

PUBLIC COMMENTS ON DRAFT ADVISORY OPINIONS

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

DRAFT B of ADVISORY OPINION 2012-27 is now available for comment. It was requested by Benjamin T. Barr, Esq., Dan Backer, Esq., and Allen Dickerson, Esq., on behalf of National Defense Committee, and is scheduled to be considered by the Commission at its public meeting on August 23, 2012. The meeting will begin at approximately 11:30 a.m. and will be held in the 9th 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.

If you wish to comment on DRAFT B of ADVISORY OPINION 2012-27, 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 9 a.m. (Eastern Time) on August 23, 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), 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 2012-27, 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



FEDERAL ELECTION COMMISSION
Washington, DC 20463

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August 22, 2012

MEMORANDUM

AGENDA ITEM

TO: The Commission

FROM: Anthony Herman *AN*
General Counsel

Kevin Deeley *KD*
Acting Associate General Counsel

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Attorney

Subject: AO 2012-27 (National Defense Committee) (Draft B)

For Meeting of 8/23/12

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 August 23, 2012.

Attachment

1 ADVISORY OPINION 2012-27

2

3 Benjamin T. Barr, Esq.

4 Dan Backer, Esq.

5 Allan Dickerson, Esq.

6 National Defense Committee

7 6022 Knights Ridge Way

8 Alexandria, VA 22310

9

10 Dear Messrs. Barr, Backer, and Dickerson:

DRAFT B

11 We are responding to your advisory opinion request on behalf of the National Defense
12 Committee (“NDC”), concerning the application of the Federal Election Campaign Act, as
13 amended (the “Act”), and Commission regulations to NDC’s proposed plan to finance certain
14 advertisements and ask for donations to fund its activities.

15 The Commission concludes that four of NDC’s seven proposed advertisements would
16 expressly advocate the election or defeat of a clearly identified Federal candidate and three
17 would not; and two of the four proposed donation requests would be solicitations for
18 contributions under the Act and two would not. The Commission does not have sufficient facts
19 to determine whether NDC must register and report with the Commission as a political
20 committee.

21 ***Background***

22 The facts presented in this advisory opinion are based on your letter and email received
23 on July 26, 2012.

24 NDC is incorporated as a non-profit social welfare organization in the Commonwealth of
25 Virginia. It is exempt from taxation under section 501(c)(4) of the Internal Revenue Code.
26 26 U.S.C. 501(c)(4). NDC focuses on issues that impact war veterans, veterans’ affairs, national
27 defense, homeland security, and national security.

1 NDC states that it is not under the control of any candidate. NDC also states that it will
2 not make any contributions to Federal candidates, political parties, or political committees that
3 make contributions to Federal candidates or political parties, and is not affiliated with any group
4 that makes contributions. NDC states that it will not make any coordinated expenditures; its
5 bylaws prohibit its members, officers, employees, and agents from engaging in activities that
6 could result in coordination with a Federal candidate or political party. Bylaws, art. VI, sec. 3
7 NDC also states that it will not accept any contributions from foreign nationals or Federal
8 contractors.

9 NDC plans to run seven advertisements, which it describes as “discuss[ing] public issues
10 relevant to upcoming Federal elections, military voting, and policy positions of candidates for
11 federal office that relate to National Defense’s core mission.” NDC will run these
12 advertisements on a variety of online and social media platforms. The advertisements, described
13 in the response to Question 1 below, will be in video format, and will include still photos, basic
14 animation, and voice-overs. NDC plans to spend just over \$3,000 to produce and distribute these
15 communications, of which \$2,000 will be paid to a production company, and \$1,000 will be used
16 to distribute the advertisements on the Internet. The production company will be responsible for
17 creating the video format.

18 NDC also plans to ask for donations from individuals through four separate donation
19 requests, which are described in the response to Question 2 below. NDC states that it has a
20 larger budget to fund activities that are “dissimilar” to the activities described in its advisory
21 opinion request, but that it is “unable to provide any details” about its overall budget or its other
22 activities.

23

1 ***Questions Presented***¹

2 (1) Will any of NDC's proposed speech constitute "express advocacy" and be subject to
3 regulation?

4
5 (2) Will any of NDC's donation communications be deemed "solicitations" and subject
6 to regulation?

7
8 (3) Will any of the activities described trigger the requirement to register and be
9 regulated as a "political committee"?

10

11 ***Legal Analysis and Conclusions***

12

13 *Question 1. Will any of NDC's proposed speech constitute "express advocacy" and be subject*
14 *to regulation?*

15

16 Yes, the Commission concludes that NDC's "Let's Make History," "ObamaCare,"

17 "Military Voting Matters," and "Military Voting Hindered" advertisements are express advocacy

18 under 11 CFR 100.22, but that NDC's "Ethically Challenged," "Stop the Liberal Agenda," and

19 "Don't Trust Harry Reid" advertisements are not express advocacy under 11 CFR 100.22.

20 Under the Commission's regulations, a communication expressly advocates the election
21 or defeat of a clearly identified Federal candidate if it

22 [u]ses phrases *such as* 'vote for the President,' 're-elect your Congressman,'

23 'support the Democratic nominee,' 'cast your ballot for the Republican challenger

24 for U.S. Senate in Georgia, 'Smith for Congress,' 'Bill McKay in '94,' 'vote Pro-

25 Life' or 'vote Pro-Choice' accompanied by a listing of clearly identified

26 candidates described as Pro-Life or Pro-Choice, 'vote against Old Hickory,'

¹ The Commission does not directly address an additional question posed by NDC: "Will the Commission continue to apply and enforce 11 CFR 100.22(b)?" This is a "general question of interpretation" and, as such, it "do[es] not qualify as [an] advisory opinion request." 11 CFR 112.1(b). The Office of General Counsel timely notified NDC of this issue pursuant to 11 CFR 112.1(d). Nonetheless, the answer to this question is apparent from the answer to Question 1, in which the Commission applies 11 CFR 100.22(b). Moreover, as a general matter, the Commission is bound to apply its properly promulgated rules unless they are found to be contrary to the Act or the Constitution. See *Chamber of Commerce v. FEC*, 69 F.3d 600, 603 (D.C. Cir. 1995) (explaining that failure to enforce its rules would constitute agency action "contrary to law").

1 'defeat' accompanied by a picture of one or more candidate(s), 'reject the
2 incumbent,' or communications of campaign slogan(s) or individual word(s),
3 which in context, can have no other reasonable meaning than to urge the election
4 or defeat of one or more clearly identified candidate(s), such as posters, bumper
5 stickers, advertisements, etc. which say 'Nixon's the One,' 'Carter '76,'
6 'Reagan/Bush' or 'Mondale!'.
7

11 CFR 100.22(a) (emphasis added).

8 Under the Commission's regulations, a communication also constitutes express advocacy
9 if "[w]hen taken as a whole and with limited reference to external events, such as the proximity
10 to the election, could only be interpreted by a reasonable person as containing advocacy of the
11 election or defeat of one or more clearly identified candidate(s) because— (1) [t]he electoral
12 portion of the communication is unmistakable, unambiguous, and suggestive of only one
13 meaning; and (2) [r]easonable minds could not differ as to whether it encourages actions to elect
14 or defeat one or more clearly identified candidate(s) or encourages some other kind of action."

15 11 CFR 100.22(b); *see also The Real Truth About Abortion, Inc. v. FEC*, 681 F.3d 544 (4th Cir.
16 2012) (upholding the constitutionality of 11 CFR 100.22(b)).

17 *A. "Let's Make History" Advertisement*

18 America needs a strong military capable of meeting the threats of
19 tomorrow. But Nydia Velazquez repeatedly introduced and
20 supported bills like HR 3638 that would cut off funding for
21 frontline troops. Rather than standing up for America, Nydia
22 Velazquez has been one of the least effective members of
23 Congress. This fall, let's make history by changing that. Protect
24 our freedom. Defend our nation. Learn about HR 3638.
25

26 The "Let's Make History" advertisement contains express advocacy under 11 CFR
27 100.22(b). It criticizes a clearly identified Federal candidate, Nydia Velazquez, as "one of the

1 least effective members of Congress” and urges viewers to “make history by changing that” “this
2 fall.” As such, the communication contains an unmistakable and unambiguous electoral portion
3 that is suggestive of only one meaning, and reasonable minds could not differ regarding the
4 meaning of the action the advertisement encourages: defeating Nydia Velazquez “this fall.” The
5 fact that the advertisement is marginally less direct than “Vote against Velazquez” does not
6 change its essential nature. *See, e.g., FEC v. Mass. Citizens For Life (“MCFL”), 479 U.S. 238,*
7 *249 (1986).*

8 The final sentence – “Learn about HR 3638” – does not alter this conclusion: The
9 advertisement contains two different statements directed at the viewer with two different calls to
10 action: (1) “This fall, let’s make history by changing that” and (2) “Learn about HR 3638.”
11 These two different statements make two different points, and the addition of the statement,
12 “Learn about HR 3638,” does not negate the fact that the advertisement contains express
13 advocacy under 11 CFR 100.22(b). *See MCFL, 479 U.S. at 249 (holding that “disclaimer”*
14 *stating that “[t]his special election edition does not represent an endorsement of any particular*
15 *candidate” does not “negate [the] fact” that the flyer contains express advocacy).*

16 *B. “Ethically Challenged” Advertisement*

17 Nydia Velazquez. Ethically challenged. A key supporter of the
18 Troubled Asset Relief Program. Calls bailed-out Wall Street
19 greedy one day, but takes hundreds of thousands from it the next.
20 A leader you can believe in? Call Nydia Velazquez and let’s make
21 sure we end the bailouts that bankrupt America.
22

23 The “Ethically Challenged” advertisement does not contain express advocacy under
24 11 CFR 100.22. Although the advertisement attacks the character of a clearly identified Federal
25 candidate (Nydia Velazquez), it contains no unmistakable and unambiguous electoral reference
26 and a reasonable mind could conclude that the ads encourage action against “bailouts.” 11

1 C.F.R. 100.22(b). The rhetorical question regarding Representative Velazquez's credibility as a
2 leader, in and of itself, is not an unmistakable and unambiguous electoral reference in the context
3 of the advertisement considered as a whole.²

4 C. "ObamaCare" Advertisement

5 Nancy Pelosi and ObamaCare, what a pair! Even though most
6 Americans opposed ObamaCare, Pelosi maintained her support of
7 socialized medicine. But we can't let ObamaCare win. Our proud
8 patriotic voices must stand against ObamaCare and vote socialized
9 medicine out. Support conservative voices and public servants
10 ready to end ObamaCare's reign.

11
12 The "ObamaCare" advertisement contains express advocacy under 11 CFR 100.22(a). It
13 is similar to the flyer at issue in *MCFL*, which the Supreme Court concluded was express
14 advocacy. That flyer contained the phrase "EVERYTHING YOU NEED TO KNOW TO VOTE
15 PRO-LIFE" and exhorted readers to "VOTE PRO-LIFE" after identifying candidates who were
16 pro-life. Here, the "ObamaCare" advertisement points out that a clearly identified Federal
17 candidate (Nancy Pelosi) supports ObamaCare, which the ad characterizes as "socialized
18 medicine," and urges the audience to "vote socialized medicine out" and "support conservative
19 voices and public servants ready to end ObamaCare's reign." The ad also tells that audience
20 that, "we can't let ObamaCare win." Such formulations are explicit directives to vote against
21 Representative Pelosi. See 11 C.F.R. 100.22(a) (express advocacy includes, *inter alia*, phrases
22 such as "vote for" or "vote against" a clearly identified candidate, and phrases advocating a

² This rhetorical question does not, so far as the Commission is aware, "co-opt" Representative Velazquez's campaign slogan. Cf. *The Real Truth About Obama, Inc. v. FEC*, 796 F. Supp. 2d 736, 750 (E.D. Va. 2011), *aff'd sub nom. The Real Truth About Abortion, Inc. v. FEC*, 681 F.3d 544 (4th Cir. 2012). Thus, it differs from the "Change" advertisement in *The Real Truth About Abortion*, in which an "Obama-like voice" discussed "Change" and a woman's voice asked facetiously, "Is this the change you can believe in?" See *The Real Truth About Abortion, Inc. v. FEC*, 681 F.3d 544, 546 (4th Cir. 2012). The District Court found that the Commission could constitutionally determine the advertisement to be express advocacy under 11 CFR 100.22(b), noting that the tag line "co-opts" Obama's campaign slogan of "Change." The communication here does not appear to use a campaign motto.

1 “vote” in favor or against a specific policy and expressly describing a clearly identified candidate
2 as supporting or opposing that policy). “The fact that this message is marginally less direct than
3 ‘Vote for Smith’ does not change its essential nature.” *MCFL*, 479 U.S. at 249; *see also*
4 Advisory Opinion 2012-11 (Free Speech) (analyzing the “Financial Reform” advertisement).

5 *D. “Military Voting Matters” Advertisement*

6 Military voting matters. That’s why Nancy Pelosi is such a
7 disappointment for service men and women. Instead of supporting
8 express delivery of overseas military ballots, Pelosi favored
9 sluggish postal unions. Shouldn’t military voices and votes
10 matter? Shouldn’t yours? Be heard this fall.
11

12 The “Military Voting Matters” advertisement contains express advocacy under 11 CFR
13 100.22(b). It criticizes a clearly identified Federal candidate (Nancy Pelosi) for being a
14 “disappointment for service men and women” because she favors “sluggish postal unions” rather
15 than supporting “express delivery of overseas military ballots.” The advertisement then says that
16 “military voting matters,” asks, “Shouldn’t military voices and votes matter?” and “Shouldn’t
17 yours?” and finally urges the viewer to “[b]e heard this fall.”

18 Urging viewers to “[b]e heard this fall” through their “voices and votes” constitutes an
19 electoral portion of the advertisement that is unmistakable, unambiguous, and suggestive of only
20 one meaning. 11 C.F.R. 100.22(b)(1). Reasonable minds could not differ that the advertisement
21 exhorts the viewer to “be heard” by voting against Representative Pelosi. The fact that this
22 message is marginally less direct than “Vote against Pelosi” does not change its essential nature.
23 *See, e.g., MCFL*, 479 U.S. at 249 (1986).

24 *E. “Military Voting Hindered” Advertisement*

25 Our heroes on the front lines know that Obama’s assault on
26 America’s military is putting their lives, the care of wounded
27 warriors, and the GI and Veterans’ benefits they were promised at

1 risk. Is that why Obama's Justice Department and Congressional
2 liberals refuse to stand up for military voting rights? Shouldn't
3 those who dodge bullets for our freedom be free to vote their
4 conscience and vote out those who won't keep their promises?
5 Take a stand with us and make sure military voting is taken
6 seriously.
7

8 The "Military Voting Hindered" advertisement contains express advocacy under 11 CFR
9 100.22(b). The advertisement identifies a candidate (President Obama), contends that the
10 candidate's "assault on America's military is . . . putting the GI and Veteran's benefits they were
11 promised at risk," and contains an unmistakable and unambiguous electoral portion ("Shouldn't
12 those who dodge bullets for our freedom be free to vote their conscience and *vote out* those who
13 won't keep their promises?"). In telling viewers to "take a stand with us" by helping military
14 persons "vote out those who won't keep their promises," after accusing the President of putting
15 "promised" military benefits "at risk," the advertisement could only be interpreted as containing
16 advocacy for his defeat. Reasonable minds could not differ that the advertisement encourages
17 viewers to help others "vote their conscience and vote out" President Obama. The fact that this
18 message is marginally less direct than "Vote against Obama" does not change its essential
19 nature. *See, e.g., FEC v. Massachusetts Citizens For Life ("MCFL")*, 479 U.S. 238, 249 (1986).

20 The fact that the final sentence also urges viewers to "make sure military voting is taken
21 seriously" does not alter this conclusion. Although the advertisement also contains advocacy
22 regarding the issue of military voting, that does not negate the fact that the advertisement
23 "contain[s]" express advocacy under 11 CFR 100.22(b). *See MCFL*, 479 U.S. at 249 (holding
24 that "disclaimer" stating that "[t]his special election edition does not represent an endorsement of
25 any particular candidate" does not "negate [the] fact" that the flyer contains express advocacy).

26 *F. "Stop the Liberal Agenda" Advertisement*

1 Harry Reid: Willing to put America's service men and women at
2 risk through his risky sequestration gamble. Willing to put politics
3 above common sense and protecting the men and women who
4 defend our nation. Stop the insanity, stop sequestrations, stop
5 Reid's twisted liberal agenda. This fall, get educated about Harry
6 Reid, get engaged, and get active.
7

8 The "Stop the Liberal Agenda" advertisement does not contain express advocacy under
9 11 CFR 100.22. The advertisement attacks a clearly identified Federal candidate, the Senate
10 Majority Leader (Harry Reid) as "[w]illing to put America's service men and women at risk" and
11 "to put politics above common sense and protecting the men and women who defend our
12 nation." It urges listeners to "stop Reid's twisted liberal agenda" and "get active" "*this* fall."
13 However, because Senator Reid is not on an election ballot "this fall" – he will be on the ballot in
14 2016 but not in 2012 – reasonable minds could differ regarding whether the advertisement
15 encourages action to defeat him in an election or encourages some other kind of action
16 (regarding, for example, sequestration).

17 *G. "Don't Trust Harry Reid" Advertisement*
18

19 What kind of leader is Harry Reid? Ineffective. Ultra-liberal.
20 Unrepresentative of Nevada values. Harry Reid voted for
21 increasing Tricare premiums to nickel and dime America's heroes.
22 Veterans and service men and women know better than to trust
23 Harry Reid. This November: support new voices, support your
24 military, support Nevada values.
25

26 The "Don't Trust Harry Reid" advertisement does not contain express advocacy under 11
27 CFR 100.22. The advertisement criticizes a clearly identified candidate, the Senate Majority
28 Leader (Harry Reid) as "ineffective," "unrepresentative of Nevada values," and not trusted by
29 veterans and service men and women, before urging the listener to "support new voices, support
30 your military, support Nevada values" "[t]his November." Because Senator Reid is not on an
31 election ballot this November – he will be on the ballot in 2016 but not in 2012 – reasonable

1 minds could differ regarding whether the advertisement encourages action to defeat Harry Reid
2 or encourages some other kind of action (regarding, for example, Tricare premiums).

3
4 *Question 2. Will any of NDC's donation communications be deemed "solicitations" and subject*
5 *to regulation?*

6
7 Yes, two of NDC's proposed donation requests – entitled "Military Voices and Votes
8 Must be Heard" and "America the Proud" – will solicit "contributions" as defined in the Act.
9 However, the proposed donation requests entitled "Strategic Stupidity" and "Fighting Back" will
10 not solicit "contributions."

11 The Act defines the term "contribution" to include "any gift, subscription, loan, advance,
12 or deposit of money or anything of value made by any person for the purpose of influencing any
13 election for Federal office." 2 U.S.C. 431(8)(A)(i); *see also* 11 CFR 100.52(a). The Act requires
14 "any person" who "solicits any contribution through any broadcasting station, newspaper,
15 magazine, outdoor advertising facility, mailing, or any other type of general public political
16 advertising" to include a specified disclaimer in the solicitation. 2 U.S.C. 441d(a); *see also* 11
17 CFR 110.11(a)(3). Funds raised from requests that "clearly indicate[] that the contributions will
18 be targeted to the election or defeat of a clearly identified candidate for Federal office" constitute
19 "contributions" under the Act. *FEC v. Survival Educ. Fund*, 65 F.3d 285, 295 (2d Cir. 1995)
20 (analyzing communications for purposes of section 441d(a)).

21 *A. "Military Voices and Votes Must be Heard" Donation Request*

22 Our heroes on the front lines know that Obama's assault on
23 America's military is putting their lives, the care of wounded
24 warriors, and the GI and Veterans benefits they were promised at
25 risk. Is that why Obama's Justice Department & Congressional
26 liberals refuse to stand up for military voting rights? Help those
27 who dodge bullets for our freedom vote their conscience. Support

1 their right to vote out Obama – donate to National Defense so we
2 can stand up for military voting rights this fall.

3
4 The “Military Voices and Votes Must Be Heard” donation request will solicit
5 contributions. It states that funds received will be used to help “those who dodge bullets for our
6 freedom vote their conscience” and urges potential donors to “support their right to *vote out*
7 *Obama* – donate to National Defense so we can stand up for military voting rights this fall.”
8 Although the request states that NDC will “stand up” for military voting rights, it does so solely
9 in the context of supporting the military’s right to “vote out Obama,” thus “clearly indicat[ing]
10 that the contributions will be targeted to the election or defeat of a clearly identified candidate for
11 federal office.” *Survival Educ. Fund*, 65 F.3d at 295. Accordingly, this donation request solicits
12 contributions under the Act. 2 U.S.C. 431(8)(A)(i); *see also Survival Educ. Fund*, 65 F.3d at
13 294-95.

14 B. “*America the Proud?*” Donation Request

15
16 It used to be that America was a nation we could be proud of. But
17 today, an ultra-liberal Congress repeatedly ignores the value of our
18 military. Military voting, ignored. Protecting military benefits,
19 disregarded. Veterans, left out in the cold. And the Commander in
20 Chief sits by. In building a \$1 billion war chest, the Commander
21 in Chief makes sure liberals will win this fall, while crippling the
22 military. Let’s put an end to this nonsense. Donate to National
23 Defense Committee today and let’s roll back the Commander in
24 Chief’s liberal agenda.

25
26 The “America the Proud” donation request will solicit contributions. It states that the
27 Commander in Chief has “built[] a \$1 billion war chest” to “make[] sure liberals will win this
28 fall,” urges potential donors to “put an end to this nonsense,” and requests donations for
29 “roll[ing] back the Commander in Chief’s liberal agenda.” The title “Commander in Chief” is an
30 unambiguous reference to President Obama. *See* 11 CFR 100.17 (defining “clearly identified”).

1 The statement that funds received in response to the request will be used to “roll back his liberal
2 agenda,” in the context of President Obama building a “\$1 billion war chest” to make sure
3 “liberals will win this fall,” clearly indicates that the funds will be targeted to defeat President
4 Obama and “ultra-liberal” Congressional candidates running for election this fall. Accordingly,
5 this donation request solicits “contributions” under the Act. 2 U.S.C. 431(8)(A)(i); *see Survival*
6 *Educ. Fund*, 65 F.3d at 294-95; *cf.* MUR 5511 (Swiftboat Veterans and POWs for Truth),
7 Conciliation Agreement ¶¶ 20-21 (concluding that fundraising communications stating that funds
8 would be used to keep advertisements “on the airwaves in key battleground states” and “help us
9 tell the true story of John Kerry” by “impacting the public discussion surrounding Senator
10 Kerry’s fitness for duties as Commander-in-Chief” and “turning up the volume” on John Kerry’s
11 campaign solicited contributions); MUR 5487 (Progress for America Voter Fund), Conciliation
12 Agreement ¶¶ 22, 26 (concluding that direct mail pieces using the phrase “help us promote
13 President Bush’s agenda in Pennsylvania with the greatest possible strength between now and
14 November 1st” solicited contributions because they “clearly indicate[d] that the funds received
15 would be targeted to the election of President Bush”); MUR 5403 (Americans Coming
16 Together), First General Counsel’s Report at 17 (stating that fundraising communications
17 asserting that the Bush campaign and the Republican National Committee are “keeping their
18 grasp on the White House and winning other critical key House, Senate, and local races” by
19 “amassing a political fortune” and noting funds will be used to “work in places where the Kerry
20 Campaign and the Democratic Party simply don’t have the resources to operate” were
21 solicitations that “promote[d], support[ed], attack[ed], or oppose[d] a clearly identified
22 candidate”).

23 C. “Strategic Stupidity” Donation Request

1
2 Crippling America’s military through sequestration is a strategic
3 failure – and Senate Democrats have supported this insanity! With
4 your dramtion, we can speak out against the liberal dream of
5 ending American Exceptionalism and decimating America’s
6 military. We can stop the Democrats’ madness. Help send a
7 message to misguided Senators like John Tester. Support National
8 Defense, and let’s retire these failed policies.
9

10 The “Strategic Stupidity” donation request will not solicit contributions. It states that
11 donations will be used to “speak out against the liberal dream of ending American
12 Exceptionnism and decimating America’s military” and to “retine these failed plncies.”
13 Although the donation request urges potential donors to “[h]elp send a message to misguided
14 Senators like John Tester,” and to “retire these failed policies,” it does not “clearly indicat[e] that
15 the contributions will be targeted to the election or defeat of a clearly identified candidate for
16 federal office.” *Survival Educ. Fund*, 65 F.3d at 295; *see also* Advisory Opinion 2012-11 (Free
17 Speech) (concluding that the “Strategic Speech” donation request, which also indicated an
18 intention to “speak out against” certain policies with funds raised and “retire failed . . . policies,”
19 was not a solicitation). Accordingly, this donation request is not a solicitation under the Act.

20 D. “*Fighting Back*” Donation Request
21

22 Supporters of traditional constitutional values have celebrated our
23 courts’ defense of freedom, and planned how to make the most
24 effective use of your support this fall. Your donation to National
25 Defense will beat back the liberal Obama agenda and bring about
26 real change in Washington. Help America fight back in print, on
27 the air, and against liberal deep pockets. Stand together. Get
28 organized. Start now.
29

30 The “Fighting Back” donation request will not solicit contributions. Although it states
31 that “this fall” funds requested “will beat back the liberal Obama agenda and bring about real
32 change in Washington,” it does not “clearly indicat[e] that the contributions will be targeted to

1 the election or defeat of a clearly identified candidate for federal office.” *Survival Educ. Fund*,
2 65 F.3d at 294-95. Although President Obama is clearly identified, “fight[ing] back in print, on
3 the air, and against liberal deep pockets” could refer to advocacy regarding legislation or
4 executive branch action rather than the election or defeat of Obama. Accordingly, this donation
5 request is not a solicitation under the Act.

6
7 *Question 3. Will any of the activities described trigger the requirements to register and be*
8 *regulated as a “political committee”?*

9
10 NDC has not provided sufficient facts about its proposed activities to permit the
11 Commission to answer this question and therefore the question is incomplete and thus cannot be
12 considered an advisory opinion request.

13 The Act and Commission regulations define a “political committee” as “any committee,
14 club, association or other group of persons which receives contributions aggregating in excess of
15 \$1,000 during a calendar year or which makes expenditures aggregating in excess of \$1,000
16 during a calendar year.” 2 U.S.C. 431(4)(A); 11 CFR 100.5. The Supreme Court has construed
17 the term “political committee” to encompass only organizations that are “under the control of a
18 candidate or the major purpose of which is the nomination or election of a candidate.” *Buckley*
19 *v. Valeo*, 424 U.S. 1, 79 (1976);³ Accordingly, organizations that satisfy the statutory definition
20 of “political committee” and have as their major purpose the nomination or election of
21 candidates must register as political committees.

³ See also Supplemental Explanation and Justification for Final Rules on Political Committee Status, 72 FR 5595, 5597 (Feb. 7, 2007). Given the recent changes in the restrictions applicable to political committee status, the First Circuit has questioned whether limiting political committee status to those organizations that have a major purpose of federal campaign activity is constitutionally required. See *Nat’l Org. for Marriage v. McKee*, 649 F.3d 34, 59 (1st Cir. 2011) (upholding a state disclosure law as applied to groups that receive or spend over \$5,000 on a candidate’s election even if those groups do not have as their major purpose the election of a candidate).

1 A. *Statutory Definition*

2 As explained in the response to Question 1 above, several of NDC's proposed
3 advertisements contain express advocacy; accordingly, funds spent on these advertisements
4 would be expenditures under the Act and Commission regulations. NDC plans to spend more
5 than \$1,000 this calendar year on these advertisements.⁴ Once it does, it will meet the statutory
6 definition of a political committee. Alternatively, NDC would meet the statutory definition of
7 political committee once it receives more than \$1,000 in a calendar year in response to the
8 "America the Proud" fundraising appeal, which the Commission has concluded is a solicitation
9 of contributions. *See supra* Question 2.

10 B. *Major Purpose*

11 To determine an entity's "major purpose," the Commission considers a group's "overall
12 conduct," including statements about its mission, the proportion of spending related to Federal
13 candidate campaigns, and the extent to which fundraising solicitations indicate that funds
14 provided will be used to support or oppose specific candidates. Supplemental Explanation and
15 Justification for Final Rules on Political Committee Status, 72 FR 5595, 5597, 5605 (Feb. 7,
16 2007). An organization can satisfy the major purpose test "through sufficiently extensive
17 spending on Federal campaign activity," *i.e.*, if its "independent spending become[s] so
18 extensive that the organization's major purpose may be regarded as campaign activity." *Id.* at
19 5601 (quoting *MCFL*, 479 U.S. at 262). In determining an organization's major purpose, the
20 Commission considers, among other factors, how much an organization spends on Federal
21 campaign activity compared to "activities that [a]re not campaign related." *Id.* at 5601, 5605;

⁴ NDC plans to spend \$440 to produce and distribute "Let's Make History"; \$410 to produce and distribute "Obamacare"; \$485 to produce and distribute "Military Voting Matters"; and \$485 to produce and distribute "Military Voting Hindered."

1 *see, e.g.*, Advisory Opinion 1996-03 (Breeden-Schmidt Foundation) (comparing an
2 organization's total contributions to candidates against its total outlays and concluding that the
3 "pattern of the [organization's] contributions . . . have not been of a magnitude, either in absolute
4 terms or in relation to total distributions, to be the [organization's] major purpose").

5 Although NDC states that "it does [not] have as its major purpose the election or defeat
6 of clearly identified candidates," this statement is not dispositive. *See The Real Truth About*
7 *Obama, Inc. v. FEC*, No. 3:08-cv-00483, 2008 WL 4416282, at *14 (E.D. Va. Sept. 24, 2008)
8 ("A declaration by the organization that they are *not* [organized] for an electioneering purpose is
9 not dispositive."), *aff'd*, 575 F.3d 342 (4th Cir. 2009), *vacated on other grounds*, 130 S. Ct. 2371
10 (2010), *remanded and decided*, 796 F. Supp. 2d 736, *aff'd sub nom.* 681 F.3d 544 (4th Cir.
11 2012). Instead, the Commission must consider the organization's disbursements, activities, and
12 statements to determine its major purpose. *The Real Truth About Obama, Inc. v. FEC*,
13 No. 3:08-cv-00483, 2008 WL 4416282, at *14 (citing *Akins v. FEC*, 101 F.3d 731, 743 (D.C.
14 Cir. 1997) and *Shays v. FEC*, 511 F. Supp. 2d 19, 31 (D.D.C. 2007)); *see also The Real Truth*
15 *About Abortion, Inc.*, 681 F.3d at 556 (concluding that the Commission "had good and legal
16 reasons" for comprehensive approach because determining major purpose "is inherently a
17 comparative task, and in most instances it will require weighing the importance of some of a
18 group's activities against others").

19 NDC plans to spend \$3,000 on seven advertisements between August 1 and November 6,
20 2012. This \$3,000 is only part of NDC's total budget, however, NDC also plans to finance
21 activity that is "dissimilar" to that described in its advisory opinion request but is "unable to
22 provide any details" about this other activity or its total budget. Without this information, the
23 Commission cannot determine whether NDC would satisfy the major purpose test. *See* 11 CFR

1 112.1(c) (“Advisory opinion requests shall include a complete description of all facts relevant to
2 the specific transaction or activity with respect to which the request is made.”); Advisory
3 Opinion 2006-32 (Progress for America) (finding incomplete a request for an advisory opinion
4 regarding the major purpose test that included only a portion of the group’s planned spending).
5 As explained above (*see supra* n.1), the Office of General Counsel timely notified NDC that this
6 request was “incomplete” and NDC did not provide the additional relevant facts. 11 CFR
7 112.1(d). Because the Commission does not have “a complete description of all facts” relevant
8 to NDC’s purpose, NDC’s question regarding political committee status was determined not to
9 “qualif[y] as an advisory opinion request.” 11 CFR 112.1(c), (d).

10 * * *

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

21

1 and case law. The cited advisory opinions are available on the Commission's Web site,
2 www.fec.gov, or directly from the Commission's advisory opinion searchable database at
3 <http://www.fec.gov/searchao>.

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On behalf of the Commission,

Caroline C. Hunter
Chair