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FEDERAL ELECTION COMMISSION
Washington, DC 20463

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May 20, 2019

MEMORANDUM

TO: The Commission

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Subject: Draft Interpretive Rule on Paying for Cybersecurity Using Party Segregated Accounts

Attached is a Draft Notice of Interpretive Rule on paying for Cybersecurity Using Party Segregated Accounts. We request that this Draft be placed on the Agenda for May 23, 2019.

Attachment

FEDERAL ELECTION COMMISSION

11 CFR Parts 110

[Notice 2019-09]

Interpretive Rule on Paying for Cybersecurity Using Party Segregated Accounts

AGENCY: Federal Election Commission.

ACTION: Notice of interpretive rule.

SUMMARY: To serve the compelling governmental interest in preventing foreign interference in United States elections, the Commission is issuing guidance on the payment by national party committees for secure information communications technology and cybersecurity products or services for national and state party committees and federal candidate committees by using funds from party segregated accounts for headquarters buildings.

DATES: [Insert date of publication in Federal Register]

FOR FURTHER INFORMATION CONTACT: Mr. Robert M. Knop, Assistant General Counsel or Mr. Joseph P. Wenzinger, Attorney, 1050 First Street, NE., Washington, DC 20463, (202) 694-1650 or (800) 424-9530.

SUPPLEMENTARY INFORMATION: In recent years, national party committees and federal candidate committees have faced growing needs for cybersecurity measures to prevent foreign interference in U.S. elections. Indeed, in 2016 hackers infiltrated the email accounts of Democratic campaign staff, stealing and leaking thousands of emails,¹ and government and

¹ See Special Counsel Robert S. Mueller, III, Report on the Investigation Into Russian Interference in the 2016 Presidential Election, Mar. 2019, <https://www.justice.gov/storage/report.pdf>; Director of National Intelligence, Assessing Russian Activities and Intentions in Recent US Elections, Jan. 16, 2017, https://www.dni.gov/files/documents/ICA_2017_01.pdf.

1 campaign officials expect similar threats to continue.² The Commission has received a number
2 of advisory opinion requests discussing the difficulties campaigns have in paying for the
3 cybersecurity measures necessary to address such threats, due to campaigns' lack of financial
4 resources, staff, and institutional experience available to deal with the problem.³

5 To address this problem, the Commission is issuing guidance interpreting two areas of
6 the Federal Election Campaign Act (the "Act"), 52 U.S.C. 30101-45, and Commission
7 regulations – the prohibition on contributions or donations by foreign nationals in connection
8 with any federal, state, or local election, *see* 52 U.S.C. 30121, as well as the provision permitting
9 national party committees to establish a separate, segregated account to defray expenses for
10 headquarters buildings, *see* 52 U.S.C. 30116(a)(9)(B) – to clarify that national party committees
11 may pay for secure information communications technology and cybersecurity products or
12 services for national and state party committees and federal candidate committees using their
13 segregated party account for headquarters buildings.

14 **A. Prohibition on Foreign Nationals Participating in Elections**

15 The Act and Commission regulations prohibit foreign nationals from making
16 contributions, expenditures, donations, or disbursements in connection with federal, state, and
17 local elections. *See* 52 U.S.C. § 30121(a)(1); 11 C.F.R. § 110.20. This prohibition is intended to
18 “exclude foreign citizens from activities intimately related to the process of democratic self-
19 government.” *See Bluman v. FEC*, 800 F. Supp. 2d 281, 287 (D.D.C. 2011) (internal quotations
20 omitted), *aff'd mem.*, 565 U.S. 1104 (2012). Such exclusion “is part of the sovereign’s

² *See, e.g.*, Colleen Long & Christina A. Cassidy, 2020 Campaign Staffers Being Trained to Handle Cyber Threats, AP News, May 3, 2019, <https://www.apnews.com/f6e1fa96f925432d95366249dab5bf66>.

³ *See* Advisory Opinion 2019-07 (Area 1 Security, Inc.) (pending) (request available at https://www.fec.gov/files/legal/aos/2019-07/201907R_1.pdf); Advisory Opinion 2018-12 (Defending Digital Campaigns, Inc.) (pending) (request available at https://www.fec.gov/files/legal/aos/2018-12/201812R_1.pdf); Advisory Opinion 2018-11 (Microsoft Corporation) (request available at <https://www.fec.gov/files/legal/aos/2018-11/2018-11.pdf>).

1 *obligation* to preserve the basic conception of a political community.” *Id.* (emphasis added).
2 Accordingly, the Commission has an obligation to curtail violations of 52 U.S.C. 30121, which
3 include disbursements – such as payments for activities in hacking campaigns and parties – by
4 foreign nationals in connection with American elections.⁴

5 However, foreign cyberattacks, in which the attackers may not have any spending or
6 physical presence in the United States, may present unique challenges to both criminal
7 prosecution and civil enforcement.⁵ Thus, the Commission recognizes that fulfilling its
8 “obligation to preserve the basic conception of a political community” under section 30121
9 cannot hinge solely on prosecution of foreign violators abroad. Effective enforcement of that
10 provision to protect American elections from urgent cyber threats also requires that
11 countermeasures be taken within the United States. Moreover, in previous advisory opinions, the
12 Commission has taken particular, carefully defined, and limited actions to address urgent
13 circumstances presenting a verified, heightened risk of physical or malicious digital harm.
14 *See* Advisory Opinion 2018-15 (Wyden); Advisory Opinion 2018-11 (Microsoft); Advisory
15 Opinion 2017-07 (Sergeant at Arms).

⁴ The U.S. Department of Homeland Security (DHS) has similarly recognized that “an electoral process that is both secure and resilient is a vital national interest.” In January 2017, DHS designated the infrastructure used to administer the nation’s elections as *critical infrastructure*: “This designation recognizes that the United States’ election infrastructure is of such vital importance to the American way of life that its incapacitation or destruction would have a devastating effect on the country.” *Election Security*, U.S. Department of Homeland Security, found at <https://www.dhs.gov/cisa/election-security>.

⁵ *See, e.g.*, Indictment, *United States v. Netyksho*, Crim. No. 18-215 (D.D.C. Jul. 13, 2018), <https://www.justice.gov/file/1080281/download> (indicting Russian agents in absentia for, among other things, hacking party and campaign committees); *see also* Mark Mazetti & Katie Benner, *12 Russian Agents Indicted in Mueller Investigation*, N.Y. TIMES (Jul. 13, 2018), <https://www.nytimes.com/2018/07/13/us/politics/mueller-indictment-russian-intelligence-hacking.html>. This activity therefore differs from foreign national activity that involves disbursements to or through U.S. entities.

1 **B. Account for Headquarters Buildings**

2 Before Congress passed the Bipartisan Campaign Reform Act of 2002, Pub. L. 107-155,
3 116 Stat. 81 (“BCRA”), the Act exempted from the definition of “contribution” any donation to,
4 or spending by, a national party committee “to defray any cost for construction or purchase of
5 any office facility” if that spending was not “for the purpose of influencing the election of any
6 candidate in any particular election for [f]ederal office.” 2 U.S.C. 431(8)(B)(viii) (2002);
7 *see also* 11 CFR 100.7(b)(12), 100.8(b)(13) (2002) (exempting costs for construction or purchase
8 of office facility from definitions of “contribution” and “expenditure”); Prohibited and Excessive
9 Contributions: Non-Federal Funds or Soft Money, 67 FR 49064, 49100 (July 29, 2002)
10 (discussing repeal of statutory exemption). BCRA repealed this exception, *see* BCRA at sec.
11 103(b)(1), 116 Stat. 87 (repealing former 2 U.S.C. 431(8)(B)(viii)), and the Commission
12 promulgated new regulations to “make clear that these exceptions no longer apply to national
13 party committees.” *See* Reorganization of Regulations on “Contribution” and “Expenditure,”
14 67 FR 50582, 50584 (Aug. 5, 2002); *see also* 11 CFR 100.56, 100.144.

15 In 2014, the Consolidated and Further Continuing Appropriations Act, 2015 Pub. L.
16 113-235, 101, 128 Stat. 2130, 2772-73 (2014) (the “Appropriations Act”) amended the Act by
17 establishing separate contribution limits for segregated party accounts and setting out certain
18 restrictions and requirements applicable to those accounts. 52 U.S.C. 30116(a)(1)(B), (2)(B),
19 (9). Contributions to each of the segregated party accounts are limited to 300 percent of the

1 contribution limit to a national party committee’s general party account.⁶ 52 U.S.C.
2 30116(a)(1)(B), (2)(B). The Appropriations Act also provides that the coordinated party
3 expenditure limits in 52 U.S.C. 30116(d)(2)-(4) do not apply to expenditures made from the new
4 segregated party accounts. 52 U.S.C. 30116(d)(5).

5 One such segregated party account may be used only to defray certain expenses incurred
6 with respect to headquarters buildings,⁷ particularly expenses involving their construction,
7 purchase, renovation, operation, and furnishing, or to repay loans the proceeds of which were
8 used to defray such expenses (including expenses for obligations incurred during the two-year
9 period that ended on the date of the Appropriations Act). 52 U.S.C. 30116(a)(9)(A). Neither the
10 Appropriation Act nor Commission regulations explicitly address the permissible uses of funds
11 in a party’s segregated account for headquarters buildings. But in a number of advisory opinions
12 addressing the pre-BCRA building fund, the Commission interpreted “construction” and
13 “purchase” costs to include expenses constituting “capital expenditures” under the Internal
14 Revenue Code and Internal Revenue Service regulations;⁸ expenses for the renovation of a party
15 headquarters building, including construction management expenses and architectural fees
16 “directly and solely related” to the restoration and renovation of a party headquarters building;⁹

⁶ For 2019-2020, contributions from individuals and single-candidate political committees are limited to \$35,500 per year to the general party account of a national party committee and \$106,500 per year to each segregated party account of a national party committee; contributions from a multicandidate political committee are limited to \$15,000 per year to the general party account of a national party committee and \$45,000 per year to each segregated party account of a national party committee. FEC, Contribution Limits for 2019-2020 Federal Elections, <https://www.fec.gov/help-candidates-and-committees/candidate-taking-receipts/contribution-limits/#contribution-limits-for-2019-2020-federal-elections>.

⁷ The other two segregated party accounts created under the Appropriations Act concern nominating conventions and election recounts, contests, and other legal proceedings. 52 U.S.C. 30116(a)(9)(A), (C).

⁸ See Advisory Opinion 1998-07 (Pennsylvania Democratic Party) at 5.

⁹ See Advisory Opinion 2001-01 (North Carolina Democratic Party) at 3.

1 and mortgage payments on a new party headquarters building.¹⁰ The Commission also allowed
2 the pre-BCRA building account to be used for a broad range of operating expenses, including
3 rent, building maintenance, utilities, and other expenses necessary to administer a party
4 headquarters building;¹¹ and property taxes and assessments related to the construction or
5 purchase of a headquarters facility.¹²

6 **C. Interpretive Guidance**

7 In light of the Commission’s obligation to curb the current threat of foreign cyberattacks
8 and the unique challenges faced in enforcing violations regarding such cyberattacks, the
9 Commission issues this guidance to clarify that national party committees may use their
10 headquarters buildings accounts to pay for secure information communications technology and
11 cybersecurity products or services for national and state party committees and federal candidate
12 committees. As with other disbursements from the headquarters building accounts, such
13 payments will not count against coordinated party expenditure limits. Expenditures by federal
14 candidate committees for cybersecurity protection for candidates’ personal devices and accounts
15 is allowed according to the terms of Advisory Opinion 2018-15 (Wyden). All such payments
16 authorized by this guidance must be timely reported as contributions by the recipient committee.

¹⁰ See Advisory Opinion 1998-08 (Iowa Democratic Party) at 3; *see also* Advisory Opinion 1993-09 (Michigan Republican State Committee) (allowing use of building fund to purchase or construct new party headquarters building and to pay off balance of land contract on current headquarters building, and to use proceeds from sale of land to purchase new headquarters building).

¹¹ See Advisory Opinion 1988-12 (Empire of America Federal Savings Bank) at 4; *see also* Advisory Opinion 2001-01 (North Carolina Democratic Party) at 3-4 n.5; Advisory Opinion 2001-12 (Democratic Party of Wisconsin) at 5-6 (addressing lease of party office building).

¹² See Advisory Opinion 1991-05 (Tennessee Democratic Party) at 4 n.1; Advisory Opinion 1998-08 (Iowa Democratic Party) at 3 n.4; Advisory Opinion 1983-08 (National Republican Senatorial Committee) (including expenses of trust that operated committee headquarters building).

1 “Secure information communications technology” means a commercial-off-the-shelf
2 computing device which has been configured to restrict unauthorized access and uses publicly
3 available baseline configurations.¹³ The term “cybersecurity product or service” means a product or
4 service that helps an organization cost-effectively identify and detect cyber risks and prevent, protect
5 against, respond to, and recover from cyber attacks by achieving the set of standards, guidelines, best
6 practices, methodologies, procedures, and processes as developed by the National Institute of Standards
7 and Technology pursuant to 15 U.S.C. 272 (c)(15) and (e).

8 The Commission believes its actions in this notice are necessary to carry out its
9 obligation to prevent foreign interference in American elections, and is an appropriate
10 interpretation of the Appropriations Act, which addresses the importance of national party
11 committees’ having the resources to strengthen infrastructure. Like a headquarters building, an
12 entity’s information-technology infrastructure is an increasingly important factor in the health of
13 an organization like a national party or campaign. Similarly, internet services are similar to
14 utilities, which the Commission long permitted to be paid for using pre-BCRA building fund
15 accounts.¹⁴ Accordingly, in this emergency situation, national party committees should have the
16 ability to protect themselves and their candidates from serious threats to their infrastructure.

17 The Commission notes several limitations on this interpretive guidance, however. Any
18 material decline in the external threat environment – as judged, for example, by the U.S.
19 Intelligence Community or U.S. national security officials – would affect the continuing
20 applicability of this guidance. That environment includes but is not limited to the demonstrated,
21 enhanced threat of foreign cyberattacks against party and candidate committees, and the
22 widespread inability of committees to protect themselves against such attacks. For example, if

¹³ See, e.g., “National Checklist Program Repository,” National Institute of Standards and Technology, found at <https://nvd.nist.gov/ncp/repository>.

¹⁴ See Advisory Opinion 1988-12 (Empire of America Federal Savings Bank) at 4.

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1 Congress were to amend the Act to address the provision of secure information communications
2 technology and cybersecurity products or services to party or candidate committees by
3 government or non-government entities, this guidance would no longer apply to secure
4 information communications technology and cybersecurity products or services the committees
5 are able to obtain in practice from those government or non-government entities pursuant to such
6 legislation.

7 No committee may sell any secure information communications technology or
8 cybersecurity products or services received by the committee that were purchased or otherwise
9 provided using headquarters buildings account funds. Nothing in the preceding sentence shall
10 prevent a committee from donating such secure information communications technology or
11 cybersecurity products or services to a charitable organization or to a Federal, State, local, or
12 Tribal government agency at the conclusion of the campaign.

13 The national committee of a political party is required to report on the schedule specified
14 by 52 U.S.C. 30104(a) the name and address of each national or state party committee or
15 authorized committee to which secure information communications technology or cybersecurity
16 products or services is supplied from a headquarters buildings account.

17 Last, nothing in this interpretive guidance should be construed to address a national party
18 committee's ability to use its headquarters buildings account for non-cybersecurity expenses
19 relating to buildings other than the national party committee's main administrative center at the
20 national level. As noted above, this interpretive guidance relies not only on the Appropriations
21 Act but also the Act, Commission regulations, and the Commission's obligation to enforce the
22 ban on foreign nationals participating in American elections, and the Commission is not aware of

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1 any exigent circumstances outside of that area warranting a broader interpretation of the
2 Appropriations Act.

3 This document is an interpretive rule announcing the general course of action that the
4 Commission intends to follow. This interpretive rule does not constitute an agency action
5 requiring notice of proposed rulemaking, opportunities for public participation, prior publication,
6 or delay in effective date under 5 U.S.C. 553 of the Administrative Procedure Act. It does not
7 bind the Commission or any members of the general public, nor does it create or remove any
8 rights, duties, or obligations. The provisions of the Regulatory Flexibility Act, which apply
9 when notice and comment are required by the Administrative Procedure Act or another statute,
10 do not apply. *See* 5 U.S.C. 603(a).

11 On behalf of the Commission,

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13
14 Ellen L. Weintraub,
15 Chair,
16 Federal Election Commission.
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18 DATED: _____