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For meeting of July 14, 2016
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July 12, 2016

MEMORANDUM

TO: The Commission

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

Adav Noti *AN*
Acting Associate General Counsel

Jessica Selinkoff *JS by AN*
Attorney

Gregory Ketcham-Colwill *GKC*
Legal Extern

Subject: AO 2016-06 (Internet Association) Draft B

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 July 14, 2016.

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 2016-06

2

3 Ronald M. Jacobs, Esq.

4 Venable LLP

5 575 7th Street NW

6 Washington, DC 20004

7

DRAFT B

8 Dear Mr. Jacobs:

9 We are responding to your advisory opinion request on behalf of the Internet Association
10 (“IA”) and the Internet Association Political Action Committee (“IAPAC”) concerning the
11 application of the Federal Election Campaign Act, 52 U.S.C. §§ 30101-46 (the “Act”), and
12 Commission regulations to proposed online communications that solicit electoral and financial
13 support for federal candidates. The Commission concludes that IAPAC may produce,
14 disseminate, and promote the online communications as proposed but that IA may not pay the
15 costs of such online communications because those costs would constitute contributions to
16 IAPAC.

17 ***Background***¹

18 IA is a trade association representing the interests of 36 internet economy companies.² It
19 is a tax-exempt corporation under section 501(c)(6) of the Internal Revenue Code. IAPAC is the
20 separate segregated fund (“SSF”) of IA. IAPAC has no staff of its own and is administered by
21 employees of IA. AOR at AOR002. IAPAC’s publicly available website is hosted as part of
22 IA’s website. AOR008.

¹ The facts presented in this advisory opinion are based on your letter dated May 25 and email dated May 31, 2016 (collectively, “Advisory Opinion Request” or “AOR”) as well as on information from public disclosure reports filed with the Commission. The Advisory Opinion Request characterized the proposed activities as “events.” AOR002-05. But the “events” proposed are *virtual* events, which broken down to their constituent parts take the form of communications webcast to the public. Internet technologies reduce physical events to nothing more than communications.

² IA’s members include internet companies such as Airbnb, Amazon, and Zynga. *See* AOR001.

1 IAPAC proposes to produce, disseminate, and promote interactive online webcasts that
2 solicit electoral and financial support for certain federal candidates. The general public may
3 view these webcasts on IAPAC's website. Each webcast will feature one candidate, selected by
4 IAPAC, and will be hosted by an IA staff person, likely IA's president and CEO. AOR003. The
5 host and the candidate will discuss the internet industry and the candidate's campaign. Viewers
6 will be able to submit questions via a chat function. Both the host and the candidate might urge
7 viewers to vote for that candidate, and the host and candidate might ask viewers to make
8 contributions to that candidate's campaign. "IA staff as well as the [IAPAC] website itself will
9 solicit voluntary contributions to the candidate" featured in IAPAC's webcasts. AOR006.

10 IA has contracted to customize an existing online platform and integrated it into IA's
11 website for use in producing and disseminating, or streaming, the webcasts. The online
12 communication system includes a contribution button through which viewers will be able to
13 contribute to the specific candidate participating in the webcast. Viewers who click the
14 contribution button will be taken to a new page within the IAPAC website that will be connected
15 to an external payment processing system for making a contribution to that candidate.³
16 AOR013.

17 IA has incurred costs associated with developing the web-based communication platform,
18 including software developer fees, IA staff time, and software license fees. Additional post-
19 development costs will include recurring license fees and the costs of IA staff time. IA staff will

³ IA has partnered with Democracy Engine, a web-based payment platform, to process contributions for those persons who click the contribute button. AOR004. Contributors who access the Democracy Engine platform via the contribution button from the IAPAC webcasts will, at that point, interact directly with Democracy Engine, making contributions in accordance with the process set forth in Advisory Opinion 2011-06 (Democracy Engine). AOR004. Neither IA nor IAPAC will have contact with any funds transferred in making these contributions. *Id.*

1 provide technical support to ensure the system is operational, track and convey viewer questions,
2 and handle logistics. AOR003, AOR009, AOR010.

3 Both IA and IAPAC plan to publicize the webcasts through unpaid social media (such as
4 Facebook and Twitter accounts) and IA's and IAPAC's websites. AOR003, AOR011. IAPAC
5 might also promote the webcasts by emailing individuals who have opted in to receiving
6 communications from IA. IA itself will promote the webcasts to its member companies, via
7 email, for further communication to those members' restricted classes. AOR011. IAPAC might
8 also pay for online advertisements on third-party sites, including social media sites, to promote
9 the webcasts. Communications about the webcasts will identify IAPAC as the sponsor and
10 include required disclaimers. AOR002.

11 IAPAC will have discussions with participating candidates about the logistics of the
12 webcasts (*e.g.*, concerning the time and location from which the candidate will appear), which
13 "will satisfy one or more of the conduct prongs of the Commission's coordination regulations,"
14 AOR008, but neither IA nor IAPAC will communicate or coordinate with the candidates or the
15 candidates' agents regarding the purchase, content, location, or frequency of any online
16 advertisements promoting the webcasts. AOR003.

17 Finally, IAPAC proposes to archive videos of the webcasts on its website. These
18 archived videos would continue to include functioning contribution buttons, allowing the general
19 public to access the Democracy Engine platform to contribute to the candidates who participated
20 in IAPAC's webcasts.

21 ***Questions Presented***

22 *Question 1. May IAPAC ask candidates to participate in the online events it has planned, and*
23 *encourage listeners to contribute to the candidates?*

1 *Question 2. Does IAPAC have to pay IA for software development costs of the events?*

2 *Question 3. Does IAPAC have to pay IA for staff costs associated with each event?*

3 *Question 4. If IAPAC must pay IA for certain expenses, would any of these costs have to be*
4 *treated as in-kind contributions to the candidates being supported, and if so, how would this be*
5 *calculated?*

6 *Question 5. Will IA or IAPAC have any reporting obligations related to the events?*

7 *Question 6.⁴ May IA send materials (e.g., email) to its members and ask those members to*
8 *disseminate the materials to employees who are within the restricted class of the member*
9 *companies?*

10 *Question 7. Would unpaid social media and online promotion of the events be an in-kind*
11 *contribution or expenditure?*

12 ***Legal Analysis and Conclusions***

13 *Question 1. May IAPAC ask candidates to participate in the online events it has planned, and*
14 *encourage listeners to contribute to the candidates?*

15 *Question 7. Would unpaid social media and online promotion of the events be an in-kind*
16 *contribution or expenditure?*

17 IAPAC may produce, disseminate, and promote the online communications soliciting
18 electoral and financial support for federal candidates as proposed.

19 No provision of the Act or Commission regulations prohibits an SSF from soliciting
20 contributions to a federal candidate. In fact, Commission regulations expressly contemplate an
21 SSF “soliciting contributions to a candidate” and provide that such activity by an SSF does not

⁴ The request includes two questions identified as “Question 6.” See AOR011. For clarity, the Commission is designating the first of these as “Question 6” and the second as “Question 7.”

1 constitute the prohibited corporate facilitation of contributions to candidates. 11 C.F.R.
2 § 114.2(f)(3).

3 The activities that IAPAC proposes consist entirely of communications from IAPAC to
4 the public. Therefore, the costs incurred by IAPAC to produce and disseminate these
5 communications would constitute in-kind contributions from IAPAC to the participating
6 candidates only if the communications are “coordinated communications.” 52 U.S.C.
7 § 30116(a)(7)(B)(i); 11 C.F.R. § 109.21(b); *see* Explanation and Justification for Final Rules on
8 Coordinated and Independent Expenditures, 68 FR 421, 425 (Jan. 3, 2003) (noting that section
9 109.21 governs coordination analysis for communications and that general coordination
10 provision of section 109.20 applies only to “expenditures that are *not made for*
11 *communications*”) (emphasis added); *see also* Advisory Opinion 2011-14 (Utah Bankers
12 Association) (analyzing and approving SSF’s solicitations of contributions to candidates via
13 email and SSF’s own website under 11 C.F.R. § 109.21).

14 Commission regulations provide a three-prong test to determine if a communication is a
15 coordinated communication and, thus, an in-kind contribution to a candidate. 11 C.F.R.
16 § 109.21(a). First, the communication must be paid for, in whole or in part, by a person other
17 than the candidate. 11 C.F.R. § 109.21(a)(1). Second, the communication must satisfy one of
18 the five content standards (the “content prong”). 11 C.F.R. § 109.21(a)(2), (c). Third, the
19 communication must satisfy one of the five conduct standards (the “conduct prong”). 11 C.F.R.
20 § 109.21(a)(3), (d).

21 Although the online communications soliciting electoral and financial support for the
22 participating candidates will be paid for by IAPAC and “will satisfy one or more of the conduct
23 prongs of the Commission’s coordination regulations,” AOR008, the communications will not

1 meet the content prong in 11 C.F.R. § 109.21(c). To meet the content prong, a communication
2 must be either a “public communication” as defined in 52 U.S.C. § 30101(22) and 11 C.F.R.
3 § 100.26, or an “electioneering communication” as defined in 52 U.S.C. § 30104(f)(3) and 11
4 C.F.R. § 100.29. Because IAPAC’s communications will appear only on IAPAC’s own website,
5 the communications will not be either public communications or electioneering communications.
6 *See* 11 C.F.R. § 100.26 (providing that internet communication that is not placed for fee on
7 another person’s website is not public communication); 11 C.F.R. § 100.29 (limiting definition
8 of electioneering communications to broadcast, cable, or satellite communications).

9 Because the content prong is not satisfied, IAPAC’s communications on its own website
10 will not be coordinated communications under 11 C.F.R. § 109.21. *See* Advisory Opinion 2011-
11 14 (Utah Bankers Association) (trade association’s production and distribution of website and
12 email communications to general public soliciting contributions to federal candidates did not
13 result in in-kind contributions to those candidates). Thus, the Commission concludes that
14 IAPAC may ask candidates to participate in the proposed online webcasts and encourage viewers
15 to contribute to those candidates without the costs of IAPAC’s communications constituting in-
16 kind contributions to the participating candidates. Similarly, the unpaid, and uncoordinated,
17 promotion of the proposed online webcasts by IA and IAPAC on their own websites and social
18 media accounts, as proposed, would not be in-kind contributions to the participating candidates.
19 *See id.*

20 *Question 2. Does IAPAC have to pay IA for software development costs of the events?*

21 *Question 3. Does IAPAC have to pay IA for staff costs associated with each event?*

22 Yes, IAPAC must pay IA for these costs.

1 Corporations, including incorporated trade associations like IA, are prohibited from
2 making contributions to their SSFs. *See* 52 U.S.C. § 30118(a); 11 C.F.R. §§ 114.1(a)(1)
3 (defining “contribution” to include those made “to any candidate, political party or committee”),
4 114.2(b), 114.8(b). A “contribution” includes “any gift, subscription, loan, advance, or deposit
5 of money or anything of value made by any person for the purpose of influencing any election
6 for Federal office.” 52 U.S.C. § 30101(8)(A)(i); *see also* 11 C.F.R. §§ 100.52(a), 114.1(a)(1).
7 “Anything of value” includes all in-kind contributions. 11 C.F.R. § 100.52(d)(1). An in-kind
8 contribution includes the provision without charge (or at less than the usual and normal charge)
9 of any goods or services, including, but not limited to, “facilities, equipment, supplies, personnel,
10 advertising services, membership lists, and mailing lists.” *Id.* Similarly, the payment by any
11 person of compensation for the personal services of another person is a contribution if those
12 services are rendered without charge to a political committee. 11 C.F.R. § 100.54.

13 IA asks the Commission to find that its costs fall within the Act’s exception from the
14 definition of “contribution” for costs a corporation incurs in the “establishment, administration,
15 and solicitation of contributions to [an SSF].” 52 U.S.C. § 30118(b)(2)(C); 11 C.F.R.
16 § 114.1(a)(2)(iii). These are the “cost of office space, phones, salaries, utilities, supplies, legal
17 and accounting fees, fund-raising and other expenses incurred in setting up and running” an SSF.
18 11 C.F.R. § 114.1(b). Specifically, IA argues that the costs it incurs in developing the software
19 for and administering the proposed webcasts would be “standard operating expenses,” that is,
20 administration costs, of the SSF. AOR009, AOR010.⁵

⁵ IA does not assert that its costs incurred in connection with the webcast communications are “establishment” or “solicitation” costs of the SSF. Nor could they be such costs: According to reports filed with the Commission, IA established IAPAC over three years ago, *see* Internet Association PAC, FEC Form 1 (Jan. 8, 2013), <http://docquery.fec.gov/pdf/294/13031001294/13031001294.pdf>, and the “solicitation” exception cannot apply here

1 The Commission concludes that IA’s payments — including payments for software
2 development, licensing fees, salaries, and other costs — incurred for and attributable specifically
3 to IAPAC’s online webcasts soliciting electoral and financial support for candidates are not
4 “administration” costs of IAPAC. These are the costs and expenses of IAPAC’s core political
5 activity — advocacy and fundraising for IAPAC’s preferred candidates — which the
6 Commission has never found to fall within section 30118(b)(2)(C). *See* Advisory Opinion 1984-
7 37 (American Medical Association); Advisory Opinion 1984-24 (Sierra Club); *see also*
8 *Campaign Guide for Congressional Candidates and Committees* at 49 (SSF must pay connected
9 corporation costs of sponsoring candidate support events “to avoid a prohibited contribution”
10 from corporation). For example, in Advisory Opinion 1984-37 (American Medical Association),
11 an incorporated membership organization’s SSF proposed to “make available” to candidates the
12 corporation’s employees; the corporation and its SSF asked how and when the SSF must
13 compensate the corporation for the corporation’s payment of salary and benefits to these
14 employees while the employees provided services for the candidates. The Commission
15 concluded that a corporation may not “use the establishment, administration, and solicitation
16 process as a means of exchanging [corporate] treasury monies for voluntary contributions.” *Id.*
17 at 3.

18 Similarly here, IA cannot invoke the “administration” cost exception to the definition of
19 “contribution” to use its corporate treasury funds to generate contributions to the preferred
20 candidates of its SSF. Because that exception does not apply, IA’s costs incurred for and
21 attributable to IAPAC’s webcasts soliciting electoral and financial support for candidates would

because the requestors do not propose to solicit contributions “to a separate segregated fund.” 52 U.S.C. § 30118(b)(2)(C); 11 C.F.R. § 114.1(a)(2)(iii).

1 be contributions to IAPAC, and so IA may not pay these costs without making prohibited
2 corporate contributions. Therefore, IAPAC must pay IA for the costs of the proposed webcasts
3 to avoid violating the Act's ban on corporate contributions.⁶

4 *Question 4. If IAPAC must pay IA for certain expenses, would any of these costs have to be*
5 *treated as in-kind contributions to the candidates being supported, and if so, how would this be*
6 *calculated?*

7 As discussed above in the responses to Questions 1 and 7, IAPAC's costs attributable to
8 the online webcasts soliciting electoral and financial support for federal candidates would not be
9 in-kind contributions to the participating candidates because the online communications are not
10 coordinated communications. Thus, IAPAC's payments to cover IA's expenses for software
11 development, staff, and other costs would not be in-kind contributions.

12 *Question 6. May IA send materials (e.g., email) to its members and ask those members to*
13 *disseminate the materials to employees who are within the restricted class of the member*
14 *companies?*

15 Yes, IA may promote IAPAC's webcasts to its members via email as proposed.

16 A trade association may make communications (other than solicitations to its SSF) with
17 its members on *any* subject, including communications containing express advocacy. *See* 11
18 C.F.R. §§ 114.1(a)(2)(i) (excluding communications to restricted class from definition of
19 "contribution"), 114.3(a)(1) (describing permissible communications to restricted class),
20 114.8(h) (describing permissible trade association communications to members). When making
21 communications to a member which is a corporation, a trade association may communicate with

⁶ Because the request represents that the software and staff costs at issue here would be incurred specifically and solely for IAPAC's online webcasts soliciting electoral and financial support for candidates, the Commission does not address whether such costs would constitute administrative expenses if they were used to raise funds for IAPAC itself in addition to candidates.

1 the representatives with whom it normally conducts the association's activities. 11 C.F.R.
2 § 114.8(h). Moreover, a trade association may ask its organizational members to disseminate its
3 communications to those members' restricted classes. *See* Advisory Opinion 1997-22 (Business
4 Council of Alabama) (extending this principle to membership organizations).

5 IA proposes to send emails to its corporate members for those members to forward to
6 their restricted classes. The emails would invite the restricted class employees to view IAPAC's
7 webcasts. Presuming that IA communicates with the member representatives with whom it
8 normally conducts the association's activities, IA's proposal is consistent with Commission
9 regulations.

10 *Question 5. Will IA or IAPAC have any reporting obligations related to the events?*

11 Political committees, including SSFs, must file reports of their receipts and
12 disbursements. *See* 52 U.S.C. § 30104(a)(1); 11 C.F.R. § 104.1. As a political committee,
13 IAPAC must therefore report its disbursements (including disbursements to IA or to vendors
14 related to the development, promotion, and production of its webcasts) on its regularly scheduled
15 reports. If IAPAC's paid online advertisements for its webcasts contain express advocacy and
16 therefore constitute independent expenditures, aggregating in excess of \$200 in a calendar year,
17 such payments must be itemized on Schedule E. *See* 52 U.S.C. § 30104(b)(6)(B)(iii); 11 C.F.R.
18 §§ 104.3(b)(3)(vii), 104.4. IAPAC will not be required to file a report as a conduit or
19 intermediary, *see* 11 C.F.R. § 110.6(c), for contributions made by event viewers because such
20 contributions will not be "earmarked" within the meaning of that section and IAPAC will not
21 meet the definition of "conduit" under that section. *See, e.g.*, Advisory Opinion 2012-22
22 (Skimmerhat) at 10 (concluding that contributions transmitted through commercial processing

1 platform are direct contributions to candidate, not contributions earmarked for candidate through
2 intermediary or conduit); Advisory Opinion 2004-19 (DollarVote.org).

3 As a non-political-committee, IA is not required to file regular reports of receipts and
4 disbursements. The request represents that IA may publicize the webcasts to its members via
5 email and request its members to forward the emails to their respective restricted classes.⁷
6 AOR011. *See* 11 C.F.R. § 100.134 (describing reporting obligations for restricted class
7 communications whose costs exceed \$2,000 per election). If IA triggers these reporting
8 obligations, it will be required to report the relevant disbursements on FEC Form 7. *Id.*; *but see*
9 Explanation & Justification for Final Rules on Internet Communications, 71 Fed. Reg. 18589,
10 18596 (Apr. 12, 2006) (noting “there is virtually no cost associated with sending e-mail
11 communications”).

12 This response constitutes an advisory opinion concerning the application of the Act and
13 Commission regulations to the specific transaction or activity set forth in your request. *See* 52
14 U.S.C. § 30108. The Commission emphasizes that, if there is a change in any of the facts or
15 assumptions presented, and such facts or assumptions are material to a conclusion presented in
16 this advisory opinion, then the requestors may not rely on that conclusion as support for their
17 proposed activity. Any person involved in any specific transaction or activity which is
18 indistinguishable in all its material aspects from the transaction or activity with respect to which
19 this advisory opinion is rendered may rely on this advisory opinion. *See* 52 U.S.C.
20 § 30108(c)(1)(B). Please note that the analysis or conclusions in this advisory opinion may be
21 affected by subsequent developments in the law including, but not limited to, statutes,

⁷ The request does not indicate whether IA proposes to make any communications other than emails to its members.

1 regulations, advisory opinions, and case law. Any advisory opinions cited herein are available
2 on the Commission's website.

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On behalf of the Commission,

Matthew S. Petersen
Chairman