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**AGENDA DOCUMENT NO. 15-57-C**  
**AGENDA ITEM**  
**For meeting of November 10, 2015**  
**SUBMITTED LATE**

November 5, 2015

**MEMORANDUM**

TO: The Commission

FROM: Daniel A. Petalas *DAP*  
Acting General Counsel

Adav Noti *AN*  
Acting Associate General Counsel

Amy L. Rothstein *AR*  
Assistant General Counsel

Theodore M. Lutz *TL*  
Neven F. Stipanovic *NFS*  
Attorneys

Subject: AO 2015-09 (Senate Majority PAC and House Majority PAC)  
Draft C

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 9, 2015.

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 2015-09

2

3 Marc E. Elias, Esq.

4 Ezra W. Reese, Esq.

5 Jonathan S. Berkon, Esq.

6 Rachel L. Jacobs, Esq.

7 Perkins Coie LLP

8 700 13th Street, NW

9 Suite 600

10 Washington, DC 20005-3960

11

12 Dear Messrs. Elias, Reese, Berkon and Ms. Jacobs:

**DRAFT C**

13 We are responding to your advisory opinion request on behalf of Senate Majority PAC  
14 and House Majority PAC (collectively, “Requestors”) concerning the application of the Federal  
15 Election Campaign Act, 52 U.S.C. §§ 30101-30146 (the “Act”), and Commission regulations to  
16 Requestors’ proposed activities. Requestors ask twelve questions about proposed activities  
17 involving individuals contemplating federal candidacy (“prospective candidates”), individuals  
18 who are federal candidates, and certain independent-expenditure-only political committees.

19 ***Background***

20 The facts presented in this advisory opinion are based on your letter received on  
21 September 11, 2015 (the “AOR”).

22 Requestors are registered with the Commission as independent-expenditure-only political  
23 committees (commonly referred to as “super PACs”). Senate Majority PAC makes independent  
24 expenditures in support of Democratic candidates for the U.S. Senate, and House Majority PAC  
25 makes independent expenditures in support of Democratic candidates for the U.S. House of  
26 Representatives. AOR001. When Requestors registered with the Commission as super PACs,  
27 they represented that they planned to “raise funds in unlimited amounts” but would “not use  
28 those funds to make contributions, whether direct, in-kind, or via coordinated communications to

1 federal candidates or committees.” AOR001 n.1; Letter from Senate Majority PAC, Misc. Rep.  
2 to FEC (July 27, 2010); House Majority PAC, FEC Form 1 at 1 (Apr. 11, 2011).<sup>1</sup>

3 Requestors propose to “work[] closely with [prospective candidates] and/or their agents,  
4 including establishing single-candidate Super PACs” (hereinafter, the “Single-Candidate  
5 Committees”). AOR004. The prospective candidates are “individuals contemplating federal  
6 candidacy,” AOR 001, and the Single-Candidate Committees would raise funds in unlimited  
7 amounts, including from corporations and labor organizations, to “support the [prospective  
8 candidates] if they decide to run for office,” AOR004. The Single-Candidate Committees would  
9 “work closely” with Requestors to solicit, transfer, and spend funds in particular states, and  
10 would also “work directly” with the prospective candidates.<sup>2</sup> *Id.*

11 Requestors would allow the prospective candidates to “participate fully” in the Single-  
12 Candidate Committees’ formation. *Id.* The prospective candidates would also select and appoint  
13 the individuals who would control the Single-Candidate Committees. *Id.* Requestors represent  
14 that “[a]llowing prospective candidates to establish [the Single-Candidates Committees] and  
15 appoint their personnel would put the prospective candidates’ direct imprimatur” on the Single-  
16 Candidate Committees, “which would make it substantially easier . . . to raise and spend” funds.  
17 AOR005.

18 Requestors would ask the prospective candidates to share “information about their  
19 strategic plans, projects, activities, or needs” with Requestors and the Single-Candidate

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<sup>1</sup> Senate Majority PAC initially formed under the name “Commonsense Ten” and subsequently changed its name to “Majority PAC” and then “Senate Majority PAC.” It was the requestor in Advisory Opinion 2010-11 (Commonsense Ten) and one of the requestors in Advisory Opinion 2011-12 (Majority PAC *et al.*).

<sup>2</sup> Requestors state that they would, “[i]f required,” identify the Single-Candidate Committees as affiliated committees on the relevant statements of organization. AOR004 n.12. The AOR does not ask, and this advisory opinion does not address, whether Requestors and the Single-Candidate Committees would be affiliated under the Commission’s regulations or implications of such affiliation.

1 Committees. AOR006. This would include the prospective candidates' "input" regarding  
2 whether Requestors and the Single-Candidate Committees should "sponsor positive advertising  
3 or negative advertising." *Id.* Requestors also propose to ask the prospective candidates to "share  
4 their campaign messaging and scheduling plans," so that Requestors and the Single-Candidate  
5 Committees "can most efficiently complement the campaigns' strategies with their own." *Id.* If  
6 the prospective candidates became candidates, Requestors and the Single-Candidate Committees  
7 would use this information "immediately" in public communications that would satisfy the  
8 "content prong" of the Commission's coordinated communication regulation, 11 C.F.R.  
9 § 109.21(c). AOR006-07. Requestors and the Single-Candidate Committees would also film the  
10 prospective candidates in a studio setting, discussing their achievements, experiences, and  
11 qualifications for office. AOR007-08. If the prospective candidates become candidates,  
12 Requestors and the Single-Candidate Committees would then use that footage in public  
13 communications that satisfy the "content prong" of the coordinated communication regulation.

14 Additionally, in conjunction with the Single-Candidate Committees and prospective  
15 candidates, Requestors propose to establish new political organizations under section 527 of the  
16 Internal Revenue Code. AOR008. These 527 organizations would raise nonfederal funds ("soft  
17 money") to pay for certain "testing-the-waters" expenses for the prospective candidates,  
18 including travel to meet with prospective voters, office space, research, consulting, and polling.  
19 AOR008.

20 Requestors are concerned that "working closely" with prospective candidates might  
21 expose Requestors to liability if those individuals were to be deemed candidates. AOR009, 011,  
22 015. Requestors thus plan to "stop working closely with these individuals" when they become  
23 "candidates" under the Act. AOR009.

1           After the prospective candidates officially declare their candidacies, Requestors propose  
2 to ask individuals associated with their campaigns to raise funds for Requestors and the Single-  
3 Candidate Committees. Requestors would make this request of the campaigns' employees and  
4 consultants — those who work primarily as fundraisers, as well as those who work primarily in  
5 non-fundraising capacities — who have actual authority to solicit, receive, direct, transfer, or  
6 spend funds on behalf of the federal candidates. Acting on their own and not at the request or  
7 suggestion of the candidates, Requestors and the Single-Candidate Committees would ask each  
8 such individual to become a fundraiser. They would ask the individuals to confirm that they had  
9 not been asked to solicit soft money by the candidates or their agents before soliciting funds for  
10 Requestors and the Single-Candidate Committees. Requestors represent that, during any  
11 conversation with potential contributors, the individuals would be required to identify themselves  
12 as fundraisers for Requestors or a Single-Candidate Committee, and not by their campaign titles,  
13 and to state that they are soliciting contributions on their own and not at the direction of a  
14 candidate or candidate's agent. Requestors also represent that the individuals would not be  
15 permitted to use campaign resources (such as letterhead or email) to solicit soft money for  
16 Requestors or the Single-Candidate Committees, or to solicit funds for a candidate's authorized  
17 committee at the same time that they solicit funds for Requestors and the Single-Candidate  
18 Committees.

19           Requestors propose to involve the candidates themselves in fundraisers at which funds are  
20 solicited in excess of \$5000 per contributor or from corporations or labor organizations.  
21 Requestors and the Single-Candidate Committees would send prospective attendees a written  
22 invitation that would note the date and time of the fundraiser, identify the candidate as a "special  
23 guest," and include a statement indicating that "[a]ll funds solicited in connection with this event

1 are by [Requestors or a Single-Candidate Committee], and not by [the candidate].” AOR019.  
2 The program for the fundraiser would include an introduction by a host (or someone else) and  
3 formal remarks by the candidate. The attending candidate would comply with 11 C.F.R.  
4 § 300.64(b)(2) while at the fundraiser and would not disseminate publicity for, or invitations to,  
5 the event.

6 ***Questions Presented***

- 7 1. *If an individual, who would not otherwise be a candidate, participates in the formation of a*  
8 *Single-Candidate Committee (either directly or through agents), whose purpose is to support the*  
9 *individual’s prospective candidacy, is the Single-Candidate Committee barred from raising or*  
10 *spending soft money after the individual becomes a candidate? Would the answer be the same if*  
11 *the individual or his or her agents ask, request, or appoint the individual who would exercise*  
12 *control over the Single-Candidate Committee?*
- 13 2. *If individuals, who would not otherwise be candidates, share with the Single-Candidate*  
14 *Committees and Requestors (either directly or through agents) information about the*  
15 *individuals’ plans, projects, activities, or needs, may the Single-Candidate Committees and*  
16 *Requestors use that information to create public communications that satisfy the “content”*  
17 *prong under 11 C.F.R. § 109.21 and air after the individuals become candidates? If yes, does*  
18 *there need to be a cooling-off period before the Single-Candidate Committees and Requestors*  
19 *can use the information and if so, how long is the cooling off period?*
- 20 3. *May Requestors and the Single-Candidate Committees film footage in a studio of*  
21 *individuals, who would not then otherwise be candidates, discussing their achievements,*  
22 *experiences, and qualifications for office, and use that footage in public communications that*  
23 *satisfy the “content prong” under 11 C.F.R. § 109.21?*

1 4. *May Requestors and the Single-Candidate Committees work with the individuals to*  
2 *establish separate 527 organizations to pay for “testing-the-waters” activities with soft money?*

3 5. *Assuming that an individual has raised or spent more than \$5000 on “testing-the-waters”*  
4 *activities, does an individual become a candidate when he or she makes a private determination*  
5 *that he or she will run for federal office?*

6 6. *Assuming that an individual has raised or spent more than \$5000 on “testing-the-waters”*  
7 *activities, does an individual “testing the waters” for six months or longer trigger candidacy?*  
8 *Nine months? One year?*

9 7. *Would the activities described in Question 1 trigger candidacy once the Single-Candidate*  
10 *Committee had raised more than \$5000? If not, would the Single-Candidate Committee’s*  
11 *receipt of \$1 million, \$5 million, \$10 million, \$25 million, \$50 million, or \$100 million trigger an*  
12 *individual’s candidacy?*

13 8. *Assuming that an individual has raised or spent more than \$5000 on “testing-the-waters”*  
14 *activities, does an individual’s public statement that he or she is running for office trigger*  
15 *candidacy, even if the individual subsequently attempts to withdraw that statement?*

16 9. *Assuming that an individual has raised or spent more than \$5000 on “testing-the-waters”*  
17 *activities, if the individual or his or her advisers inform the media that the individual will*  
18 *announce candidacy on a date certain in the future, has the individual triggered candidacy?*

19 10. *Assuming that an individual has raised or spent more than \$5000 on “testing-the-waters”*  
20 *activities, would the activity described in Question 3 trigger candidacy?*

21 11. *Can individuals who are “agents” of candidates solicit soft money for Requestors and the*  
22 *Single-Candidate Committees, as long as the steps described in the Request are taken to ensure*  
23 *that the fundraising is not undertaken in their capacity as “agents”?*

1 12. Does 11 C.F.R. § 300.64 require that there be a minimum number of expected attendees  
2 before the candidate can permissibly speak, attend, or be featured as a special guest?

3 ***Legal Analysis and Conclusions***<sup>3</sup>

4 **A. Candidacy Trigger Questions**

5 5. Assuming that an individual has raised or spent more than \$5000 on “testing-the-waters”  
6 activities, does an individual become a candidate when he or she makes a private determination  
7 that he or she will run for federal office?

8 Yes, an individual who has raised or spent more than \$5000 on “testing-the-waters”  
9 activities would become a candidate when that individual makes a private determination that the  
10 individual will run for federal office.

11 An individual is a “candidate” if he or she receives contributions or makes expenditures  
12 in excess of \$5000 or consents to another person’s receiving contributions or making  
13 expenditures in excess of \$5000 on the individual’s behalf. 52 U.S.C. § 30101(2)(A); 11 C.F.R.  
14 § 100.3(a). Although an individual may raise or spend more than \$5000 on “testing-the-waters”  
15 activity without becoming a candidate, the testing-the-waters exemption does not apply “to  
16 individuals who have decided to become candidates.” 11 C.F.R. §§ 100.72(b), 100.131(b); *see*  
17 *also* Advisory Opinion 1981-32 (Askew) at 4 (explaining that regulation distinguishes “activities  
18 directed to an evaluation of the feasibility of one’s candidacy . . . from conduct signifying that a  
19 private decision to become a candidate has been made”).

20 To try to discern an individual’s state of mind at a given time, the Commission ordinarily  
21 must assess whether that individual engaged in objective “conduct signifying that a private

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<sup>3</sup> The Commission answers the questions in a sequence different from that presented in the AOR, but because some of the questions explicitly refer to other questions by number, the Commission has retained the AOR’s numbering throughout this opinion.



1 decision to become a candidate has been made,” *see* Advisory Opinion 1981-32 (Askew), at 3.  
2 *See* 11 C.F.R. § 100.131(b); *see also, e.g.*, Factual and Legal Analysis at 7, MUR 5693  
3 (Aronsohn) (concluding that statements in individual’s solicitation letter to supporters indicated  
4 “he has decided to run”); Factual and Legal Analysis at 8, MUR 6449 (Bruning); Factual and  
5 Legal Analysis at 7, MUR 6735 (Sestak) (concluding that statements in individual’s solicitation  
6 emails referring to individual as candidate “clearly establish[ed] that [individual] had decided to  
7 ‘seek’ election”). Commission regulations provide a non-exhaustive list of activities indicative  
8 of a decision to become a candidate: (1) using general public political advertising to publicize  
9 his or her intention to campaign for federal office; (2) raising funds in excess of what could  
10 reasonably be expected to be used for exploratory activities, or undertaking activity designed to  
11 amass campaign funds that would be spent after he or she becomes a candidate; (3) making or  
12 authorizing written or oral statements that refer to him or her as a candidate for a particular  
13 office; (4) conducting activities in close proximity to the election or over a protracted period of  
14 time; and (5) taking action to qualify for the ballot under state law. 11 C.F.R. §§ 100.72(b),  
15 100.131(b).

16         The Commission, in sum, generally must assess the extent to which specific facts in a  
17 record demonstrate that an individual made a private determination to become a candidate.  
18 Question 5, which concerns an individual’s “private determination,” is thus largely academic in  
19 practice, since the Commission normally must review whether an individual is a candidate in the  
20 absence of a definitive manifestation of intent.

21

1 6. *Assuming that an individual has raised or spent more than \$5000 on “testing-the-waters”*  
2 *activities, does an individual “testing the waters” for six months or longer trigger candidacy?*  
3 *Nine months? One year?*

4 No, an individual who has raised or spent more than \$5000 on testing-the-waters activity  
5 would not trigger candidacy merely by having engaged in the testing-the-waters activity for a  
6 specific period of time.

7 Commission regulations provide that testing-the-waters activities conducted by an  
8 individual “in close proximity to the election or over a protracted period of time” objectively  
9 evidences that the individual decided to become a candidate. 11 C.F.R. §§ 100.72(b)(4),  
10 100.131(b)(4). But the regulation does not prescribe a specific time limit for such activities. *See*  
11 *Factual and Legal Analysis at 6, MUR 5722 (Friends for Lauzen)* (“The testing the waters  
12 provisions . . . do not contain a timing prerequisite, and often potential candidates will engage in  
13 testing the waters activity well in advance of an election.”). Thus, the length of time an  
14 individual spends deliberating whether to become a candidate does not, in and of itself,  
15 determine whether the individual has become a candidate.

16 8. *Assuming that an individual has raised or spent more than \$5000 on “testing-the-waters”*  
17 *activities, does an individual’s public statement that he or she is running for office trigger*  
18 *candidacy, even if the individual subsequently attempts to withdraw that statement?*

19 Commission regulations specifically provide that “mak[ing] or authoriz[ing] written or  
20 oral statements that refer to [an individual] as a candidate for a particular office” objectively  
21 evidences that the individual has decided to become a candidate. 11 C.F.R. §§ 100.72(b)(3),  
22 100.131(b)(3). Thus, if an individual makes or authorizes such a statement, it generally indicates  
23 that the individual has decided to become a candidate, and so the statement may trigger

1 candidacy regardless of subsequent retraction attempts. *See, e.g.*, Factual and Legal Analysis at  
2 4-8, MUR 5363 (Sharpton) (finding that once individual's actions trigger candidate status,  
3 "equivocal statements of intent . . . do not eradicate the [Act's candidate] registration and  
4 reporting requirements"). Thus, when the facts and circumstances demonstrate that an  
5 individual's statement regarding candidacy reflects that individual's decision to run for office,  
6 mere assertions that the individual's subjective intent differ from his or her statement typically  
7 will not negate the objective indication of candidacy arising from the statement.

8 On the other hand, the Commission has recognized that demonstrably inadvertent  
9 misstatements do not necessarily trigger candidacy. In MURs 5672 and 5773 (Davis), five  
10 Commissioners explained that for an individual to trigger candidacy through a statement  
11 referring to himself or herself as a candidate "requires some objective deliberateness, not a mere  
12 'slip up.'" *See* SOR at 2-3 (dismissing allegations against prospective candidate who "quickly  
13 corrected" himself after appearing to state that he was running for office). "Any other  
14 conclusion could run the risk of creating the impression that the Commission is waiting for  
15 prospective candidates to 'slip up,' at which point, it will exclaim, 'Gotcha!' and proclaim their  
16 'testing the waters' periods over." *Id.* at 3.

17 Therefore, although an individual's statement that he or she is running for office may  
18 indicate that he or she has decided to become a candidate, 11 C.F.R. §§ 100.72(b)(3),  
19 100.131(b)(3), that inference may be negated if the individual can show that the statement did  
20 not accurately reflect the individual's decision.

21

1 9. *Assuming that an individual has raised or spent more than \$5000 on “testing-the-waters”*  
2 *activities, if the individual or his or her advisers inform the media that the individual will*  
3 *announce candidacy on a date certain in the future, has the individual triggered candidacy?*

4 Yes, an individual who has raised or spent more than \$5000 on testing-the-waters  
5 activities and who informs the media, either directly or through an advisor, that he or she “will  
6 announce candidacy” would be a candidate.

7 As explained above, an individual becomes a candidate under the Act and Commission  
8 regulations when that individual decides to become a candidate for federal office. Advisory  
9 Opinion 1981-32 (Askew) at 4. A non-conditional statement by an individual (directly or  
10 indirectly) that he or she “will” announce his or her candidacy on a given date unambiguously  
11 indicates that the individual has decided to become a candidate. *See, e.g.*, Gen. Counsel’s Rpt. at  
12 10, MUR 2262 (Robertson) (concluding that individual stating to supporters “he will declare  
13 officially within the year” had decided to become candidate). The fact that the public  
14 announcement postdates the individual’s statement of intent “do[es] not eradicate the registration  
15 and reporting requirements that have been triggered” by the decision. Factual and Legal  
16 Analysis at 8, MUR 5363 (Sharpton).

17 By contrast, informing the media only that an announcement regarding or related to  
18 candidacy will be made does not, in and of itself, trigger candidacy. *See, e.g.*, Statement of  
19 Reasons, Vice Chairman Petersen and Comm’rs Hunter, McGahn, and Weintraub at 2, MUR  
20 5934 (Thompson) (concluding that prospective candidate’s announcement that “[W]e’re going  
21 to be making a statement shortly’ could simply mean that [the prospective candidate] anticipated  
22 making a decision soon”).

1           Accordingly, the Commission concludes that an individual who has raised or spent more  
2 than \$5000 on testing-the-waters activities and who unerroneously informs the media that he or  
3 she “will announce candidacy” on a date certain would be a candidate at that time because that  
4 individual unambiguously has decided to become a candidate.

5       7.     *Would the activities described in Question 1<sup>4</sup> trigger candidacy once the Single-Candidate*  
6 *Committee had raised more than \$5000? If not, would the Single-Candidate Committee’s*  
7 *receipt of \$1 million, \$5 million, \$10 million, \$25 million, \$50 million, or \$100 million trigger an*  
8 *individual’s candidacy?*

9       10.    *Assuming that an individual has raised or spent more than \$5000 on “testing-the-waters”*  
10 *activities, would the activity described in Question 3<sup>5</sup> trigger candidacy?*

11           No, neither the activities described in Question 1 nor the activities described in Question  
12 3 would trigger candidacy status once the Single-Candidate Committee had raised more than  
13 \$5000 because it is known that at that time the prospective candidates would be only  
14 “contemplating federal candidacy” and thus would not yet have decided to become candidates.  
15 AOR001; *see also* AOR004 (noting that the prospective candidates would be only “exploring  
16 candidacy” and that the proposed Single-Candidate Committees “would support the individuals’  
17 candidacies *if they decided to run for office*” (emphasis added)).

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<sup>4</sup>     The “activities described in Question 1” are as follows: “[A]n individual, who would not otherwise be a candidate, participates in the formation of a single-candidate super PAC (either directly or through agents), whose purpose is to support the individual’s prospective candidacy” if that individual “decide[s] to run for office,” and “the individual or his or her agents ask, request, or appoint the individual who would exercise control over the single-candidate super PAC.” AOR004-06.

<sup>5</sup>     The “activity described in Question 3” is that “Requestors and the single-candidate super PACs film footage in a studio of individuals, who would not then otherwise be candidates, discussing their achievements, experiences, and qualifications for office, and use that footage in public communications that satisfy the ‘content prong’ under 11 C.F.R. § 109.21.” AOR007.

1           As discussed above, because the Commission ordinarily cannot know an individual's  
2 state of mind at a given time, the Commission examines whether the individual engaged in  
3 objective "conduct signifying that a private decision to become a candidate has been made." *See*  
4 Advisory Opinion 1981-32 (Askew), at 3; *see also* 11 C.F.R. §§ 100.72(b), 100.131(b).  
5 Therefore, if the prospective candidates' states of mind were unknown, the Commission would  
6 assess their conduct in the light of all record facts and circumstances to determine whether that  
7 conduct objectively indicates a decision to become a candidate has been made. An individual's  
8 active participation in the formation and operation of the contemplated Single-Candidate  
9 Committees, the sole purpose of which is to support that individual's federal candidacy, or in the  
10 filming of video intended to be used to promote that individual's federal candidacy, could  
11 evidence the making of "a decision . . . to seek nomination for election, or election, to a Federal  
12 office." Advisory Opinion 1981-32 (Askew) at 4. *But see* Factual and Legal Analysis at 6,  
13 MUR 6533 (Haney) (explaining that "the mere preparation, rather than dissemination, of  
14 campaign materials in advance of a declaration of candidacy" does not by itself indicate that an  
15 individual has "decided to become a candidate"); Factual and Legal Analysis at 9, MUR 6430  
16 (Daines) (concluding that individual's mere appearance in issue ad aired during previous election  
17 cycle did not, by itself, trigger candidacy).

18           However, the examination of objective criteria is unwarranted here because the AOR  
19 establishes that the prospective candidates would not have decided to become candidates at the  
20 time the Single-Candidate Committees raise more than \$5000. It is thus actually known that the  
21 prospective candidates are not "candidates" at that time. Accordingly, neither the activities  
22 described in Question 1 nor the activities described in Question 3 would trigger candidacy status  
23 when the proposed Single-Candidate Committees raised or spent more than \$5000.

1           **B. Pre-Candidacy Questions**

2       1.     *If an individual, who would not otherwise be a candidate, participates in the formation of a*  
3     *Single-Candidate Committee (either directly or through agents), whose purpose is to support the*  
4     *individual's prospective candidacy, is the Single-Candidate Committee barred from raising or*  
5     *spending soft money after the individual becomes a candidate? Would the answer be the same if*  
6     *the individual or his or her agents ask, request, or appoint the individual who would exercise*  
7     *control over the Single-Candidate Committee?*

8           The Act prohibits federal candidates and officeholders; their agents; and entities directly  
9     or indirectly established, financed, maintained, or controlled by them, or acting on their behalf,  
10    from “solicit[ing], receiv[ing], direct[ing], transferr[ing], or spend[ing] funds in connection with  
11    an election for Federal office . . . unless the funds are subject to the limitations, prohibitions, and  
12    reporting requirements of th[e] Act.” 52 U.S.C. § 30125(e)(1)(A); *see also* 11 C.F.R. § 300.61;  
13    Advisory Opinion 2011-12 (Majority PAC) at 4 (applying § 30125 to super PACs).

14           Because it is actually known that the prospective candidates would not have decided to  
15    become candidates for federal office at the time they would participate in the formation of the  
16    Single-Candidate Committees, *see* AOR001, 004, no federal candidate or officeholder would  
17    have established, financed, maintained, or controlled the proposed Single-Candidate  
18    Committees. The Single-Candidate Committees, consequently, would not be prohibited from  
19    raising or spending funds that do not comply with the amount limitations, source prohibitions,  
20    and reporting requirements of the Act in connection with a federal election.

21

22

1 2. *If individuals, who would not otherwise be candidates, share with the Single-Candidate*  
2 *Committees and Requestors (either directly or through agents) information about the*  
3 *individuals' plans, projects, activities, or needs, may the Single-Candidate Committees and*  
4 *Requestors use that information to create public communications that satisfy the "content"*  
5 *prong under 11 C.F.R. § 109.21 and air after the individuals become candidates? If yes, does*  
6 *there need to be a cooling-off period before the Single-Candidate Committees and Requestors*  
7 *can use the information and if so, how long is the cooling off period?*

8 3. *May Requestors and the Single-Candidate Committees film footage in a studio of*  
9 *individuals, who would not then otherwise be candidates, discussing their achievements,*  
10 *experiences, and qualifications for office, and use that footage in public communications that*  
11 *satisfy the "content prong" under 11 C.F.R. § 109.21?*

12 Requestors and the proposed Single-Candidate Committees may conduct the activities  
13 proposed in Question 2 and Question 3 because the AOR establishes that at the time of the  
14 communications between them and the prospective candidates, the prospective candidates would  
15 not yet have decided to become candidates. The proposed communications, therefore, would not  
16 be "coordinated communications" under Commission regulations because coordination requires  
17 a communication with or the material involvement of a "candidate" for federal office. *See* 11  
18 C.F.R. § 109.21(a).

19 4. *May Requestors and the Single-Candidate Committees work with the individuals to*  
20 *establish separate 527 organizations to pay for "testing-the-waters" activities with soft money?*

21 Yes, the proposed 527 organizations may use funds raised outside of the Act's limitations  
22 and prohibitions to pay for testing-the-waters activities for the prospective candidates  
23 contemplating candidacy, but if the prospective candidates decide to become candidates, the use



1 of such money by the 527 organization proposed under Question 4 would violate Commission  
2 regulations. This is because when an individual becomes a candidate, payments for testing-the-  
3 waters activities may be made only with “funds permissible under the Act.” 11 C.F.R.  
4 §§ 100.72(a), 100.131(a). The fact that an organization — rather than the individual exploring  
5 potential candidacy — would pay for the testing-the-waters activities is immaterial.

6 **C. Post-Candidacy Questions**

7 *11. Can individuals who are “agents” of candidates solicit soft money for Requestors and*  
8 *Single-Candidate Committees, as long as the steps described in the Request are taken to ensure*  
9 *that the fundraising is not undertaken in their capacity as “agents”?*

10 Individuals who are agents of federal candidates may solicit nonfederal funds to  
11 Requestors as proposed.

12 The Act generally prohibits an “agent” of a federal candidate or officeholder from raising  
13 or spending nonfederal funds in connection with an election for federal office. 52 U.S.C.  
14 § 30125(e)(1)(A); 11 C.F.R. § 300.61. Commission regulations define an “agent” of a federal  
15 candidate or officeholder as “any person who has actual authority, either express or implied . . .  
16 [t]o solicit, receive, direct, transfer, or spend funds in connection with any election.” 11 C.F.R.  
17 § 300.2(b)(3).

18 While the Act “restricts the ability of Federal officeholders, candidates, and national  
19 party committees to raise non-Federal funds,” it “does not prohibit individuals who are agents of  
20 the foregoing from also raising non-Federal funds for other political parties or outside groups.”  
21 Definition of “Agent” for BCRA Regulations on Non-Federal Funds or Soft Money and

1 Coordinated and Independent Expenditures, 71 Fed. Reg. 4975, 4979 (Jan. 31, 2006).<sup>6</sup>  
2 Accordingly, an individual is subject to the Act’s “soft money prohibitions” only when acting on  
3 behalf of a candidate, officeholder, or party committee. *Id.* at 4979 n.9. In prior advisory  
4 opinions, the Commission has concluded that individuals who are agents of federal candidates  
5 may solicit funds on behalf of other organizations if the individuals act in their own capacities  
6 “exclusively on behalf of” the other organizations when fundraising for them, “not on the  
7 authority of” the candidates, and raise funds on behalf of the candidates and the other  
8 organizations “at different times.” Advisory Opinion 2003-10 (Nevada State Democratic Party  
9 *et al.*) at 5; Advisory Opinion 2007-05 (Iverson) at 5.

10 Requestors’ proposal is consistent with those found to be permissible in prior advisory  
11 opinions. Requestors propose to have individuals who are agents of federal candidates solicit  
12 funds “on their own” and “not at the request or suggestion” of federal candidates. AOR018. In  
13 soliciting contributions, the individuals would identify themselves as raising funds only for  
14 Requestors, would not use their campaign titles or campaign resources (such as letterhead and  
15 email), and would inform potential contributors that they are “making the solicitation on [their]  
16 own and not at the direction of [the federal candidates] or their agents.” *Id.* Finally, the  
17 individuals would not solicit contributions for the candidates and for Requestors at the same  
18 time. *Id.* Under these circumstances, Requestors may permissibly have individuals who are also  
19 agents of federal candidates raise nonfederal funds on their behalf.

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<sup>6</sup> A federal candidate “can only be held liable for the actions of an agent when the agent is acting on behalf of the [candidate], and not when the agent is acting on behalf of other organizations or individuals.” Prohibited and Excessive Contributions: Non-Federal Funds or Soft Money, 67 Fed. Reg. 49,064, 49,083 (Jul. 29, 2002)

1 12. Does 11 C.F.R. § 300.64 require that there be a minimum number of expected attendees  
2 before the candidate can permissibly speak, attend, or be featured as a special guest?

3 No, because Requestors' planned fundraisers would satisfy all of the requirements of  
4 11 C.F.R. § 300.64, federal candidates may "attend, speak, or be featured as a special guest" in  
5 such circumstances, regardless of the number of expected attendees.

6 Although federal candidates generally may not solicit nonfederal funds, *see* 52 U.S.C.  
7 § 30125(e)(1), federal candidates may "attend, speak, or be a featured guest" at nonfederal  
8 fundraising events. 11 C.F.R. § 300.64(a), (b)(1). Federal candidates also may solicit federal  
9 funds at such events, provided that the solicitation is limited to funds that comply with the Act's  
10 amount limitations and source prohibitions. 11 C.F.R. § 300.64(b). Federal candidates may  
11 limit these solicitations by displaying at the fundraising event a "clear and conspicuous written  
12 notice" or "making a clear and conspicuous oral statement" that the solicitation does not seek  
13 nonfederal funds. 11 C.F.R. § 300.64(b)(2)(i). To be clear and conspicuous, a written notice or  
14 oral statement must not be "difficult to read or hear" or placed in a manner that it "is easily  
15 overlooked by any significant number of those in attendance." *Id.*; *see also* Participation by  
16 Federal Candidates and Officeholders at Non-Federal Fundraising Events, 75 Fed. Reg. 24,375,  
17 24,379 (May 5, 2010) (explaining that § 110.11(c) further informs clear and conspicuous  
18 standard).

19 Further, the name or likeness of a federal candidate or officeholder may appear in  
20 publicity for nonfederal fundraising events that include a solicitation if the candidate or  
21 officeholder is identified as a special, honored, or featured guest, or as a featured or honored  
22 speaker, "or in any other manner not specifically related to fundraising." 11 C.F.R.

1 § 300.64(c)(3)(A). Such publicity must include a “clear and conspicuous disclaimer that the  
2 solicitation is not being made by the Federal candidate.” 11 C.F.R. § 300.64(c)(3)(B).

3 Requestors state that they would comply with the foregoing requirements. The written  
4 invitation would identify the federal candidate as a “special guest” and state that funds would be  
5 solicited by Requestors or the Single-Candidate Committees and not the federal candidate, as  
6 required by § 300.64(c)(3). A host would introduce the federal candidate to the attendees, and  
7 the federal candidate would make “formal remarks,” thereby satisfying § 300.64(b)(1). And, in  
8 accordance with § 300.64(b)(2), the federal candidate would make known to the attendees, in a  
9 clear and conspicuous manner, that he or she is not soliciting nonfederal funds. Although the  
10 request does not specifically identify how the disclaimer will be made, a federal candidate may  
11 satisfy the disclaimer requirement by including a “placard prominently displayed so that it  
12 cannot be overlooked at the entrance . . . or a card placed on [a] table” stating: “[s]olicitations  
13 made by Federal candidates and officeholders at this event are limited by Federal law. The  
14 Federal candidates and officeholders speaking tonight are soliciting only donations . . . up to  
15 Federally permissible amount . . . . They are not soliciting donations in any amount from  
16 corporations, labor organizations, national banks, Federal contractors, or foreign nationals.” *See*  
17 *Participation by Federal Candidates and Officeholders at Non-Federal Fundraising Events*, 75  
18 *Fed. Reg.* at 24,380. Or the federal candidate or host may decide to make a similar disclaimer  
19 orally. *Id.*

20 Although Requestors propose to fundraise with as few as two attendees, neither the Act  
21 nor Commission regulations prescribe a minimum number of attendees for nonfederal  
22 fundraisers involving federal candidates. Thus, in light of Requestors’ representations that they

1 will comply with all of the requirements of 11 C.F.R. § 300.64 when engaging in the specified  
2 activity, a federal candidate may attend, speak, or be a featured guest as proposed.

3         This response constitutes an advisory opinion concerning the application of the Act and  
4 Commission regulations to the specific transaction or activity set forth in your request. *See*  
5 52 U.S.C. § 30108. The Commission emphasizes that, if there is a change in any of the facts or  
6 assumptions presented, and such facts or assumptions are material to a conclusion presented in  
7 this advisory opinion, then Requestors may not rely on that conclusion as support for their  
8 proposed activity. Any person involved in any specific transaction or activity which is  
9 indistinguishable in all its material aspects from the transaction or activity with respect to which  
10 this advisory opinion is rendered may rely on this advisory opinion. *See id.* § 30108(c)(1)(B).  
11 Please note that the analysis or conclusions in this advisory opinion may be affected by  
12 subsequent developments in the law including, but not limited to, statutes, regulations, advisory  
13 opinions, and case law. Any advisory opinions and enforcement materials cited herein are  
14 available on the Commission's website.

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On behalf of the Commission,

Ann M. Ravel  
Chair