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FEDERAL ELECTION COMMISSION  
Washington, DC 20463

**AGENDA DOCUMENT NO. 22-18-A**  
**AGENDA ITEM**  
**For meeting of May 26, 2022**

May 19, 2022

**MEMORANDUM**

TO: The Commission

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

Neven F. Stipanovic *NFS*  
Associate General Counsel

Amy Rothstein *JSW for ALR*  
Assistant General Counsel

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Attorney

Subject: Draft AO 2022-05 (DSCC) – Draft A

Attached is a proposed draft of the subject advisory opinion.

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 May 25, 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 2022-05

2

3 Jacquelyn K. Lopez, Esq.  
4 Zachary P. Morrison, Esq.  
5 Elias Law Group  
6 10 G Street NE, Suite 600  
7 Washington, DC 20002

**DRAFT A**

8 Dear Ms. Lopez and Mr. Morrison:

9 We are responding to your request for an advisory opinion on behalf of DSCC  
10 concerning the application of the Federal Election Campaign Act, 52 U.S.C. §§ 30101-45  
11 (the “Act”), and Commission regulations to DSCC’s proposed purchase of a research  
12 book for its own use and for provision to two candidates’ authorized committees. The  
13 Commission concludes that the value of the research book to each authorized committee  
14 is the usual and normal charge for the research book and any associated copyright license  
15 in the market from which they ordinarily would have been purchased.

16 ***Background***

17 The facts presented in this advisory opinion are based on your letter received on  
18 March 31, 2022.

19 DSCC is a national party committee “dedicated to electing Democrats to the  
20 U.S. Senate.”<sup>1</sup> DSCC plans to hire a consultant to write a research book (the “book”)  
21 about a sitting Republican U.S. senator from “State A” for a fee of \$30,000.<sup>2</sup> DSCC  
22 states that it will own the book’s copyright and will therefore be able to use the book in  
23 any way it chooses without incurring an additional charge.<sup>3</sup> DSCC intends to use the

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<sup>1</sup> Advisory Opinion Request (“AOR”) at 001.

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

1 book to inform its own political strategy in State A; after receiving and reviewing the  
2 book, DSCC also intends to provide it “in full” to two candidates for the Democratic  
3 nomination for the U.S. Senate in State A.<sup>4</sup> Both candidates will be able to use the book  
4 in whole or in part for their own political purposes, at their discretion and without  
5 restriction.<sup>5</sup>

6 DSCC plans to offer each candidate’s authorized committee the choice of  
7 (i) paying DSCC for the value of the book; (ii) treating the value of the book as an in-  
8 kind contribution from DSCC to the authorized committee; or (iii) treating the value of  
9 the book as a coordinated party expenditure, subject to the limit for the U.S. Senate in  
10 State A.<sup>6</sup>

11 ***Question Presented***

12 *Is the value of the research book that will be purchased by DSCC for \$30,000*  
13 *and used by DSCC for its own purposes, and then provided to two Democratic primary*  
14 *campaigns for U.S. Senate, \$10,000 per campaign?*

15 ***Legal Analysis and Conclusion***

16 The value to each political committee of the research book that will be purchased  
17 by DSCC for \$30,000 and used by DSCC for its own purposes, and then provided to two

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<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> AOR001-02. According to DSCC, the Democratic National Committee has assigned its full coordinated party spending authority for the 2022 U.S. Senate election in State A to DSCC. AOR002; *see also* 52 U.S.C. § 30116(d); 11 C.F.R. §§ 109.32(b), 109.33. The Commission notes that coordinated party expenditures may be made only in connection with a general election. *See* 52 U.S.C. § 30116(d)(1).

1 Democratic primary campaigns for U.S. Senate, will be the usual and normal charge for  
2 the research book and associated copyright license in the market from which they  
3 ordinarily would have been purchased.<sup>7</sup>

4 A contribution includes “any gift, subscription, loan, advance, or deposit of  
5 money or anything of value made by any person for the purpose of influencing any  
6 election for Federal office.”<sup>8</sup> The term “anything of value” includes all in-kind  
7 contributions, such as goods or services provided without charge or at less than the usual  
8 and normal charge.<sup>9</sup> The “usual and normal charge” for goods is the price of those goods  
9 in the market from which they ordinarily would have been purchased at the time of the  
10 contribution, and the “usual and normal charge” for services is the commercially  
11 reasonable rate prevailing at the time the services were rendered.<sup>10</sup>

12 Here, DSCC proposes to commission a research book for its own political use,  
13 and then to give the book to two candidates’ authorized committees for their individual  
14 use “in full” and “without restriction.”<sup>11</sup> Accordingly, if either authorized committee

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<sup>7</sup> The Commission assumes for present purposes that each authorized committee will receive a non-exclusive copyright license along with the book. Although the normal and usual charge for the book with a non-exclusive copyright license would likely be less than the price that the DSCC will pay for the book with full copyright under its contract with the consultant, the Commission does not have sufficient information to determine what that charge would be.

<sup>8</sup> 52 U.S.C. § 30101(8)(A)(i); *see also* 11 C.F.R. § 100.52(a). Similarly, an expenditure includes “any purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value, made by any person for the purpose of influencing any election for Federal office.” 52 U.S.C. § 30101(9)(A)(i); *see also* 11 C.F.R. § 100.111(a).

<sup>9</sup> 11 C.F.R. § 100.52(d)(1) (definition of contribution); *see also id.* § 100.111(e)(1) (definition of expenditure).

<sup>10</sup> 11 C.F.R. § 100.52(d)(2) (definition of contribution); *see also id.* § 100.111(e)(2) (definition of expenditure).

<sup>11</sup> AOR001.

1 opts to treat the book as an in-kind contribution or a coordinated party expenditure, the  
2 amount of the contribution or expenditure by DSCC will be the usual and normal charge  
3 for the research book and associated copyright license in the market from which they  
4 ordinarily would have been purchased. If either authorized committee opts to pay DSCC  
5 for the book at less than the usual and normal charge, DSCC would make a contribution  
6 to that committee equal to the difference between the usual and normal charge and the  
7 amount paid by the committee.<sup>12</sup>

8 Commission regulations also provide that expenditures made on behalf of more  
9 than one clearly identified federal candidate, including in-kind contributions and  
10 coordinated expenditures, “shall be attributed to each such candidate according to the  
11 benefit reasonably expected to be derived.”<sup>13</sup> The regulation does not call for an  
12 expenditure to be simply split, however. Instead, it focuses on the actual benefit  
13 received. For example, expenditures for publications or broadcast communications are  
14 allocated according to “the proportion of space or time devoted to each candidate as  
15 compared to the total space or time devoted to all candidates.”<sup>14</sup> Similarly, expenditures  
16 for fundraising events are allocated according to “the proportion of funds received by  
17 each candidate as compared to the total receipts by all candidates.”<sup>15</sup> And expenditures  
18 for phone banks are allocated “by the number of questions or statements devoted to each

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<sup>12</sup> 11 C.F.R. § 100.52(d)(1) (definition of contribution); *see also id.* § 100.111(e)(1) (definition of expenditure).

<sup>13</sup> 11 C.F.R. § 106.1(a)(1).

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

1 candidate as compared to the total number of questions or statements devoted to all  
2 candidates.”<sup>16</sup>

3           Nonetheless, DSCC argues that it should be able to allocate its expenditure for the  
4 book equally among itself and the two authorized committees, such that the value of the  
5 book to each committee would be only \$10,000.

6           In Advisory Opinion 1985-19 (Valley for Congress), the Commission rejected a  
7 proposal similar to the one advanced by DSCC here. In that advisory opinion, a political  
8 committee proposed to enter into a joint purchasing agreement for a new computer  
9 system with a for-profit firm, and to split the cost of the system equally with the firm.  
10 Significantly, despite splitting the cost, the committee and the firm each would have been  
11 entitled to use the computer system fully and without restrictions.<sup>17</sup> The Commission  
12 reasoned that if the political committee had full use of the computer system while paying  
13 only half the cost, the firm would, in effect, subsidize the committee’s use of the  
14 computer system in the amount of half its purchase price, resulting in a prohibited  
15 corporate contribution.<sup>18</sup>

16           Like the political committee in Advisory Opinion 1985-19 (Valley for Congress),  
17 the two authorized committees here would each receive full and unrestricted access to,

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<sup>16</sup>       *Id.*

<sup>17</sup>       Advisory Opinion 1985-19 (Valley for Congress) at 2 (stating, “the value of the computer system as an operating asset to the Committee in terms of how it can and will be utilized for campaign purposes remains the same whether the Committee is a joint purchaser or a sole purchaser”).

<sup>18</sup>       *Id.* at 2-3; *see also* Advisory Opinion 2007-22 (Hurysz) at 6 (“The provision of [materials] without charge would relieve your campaign of the expense that it would otherwise incur to obtain such materials. Thus, the provision of such items without charge would constitute a contribution . . .”).

1 use of, and benefit from, the book.<sup>19</sup> The “benefit reasonably expected to be derived” by  
2 each authorized committee would thus be the full fair market value of the book with any  
3 associated copyright license. The DSCC’s proposal that the authorized committees value  
4 the book at only one-third its cost to DSCC could result in unreported and potentially  
5 excessive contributions, if the usual and normal charge for the research book and  
6 associated copyright license in the market from which they ordinarily would have been  
7 purchased is more than one-third of DSCC’s cost.<sup>20</sup>

8           The three advisory opinions relied upon by DSCC do not change the  
9 Commission’s conclusion. Although the advisory opinions involve attributing costs to  
10 and allocating costs among political committees (and others) based on the benefit  
11 reasonably expected to be derived, their facts differ materially from the facts here.

12 •       In Advisory Opinion 1980-38 (Allen for Congress), a federal candidate proposed  
13 to enter into an agreement with a state candidate to allocate the rental costs and the use of  
14 computer equipment; one candidate would pay all rental costs and the other candidate  
15 would pay all data entry costs in the first instance, with subsequent reconciliation of  
16 payments and expenses by each candidate. The Commission found the agreement to  
17 share the expenses of the computer rental and data entry to be permissible, “provided that  
18 such costs are allocated between the respective committees in a manner that equitably

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<sup>19</sup> AOR001.

<sup>20</sup> Requiring each political committee to report the full fair market value of the book will ensure that the public record accurately reflects the benefit received by each committee and the level of support provided to the authorized committees by DSCC.

1 reflects the actual use and benefit to each campaign.”<sup>21</sup> The Commission did not  
2 separately address the requestor’s proposal that the committees evenly split the costs of  
3 data entry and rent attributable to an area where the state and federal districts overlapped.

4 • In Advisory Opinion 1986-30 (Martin), a candidate proposed to use a houseboat  
5 for campaign purposes without paying a rental fee and certain other costs, courtesy of the  
6 boat’s corporate manufacturer and sales representative. The Commission rejected that  
7 proposal. Instead, the Commission required the candidate to attribute the costs to himself  
8 and other federal candidates traveling on the same boat at different times and for different  
9 durations “in proportion to . . . the benefit reasonably expected to be derived.”<sup>22</sup> The  
10 Commission did not opine as to what that benefit might be, but did note that “where [the  
11 candidate’s] committee also pays for the portion of these expenses allocable to another  
12 Federal candidate, such payment will constitute an in-kind contribution to that  
13 candidate.”<sup>23</sup>

14 • Finally, in Advisory Opinion 2007-24 (Burkee/Walz), two principal campaign  
15 committees proposed to campaign and fundraise jointly and to allocate costs accordingly.  
16 The candidates would, for example, appear together and be given equal time and  
17 prominence in broadcast, print, email, and internet advertisements, on a joint website, and  
18 in yard signs, banners, stickers, and other fundraising and promotional materials. The

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<sup>21</sup> Advisory Opinion 1980-38 (Allen for Congress) at 2.

<sup>22</sup> Advisory Opinion 1986-30 (Martin) at 2. Allocating the costs of candidate travel on privately-owned vehicles is now governed by Commission regulations at 11 C.F.R. § 100.93, which were promulgated after the issuance of Advisory Opinion 1986-30 (Martin).

<sup>23</sup> *Id.*



1 Commission concluded, in part, that the candidates must attribute the costs of their joint  
2 campaign events and advertising activities that did not include fundraising “to each such  
3 candidate according to the benefit reasonably expected to be derived.”<sup>24</sup> The Commission  
4 approved the candidates’ proposal to split equally the salary costs of individuals working for  
5 the two committees jointly, with each candidate solely responsible for personnel costs  
6 attributable to activity conducted exclusively on that candidate’s behalf.

7 The advisory opinions cited by the requestor reiterate the principle of allocating  
8 shared expenses among political committees according to the benefit reasonably expected  
9 to be derived. None of these advisory opinions, however, considers a situation where, as  
10 here, each committee receives unrestricted access to, and enjoys the full use of, an asset,  
11 or supports the requestor’s contention that an asset’s value is divided by the number of  
12 committees with which it is shared.<sup>25</sup>

13 Accordingly, the Commission concludes that the value of the book to each  
14 authorized committee would be the usual and normal charge for the research book and  
15 associated copyright license in the market from which they ordinarily would have been  
16 purchased.

17 This response constitutes an advisory opinion concerning the application of the  
18 Act and Commission regulations to the specific transaction or activity set forth in your

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<sup>24</sup> Advisory Opinion 2007-24 (Burkee/Walz) at 5; *see also id.* at 6, 9. The requestors’ allocation of expenses for their joint fundraising activities was subject to the terms of their joint fundraising agreement, *see* 11 C.F.R. § 102.17(c)(6)-(7), rather than 11 C.F.R. § 106.1.

<sup>25</sup> Similarly, the Commission’s regulation on polling costs, on its face, does not apply to a research book. *See* 11 C.F.R. § 106.4(e) (requiring allocation of costs of polling results provided to candidate- and political committee-recipients according to specified methods), (f)-(g) (requiring computation of in-kind contributions and expenditures among sequential recipients of shared polling results based on days elapsed since initial receipt).

1 request. *See* 52 U.S.C. § 30108. The Commission emphasizes that, if there is a change  
2 in any of the facts or assumptions presented, and such facts or assumptions are material to  
3 a conclusion presented in this advisory opinion, then the requestor may not rely on that  
4 conclusion as support for its proposed activity. Any person involved in any specific  
5 transaction or activity which is indistinguishable in all its material aspects from the  
6 transaction or activity with respect to which this advisory opinion is rendered may rely on  
7 this advisory opinion. *See* 52 U.S.C. § 30108(c)(1)(B). Please note that the analysis or  
8 conclusions in this advisory opinion may be affected by subsequent developments in the  
9 law including, but not limited to, statutes, regulations, advisory opinions, and case law.  
10 Any advisory opinions cited herein are available on the Commission’s website.

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On behalf of the Commission,

Allen J. Dickerson  
Chairman