



FEDERAL ELECTION COMMISSION
Washington, DC 20463

BY ELECTRONIC MAIL ONLY

melias@elias.law
Marc Elias, Esq.
10 G Street NE, Suite 600
Washington, DC 20002

September 15, 2021

RE: MUR 7358
Jacky Rosen
Rosen for Nevada and Steven Mele
in his official capacity as treasurer

Dear Mr. Elias:

On April 5, 2018, the Federal Election Commission notified your clients, Jacky Rosen, and Rosen for Nevada and Steven Mele in his official capacity as treasurer, of a complaint alleging violations of certain sections of the Federal Election Campaign Act of 1971, as amended. A copy of the complaint was forwarded to your clients at that time. Upon further review of the allegations contained in the complaint, and information supplied by your clients, the Commission, on August 31, 2021, voted to dismiss the allegations that your clients violated 52 U.S.C. §§ 30116(f) and 30104(b) by knowingly accepting and failing to report excessive in-kind contributions in the form of third-party payments for legal expenses. Accordingly, the Commission closed its file in this matter.

Documents related to the case will be placed on the public record within 30 days. *See* Disclosure of Certain Documents in Enforcement and Other Matters, 81 Fed. Reg. 50,702 (Aug. 2, 2016). The Factual and Legal Analysis, which explains the Commission's findings, is enclosed for your information.

If you have any questions, please contact Nick Mueller, the attorney assigned to this matter, at (202) 694-1577.

Sincerely,

Peter G. Blumberg
Peter G. Blumberg
Acting Deputy Associate General Counsel

Enclosure

Factual and Legal Analysis

FEDERAL ELECTION COMMISSION
FACTUAL AND LEGAL ANALYSIS

RESPONDENTS: Rosen for Nevada and Steven Mele in his official capacity as treasurer
Jacky Rosen
Perkins Coie LLP
Wolf, Rifkin, Shapiro, Schulman & Rabkin, LLP

I. INTRODUCTION

12 This matter was generated by a Complaint filed with the Federal Election Commission
13 involving allegations that the law firms Perkins Coie LLP (“Perkins Coie”) and Wolf, Rifkin,
14 Shapiro, Schulman & Rabkin, LLP (“Wolf Rifkin”) made excessive and unreported in-kind
15 contributions to then-U.S. Representative Jacky Rosen and her principal campaign committee,
16 Rosen for Nevada and Steven Mele in his official capacity as treasurer (the “Committee”), by
17 providing the Committee with free legal services defending Rosen and the Committee in a
18 defamation action stemming from her 2016 congressional campaign.¹ Respondents assert that
19 two national party committees paid for the legal services received by the Committee with funds
20 from a segregated account designated for election recounts and contests and other legal
21 proceedings and argue that such payments are not subject to limitation under the Federal Election
22 Campaign Act of 1971, as amended (the “Act”).²

23 As discussed below, neither law firm appears to have made an in-kind contribution to
24 Rosen or her Committee. Accordingly, the Commission finds no reason to believe that Perkins
25 Coie or Wolf Rifkin violated 52 U.S.C. § 30116(a) by making excessive in-kind contributions.

¹ Compl. (Mar. 30, 2018). During the 2016 election cycle, Rosen was a candidate for the U.S. House of Representatives from the Third District in Nevada. *See* Jacky Rosen Statement of Candidacy (Jan. 26, 2016). Rosen was a candidate for U.S. Senate from Nevada in 2018 and the Committee remains her principal campaign committee. *See* Rosen for Nevada Amended Statement of Organization (Mar. 23, 2021).

² Rosen and Committee Resp. (“Rosen Resp.”) (May 25, 2018); Perkins Coie Resp. (May 25, 2018); Wolf Rifkin Resp. (May 25, 2018) (incorporating by reference Perkins Coie Resp.).

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1 Further, considering that the Commission has yet to provide guidance to the regulated
 2 community regarding the scope of “legal proceedings” that may be paid for from such a
 3 segregated account, the Commission dismisses as a matter of prosecutorial discretion the
 4 allegation that Rosen or the Committee violated 52 U.S.C. §§ 30116(f) and 30104(b) by
 5 knowingly accepting and failing to report, respectively, excessive in-kind contributions in the
 6 form of third-party payments for legal expenses.

7 **II. FACTUAL BACKGROUND**

8 In November 2016, Rosen and the Committee were sued for defamation by her 2016
 9 general election opponent, Danny Tarkanian.³ Tarkanian alleged that ads run by the Rosen
 10 Committee on YouTube and other social media platforms made false claims, including that
 11 “Tarkanian set up 13 fake charities that preyed on vulnerable seniors.”⁴ Rosen and the
 12 Committee retained Perkins Coie and Wolf Rifkin to defend them in the lawsuit.⁵ The
 13 Complaint notes that the defamation suit survived a motion to dismiss and an appeal had been
 14 filed with the Supreme Court of Nevada,⁶ but the Committee’s reports filed with the
 15 Commission do not disclose any disbursements to Wolf Rifkin and only one disbursement for
 16 \$6,232 to Perkins Coie for “legal services.”⁷ Based on this information, the Complaint alleges

³ Compl. at 1.

⁴ *Rosen v. Tarkanian*, 135 Nev. 436, 437-438 (Nev. 2019).

⁵ *Id.*; Rosen Resp. at 2; Perkins Coie Resp. at 2.

⁶ Since the filing of the Complaint in this matter, the Nevada Supreme Court heard the case, reversing and remanding the trial court’s denial of Rosen’s special motion to dismiss. *Rosen v. Tarkanian*, 135 Nev. 436 (Nev. 2019).

⁷ Compl. at 1-2; Rosen for Nevada, 2017 Year-End Report (Feb. 9, 2018). Commission records show 32 additional payments from the Committee to Perkins Coie totaling \$125,460 after the Complaint was filed. *See FEC Disbursements: Filtered Results*, FEC.GOV, https://www.fec.gov/data/disbursements/?data_type=processed&committee_id=C00606939&recipient_name=PERKINS+COIE&min_date=03%2F31%2F2018&max_date=12%2F31%2F2021 (Last visited July 19, 2021) (Rosen for Nevada disbursements to Perkins Coie from March 31, 2018, to present).

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1 that the value of the work done by these firms, over the course “of sixteen months of legal
2 representation,” exceeds the contribution limits.⁸

3 Respondents do not dispute these facts but explain that the Democratic Congressional
4 Campaign Committee (“DCCC”) and the Democratic Senatorial Campaign Committee
5 (“DSCC”) paid Perkins Coie and Wolf Rifkin for the legal services they provided to Rosen and
6 the Committee from their “legal proceedings account[s].”⁹ Reports filed with the Commission
7 by the DCCC and the DSCC between 2017 and 2021 reflect that these committees have made
8 disbursements to Perkins Coie in excess of \$45,000,000 and to Wolf Rifkin in excess of \$25,000,
9 many of which indicate the use of the recount or other legal proceedings fund, but which do not
10 indicate which legal matter is associated with each disbursement.¹⁰

11 **III. LEGAL ANALYSIS**

12 Under the Act, a “contribution” is “anything of value made by any person for the purpose
13 of influencing an election for Federal office.”¹¹ “Anything of value” includes all in-kind
14 contributions, such as “the provision of any goods or services without charge” or at a charge less

⁸ Compl. at 3.

⁹ Rosen Resp. at 1; Perkins Coie Resp. at 1. Respondents state that DCCC made these disbursements from its recount and legal services account and that once Rosen announced her 2018 candidacy for the Senate, DSCC also began making such disbursements. Rosen Resp. at 3; Perkins Coie Resp. at 3; *see* Jacky Rosen Statement of Candidacy for U.S. Senate (July 7, 2017).

¹⁰ *See, e.g.*, FEC Disbursements: Filtered Results, FEC.GOV, https://www.fec.gov/data/disbursements/?data_type=processed&committee_id=C00000935&recipient_name=perkins+coie&min_date=01%2F01%2F2017&max_date=12%2F31%2F2021 (last visited July 19, 2021) (DCCC disbursements to Perkins Coie from 2017, to present); FEC Disbursements: Filtered Results, FEC.GOV, https://www.fec.gov/data/disbursements/?data_type=processed&committee_id=C00042366&recipient_name=perkins+coie&min_date=01%2F01%2F2017&max_date=12%2F31%2F2021; (last visited July 19, 2021) (DSCC disbursements to Perkins Coie from 2017 to present); DSCC, February Monthly Report at 1636 (Feb. 20, 2018), *available at* <http://docquery.fec.gov/pdf/719/201802200200162719/201802200200162719.pdf>; *see also* Rosen Resp. at 5 (stating that the amounts paid during this period to Perkins Coie by DCCC include not only payments relating to Rosen’s defamation defense, but also “other legal expenses incurred by DCCC in connection with election recounts, contests and other legal proceedings”).

¹¹ 52 U.S.C. § 30101(8)(A)(i).

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1 than the usual and normal charge.¹² The Act also defines “contribution” to include the “payment
 2 by any person of compensation for the personal services of another person which are rendered to
 3 a political committee without charge for any purpose.”¹³ All principal campaign committees are
 4 required to file reports disclosing all of their receipts and disbursements, including in-kind
 5 contributions.¹⁴ The Act further provides that no person shall make contributions to any
 6 candidate and his or her authorized political committees with respect to any election for federal
 7 office which, in the aggregate, exceed \$2,700 for the 2016 or 2018 election cycles.¹⁵ National
 8 political party committees may support their candidates with coordinated party expenditures,
 9 subject to limitation.¹⁶

10 In the present matter, both law firms were paid for their services by the DCCC and the
 11 DSCC, via their respective segregated accounts. Thus, neither law firm “provi[ded] any goods
 12 or services without charge” and thereby did not make in-kind contributions to the Committee as
 13 the Complaint alleges. Likewise, the Committee did not receive, and thus was not required to
 14 report, any such in-kind contributions from the law firms.

15 The Consolidated and Further Continuing Appropriations Act of 2015 amended the Act
 16 to allow national party committees to create separate segregated accounts “to defray expenses
 17 incurred with respect to the preparation for and the conduct of election recounts and contests and

¹² 11 C.F.R. § 100.52(d).

¹³ 52 U.S.C. § 30101(8)(A)(ii); 11 C.F.R. § 100.54.

¹⁴ 52 U.S.C. § 30104(b); 11 C.F.R. § 104.3.

¹⁵ 52 U.S.C. § 30116(a)(1)(A); *see* 11 C.F.R. §§ 110.1(b)(1)(i), 110.17(b); Price Index Adjustments for Contribution and Expenditure Limitations and Lobbyist Bundling Disclosure Threshold (2018 election cycle), 82 Fed. Reg. 10904, 10906 (Feb. 16, 2017); Price Index Adjustments for Contribution and Expenditure Limitations and Lobbyist Bundling Disclosure Threshold (2016 election cycle), 80 Fed. Reg. 5750, 5752 (Feb. 3, 2015).

¹⁶ 52 U.S.C. § 30116(d)(1)-(3); 11 C.F.R. § 109.32.

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1 other legal proceedings.”¹⁷ Such accounts are in addition to any other federal accounts
 2 maintained by a national party committee and are subject to contribution limits equal to 300% of
 3 the otherwise-applicable contribution limit to national party committees.¹⁸ In addition,
 4 disbursements from such accounts are not subject to coordinated party expenditure limits.¹⁹

5 Since the 1970s, the Commission has recognized that recounts are not themselves
 6 elections and thus funds received and spent for them are not “contributions” or “expenditures.”²⁰

7 In a series of advisory opinions, the Commission further explained that a national party
 8 committee “may establish a recount fund, separate from its other accounts and subject to a
 9 separate limit on amounts received, and use that fund to pay expenses incurred in connection
 10 with recounts and election contests of Federal elections.”²¹ The Commission made clear that
 11 funds in such recount accounts cannot “be used for campaign activities” and that “recount
 12 activities paid for by the recount fund must have no relation to campaign activities.”²²

13 Subsequent to the 2015 amendment, the Commission reaffirmed that funds raised by a
 14 candidate to pay for recounts and “lawsuits directly related to the counting and recounting of

¹⁷ Pub. L. No. 113-235, 101, 128 Stat. 2130, 2772-73 (2014) (codified at 52 U.S.C. § 30116(a)(9)(C)).

¹⁸ 52 U.S.C. § 30116(a)(1)(B), (2)(B).

¹⁹ 52 U.S.C. § 30116(d)(5); *see also* 11 C.F.R. §§ 109.30, 109.32(a)(1).

²⁰ *See* 11 C.F.R. § 100.91 (“A gift, subscription, loan, advance, or deposit of money or anything of value made with respect to a recount of the results of a Federal election, or an election contest concerning a Federal election, is not a contribution except that the prohibitions of 11 CFR 110.20 and part 114 apply.”); *see also* Advisory Op. 1978-92 (Miller) at 2 (explaining that Commission regulations provide that “gifts, or loans or payments of money or anything of value that are made solely for the purpose of defraying the expenses of a Federal election recount are not contributions or expenditures under the Act and Commission regulations” and are therefore not subject to the contribution limits).

²¹ Advisory Op. 2009-04 (Franken/DSCC) at 2-3 (“AO 2009-04”) (citing AO 2006-24).

²² Advisory Op. 2010-14 (DSCC) at 3, 5 (citing AO 1978-92) (“[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.”). Thereafter, in one instance, the Commission further permitted national party committees to use funds in their recount accounts to pay for litigation seeking the disgorgement of primarily soft-money contributions that had been made prior to the enactment of BCRA. Advisory Op. 2011-03 (DSCC, RNC, NRCC, DCCC, and NRSC) at 3-4.

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1 ballots” are subject to the Act’s limitations, prohibitions, and reporting requirements but are not
2 aggregated with contributions for the general election and “must have no relation to campaign
3 activities” and “may not be used in any manner that would constitute a contribution or
4 expenditure under the Act or regulations.”²³ Thus, if the payments from the DCCC and the
5 DSCC to the law firms at issue in this matter were properly made from these segregated
6 accounts, they would not be considered contributions under the Act and therefore the Committee
7 would not have received or failed to report excessive in-kind contributions. This raises the
8 question whether the DCCC and the DSCC’s use of their segregated accounts to pay for Rosen’s
9 defense in a defamation suit filed by her 2016 campaign opponent was a proper use of funds
10 designated for “election recounts and contests and other legal proceedings.”

11 Here, the DCCC and DSCC have not been named as respondents, and the Complaint does
12 not allege that they misused their segregated accounts. The Commission has yet to provide
13 guidance to the regulated community on the scope of permissible uses of these accounts under
14 52 U.S.C. § 30116(a)(9)(C) or the effect of payments from these accounts under 52 U.S.C.
15 § 30101(8)(A)(ii). For these reasons, the Commission dismisses these allegations as a matter of
16 prosecutorial discretion.²⁴

17 Accordingly, the Commission finds no reason to believe that Perkins Coie or Wolf Rifkin
18 violated 52 U.S.C. § 30116(a) by making excessive in-kind contributions and dismisses the
19 allegations that Rosen and the Committee violated 52 U.S.C. §§ 30116(f) and 30104(b) by
20 knowingly accepting and failing to report, respectively, excessive in-kind contributions in the
21 form of third-party payments for legal expenses.

²³ Advisory Op. 2019-02 (Nelson) at 2-3.

²⁴ See *Heckler v. Chaney*, 470 U.S. 821, 831 (1985).