

May 29, 2020

Hon. Lisa J. Stevenson
Acting General Counsel
Federal Election Commission
1050 First Street, N.E.
Washington, D.C. 20463

RE: Advisory Opinion Request from Shaun McCutcheon and McCutcheon
for Freedom Regarding Unlimited Contributions to National Political
Party Committees Under the “Bloomberg Billionaire Loophole”

Dear Ms. Stevenson:

Pursuant to 52 U.S.C. § 30108(a)(1), please accept this Advisory Opinion Request from Shaun McCutcheon and his authorized principal presidential campaign committee, McCutcheon for Freedom (“MFF”). This request concerns whether McCutcheon may transfer an unlimited amount of funds from MFF, which McCutcheon funded entirely himself, to the general, unrestricted account of a national political party committee.

Former Democratic presidential candidate Michael Bloomberg recently laundered approximately \$18 million of his personal funds by depositing them in his presidential candidate committee’s account and then transferring them to the Democratic National Committee (“DNC”). Bloomberg’s \$18 million transfer to the DNC appears to have blatantly violated the \$35,500 limit on contributions from “persons” to national political party committees. *See* 52 U.S.C. § 30116(a)(1)(B); 11 C.F.R. § 110.1(c)(1); *see also* FEC, *Price Index Adjustments for Contribution and Expenditure Limitations and Lobbyist Bundling Disclosure Threshold*, 84 Fed. Reg. 2504, 2506 (Feb. 7, 2019).¹ Through this “Bloomberg Billionaire Loophole,” Bloomberg was able to contribute over 475 times the legal limit to the DNC’s general treasury account.

Unlike Bloomberg, however, McCutcheon cannot rely on the pervasively Democratic Deep State federal bureaucracy to shield him from administrative proceedings or criminal prosecution. Accordingly, he seeks an advisory opinion from the Commission as to whether the Commission believes such egregious conduct is, in fact, legally permissible, before engaging in such circumvention of contribution limits himself.

¹ Individuals may also contribute up to \$106,500 to each of three separate segregated “*McCutcheon* accounts” of a national political party committee, including an account to help defray the costs of holding the party’s national nominating convention, constructing or renovating the party’s headquarters, and conducting recounts and election contests. 52 U.S.C. § 30116(a)(1)(B), (a)(9). Congress adopted these provisions in response to the U.S. Supreme Court’s ruling in *McCutcheon v FEC*, 572 U.S. 185 (2014), which invalidated aggregate contribution limits. McCutcheon does not wish to contribute to the *McCutcheon* account, and they are irrelevant to this request.

Questions Presented

1. May Shaun McCutcheon transfer \$50,000 of the personal funds he has deposited into the account of MFF, his authorized principal presidential candidate committee, to the general, unrestricted federal account of the Libertarian National Committee, Inc. (“LNC”) (FEC ID #C00255695), a national political party committee?

2. If so, after making the transfer described above in #1, may McCutcheon deposit unlimited amounts of additional personal funds into MFF’s account, and then transfer them to the general, unrestricted federal account of the LNC? If so, is there a date on which it would become illegal for him to do so?

3. May McCutcheon deposit unlimited amounts of additional personal funds into MFF’s account and then transfer them to the general, unrestricted federal account of the Republican National Committee (“RNC”), a national political party committee, without regard to 52 U.S.C. § 30116(a)(1)(B)’s limits? If so, is there a date on which it would become illegal for him to do so?

Background Facts

Shaun McCutcheon was a candidate for the Libertarian Party nomination for President of the United States in the 2020 election. He is constitutionally eligible to serve as President.²

McCutcheon began his campaign on May 1, 2020, when, in the first official act after deciding to run, he obtained an Employee Identification Number (“EIN”) for McCutcheon For Freedom (“MFF”) (FEC ID #00745661) and opened a bank account for MFF. A few days later, on May 6, McCutcheon wired \$50,000 of his personal funds to MFF. That day, he also filed his FEC Form 1, establishing MFF as his authorized principal candidate committee. At approximately the same time, MFF uploaded a video of McCutcheon announcing his candidacy to the Internet. McCutcheon’s candidacy was discussed online, including by Dave Levinthal, Editor-at-Large for Center for Public Integrity, *see* <https://twitter.com/davelevinthal/status/1258337735300898822>. McCutcheon self-funded his entire candidacy. On May 22, he contributed an additional \$15,000 of his personal funds to MFF, for a total of \$65,000.

McCutcheon and his campaign team ran a vigorous virtual campaign, due in large part to the constraints imposed by COVID-19. His campaign manager was Mike Byrne, a seasoned campaign manager on numerous Republican House and Senate campaigns. Ron Nielsen, who had been the campaign manager for Libertarian presidential candidate Gary Johnson in the 2012 and 2016 elections, served as Special Advisor to the McCutcheon campaign. McCutcheon also received volunteer assistance from other Johnson 2016 personnel.

² McCutcheon is a natural-born citizen who was born in the state of Arkansas. He has resided in the United States all his life. Furthermore, he is over 35 years old; he was born in 1967.

McCutcheon's campaign website can be found at <http://www.mccutcheonforfreedom.com>. Working with several outside data providers and digital advertising firms, he ran paid political advertisements targeted directly to Libertarian Party members and Libertarian National Convention delegates on Facebook. He also contacted them directly through advertisements served to their home IP addresses via SMS, and sent more than 500,000 e-mails. All together, MFF made nearly \$15,000 in expenditures in support of McCutcheon's campaign.

The Libertarian Party held its national convention over the Internet on May 23, 2020. McCutcheon did not receive the party's nomination for either President or Vice President. He has approximately \$50,000 remaining in his campaign account. He now wishes to transfer the remaining personal funds, which he had originally deposited into his candidate committee's account, to the Libertarian Party's general treasury (and not to their *McCutcheon* accounts). He seeks to make this contribution at the earliest possible time so they can have the greatest impact over the course of the general election campaign.

In addition, McCutcheon wishes to deposit additional personal funds into his campaign account and subsequently transfer those funds to the general unrestricted federal accounts of the LNC and likely the RNC to ensure the defeat of the presumptive Democratic nominee, Joe Biden.

The Bloomberg Billionaire Loophole

As the facts outlined above demonstrate, McCutcheon wishes to take advantage of the "Bloomberg Billionaire Loophole" that Michael Bloomberg ("Bloomberg") recently used to transfer \$18 million of his own funds to the DNC, but wishes to confirm the legality of circumventing and undermining campaign finance law in this manner before doing so. As the Commission is aware, Bloomberg transferred over \$935 million of his personal funds to his authorized principal presidential candidate committee, Mike Bloomberg 2020, Inc. ("MB2020"). Bloomberg's candidacy was completely unsuccessful, rather definitively confirming that money does not buy elections. Despite his expenditures, Bloomberg never received more than 1/5 of the vote in presidential preference contests within the continental United States and won less than 2% of the pledged delegates to the Democratic National Convention. After approximately four months, he announced he was suspending his campaign and transferring \$18 million to the DNC. *See* Dan Merica, et al., *Bloomberg Campaign Transfers \$18 Million to DNC*, CNN (Mar. 20, 2020, 3:26 PM), <https://www.cnn.com/2020/03/20/politics/bloomberg-campaign-money-dnc/index.html>.

It would have been patently illegal for Bloomberg to directly contribute \$18 million of his personal funds to the DNC. Instead, he parked those funds in his candidate committee, where they were subject to his exclusive control at all times. After his abortive campaign spectacularly imploded, Bloomberg could have refunded those funds to himself, donated them to charity, or even met his personal commitments to the scores of political staffers whom he lured to his campaign and now find themselves unemployed during a national pandemic. *See, e.g.*, Juana Summers, *Former Staffers Sue Bloomberg Campaign, Alleging They Were Promised Pay Through Nov.*, NPR (Mar. 23, 2020, 4:37 PM), <https://www.npr.org/2020/03/23/820228854/former-staffers-sue-bloomberg-campaign-alleging-they-were-promised-pay-through-n>. Instead, he transferred the \$18 million to the DNC. The supposed legal basis for this money laundering scheme is likely 52 U.S.C.

§ 30114(a)(4), which provides, “A contribution accepted by a candidate . . . may be used by the candidate . . . for transfers, without limitation, to a national, State, or local committee of a political party.” *Accord* 11 C.F.R. § 113.2(c).

Analysis

There are at least four main reasons why the Commission may conclude the Bloomberg Billionaire Loophole is invalid, and it would be illegal for McCutcheon to engage in his intended course of action. **First**, the Commission may conclude the transfers from MFF to the LNC must be treated as contributions directly from McCutcheon himself to the LNC which are subject to contribution limits, since all the funds at issue originated with McCutcheon, he has complete control over MFF’s actions, and he could simply refund them to himself. *See* 52 U.S.C. § 30116(a)(1)(B); *accord* 11 C.F.R. § 110.1(c)(1)(i); *see also* 84 Fed. Reg. 2504 (Feb. 7, 2019). **Second**, for the same reasons, the Commission might conclude that, since the transfers from MFF to the LNC are attributable to McCutcheon, they would constitute illegal contributions in the name of another. *See* 52 U.S.C. § 30122; 11 C.F.R. § 110.4(b)(1)(i), (iv).

Third, in the alternative, the Commission may conclude 52 U.S.C. § 30114(a)(4) and 11 C.F.R. § 113.2(c) do not authorize a candidate committee to transfer unlimited amounts of funds the committee received from the candidate himself to a political party committee. **Fourth**, as yet another alternative, the Commission may determine that, when a candidate deposits personal funds into his campaign committee’s account, and the committee later transfers those personal funds to a political party, those personal funds must be treated as contributions from the candidate to that campaign committee and are subject to the ordinary contribution limits that govern contributions from individuals to candidates, *see* 52 U.S.C. § 30116(a)(1)(A); 11 C.F.R. § 110.1(b)(1), rather as expenditures by the candidate permitted by 11 C.F.R. § 110.10.

In light of these substantial potential obstacles, McCutcheon seeks guidance from the Commission as to the legality of the Bloomberg Billionaire Loophole before either transferring the personal funds that remain in MFF’s account to the LNC, or depositing additional personal funds into MFF’s account to transfer to the LNC and/or RNC.

1. A transfer of an unlimited amount of McCutcheon’s personal funds through his campaign committee to a political party committee would be an illegally excessive contribution from McCutcheon to that party committee.

Most basically, it appears McCutcheon cannot circumvent limits on the amount an individual may contribute to a national political party committee through the simply expedient of transferring his personal funds through his candidate committee. A person may contribute no more than \$35,500 annually to the general account of a national political party committee. 52 U.S.C. § 30116(a)(1)(B); *accord* 11 C.F.R. § 110.1(c)(1)(i); *see also* 84 Fed. Reg. 2504 (Feb. 7, 2019). McCutcheon has deposited a total of \$65,000 of his personal funds in MFF’s account, of which slightly more than \$50,000 remains. MFF did not raise funds from any other sources. The funds are subject to McCutcheon’s exclusive direction and control. He has plenary authority to simply refund that money back to his personal account. *See Pike for Congress*, A.O. 2010-15, at 2-3 (Aug.

26, 2010). Under these circumstances, the Commission may deem a transfer from MFF to the LNC to be a contribution from McCutcheon himself to the LNC. Accordingly, it appears McCutcheon's intended contribution to the LNC of \$50,000 of the personal funds he has transferred to MFF may violate 52 U.S.C. § 30116(a)(1)(B)'s and 11 C.F.R. § 110.01(c)(1)(i)'s contribution limits.

2. A transfer of McCutcheon's personal funds through his campaign committee to a political party committee would be an illegal contribution in the name of another.

McCutcheon's intended contribution of \$50,000 from MFF to the LNC also may violate federal prohibitions on contributions in the name of another. The Federal Election Campaign Act (the "FECA") provides, "No person shall make a contribution in the name of another person or knowingly permit his name to be used to effect such a contribution, and no person shall knowingly accept a contribution made by one person in the name of another person." 52 U.S.C. § 30122; *accord* 11 C.F.R. § 110.4(b)(1)(i), (iv).

As discussed above, McCutcheon deposited a total of \$65,000 of his personal funds in MFF's account, of which slightly more than \$50,000 remains. MFF did not raise funds from any other sources. The funds are subject to McCutcheon's exclusive direction and control. He has plenary authority to simply refund that money back to his personal account. *See Pike for Congress*, A.O. 2010-15, at 2-3 (Aug. 26, 2010). Under these circumstances, by using MFF as a vehicle for transferring his personal funds to the LNC, McCutcheon may be violating 52 U.S.C. § 30122 and 11 C.F.R. § 110.4(b)(1)(i), (iv).

3. A candidate committee may not transfer unlimited amounts of personal funds it received from a candidate to a political party committee.

In the alternative, McCutcheon's proposed transaction may cause MFF to violate the \$35,500 limit on the amount a person, including a political committee, *see* 52 U.S.C. § 30101(11); 11 C.F.R. § 100.10, may contribute to a national political party committee each year. *See* 52 U.S.C. § 30116(a)(1)(B); *accord* 11 C.F.R. § 110.1(c)(1).

When candidate committees transfer unlimited amounts of funds to national political party committees, they generally rely on a narrow exception to contribution limits set forth in 52 U.S.C. § 30114(a)(4); *accord* 11 C.F.R. § 113.2(c). These provisions specify, "A contribution accepted by a candidate . . . may be used by the candidate . . . for transfers, without limitation, to a national, State, or local committee of a political party." 52 U.S.C. § 30114(a)(4). A candidate's contributions of his own personal funds to his campaign account, however, do not qualify as "a contribution accepted by a candidate" for purposes of 52 U.S.C. § 30114(a)(4). A candidate cannot "accept" personal funds the candidate himself deposits into his own campaign account.

All of MFF's funds were contributed by McCutcheon himself. McCutcheon did not "accept" any contributions that fall within 52 U.S.C. § 30114(a)(4)'s special exception for unlimited transfers to political parties. Thus, it appears MFF's intended transfer of \$50,000 to the LNC may violate 52 U.S.C. § 30116(a)(1)(B)'s and 11 C.F.R. § 110.01(c)(1)'s limits on contributions from political committees to national political party committees.

4. A candidate's transfer of personal funds through his candidate committee to a national political party qualifies as a contribution from that candidate to the candidate committee, to which contribution limits apply.

Finally, the FECA provides a person may not contribute more than \$2,800 per election to a candidate committee. 52 U.S.C. § 30116(a)(1)(A); *accord* 11 C.F.R. § 110.1(b)(1). Neither federal law nor Supreme Court precedent allows individuals to make unlimited contributions to any political committees other than Independent Expenditure Only Committees, *see SpeechNow.org v. FEC*, 599 F.3d 686 (D.C. Cir. 2010) (en banc), or to committees' segregated Independent Expenditure Only accounts, *see Carey v. FEC*, 791 F. Supp. 2d 121 (D.D.C. 2011), that exclusively make independent expenditures. The FECA does not create an exception allowing a candidate to make unlimited contributions to his own candidate committee.

Rather, a candidate may make unlimited expenditures in support of his own campaign. 11 C.F.R. § 110.10; *see also Buckley v. Valeo*, 424 U.S. 1, 21, 51 (1976) (per curiam) (establishing the critical constitutional distinction between “contributions” to advance the speech of another, which the Government may limit, and “expenditures” to advance one's own speech, which constitute pure speech and generally may not be limited); *see also Cal. Med. Ass'n v. FEC*, 453 U.S. 182, 196-97 (1981) (plurality op.) (“[T]he ‘speech by proxy’ that CMA seeks to achieve through its contributions to CALPAC is not the sort of political advocacy that this Court in *Buckley* found entitled to full First Amendment protection.”). The Commission has issued advisory opinions stating that, rather than directly making expenditures from their personal funds in support of their own campaigns, candidates may instead transfer unlimited amounts of their personal funds to their candidate committees to have those committees make the expenditures instead. *See Mulloy*, AO 1984-60, at 2 (Jan. 11, 1985) (stating a candidate's right to “make unlimited expenditures from his or her personal funds[] includ[es] contributions to the candidate's principal campaign committee”); *accord Collins*, AO 1985-33 at 1 (Nov. 22, 1985).

This efficient and practical work-around exists so candidates can disclose those expenditures on their campaign committees' periodic FEC reports. When a candidate deposits his personal funds into his campaign account to make expenditures in support of his candidacy, the law generally treats it as an expenditure directly from the candidate himself, which may not constitutionally be limited. *Cf. Mueller*, A.O. 1990-09 (June 25, 1990) (holding personal funds expended by a candidate in support of his campaign should be reported as both in-kind contributions to his campaign committee, as well as expenditures by the committee). Moreover, a candidate's expenditure of personal funds on his own campaign—whether he spends them directly or through his campaign committee—raises no risk of actual or apparent *quid pro quo* corruption, and therefore may not constitutionally be restricted. *See Nat'l Conservative Political Action Comm. v. FEC*, 470 U.S. 480, 496-97 (1985) (recognizing contribution limits are constitutionally permissible only when they are closely related to preventing actual or apparent *quid pro quo* corruption).

However, if a candidate contributes personal funds to his campaign committee, and the committee transfers those funds to a national political party committee, then by definition the candidate is not using them to fund an expenditure in support of his own candidacy—his own speech. A candidate’s ability to make unlimited contributions to his or her campaign committee arises solely from—and is limited by—his right to make unlimited *expenditures* in support of his campaign. See 11 C.F.R. § 110.10. Citing § 110.10, the Commission has expressly declared, “Commission regulations explicitly permit a candidate for Federal office to make **unlimited expenditures** from his or her personal funds, **including contributions to the candidate’s principal campaign committee.**” *Mulloy*, A.O. 1984-60 (Jan. 11, 1985) (emphasis added). A candidate’s ability to make unlimited contributions to his own campaign committee is only a component of his greater constitutional right to make unlimited expenditures on behalf of his own campaign. *Buckley*, 424 U.S. at 51.

11 C.F.R. § 110.10 allows a candidate *only* to make *unlimited expenditures* in support of his campaign, either directly or through his campaign committee. See *Mulloy*, A.O. 1984-60. When personal funds that a candidate transferred to his campaign committee are not used by the committee to make expenditures in support of that campaign, they no longer fall within 11 C.F.R. § 110.10. More specifically, personal funds a candidate deposits with his campaign which are subsequently transferred to political party committees do not fall within § 110.10’s safe harbor allowing candidates to make unlimited expenditures.

Rather, personal funds a candidate provides to his or her campaign committee, which the committee in turn transfers to a national political party committee, is a “contribution” from that candidate to his or her candidate committee and is subject to 52 U.S.C. § 30116(a)(1)(A)’s limits. A contrary conclusion would go far beyond the Commission’s earlier advisory opinions and enable circumvention of federal limits on contributions from individuals to national political party committees. See *FEC v. Colo. Republican Fed. Campaign Comm.*, 533 U.S. 431, 455 (2001) (recognizing the Government’s interest in combating actual and apparent quid pro quo corruption empowers it to prevent circumvention of contribution limits). A candidate’s right to transfer unlimited amounts of personal funds to his or her campaign committee to make expenditures on behalf of his or her own candidacy does not include the completely unrelated right to subsequently re-transfer those funds to third-party entities such as political party committees. Cf. *Constitutional Conservatives Fund PAC*, A.O. 2011-21, at 3-4 (Dec. 1, 2011) (explaining it is necessary to limit contributions to political party committees to further the Government’s compelling interest in preventing corruption (citing *McConnell v. FEC*, 540 U.S. 93, 182 (2003))); *Majority PAC*, A.O. 2011-12, at 3-4 (June 30, 2011) (recognizing, notwithstanding *Citizens United v. FEC*, 558 U.S. 310 (2010), BCRA limits the amount an individual may contribute to national political party committees (citing *McConnell*, 540 U.S. at 181-84)).

McCutcheon transferred \$65,000 of his personal funds to MFF. If he transfers \$50,000 of those funds from MFF to the LNC, that \$50,000 would appear to no longer qualify as an expenditure by McCutcheon under 11 C.F.R. § 110.10. Rather, it appears that \$50,000 would be treated as a contribution from McCutcheon to his campaign committee, in excess of the limits set forth in 52 U.S.C. § 30116(a)(1)(A) and 11 C.F.R. § 110.1(b)(1). Likewise, any subsequent deposits of personal funds McCutcheon makes to MFF’s account, which MFF goes on to transfer

to either the LNC or RNC, would qualify as contributions subject to limits, rather than expenditures which are exempt from limits under the First Amendment and 11 C.F.R. § 110.10. Thus, it appears McCutcheon's intended transfers to the LNC and RNC may violate federal law.

Conclusion

In conclusion, McCutcheon and McCutcheon for Freedom respectfully request an advisory opinion on whether MFF may transfer \$50,000 of the funds it received from McCutcheon to the general unrestricted federal account of a national political party committee. McCutcheon further requests an opinion on whether he may deposit additional personal funds with MFF, which are then transferred to the LNC's or RNC's general accounts in amounts exceeding \$35,500. The Bloomberg Billionaire Loophole appears to violate federal campaign finance law in numerous ways. McCutcheon seeks a ruling concerning the legality of this loophole before following the apparently illegal example of Bloomberg and the DNC.

Respectfully submitted,



Dan Backer

*Counsel for Shaun McCutcheon
and McCutcheon for Freedom*