



FEDERAL ELECTION COMMISSION
Washington, DC 20463

AGENDA DOCUMENT NO. 21-33-A
AGENDA ITEM
For meeting of July 29, 2021

RECEIVED

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July 21, 2021

MEMORANDUM

TO: The Commission

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

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Assistant General Counsel

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Subject: AO 2021-08 (Fitzgerald) Draft A

Attached is a proposed draft of the subject advisory opinion. 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 12:00 pm (Eastern Time) on July 28, 2021.

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 2021-08
2
3 Congressman Scott Fitzgerald
4 c/o Ms. Jessie Augustyn
5 Augustyn Law
6 1010 E. Washington Ave, #507
7 Madison, WI 53703

DRAFT A

8 Dear Congressman Fitzgerald:

9 We are responding to your request for an advisory opinion concerning the
10 application of the Federal Election Campaign Act, 52 U.S.C. §§ 30101-45 (the “Act”),
11 and Commission regulations to your proposal to transfer unlimited funds from your state
12 campaign committee to your federal leadership PAC. The Commission concludes that
13 the state campaign committee and leadership PAC are affiliated under the Act and
14 Commission regulations and that the unlimited transfer of funds from the state campaign
15 committee to the leadership PAC is permitted. The Commission further concludes that
16 the state campaign committee is required to notify contributors that their contributions are
17 subject to the prohibitions and limitations of the Act prior to making any transfers to the
18 leadership PAC.

19 ***Background***

20 The facts presented in this advisory opinion are based on your letter received via
21 email on June 3, 2021, reports filed with the Commission, and other publicly available
22 information. You are a United States Representative first elected to Congress in 2020.
23 Advisory Opinion Request (“AOR”) at AOR001. In connection with your federal
24 candidacy and status as a federal officeholder, you have registered with the Commission

1 a principal campaign committee¹ and a leadership PAC, Sconnie PAC, that you
2 established and control.² *Id.*

3 Prior to becoming a Member of Congress, you served in the Wisconsin state
4 senate until your resignation from that body on January 1, 2021. *Id.* Your state
5 campaign committee, Scott Fitzgerald for Senate (“State Committee”), has been
6 registered with the Wisconsin Ethics Commission and its predecessor agencies since
7 1994, pursuant to Wisconsin law. *Id.* The State Committee “has not yet been
8 terminated” and “has a significant cash on hand balance.”³ *Id.* Since you “announced
9 [your] candidacy for Congress on September 17, 2019, [the State Committee’s] purpose
10 has been to support candidates for Wisconsin state office.” AOR002. You represent that
11 upon the termination of the State Committee, Wisconsin law permits you to use
12 committee “funds for any purpose not prohibited by law.” *Id.* (internal citation omitted).

13 According to your request, if permissible under the Act and Commission
14 regulations, you intend to make unlimited transfers of funds from the State Committee to
15 Sconnie PAC, your federal leadership PAC. *See generally* AOR. You state that it is
16 “likely that the vast majority of funds in the [State Committee’s account] are federally

¹ Scott Fitzgerald for Congress, Statement of Organization, Amend., FEC Form 1 (Feb. 15, 2021), <https://docquery.fec.gov/pdf/425/202102159427791425/202102159427791425.pdf>.

² Sconnie PAC, Statement of Organization, FEC Form 1 (Oct. 08, 2020), <https://docquery.fec.gov/pdf/182/202010089285057182/202010089285057182.pdf>.

³ The State Committee’s most recent publicly available filing with the Wisconsin Ethics Commission shows a cash on hand balance of \$283,313.28. Scott Fitzgerald for Senate, January Continuing 2021 Report (Jan. 15, 2021), <https://cfis.wi.gov/ReportsOutputFiles/0103112JanuaryContinuing202172416115202163322PMCF-2Report.pdf>.

1 permissible” because “Wisconsin’s source restrictions mirror federal restrictions, with the
2 exception of [the prohibition against contributions from] federal contractors, and its
3 contribution limits are lower than federal limits.”⁴ AOR005. Additionally, you state that
4 you “have not and will not take any contributions to the [S]tate [C]ommittee from donors
5 that also will make a contribution to [Sconnie PAC] during the year.” *Id.* If the proposed
6 transfers are permissible, you represent that any contributions made to the State
7 Committee that are prohibited under the Act or Commission regulations “would either be
8 segregated in a nonfederal account and used for purposes allowed by Wisconsin law or
9 divested prior to registering the [S]tate [C]ommittee with the Commission.” *Id.* You also
10 represent that you “may register [Sconnie PAC] with the Commission as a political
11 committee in order to make transfers of more than \$1,000 annually.” *Id.*

12 ***Questions Presented***

13 *1(A). Are the State Committee and Sconnie PAC affiliated under the Act and*
14 *Commission regulations?*

⁴ The request characterizes Wisconsin state law as it pertains to contributions to the State Committee as follows:

The State Committee may not accept contributions from foreign nationals, corporations, labor organizations, federally-recognized Indian Tribes, cooperatives, or independent expenditure committees. Contributions during each four-year term of office are limited to \$2,000 from individuals, including partnerships and LLCs treated as partnerships by the [Internal Revenue Service], political action committees, and Wisconsin candidate committees. Wisconsin political parties may make unlimited contributions to the State Committee. The State Committee must report the name and mailing address of each contributor, regardless of amount. It may not accept anonymous contributions in excess of \$10 and must itemize those received.

AOR001-02 (internal citations omitted). The Commission expresses no opinion regarding the application or interpretation of any Wisconsin state law cited herein or implicated by the transactions proposed in the request.

1 *1(B). May Sconnie PAC receive unlimited transfers of funds from the State*
2 *Committee, provided such funds comply with the Act’s source prohibitions and*
3 *contribution limitations?*

4 2. *If the transfers described in Question #2 are permissible, is the State*
5 *Committee required to notify its contributors that their contributions are subject to the*
6 *Act’s source prohibitions and contribution limitations at the time such transfers are*
7 *made?*

8 ***Legal Analysis and Conclusions***

9 *1(A). Are the State Committee and Sconnie PAC affiliated under the Act and*
10 *Commission regulations?*

11 Yes, the State Committee and Sconnie PAC are affiliated under the Act and
12 Commission regulations.

13 Committees, including leadership PACs, may be “affiliated” if they are
14 established, financed, maintained, or controlled by the same person. *See* 52 U.S.C.
15 § 30116(a)(5); 11 C.F.R. §§ 100.5(g)(2), 110.3(a)(1)(ii). For purposes of the Act’s
16 contribution limits, contributions made to or by affiliated committees are considered to
17 have been made to or by a single committee, regardless of whether a committee qualifies
18 as a political committee under 11 C.F.R. § 100.5. *See* 52 U.S.C. § 30116(a)(5); 11 C.F.R.
19 §§ 100.5(g)(2), 110.3(a)(1); *see also* 52 U.S.C. § 30101(4) (definition of “political
20 committee”). Additionally, Commission regulations permit unlimited transfers of funds
21 “between affiliated committees whether or not they are political committees under 11
22 C.F.R. § 100.5.” 11 C.F.R. §§ 102.6(a)(i), 110.3(c)(1). Such transfers, however, may
23 only be made from funds which are permissible under the Act. 11 C.F.R. § 102.6(a)(iv).

1 In Advisory Opinion 1990-16 (Thompson), the Commission determined that a
2 state campaign committee was affiliated with a nonconnected Federal political committee
3 where both committees were established, financed, maintained, or controlled by the same
4 individual, a former state officeholder. The Commission further concluded that the State
5 Committee could make unlimited transfers of federally permissible funds to the
6 nonconnected Federal political committee, but advised that the state campaign committee
7 would itself have to register and report as a nonconnected Federal political committee.

8 In 2003, the Commission reaffirmed the continued validity of Advisory Opinion
9 1990-16 (Thompson) following the enactment of the Bipartisan Campaign Finance
10 Reform Act of 2002, Pub. L.107–155, 116 Stat. 81 (2002) (“BCRA”). Specifically, in
11 the Explanation and Justification for the Commission’s regulation on Leadership PACs,
12 the Commission clarified that “these new rules merely codify the discretion the
13 Commission has exercised when the question of affiliation between an authorized
14 committee and an unauthorized committee has come before it in the past. Thus, the final
15 rules supersede [Advisory Opinion 1990-16] only to the extent these advisory opinions
16 suggest that an authorized committee can be affiliated with an unauthorized committee.”
17 63 Fed. Reg. 67013, 67017-18 (Dec. 1, 2003).

18 The Commission also clarified that the reasoning of Advisory Opinion 1990-16
19 applies to the relationship between nonfederal committees and leadership PACs. To wit,
20 citing to Advisory Opinion 1990-16, the Commission also stated “Although such
21 leadership PACs are not exposed to the consequences of affiliation with authorized
22 committees, leadership PACs may still be deemed affiliated with other unauthorized
23 committees.” 63 Fed. Reg. at 67017.

1 There is nothing in the Act or Commission regulations that prohibits nonfederal
2 committees from affiliating with a leadership PAC. You represent that the State
3 Committee and Sconnie PAC were established, financed, maintained, or controlled by the
4 same individual, Mr. Fitzgerald. Therefore, the State Committee and Sconnie PAC are
5 affiliated.

6 *1(B). May Sconnie PAC receive unlimited transfers of funds from the State*
7 *Committee, provided such funds comply with the Act's source prohibitions and*
8 *contribution limitations?*

9 Yes, Sconnie PAC may receive unlimited transfers from the State Committee,
10 provided that the State Committee converts to a Federal multicandidate committee before
11 making unlimited transfers.

12 In general, affiliated committees may make and receive unlimited transfers of
13 funds from one another. 11 C.F.R. §§ 102.6(a)(i), 110.3(c)(1). However, such transfers
14 are limited to funds that are permissible under the Act. 11 C.F.R. § 102.6(a)(iv). Further,
15 Federal candidates and office holders are prohibited from soliciting, receiving, directing,
16 transferring, spending, or disbursing funds in connection with an election for Federal
17 office unless the funds are subject to the limitations, prohibitions, and reporting
18 requirements of the Act. 52 U.S.C. § 30125(e)(1)(A); 11 C.F.R. § 300.61.

19 You are a Federal officeholder. Therefore, you may not transfer or receive funds
20 that are not subject to the limitations, prohibitions, and reporting requirements of the Act.
21 Consistent with the Commission's guidance in Advisory Opinion 1990-16 (Thompson),
22 one way to ensure that any funds transferred by the State Committee to Sconnie PAC are
23 Federally permissible is to register the State Committee as a Federal nonconnected

1 multicandidate political committee. *See* 11 C.F.F. § 114.12. As part of the requirements
2 to register and report as a political committee, the State Committee will need to disclose
3 the source of funds in its accounts on its first report, including itemizing prior
4 contributions consistent with the Act, with current cash-on-hand presumed to consist of
5 contributions most recently received. *See* Advisory Opinion 1990-16 (Thompson) at 2.
6 Consistent with the Act, Commission regulations, and the Commission’s guidance in
7 Advisory Opinion 1990-16, the State Committee must purge any funds that are not
8 Federally permissible from its cash-on-hand when it registers and reports as a political
9 committee, including any contributions from Federal contractors and any contributions
10 that, when aggregated with contributions to Sconnie PAC, would exceed the Federal
11 multicandidate political committee contribution limits.

12 2. *If the transfers described in Question #2 are permissible, is the State*
13 *Committee required to notify its contributors that their contributions are subject to the*
14 *Act’s source prohibitions and contribution limitations at the time such transfers are*
15 *made?*

16 Yes, the State Committee is required to notify its contributors that their
17 contributions are subject to the Act’s source prohibitions and contribution limitations.

18 Commission regulations state that only contributions that are designated for a
19 Federal account, result from a solicitation which expressly states that the contribution
20 will be used in connection with a Federal election, or are from contributors who are
21 informed that all contributions are subject to the prohibitions and limitations of the Act
22 may be deposited in a Federal account or received by a political committee. 11 C.F.R. §
23 102.5(a)(2).

1 You represent that the State Committee’s purpose has been to support state
2 candidates. Accordingly, it appears that funds contributed to the state committee were
3 not designated for a Federal account nor given in response to a solicitation that expressly
4 states that they will be used in connection with Federal elections. Therefore, in order to
5 be deposited in a Federal account or transferred to a Federal political committee,
6 contributors to the State Committee must be informed that their contributions are subject
7 to the prohibitions and limitations of the Act.

8 This response constitutes an advisory opinion concerning the application of the
9 Act and Commission regulations to the specific transaction or activity set forth in your
10 request. *See* 52 U.S.C. § 30108. The Commission emphasizes that, if there is a change
11 in any of the facts or assumptions presented, and such facts or assumptions are material to
12 a conclusion presented in this advisory opinion, then the requestor may not rely on that
13 conclusion as support for its proposed activity. Any person involved in any specific
14 transaction or activity which is indistinguishable in all its material aspects from the
15 transaction or activity with respect to which this advisory opinion is rendered may rely on
16 this advisory opinion. *See* 52 U.S.C. § 30108(c)(1)(B). Please note that the analysis or
17 conclusions in this advisory opinion may be affected by subsequent developments in the
18 law including, but not limited to, statutes, regulations, advisory opinions, and case law.

19 Any advisory opinions cited herein are available on the Commission’s website.

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On behalf of the Commission,

Shana M. Broussard
Chair