



FEDERAL ELECTION COMMISSION
Washington, DC 20463

MEMORANDUM

TO: The Commission

FROM: Office of the Commission Secretary *LC*

DATE: October 20, 2022

SUBJECT: AO 2022-21 (DSCC et. al) Comment from Requestors DSCC,
Bennet for Colorado, and People for Patty Murray

Attached is AO 2022-21 (DSCC, et al.) Requestors' Comment on Drafts A-D.

This matter will be discussed on the Open Meeting of October 20, 2022.

Attachment

RECEIVED

By Office of the Commission Secretary at 8:37 am, Oct 20, 2022

October 19, 2022

BY ELECTRONIC MAIL DELIVERY

Federal Election Commission
1050 First Street, NE
Washington, DC 20463

Re: Comment Regarding AO 2022-21

Dear Commissioners:

DSCC, Bennet for Colorado, and People for Patty Murray (“**Requestors**”) submit these comments in response to the four draft advisory opinions issued regarding AO 2022-21. Requestors urge the Commission to adopt Draft D because it proposes a commonsense approach and provides clear, practical guidance to Requestors and the regulated community in accordance with congressional intent with respect to DSCC’s Legal Proceedings Account.

Drafts A and B rely on an incorrect legal standard governing the Legal Proceedings Account. Both drafts hinge their analysis of Requestors’ proposed solicitations on whether the communications are “for the purpose of influencing a federal election.” This standard conflicts with the plain text and the legislative history of the law creating the Legal Proceedings Account, the Consolidated and Further Continuing Appropriations Act of 2015 (the “**Appropriations Act**”).

Under the Appropriations Act, the national party committees are permitted to raise funds into a separate account in order “to defray expenses incurred with respect to the preparation for and the conduct of election recounts and contests and other legal proceedings.”¹ This Legal Proceedings Account is subject to its own contribution limit separate from the committees’ general accounts, and expenditures using the funds in a Legal Proceedings Account do not count against the committees’ coordinated party expenditure limit.² Prior to the establishment of the present-day Legal Proceedings Account, the Commission permitted state and national party committees to establish segregated accounts for use in connection with recounts and election contests.³ When enacting the Appropriations Act, Congress went even further by also including a third category of permissible expenses – “other legal proceedings” – which the previous segregated accounts could not cover.

At the time of passing the Appropriations Act, the drafters, then-Speaker of the House John Boehner and then-Senate Majority Leader Harry Reid declared this intent very clearly. In their joint Explanation of Congressional Intent accompanying the Appropriations Act (the “**Explanation**”), they stated that by including the phrase “and other legal proceedings,” Congress intended to permit the Legal Proceedings Account to be used for *all* legal proceedings, not just legal proceedings arising out of election contests and recounts. After describing that although the law “is not intended to modify Federal Election Commission precedent permitting the raising and spending of [recount] funds by

¹ 52 U.S.C. § 30116(a)(9)(C).

² *Id.* § 30116(d)(5).

³ *See, e.g.*, Advisory Opinion 2009-04 (DSCC).

campaign or state or national party committees. *See* FEC Advisory Opinions 2006–24, 2009–4,” the legislative history goes on to say that the law “is *also* intended to permit the national parties to use such funds for costs, fees, and disbursements associated with other legal proceedings.”⁴ Notably, the advisory opinions cited with respect to recount funds have limited the use of those funds to expenses that are not for the purpose of influencing a federal election. But the legislative history does not cite those advisory opinions after the sentence about “other legal proceedings,” it does so only with respect to recounts.

As the legislative history notes, prior to the enactment of the Appropriations Act, the national party committees were already expressly authorized to use funds raised under separate contribution limits to defray expenses incurred in connection with *recounts and election contests*.⁵ But, in addition to approving the use of the Legal Proceedings Account for recounts and election contests, the Appropriations Act created a separate, independent use of the Legal Proceedings Account: to pay for expenses incurred with respect to the preparation for and the conduct of “other legal proceedings.” The legislative history is crystal clear on this intent – “[s]ection 101 **is also intended** to permit the national parties to use such funds for costs, fees, and disbursements **associated with other legal proceedings**.”⁶ The express use of the term “also” leaves no doubt that Congress intended to permit a third category of permissible expenses.

Thus, in passing the Appropriations Act, Congress expressly intended to expand the permissible use of the Legal Proceedings Account beyond costs related to the conduct of election recounts and contests to any “other legal proceedings.” Any other read of the Appropriations Act ignores not only the plain language of the statute, but also the legislative history accompanying its passage.

This intent is also underscored by the fact that the Explanation explicitly says:

Finally, under current law coordinated limits do not apply even absent these provisions to the existing accounts as described in section 315 of FECA and therefore it is the intent of the amendments contained herein that expenditures made from the accounts described in section 315(a)(9) of FECA, *many of which (such as recount and legal proceeding expenses) are not for the purpose of influencing federal elections*, do not count against the coordinated party expenditure limits described in section 315(d) of FECA.⁷

Had Congress wanted to limit the use of the Legal Proceedings Account to expenses that were not for the purposes of influencing an election, it would not have included the modifier “many of which” and instead would have said “all of which” or simply “which.” This position makes logical sense because if an expense is not for the purpose of influencing an election to begin with, it would not be subject to the coordinated party expenditure limits. Thus, there would have been no need to further clarify or expressly exempt expenses from the Legal Proceedings Account from the coordinated party expenditure limits if those expenses could never be for the purposes of influencing an election in the first place.

⁴ 160 Cong. Rec. H9286 (daily ed. Dec. 11, 2014) (statement of Rep. Boehner) (emphasis added); 160 Cong. Rec. S6814 (daily ed. Dec. 13, 2014) (statement of Sen. Reid) (emphasis added).

⁵ *See* Advisory Opinion 2006-24 (DSCC); Advisory Opinion 2009-4 (DSCC).

⁶ 160 Cong. Rec. H9286 (daily ed. Dec. 11, 2014) (statement of Rep. Boehner) (emphasis added); 160 Cong. Rec. S6814 (daily ed. Dec. 13, 2014) (statement of Sen. Reid) (emphasis added).

⁷ *Id.*

As Requestors have noted, the regulated community has long suffered from the lack of any guidance beyond the plain text of the Appropriations Act. Requestors strongly support Draft D because it offers clear guidance on the proposed activity. Draft D draws on well-established Commission principles to reach a conclusion to the request. Draft D observes that Commission regulations “stand generally for the proposition that allocation is an appropriate way to fund activities with multiple purposes.”⁸ Using this method for allocating cost for communications with multiple purposes is consistent with long-standing Commission precedents. For example, Commission regulations provide that “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,” as “determined by the proportion of space or time devoted to each candidate as compared to the total space or time devoted to all candidates.”⁹ A similar principle applies to polling expenses.¹⁰ The regulation governing phone banks also provides that a party committee and a federal candidate may allocate the costs of a phone bank 50/50 when the communication (1) refers to only one clearly identified federal candidate, (2) generically references without identifying other candidates of the same political party, and (3) does not solicit a contribution or donation.¹¹

Based on these allocation principles, the Commission has approved of two further methods by which a party committee can share the costs of a communication with one or more clearly identified federal candidates without making an in-kind contribution or a party coordinated expenditure with those candidates. For example, for multicandidate advertisements, which are communications benefitting more than one clearly identified federal candidate, the Commission has advised that committees can allocate based on “the benefit reasonably expected to be derived” by each committee.¹² The Commission has also already allowed committees to allocate the costs of certain activities between their main accounts and legal proceeding accounts.¹³ In Advisory Opinion 2010-14, the Commission allowed the DSCC to allocate expenses that were attributable to both “recount activities” and “campaign activities” unrelated to potential recounts, including the salary and benefits of staff who worked on both recount and campaign activities, by keeping a monthly log of the staff time spent on each type of activity and reimbursing the general account with funds from the legal proceeding account. The FEC also applied the same rationale to state party legal accounts in Advisory Opinion 2006-24. Finally, Commission regulations also provide for allocation of expenditures between a committee’s federal and non-federal accounts.¹⁴

In short, Commission regulations and guidance have consistently provided for political committee expenses being allocable based on the purpose of those expenditures. Accordingly, Requesters respectfully urge the Commission to approve Draft D.

⁸ Advisory Opinion 2010-14 at 6 (DSCC).

⁹ 11 C.F.R. § 106.1(a).

¹⁰ *Id.* § 106.4.

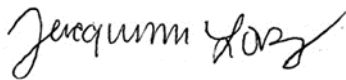
¹¹ *Id.* § 106.8.

¹² See Factual & Legal Analysis at 3, MURs 7169, *et al.* (Democratic Congressional Campaign Committee, *et al.*) (2017).

¹³ Advisory Opinion 2010-14 (DSCC).

¹⁴ 11 C.F.R. §§ 106.5-106.7.

Very truly yours,

A handwritten signature in black ink, appearing to read "Jacquelyn Lopez", with a stylized flourish at the end.

Jacquelyn K. Lopez
Rachel L. Jacobs
Jonathan A. Peterson

Counsel to DSCC, Bennet for Colorado, and People for Patty Murray