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FEDERAL ELECTION COMMISSION
Washington, DC 20463

AGENDA DOCUMENT NO. 13-46
AGENDA ITEM
For meeting of November 14, 2013
SUBMITTED LATE

November 8, 2013

MEMORANDUM

TO: The Commission

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

Adav Noti *AN*
Acting Associate General Counsel

Amy L. Rothstein *ALR*
Assistant General Counsel

Joanna Waldstreicher *ALR for JW*
Attorney

Subject: Draft AO 2013-13 (Freshman Hold 'em JFC)

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 November 13, 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 2013-13

2

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

DRAFT

8

9 Mr. Paul D. Kamenar
10 Coolidge Reagan Foundation
11 1629 K Street, N.W.
12 Suite 300
13 Washington, D.C. 20006

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15 Dear Messrs. Backer and Kamenar:

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We are responding to your advisory opinion request on behalf of Freshman

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Hold'em, Stutzman for Congress, Gardner for Congress 2012, Tom Reed for Congress,

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Denham for Congress, Benishek for Congress, Inc., Rodney for Congress, Duffy for

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Congress, Chris Gibson for Congress, Friends of Joe Heck, Friends of Dave Joyce, Pat

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Meehan for Congress, Scott Rigell for Congress, Rothfus for Congress, Jon Runyan for

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Congress, Inc., VoteTipton.com, Valadao for Congress, and Walorski for Congress, Inc.

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Joint Fundraising Committee (the "Committee"). The Committee asks whether it may

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use only "Freshman Hold'em JFC" and the URL of the Committee's website to identify

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the Committee in its disclaimers on emails, webpages, and printed materials. The

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Commission concludes that the Federal Election Campaign Act (the "Act") and

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Commission regulations require the Committee's disclaimers to identify all of the

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Committee's participating candidates.

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Background

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The facts presented in this advisory opinion are based on your letter received on

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August 22, 2013, and your emails dated August 29 and September 3, 2013.

1 The Committee is registered with the Commission as a joint fundraising
2 committee.¹ The Committee maintains a website, www.FreshmanHoldem.com, on which
3 it posts its joint fundraising notice, including the names of its participating candidates.
4 The Committee’s participants change from election cycle to election cycle based on the
5 outcomes of elections. Currently, the Committee has 18 participating candidates; in the
6 last election cycle, it had 30 participating candidates.

7 The Committee represents that it is commonly known as “Freshman Hold’em
8 JFC,” and that it is referred to as such in the URL for its website, on its webpages, emails,
9 nametags, and invitations to Committee events, and by the media. The Committee plans
10 to send out emails and printed materials — including nametags, donor cards, playing
11 cards, and invitations — and to create webpages for events and other Committee
12 business. The Committee asserts that its full name cannot be conveniently printed or
13 practicably displayed in these communications because the amount of text necessary for a
14 disclaimer using its full name would distract the reader’s attention from the substance of
15 the communication.

16 ***Question Presented***

17 *May the Committee use only “Freshman Hold’em JFC,” and its URL,*
18 *www.FreshmanHoldem.com, to identify itself in its disclaimers on emails, webpages, and*
19 *printed materials?*

¹ The Committee’s most recent Statement of Organization, dated March 15, 2013, is available at <http://images.nictusa.com/pdf/618/13961151618/13961151618.pdf>.

1 ***Legal Analysis and Conclusion***

2 No, the Committee’s disclaimers must identify all of the Committee’s
3 participating candidates.

4 The Act and Commission regulations permit candidates and political committees
5 to engage in joint fundraising by establishing a separate political committee to serve as
6 their joint fundraising representative. 2 U.S.C. § 432(e)(3); 11 C.F.R. § 102.17(a). In
7 raising funds for its participating candidates and political committees, the joint
8 fundraising representative “shall collect contributions, pay fundraising costs from gross
9 proceeds and from funds advanced by the participants, and disburse net proceeds to each
10 participant,” as well as comply with applicable recordkeeping and reporting requirements
11 11 C.F.R. § 102.17(b)(1), (c)(4), (c)(8).

12 The Act and Commission regulations require all political committees — including
13 joint fundraising committees — to identify themselves in their (1) “public
14 communications,” 11 C.F.R. § 100.26;² *see also* 2 U.S.C. § 431(22); (2) electronic mail
15 of more than 500 substantially similar communications; and (3) websites available to the
16 general public. *See* 2 U.S.C. § 441d(a)(1); 11 C.F.R. § 110.11(a). If a public
17 communication, mass email, or website is paid for by an authorized committee of a
18 candidate, the disclaimer must “clearly state that the communication has been paid for by
19 the authorized political committee.” 11 C.F.R. § 110.11(b). The disclaimer ensures that
20 readers of these materials can determine which candidates have underwritten them. With

² A “public communication” is “a communication by means of any broadcast, cable or satellite communication, newspaper, magazine, outdoor advertising facility, mass mailing, or telephone bank to the general public, or any other form of general public political advertising,” but not “communications over the Internet, other than those placed for a fee on another person’s Web site.” 11 C.F.R. § 100.26.

1 that knowledge, the readers can be “fully informed about the person or group who is
2 speaking” and “make informed decisions and give proper weight to different speakers
3 and messages.” *Citizens United v. FEC*, 558 U.S. 310, 368, 371 (2010).

4 The Committee’s proposal to identify itself only as Freshman Hold’em JFC and
5 www.freshmanholdem.com, without more, on its public communications, website, and
6 mass emails would not be consistent with the Act and Commission regulations because it
7 would not “give the reader . . . adequate notice of the identity of the person or political
8 committee that paid for . . . the communication.” 11 C.F.R. § 110.11(c)(1). By
9 definition, a joint fundraising committee is not an independent committee; rather, it is
10 “established *solely* for the purpose of joint fundraising by” the candidates who form it.
11 *See* 2 U.S.C. § 432(e)(3)(A)(ii) (emphasis added). In other words, a political committee
12 such as the requestor here exists only to raise funds for its participants. A disclaimer
13 identifying “Freshman Hold’em” as the source of the communications would therefore be
14 misleading: It would suggest to recipients that a political committee with that name bore
15 ultimate responsibility for them, when in reality it is the committee’s participants who
16 sponsor and authorize those communications. To avoid such confusion and to provide
17 “adequate notice,” a joint fundraising committee’s disclaimers must identify its
18 participating candidates. Indeed, the need to identify the candidates paying for a
19 communication is even more compelling where, as here, the identities of participating
20 candidates change over time.

21 The requestor asserts that including its full name in disclaimers on its emails,
22 webpages, and printed materials is both inconvenient and impracticable. With regard to
23 electronic communications such as emails and webpages, however, the Commission has

1 explained that “the interests served by prompt public disclosure warrant application of the
2 disclaimer provisions” to such communications “in light of the widespread use of this
3 technology in modern campaigning, and the relatively non-intrusive nature of disclaimer
4 requirements.”³

5 Regarding printed materials, a political committee need not include a disclaimer
6 unless the materials are “public communications” as defined in the Act and Commission
7 regulations.⁴ For such communications, the Commission has promulgated a regulation to
8 address situations in which issues of convenience and practicability warrant an exception
9 from section 110.11’s disclaimer requirements: A political committee need not include
10 *any* disclaimers (1) on items that are too small for the convenient printing of a disclaimer,
11 such as bumper stickers, pins, buttons, or pens; or (2) on means of communication that by
12 their nature make including a disclaimer impracticable, such as skywriting and water
13 towers.⁵ The printed materials presented in this request — such as invitations and donor
14 cards — are not inherently limited in size or of a nature that would render disclaimers
15 impracticable. In effect, therefore, the Committee seeks a partial exemption from
16 disclaimer requirements based not on the size or nature of its printed materials, but rather

³ Disclaimers, Fraudulent Solicitation, Civil Penalties, and Personal Use of Campaign Funds, 67 Fed. Reg. 76,962, 76,964 (Dec. 13, 2002); *see also* Internet Communications, 71 Fed. Reg. 18,589, 18,601 (Apr. 12, 2006) (“[T]he inclusion of a disclaimer statement [on emails] poses only a minimal burden for political committees.”). The emails and webpages at issue in this request are not electronic communications in which the inclusion of disclaimers may be inherently impracticable. *See, e.g.*, Advisory Opinion 2010-19 (Google) (concurring statement of Chairman Matthew S. Petersen), <http://saos.nictusa.com/aodocs/1160122.pdf>.

⁴ The requestor states that including its full name in disclaimers on nametags and playing cards is burdensome. But because the definition of “public communication” generally would not include nametags and playing cards, *see* 11 C.F.R. § 100.26, these items likely would not need disclaimers.

⁵ 11 C.F.R. § 110.11(f)(1)(i)-(ii). The Committee does not ask whether any of its planned materials would qualify for this exemption.

1 on the length of the Committee's name. Nothing in the Act or Commission regulations
2 authorizes such an exemption or indicates that the disclaimer requirements might apply
3 differently to political committees with longer or shorter names.

4 Furthermore, to the extent that any of the materials at issue are solicitations, they
5 must include a joint fundraising notice "[i]n addition to any [disclaimer] notice required
6 under 11 C.F.R. § 110.11." 11 C.F.R. § 102.17(c)(2). The joint fundraising notice sets
7 out the names of all committees participating in the joint fundraising activity, as well as
8 certain other information. 11 C.F.R. § 102.17(c)(2). Given that the names of all
9 participating candidates already appear in the joint fundraising notice, the only additional
10 information that a joint fundraising committee would have to include in its solicitations to
11 satisfy the applicable disclaimer requirement would be a statement that the candidates
12 paid for the communication. Adding that brief statement to invitations or donor cards
13 (assuming that they are solicitations) would not be unduly burdensome.

14 The Committee also asserts that it should be permitted to use an abbreviated form
15 of its name in its disclaimers because otherwise the disclaimer would occupy a large
16 percentage of the communication in question. But both the Supreme Court and the
17 Commission have concluded that such concerns do not outweigh the public's interest in
18 obtaining adequate information regarding the financing of political speech. In *Citizens*
19 *United*, the Supreme Court upheld a provision of the Act that required a nonprofit
20 corporation to devote up to four seconds of a 10-second advertisement to a disclaimer.
21 558 U.S. at 368. The Court explained that disclaimers provide information to the public
22 about the entity who is speaking "so that the people will be able to evaluate the
23 arguments to which they are being subjected." *Id.* (quoting *First Nat'l Bank of Boston v.*

1 *Bellotti*, 435 U.S. 765, 792 n.32 (1978)). Similarly, in Advisory Opinion 2007-33 (Club
2 for Growth PAC), the Commission concluded that the Act and Commission regulations
3 did not permit a political committee to truncate or dispense with required disclaimers in
4 its 10- and 15-second advertisements even though the disclaimers would take up a
5 significant portion of the advertisements. There is even less justification here for the
6 Committee's request to truncate its disclaimer on standard printed materials, such as
7 invitations, or on communications that are not meaningfully limited in space, such as
8 emails and webpages.

9 Finally, the requestor analogizes its proposal to a Commission regulation that
10 allows a separate segregated fund ("SSF") to include in its name a "clearly recognized
11 abbreviation or acronym by which the [SSF's] connected organization is commonly
12 known." 11 C.F.R. § 102.14(c). But even an SSF that adopts a shortened name must
13 nonetheless include both its full name and its shortened name in any disclaimers required
14 by section 110.11. 11 C.F.R. § 102.14(c); *see* Advisory Opinion 2007-15 (GMAC) at 3,
15 Advisory Opinion 2004-04 (AirPAC) at 2, Advisory Opinion 2000-34 (SAPPI PAC) at 2,
16 Advisory Opinion 1999-20 (EQUI-PAC) at 2, Advisory Opinion 1980-23 (Agricultural
17 and Dairy Educational Political Trust) at 2. Thus, the SSF-naming provision in 11 C.F.R.
18 § 102.14(c) does not support the Committee's request to omit its participating candidates'
19 names from its disclaimers.

20 This response constitutes an advisory opinion concerning the application of the
21 Act and Commission regulations to the specific transaction or activity set forth in your
22 request. *See* 2 U.S.C. § 437f. The Commission emphasizes that, if there is a change in
23 any of the facts or assumptions presented, and such facts or assumptions are material to a

1 conclusion presented in this advisory opinion, then the requestor may not rely on that
2 conclusion as support for its proposed activity. Any person involved in any specific
3 transaction or activity that is indistinguishable in all its material aspects from the
4 transaction or activity with respect to which this advisory opinion is rendered may rely on
5 this advisory opinion. *See* 2 U.S.C. § 437f(c)(1)(B). Please note that the analysis or
6 conclusions in this advisory opinion may be affected by subsequent developments in the
7 law including, but not limited to, statutes, regulations, advisory opinions, and case law.

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On behalf of the Commission,

Ellen L. Weintraub
Chair