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September 21, 2012

By FedEx

Anthony Herman, Esq.
General Counsel
Federal Election Commission
999 E Street, N.W.
Washington, DC 20463

Re: Advisory Opinion Request

Dear Mr. Herman:

Pursuant to 2 U.S.C. §437(f), we seek an advisory opinion on behalf of Freedom PAC, an independent expenditure only Super PAC (hereinafter "FP"). FP poses the following questions:

1. May FP accept a contribution of $10,000, or more, in 2012 from an authorized federal candidate committee, when the candidate has withdrawn from the 2012 election and has excess contributions in the committee account?

2. If the answer to question 1 is no, may the aforementioned candidate committee donate $5,000, or less, in excess funds to FP, if the candidate has withdrawn from seeking federal office and will not receive any personal benefit from such donation?

Background

Freedom PAC is a registered independent expenditure only "Super PAC," raising and spending funds to engage in political speech through independent expenditures in support of, or in opposition to, candidates for federal office.

Freedom PAC raises funds and makes decisions regarding how to use those funds, without the donor providing advice, guidance, or having any operational control.

Friends of Mike H is the authorized principal campaign committee for a candidate who sought election to the United States Senate from Florida. That candidate withdrew from the race well before the 2012 primary election. He is neither seeking any federal elective office in the

2012 general election nor does he hold any federal office or position. According to the July 2012 quarterly report of receipts and disbursements, the subject committee, Friends of Mike H ("MH") has substantial excess funds at its disposal, some of which it wants to donate to FP. MH will not direct, control, or in any way be involved in the specific content, timing or target audience of the messages FP decides to publish.

Questions Presented & Legal Analysis

1. May Freedom PAC, an independent expenditure only federal committee, accept contributions of $10,000, or more in excess funds, from an authorized candidate campaign committee, after the candidate has withdrawn from the election and is no longer seeking federal office?

The Supreme Court has opined that independent expenditure only committees may raise and spend unlimited funds. The Court began with *Buckley* by dividing the campaign finance world into two spheres: contributions and independent expenditures, *Buckley v. Valeo*, 424 U.S. at 20-21, 45-47. Since *Buckley*, limits on federal independent expenditures made by individuals have not been permitted because there is no compelling state interest. See, e.g., *id.* at 23, 45-48 (ruling that a $1,000 limit on independent expenditures "impose[s] significantly more severe restrictions on protected freedoms of political expression and association," and that the prevention of corruption or appearance thereof is inadequate to justify the limits); 581 F.3d 1, 4, 8 (D.C. Cir. 2009) ("The First Amendment, as interpreted by the Supreme Court, protects the right of individual citizens to spend unlimited amounts to express their views about policy issues and candidates for public office .... The Court has rejected expenditure limits on individuals, groups, candidates, and parties, even though expenditures may confer benefits on candidates.") (emphasis omitted). This principle was most recently reiterated in *Citizens United* where the Supreme Court extended the rational to corporations, allowing corporations to make independent expenditures without limits. 130 S.Ct. at 909 ("[W]e now conclude that independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption.").

During the last few years there have been several federal circuit courts of appeals and federal district courts that have recognized that if there is no compelling state interest in limiting the amount of independent expenditures, there can likewise be no compelling interest limiting the amount one can give to a group or an individual making only independent expenditures. See *Speechnow.org*, 599 F.3d at 695 ("[T]he government has no anti-corruption interest **in limiting contributions** to an independent expenditure group. . . .") (emphasis added); *Wisconsin Right to Life*, 664 F.3d at 154 (striking down as unconstitutional Wisconsin's $10,000 cap on *contributions* to entities that only make independent expenditures); *Thalheimer*, 645 F.3d 1109

(a municipal ordinance restraining the amount of contributions to, and expenditures from, general purpose recipient committees – even if the committee was independent and did not coordinate with candidates – violated the First Amendment); *Farris v. Seabrook*, 677 F.3d 858, 867 (9th Cir. 2012) (holding that Washington's contribution limits are unconstitutional as applied to recall committees because, like independent expenditure-only entities, recall committees "do not coordinate or prearrange their independent expenditures with candidates, and they do not take direction from candidates on how their dollars will be spent . . . ."); *N.C. Right to Life, Inc. v. Leake*, 525 F.3d 274, 293 (4th Cir. 2008) (citation omitted) (holding that limits on contributions to independent expenditure committees are unconstitutional because "it is 'implausible' that contributions to independent expenditure political committees are corrupting"); *Yamada v. Weaver*, No. 10-00497, 2012 U.S. Dist. LEXIS 38358 (D. Haw. Mar. 21, 2012) (Hawaii's contribution limit of $1,000 per election to a non-candidate committee held to violate the First Amendment as applied to an independent expenditure-only organization); *Personal PAC v. McGuffage*, No. 12-CV-1043, 2012 U.S. Dist. LEXIS 33553 (N.D. Ill. Mar. 13, 2012) (holding that Illinois statute prohibiting political committees from accepting more than $10,000 from any individual, $20,000 from any corporation or labor organization, or $50,000 from any PAC, is unconstitutional as applied to political committees that make only independent expenditures); *Stay The Course West Virginia v. Tennant*, No. 12-CV-01658, slip op. at 9 (S.D. W.Va Aug. 9, 2012) ("[B]ecause *Citizens United* holds that independent expenditures do not corrupt or give the appearance of corruption as a matter of law, then the government can have no anti-corruption interest in limiting contributions to independent expenditure-only organizations. . . . [T]he limits on contributions to [independent expenditure PACs] cannot stand.").

Thus, the Courts, from District Court to the Supreme Court, have clearly established the proposition that independent expenditure only committees may both spend, and raise unlimited funds from individuals, corporations, labor organizations, and generally from political committees. See for example, *Emily's List v. FEC*, 581 F.3d 8, (D.C. Cir. 2009) "The Court has rejected expenditure limits on individuals, groups, candidates, and parties, even though expenditures may confer benefits on candidates."

Here we are faced with the unusual situation where a committee that has only raised hard dollars, pursuant to the statutory limits, and has followed all regulations regarding reporting and disclosure, wishes to donate some of those excess dollars to an independent expenditure committee. Moreover, while MH is technically an authorized candidate committee, there is no actual candidate and no federal election MH is involved in during the 2012 election cycle.

11 C.F.R. §100.16 defines independent expenditures and indicates at (b) that no expenditure by an authorized committee of a candidate on behalf of that candidate shall qualify as an independent expenditure. This section should not be a bar to the current situation as there is no candidate to support by any donation to an independent expenditure committee. Nor should (c) of that regulation control, as explained above there will be no coordination, nor should the naked donation of excess hard dollar funds, from a candidate committee of a former candidate, implicate the intent or meaning of that section.

This interpretation is well supported by recent Advisory Opinions, such as AO 2010-11, at 3, "It necessarily follows that corporations, labor organizations, and political committees may also make unlimited contributions to organizations such as the Committee that make only independent expenditures" (emphasis added). And by both Advisory Opinion 2011-12 and 11 CFR 300.64, which clearly allows a current federal candidate or office holder to attend, speak at and be a featured guest at a nonfederal fundraiser, including an independent expenditure committee fundraiser, provided s/he only solicits funds within the limitations and prohibitions of the Act.

In the current situation, MH, the candidate committee raised funds within the limitations and prohibitions of law and now wishes to use excess funds donated for use in the 2012 election cycle, to FP in order to fund political activity this year.

There are also a long line of Advisory Opinions supporting the notion that excess funds may be donated for any lawful purpose. See for example AO 2011-17(home security system); AO 2012-05 (a Foundation named after the candidate); and, AO 1993-13 (establish a scholarship fund). More to the point 11 C.F.R. §113.2(e) expressly allows excess funds to be used for any other lawful purpose, unless such use is personal use under 11 C.F.R. 113.1(g), which the proposed donation is not. Interestingly, this section was deleted in 2002 and then added again by Congress in late 2004, thereby evincing the Congressional intent to liberally allow expenditures of excess funds.

We note the current request is quite different from the situation presented in AO 2011-12, in which a Leadership PAC of a sitting elected official sought to raise and spend unlimited funds by establishing a separate independent expenditure bank account as a component of said PAC. Here, FP, seeks to accept, and MH seeks to donate, excess funds, raised entirely within the limits of the Act. Moreover, there is no sitting federal officeholders, or federal candidates, to control, divert or benefit from such donation. Rather, FP, an independent expenditure only committee, wholly separate from and independent of the MH committee, which can clearly accept such donations from other political committees, individuals and businesses, and it alone will control the use of such donation.

2. If the answer to question 1 is no, may Freedom PAC accept a contribution of up to $5,000 from the aforementioned committee?

If the answer to question 1 is no, in the aforementioned circumstances it appears the $2,000 limit for a contribution from a federal candidate committee to another federal candidate committee found in 11 C.F.R. 102.12(c) and 102.13(c) clearly would not control. As such, would the more general rules applicable to political committee contributions, such as 11 C.F.R. 110.2(d), allowing multi-candidate committees to donate $5,000 per year to another political committee control?

Very truly yours,

Bracewell & Giuliani LLP

Laurence A. Levy

Advisory Opinion Request

Levy, Larry to: Arothstein@fec.gov, nstipanovic@fec.gov 10/02/2012 02:26 PM

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Ms. Rothstein & Mr. Stipanovic,

Pursuant to your request to clarify two points in the annexed advisory opinion request, dated September 21, 2012, please be advised that:

1. All of the funds in the Friends of Mike H Committee account that may be donated to Freedom PAC, were contributed for the Primary Election.
2. The Friends of Mike H Committee joins in this request for an Advisory Opinion, and, for the limited purpose of obtaining this opinion, has authorized me to act as their attorney.

Should you need any additional information do not hesitate to contact me.

Larry Levy

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