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By Office of the Commission Secretary at 1:56 pm, Jul 07, 2022

By ELECTRONIC MAIL DELIVERY

Office of General Counsel
Attn: Lisa J. Stevenson, Esq.
Acting General Counsel
Federal Election Commission
1050 First Street NE
Washington, DC 20463

Re: Advisory Opinion Request

Dear Ms. Stevenson:

Pursuant to 52 U.S.C. § 30108, we seek an advisory opinion on behalf of DSCC and DNC Services Corporation/Democratic National Committee (“DNC”) (collectively, “Committees”) to confirm that Committees can retain and use contributions deposited promptly, but slightly longer than 10 days after receipt, when the delay was caused by a third party and there was no fault or wrongdoing on the part of Committees.

I. FACTUAL DISCUSSION

Committees are national political party committees. For over twelve years, each Committee has contracted and received services from a contribution caging vendor (“Vendor”). The relevant terms of the agreements between (1) DSCC and Vendor and (2) DNC and Vendor are identical for purposes of this request. Under the terms of the agreements, Vendor directly receives and processes contributions designated for Committees and electronically deposits the contributions into Committees’ designated bank account. Given the sensitive nature of the services performed, Committees put in place a number of safeguards aimed at ensuring compliance with all applicable requirements of the Federal Election Campaign Act of 1971, as amended (the “Act”) and the regulations of the Federal Election Commission (“FEC” or the “Commission”), including the requirement that contributions be deposited within 10 days after receipt. The Vendor’s agreements with Committees require the Vendor to comply with the Act and Commission regulations. With regard to the 10-day deposit rule specifically, Committees contractually mandated that Vendor check Committees’ designated mailbox every business day and deposit all contributions within one or two business days of receipt (depending on the form of the

contribution) to provide significant cushion and protect against any issue with late deposited funds.

Further, over the course of their relationship with the Vendor, Committees regularly engaged with Vendor's personnel to ensure that Vendor understands their legal obligations, including the rules on the timing of deposits. Committees closely monitored the timing of deposits and took every reasonably possible step to ensure their contributions are deposited within the required timeframe. In short, Committees did everything reasonably within their control to ensure compliance with the Act and Commission regulations. And in fact, over the many years that Committees have worked with Vendor, there has never previously been a significant issue of late-deposited contributions.

However, beginning in April 2022, Vendor began experiencing severe delays in processing Committees' contributions. The delays caused Vendor to deposit some contributions more than ten days after receipt. These late deposits occurred without Committees' authorization and in direct breach of Vendor's contractual obligations to Committees. When Committees learned of this issue, they promptly took steps to assess and correct the problem, including frequent communications with Vendor's personnel, engaging counsel, and demanding orally and in writing that Vendor immediately cease violating their clear contractual and legal obligations. After the actions by Committees, and to Committees' best understanding, Vendor is no longer processing or depositing contributions more than 10 days after receipt. Vendor, to date, has provided a number of explanations for its delay, including claims of staff turnover, staff unavailability due to COVID-19 infections and a significant uptick of contributions received by its other clients due to global events (*e.g.*, the war in Ukraine). Committees had no control over any of these causes and did not have adequate notice from Vendor of the issues, which could have enabled them to prevent the problem. Committees did everything reasonably in their power to ensure that Vendor always deposited their contributions within 10 days of receipt.

It is Committees' understanding that all contributions received by Vendor were deposited within 32 days of receipt into the DSCC's and DNC's designated bank accounts, and in many cases, contributions were only deposited a day or two after the required timeframe. Committees have segregated contributions that Vendor failed to deposit within 10 days of receipt pending the Commission's consideration of this advisory opinion request. The segregation of funds prevents their use until this issue is resolved by the Commission.

Given the large number of contributions at issue (as many of the contributions that were deposited late were low-dollar gifts), any effort by Committees to refund all of the contributions will be of limited effectiveness. Given the way that the contributions were received and the financial structures of Committees, any refunds of late-deposited contributions would have to be issued via check. Moreover, due to the volume of contributions, it would be some time before all the refunds could be issued. It is Committees' experience (and that of others in the regulated

community that have come before the Commission¹) that donors very frequently never cash refund checks issued by political committees, thereby compelling the committees to repeatedly recut checks and eventually disgorge the corresponding funds to the U.S. Treasury. In the current age, many donors do not take notice of small checks sent in the mail, believing that the checks are spam or misplacing them before they can ever be deposited. The status quo is currently that all of the contributions sent to Committees from their supporters have been deposited, according to the supporters' wishes. Any effort to do a mass refund of late deposited contributions will result in months of attempted reimbursements and, ultimately, a frustration of the intent of many contributors who wished to give to Committees and thought their donation was successful, only to have their funds sent to the U.S. Treasury.

II. QUESTION PRESENTED

May Committees retain and use the contributions that Vendor failed to deposit within 10 days of receipt when the delay was not the responsibility or fault of Committees under the circumstances presented here?

It is our understanding that the Commission has an informal policy of issuing an advisory opinion in response to an advisory opinion request within 30 days where there are exigent circumstances for expedited review. We believe expedited review is warranted here in order to provide prompt clarity to Committees' supporters regarding the fate of their contributions in line with the purpose behind the requirement to deposit contributions within 10 days. Committees respectfully request the Commission to issue an advisory opinion within 30 days of this request.

III. LEGAL ANALYSIS

Commission regulations provide that "deposits shall be made within 10 days of the treasurer's receipt."² The 10-day deposit requirement "was designed to encourage the prompt disposition of contributions rather than permit 'stale' checks to be kept lying around or lost."³ An exception to the 10-day requirement applies for any contribution that, within 10 days of the treasurer's receipt, is returned to the contributor without being deposited.⁴ Contributions of questionable legality (*i.e.*, if they appear received from a prohibited source) may be deposited within 10 days but must be refunded within 30 days if the permissibility of the contribution cannot be determined.⁵

¹ Fed. Election Comm'n, Adv. Op. 2003-18 at 1 (Smith) (Requester seeking guidance on permissible action regarding \$60,000 in refund checks that had not been cashed).

² 11 C.F.R. § 103.3(a).

³ House Doc. No. 95-44, 45, (Jan. 12, 1977), available at <https://www.fec.gov/resources/cms-content/documents/95-44.pdf#page=10>.

⁴ 11 C.F.R. § 103.3(a).

⁵ *Id.* § 103.3(b)(1). The regulations separately state that "every person who receives a contribution of \$50 or less for a political committee which is not an authorized committee shall forward such contribution to the treasurer of the

Commission regulations do not provide guidance to committees that have received contributions but are unable, through the fault of their vendor, to deposit or refund the contributions within the required ten days.⁶ However, through a number of advisory opinions, the Commission has examined circumstances in which a committee's use or deposit of contributions was interrupted by persons or events. In Advisory Opinion 1993-05 (Fields), for instance, the Commission permitted the deposit and use of contributions that were delayed in being deposited for approximately two months because postal employees, with whom the committee had contracted to operate a post office box, incorrectly removed checks from the committee's box.⁷ The Commission explained that the contributions were made by the date of the postmark on the envelopes and that the committee received "constructive possession of the checks when they were placed in its post office box," but that an "intervening event, action by the post authorities," prevented the committee from obtaining the use of the checks and depositing them.⁸ The Commission noted the delay was not the fault of the committee, there was no evidence of wrongdoing on the part of the committee, and there was "nothing to indicate that campaign staff were responsible for the failure to obtain or deposit the contribution checks."⁹

Similarly, in Advisory Opinion 2001-11 (Democratic Party of Virginia), the Commission allowed a late transfer of funds from the state party's non-federal account to its federal account when the state party was not responsible for the delay.¹⁰ The state party had requested the transfer in a timely manner, but the state party's bank, Wachovia Bank, failed to make the transfer.¹¹ The Commission explained "[i]t is significant that the State Party's request to the

political committee no later than 30 days after receipt." *Id.* § 102.8(b). Persons who receive contributions in excess of \$50 for a nonauthorized political committee must, no later than 10 days after receipt of the contribution, forward the contribution to the treasurer of the political committee. *Id.*

⁶ Further, the Commission's public guidance is unclear and appears conflicting at times on how to address these situations. *Compare* FEC, Refunds of contributions, <https://www.fec.gov/help-candidates-and-committees/taking-receipts-political-party/refunds-contributions/> ("A committee may return a contribution to the donor without depositing it, although the return must be made within 10 days of the treasurer's receipt of the contribution. In this case, the committee does not have to report either the receipt or the return of the contribution."), *and* FEC Campaign Guide, Political Party Committees at 22, Aug. 2013, <https://www.fec.gov/resources/cms-content/documents/partygui.pdf> ("Within 10 days of receipt by the treasurer, a contribution or other receipt must be deposited in the committee's campaign depository or returned to the source."), *with id.* at 68 ("Once the treasurer (or authorized agent) receives a receipt, he or she must deposit it within 10 days. Contributions not deposited within 10 days must be returned to their donors.").

⁷ Fed. Election Comm'n Advisory Opinion 1993-05 (Fields).

⁸ *Id.* at 2. The Commission has applied this same principle in other matters. *See, e.g.*, Fed. Election Comm'n Adv. Op. 1992-42 (Lewis) (Committee could accept replacement checks for prior election even though it had no outstanding debts when checks were lost in transit and committee took reasonable steps to comply with the Act and Commission regulations).

⁹ Fed. Election Comm'n, Adv. Op. 1993-05 at 3 (Fields).

¹⁰ Fed. Election Comm'n, Adv. Op. 2001-11 at 4 (Democratic Party of Virginia).

¹¹ *Id.* at 2.

Bank was made in a timely manner so that the relevant transfer (relating to allocable expenses between April 20 and May 3) would have been made [in the required timeframe].”¹² The Commission also noted the state party “expeditiously followed up its discovery by submitting this request to the Commission seeking legal review.”¹³ Ultimately, the Commission permitted the transfer “[b]ased on the Bank’s control of the means of the transfer and on the actions of the State Party with respect to the requested transfer.”¹⁴

The Commission has also permitted the deposit and use of contributions where a collecting agent failed to timely transmit the funds even though the collecting agent was fully able to do so. In Advisory Opinion 1999-33 (MediaOne PAC), a company with a centralized payroll system instituted payroll deductions program for employees who wished to contribute to the company’s separate segregated fund (“SSF”).¹⁵ However, one regional office that was not on the centralized system was inadvertently holding funds in a general ledger account that were meant to be sent to the SSF as payroll deduction contributions. Nearly two years passed before the committee discovered that the payroll office was collecting and holding the contributions, and the discovery only came about after the regional office converted to the centralized system.¹⁶ The Commission noted that the donors had relinquished control over the contributions and that the committee sought guidance from the Commission in a timely manner once it discovered the contributions were not being transferred.¹⁷ After noting that “the ability to transmit the contributions was entirely under the control of [the company],” the Commission, nevertheless, permitted the committee to deposit the contributions.¹⁸

Based on these advisory opinions, it is clear that the Commission does not categorically penalize committees by requiring them to refund contributions made by individuals that were untimely transferred or deposited, even in instances where the committee or their agents might have control of the funds. Rather, the Commission examines the specific circumstances of each matter, including whether there was some intervening event that caused the untimely deposits or transfers, whether the conduct was intentional or inadvertent, and whether the committee took prompt action to remedy the issues. These prior decisions establish that Committees may retain

¹² *Id.* at 4.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ Fed. Election Comm’n, Adv. Op. 1999-33 at 1-2 (MediaOne PAC).

¹⁶ *Id.* at 1-2.

¹⁷ *Id.* at 3-4.

¹⁸ *Id.* at 3. Notably, the First Draft Advisory Opinion concluded that the contributions must be refunded on grounds that “there was no legal impediment to the transmitted, and the administrative circumstances under which the contributions were retained in the general ledger account were created entirely by the corporation or its regional office.” Fed. Election Comm’n, Draft Adv. Op. 1999-33 at 3 (MediaOne PAC) (Dec. 8, 1999). However, the Commission instructed the Office of General Counsel to draft a revised response that would allow the committee to retain the funds and include proposed remedial action.

and use the funds at issue here. Under Commission regulations, the donors relinquished control over the contribution checks when they were mailed and thus the contributions are considered made.¹⁹ The checks have also been received by Vendor, and many of them were deposited before Committees knew that Vendor was failing to deposit them within 10 days. For all of the contributions, the delay was slight – no more than 22 days beyond the 10-day deadline – far from the point of becoming a stale check. Vendor has represented to Committees that the untimely deposits were caused by staff shortages, staff unavailability due to COVID-19 infections, and a significant increase in contributions by other clients caused by global events (*e.g.*, the war in Ukraine). None of these events were caused by Committees’ conduct, nor were Committees in any position to prevent or remedy these events. Committees took every reasonable step to ensure that contributions were timely deposited and complied with the law. Specifically, Committees contractually required that the Vendor comply with the Act and the Commission’s regulations and paid premium rates to go a step further and require that all contributions be deposited within one or two business days, well beyond the requirements of the Act, specifically to try and avoid a problematic deposit at all costs. Committees required Vendor to comply with the Act and the Commission’s regulations. In sum, Committees could not have reasonably prevented these late deposits. When Committees became aware of late deposited contributions, they took every step to immediately end the problem, including demanding that Vendor comply with the 10-day requirement, segregating the late deposited contributions, and seeking guidance from the Commission. Further, it is due to the diligence of Committees that the delay at issue here—no more than 30 days—is minimal in comparison to the 20-month delay the Commission forgave in Advisory Opinion 1999-33 (MediaOne PAC).

Further, the facts here are clearly distinguishable from Advisory Opinion 1992-29 (Holtzman), where the late deposits were the fault of a committee employee’s negligence. In this opinion, a campaign committee asked the Commission whether it could retain contributions that it found in a desk drawer of a former employee of the campaign.²⁰ The checks were issued in 1991 and early 1992 but were not found until June 1992.²¹ Noting that the failure occurred because the campaign employee neglected to deposit the checks, the Commission concluded that the committee may not retain the amounts represented by the checks and should refund the contributions to the contributors.²² Unlike in Advisory Opinion 1992-29, here an outside vendor—a third party, and not a committee employee—was responsible for depositing the contribution checks in a timely manner. While political committees do have some responsibility for the actions of their “agents” in addition to employees, there are also real differences between the control over employees and independent contractors. This is not to say that the Commission should permit committees to deposit and use untimely deposited contributions in every case in

¹⁹ 11 C.F.R. § 110.1(b)(6).

²⁰ Federal Election Comm’n Adv. Op. 1992-29 at 1-2 (Holtzman).

²¹ *Id.* at 1.

²² *Id.* at 2.

which a vendor with which it contracts fails to deposit contributions within 10 days. Rather, consistent with Commission precedent, the Commission should analyze the specific factual circumstances presented, including the reason for the delay, whether the committees contractually required vendor's compliance with the Act, and whether the committees took prompt action to remedy any delays. In this matter, Committees took every step reasonably possible to ensure that its vendor met the requirement to deposit contributions within 10 days. The error was not their fault, nor was it due to their wrongful actions. And again, the lack of any issues over the years Committees have worked with the Vendor demonstrates the uniqueness of the situation at hand. Under these circumstances, Commission precedent permits Committees to retain the late deposited contributions.

Moreover, even if the Commission took the position that the ability to make the deposits were within the control of Committees on grounds that Vendor is their agent, Commission precedent does not require refund. There is no evidence that Vendor's delays were intentional or similar in nature to the conduct that occurred in Advisory Opinion 1992-29 (Holtzman). And under the analogous circumstances of Advisory Opinion 1999-33 (MediaOne PAC), the Commission permitted the SSF to retain contributions that were untimely transferred to the SSF despite the fact that the ability to make the transfers were within the company's control and there was nothing preventing the transfer except for the fact that the company and SSF were unaware that the funds were being collected but not transferred. In fact, Committees' diligence went far beyond the level of attention showed by the collecting agent in Advisory Opinion 1999-33—the issue was promptly identified by Committees and remedial action was taken all within the same calendar quarter.

Finally, there is no Commission regulation requiring a committee to return already deposited contributions that were deposited outside of the ten-day window due to no fault of the committee. The regulations only provide that a contribution must be deposited “within 10 days of the treasurer's receipt” and that “any contribution may be, within 10 days of the treasurer's receipt, returned to the contributor without being deposited.”²³ The 10-day deposit requirement “was designed to encourage the prompt disposition of contributions rather than permit ‘stale’ checks to be kept lying around or lost.”²⁴ Here, no stale checks were left around or lost. Rather, they remained in Vendor's custody and were deposited within 11 and 32 days of receipt. These were not unprocessed contributions from “months ago” as was the case in Advisory Opinion 1992-29 (Holtzman). All of the contributions here were received and deposited in the same election cycle and within the same calendar quarter. As such, requiring Committees to return the funds would do nothing to protect donors' or the Commission's interest in preventing stale checks from being treated in a haphazard and unsecure manner. Instead, requiring that Committees refund the contributions, many of which will likely never be received by the donors

²³ 11 C.F.R. § 103.3(a).

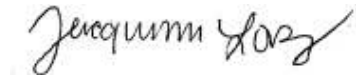
²⁴ House Doc. No. 95-44, 45, (Jan. 12, 1977), available at <https://www.fec.gov/resources/cms-content/documents/95-44.pdf#page=10>.

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and therefore will ultimately be disgorged to the U.S. Treasury, does nothing to protect donors' interests or the Commission's.

For these reasons, we ask the Commission to confirm that Committees may retain, desegregate, and use the contributions that were deposited more than ten days after Vendor's receipt.

Very truly yours,



Graham M. Wilson
Jacquelyn K. Lopez
Jonathan A. Peterson
Andrea T. Levien
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Counsel to Committees