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For meeting of Oct. 20, 2022

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October 18, 2022

MEMORANDUM

TO: The Commission

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Subject: Draft AO 2022-21 (DSCC, *et al.*) - Draft C

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 9:00 am (Eastern Time) on September 20, 2022.

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 2022-21

2

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11 Dear Counsel:

12 We are responding to your advisory opinion request on behalf of the DSCC,
13 Bennet for Colorado, and People for Patty Murray concerning the application of the
14 Federal Election Campaign Act, 52 U.S.C. §§ 30101-45 (the “Act”), and Commission
15 regulations to requestors’ proposal for the DSCC to pay for two types of television
16 advertisements, labeled Solicitation 1 and 2 in the request, using funds in the DSCC’s
17 account established under 52 U.S.C. § 30116(a)(9)(C) (“Legal Proceedings Account”).

18 The proposed television advertisements would feature federal candidates, including
19 Senators Bennet and Murray, and solicit donations to the Legal Proceedings Account.
20 Requestors ask whether the proposal to pay for these advertisements using the Legal
21 Proceedings Account is permissible and whether Bennet for Colorado and People for
22 Patty Murray (collectively “Candidate Committees”) may coordinate the timing, content,
23 and placement of these advertisements with the DSCC.

24 The Commission concludes that the DSCC may use funds from the Legal
25 Proceedings Account to pay for television advertisements described in Solicitations 1 and
26 2 because those advertisements would solicit donations to the Legal Proceedings
27 Account, which is a permissible use of funds in that account. The Commission further
28 concludes that the Candidate Committees may coordinate Solicitations 1 and 2 with the

1 DSCC because limitations on coordinated expenditures by a national party committee do
2 not apply to disbursements from a separate, segregated account established under 52
3 U.S.C. § 30116(a)(9)(C).

4 ***Background***

5 The facts presented in this advisory opinion are based on your letter dated
6 September 20, 2022, your email dated September 23, 2022, and disclosure reports and
7 other public documents filed with the Commission.

8 The DSCC is a national political party committee whose purpose is electing
9 Democrats to the U.S. Senate.¹ Bennet for Colorado is the principal campaign committee
10 of Michael Bennet, the sitting Democratic senator from Colorado,² and People for Patty
11 Murray is the principal campaign committee of Patty Murray, the sitting Democratic
12 senator from Washington state.³ Both senators are seeking re-election in the November
13 2022 general election.

14 The DSCC established the Legal Proceedings Account under 52 U.S.C.
15 § 30116(a)(9)(C), and it represents that the account is used to pay for expenses in
16 connection with recounts, contests, and other legal proceedings.⁴ Requestors provide two
17 alternate proposals under which the DSCC would use this Legal Proceedings Account to

¹ See DSCC, Statement of Organization, FEC Form 1 (Sept. 19, 2022), <https://docquery.fec.gov/cgi-bin/forms/C00042366/1630498/>.

² See Bennet for Colorado, Statement of Organization, FEC Form 1 (Aug. 17, 2022), <https://docquery.fec.gov/cgi-bin/forms/C00458398/1624593/>.

³ See People for Patty Murray, Statement of Organization, FEC Form 1 (Sept. 15, 2022), <https://docquery.fec.gov/cgi-bin/forms/C00257642/1629812/>.

⁴ Advisory Opinion Request (“AOR”) at AOR001.

1 pay for television advertisements soliciting donations to the Legal Proceedings Account;
2 the advertisements would feature Senators Bennet and Murray and other federal
3 candidates. Under both proposals, the requestors represent that all advertisements would
4 “comply fully” with the disclaimer requirements of 52 U.S.C. § 30120 and 11 C.F.R.
5 § 110.11.⁵ Further, under both proposals, if any donation exceeded a donor’s limit to the
6 Legal Proceedings Account, the DSCC would refund the excess portion of the donation.
7 Any funds raised through either proposed solicitation “would be spent exclusively on
8 legal proceedings that comply with the permissible uses of the Legal Proceedings
9 Account.”⁶

10 For Solicitation 1, the advertisements purchased using funds from the Legal
11 Proceedings Account would feature one or more candidates, including Senator Bennet
12 and Senator Murray. The ads would air “in states across the country,” including
13 Colorado and Washington, and may air in the jurisdiction in which the featured
14 candidate(s) are candidate(s) for re-election as well as in other jurisdictions where the
15 featured candidate(s) are not candidates.⁷ Solicitation 1 would “[i]nclude a clear
16 solicitation asking viewers to donate to the Legal Proceedings Account so that [the]
17 DSCC can protect the right to vote in court and prepare for potential recounts and
18 election contests.”⁸ The solicitation included in these advertisements would be both oral
19 and written, with the written solicitation appearing as an easily readable weblink. The

⁵ AOR006.

⁶ AOR006.

⁷ AOR002.

⁸ AOR002.

1 weblink would direct viewers to a contribution page, which would clearly state that
2 donations would be allocated to the DSCC’s Legal Proceedings Account.

3 The DSCC “wants to include recognizable political figures in the communications
4 because it believes [doing so would] make viewers of the communications more likely to
5 donate to the cause.”⁹ The advertisements would “focus on the issue of voter suppression
6 and [would] make no mention of any political party.”¹⁰ The advertisements would also
7 not contain express advocacy or publish or republish any candidate materials. The ads,
8 however, would “[b]e coordinated, including timing, content, and placement” with the
9 candidates appearing in the ads.¹¹

10 For Solicitation 2, the advertisements purchased using funds from the Legal
11 Proceedings Account would feature “a single candidate seeking re-election . . . in the
12 jurisdiction where the advertisement is disseminated” and would be “coordinated,
13 including the timing, content, and placement with the Democratic Senate candidate
14 whose race is featured” in the ad.¹² Each ad would focus on “one or more policy issues
15 central to the . . . general election in the jurisdiction of distribution” and “would either
16 discuss a Democratic candidate and promote or support the candidate and [the
17 candidate’s] policy position(s), or discuss a Republican candidate and attack or oppose
18 the candidate and [the candidate’s] policy positions.”¹³ The advertisement would not

⁹ AOR002.

¹⁰ AOR006.

¹¹ AOR002.

¹² AOR003.

¹³ AOR003.

1 publish or republish candidate materials, but “[m]ight in some circumstances expressly
2 advocate the election or defeat of a clearly identified candidate for federal office.”¹⁴ The
3 advertisements would not mention the Legal Proceedings Account or any legal
4 proceedings, but would include a written link to an online webpage such as
5 dsc.org/urgent and that website would “clearly state that all funds accepted through the
6 page are allocated to [the] DSCC’s Legal Proceedings Account.”¹⁵

7 ***Questions Presented***

8 *1a. May the DSCC use funds in its Legal Proceedings Account to pay for*
9 *television advertisements following the description for Solicitation 1?*

10 *1b. May the Candidate Committees coordinate with the DSCC on such*
11 *communications by having input on the content, timing, and placement of the*
12 *communications for Solicitation 1?*

13 *2a. May the DSCC use funds in its Legal Proceedings Account to pay for*
14 *television advertisements following the description for Solicitation 2?*

15 *2b. May the Candidate Committees coordinate with the DSCC on such*
16 *communications by having input on the content, timing, and placement of the*
17 *communications for Solicitation 2?*

¹⁴ AOR003.

¹⁵ AOR003.

1 ***Legal Analysis***

2 *1a. May the DSCC use funds in its Legal Proceedings Account to pay for*
3 *television advertisements following the description for Solicitation 1?*

4 *2a. May the DSCC use funds in its Legal Proceedings Account to pay for*
5 *television advertisements following the description for Solicitation 2?*

6 Yes, the DSCC may use funds in its Legal Proceedings Account to pay for
7 television advertisements following the descriptions for Solicitations 1 and 2 because
8 funds in an account established under 52 U.S.C. § 30116(a)(9)(C) may be used to pay for
9 the solicitation of donations to that account.

10 As added to the Act by the Consolidated and Further Continuing Appropriations
11 Act, 2015 (“Appropriations Act”), 52 U.S.C. § 30116(a)(9)(C) authorizes a national party
12 committee, including a national congressional campaign committee, to establish a
13 “separate, segregated account” to “defray expenses incurred with respect to the
14 preparation for and conduct of election recounts and contests and other legal
15 proceedings.”¹⁶

16 Notably, in the Appropriations Act, which authorized separate, segregated
17 national party accounts “used to defray expenses incurred with respect to the preparation
18 for and the conduct of election recounts and contests and other legal proceedings” under
19 52 U.S.C. § 30116(a)(9)(C), Congress also authorized two additional separate, segregated

¹⁶ Consolidated and Further Continuing Appropriations Act of 2015, Pub. L. No. 113-235, § 101, 128 Stat. 2130, 2772-73 (2014).

1 national party committee accounts, codified at 52 U.S.C. § 30116(a)(9)(A) and (B).¹⁷
2 Congress limited those two additional accounts to be “*used solely*” for the statutorily
3 listed purposes related to the payment of expenses for presidential nominating
4 conventions and party headquarters buildings.¹⁸ Congress did not, however, include
5 similar limiting language for accounts established under 52 U.S.C. § 30116(a)(9)(C) to be
6 used for election recounts, contests, and other legal proceedings. This omission suggests
7 that Congress intended a wider scope of permissible uses for funds in accounts
8 established under subsection (C) and did not intend to strictly limit the use of funds in an
9 account authorized by that subsection to solely the listed legal expenses. Accordingly,
10 the Commission concludes that funds in the Legal Proceedings Account are not limited
11 solely to expenses for election recounts, contests, and other legal proceedings, and may
12 be used for other purposes.

13 Furthermore, as the Requestor notes, the drafters of the Appropriations Act
14 explained that “a national party committee of a political party committee (including a
15 national congressional campaign committee of a political party) [may] defray expenses
16 incurred with respect to the preparation for and the conduct of election recounts and
17 contests and other legal proceedings, including the costs of fundraising for [the LPA],
18 using funds raised under a separate limit.”¹⁹

¹⁷ Consolidated and Further Continuing Appropriations Act of 2015, Pub. L. No. 113-235, § 101, 128 Stat. 2130, 2772-73 (2014).

¹⁸ *Id.*; 52 U.S.C. § 30116(a)(9)(A), (B).

¹⁹ Request at 4 (citing 106 Cong. Rec. H9286 (daily ed. Dec. 11, 2014) (statement of Rep. Boehner); 106 Cong. Rec. S6814 (daily ed. Dec. 13, 2014) (statement of Sen. Reid).

1 In 2016, the Commission received a petition for rulemaking asking it to issue
2 regulations governing accounts established under 52 U.S.C. § 30116(a)(9)(C), as well as
3 the additional separate, segregated national party accounts authorized by the
4 Appropriations Act.²⁰ The Commission subsequently published a notice of availability
5 seeking public comment on that petition for rulemaking and received four comments in
6 response.²¹ To date, the Commission has not issued a notice of disposition, nor has it
7 issued a notice of proposed rulemaking or final rule governing these accounts, and the
8 Commission has not previously addressed the question of whether LPA funds may be
9 spent on communications soliciting funds for the LPA.

10 Although the Commission has not previously addressed the issue of payment for
11 solicitations in the context of an account established under 52 U.S.C. § 30116(a)(9)(C),
12 the Commission has explained in previous advisory opinions that “Commission
13 regulations generally permit (and in some cases require) the proceeds of fundraising
14 activities to be used to defray the costs of those activities.”²² Likewise, in the case of
15 publicly funded presidential campaign committees, general election legal and accounting
16 compliance funds may be used to defray the cost of soliciting and contributions to the
17 GELAC fund.²³

²⁰ Perkins Coie LLP Political Law Group, Petition for Rulemaking (Jan. 8, 2016), <http://sers.fec.gov/fosers/showpdf.htm?docid=351581> (beginning at page 705).

²¹ Rulemaking Petition: Implementing the Consolidated and Further Appropriations Act, 2015, 81 Fed. Reg. 69,722 (Oct. 7, 2016). Comments are available on the Commission’s website. FEC Online Rulemaking System, <http://sers.fec.gov/fosers/>.

²² See Advisory Opinion 2010-14 (DSCC) at 5 (“The DSCC may also use recount funds to defray the costs of soliciting donations to the recount fund.”) (citing 11 C.F.R. §§ 102.17(c)(7)(i)(A), 9003.3(a)(2)(i)(E), Advisory Opinion 2003-15 (Majette)).

²³ 11 C.F.R. § 9003.3(a)(2)(i)(E).

1 Here, the DSCC may use funds in its Legal Proceedings Account to pay for
2 television advertisements following the descriptions for Solicitations 1 and 2 because
3 both advertisements would solicit contributions to the Legal Proceedings Account, as that
4 term is used in the Commission’s existing regulatory definition of “to solicit.”²⁴ Unless
5 and until the Commission duly promulgates regulations on the use of funds in the
6 additional separate, segregated national party accounts authorized by the Appropriations
7 Act, it would be inappropriate for the Commission to attempt to fill any statutory gaps or
8 ambiguity created by Congress when it authorized these accounts. Accordingly, because
9 funds in the Legal Proceedings Account may be used to pay for solicitations for
10 donations to that account,²⁵ the proposal is permissible whether the solicitation follows
11 the description for Solicitation 1 or Solicitation 2.

12 Because the advertisements as described in Solicitations 1 and 2 would solicit
13 donations to the Legal Proceedings Account, and funds in an account established under
14 52 U.S.C. § 30116(a)(9)(C) may be used to pay for the solicitation of donations to that
15 account, the Commission concludes that the proposal is permissible.

16 *Ib. May the Candidate Committees coordinate with the DSCC on such*
17 *communications by having input on the content, timing, and placement of the*
18 *communications for Solicitation 1?*

²⁴ See 11 C.F.R. § 300.2(m) (defining “to solicit”).

²⁵ See Advisory Opinion 2010-14 (DSCC) at 5.

1 2b. *May the Candidate Committees coordinate with the DSCC on such*
2 *communications by having input on the content, timing, and placement of the*
3 *communications for Solicitation 2?*

4 Yes, the Candidate Committees may coordinate with the DSCC on the content,
5 timing, and placement of the advertisements for Solicitations 1 and 2.

6 The Act limits on coordinated expenditures by a national party committee on
7 behalf of a federal candidate of that party.²⁶ However, the Act expressly provides that
8 those limitations “shall not apply” to disbursements from a national party committee’s
9 separate, segregated account established under 52 U.S.C. § 30116(a)(9)(C).²⁷ Because
10 the Act expressly excludes disbursements from an account established under 52 U.S.C.
11 § 30116(a)(9)(C) from the limitations on a national party committee’s coordinated
12 expenditures on behalf of candidates the proposal is permissible.

13 This response constitutes an advisory opinion concerning the application of the
14 Act and Commission regulations to the specific transaction or activity set forth in your
15 request.²⁸ The Commission emphasizes that, if there is a change in any of the facts or
16 assumptions presented, and such facts or assumptions are material to a conclusion
17 presented in this advisory opinion, then the requestors may not rely on that conclusion as
18 support for its proposed activity. Any person involved in any specific transaction or
19 activity that is indistinguishable in all its material aspects from the transaction or activity

²⁶ 52 U.S.C. § 30116(d)(3).

²⁷ 52 U.S.C. § 30116(d)(5).

²⁸ *See* 52 U.S.C. § 30108.

1 with respect to which this advisory opinion is rendered may rely on this advisory
2 opinion.²⁹ Please note that the analysis or conclusions in this advisory opinion may be
3 affected by subsequent developments in the law including, but not limited to, statutes,
4 regulations, advisory opinions, and case law. Any advisory opinions cited herein are
5 available on the Commission’s website.

6 On behalf of the Commission,

7 Allen J. Dickerson
8 Chairman
9

²⁹ See 52 U.S.C. § 30108(c)(1)(B).