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FEDERAL ELECTION COMMISSION
Washington, DC 20463

AGENDA DOCUMENT NO. 13-37
AGENDA ITEM
For meeting of August 22, 2013
Submitted Late

August 16, 2013

MEMORANDUM

TO: The Commission

FROM: Lisa J. Stevenson *LJS by AN*
Deputy General Counsel

Adav Noti *AN*
Acting Associate General Counsel

Robert M. Knop *RMK*
Assistant General Counsel

Cheryl Hemsley
Attorney *CH*

Subject: Draft AO 2013-09 (Special Operations PAC/ Col. Robert Maness)

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 12:00 pm (Eastern Time) on August 21, 2013.

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 <http://www.fec.gov/law/draftaos.shtml>.

Attachment

1 ADVISORY OPINION 2013-09

2

3 Dan Backer, Esq.
4 DB Capitol Strategies, PLLC
5 717 King Street, Suite 300
6 Alexandria, VA 22314

DRAFT

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8 Mr. Paul D. Kamenar
9 Coolidge Reagan Foundation
10 1629 K Street, N.W. Suite 300
11 Washington, DC 20036

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13 Dear Messrs. Backer and Kamenar:

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15 We are responding to your advisory opinion request on behalf of the Special Operations

16 Speaks PAC (“SOS”) and Robert L. Maness concerning the application of the Federal Election

17 Campaign Act (the “Act”) and Commission regulations to contributions made by a political

18 committee that is not a “multicandidate political committee.” The requestors ask whether the

19 Act’s definition of a “multicandidate political committee” prevents SOS from making

20 contributions in excess of \$2,600 per election to Maness, who is a candidate for federal office,

21 and whether Maness is prohibited from accepting such contributions. The Commission

22 concludes that because SOS has not yet qualified as a multicandidate political committee, the

23 Act currently prohibits SOS from contributing more than \$2,600 per election to Maness, and it

24 prohibits Maness from knowingly accepting more than \$2,600 per election from SOS.¹

25 ***Background***

26 The facts presented in this advisory opinion are based on your letter received on July 10,

27 2013.

¹ The requestors asked for this advisory opinion to be issued within 20 days under 11 C.F.R. § 112.4(b). That provision, however, applies only when a candidate submits a request “within the 60 calendar days preceding the date of any election in which the candidate is seeking nomination or election.” *Id.*; see also 2 U.S.C. § 437f(a)(2). Because the request states that the election in question is “to be held on November 4, 2014” — which is more than 60 days after the request was submitted on July 10, 2013 — this request does not qualify for expedition under section 112.4(b).

1 SOS is a nonconnected hybrid political committee.² It registered as a political committee
2 on July 2, 2012. SOS represents that it has made contributions to three federal candidates and
3 has “thousands of grassroots contributors.” One of SOS’s contributions was to Maness — a
4 2014 candidate for the U.S. Senate from Louisiana — in the amount of \$2,600. SOS wishes to
5 contribute an additional \$2,400 to Maness, who wishes to accept the additional contribution.

6 ***Questions Presented***

7 1. *May SOS make contributions to candidates of up to \$5,000 per election before it*
8 *has made contributions to at least five candidates in accordance with 2 U.S.C. § 441a(a)(4)?*

9 2. *May Maness accept contributions above \$2,600, but not exceeding \$5,000, per*
10 *election from SOS before SOS has contributed to at least five candidates?*

11 ***Legal Analysis and Conclusions***

12 No, SOS may not make contributions to candidates in excess of \$2,600 per election until
13 it has qualified as a multicandidate political committee, nor may Maness knowingly accept such
14 contributions from SOS until it has qualified as a multicandidate political committee.

15 The Act provides that “no person” shall contribute more than \$2,600 to any candidate
16 with respect to any election. 2 U.S.C. § 441a(a)(1)(A); *see also* 11 C.F.R. § 110.1(b); Price
17 Index Adjustments for Contribution and Expenditure Limits and Lobbyist Bundling Disclosure
18 Threshold, 78 Fed. Reg. 8530 (Feb. 6, 2013) (adjusting limit for inflation pursuant to 2 U.S.C.
19 § 441a(c)). The statutory definition of “person[s]” subject to this limit generally includes
20 political committees, 2 U.S.C. § 431(11), but it does not include “multicandidate political
21 committee[s],” which can contribute up to \$5,000 per election to a candidate. 2 U.S.C.

² *See* Press Release, FEC Statement on *Carey v. FEC*: Reporting Guidance for Political Committees that Maintain a Non-Contribution Account (Oct. 5, 2011), *available at* <http://www.fec.gov/press20111006postcarey.shtml>.

1 § 441a(a)(2)(A); *see also* 11 C.F.R. § 110.2(b). To qualify as a multicandidate political
2 committee, a political committee must meet three criteria: (1) be registered with the
3 Commission as a political committee for at least six months; (2) receive contributions from more
4 than 50 persons; and (3) make contributions to at least five federal candidates. 2 U.S.C. §
5 441a(a)(4); *see also* 11 C.F.R. § 100.5(e)(3) (defining “multicandidate committee”). No
6 candidate may knowingly accept any contribution that is in violation of the Act’s contribution
7 limits. 2 U.S.C. § 441a(f); *see also* 11 C.F.R. § 110.9.

8 SOS has not yet qualified as a multicandidate political committee. Although it has been
9 registered with the Commission as a political committee for more than six months and has
10 received contributions from more than 50 persons, it has made contributions to only three federal
11 candidates. As a result, SOS is not a multicandidate political committee under section 441a(a)(4)
12 but rather a “person” subject to the contribution limits of section 441a(a)(1). Thus, SOS may not
13 currently make contributions of more than \$2,600 to any candidate with respect to any election,
14 and Maness may not knowingly accept contributions of more than \$2,600 per election from SOS
15 until it qualifies as a multicandidate political committee.³

16 Despite the plain language of the Act, the requestors ask the Commission to determine
17 that SOS may make, and Maness may accept, contributions in excess of the limit in section
18 441a(a)(1)(A) because they contend the congressionally prescribed definition of a multicandidate
19 political committee is “unconstitutional both facially and as applied to SOS.” In *Buckley v.*
20 *Valeo*, however, the Supreme Court upheld the constitutionality of the Act’s requirements for
21 political committees to qualify for the higher \$5,000 limit on contributions to candidates. 424

³ Although the request states that SOS has “purposefully” contributed to only three federal candidates, SOS would appear to qualify as a multicandidate political committee if it were to make contributions to at least two other candidates.

1 U.S. 1, 35-36 (1976) (“[T]he registration, contribution, and candidate conditions serve the
2 permissible purpose of preventing individuals from evading the applicable contribution
3 limitations by labeling themselves committees.”). Moreover, the Commission lacks the power to
4 determine that a provision of the Act is unconstitutional. *See Johnson v. Robison*, 415 U.S. 361,
5 368 (1974) (adjudication of constitutionality is generally outside administrative agency’s
6 authority); *Robertson v. FEC*, 45 F.3d 486, 489 (D.C. Cir. 1995) (noting in context of
7 Commission’s administrative enforcement process that “[i]t was hardly open to the Commission,
8 an administrative agency, to entertain a claim that the statute which created it was in some
9 respect unconstitutional”). Thus, as the Commission noted in a recent advisory opinion on the
10 same statutory provision at issue here: “Because no court has invalidated the limitation in
11 section 441a(a)(1)(A) or the definition of ‘multicandidate political committee’ in section
12 441a(a)(4), we are required to give these provisions full force.” Advisory Opinion 2012-32 (Tea
13 Party Leadership Fund) at 3.

14 This response constitutes an advisory opinion concerning the application of the Act and
15 Commission regulations to the specific transaction or activity set forth in your request. *See*
16 2 U.S.C. § 437f. The Commission emphasizes that, if there is a change in any of the facts or
17 assumptions presented, and such facts or assumptions are material to a conclusion presented in
18 this advisory opinion, then the requestors may not rely on that conclusion as support for their
19 proposed activity. Any person involved in any specific transaction or activity which is
20 indistinguishable in all its material aspects from the transaction or activity with respect to which
21 this advisory opinion is rendered may rely on this advisory opinion. *See* 2 U.S.C.
22 § 437f(c)(1)(B). Please note that the analysis or conclusions in this advisory opinion may be
23 affected by subsequent developments in the law, including, but not limited to, statutes,

1 regulations, advisory opinions, and case law. The cited advisory opinion is available on the
2 Commission's website, www.fec.gov, or directly from the Commission's Advisory Opinion
3 searchable database at www.fec.gov/searchao.

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On behalf of the Commission,

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Ellen L. Weintraub

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Chair

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