MEMORANDUM

TO: The Commission
FROM: Lisa J. Stevenson  
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Subject: Draft AO 2019-02 (Bill Nelson for Senate) Draft A

Attached is a proposed draft of the subject advisory opinion.

Members of the public may submit written comments on the draft advisory opinion. We are making this draft available for comment until 12:00 pm (Eastern Time) on March, 27, 2019.

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
Dear Mr. Elias and Ms. Jacobs:

We are responding to your advisory opinion request on behalf of Bill Nelson for Senate (the “Committee”), concerning the application of the Federal Election Campaign Act, 52 U.S.C. §§ 30101-45 (the “Act”), and Commission regulations to its proposal to donate excess recount funds to a charitable organization or transfer the funds to a national party committee’s separate, segregated account for election recounts, contests, and other legal proceedings. The Commission concludes that the Committee’s proposed donation or transfer would be consistent with the Act and Commission regulations.

**Background**

The facts presented in this advisory opinion are based on your letter received on January 30, 2019 and publicly available information.

During the 2017-2018 election cycle, Senator Bill Nelson ran for re-election to Florida’s seat in the United States Senate, and the Committee is his principal campaign committee.¹

See Advisory Opinion Request at AOR001.

In the days following the election, between Saturday, November 10 and Sunday, November 18, Senator Nelson participated in a machine recount and a hand recount under Florida law, as well as more than a dozen lawsuits “directly related to the counting and

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recounting of ballots.” AOR001. To fund those recounts and lawsuits, the Committee established a separate bank account that accepted only funds subject to the limits, source restrictions, and reporting requirements of the Act. Id.

You state that the Committee now has excess funds in its recount account, that Senator Nelson is winding down the Committee’s operations, and that the Committee would like to donate the excess funds to a charity or transfer them to a national party committee. Regarding the proposed charity donation, the Committee would donate funds to an organization that does not pay any compensation to Senator Nelson and that is “prohibited from participating or intervening in any political campaign” under section 501(c)(3) of the Internal Revenue Code. AOR003. The Committee also proposes to transfer excess recount funds to the Democratic Senatorial Campaign Committee’s separate segregated account for “election recounts and contests and other legal proceedings” (the “DSCC recount account”). See AOR001-002.

According to the request, the DSCC recount account was established under the Consolidated and Further Continuing Appropriations Act, 2015, Pub. L. 113-235, 101, 128 Stat. 2130, 2772-73 (2014) (“Appropriations Act”) (codified as 52 U.S.C. § 30116(a)(9)(C)), which permits national party committees (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.” See AOR002.

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Questions Presented

1. May the Committee donate excess recount funds to a charitable organization from which Senator Nelson will receive no compensation?

2. May the Committee transfer excess recount funds to the DSCC’s account for recounts, contests, and other legal proceedings established under 52 U.S.C. § 30116(a)(9)(C)?

Legal Analysis and Conclusions

Yes, the Committee may donate excess recount funds to a charitable organization from which Senator Nelson will receive no compensation, and the Committee may transfer excess recount funds to the DSCC recount account.

The Act and Commission regulations define the term “contribution” and “expenditure” to include any gift, loan, or payment of money or anything of value for the purpose of influencing a federal election. 52 U.S.C. §§ 30101(8)(A)(i), 30101(9)(A)(i); 11 C.F.R. §§ 100.52(a), 100.111(a). Commission regulations expressly except from its definitions of contribution and expenditure funds raised and spent for recounts and contests concerning federal elections. See 11 C.F.R. §§ 100.91, 100.151.

Although recount funds are neither contributions nor expenditures, under the Bipartisan Campaign Reform Act (“BCRA”), federal candidates may not raise or spend funds “in connection with an election for federal office” unless the funds are subject to the limitations, prohibitions, and reporting requirements of the Act. 52 U.S.C. § 30125(e). The Commission has concluded that BCRA applies to federal candidates’ recount funds because such funds would be raised or spent “in connection with” a federal election. Advisory Opinion 2006-24 (National Republican Senate Committee et al.) (“NRSC”) at 6. But “donations to a [f]ederal candidate’s
‘recount fund’ [are] not . . . aggregated with contributions from those persons to the [f]ederal
candidate for the general election.” *Id.* Rather, federal candidates may establish a separate
recount account — subject to a separate contribution limit — that may be used to pay for certain
activities related to recounts and election contests. *See, e.g.*, Advisory Opinion 2006-24 (NRSC)
at 2 (stating that recount funds may be used for expenses “resulting from a recount, election
contest, counting of provisional and absentee ballots and ballots cast in polling places,” and
“post-election litigation and administrative-proceeding expenses concerning the casting and
counting of ballots during the [f]ederal election, fees for the payment of staff assisting the
recount or election contest efforts, and administrative and overhead expenses in connection with
recounts and election contests”); see also Advisory Opinion 2010-18 (Minnesota Democratic-
Farmer-Labor Party) at 1 (concluding that state party committee may use recount funds “to pay
for recount activities relating to future recounts”).

The Commission has explained that recount activities paid for by the recount fund “must
have no relation to campaign activities,” and that “any resulting surplus of funds may not be used
in any manner that would constitute a contribution or expenditure under the Act or regulations.”
*See* Advisory Opinion 2010-14 (DSCC) at 5 (quoting Advisory Opinion 1978-92 (Miller)). The
Commission, however, has not previously addressed whether a candidate may dispose of excess
recount funds by donating the funds to a charity or transferring the funds to a national party
committee. Under the circumstances presented here, the Commission concludes that the
proposed use of excess recount funds is consistent with the Act for two reasons: (1) the donated
or transferred funds would not be used for the purpose of influencing a federal election, and thus
would not constitute a contribution or expenditure under the Act or Commission regulations, and
(2) the excess recount funds would be disposed of in a manner similar to how candidates may
permissibly dispose of excess campaign funds under the Act.

First, neither the proposed donation to a 501(c)(3) charity nor the transfer to the DSCC
recount account would be used for the purpose of influencing a federal election, and thus would
not violate the prohibition on using recount funds for contributions and expenditures as
explained above. Regarding the proposed charitable donation, because the Committee would
transfer excess recount funds exclusively to charitable organizations that are prohibited from
participating or intervening in any political campaign under section 501(c)(3) of the Internal
Revenue Code, see 26 U.S.C. § 501(c)(3), the excess recount funds donated to such charitable
organizations could not be used to influence a federal election. Similarly, the DSCC recount
account may be used only for certain purposes, namely expenses related to election recounts,
contests, and other legal proceedings. 52 U.S.C. § 30116(a)(9)(C). Statements by House and
Senate leaders at the time of enactment of section 30116(a)(9)(C) indicate that “Commission
precedent” on raising and spending of recount funds would apply to national party committee
accounts such as the DSCC’s recount account. See 160 Cong. Rec. H9286 (daily ed. Dec. 11,
of Sen. Reid). Given that Commission precedent prohibits the use of recount funds for campaign
activities, see Advisory Opinion 2010-14 (DSCC) at 5, any funds that the Committee transfers to
the DSCC recount account also could not be used for the purpose of influencing a federal
election.

Second, the proposed donation and transfer of excess recount funds would be consistent
with how candidates may dispose of excess campaign funds under the Act. The Act provides
that a “contribution accepted by a candidate” may be donated “to an organization described in section 170(c) of title 26,” including certain organizations under 501(c)(3) of the Internal Revenue Code, 52 U.S.C. § 30114(a)(3); see 11 C.F.R. § 113.2(b), “unless the candidate receives compensation from the organization before the organization has expended the entire amount donated for purposes unrelated to his or her personal benefit,” 11 C.F.R. § 113.1(g)(2).

Similarly, federal candidates may transfer campaign funds without limit to a national party committee such as the DSCC. See 52 U.S.C. § 30114(a)(4); 11 C.F.R. § 113.2(c). Here, the Committee plans to donate funds to a 501(c)(3) charity from which Senator Nelson would receive no compensation; Senator Nelson thus would not personally benefit from the proposed transaction. The proposed transfer to the DSCC recount account also would be consistent with the Act’s long recognized permission for candidates to transfer unlimited funds to national party committees. Given that Congress has expressly allowed federal candidates to dispose of excess campaign funds in similar circumstances, the Commission discerns no reason to apply a different standard here.

In sum, because the excess recount funds donated to a 501(c)(3) charity or transferred to the DSCC recount account would not be used for the purpose of influencing a federal election, and the donation or transfer would be consistent with how candidates may dispose of excess campaign funds in similar circumstances, the Commission concludes that the Committee’s proposed donation or transfer would be consistent with the Act and Commission regulations.

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. See 52 U.S.C. § 30108. 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 you may not rely on that conclusion as support for its proposed
activity. Any person involved in any specific transaction or activity which is indistinguishable in
all its material aspects from the transaction or activity with respect to which this advisory
opinion is rendered may rely on this advisory opinion. See 52 U.S.C. § 30108(c)(1)(B). 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,

Ellen L. Weintraub
Chair