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RE: Comments on Advisory Opinion Request 2019-02, Draft A

The Campaign Legal Center respectfully submits these comments on Draft A of Advisory Opinion 2019-02 (Bill Nelson for Senate) ("Draft A").

Former Senator Bill Nelson's campaign committee, Bill Nelson for Senate, asks whether it may disburse excess funds from its recount account to charity, or to the Democratic Senatorial Campaign Committee's ("DSCC") separate segregated account for "election recounts and contests and other legal proceedings." *See* AOR001-002.

Draft A concludes that such disbursements are permissible. As to donating the funds to charity, that conclusion is unobjectionable. These comments are focused on Draft A's analysis as it pertains to the DSCC "other legal proceedings" account.

Funds raised and spent for recounts are exempted from the definitions of "contribution" and "expenditure." 11 C.F.R. §§ 100.91, 100.151. Recount funds administered through a candidate's authorized committee are subject to FECA's amount limitations, source prohibitions, and reporting requirements. *See* Advisory Opinion 2006-24 (NRSC) at 5-6 (concluding that 52 U.S.C. 30125(e) applies to federal candidates' recount funds). The Commission has permitted federal candidates to establish a separate recount account, subject to a separate contribution limit, to pay for a specific set of recount expenses: those "resulting from a recount, election contest, counting of provisional and absentee ballots and ballots cast in polling places," and "post-election litigation and administrative-proceeding expenses concerning the casting and

counting of ballots during the [f]ederal election, fees for the payment of staff assisting the recount or election contest efforts, and administrative and overhead expenses in connection with recounts and election contests.” Advisory Opinion 2006-24 (NRSC) at 2.

“None of the activities” paid for by a recount fund, nor “the results of those activities,” may have any “relation to campaign activities.” Advisory Opinion 2010-14 (DSCC) at 4-5. Moreover, “any resulting surplus of funds may not be used in any manner that would constitute a contribution or expenditure under the Act or regulations.” *Id.* at 5 (quoting Advisory Opinion 1978-92 (Miller)).

Because there is substantial ambiguity regarding the permissible uses of funds in the DSCC’s legal proceedings account, Draft A errs in concluding that Bill Nelson for Senate may permissibly transfer excess recount funds to that account. Draft A at 3.

The DSCC legal proceedings account was created pursuant to the 2014 “Cromnibus” legislation, which authorized national party committees to establish a separate, segregated account, subject to separate contribution limits, “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*.”¹ 52 U.S.C. § 30116(a)(9)(C) (emphasis added).

The statutory language suggests that funds in the legal proceedings account might be used for purposes beyond recount activities, including “other legal proceedings.” While we would support the Commission clarifying by rule that “other legal proceedings” are those related to recounts or election contests, the Commission has promulgated no such rule. Indeed, in the 51 months since the enactment of these provisions, the Commission has failed to adopt any regulations to implement paragraph 30116(a)(9).

In the absence of guidance from the Commission, both major political parties have used funds in their legal proceedings accounts for a variety of purposes that have few if any connections to recount activities, and which likely constitute contributions or expenditures under the Act.

For example, since 2015, the National Republican Senatorial Committee has used its legal proceedings account to pay:

- At least \$51,379 in 2016 to Calistoga Ranch in California for “facility rental/caterin[g]”;²

¹ *Consolidated and Further Continuing Appropriations Act, 2015*, Pub. L. No. 113-235, Div. N, § 101, 128 Stat. 2130, 2772-73 (2014) (emphasis added).

² NRSC, 2016 May Monthly, FEC Form 3X, at 973 (filed May 20, 2016), <http://docquery.fec.gov/cgi-bin/fecimg/?201605200200179479>; NRCC, 2016 October Monthly,

- \$10,000 on June 15, 2016 for “data purchase” from Cap Square Solutions,³ a government relations/lobbying firm;⁴
- \$60,000 on November 1, 2016 to Community Networking Resources, which is apparently a lobbying firm,⁵ for “consulting”;⁶
- \$3,750 on November 2, 2016 to political consulting firm EM Campaigns for “consulting”;⁷
- \$7,991 on November 21, 2016 to marketing firm Empire Strategies for “consulting”;⁸
- Over \$54,167 in 2016 to Holloway Consulting for “finance consulting”;⁹
- \$76,970 on December 5, 2016 for “facility rental/caterin[g]” to the Mandarin Oriental in Washington, DC;¹⁰ and
- \$60,005 on June 2, 2016 for “fac rent/cater” to the Salamander Resort & Spa in Virginia.¹¹

The National Republican Congressional Committee has used its legal proceedings account to pay:

- \$49,400 to former House Speaker Paul Ryan’s joint fundraising committee, Team Ryan, for a “transfer” on November 15, 2018;¹²

FEC Form 3X, at 4659 (filed Oct. 20, 2016), <http://docquery.fec.gov/cgi-bin/fecimg/?201610240200564986>.

³ NRSC, 2016 July Monthly, FEC Form 3X, at 1958 (filed July 20, 2016), <http://docquery.fec.gov/cgi-bin/fecimg/?201607210200295264>.

⁴ *Cap Square Solutions LLC*, Bloomberg, <https://www.bloomberg.com/profiles/companies/0204882D:US-cap-square-solutions-llc> (last visited Mar. 27, 2019).

⁵ Laura Vecsey, *Commentary: Fundraiser Mike Musser runs Dauphin County commissioners’ campaigns*, Penn Live (Apr. 25, 2011), https://www.pennlive.com/midstate/index.ssf/2011/04/commentary_fundraiser_mike_mus.html; Itai Vardi, *Exclusive: PA Lawmaker Working to Curb Pipeline Protestors Tied to Shadow Lobbyists for Company Behind Project*, Desmog (June 22, 2017), <https://www.desmogblog.com/2017/06/22/exclusive-pa-lawmaker-working-curb-pipeline-protestors-tied-shadow-lobbyists-company-behind-project>.

⁶ NRSC, 2016 Post-General FEC Form 3X, at 6932 (filed Dec. 8, 2016), <http://docquery.fec.gov/cgi-bin/fecimg/?201612080200681663>.

⁷ *Id*; see also *Our Team*, Election Management Solutions, <http://electionmgmt.com/our-team/> (last visited Mar. 27, 2019).

⁸ NRSC, 2016 Post-General, *supra* note 6, at 6932, <http://docquery.fec.gov/cgi-bin/fecimg/?201612080200681663>.

⁹ NRSC, 2016 February Monthly, FEC Form 3X, at 471 (filed Feb. 19, 2016), <http://docquery.fec.gov/cgi-bin/fecimg/?201602190200072697>; NRSC, 2016 March Monthly, FEC Form 3X, at 731 (filed Mar. 18, 2016), <http://docquery.fec.gov/cgi-bin/fecimg/?201603180200083866>.

¹⁰ NRSC, 2016 Year-End, FEC Form 3X, at 3425 (filed Jan. 31, 2017), <http://docquery.fec.gov/cgi-bin/fecimg/?201701310200025591>.

¹¹ NRSC, 2016 July Monthly, FEC Form 3X, at 1960 (filed July 20, 2016), <http://docquery.fec.gov/cgi-bin/fecimg/?201607210200295266>.

¹² NRCC, 2018 Post-General, FEC Form 3X, at 10697 (filed Dec. 6, 2018), <http://docquery.fec.gov/cgi-bin/fecimg/?201812069134943793>.

- \$40,000 to Fulcrum Campaign Strategies, a trade name¹³ for the “high-stakes public strategy firm” Mercury Public Affairs LLC,¹⁴ for “legal consulting” on December 21, 2018;¹⁵ and
- \$30,000 to Convergence Media, a “multi-functional media firm that...help[s] our clients reach their goals and win elections”¹⁶ for “fundraising web svc” on October 25, 2018.¹⁷

The Republican National Committee has used its legal proceedings account to pay:

- \$146,222 to Info Group Inc. (“a big data, analytics, and marketing services provider”¹⁸) for “list acquisition” on November 28, 2018;¹⁹
- \$21,875 to Exclusive Charter Services, a charter plane company, on November 20, 2018;²⁰ and
- Tens of thousands of dollars in transfers to state parties, including:
 - \$1,839 to the Republican Party of Texas on December 3, 2018;²¹
 - \$960 to the Republican Party of Wisconsin on December 3, 2018;²²
 - \$38,414 to the Arizona Republican Party on November 20, 2018;²³ and
 - \$40,480 to the Ohio Republican Party State Central & Executive Committee in November and December 2018.²⁴

The Democratic National Committee has used funds from its legal proceedings account to pay:

¹³ *Mercury Public Affairs LLC*, OpenCorporates, https://opencorporates.com/companies/us_dc/EXTUID_2880298 (last visited Mar. 27, 2019).

¹⁴ *About*, Mercury LLC, <http://www.mercuryllc.com/about/> (last visited Mar. 27, 2019).

¹⁵ NRCC, 2018 Year-End, FEC Form 3X, at 5318 (filed Jan. 31, 2019), <http://docquery.fec.gov/cgi-bin/fecimg/?201901319144437028>.

¹⁶ *About Convergence Media*, Convergence Media, <https://www.convergencemedia.us/about-convergence> (last visited Mar. 27, 2019).

¹⁷ NRCC, 2018 Post-General, *supra* note 12, at 10707, <http://docquery.fec.gov/cgi-bin/fecimg/?201812069134943803>.

¹⁸ Info Group, <https://www.infogroup.com/> (last visited Mar. 27, 2019).

¹⁹ Republican National Committee, 2018 Year-End, FEC Form 3X, at 17209 (filed Jan. 31, 2019), <http://docquery.fec.gov/cgi-bin/fecimg/?201901319145347128>.

²⁰ Republican National Committee, 2018 Post-General, FEC Form 3X, at 77276 (amended Jan. 31, 2019), <http://docquery.fec.gov/cgi-bin/fecimg/?201901319144412101>.

²¹ Republican National Committee, 2018 Year-End, *supra* note 19, at 17213, <http://docquery.fec.gov/cgi-bin/fecimg/?201901319145347132>.

²² *Id.* at 17212, <http://docquery.fec.gov/cgi-bin/fecimg/?201901319145347131>.

²³ Republican National Committee, 2018 Post-General, *supra* note 20, at 77276, <http://docquery.fec.gov/cgi-bin/fecimg/?201901319144412101>.

²⁴ *Id.* at 77277, <http://docquery.fec.gov/cgi-bin/fecimg/?201901319144412102>; Republican National Committee, 2018 Year-End, *supra* note 19, at 17212, <http://docquery.fec.gov/cgi-bin/fecimg/?201901319145347131>.

- \$1,680 for “GOTV canvassing” on February 1, 2017;²⁵
- \$2,080 for “GOTV canvassing,” also on February 1, 2017;²⁶
- \$3,000 for “GOTV consulting” on June 30, 2017;²⁷
- \$2,080 for “GOTV canvassing” on January 17, 2017;²⁸ and
- At least \$26,501 to cybersecurity company CrowdStrike, Inc. for “technology services” and “legal fees” in August 2018.²⁹

As these examples show, the statute’s ambiguity and the lack of Commission guidance have meant that legal proceedings accounts are regularly used for a range of purposes that constitute contributions or expenditures or are otherwise related to campaign activities.³⁰ As noted above, the Commission’s precedents are clear that recount funds raised by campaign committees cannot be converted to such uses.

As a result, the Commission should conclude that Bill Nelson for Senate may not transfer excess recount funds to the DSCC legal proceedings account.

Sincerely,

_____/s/_____
 Adav Noti
 Senior Director, Trial Litigation

_____/s/_____
 Brendan Fischer
 Director, Federal Reform Program

²⁵ DNC Services Corp./Dem. Nat’l Committee, 2017 March Monthly, FEC Form 3X, at 2037 (filed Mar. 20, 2017), <http://docquery.fec.gov/cgi-bin/fecimg/?201703209050966283>.

²⁶ *Id.*

²⁷ DNC Services Corp./Dem. Nat’l Committee, 2017 July Monthly, FEC Form 3X, at 4583 (filed July 20, 2017), <http://docquery.fec.gov/cgi-bin/fecimg/?201707209067014915>.

²⁸ DNC Services Corp./Dem. Nat’l Committee, 2017 February Monthly, FEC Form 3X, at 1161 (filed Feb. 20, 2017), <http://docquery.fec.gov/cgi-bin/fecimg/?201702209049746562>.

²⁹ DNC Services Corp./Dem. Nat’l Committee, Disbursements to CrowdStrike, Aug. 1, 2018 – Aug. 31, 2018, FEC.gov, https://www.fec.gov/data/disbursements/?two_year_transaction_period=2018&data_type=processed&committee_id=C00010603&recipient_name=crowdstrike&min_date=08%2F01%2F2018&max_date=08%2F31%2F2018 (last visited Mar. 27, 2019) (showing three payments to CrowdStrike in August 2018, all designated in the memo field as coming from the “legal account,” which appears when the detailed information of each expenditure is viewed).

³⁰ Indeed, in advance of the 2016 elections, one Republican election law practitioner told the *Washington Post* that “[w]e are in an environment in which there has been virtually no enforcement of the campaign finance laws, so it would arguably be political malpractice not to make maximum uses of these accounts.” Matea Gold, *Trump’s Deal With the RNC Shows How Big Money Is Flowing Back to the Parties*, Wash. Post (May 18, 2016), https://www.washingtonpost.com/politics/trumps-deal-with-the-rnc-shows-how-big-money-is-flowing-back-to-the-parties/2016/05/18/4d84e14a-1d11-11e6-b6e0-c53b7ef63b45_story.html.