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FEDERAL ELECTION COMMISSION
Washington, DC 20463

AGENDA DOCUMENT NO. 22-26-A
AGENDA ITEM
For meeting of July 14, 2022

July 7, 2022

MEMORANDUM

TO: The Commission

FROM: Lisa J. Stevenson *NFS for LJS*
Acting General Counsel

Neven F. Stipanovic *NFS*
Associate General Counsel

Amy Rothstein *NFS for ALR*
Assistant General Counsel

Heather Filemyr *HF*
Attorney

Subject: Draft AO 2022-09 (Democratic Party of Wisconsin Federal) – Draft A

Attached is a proposed draft of the subject advisory opinion.

Members of the public may submit written comments on the draft advisory opinion. We are making this draft available for comment until 12:00 pm (Eastern Time) on July 13, 2022.

Members of the public may also attend the Commission meeting at which the draft will be considered. The advisory opinion requestor may appear before the Commission at this meeting to answer questions.

For more information about how to submit comments or attend the Commission meeting, go to <https://www.fec.gov/legal-resources/advisory-opinions-process/>.

Attachment

1 ADVISORY OPINION 2022-09
2
3 Jacquelyn K. Lopez, Esq.
4 Sarah N. Mahmood, Esq.
5 Elias Law Group
6 10 G Street NE
7 Suite 600
8 Washington, DC 20463

DRAFT A

9 Dear Ms. Lopez and Ms. Mahmood:

10 We are responding to your advisory opinion request on behalf of the Democratic
11 Party of Wisconsin Federal (“State Party Committee”) concerning the application of the
12 Federal Election Campaign Act, 52 U.S.C. §§ 30101-45 (the “Act”), and Commission
13 regulations to the State Party Committee’s proposal to form a joint fundraising committee
14 with a nominee fund that has been established for the eventual Democratic nominee for
15 U.S. Senate in Wisconsin. The request provides that the nominee would be required to
16 ratify the joint fundraising agreement between the State Party Committee and the
17 nominee fund after the primary election in order to receive proceeds raised by the joint
18 fundraising committee. The Commission concludes that the proposal is permissible
19 because it is consistent both with the Commission’s regulation governing joint
20 fundraising activities and with prior Commission advisory opinions concerning the
21 solicitation of contributions on behalf of a yet-determined recipient.

22 ***Background***

23 The facts presented in this advisory opinion are based on your letter dated May
24 18, 2022, your emails dated June 1 and 23, 2022, and disclosure reports filed with the
25 Commission.

26 The State Party Committee is registered with the Commission as the qualified
27 state committee of a political party and is “dedicated to electing Democrats in

1 Wisconsin.”¹ The State Party Committee proposes to form a joint fundraising committee
2 with a nominee fund² that has been established for the eventual Democratic nominee for
3 U.S. Senate in Wisconsin, who will be selected by voters in an August 9, 2022, primary
4 election. The nominee fund is a separate account of an existing nonconnected political
5 committee registered with the Commission, and this existing nonconnected political
6 committee is not an affiliated committee with the State Party Committee.

7 The State Party Committee proposes to open a new separate depository account
8 “to be used solely for the receipt and disbursement of the joint fundraising proceeds” and
9 to register a new joint fundraising committee with the Commission.³ The joint
10 fundraising committee would “only accept contributions from donors up to the total
11 amount that a donor could contribute” to the State Party Committee and to the yet-
12 determined nominee under the Act.⁴ The State Party Committee and the nominee fund
13 would “enter into a written joint fundraising agreement that identifies the new joint
14 fundraising committee as the joint fundraising representative” of the State Party
15 Committee and the nominee fund and “states a formula for the allocation of proceeds”

¹ Advisory Opinion Request (“AOR”) at AOR001; Democratic Party of Wisconsin Federal, Statement of Organization, FEC Form 1 (Feb. 14, 2022), <https://docquery.fec.gov/pdf/361/202202149491737361/202202149491737361.pdf>.

² Nominee funds hold contributions earmarked for “eventual party nominees who have not yet been identified.” Advisory Opinion 2014-19 (ActBlue) at 1; *see also* Advisory Opinion 2019-01 (It Starts Today) at 1; Advisory Opinion 2016-15 (Gary Johnson Victory Fund) at 4. The request states that the nominee fund will operate consistently with prior Commission advisory opinions on such funds. AOR001.

³ AOR004.

⁴ *Id.*

1 from the joint fundraising activities.⁵ This allocation formula would “be included in a
2 joint fundraising notice with every solicitation for contributions.”⁶

3 Any funds allocated to the nominee fund would be held in escrow by the joint
4 fundraising committee until after the primary election. Following the primary election,
5 the joint fundraising committee would disburse those funds directly to the nominee, but
6 only if the nominee ratifies the joint fundraising agreement within 10 days of the state
7 “declaring a winner” of the Democratic primary election for U.S. Senate “so that there is
8 a joint fundraising agreement in place” between the State Party Committee and the
9 nominee.⁷ The joint fundraising agreement would require the nominee to “amend their
10 Statement of Candidacy and their authorized candidate committee’s Statement of
11 Organization to add the joint fundraising committee as its joint fundraising representative
12 and to show the joint fundraising bank account as an additional depository.”⁸ If the
13 nominee does not ratify the joint fundraising agreement within the 10-day period, the
14 joint fundraising committee would refund the contributions that had been allocated to the
15 nominee fund. The joint fundraising committee would disclose to prospective
16 contributors the criteria for disbursing funds to the nominee and for refunding those
17 contributions if the nominee does not ratify the joint fundraising agreement within the 10-
18 day period.

⁵ AOR001, 4.

⁶ AOR004.

⁷ AOR004, 5. Based on this statement that there would be a joint fundraising agreement in place between the nominee and the State Party Committee, the Commission understands that the nominee would ratify the joint fundraising agreement by signing the agreement.

⁸ AOR004.

1 The request states that the State Party Committee, the nonconnected political
2 committee hosting the nominee fund, and the joint fundraising committee have no role in
3 selecting the Democratic Party’s nominee for U.S. Senate in Wisconsin, and multiple
4 candidates are running in that primary.⁹ State law establishes the date of the Democratic
5 primary.¹⁰

6 ***Question Presented***

7 *May the State Party Committee form a joint fundraising committee with a*
8 *nominee fund that has been established for the eventual Democratic nominee for U.S.*
9 *Senate in Wisconsin under the conditions proposed?*

10 ***Legal Analysis***

11 Yes, the State Party Committee may form a joint fundraising committee with a
12 nominee fund that has been established for the eventual Democratic nominee for U.S.
13 Senate in Wisconsin under the conditions proposed. The proposal is consistent both with
14 the Commission’s regulation governing joint fundraising activities and with prior
15 Commission advisory opinions concerning the solicitation of contributions on behalf of a
16 yet-determined recipient.¹¹

⁹ AOR006.

¹⁰ Wis. Stat. § 5.02(12s) (defining partisan primary as “the primary held the 2nd Tuesday in August to nominate candidates to be voted for at the general election”).

¹¹ The request states that other political committees have already formed joint fundraising committees with nominee funds. AOR002, n.3. While the Commission concludes that the State Party Committee’s proposal is permissible, this advisory opinion is not intended to foreclose any alternative means of establishing a joint fundraising committee with a nominee fund that complies with the Act and Commission regulations.

1 **A. Joint Fundraising Requirements**

2 The Commission’s regulation at 11 C.F.R. § 102.17(a)(1)(i) provides that a
3 political committee, including a political party committee, “may engage in joint
4 fundraising with other political committees or with unregistered committees or
5 organizations” and may either establish a separate joint fundraising committee or select
6 one of the participating committees to be the joint fundraising representative for all
7 participants. The regulation requires that a separate committee established to serve as a
8 fundraising representative must be a “reporting political committee,” the participants or
9 the joint fundraising committee must establish a “separate depository account to be used
10 solely for the receipt and disbursement of the joint fundraising proceeds,” and each
11 participant committee must amend its Statement of Organization to reflect this separate
12 depository account as an additional committee account.¹² The regulation further requires
13 that participants engaged in joint fundraising must “enter into a written agreement” that
14 identifies the fundraising representative and provides a formula for the allocation of
15 fundraising proceeds.¹³ The joint fundraising committee must include a joint fundraising
16 notice with every solicitation that includes the names of all committees participating in
17 the joint fundraising activity and this allocation formula, along with other disclosures.¹⁴
18 Finally, a contributor may make a contribution to the joint fundraising committee only up

¹² 11 C.F.R. § 102.17(b)(1), (c)(3)(i).

¹³ *Id.* at § 102.17(c)(1)

¹⁴ *Id.* at § 102.17(c)(2).

1 to the amount that “represents the total amount that the contributor could contribute to all
2 of the participants” under the Act’s contribution limits.¹⁵

3 The State Party Committee’s proposal is consistent with each of the
4 aforementioned requirements. First, the State Party Committee would establish a
5 separate depository account to be used exclusively for joint fundraising proceeds, register
6 the joint fundraising committee with the Commission, and enter into a joint fundraising
7 agreement with the nominee fund.¹⁶ Because the joint fundraising committee would
8 disburse funds directly to the nominee, the State Party Committee’s proposal would
9 require the nominee to ratify the fundraising agreement and amend the nominee’s
10 Statement of Organization to reflect this separate depository account as an additional
11 committee account before the joint fundraising committee disburses any joint fundraising
12 proceeds to the nominee. Second, the joint fundraising agreement would provide the
13 allocation formula for the disbursement of joint fundraising proceeds, and that formula
14 would be provided in a joint fundraising notice with every solicitation.¹⁷ Finally, the
15 depository account would accept contributions from donors only up to the total amount
16 that a donor could contribute under the Act to the State Party Committee and to the
17 eventually selected nominee. Accordingly, the proposal complies with the Commission’s
18 joint fundraising regulation.

¹⁵ 11 C.F.R. § 102.17(c)(5).

¹⁶ The Commission assumes that the State Party Committee will amend its Statement of Organization to list the joint fundraising account as a separate depository, pursuant to 11 C.F.R. § 102.17(c)(3)(i).

¹⁷ AOR001, 4. Each joint fundraising notice must also meet all other requirements of 11 C.F.R. § 102.17(c)(2).

1 **B. Forwarding Contributions**

2 Under the State Party Committee’s proposal, the nominee fund would be a party
3 to the joint fundraising agreement, but the joint fundraising committee would not
4 disburse funds to the nominee fund. The joint fundraising committee would, instead,
5 disburse funds directly to the nominee if the nominee ratifies the joint fundraising
6 agreement within the 10-day period.¹⁸ The request states that the conditions on
7 disbursements to the nominee would be “clearly communicate[d]” to contributors, which
8 the Commission understands to mean that the criteria for disbursement by the joint
9 fundraising committee directly to the nominee would be included in each joint
10 fundraising notice.¹⁹

11 In prior advisory opinions, the Commission has approved proposals by political
12 committees to solicit and accept contributions to be forwarded to another political
13 committee after a predetermined event, including the selection of a party’s nominee,
14 where the ultimate recipient was not yet identified at the time of the solicitation. The
15 Commission has approved such proposals where (1) the condition that would trigger the
16 disbursement of the funds was objectively determinable and outside the control of the
17 committee forwarding the contributions; (2) the committee forwarding the contributions
18 specified a date certain by which the condition would or would not be met; (3) the
19 committee forwarding the contributions would refund or otherwise lawfully distribute the

¹⁸ AOR001-2, 4.

¹⁹ AOR005. The Commission assumes that the joint fundraising agreement will set forth the disbursement criteria and that both the joint fundraising agreement and notices to potential contributors will stipulate that the escrowed funds would go to the nominee, rather than the nominee fund, and explain that the joint fundraising committee would refund joint fundraising proceeds allocated to the nominee fund if the nominee fails to ratify the joint fundraising agreement within the 10-day period.

1 funds if the triggering condition was not met; and (4) all of the foregoing were clearly
2 communicated to contributors.²⁰ “These requirements ensure that the contributors have
3 ultimate control over their contributions and that the intermediary political committee
4 exercises no discretion with regard to the disposition of the conditional funds.”²¹

5 In Advisory Opinion 2016-15 (Gary Johnson Victory Fund), the Commission
6 considered a proposal by a joint fundraising committee conducting fundraising on behalf
7 of a presidential candidate committee and 24 Libertarian committees that had not yet
8 been recognized as state party committees (and so were subject to the lower contribution
9 limits applicable to nonconnected political committees at the time of the request). The
10 Commission concluded that the joint fundraising committee could solicit funds on behalf
11 of the Libertarian committees under 11 C.F.R. § 102.17, hold the funds for them in
12 escrow until the Commission issued advisory opinions on whether they qualified as state
13 party committees, and disburse funds to each Libertarian committee up to the Act’s limit
14 for contributions to a state party committee only if the Commission issued an advisory
15 opinion recognizing the committee as a state party committee. The joint fundraising
16 committee in that advisory opinion proposed to refund any contributions over the limit
17 for contributions to nonconnected political committees if that condition was not met by a

²⁰ Advisory Opinion 2019-01 (It Starts Today) at 4 (nominee fund where triggering condition was the nomination of a candidate who received the endorsement of a pre-selected endorsing organization); Advisory Opinion 2014-19 (ActBlue) at 3-4 (nominee fund where triggering condition was the nomination of a female candidate); Advisory Opinion 2006-30 (ActBlue) at 4-5 (earmarked contributions for named “prospective candidates” with funds forwarded within 10 days of candidate registering with Commission); Advisory Opinion 2003-23 (WE LEAD) at 3-5 (“presumptive” nominee fund where triggering condition was a candidate receiving a sufficient number of pledged delegates to win nomination).

²¹ Advisory Opinion 2016-15 (Gary Johnson Victory Fund) at 5.

1 “date certain.”²² For committees that had submitted an advisory opinion request on their
2 state party status, the date certain was the date the Commission issued a written response
3 to an advisory opinion request or the date the advisory opinion request was withdrawn.

4 The State Party Committee’s proposal here is consistent with proposals approved
5 by the Commission in prior advisory opinions described above. First, under the State
6 Party Committee’s proposal, the joint fundraising committee will disburse joint
7 fundraising proceeds to the nominee only if: (1) the state of Wisconsin declares the
8 winner of the Democratic primary, and (2) the nominee ratifies the joint fundraising
9 agreement. Each of these conditions is an objectively determinable event over which the
10 joint fundraising committee has no control.²³ Second, the nominee will receive the
11 escrowed funds only if the nominee ratifies the joint fundraising agreement by a date
12 certain: within 10 days of the state declaring the winner of the primary. Third, the joint
13 fundraising committee will refund the escrowed funds if the nominee does not ratify the
14 joint fundraising agreement within the 10-day period. Finally, the joint fundraising
15 committee will clearly communicate all of the foregoing to contributors.

16 The State Party Committee’s proposal is consistent with the Commission’s
17 regulation governing joint fundraising activities, as well as proposals approved in prior
18 Commission advisory opinions concerning the solicitation of contributions on behalf of a

²² *Id.* at 4-5.

²³ The State Party Committee represents that the joint fundraising committee will not play any role in the election of the Democratic Party nominee, which will be conducted on a date established by state law with multiple candidates seeking the nomination. *See* Wis. Stat. § 5.02(12s); AOR006. The State Party Committee also represents that the nonconnected political committee hosting the nominee fund and the State Party Committee similarly will have no control over the selection of the nominee. AOR006.

1 yet-determined recipient. Accordingly, the Commission concludes that the State Party
2 Committee's proposal is permissible.

3 This response constitutes an advisory opinion concerning the application of the
4 Act and Commission regulations to the specific transaction or activity set forth in your
5 request.²⁴ The Commission emphasizes that, if there is a change in any of the facts or
6 assumptions presented, and such facts or assumptions are material to a conclusion
7 presented in this advisory opinion, then the State Party Committee may not rely on that
8 conclusion as support for its proposed activity. Any person involved in any specific
9 transaction or activity that is indistinguishable in all its material aspects from the
10 transaction or activity with respect to which this advisory opinion is rendered may rely on
11 this advisory opinion.²⁵ Please note that the analysis or conclusions in this advisory
12 opinion may be affected by subsequent developments in the law including, but not
13 limited to, statutes, regulations, advisory opinions, and case law. Any advisory opinions
14 cited herein are available on the Commission's website.

15 On behalf of the Commission,

16 Allen J. Dickerson
17 Chairman

²⁴ See 52 U.S.C. § 30108.

²⁵ See *id.* § 30108(c)(1)(B).