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FEDERAL ELECTION COMMISSION
Washington, DC 20463

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

July 21, 2021

MEMORANDUM

TO: The Commission

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

Neven F. Stipanovic *NFS*
Associate General Counsel

Robert Knop *RMK*
Assistant General Counsel

Kevin M. Paulsen *KMP*
Attorney

Subject: AO 2021-08 (Fitzgerald) Draft B

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 B

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 unlimited transfer of funds from the state campaign committee to the leadership PAC
14 is not permitted.

15 ***Background***

16 The facts presented in this advisory opinion are based on your letter received via
17 email on June 3, 2021, reports filed with the Commission, and other publicly available
18 information. You are a United States Representative first elected to Congress in 2020.
19 Advisory Opinion Request (“AOR”) at AOR001. In connection with your federal
20 candidacy and status as a federal officeholder, you have registered with the Commission
21 a principal campaign committee¹ and a leadership PAC, Sconnie PAC, that you
22 established and control.² *Id.*

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>.

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

11 According to your request, if permissible under the Act and Commission
12 regulations, you intend to make unlimited transfers of funds from the State Committee to
13 Sconnie PAC, your federal leadership PAC. *See generally* AOR. You state that it is
14 “likely that the vast majority of funds in the [State Committee’s account] are federally
15 permissible” because “Wisconsin’s source restrictions mirror federal restrictions, with the
16 exception of [the prohibition against contributions from] federal contractors, and its

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 contribution limits are lower than federal limits.”⁴ AOR005. Additionally, you state that
2 you “have not and will not take any contributions to the [S]tate [C]ommittee from donors
3 that also will make a contribution to [Sconnie PAC] during the year.” *Id.* If the proposed
4 transfers are permissible, you represent that any contributions made to the State
5 Committee that are prohibited under the Act or Commission regulations “would either be
6 segregated in a nonfederal account and used for purposes allowed by Wisconsin law or
7 divested prior to registering the [S]tate [C]ommittee with the Commission.” *Id.*

8 ***Questions Presented***

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

11 *1(B). May Sconnie PAC receive unlimited transfers of funds from the State*
12 *Committee, provided such funds comply with the Act’s source prohibitions and*
13 *contribution limitations?*

14 *2. If the transfers described in Question #2 are permissible, is the State*
15 *Committee required to notify its contributors that their contributions are subject to the*

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 *Act's source prohibitions and contribution limitations at the time such transfers are*
2 *made?*

3 ***Legal Analysis and Conclusions***

4 *1(A). Are the State Committee and Sconnie PAC affiliated under the Act and*
5 *Commission regulations?*

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 The Commission concludes that Sconnie PAC and the State Committee cannot be
10 deemed affiliated for purposes of the Act and Commission regulations because, as
11 discussed below, the proposed transfer of funds would violate the Act's restrictions on
12 the use of non-federal funds following the enactment of the Bipartisan Campaign Finance
13 Reform Act of 2002, Pub. L.107–155, 116 Stat. 81 (2002) (“BCRA”), and its
14 implementing regulations.

15 A leadership PAC is a political committee that is directly or indirectly established,
16 financed, maintained, or controlled by a candidate for federal office or an individual
17 holding federal office, but which is not an authorized committee of the candidate or
18 individual and which is not affiliated with an authorized committee of the candidate or
19 individual. 11 C.F.R. § 100.5(e)(6). Committees, including leadership PACs, may be
20 “affiliated” if they are established, financed, maintained, or controlled by the same
21 person. *See* 52 U.S.C. § 30116(a)(5); 11 C.F.R. §§ 100.5(g)(2), 110.3(a)(1)(ii). For
22 purposes of the Act's contribution limits, contributions made to or by affiliated
23 committees are considered to have been made to or by a single committee, regardless of

1 whether a committee qualifies as a political committee under 11 C.F.R. § 100.5. *See* 52
2 U.S.C. § 30116(a)(5); 11 C.F.R. §§ 100.5(g)(2), 110.3(a)(1); *see also* 52 U.S.C.
3 § 30101(4) (definition of “political committee”). Additionally, Commission regulations
4 permit unlimited transfers of funds “between affiliated committees whether or not they
5 are political committees under 11 C.F.R. § 100.5.”⁵ 11 C.F.R. §§ 102.6(a)(i),
6 110.3(c)(1). Such transfers, however, may only be made from funds which are
7 permissible under the Act. 11 C.F.R. § 102.6(a)(iv).

8 The Commission’s regulations outlining affiliation and allowing for unlimited
9 transfers between affiliated committees were promulgated in 1980. *See* Amendments to
10 Federal Election Campaign Act of 1971, 45 Fed. Reg. 15080 (Mar. 7, 1980). In 2002,
11 Congress amended the Act to prohibit federal candidates and officeholders and entities
12 established, financed, maintained, or controlled by a federal candidate or officeholder
13 from soliciting, receiving, directing, transferring, or spending funds in connection with a
14 federal election unless the funds are subject to the source prohibitions, contribution
15 limitations, and reporting requirements of the Act and Commission regulations. 52
16 U.S.C. § 30125(e)(1)(A); 11 C.F.R. §§ 300.2, 300.61. Because a leadership PAC is, by
17 definition, controlled by a federal candidate or officeholder, it must comply with the
18 Act’s soft money restrictions. 52 U.S.C. § 30125(e)(1); 11 C.F.R. § 300.60. Thus, to the
19 extent that a non-federal political committee and a leadership PAC may be affiliated

⁵ In promulgating 11 C.F.R. § 102.6(a), which permits affiliated committees to transfer funds without limit, the Commission explained that any such transfers would apply toward the thresholds for determining whether the committee becomes a political committee under the Act. Amendments to Federal Election Campaign Act of 1971, 45 Fed. Reg. 15,080, 15,084 (March 7, 1980). Thus, a transfer of funds from a non-federal committee to a federal political committee could result in the non-federal political committee triggering political committee status.

1 under the earlier affiliation regulations, BCRA’s soft-money ban superseded the ability of
2 the federal leadership PAC to receive non-federal funds from the non-federal committee.

3 The request posits that because you established, finance, maintain, or control⁶
4 both Sconnie PAC and the State Committee, these committees are affiliated under
5 11 C.F.R. § 100.5(g)(2) and, consequently, Sconnie PAC may receive unlimited transfers
6 of funds from the State Committee pursuant to 11 C.F.R. §§ 102.6(a)(1)(i), 110.3(c).⁷ If
7 the Commission were to permit affiliation between a federal candidate’s or officeholder’s
8 state campaign committee and leadership PAC, however, it would necessarily sanction
9 the unlimited transfer of non-federal funds to an entity established and controlled by a
10 federal officeholder in violation of 52 U.S.C. § 30125(e)(1)(A) and 11 C.F.R. § 300.61.
11 *See* 11 C.F.R. §§ 102.6(a)(1)(i), 110.3(c).⁸

12 You assert that the “vast majority” of the State Committee’s funds comply with
13 the federal contribution limitations (because the maximum amount an individual can
14 contribute to the State Committee under Wisconsin law is less than what an individual

⁶ Because you represent in the request that you established and control both committees, AOR001, the Commission assumes this fact for purposes of its legal analysis.

⁷ In support of this proposition, the request cites to a prior advisory opinion in which the Commission concluded that the state campaign committee of a governor could make unlimited transfers of funds to his federal, nonconnected multicandidate committee because the two committees were affiliated. AOR004; *see generally* Advisory Opinion 1990-16 (Thompson). Reliance on that precedent here is misplaced for several reasons. First, that advisory opinion was issued pre-BCRA, which, as explained above, significantly altered the legal landscape regarding the use of non-federal funds. Additionally, the requestor in that matter was not a federal candidate or officeholder, a key legal distinction from the present request. *See* 52 U.S.C. § 30125(e)(1); 11 C.F.R. § 300.60. Finally, in recognition of these considerations, the leadership PAC rulemaking expressly superseded the Commission’s conclusion in Advisory Opinion 1990-16 (Thompson) “to the extent [it] suggest[s] that an authorized committee can be affiliated with an unauthorized committee.” Leadership PACs, 68 Fed. Reg. at 67,017-18.

⁸ *See also* 11 C.F.R. § 110.3(d) (prohibiting transfers from a candidate’s nonfederal campaign committee to his or her principal campaign committee or other authorized committee).

1 can contribute to a federal candidate committee or PAC⁹) and source prohibitions
2 (because the source prohibitions under Wisconsin law are generally similar to the Act's).
3 AOR005; *see also* footnote 4. Even assuming, *arguendo*, that this is correct, the funds
4 would nevertheless still constitute non-federal funds. Sconnie PAC, as an entity
5 established and controlled by a federal officeholder, may only receive federal funds
6 subject to the source prohibitions, contribution limitations, *and reporting requirements*
7 under the Act and Commission regulations. 52 U.S.C. § 30125(e)(1)(A); 11 C.F.R.
8 §§ 300.2, 300.61. Commission regulations require political committees, for example, to
9 file regular reports with the Commission itemizing contributions from individuals who
10 contribute greater than \$200 during the calendar year, along with the date of receipt and
11 amount of such contributions. 11 C.F.R. § 104.3(a)(4)(i). The funds the State Committee
12 seeks to transfer to Sconnie PAC have never been reported to the Commission and,
13 therefore, disclosed to the public along with the relevant reportable information that is
14 required for federal funds. Because the funds in question were not subject to requisite
15 reporting requirements, Sconnie PAC is prohibited from receiving transfers of these
16 funds from the State Committee. 52 U.S.C. § 30125(e)(1)(A); 11 C.F.R. §§ 300.2,

⁹ As adjusted for inflation during the 2019-2020 election cycle, the Act permitted an individual to contribute a maximum of \$2,800 per election to a federal candidate. 52 U.S.C. § 30116(a)(1)(A); *see also* Contribution Limits for 2019-2020 (Feb. 2019), https://www.fec.gov/resources/cms-content/documents/contribution_limits_chart_2019-2020.pdf. An individual can contribute a maximum of \$5,000 per year to a PAC. 52 U.S.C. § 30116(a)(1)(C); 11 C.F.R. § 110.1(d).

1 300.61.¹⁰ Therefore, the Commission further concludes that the State Committee and
2 Sconnie PAC are not affiliated for the purposes of the Act and Commission regulations.

3 This conclusion is consistent with the Commission’s prior determinations that
4 leadership PACs are subject to BCRA’s soft money prohibitions. As the Commission has
5 previously acknowledged, BCRA’s legislative history makes clear the legislation’s
6 “limitations on the sources and amounts of funds that Federal candidates and
7 officeholders can raise applies to leadership PACs.” Leadership PACs, 67 Fed. Reg.
8 78,753, 78,755 (Dec. 26, 2002).¹¹ Accordingly, in a notable post-BCRA advisory
9 opinion, the Commission concluded that leadership PACs could not receive unlimited
10 funds from individuals, or any funds from corporations or labor organizations, because
11 such funds would not be subject to the limitations and prohibitions of the Act. Advisory
12 Opinion 2011-21 (Constitutional Conservatives Fund PAC) at 3 (finding that a leadership
13 PAC could not receive such funds even if used only for independent expenditures

¹⁰ *Cf.* Transfers of Funds from State to Federal Campaigns, 58 Fed. Reg. 3474, 3475 (Jan. 8, 1993) (explaining that the Commission, even before BCRA’s passage, adopted Section 110.3(d)’s total prohibition on transfers from a candidate’s nonfederal campaign committee to his or her principal campaign committee or other authorized committee because of the practical difficulty in linking or otherwise accounting for federally permissible funds available for transfer).

¹¹ *See also* Prohibited and Excessive Contributions: Non-Federal Funds or Soft Money, 67 Fed. Reg. 49,064, 49,107 (July 29, 2002)) (citing 148 Cong. Rec. S2140 (daily ed. Mar. 20, 2002) (statement of Sen. McCain)) (“Although candidate PACs and leadership PACs are not specifically mentioned, the legislative history indicates that [52 U.S.C. § 30125(e)(1)] is intended to prohibit Federal officeholders and candidates from soliciting any funds for these committees that do not comply with FECA’s source and amount limitations.”) .

1 supporting or opposing federal candidates and officeholders other than the senator who
2 controlled the committee).¹²

3 The Commission notes that the exercise of its discretion to conclude that Scennie
4 PAC and the State Committee are not affiliated is consistent with its practice prior to
5 2003 with respect to leadership PACs. Before BCRA, in a number of advisory opinions
6 and compliance matters, the Commission examined leadership PACs whose activities
7 were significantly intertwined with the activities of a federal candidate's authorized
8 committee. Leadership PACs, 68 Fed. Reg. 67,013, 67,016 (Dec. 1, 2003). In describing
9 the evolution of its regulation on leadership PACs, the Commission stated that:

10 [t]he Commission has declined in several instances to find that a leadership PAC
11 was affiliated with a candidate's authorized committee, even where it was apparent
12 that the committees were controlled by the same person. Instead, the Commission
13 exercised its discretion to determine that a leadership PAC made in-kind
14 contributions to the related Federal candidate's campaign. Nonetheless, the
15 Commission maintained its discretion to pursue either of the two competing
16 approaches. In making these findings, the Commission typically found that
17 committees formed by a candidate to further his or her campaign were affiliated;
18 those formed for other purposes were not.

19
20 *Id.* (internal citations omitted).

21 After the enactment of BCRA, the Commission promulgated new rules that
22 clarified "the relationship between an authorized committee and a leadership PAC by
23 removing the possibility that a candidate's authorized committee can be affiliated with an
24 entity that is not an authorized committee, even if the candidate established, financed,
25 maintained, or controlled that entity." *Id.*; see also 11 C.F.R. § 100.5(g)(5). By

¹² See also Advisory Opinion 2011-12 (Majority PAC and House Majority PAC) (concluding that a federal candidate or officeholder could not solicit unlimited individual contributions or corporate and labor organization contributions on behalf of an independent expenditure-only political committee because those funds would not be subject to the limitations and prohibitions of the Act).

1 eliminating the possibility of affiliation between a leadership PAC and authorized
2 committee, the Commission ensured that the affiliation rules, designed to enforce the
3 contribution limitations, could not be used as a “new avenue for circumventing the
4 separate contribution limitations applicable to authorized and unauthorized committees.”
5 Leadership PACs at 67,017.¹³ Although with respect to authorized committees and
6 leadership PACs the Commission chose to codify “the discretion the Commission has
7 exercised when the question of affiliation between an authorized committee and an
8 unauthorized committee has come before it in the past,” it maintains its discretion with
9 respect to the question of affiliation between a federal political committee and a non-
10 federal committee when both entities are established, financed, maintained, and
11 controlled by the same federal candidate or officeholder.

12 Further, the Commission notes that the ability to transfer funds is but one
13 consequence of being deemed affiliated; as noted above, contributions made by or to
14 affiliated committees are treated as being made to or by a single committee under the Act.
15 52 U.S.C. § 30116(a)(5); 11 C.F.R. §§ 100.5(g)(2), 110.3(a)(1). Thus, affiliated
16 committees are typically of types that would be subject to the similar limitations on

¹³ For example, in Advisory Opinion 2003-12 (Flake), the Commission determined that the relationship between a federal officeholder and a state ballot initiative committee that he established, financed, maintained, or controlled was sufficiently similar to the relationship between an officeholder and his leadership PAC to conclude that the state committee was not affiliated with the federal officeholder’s principal campaign committee. *See also* Leadership PACs, 68 Fed. Reg. at 67,017 (discussing Advisory Opinion 2003-12 (Flake), the Commission stated that it “will continue to use the affiliation factors in 11 C.F.R. § 300.2(c) to determine whether the Federal candidate and officeholder ... directly or indirectly established or financed or maintained or controlled the [state] ballot initiative committee for purposes of the restrictions on the solicitation, receipt, transfer or disbursement of non-Federal funds in [52 U.S.C. § 30125(e)].”).

1 contributions in their individual capacities.¹⁴ Leadership PACs, 68 Fed. Reg. at 67,016-
2 17. This is not the case between leadership PACs and state candidate committees. The
3 maximum individual contribution to a leadership PAC that has qualified as a
4 multicandidate committee is \$5,000 per year. 11 C.F.R. § 110.1(d). Individual
5 contributions to state candidates vary widely among the 50 states, with some states
6 permitting unlimited contributions.¹⁵ Concluding that a federal leadership PAC and a
7 state committee were affiliated would require the state committee to share a contribution
8 limit with a federal political committee, which would compel the Commission to impose
9 the Act’s contribution limitations on a type of committee for which the limitations were
10 not intended. *See* 52 U.S.C. §§ 30116(a)(5), 30101(4); 11 C.F.R. §§ 100.5(g)(2),
11 110.3(a)(1). This illogical result is analogous to the type of situation the Commission
12 sought to avoid when it prohibited affiliation between an authorized committee and an
13 entity that is not an authorized committee. 11 C.F.R. § 100.5(g)(5); *see also* Leadership
14 PACs, 68 Fed. Reg. at 67,016-17.

¹⁴ In promulgating the leadership PAC rules, the Commission explained: “Typically, committees that become affiliated already operate under similar limitations on the amounts of contributions that they can make and accept. The fact of affiliation simply means that they now share one common limitation. One of the complications in affiliating authorized committees with leadership PACs is that these types of committees are subject to different amount limitations for making and receiving contributions. Requiring them to abide by a single contribution limit means choosing a limitation that is not intended for one of those committees. Consequently, it is logical to view an authorized committee and a leadership PAC as separate committees, and transactions between them that benefit the authorized committee as contributions and not as a basis to find them affiliated.” Leadership PACs, 68 Fed. Reg. at 67,016-17 (internal citations omitted).

¹⁵ *See* State Limits on Contributions to Candidates – 2019-2020 Election Cycle, National Conference of State Legislatures (Updated June 2019), <https://www.ncsl.org/Portals/1/Documents/Elections/Contribution-Limits-to-Candidates-2019-2020.pdf?ver=2019-10-02-132802-117>.

1 In sum, the Commission concludes that, under the Act and Commission
2 regulations, the State Committee and Sconnie PAC are not affiliated and the unlimited
3 transfer of funds from the State Committee to Sconnie PAC is not permitted because to
4 conclude otherwise would permit circumvention of the Act’s source prohibitions,
5 contribution limitations, and reporting requirements.¹⁶

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

10 Given the answer to Questions 1(A) and 1(B), this question is moot.

11 This response constitutes an advisory opinion concerning the application of the
12 Act and Commission regulations to the specific transaction or activity set forth in your
13 request. *See* 52 U.S.C. § 30108. The Commission emphasizes that, if there is a change
14 in any of the facts or assumptions presented, and such facts or assumptions are material to
15 a conclusion presented in this advisory opinion, then the requestor may not rely on that
16 conclusion as support for its proposed activity. Any person involved in any specific
17 transaction or activity which is indistinguishable in all its material aspects from the
18 transaction or activity with respect to which this advisory opinion is rendered may rely on

¹⁶ You represent in the request that you “have not and will not take any contributions to the State Committee from donors that also will make a contribution to [Sconnie PAC] during the year” and that any contributions made to the State Committee that are prohibited under the Act or Commission regulations “would either be segregated in a nonfederal account and used for purposes allowed by Wisconsin law or divested prior to registering the State Committee with the Commission.” AOR004. These representations are immaterial to the present analysis and do not alter the Commission’s conclusion because they are impractical for the Commission to verify and do not rectify the fact that the State Committee’s funds were not subject to the reporting requirements under the Act and Commission regulations.

1 this advisory opinion. *See* 52 U.S.C. § 30108(c)(1)(B). Please note that the analysis or
2 conclusions in this advisory opinion may be affected by subsequent developments in the
3 law including, but not limited to, statutes, regulations, advisory opinions, and case law.
4 Any advisory opinions cited herein are available on the Commission’s website.

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On behalf of the Commission,

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Shana M. Broussard

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Chair