

April 5, 2019

BY E-MAIL

Lisa J. Stevenson
Acting General Counsel
Federal Election Commission
1050 First Street NW
Washington, DC 20463

**Re: Comments on Advisory Opinion Request 2018-12, Drafts A and B and
Supplementary Information**

Dear Ms. Stevenson:

We are writing on behalf of Defending Digital Campaigns, Inc. (“DDC” or the “Organization”) to comment on Drafts A and B of Advisory Opinion 2018-12 as well as to provide supplementary information concerning DDC’s proposed activities.

DDC believes Draft A contains the appropriate analysis and reaches the correct conclusion because DDC’s proposed activities are neither for the purpose of influencing nor in connection with a federal election. Draft B, on the other hand, concludes that DDC’s proposed activities are impermissible because such activities would be “in connection with a federal election.” DDC disagrees with Draft B’s analysis and conclusion for the following reasons.

First, as the Commission has previously explained, “not all activities that may have some indirect effect on elections are encompassed by the ‘in connection with’ standard”¹ DDC’s proposed cybersecurity activities are most analogous to various legal defense funds the Commission has approved over the years. For example, in Advisory Opinion 2003-15, the Commission concluded that Representative Majette’s costs of defending and monitoring litigation seeking a special primary and a special general election—which, if successful, would overturn the primary and general election she recently won—were not in connection with any election. Accordingly, the Commission permitted a separate legal defense fund to raise unlimited corporate and individual donations to pay for these litigation costs.²

Similarly, in Advisory Opinion 2011-1, the Commission concluded that a separate legal defense fund could pay for the costs of defending Robin Carnahan for Senate in a lawsuit filed by Fox News and Chris Wallace alleging that the campaign had infringed Fox News’ copyright, invaded Mr. Wallace’s rights of privacy and publicity, and misappropriated Mr. Wallace’s likeness and persona. The Commission permitted the legal defense fund to raise unlimited corporate and individual donations, stating that the fund’s “receipts and disbursements would not be ‘contributions’ to, or ‘expenditures’ by the [f]und . . . nor would they be in-kind ‘contributions’

¹ FEC Adv. Op. 2010-3 (Nat’l Democratic Redistricting Trust) at 3 n.3.

² FEC Adv. Op. 2003-15 (Majette).

from the [f]und to [Robin Carnahan for Senate].”³ In a concurring opinion, three Commissioners clarified that “the legal defense fund at issue is not in connection with any election.”⁴

The federal candidates and campaigns who requested these advisory opinions were forced to defend themselves in post-election and commercial litigation or face the adverse consequences of default judgment. Today, campaigns and political parties have no choice but to defend themselves against cyberattacks by foreign actors. If they do not, we all suffer the adverse consequences of these assaults on our democratic institutions. Much like the legal defense funds the Commission has previously approved, DDC seeks to assist campaigns, political parties, and non-political organizations in defending themselves against unprecedented foreign cyberattacks. “[T]he ultimate beneficiary of [DDC’s] activities will be the nation’s voters and the electoral system itself, much the same way that an immunization program inoculates individuals for the ultimate purpose of safeguarding an entire community from a disease.”⁵

Second, Draft B’s reliance on Advisory Opinion 1999-2 (Premera) to conclude that DDC’s proposed activities are necessarily in connection with a federal election for purposes of the Act is misplaced, both as a matter of law and fact. Advisory Opinion 1999-2 held, in relevant part, that a corporate-hosted forum may be deemed to be in connection with a federal election if “the determining factor in extending the invitation to participate in the (candidate) forums” was “the status of the speakers as candidates.”⁶ That opinion cited to past statements by the Commission that “invitations extended to multiple candidates for the same office, or invitations extended to candidates qua candidates, establish that the event planned is, in fact, in connection with a Federal election.”⁷ Draft B points to this precedent to support the conclusion that DDC’s activities also must necessarily be in connection with a federal election since DDC’s proposal is purportedly “aimed only” at federal candidates and parties participating in federal elections.⁸

Draft B’s reliance on this precedent is inapposite in several respects. Advisory Opinion 1999-2 and the opinions cited therein are concerned exclusively with corporate-hosted conferences, forums, and other events intended to give public exposure to candidates, as opposed to the prophylactic and ideally invisible protections DDC is seeking to implement. These advisory opinions focus on determining what characteristics will render corporate events as campaign-related and therefore in connection with a federal election for purposes of the Act. In this context, it is appropriate to use invitation criteria as a proxy for whether the purpose of an event is to provide candidates with a forum to engage in campaign-related activities in connection with their elections. But DDC’s proposed activities should not be analyzed under this standard because they are of a completely different nature than the activities contemplated in this line of

³ FEC Adv. Op. 2011-1 (Robin Carnahan for Senate) at 4.

⁴ FEC Adv. Op. 2011-1 (Robin Carnahan for Senate), Concurring Statement of Vice Chair Caroline C. Hunter and Commissioners Donald F. McGahn and Matthew S. Petersen.

⁵ AOR 011.

⁶ FEC Adv. Op. 1999-2 (Premera) at 4.

⁷ *Id.* (citing FEC Adv. Ops. 1996-11, 1986-37, 1984-13).

⁸ Draft B at 13.

precedent.⁹ DDC is not seeking to provide candidates with any kind of platform—non-partisan or otherwise—to express their views, or provide them with any other opportunities that could be used to promote their candidacies or influence their elections. And DDC’s proposed selection criteria is likewise not intended to target one or more candidates running in a particular race for the purpose of directing attention to that election—rather, DDC’s selection criteria are intended to target the most vulnerable entities in our democratic process in a non-partisan and election-agnostic manner.

Even to the extent that Advisory Opinion 1999-2 can be applied here, Draft B relies on a factually inaccurate characterization of DDC’s activities to bring them within the ambit of the opinion’s holding. Draft B states that “DDC’s stated purpose [is] protecting *federal elections* from cyberattacks” and “its proposal is aimed *only* to protect *federal candidates and parties* from such attacks” and goes on to conclude that this exclusive focus on elections necessarily means that the activities are in connection with an election for purposes of the Act.¹⁰ However, as stated in DDC’s Articles of Incorporation, the Organization was formed “to provide education and research for *civic institutions* on cybersecurity best practices and assist them in implementing technologies, processes, resources, and solutions for enhancing cybersecurity and resilience to hostile cyber acts targeting the *domestic democratic process*.”¹¹ Contrary to the factually inaccurate premise in Draft B, DDC’s “stated purpose” is *not* limited to protecting federal elections from cyberattacks, but to “protect our democratic system of governance.”¹²

As an organization with finite resources, DDC pragmatically decided to work initially with federal campaigns and national political parties because these entities are “the most vulnerable players in our electoral system.”¹³ Inoculating a “critical mass” of these vulnerable actors will help fortify our democratic institutions.¹⁴ However, since DDC submitted its advisory opinion request, the Organization has observed that “think tanks” and other public policy-focused non-governmental organizations (“NGOs”) are likewise facing increased cybersecurity threats and often lack the expertise to prevent, detect, and respond to these threats on their own. Although NGOs do not directly participate in elections, they nevertheless play an important role in our democratic process because they often shape the public policy discussion among candidates and political parties at all levels of government. DDC plans to work initially with several NGOs in the Washington, DC area. For example, the Truman Center for National Policy and the Hudson Institute have both expressed interest in working with DDC to bolster their cybersecurity defenses. DDC’s commitment to working with NGOs—who do not directly participate in

⁹ If the legal defense funds discussed above were analyzed under this standard, they would be impermissible because the legal defense funds were formed to pay for the legal expenses of candidates and their campaign committees.

¹⁰ Draft B at 13 (emphasis added).

¹¹ AOR 017 (emphasis added).

¹² AOR 011.

¹³ AOR 002.

¹⁴ *Id.*

Ms. Stevenson

April 5, 2019

Page 4

elections—further reflects the Organization’s broader focus on protecting our democratic process from the negative effects of foreign cyberattacks.

In light of the foregoing, we respectfully submit that the Commission adopt Draft A because DDC’s proposed activities are neither for the purpose of influencing a federal election nor in connection with a federal election. Alternatively, we ask the Commission to conclude that DDC’s proposed activities are permissible under the legal analysis set forth in Campaign Legal Center’s April 5, 2019 comment.

Very truly yours,

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