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FEDERAL ELECTION COMMISSION  
Washington, DC 20463

**AGENDA DOCUMENT NO. 21-30-A**  
**AGENDA ITEM**  
**For meeting of June 24, 2021**  
**SUBMITTED LATE**

June 21, 2021

**MEMORANDUM**

TO: The Commission

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

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Subject: Draft AO 2021-06 (Rep. Kelly and DPI) – 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 9:00am (Eastern Time) on June 24, 2021.

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 2021-06  
2  
3 Charles E. Borden, Esq.  
4 Samuel C. Brown, Esq.  
5 Holland & Knight  
6 800 17th St., NW  
7 Suite 1100  
8 Washington, DC 20006

**DRAFT A**

9 Dear Messrs. Borden and Brown:

10 We are responding to your advisory opinion request on behalf of United States  
11 Representative Robin Kelly and the Democratic Party of Illinois (“the state party”)  
12 concerning the application of the Federal Election Campaign Act, 52 U.S.C. §§ 30101-45  
13 (the “Act”), and Commission regulations to Congresswoman Kelly’s election to serve as  
14 chair of the Democratic State Central Committee (“central committee”), which governs  
15 the state party. The requestors ask whether adopting one of three proposed governance  
16 structures during Congresswoman Kelly’s tenure as chair would permit the state party to  
17 raise and spend funds through its non-federal account in amounts and from sources  
18 prohibited by the Act but permitted under Illinois law.

19 The Commission concludes that the state party would be prohibited from raising  
20 and spending funds in amounts and from sources prohibited by the Act through its non-  
21 federal account under any of the proposed governance structures because  
22 Congresswoman Kelly would retain indirect control over the non-federal account.

23 ***Background***

24 The facts presented in this advisory opinion are based on your letter dated May 5,  
25 2021, email dated May 16, 2021, and the central committee bylaws provided with your  
26 letter.

1           The Democratic Party of Illinois is the state political party for the Democratic  
2 Party in Illinois. Advisory Opinion Request (“AOR”) at AOR001. The state party is  
3 governed by the central committee, which consists of 36 members, two from each of the  
4 state’s 18 congressional districts, directly elected by the voters in those districts.  
5 AOR001, AOR011. Among other responsibilities, the central committee is required to:  
6 (1) “promote, and aid and assist in, the election of all candidates for public office on the  
7 ticket of the Democratic Party in all general elections in the State,” (2) develop and  
8 maintain public relations for the party, (3) “devise and execute ways and means of  
9 financing all activities and to cooperate and work with other segments of Party  
10 organization at national and local levels in the development of an integrated and  
11 coordinated finance plan for the Party,” and (4) plan and conduct the state convention and  
12 consider the state convention platform. AOR011-012.

13           On March 3, 2021, Congresswoman Robin Kelly, a member of the U.S. House of  
14 Representatives, was elected chair of the central committee. AOR001. Under central  
15 committee bylaws, all other officers are members of the central committee and  
16 designated by the chair. AOR013. Under the bylaws, the chair is “chief executive  
17 officer” for the central committee with “full authority to exercise the executive powers”  
18 of the central committee. *Id.* She is authorized to appoint and dismiss “any and all  
19 personnel or staff” of the central committee. *Id.* Among other duties, the chair presides  
20 over all central committee meetings and, under current bylaws, “serve[s] ex-officio on all  
21 committees of the Central Committee with the right to vote.” *Id.* The chair is authorized  
22 to establish standing committees, determine the number of appointments for the standing

1 committees, and appoint the members of such committees from the membership of the  
2 central committee. AOR014.

3 The state party maintains both a federal account, subject to the Act’s contribution  
4 limits, source prohibitions, and reporting requirements, and a non-federal account.  
5 AOR003.<sup>1</sup> The non-federal account “long predates” Congresswoman Kelly’s election as  
6 chair. AOR004 n.20. Illinois law allows the non-federal account to receive contributions  
7 that exceed the Act’s contribution limits and permits the non-federal account to receive  
8 contributions from corporations and labor unions, which are prohibited from making  
9 contributions under the Act. 10 ILCS 5/9-8.5(c), (g); *see* State of Illinois Board of  
10 Elections, Contributions Limits Per Election Cycle at 1 (Jan. 1, 2021);<sup>2</sup> AOR003.

11 The Act prohibits a federal officeholder or an “entity directly or indirectly  
12 established, financed, maintained or controlled by or acting on behalf of 1 or more . . .  
13 individuals holding federal office” from soliciting, receiving, directing, transferring, or  
14 spending funds in connection with “any election other than an election for Federal  
15 office,” unless the funds do not exceed the Act’s contribution limits and are not from  
16 sources prohibited by the Act. 52 U.S.C. § 30125(e)(1)(B). Given this prohibition, the  
17 state party and Congresswoman Kelly propose alternate “governance structures” intended  
18 to provide that the congresswoman is “appropriately insulated” from the state party’s  
19 non-federal account activities. AOR001-002. Requestors ask whether adopting one of  
20 the proposed structures would be sufficient to permit Congresswoman Kelly to serve in

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<sup>1</sup> The state party first registered its federal account with the Commission in 1983. *See*  
<https://www.fec.gov/data/committee/C00167015/?tab=filings&cycle=1984>.

<sup>2</sup> <https://www.elections.il.gov/downloads/campaigndisclosure/pdf/contributionssummary.pdf>.

1 her position as chair of the central committee while still allowing the state party to raise  
2 and spend funds through its non-federal account in amounts and from sources prohibited  
3 by the Act but permitted under Illinois law. AOR002.

4 For each proposal, the central committee would amend its bylaws to reflect the  
5 limits on the chair's authority, and Congresswoman Kelly would be required to annually  
6 certify compliance with those restrictions on her conduct. AOR007-008. Policies would  
7 also require annual training and establish recordkeeping requirements for the individuals  
8 charged with administering the governance structure adopted. AOR008.

9 For all of the proposed options, Congresswoman Kelly would not supervise or  
10 review the work of any officer or employee with respect to that person's work on non-  
11 federal account matters and would be prohibited from terminating an individual's  
12 employment, or otherwise taking adverse employment action against an officer or  
13 employee of the state party, for reasons related to that person's non-federal account work.  
14 AOR007-008. Congresswoman Kelly would retain the general authority granted by the  
15 bylaws to hire staff and appoint officers to the central committee and dismiss staff who  
16 work on the non-federal account for reasons unrelated to their non-federal account work.  
17 AOR007-008, AOR013-014.

18 Under all three proposed options, Congresswoman Kelly would not make any  
19 contributions or transfers to the non-federal account from her personal funds or her  
20 congressional campaign and would not solicit or receive funds on behalf of the non-  
21 federal account. AOR007-008; AOR Supplement ("AOR Supp.") at 001.  
22 Congresswoman Kelly would, however, solicit funds on behalf of the state party's federal

1 account. AOR Supp. at 001. Under all of the proposals, Congresswoman Kelly would  
2 retain authority to endorse and campaign for non-federal candidates. AOR009.

3 **A. Option One: Special Committee**

4 Under proposed option one, the state party would establish a special committee,  
5 consisting of individuals who are not federal candidates or officeholders, to administer  
6 the non-federal account. AOR007. The special committee “would be responsible for the  
7 [non-federal account]’s fundraising (including solicitations), and spending (including  
8 decisions related to contributions by the [non-federal account], advertising on behalf of  
9 candidates, and transfers),” without review or approval by Congresswoman Kelly. *Id.*  
10 The special committee would further be authorized to delegate responsibilities to  
11 individuals associated with the state party who are not federal candidates or  
12 officeholders. *Id.*

13 **B. Option Two: Vice Chair**

14 Under proposed option two, a vice chair would administer the non-federal account  
15 and have “complete responsibility for the [non-federal account]’s operations and  
16 activities, without the review or approval of Congresswoman Kelly.” *Id.* The vice chair  
17 “would be responsible for the [non-federal account]’s fundraising (including  
18 solicitations), and spending (including decisions related to contributions by the [non-  
19 federal account], advertising on behalf of candidates, and transfers).” AOR008.

20 **C. Option Three: Recusal**

21 Under proposed option three, Congresswoman Kelly would recuse herself from  
22 matters involving the non-federal account, including: “fundraising, including

1 solicitations” and “spending, including decisions related to contributions by the [non-  
2 federal account], advertising on behalf of candidates, and transfers.” AOR008.

3 ***Questions Presented***

4 1. *Would option one be sufficient to permit Congresswoman Kelly to serve in*  
5 *her position as chair of the central committee without precluding the state party from*  
6 *raising and spending non-federal funds through the non-federal account?*

7 1a. *If not, would option one be sufficient if the bylaws provided that a majority*  
8 *of special committee members would not be appointed to the special committee by the*  
9 *chair, but instead would automatically be members of the special committee by virtue of*  
10 *holding a specific office not appointed by the chair (e.g., President or Minority Leader of*  
11 *the Illinois State Senate, or the Speaker or Minority Leader of the Illinois House of*  
12 *Representatives, as applicable)?*

13 2. *Would option two be sufficient to permit Congresswoman Kelly to serve in*  
14 *her position as chair of the central committee without precluding the state party from*  
15 *raising and spending non-federal funds through the non-federal account?*

16 3. *Would option three be sufficient to permit Congresswoman Kelly to serve*  
17 *in her position as chair of the central committee without precluding the state party from*  
18 *raising and spending non-federal funds through the non-federal account?*

19 4. *If the Commission finds that one of the three options is sufficient to permit*  
20 *Congresswoman Kelly to serve in her position as chair without precluding the state party*  
21 *from raising and spending non-federal funds through the non-federal account, could the*  
22 *chair be included on state party letterhead for solicitations on behalf of the non-federal*

1 *account, or would the state party be required to have separate letterheads for the federal*  
2 *and non-federal accounts?*

3 ***Legal Analysis and Conclusions***

4 1. *Would option one be sufficient to permit Congresswoman Kelly to serve in*  
5 *her position as chair of the central committee without precluding the state party from*  
6 *raising and spending non-federal funds through the non-federal account?*

7 No. The Commission concludes that the non-federal account would be an entity  
8 indirectly controlled by Congresswoman Kelly under option one given the authority that  
9 Congresswoman Kelly would continue to have over the governance of the non-federal  
10 account and personnel managing the non-federal account, and the context of the overall  
11 relationship between Congresswoman Kelly and the state party. As a result, the state  
12 party must not solicit, receive, direct, transfer, or spend funds in excess of the amounts  
13 permitted by the Act or from prohibited sources through the non-federal account under  
14 option one.

15 Under the Act, as amended by the Bipartisan Campaign Reform Act of 2002  
16 (“BCRA”), a federal officeholder or an “entity directly or indirectly established, financed,  
17 maintained or controlled by or acting on behalf” of a federal officeholder shall not:

18 (B) solicit, receive, direct, transfer, or spend funds in connection  
19 with any election other than an election for Federal office or disburse  
20 funds in connection with such an election unless the funds—  
21 (i) are not in excess of the amounts permitted with respect to  
22 contributions to candidates and political committees . . . ; and  
23 (ii) are not from sources prohibited by [the] Act from making  
24 contributions in connection with an election for Federal office.

25 52 U.S.C. § 30125(e)(1)(B); *see also* 11 C.F.R. § 300.62. This “soft money” prohibition  
26 was one of the “central” provisions of BCRA and “designed to address Congress’



1 concerns about the increasing use of soft money . . . to influence federal elections.”

2 *Shays v. FEC*, 528 F.3d 914, 918 (D.C. Cir. 2008) (“*Shays III*”) (internal quotations

3 omitted).<sup>3</sup>

4 To determine whether a federal officeholder directly or indirectly established,  
5 finances, maintains, or controls an entity, the Commission examines a non-exclusive list  
6 of ten factors set forth in 11 C.F.R. § 300.2(c)(2).<sup>4</sup> Relevant here, the Commission  
7 considers whether a federal officeholder, directly or through an agent, does any of the  
8 following: (1) “has the authority or ability to direct or participate in the governance of  
9 the entity through provisions of constitutions, bylaws, contracts, or other rules, or through  
10 formal or informal practices or procedures”; (2) “has the authority or ability to hire,  
11 appoint, demote, or otherwise control the officers, or other decision-making employees or  
12 members of the entity”; (3) “provides funds or goods in a significant amount or on an  
13 ongoing basis to the entity, such as through direct or indirect payments for administrative,  
14 fundraising, or other costs”; (4) “causes or arranges for funds in a significant amount or  
15 on an ongoing basis to be provided to the entity”; or (5) “had an active or significant role  
16 in the formation of the entity.” *Id.*<sup>5</sup> The Commission considers the regulatory factors “in  
17 the context of the overall relationship between the sponsor and the entity to determine

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<sup>3</sup> The statute sets forth three exceptions to the soft money prohibition, none of which apply to this request. *See* 52 U.S.C. § 30125(e)(2-4).

<sup>4</sup> These factors are adapted from the Commission’s regulation at 11 C.F.R. § 100.5(g), which provides factors for determining whether committees are affiliated. *See* Prohibited and Excessive Contributions: Non-Federal Funds or Soft Money, 67 Fed. Reg. 49,064, 49,083-84 (July 29, 2002) (explaining Commission’s decision to adopt affiliation factors).

<sup>5</sup> Other regulatory factors, such as “[w]hether a sponsor, directly or through its agent, owns controlling interest in the voting stock or securities of the entity,” 11 C.F.R. § 300.2(c)(2)(i), are not relevant to the circumstances of this request.

1 whether the presence of any factor or factors is evidence that the sponsor directly or  
2 indirectly established, finances, maintains, or controls the entity.” *Id.*

3         In other circumstances involving BCRA’s soft money prohibitions, the  
4 Commission determined that a federal candidate may serve as honorary chair of publicly  
5 funded state candidates’ campaigns where the campaigns would not engage in any further  
6 fundraising. Advisory Opinion 2007-21 (Holt) at 3. On the other hand, where a federal  
7 officeholder established a political organization that undertakes activity in connection  
8 with an election other than an election for federal office, the political organization “must  
9 not solicit, receive, direct, transfer, spend, or disburse funds in excess of the amounts  
10 permitted with respect to contributions to candidates and political committees or from  
11 prohibited sources under the Act.” Advisory Opinion 2003-12 (Stop Taxpayer Money  
12 for Politicians Committee *et al.*) at 11. The prohibition “applies regardless of whether [a  
13 fund] is established as a separate bank account of a candidate’s authorized committee or a  
14 separate entity.” Advisory Opinion 2006-24 (National Republican Senatorial Committee  
15 *et al.*) at 4 (recount fund established by federal officeholder subject to soft money  
16 prohibition).

17         The Commission has not previously considered under what circumstances a  
18 federal officeholder controls the non-federal account of a state political party.<sup>6</sup> The  
19 Commission concludes, based on the overall relationship between Congresswoman Kelly

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<sup>6</sup> Although requestors ask the Commission to evaluate their request using precedent specific to the Act’s foreign national prohibition, *see* AOR008, the Commission is bound to evaluate the request under the regulations it has adopted to implement the soft money prohibition. The courts have made clear that the Commission lacks authority to create additional exceptions to the soft money prohibition beyond those explicitly included in the statute. *See Shays III*, 528 F.3d at 933 (“when Congress wanted to create an exception to the ban on federal candidates soliciting soft money, it did so explicitly”).

1 and the state party and the specific proposal provided by requestors, that the non-federal  
2 account would be an entity indirectly controlled by Congresswoman Kelly.

3 **A. Governance**

4 The first relevant factor is whether Congresswoman Kelly, or her agent, “has the  
5 authority or ability to direct or participate in the governance of the [non-federal account]  
6 through provisions of constitutions, bylaws, contracts, or other rules, or through formal or  
7 informal practices or procedures.” 11 C.F.R. § 300.2(c)(2)(ii). Authority under bylaws  
8 to appoint those who oversee an entity, such as a board of directors, is relevant to this  
9 element. *See* Advisory Opinion 2016-02 (Enable Midstream Services) at 7 (finding  
10 authority to appoint 25 percent corporate board members weighed in favor of finding  
11 affiliation but did not weigh heavily given low percentage of membership). Here,  
12 Congresswoman Kelly has authority under the bylaws to appoint all officers of the  
13 central committee, which governs the state party and its non-federal account. AOR013.  
14 The bylaws also grant her exclusive authority to appoint members of standing  
15 committees, including the proposed special committee. AOR014. Although the bylaws  
16 would be amended to remove her direct authority to oversee the non-federal account,  
17 AOR007, Congresswoman Kelly would retain authority over the governance of the non-  
18 federal account through the appointment of central committee officers and special  
19 committee members. Accordingly, this factor weighs in favor of finding that  
20 Congresswoman Kelly indirectly controls the non-federal account.

21 **B. Personnel**

22 The second relevant factor is whether Congresswoman Kelly, or her agent, “has  
23 the authority or ability to hire, appoint, demote, or otherwise control the officers, or other

1 decision-making employees or members of the” non-federal account. 11 C.F.R.  
2 § 300.2(c)(2)(iii). The bylaws grant Congresswoman Kelly authority to “appoint and  
3 dismiss any and all personnel or staff of the Central Committee.” AOR013. As  
4 discussed for the previous factor, she also has authority to appoint all officers of the  
5 central committee and members of any special committee. AOR013-014. Under this  
6 option, the bylaws would be amended to prevent Congresswoman Kelly from supervising  
7 the work of any central committee officer or employee with respect to that person’s work  
8 on non-federal account matters, and she would further be prohibited from terminating an  
9 employee’s employment or otherwise taking adverse action based on an employee’s work  
10 on such matters. AOR007. However, Congresswoman Kelly would retain the general  
11 authority granted by the bylaws to hire staff and appoint officers who may work on the  
12 non-federal account and to dismiss and discipline staff who work on the non-federal  
13 account for reasons unrelated to their non-federal account work. AOR013. Given the  
14 general control that Congresswoman Kelly has over state party personnel and officers in  
15 her role as chair, this factor weighs in favor of finding that Congresswoman Kelly would  
16 exercise indirect control over the state party’s non-federal account under this option.

17 **C. Provision of Funds or Goods or Arranging Provision of Funds or**  
18 **Goods**

19 The third and fourth relevant factors are whether Congresswoman Kelly, or her  
20 agent, “provides funds or goods in a significant amount or on an ongoing basis to the  
21 [non-federal account], such as through direct or indirect payments for administrative,  
22 fundraising, or other costs,” 11 C.F.R. § 300.2(c)(2)(vii), or “causes or arranges for funds

1 in a significant amount or on an ongoing basis to be provided to the [non-federal  
2 account],” *Id.* § 300.2(c)(2)(viii).

3           Congresswoman Kelly would not make contributions or transfers to the non-  
4 federal account from her personal funds or her congressional campaign account and  
5 would not solicit or receive funds on behalf of the non-federal account; AOR007; AOR  
6 Supp. at 001. Accordingly, Congresswoman Kelly would not provide funds or goods or  
7 cause funds or goods to be provided in a significant amount or on an ongoing basis to the  
8 non-federal account. These factors weigh against finding that Congresswoman Kelly  
9 finances the non-federal account.

10           **D.     Formation**

11           The fifth relevant factor is whether Congresswoman Kelly, or her agent, “had an  
12 active or significant role in the formation of the [non-federal account].” 11 C.F.R.  
13 § 300.2(c)(2)(ix). Because the non-federal account “long predates” Congresswoman  
14 Kelly’s election as chair, AOR004 n.20, this factor weighs against finding that  
15 Congresswoman Kelly established the non-federal account.

16           **E.     Overall Relationship**

17           The Commission considers the foregoing factors in light of the “overall  
18 relationship between sponsor and the entity to determine whether the presence of any  
19 factor or factors is evidence that the sponsor directly or indirectly established, finances,  
20 maintains, or controls the entity.” 11 C.F.R. § 300.2(c)(2). Here, Congresswoman Kelly  
21 was elected chair of the central committee, which governs both the federal and non-  
22 federal accounts of the state party. AOR001, AOR011. Although option one attempts to  
23 insulate the congresswoman from the solicitation and spending of soft money through the

1 non-federal account, Congresswoman Kelly would retain significant authority over the  
2 governance of the state party and its non-federal account through her authority to appoint  
3 officers and special committee members under the bylaws and would also retain  
4 personnel authority over the officers and staff working on the non-federal account for  
5 their work on other matters. AOR013-014. As a result, she would continue to have  
6 indirect control over the non-federal account under this option. Therefore, the non-  
7 federal account would be prohibited from soliciting, receiving, directing, transferring, or  
8 spending funds in excess of the Act's contribution limits and from prohibited sources.

9 *1a. If not, would option one be sufficient if the bylaws provided that a majority*  
10 *of special committee members would not be appointed to the special committee by the*  
11 *chair, but instead would automatically be members of the committee by virtue of holding*  
12 *a specific office not appointed by the chair (e.g., President or Minority Leader of the*  
13 *Illinois State Senate, or the Speaker or Minority Leader of the Illinois House of*  
14 *Representatives, as applicable)?*

15 No. Amending the bylaws to require that a majority of special committee  
16 members be automatically included because they hold specific offices would reduce the  
17 amount of control that Congresswoman Kelly exercises over the special committee. *See*  
18 *Advisory Opinion 2016-02 (Enable Midstream Services) at 7 (authority to appoint 25*  
19 *percent of members a corporate board weighed in favor of finding affiliation but did not*  
20 *weigh heavily given the low percentage of board members). However, this single change*  
21 *would be insufficient to determine that Congresswoman Kelly no longer exercises*  
22 *indirect control over the non-federal account. Because Congresswoman Kelly would*  
23 *retain authority to appoint the remaining members of the special committee and officers*

1 of the central committee and would continue to have the same degree of personnel  
2 control over officers and staff working on the non-federal account, as discussed in  
3 response to question one, and given her overall relationship with the state party, she  
4 would continue to exercise indirect control over the non-federal account under this  
5 option.

6           2.       *Would option two be sufficient to permit Congresswoman Kelly to serve in*  
7 *her position as chair of the central committee without precluding the state party from*  
8 *raising and spending non-federal funds through the non-federal account?*

9           No. Congresswoman Kelly would continue to exercise indirect control over the  
10 non-federal account under option two. The only difference between options one and two  
11 is that under option two, a vice chair would administer the non-federal account and have  
12 “complete responsibility for the [non-federal account]’s operations and activities, without  
13 the review or approval of Congresswoman Kelly,” instead of the non-federal account  
14 being administered by a special committee as under option one. AOR007-008. Under  
15 the central committee bylaws, the vice chair is appointed by the chair. AOR013.

16 Congresswoman Kelly would continue to retain control over the appointment of state  
17 party officers, including the vice chair, who would be charged with overseeing the non-  
18 federal account and would retain the same personnel control over staff and officers of the  
19 central committee as under option one. Accordingly, Congresswoman Kelly would  
20 continue to exercise indirect control over the non-federal account under this option.

21           3.       *Would option three be sufficient to permit Congresswoman Kelly to serve*  
22 *in her position as chair of the central committee without precluding the state party from*  
23 *raising and spending non-federal funds through the non-federal account?*

1           No. Under this option, Congresswoman Kelly would continue to exercise control  
2 over the governance of the state party and personnel control over the officers and staff  
3 operating the non-federal account in the same manner as under the other options.  
4 AOR008. Accordingly, Congresswoman Kelly would continue to exercise indirect  
5 control over the non-federal account under option three.

6           In conclusion, under each of the three proposed options, Congresswoman Kelly  
7 would retain significant authority over the governance of the state party and its non-  
8 federal account through her role as chair of the central committee and her authority to  
9 appoint officers under the bylaws and would also retain personnel authority over the  
10 officers and staff working on the non-federal account for their work on other matters.  
11 Accordingly, she would continue to exert indirect control over the non-federal account  
12 under all three options. As a result, the non-federal account would be prohibited from  
13 soliciting, receiving, directing, transferring, or spending funds in excess of the Act's  
14 contribution limits and from prohibited sources under any of the proposed options.

15           4.     *If the Commission finds that one of the three options is sufficient to permit*  
16 *Congresswoman Kelly to serve in her position as chair without precluding the state party*  
17 *from raising and spending non-federal funds through the non-federal account, could the*  
18 *chair be included on state party letterhead for solicitations on behalf of the non-federal*  
19 *account, or would the state party be required to have separate letterheads for the federal*  
20 *and non-federal accounts?*

21           This question is moot given the Commission's answers to questions one through  
22 three.



