

## **PUBLIC COMMENTS ON DRAFT ADVISORY OPINIONS**

Members of the public may submit written comments on draft advisory opinions.

DRAFT ADVISORY OPINION 2012-03 is now available for comment. It was requested by Barry A. Bostrom, Esq., on behalf of ActRight, and is scheduled to be considered by the Commission at its public meeting on March 1, 2012. The meeting will begin at 10:00 a.m. and will be held in the 9<sup>th</sup> Floor Hearing Room at the Federal Election Commission, 999 E Street, NW, Washington, DC. Individuals who plan to attend the public meeting and who require special assistance, such as sign language interpretation or other reasonable accommodations, should contact the Commission Secretary, at (202) 694-1040, at least 72 hours prior to the meeting date.

If you wish to comment on DRAFT ADVISORY OPINION 2012-03, please note the following requirements:

- 1) Comments must be in writing, and they must be both legible and complete.
- 2) Comments must be submitted to the Office of the Commission Secretary by hand delivery or fax ((202) 208-3333), with a duplicate copy submitted to the Office of General Counsel by hand delivery or fax ((202) 219-3923).
- 3) Comments must be received by noon (Eastern Time) on February 29, 2012.
- 4) The Commission will generally not accept comments received after the deadline. Requests to extend the comment period are discouraged and unwelcome. An extension request will be considered only if received before the comment deadline and then only on a case-by-case basis in special circumstances.
- 5) All timely received comments will be made available to the public at the Commission's Public Records Office and will be posted on the Commission's website at <http://saos.nictusa.com/saos/searchao>.

## **REQUESTOR APPEARANCES BEFORE THE COMMISSION**

The Commission has implemented a pilot program to allow advisory opinion requestors, or their counsel, to appear before the Commission to answer questions at the open meeting at which the Commission considers the draft advisory opinion. This program took effect on July 7, 2009.

Under the program:

- 1) A requestor has an automatic right to appear before the Commission if any public draft of the advisory opinion is made available to the requestor or requestor's counsel less than one week before the public meeting at which the advisory opinion request will be considered. Under these circumstances, no advance written notice of intent to appear is required. This one-week period is shortened to three days for advisory opinions under the expedited twenty-day procedure in 2 U.S.C. 437f(a)(2).
- 2) A requestor must provide written notice of intent to appear before the Commission if all public drafts of the advisory opinion are made available to requestor or requestor's counsel at least one week before the public meeting at which the Commission will consider the advisory opinion request. This one-week period is shortened to three days for advisory opinions under the expedited twenty-day procedure in 2 U.S.C. 437f(a)(2). The notice of intent to appear must be received by the Office of the Commission Secretary by hand delivery, email ([Secretary@fee.gov](mailto:Secretary@fee.gov)), or fax ((202) 208-3333), no later than 48 hours before the scheduled public meeting. Requestors are responsible for ensuring that the Office of the Commission Secretary receives timely notice.
- 3) Requestors or their counsel unable to appear physically at a public meeting may participate by telephone, subject to the Commission's technical capabilities.
- 4) Requestors or their counsel who appear before the Commission may do so only for the limited purpose of addressing questions raised by the Commission at the public meeting. Their appearance does not guarantee that any questions will be asked.

**FOR FURTHER INFORMATION**

Press inquiries: Judith Ingram  
Press Officer  
(202) 694-1220

Commission Secretary: Shawn Woodhead Werth  
(202) 694-1040

Comment Submission Procedure: Kevin Deeley  
Acting Associate General Counsel  
(202) 694-1650

Other inquiries:

To obtain copies of documents related to Advisory Opinion 2012-03, contact the Public Records Office at (202) 694-1120 or (800) 424-9530, or visit the Commission's website at <http://saos.nictusa.com/saos/searchao>.

**ADDRESSES**

Office of the Commission Secretary  
Federal Election Commission  
999 E Street, NW  
Washington, DC 20463

Office of General Counsel  
ATTN: Kevin Deeley, Esq.  
Federal Election Commission  
999 E Street, NW  
Washington, DC 20463

**AGENDA DOCUMENT NO. 12-16**



FEDERAL ELECTION COMMISSION  
Washington, DC 20463

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February 24, 2012

**AGENDA ITEM**

**MEMORANDUM**

TO: The Commission

FROM: Anthony Herman *AH*  
General Counsel

Kevin Deeley *KD*  
Acting Associate General Counsel

Robert M. Knop *RMK by NFS*  
Assistant General Counsel

Neven F. Stipanovic *NFS*  
Attorney

David C. Adkins *DCA by NFS*  
Attorney

Subject: Draft AO 2012-03 (ActRight)

For Meeting of 3-1-12

**SUBMITTED LATE**

Attached is a proposed draft of the subject advisory opinion. We have been asked to have this draft placed on the Open Session agenda for March 1, 2012.

Attachment

1 ADVISORY OPINION 2012-03

2  
3 Barry A. Bostrom, Esq.

4 General Counsel

5 ActRight

6 2524 N. 8<sup>th</sup> Street

7 Terre Haute, IN 47804-1811

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**DRAFT**

9 Dear Mr. Bostrom:

10 We are responding to your advisory opinion request on behalf of ActRight,  
11 concerning the application of the Federal Election Campaign Act (the "Act") and  
12 Commission regulations to ActRight's proposed plan to solicit and forward unlimited  
13 contributions earmarked for nonconnected political committees that make only  
14 independent expenditures or earmarked for a nonconnected political committee's non-  
15 contribution account used to finance independent expenditures<sup>1</sup> (collectively "Recipient  
16 Committees").

17 The Commission concludes, subject to the conditions and representations  
18 described below, that ActRight may solicit unlimited contributions earmarked for the  
19 Recipient Committees and forward them to the Recipient Committees.

20 ***Background***

21 The facts presented in this advisory opinion are based on your letter received on  
22 January 18, 2012.

23 ActRight is a nonconnected political committee that is registered with the  
24 Commission. Through its website, ActRight.com, it solicits contributions earmarked for  
25 Federal candidates and then forwards them to the treasurer of candidate's authorized

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<sup>1</sup> See Press Release, FEC Statement on *Carey v. FEC*: Reporting Guidance for Political Committees that Maintain a Non-Contribution Account (Oct. 5, 2011), <http://www.fec.gov/press/Press2011/20111006postcarey.shtml>.

1 committee. ActRight now plans to solicit, through the same website, unlimited  
2 contributions earmarked for the Recipient Committees.<sup>2</sup>

3 Donors will select the political committees to which they wish to contribute by  
4 going to the ActRight website and clicking the “donate” button next to the name of the  
5 political committee. Donors will then complete the website donation form that will  
6 include a request for all required contributor information and disclaimers.

7 ActRight will deposit the contributions earmarked for the Recipient Committees  
8 into a bank account separate from its account that contains contributions earmarked for  
9 Federal candidates and then forward them to the Recipient Committees. ActRight will  
10 not exercise any direction or control over the earmarked funds.

11 ActRight will forward the contributions and all necessary contributor information  
12 to the Recipient Committees according to the requirements of 11 CFR 102.8(b).

13 ActRight will also report all of its non-contribution account activity related to  
14 contributions earmarked for the Recipient Committees according to guidance the  
15 Commission has issued. See Press Release, FEC Statement on *Carey v. FEC*: Reporting  
16 Guidance for Political Committees that Maintain a Non-Contribution Account (Oct. 5,  
17 2011), <http://www.fec.gov/press/Press2011/20111006postcarey.shtml>.

18 ***Question Presented***

19 *May ActRight solicit and accept unlimited contributions from individuals,*  
20 *political committees, corporations, and labor organizations, into a non-contribution*

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<sup>2</sup> ActRight would not solicit or accept funds from foreign nationals, Federal contractors, national banks or corporations organized by authority of any law of Congress.

1 *account and then forward the contributions earmarked for Recipient Committees to those*  
2 *earmarked Recipient Committees?*

3 ***Legal Analysis and Conclusions***

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5 Yes, ActRight may solicit unlimited contributions earmarked for Recipient  
6 Committees and forward them to the earmarked Recipient Committees subject to the  
7 conditions and representations described below.

8 The Act and Commission regulations require any person who receives  
9 contributions on behalf of unauthorized committees to forward the contributions it  
10 receives, along with certain contributor information, to the treasurers of the unauthorized  
11 committees in a timely manner. 2 U.S.C. 432(b)(2); 11 CFR 102.8(b). Any person who  
12 receives a contribution in excess of \$50 on behalf of an unauthorized committee must  
13 forward the contribution, as well as the contributor's name, address, and receipt date, to  
14 the treasurer no later than ten days after receipt. 2 U.S.C. 432(b)(2)(B); 11 CFR  
15 102.8(b)(2). If the contribution exceeds \$200, the contributor's employer and occupation  
16 also must be forwarded. 11 CFR 102.8(b)(2). Contributions of \$50 or less to  
17 unauthorized committees must be forwarded within thirty days (with no information  
18 forwarding requirement). 2 U.S.C. 432(b)(2)(A); 11 CFR 102.8(b)(1).

19 ActRight would be receiving contributions earmarked for political committees  
20 that are not authorized committees of any candidates. As such, ActRight would have the  
21 duty to forward the contributions it receives, along with the required contributor  
22 information, to the treasurers of the Recipient Committees within the time frames  
23 required by 11 CFR 102.8(b). ActRight states that it will forward all contributions and

1 the information required by the Act and Commission regulations to the Recipient

2 Committees within the time constraints of the Commission's regulations.

3       Because the contributions would not be intended for ActRight to use for its own  
4 purposes, and ActRight would not have any direction or control over the earmarked  
5 funds, ActRight would not need to report the earmarked contributions as contributions to  
6 ActRight. *See e.g.*, Advisory Opinion 1996-18 (International Association of Fire  
7 Fighters) (finding that a conduit was not accepting or making contributions because funds  
8 placed in a separate conduit account remained in the control of the individual  
9 contributor). However, because the earmarked contributions would be deposited into  
10 ActRight's non-contribution account, ActRight would have to report them as "Other  
11 Federal Receipts" on Line 17 of Form 3X with an explanation that they are earmarked by  
12 the contributors for noncandidate political committees. In addition, when the funds are  
13 distributed, ActRight would have to report the disbursements as "Other Disbursements"  
14 on Line 29 of Form 3X. *See* Advisory Opinion 1981-57 (Coal Miners PAC); Advisory  
15 Opinion 1983-18 (Stop and Shop); Press Release, FEC Statement on *Carey v. FEC*:  
16 Reporting Guidance for Political Committees that Maintain a Non-Contribution Account  
17 (Oct. 5, 2011), <http://www.fec.gov/press/Press2011/20111006postcarey.shtml>.

18       ActRight plans to forward funds from its separate non-contribution account  
19 containing contributions of unlimited amounts from individuals, as well as from  
20 corporations and labor organizations, to earmarked Recipient Committees. That plan is  
21 permissible because the Recipient Committees are permitted to receive such  
22 contributions. *See EMILY's List v. FEC*, 581 F.3d 1, 12 (D.C. Cir. 2009);  
23 *SpeechNow.org v. FEC*, 599 F.3d 686, 696 (D.C. Cir. 2010) (*en banc*) (striking down

1 limitations on contributions from individuals to groups that make only independent  
2 expenditures); *Carey v. FEC*, 791 F. Supp. 2d 121, 131 (D.D.C. 2011); Press Release,  
3 FEC Statement on *Carey v. FEC*: Reporting Guidance for Political Committees that  
4 Maintain a Non-Contribution Account (Oct. 5, 2011),  
5 <http://www.fec.gov/press2011/20111006postcarey.shtml>; *see also* Advisory Opinion  
6 2010-11 (Commonsense Ten) (independent expenditure-only committees may receive  
7 unlimited contributions from corporations and labor organizations).<sup>3</sup>

8 In sum, the Commission concludes that ActRight may solicit earmarked  
9 contributions and forward them to the earmarked Recipient Committees consistent with  
10 the foregoing conditions and representations.

11 This response constitutes an advisory opinion concerning the application of the  
12 Act and Commission regulations to the specific transaction or activity set forth in your  
13 request. *See* 2 U.S.C. 437f. The Commission emphasizes that, if there is a change in any  
14 of the facts or assumptions presented, and such facts or assumptions are material to a  
15 conclusion presented in this advisory opinion, then the requestors may not rely on that  
16 conclusion as support for its proposed activity. Any person involved in any specific  
17 transaction or activity which is indistinguishable in all its material aspects from the  
18 transaction or activity with respect to which this advisory opinion is rendered may rely on  
19 this advisory opinion. *See* 2 U.S.C. 437f(c)(1)(B). Please note the analysis or  
20 conclusions in this advisory opinion may be affected by subsequent developments in the  
21 law including, but not limited to, statutes, regulations, advisory opinions, and case law.

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<sup>3</sup> The Commission notes that this advisory opinion implicates issues that may also be the subject of a forthcoming Commission rulemaking in light of recent court rulings in *SpeechNow.org v. FEC*, 599 F.3d 686 (D.C. Cir. 2010) and *EMILY's List v. FEC*, 581 F.3d 1 (D.C. Cir. 2009).

1 The cited advisory opinions are available on the Commission's Web site at,  
2 www.fec.gov, or directly from the Commission's Advisory Opinion searchable database  
3 at http://www.fec.gov/searchao.

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On behalf of the Commission,

Caroline C. Hunter  
Chair