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RE: Comments on Advisory Opinion Request 2020-03

The Campaign Legal Center respectfully submits these comments in response to Advisory Opinion Request 2020-03.

Former Libertarian presidential candidate Shaun McCutcheon asks whether he may circumvent federal contribution limits by transferring to a national party committee unlimited personal funds that were first deposited into his campaign account. The Commission should respond in the negative.

As a preliminary matter, Mr. McCutcheon should be commended for first seeking clarity from the Commission about the legality of such a transaction, rather than simply forging ahead and anticipating that the Commission will decline to initiate an enforcement action. As the Request notes, former Democratic presidential candidate Michael Bloomberg sought no such guidance before transferring $18 million from his self-financed campaign to the Democratic National Committee; for that reason, the Request refers to such a transaction as the "Bloomberg Billionaire Loophole."

The Commission should make clear that the "Bloomberg Billionaire Loophole" does not exist.

The legal basis for the Bloomberg Billionaire Loophole is contrived by adding and subtracting varying statutory and regulatory provisions and ignoring the constitutional distinctions between "contributions" and "expenditures."

Although a person may not contribute more than $35,500 per calendar year to a national party committee, 52 U.S.C. § 30116(a)(1)(B), FECA provides that a

"contribution accepted by a candidate" may be transferred "without limitation" to "a national, State, or local committee of a political party," 52 U.S.C § 30114(a)(4); *accord* 11 C.F.R. § 113.2(c).

A candidate's personal funds expended in support of their campaign are not "contribution[s] accepted by a candidate." Instead, a candidate's personal funds used in support of their campaign are properly regarded as "expenditures," and therefore not subject to the unlimited party transfer provisions.

Commission regulations permit a candidate to make "unlimited *expenditures* from personal funds" in support of their campaign. 11 C.F.R. § 110.10 (emphasis added). Such regulations are consistent with the constitutional treatment of a candidate's disbursements of personal funds on their own campaign as "expenditures." *Buckley v. Valeo*, 424 U.S. 1, 52-53 (1976) (per curiam) (rejecting a "ceiling on personal expenditures by a candidate in furtherance of his own candidacy," on grounds that a candidate has a "First Amendment right to . . . advocate his own election," and that, in contrast with contribution limits, such personal *expenditure* limits do not serve the government's interest in preventing actual or apparent corruption); *see also Davis v. FEC*, 554 U.S. 724, 738-739 (2008) (affirming the constitutional treatment of a candidate's use of personal funds on their own campaign as "expenditures").

The Commission has advised that candidates who make expenditures from personal funds in support of their campaign shall report those expenditures as both contributions to and expenditures of the candidate's committee. *See, e.g.*, AO 1990-09 (Mueller) at 3. As the Request notes, Commission advisory opinions have also described the candidate's right to make unlimited personal expenditures to include the right to transfer unlimited personal funds to the candidate's committee in order for the committee to make the expenditures instead. *See* AOR at 6 (citing AO 1984-60 (Mulloy) at 2, AO 1985-33 (Collins) at 1). Such reporting conventions, however, do not convert a candidate's "expenditure" of personal funds into a "contribution accepted by a candidate" that may be transferred without limit to a party committee.

A candidate's constitutional right to make unlimited expenditures of personal funds "in furtherance of his own candidacy" does not translate into a right to make unlimited contributions of personal funds to a political party—contributions which implicate a significant risk of corruption. *See, e.g., McConnell v. FEC,* 540 U.S. 93, 143-54 (2003) (acknowledging that "large soft-money contributions to national political parties give rise to corruption and the appearance of corruption").

The Act and Commission regulations provide no legitimate basis for a candidate to transfer personal funds in excess of federal limits to a national party committee. The Request describes four ways that such a transfer may violate 52 U.S.C §

30116(a)(1)(B) or other provisions of FECA, AOR at 4-7; such a transfer would additionally violate 52 U.S.C § 30125(a).

Under 52 U.S.C § 30125(a), a national party committee may not "receive" funds that are "not subject to the limitations, prohibitions, and reporting requirements" of FECA. A candidate may expend personal funds without regard for FECA's limits in support of their own candidacy, but such personal funds are therefore "not subject to [FECA's] limitations."

Accordingly, a party committee violates 52 U.S.C § 30125(a) by receiving transfers of a candidate's personal funds that were deposited into a campaign committee outside of FECA's limits.

Contributions to party committees are capped to limit corruption and its appearance. Candidates may use their personal wealth on their own campaigns because candidates generally cannot corrupt themselves. The latter rationale does not negate the former: An individual's ability to buy excessive influence is not diminished simply because they became a candidate before giving the party millions in contributions.

The Commission should decline this request to allow a self-funded candidate to evade FECA's anti-corruption provisions.

Respectfully submitted,

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