCC maintains a segregated bank account out of which it pays for expenses in connection with recounts, contests, and other legal proceedings.³ Senator Bennet is a member of the US Senate and the Democratic nominee for U.S. Senate in the November 8, 2022 general election in Colorado; Senator Murray likewise a sitting Senator and is the Democratic nominee for U.S. Senate in the November 8, 2022 general election in Washington State (collectively, the “*Candidates*”). Bennet for Colorado and People for Patty are their principal campaign committees (collectively, the “*Campaigns*”).

¹ 52 U.S.C. § 30116(a)(9)(C).

² *Id.* § 30108(a)(2).

³ *See id.* § 30116(a)(9)(C).

Based on the legislative history surrounding the addition of the Legal Proceedings Account to the Federal Election Campaign Act of 1971, as amended (the “*Act*”), and FEC precedent, DSCC may pay the costs to solicit funds for its Legal Proceedings Account using money in that account. However, there is little guidance in the Act, its legislative history, and from the Commission about any content restrictions that apply in order for the cost of a solicitation to qualify as “solicitations for its Legal Proceedings Account.” Consequently, DSCC seeks guidance on whether its plans for two types of public communications are permissible, and the Campaigns seek confirmation that they may coordinate with DSCC on these communications.

Solicitation 1: DSCC wants to know if it would be permissible to use funds in the Legal Proceedings Account to pay for the production and airing of television advertisements that would be disseminated in states across the country, including Colorado and Washington, that raise funds for the Legal Proceedings Account by highlighting the pressing need to protect the right to vote through affirmative voting rights litigation as well as prepare for potential recounts and contests.

These communications would:

1. Feature one or more U.S. Senate candidates, including the Candidates. DSCC wants to include recognizable political figures in the communications because it believes it will make viewers of the communications more likely to donate to the cause. Accordingly, the advertisements may air in the jurisdiction in which the featured candidate(s) are candidates for re-election as well as other jurisdictions where the featured candidate(s) are not candidates for federal office.
2. Not publish or republish candidate materials.
3. Not expressly advocate the election or defeat of a clearly identified candidate for federal office.
4. Focus on the topic of voter disenfranchisement as a pressing issue heading into the 2022 general election.
5. Include a clear solicitation asking viewers to donate to the Legal Proceeding Account so that DSCC can protect the right to vote in court and prepare for potential recounts and election contests. The solicitation in the advertisement would be both oral and written. The written solicitation will appear as a webpage link displayed on the screen (in a font, color and size that is easily readable) directing viewers to an online contribution page. The oral solicitation will be spoken by a narrator and refer generally to donating via the onscreen webpage link. The online contribution page would in turn clearly state that all funds accepted through the page are allocated to DSCC’s Legal Proceedings Account. To the extent a donor’s contribution via the designated contribution page exceeds their limit to the Legal Proceedings Account, any excess portion of the contribution will be refunded, not allocated to another account.
6. Be coordinated, including the timing, content, and placement with the Democratic Senate candidate appearing in the advertisement.

Solicitation 2: Though the DSCC has serious misgivings as to its legality, DSCC also seeks to know if it would be permissible to use funds in the Legal Proceedings Account to pay for the production and airing of television advertisements that expressly advocate for or against one clearly identified

candidate for federal office and/or address policy issues featuring a federal candidate while also including a solicitation for the Legal Proceedings Account.

These communications would:

1. Feature a single candidate seeking re-election in November 2022 in the jurisdiction where the advertisement is disseminated. The advertisement would be fully coordinated with the Democratic Senate candidate in the jurisdiction.
2. Focus on one or more policy issues central to the November 8, 2022, general election in the jurisdiction of distribution. The communication would either discuss a Democratic candidate and promote or support the candidate and their policy position(s), or discuss a Republican candidate and attack or oppose the candidate and their policy position(s). DSCC believes featuring high profile candidates and policy positions will help motivate viewers to contribute to the Legal Proceedings Account.
3. Not publish or republish candidate materials.
4. Might in some circumstances expressly advocate the election or defeat of a clearly identified candidate for federal office.
5. At the end of these advertisements, there will be a voiceover that states simply, “Donate today.” The visual will include a written-out link to an online webpage (in a font, color and size that is easily readable) such as “Donate at dsc.org/urgent” Although these communications will not mention the Legal Proceedings Account or any legal proceedings, the contribution page would clearly state that all funds accepted through the page are allocated to DSCC’s Legal Proceedings Account. To the extent a donor’s contribution via the designated webpage exceeds their contribution to the Legal Proceedings Account, any excess portion of the contribution will be refunded, not allocated to another account.
6. Be coordinated, including the timing, content, and placement with the Democratic Senate candidate whose race is featured in the advertisement.

II. QUESTIONS PRESENTED

1. May DSCC use funds in its Legal Proceedings Account to pay for television advertisements following the description for Solicitation 1? May the Campaigns coordinate with DSCC on such communications by having input on the content, timing, and placement of the communications?
2. May DSCC use funds in its Legal Proceedings Account to pay for television advertisements following the description for Solicitation 2? May the Campaigns coordinate with DSCC on such communications by having input on the content, timing and placement of the communications?

III. LEGAL ANALYSIS

A. Legal Background

Pursuant to the Consolidated and Further Continuing Appropriations Act of 2015 (the “*Appropriations Act*”), national political party committees are permitted to raise funds into a separate account in order “to defray expenses incurred with respect to the preparation for and the conduct of election recounts and

contests and other legal proceedings.”⁴ This Legal Proceedings Account has its own contribution limit separate from each national party committees’ general account, and disbursements from the Legal Proceedings Account do not count against a national party committee’s coordinated party expenditure limit.⁵

The drafters of the Appropriations Act, then-Speaker of the House John Boehner and then-Senate Majority Leader Harry Reid, declared the intent of the Legal Proceedings Account in a joint Explanation of Congressional Intent (the “*Explanation*”). In the Explanation, they stated as follows:

The third account, described in section 315(a)(9)(C) of FECA (as amended), is intended to permit a national committee of a political party (including a national congressional campaign committee of a political party) to defray expenses incurred with respect to the preparation for and the conduct of election recounts and contests and other legal proceedings, *including the costs of fundraising for this segregated account, using funds raised under a separate limit*. Section 101 of Division N is not intended to modify Federal Election Commission precedent permitting the raising and spending of [recount] funds by campaign or state or national party committees. See FEC Advisory Opinions 2006–24, 2009–4. Section 101 is also intended to permit the national parties to use such funds for costs, fees, and disbursements associated with other legal proceedings.

Finally, under current law coordinated limits do not apply even absent these provisions to the existing accounts as described in section 315 of FECA and therefore it is the intent of the amendments contained herein that expenditures made from the accounts described in section 315(a)(9) of FECA, 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 described in section 315(d) of FECA.⁶

B. Legal Conclusions

When Congress enacted the Appropriations Act, it made clear that the costs of fundraising for a national party committee’s Legal Proceedings Account can be paid from the Legal Proceedings Account. Requestors seek the Commission’s guidance as to the scope of the kinds of communications that qualify as permissible fundraising expenses for the Legal Proceedings Account. Specifically, Requestors ask whether the communication must at least, in part, relate to and solicit funding for “the preparation for and the conduct of election recounts and contests and other legal proceedings.”

The Act itself states that disbursements from the Legal Proceedings account are not party coordinated expenditures.⁷ Therefore, provided that the purpose of a communication is to solicit funds for the account, based on an objective standard, it appears that DSCC can coordinate with candidates, as described above, on communications financed with its Legal Proceedings Account without triggering coordinated party spending authority.

Solicitation 1: The communications would focus on litigation related to voter disenfranchisement, an issue that DSCC is already addressing and will continue to address using funds in its Legal Proceedings Account. The communications would explicitly ask for donations to help pay for its efforts around that

⁴ *Id.*

⁵ *Id.* § 30116(d)(5).

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

⁷ 52 U.S.C. § 30116(d)(5)

issue. The inclusion of a federal candidate, including the Candidates, would help provide context for viewers as to why this work is important this election cycle. Based on these factors, the clear purpose of such an expenditure is to raise money for the Legal Proceedings Account and an objective viewer would undoubtedly regard the purpose as such.

Solicitation 2: Solicitation 2 does not relate to “the preparation for and the conduct of election recounts and contests and other legal proceedings,” however, it still raises donations for the Legal Proceedings Account. The communications would conclude by asking for a donation by displaying a written online webpage. When the viewer goes to the online link to make a donation, the page will explain that the money raised is for DSCC’s Legal Proceedings Account. Therefore, the donor would learn how their contributed funds can be used on that website. Because these communications would expressly advocate for or against candidates or include policy positions about candidates, are coordinated with those candidates, and would be disseminated in the jurisdiction where they are running, they raise serious concerns that they would later be deemed illegal by the Commission or in a criminal case. Thus, out of prudence, DSCC and the Candidates seek an advisory opinion before engaging in this activity .

Accordingly, DSCC and the Campaigns urge the Commission to answer their first question in the affirmative and provide a clear answer to their second question so they can engage in the proposed conduct without fear of civil and criminal enforcement. Should the Commission have any questions about this advisory opinion request as it develops its response, please do not hesitate to contact the undersigned.

Very truly yours,



Jacquelyn K. Lopez
Rachel L. Jacobs
Shanna M. Reulbach
Jonathan A. Peterson

Counsel to DSCC, Bennet for Colorado, and People for Patty Murray

From: [Jacquelyn Lopez](#)
To: [Robert Knop](#); [Jonathan Peterson](#)
Cc: [Heather Filemyr](#); [Neven Stipanovic](#)
Subject: RE: Pre-AOR 529 (DSCC, Bennet for Colorado, and People for Patty Murray)
Date: Friday, September 23, 2022 5:01:34 PM

Hi Mr. Knop,

Please see below.

- 1. In light of the New York Times article of September 21, 2022, please confirm that requestors have submitted this request to seek guidance about their own proposed future activity and not about the past actions or ongoing activity of any third party.**

Confirmed. Requestors seek the Commission's guidance as to the legality of the activities specified in the request. Since the creation of the Legal Proceedings Account, as part of the Consolidated and Further Continuing Appropriations Act of 2015, the Commission has failed to promulgate regulations on the permissible use of the account. We are forty five days away from the *fourth federal election* in which the regulated community has been forced to operate without such guidance from the Commission. The advisory opinion process is intended precisely to allow organizations like the Requestors to obtain guidance upon which they may rely prior to engaging in activities that could otherwise be deemed a violation of federal law.

- 2. Please provide sample language that would be used in Solicitation 1 or provide additional information about the contours of the contents of that Solicitation.**

Solicitation 1 will focus on the issue of voter suppression and will make no mention of any political party. Requestors also wish to stipulate that the funds raised through the solicitation would be spent exclusively on legal proceedings that comply with the permissible uses of the Legal Proceedings Account.

- 3. Would disclaimers be provided in the television advertisements for Solicitations 1 and 2?**

Yes, the advertisements would comply fully with 52 U.S.C. § 30120 and 11 C.F.R. § 110.11.

Thank you,
Jackie

Jacquelyn ("Jackie") Lopez
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From: Robert Knop <[REDACTED]>
Sent: Thursday, September 22, 2022 8:25 PM
To: Jacquelyn Lopez <jlopez@elias.law>; Jonathan Peterson <jpeterson@elias.law>
Cc: Heather Filemyr <[REDACTED]>; Neven Stipanovic <[REDACTED]>
Subject: Pre-AOR 529 (DSCC, Bennet for Colorado, and People for Patty Murray)

Dear Ms. Lopez and Mr. Peterson:

Thank you for speaking with me and my colleague, Heather Filemyr, about your letter requesting an advisory opinion on behalf of the Democratic Senatorial Campaign Committee, Bennet for Colorado, and People for Patty Murray, received by this office on September 20, 2022. As discussed, we have determined that your letter does not yet qualify as a complete advisory opinion request, and we need the following additional information:

1. In light of the New York Times article of September 21, 2022, please confirm that requestors have submitted this request to seek guidance about their own proposed future activity and not about the past actions or ongoing activity of any third party.
2. Please provide sample language that would be used in Solicitation 1 or provide additional information about the contours of the contents of that Solicitation.
3. Would disclaimers be provided in the television advertisements for Solicitations 1 and 2?

Your response may be considered to be part of the advisory opinion request; if so, it will be posted on the Commission's website along with your letter received on September 20, 2022.

Please let us know if you have any questions.

Thank you.
Bob