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Washington, DC 20463

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For meeting of November 10, 2015
SUBMITTED LATE

November 9, 2015

MEMORANDUM

TO: The Commission

FROM: Daniel A. Petalas *DAP*
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Attorneys

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

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 9:00 am (Eastern Time) on November 10, 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:

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 12 questions about proposed activities involving
17 individuals contemplating federal candidacy (“prospective candidates”), individuals who are
18 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. AOR at AOR001. When Requestors registered with the Commission as super
27 PACs, they represented that they planned to “raise funds in unlimited amounts” but would “not
28 use those funds to make contributions, whether direct, in-kind, or via coordinated
29 communications to federal candidates or committees.” AOR001 n.1; Letter from Senate

DRAFT F

1 Majority PAC, Misc. Rep. to FEC (July 27, 2010); House Majority PAC, FEC Form 1 at 1 (Apr.
2 11, 2011).¹

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 Single-Candidate Committees would raise funds in unlimited
6 amounts, including from corporations and labor organizations, to “support the [prospective
7 candidates] if they decide to run for office.” *Id.* The Single-Candidate Committees would “work
8 closely” with Requestors to solicit, transfer, and spend funds in particular states, and would also
9 “work directly” with the prospective candidates.² *Id.*

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

17 Requestors would ask the prospective candidates to share “information about their
18 strategic plans, projects, activities, or needs” with Requestors and the Single-Candidate
19 Committees. AOR006. This would include the prospective candidates’ “input” regarding

¹ 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.*).

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

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

19 Requestors are concerned that “working closely” with prospective candidates might
20 expose Requestors to liability if those individuals were to be deemed candidates. AOR009, 011,
21 015. Requestors thus plan to “stop working closely with these individuals” when they become
22 “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*
8 *a Single-Candidate Committee (either directly or through agents), whose purpose is to support*
9 *the individual’s prospective candidacy, is the Single-Candidate Committee barred from raising*
10 *or spending soft money after the individual becomes a candidate? Would the answer be the*
11 *same if the individual or his or her agents ask, request, or appoint the individual who would*
12 *exercise 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-*
4 *waters” activities, does an individual become a candidate when he or she makes a private*
5 *determination 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-*
7 *waters” activities, does an individual “testing the waters” for six months or longer trigger*
8 *candidacy? 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-*
14 *waters” activities, does an individual’s public statement that he or she is running for office*
15 *trigger 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-*
17 *waters” activities, if the individual or his or her advisers inform the media that the individual*
18 *will 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?-*
20 *waters” 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*
22 *the Single-Candidate Committees, as long as the steps described in the Request are taken to*
23 *ensure 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***

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

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

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

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

1 Testing-the-waters activities conducted by an individual “in close proximity to the
2 election or over a protracted period of time” are “[e]xamples of activities that indicate that [the]
3 individual has decided to become a candidate.” 11 C.F.R. §§ 100.72(b)(4), 100.131(b)(4). But
4 Commission regulations do not prescribe a specific time limit for such activities. *See* Factual
5 and Legal Analysis at 6, MUR 5722 (Friends for Lauzen) (“The testing the waters provisions . . .
6 do not contain a timing prerequisite, and often potential candidates will engage in testing the
7 waters activity well in advance of an election.”). Thus, the length of time that an individual
8 spends deliberating whether to become a candidate is one factor and does not, in and of itself,
9 determine whether the individual has become a candidate.

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

13 Commission regulations provide that “mak[ing] or authoriz[ing] written or oral
14 statements that refer to [an individual] as a candidate for a particular office” are “[e]xamples of
15 activities that indicate that [the] individual has decided to become a candidate.” 11 C.F.R.
16 §§ 100.72(b)(3), 100.131(b)(3). Thus, if an individual makes or authorizes such a statement, it
17 would generally reflect the individual’s decision to become a candidate, and so the statement
18 may trigger candidacy regardless of subsequent retraction attempts. *See, e.g.,* Factual and Legal
19 Analysis at 4-8, MUR 5363 (Sharpton) (finding that once individual’s actions trigger candidate
20 status, “equivocal statements of intent . . . do not eradicate the [Act’s candidate] registration and
21 reporting requirements”). Where the circumstances demonstrate that an individual’s statement
22 regarding candidacy reflects that individual’s decision to run for office, mere assertions that the

1 individual's subjective intent differs from his or her statement generally will not negate the
2 objective indication of candidacy arising from the statement.³

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

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

9 A non-conditional statement by an individual (directly or indirectly) that he or she "will"
10 announce his or her candidacy on a given date unambiguously indicates that the individual has
11 decided to become a candidate. *See, e.g.,* Gen. Counsel's Rpt. at 10, MUR 2262 (Robertson)
12 (concluding that individual stating to supporters "he will declare officially within the year" had
13 decided to become candidate). The fact that the public announcement postdates the individual's
14 statement of intent "do[es] not eradicate the registration and reporting requirements that have
15 been triggered" by the decision. Factual and Legal Analysis at 8, MUR 5363 (Sharpton).

16 Accordingly, the Commission concludes that an individual who has raised or spent more
17 than \$5000 on testing-the-waters activities and who informs the media that he or she "will
18 announce candidacy" on a date certain would be a candidate.

19 * * *

20 The Commission could not approve a response to the remaining questions by the required
21 four affirmative votes. *See* 52 U.S.C. § 30106(c); 11 C.F.R. § 112.4(a).

³ A demonstrably inadvertent misstatement, however, does not necessarily indicate that the individual has decided to become a candidate.

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

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On behalf of the Commission,

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Ann M. Ravel

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Chair