



FEDERAL ELECTION COMMISSION

Washington, DC 20463

MEMORANDUM

TO: The Commission

FROM: Office of the Commission Secretary *LC*

DATE: May 25, 2022

SUBJECT: AO 2022-05 (DSCC) Requestor Comment

Attached is a comment on AO 2022-05 (DSCC). This matter is on the May 26, 2022 Open Meeting Agenda.

Attachment

RECEIVED

By Office of the Commission Secretary at 2:03 pm, May 25, 2022

May 25, 2022

BY ELECTRONIC MAIL DELIVERY

The Honorable Allen Dickerson, Chairman
Federal Election Commission
1050 First Street NE
Washington, DC 20463

Re: Comment Regarding AO 2022-05 Draft Advisory Opinion

Dear Commissioners:

We submit these comments on behalf of DSCC (the “Committee”) regarding Draft A (the “Draft”) of Advisory Opinion 2022-05, which the Commission provided on May 23, 2022. We urge the Commission to reconsider its conclusion and confirm that the value of the research book that will be purchased by DSCC for \$30,000 and used by DSCC for its own purposes, and then provided to two Democratic primary campaigns for U.S. Senate is \$10,000 per campaign.

DISCUSSION

The Draft holds that the value of a research book purchased by DSCC, used for its own purposes, and then provided to two recipient campaigns is “the usual and normal charge for the research book and associated copyright license in the market from which they ordinarily would have been purchased.”¹ This conclusion is both practically and legally flawed.

In setting the valuation as the “usual and normal charge” for the book and copyright license, the Draft ignores the facts presented by the Committee and fails to provide guidance on the question asked. The Committee’s request states that “[u]nder the proposed contract terms, in return for the \$30,000 fee, DSCC will own the copyright to the research book, allowing DSCC to give the book to third parties in its sole discretion.”² This is a custom research book commissioned by the DSCC and it is the DSCC’s exclusive work product. There is no “usual and normal charge” in the market for the same book and “associated copyright license” because it is not available for purchase. On top of not making practical sense, the valuation method proposed by the Draft reflects an overly rigid interpretation of the Act that contradicts both past Commission Advisory Opinions and current Commission regulations.

¹ FEC Adv. Op. 2022-05 (DSCC), Draft A at 4 [Draft A].

² Committee request at 1.

The Draft relies on the definition of a “contribution” and the term “anything of value” to hold that the benefit to the recipients of the book is calculated by determining “the usual and normal charge” of the same good at market value.³ Therefore, the Draft explains, the value of a research book provided to a campaign should be the usual and normal charge of the book and an associated license.⁴ The definition of a “contribution” and “usual and normal charge” relied on by the Draft to get to this conclusion applies to all activity governed by the Act and Commission regulations. Yet, there are multiple contexts where Commission regulations acknowledge that the value to a recipient of a full resource is only a portion of the original cost. In the context of polling in Section 106.4 and private travel in Section 100.93, the value of the goods or services is explicitly split among the recipient committees, even when each committee receives the full benefit.⁵ Therefore, it cannot be true that the “usual and normal charge” standard relied on by the Draft precludes splitting the cost of a resource to determine the value of the benefit to a recipient.

The Draft’s valuation method further ignores the more nuanced attribution for valuing expense allocation when there are party expenditures made on behalf of multiple committees. Section 106.1, the regulation at issue, requires attribution based on “the benefit reasonably expected to be derived,” recognizing that joint expenses do not fit squarely into a “usual and normal charge” analysis. The Commission is of course correct that Section 106.1 does not expressly call for an expenditure for a research book to be split. That does not mean, however, that it is not a proper way to calculate the benefit expected to be derived. And in fact, Section 106.1 and past Commission Advisory Opinions support this valuation.

The Draft uses the examples in Section 106.1(a)(1) to illustrate that the attribution calculation should focus on the benefit received. While this is true, the examples also highlight a determination of value per committee as a distinct “proportion” of the total good.⁶ The attribution method in Section 106.1(a) does not specifically discuss joint expenditures that are provided in full to each recipient, but the regulation certainly does not suggest that, in such an

³ Draft A at 3.

⁴ *Id.* at 4.

⁵ 11 CFR §§ 106.4(e)(2); 100.93(c)(1).

⁶ *Id.* § 106.1(a)(1) (“Expenditures, including in-kind contributions, independent expenditures, and coordinated expenditures made on behalf of more than one clearly identified Federal candidate shall be attributed to each such candidate according to the benefit reasonably expected to be derived. For example, in the case of a publication or broadcast communication, the attribution shall be determined by the proportion of space or time devoted to each candidate as compared to the total space or time devoted to all candidates. In the case of a fundraising program or event where funds are collected by one committee for more than one clearly identified candidate, the attribution shall be determined by the proportion of funds received by each candidate as compared to the total receipts by all candidates. In the case of a phone bank, the attribution shall be determined by the number of questions or statements devoted to each candidate as compared to the total number of questions or statements devoted to all candidates. These methods shall also be used to allocate payments involving both expenditures on behalf of one or more clearly identified Federal candidates and disbursements on behalf of one or more clearly identified non-Federal candidates.”)

instance, the attribution of costs per committee can or should exceed the aggregate amount of the expenditure. The Advisory Opinions discussed below and cited in the request further illustrate this point and support a split of the total cost in such an instance.

Advisory Opinion 1980-38 expressly involved the split of the cost of a resource fully available to multiple recipients. The Draft utilizes a technical reading of Advisory Opinion 1980-38 to ignore this, explaining that the Opinion “did not separately address the requestor’s proposal” that data and rent costs could be evenly split for overlapping data.⁷ However, the facts in the Opinion clearly stipulate that expenses for data in overlapping districts would be “split evenly between the campaigns.”⁸ The Commission made no inclination that it objected to this arrangement. The fact that the Commission (1) did not contest the cost splitting and (2) agreed that the arrangement was permissible (provided that such costs are allocated based on the benefit derived) is evidence that the Commission found it reasonable to attribute costs equally to each committee when both committees received the full resource.

In discussing Advisory Opinion 1986-30, the Draft claims the only takeaway from the opinion is that the value of a shared houseboat to multiple users is calculated as the benefit reasonably expected to be derived.⁹ In doing so, the Draft suggests that benefiting committees must pay expenses in proportion to the benefit received, and this proportion is wholly unrelated to the actual costs of a trip. In other words, the argument goes, if several committees in Advisory Opinion 1986-30 were on the houseboat for $\frac{3}{4}$ of the trip, each committee would owe the manufacturer or its sales representative 75% of the travel expenses. Under the Draft’s read of the opinion, it is apparently of no concern that the actual payments to the manufacturer or sales representative would greatly exceed the travel expenses charged. In reality, the Commission in Advisory Opinion 1986-30 was requiring each committee to pay their “allocable portion” of a fixed amount of expenses (*i.e.*, the operating costs + rental charge + pilots compensation).¹⁰ Nothing in the Advisory Opinion suggests that determining the benefit derived per committee should result in the committees collectively overpaying for services. If the Commission’s intent was not clear, the subsequently adopted regulations in Section 100.93 left no doubt that the costs must be *proportionately divided*.¹¹

⁷ Draft A at 7.

⁸ FEC Adv. Op. 1986-30 (Allen for Congress) at 1.

⁹ Draft A at 7

¹⁰ FEC Adv. Op. 1986-30 (Allen for Congress) at 2.

¹¹ 11 CFR 100.93(c)(1) (“A Senate, presidential, or vice-presidential candidate traveling on his own behalf, or any person traveling on behalf of such candidate or the candidate's authorized committee must pay the pro rata share per campaign traveler of the normal and usual charter fare or rental charge for travel on a comparable aircraft of comparable size. The pro rata share shall be calculated by dividing the normal and usual charter fare or rental charge by the number of campaign travelers on the flight that are traveling on behalf of such candidates or their authorized committees, including members of the news media, and security personnel traveling with a candidate.”)

The Draft, again in its discussion of Advisory Opinion 2007-24, chooses only to focus on the general principle that shared expenses must be allocated based on the benefit reasonably expected to be derived.¹² Yet, the Draft ignores the reality in Advisory Opinion 2007-24 that the Commission approved the committees evenly splitting costs when they both received the full benefit of work jointly provided by a salaried employee.¹³

In summation, the Draft relies on the generic definition of a contribution to then engage in a highly technical read of 11 CFR § 106.1(a)(1) that not only leads to an absurd result – DSCC spending \$30,000 on a resource and reporting the value of that resource to the public as \$90,000 – but further contradicts the approach taken in a series of past Advisory Opinions and Commission regulations. We respectfully contend that the appropriate way to attribute the value of a research book purchased by DSCC, used for its own purposes and then provided to two candidate committees is to evenly divide the total costs by the number of recipient committees. This valuation method is explicitly provided for in Sections 106.4 and 100.93, and is demonstrated on multiple occasions in Advisory Opinions analyzing Section 106.1.

Whether the cost of the research book is considered a coordinated party expenditure, in-kind contribution, or the recipient candidate committee intends to pay DSCC for the research book, the value of the book is most accurately calculated by dividing the costs among the recipient committees.

For the foregoing reasons, we urge the Commission to reject Draft A of Advisory Opinion 2022-05 and confirm that the value of the research book that will be purchased by DSCC for \$30,000 and used by DSCC for its own purposes, and then provided to two Democratic primary campaigns for U.S. Senate is \$10,000 per campaign.

Very truly yours,



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¹² Draft A at 8.

¹³ FEC Adv. Op. 2007-24 (Burkee/Waltz).