FEDERAL ELECTION COMMISSION
Washington, DC 20463

MEMORANDUM

TO: **Commissioners**
Staff Director

FROM: **Commission Secretary's Office** LCS

DATE: **November 4, 2022**

SUBJECT: **Statement Regarding Advisory Opinion 2022-21 (DSCC, et al.) – Commissioner Shana M. Broussard**

Attached is a statement from Commissioner Shana M. Broussard. This matter was on the October 20, 2022 Open Meeting Agenda.

Attachment

FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

STATEMENT OF COMMISSIONER SHANA M. BROUSSARD REGARDING ADVISORY OPINION 2022-21 (DSCC, *ET AL.*)

The Consolidated and Further Continuing Appropriations Act, 2015 ("Appropriations Act"), authorized national party committees, including a national congressional campaign committee, to establish three "separate, segregated" accounts, each for a specific purpose: nominating conventions, building funds, and "recount, election contest, and other legal proceedings."[1] This last category, "Legal Proceedings Accounts," [2] was the subject of this advisory opinion request from the DSCC and two authorized candidate committees, Bennet for Colorado and People for Patty Murray. The request asked whether the DSCC could pay for two types of television advertisements, labeled Solicitation 1 and Solicitation 2 in the request, using funds in the Legal Proceedings Account. Both Solicitations 1 and 2 would solicit donations to the Legal Proceedings Account. Solicitation 1 would feature one or more federal candidates, including Senator Murray and Senator Bennet, but would neither promote or support nor attack or oppose the featured candidate or any other federal candidate. Solicitation 1 also would not expressly advocate the election or defeat of any clearly identified federal candidate. Solicitation 2 would feature a single federal candidate and would promote or support or attack or oppose the featured candidate or another federal candidate and the candidate's policy positions. In some instances, Solicitation 2 might expressly advocate the election or defeat of a clearly identified federal candidate.

Draft D, which was adopted by the Commission,[3] noted that both Solicitation 1 and Solicitation 2 could serve two purposes: they would solicit funds to the Legal Proceedings Account *and* could contain other content that would qualify the resulting television advertisement as a party

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1 Consolidated and Further Continuing Appropriations Act of 2015, Pub. L. No. 113-235 § 101, 128 Stat. 2130, 2772-73 (2014) (codified at 52 U.S.C. § 30116(a)(1)(B), (2)(B), (a)(9), and (d)(5)).

2 52 U.S.C. § 30116(a)(9)(C) ("A separate segregated account of a national committee of a political party (including a national congressional campaign committee of a political party) which is used to defray expenses incurred with respect to the preparation for and the conduct of election recounts and contests and other legal proceedings.").

3 Certification, Advisory Opinion 2022-21 (DSCC, *et al.*) (Oct. 20, 2022).

coordinated communication.[4] Relying on Commission precedent[5], the advisory opinion concluded that "to the extent that [Solicitations 1 and 2 are] attributable to more than one purpose, the DSCC must use a reasonable method to allocate the costs for its solicitation of donations to its Legal Proceedings Account and allocate the costs for other purposes to other accounts from which such disbursements are permissible."[6]

In its request, the DSCC did not propose to allocate or indicate a specific allocation method to apply to the costs of Solicitations 1 and 2. Accordingly, the advisory opinion issued by the Commission does not approve any particular allocation method. However, in response to questioning by commissioners at the Open Meeting of October 20, 2022, counsel for the DSCC stated that if the Commission adopted Draft D, she would look at the ad script and allocate based on the purpose of each portion of the ad. For example, if the audio portion of an ad consisted of 100 percent express advocacy, but the ad also displayed a banner occupying ten percent of the visual space of the ad that solicited contributions to the Legal Proceedings Account, she would "allocate ten percent to the Legal Account and tell the client 'the rest of it, you need to pay out of the general account – treat it as a party coordinated communication if it meets [11 C.F.R. §] 109.37.'"[7]

Based this representation, I voted to approve Draft D. In my view, the method described by the DSCC's counsel is a reasonable method of allocating expenses for communications that both solicit funds for the Legal Proceedings Account and also constitute party coordinated communications. By approving this draft, I do not opine on any other allocation methods. It is past time for the Commission to initiate a rulemaking to implement the Appropriations Act provisions

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[4] 11 C.F.R. § 109.37 (defining a "party coordinated communication" as a communication that meets certain payment, content, and conduct standards). The payment prong is met if the communication is paid for by a political party committee or its agent. 11 C.F.R. § 109.37(a)(1). The content prong is met if the communication meets one of three standards, including if the communication is a public communication that "expressly advocates the election or defeat of a clearly identified candidate for Federal office" or "refers to a clearly identified House or Senate candidate and is publicly distributed or otherwise publicly disseminated in the clearly identified candidate's jurisdiction 90 days or fewer before the clearly identified candidate's general . . . election." 11 C.F.R. § 109.37(a)(2)(ii)-(iii). Finally, a communication meets the conduct prong if it meets any one of six standards, including that a candidate or candidate's committee is "materially involved" in decisions regarding the "content" of the communication, the "means or mode" or "specific media outlet used" for the communication, or the "timing or frequency" of the communication. 11 C.F.R. §§ 109.37(a)(3), 109.21(d)(2). Commission regulations provide a safe harbor from the definition of "coordinated communication" for a public communication in which a federal candidate solicits contributions to a political committee unless the public communication promotes, supports, attacks, or opposes the soliciting candidate or another candidate who seeks election to the same office as the soliciting candidate. 11 C.F.R. §§ 109.37(a)(3), 109.21(g)(2).

[5] Prior to the enactment of 52 U.S.C. § 30116(a)(9)(C), the Commission concluded in Advisory Opinion 2010-14 (DSCC) that the DSCC could allocate expenses attributable to both recount activities and campaign activities and could not allocate costs for campaign activities to its recount account. In doing so, the Commission noted that while the Commission regulations and prior advisory opinions did not address allocation of costs between recount and campaign activities, the Commission's allocation regulations "stand generally for the proposition that allocation is an appropriate way to fund activities with multiple purposes." Advisory Opinion 2010-14 (DSCC) (Aug. 26, 2010) at 6-7.

[6] Advisory Opinion 2022-21 (DSCC, *et al*.) at 5, 8.

[7] Audio Recording, Open Meeting of the Federal Election Commission at 8:02 (October 20, 2022), https://www.fec.gov/resources/cms-content/documents/2022102001.mp3. The DSCC's counsel also confirmed that "I would not let a client pay for more than ten percent of that ad out of the Legal Account because I think 90 percent of that purpose is an attack ad. And a ten percent banner on the bottom doesn't undo the fact that the rest of the ad is a pure attack ad. So I would allocate that at about ten percent." *Id*. at 10:26.

that have been on the books since 2014. Until that happens, however, I will evaluate the reasonableness of other allocation methods on a case-by-case basis. As may any entity that seeks the Commission's opinion on whether a proposed activity is permissible, a national party committee that seeks to use another method to allocate expenses for a communication that both solicit donations to a Legal Proceedings Account and that constitutes a party coordinated communication may submit an advisory opinion request.

November 4, 2022
Date

Shana M. Broussard
Commissioner