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Washington, DC 20463

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AGENDA ITEM
For meeting of October 27, 2016

October 20, 2016

MEMORANDUM

TO: The Commission

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

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Attorney

Subject: AO 2016-12 (Citizen Super PAC) Draft A

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 October 26, 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 2016-12

2

3 Chris K. Gober, Esq.

4 Troy A. McCurry, Esq.

5 The Gober Group

6 2308 Mt. Vernon Ave., Suite 762

7 Alexandria, VA 22301

8

DRAFT A

9 Dear Messrs. Gober and McCurry:

10 We are responding to your advisory opinion request on behalf of Citizen Super PAC
11 concerning the application of the Federal Election Campaign Act, 52 U.S.C. §§ 30101-46 (the
12 “Act”), and Commission regulations to the requestor’s proposal to distribute a public
13 communication expressly advocating the election of a candidate after contacting that candidate’s
14 authorized committee to request certain support for the communication. The Commission
15 concludes that the proposal is not permissible because it would result in a coordinated
16 communication, and therefore it would be a contribution from Citizen Super PAC to the
17 candidate’s authorized committee.

18 ***Background***¹

19 Citizen Super PAC is registered with the Commission as an independent expenditure-
20 only political committee. Advisory Opinion Request (“AOR”) at AOR002. The requestor has
21 worked with a vendor to produce a video advertisement expressly advocating the election of
22 Representative Joe Heck, a candidate for U.S. Senate; the requestor has placed that video on a
23 designated page of its website. AOR004; *see* A Clear Choice, Citizen Super PAC,

¹ The facts presented in this advisory opinion are based on your letter dated September 9 and email dated September 13, 2016.

1 <https://www.citizensuperpac.com/176> (last visited Oct. 3, 2016) (cited at AOR004).² On that
2 webpage, the requestor seeks contributions in support of a specific distribution of the video, *i.e.*,
3 as a paid Facebook advertisement during a specified date range and to specifically targeted
4 voters. *See id.*

5 Citizen Super PAC proposes to contact Representative Heck’s authorized committee by
6 email to notify it of the project, sending the link to the Citizen Super PAC webpage on which the
7 requestor has posted the video and is seeking funding to pay for the video’s distribution on
8 Facebook. *See id.* In that email to the candidate’s committee, Citizen Super PAC would ask the
9 committee to email its supporters and solicit them to give up to \$5,000 to the requestor to finance
10 the requestor’s distribution of the advertisement. AOR004-006.

11 ***Questions Presented***

12 Citizen Super PAC asks three questions about its proposal to distribute its advertisement
13 after contacting the candidate about it as proposed. Because the requestor’s third question
14 incorporates by reference the first two questions, the Commission addresses that third question.

15 ***Legal Analysis and Conclusions***

16 *Question 3: If Citizen Super PAC pays to distribute an advertisement that expressly advocates*
17 *the election of a federal candidate,³ would it be a coordinated communication, and therefore a*

² Citizen Super PAC represents that the advertisement was produced by a vendor in a manner that would not satisfy the “common vendor” or “former employee or independent contractor” coordination conduct standards at 11 C.F.R. § 109.21(d)(4)-(5). AOR009.

³ As presented in the AOR, the introduction of Question 3 and Question 3(a) incorporate by reference Question 1, which asks: “May Citizen Super PAC contact a Federal candidate’s authorized committee via email and provide a public Internet hyperlink to Citizen Super PAC’s website containing one of Citizen Super PAC’s advertisement projects that contains express advocacy in support of that candidate?” AOR001.

1 *contribution from Citizen Super PAC to that candidate’s authorized committee if, in advance of*
2 *distributing the advertisement:*

3 *(a) Citizen Super PAC contacts the candidate’s authorized committee via email to*
4 *provide a public internet hyperlink to the Citizen Super PAC webpage for the advertisement*
5 *supporting that candidate;*

6 *(b) the candidate’s authorized committee places on its own website a public internet*
7 *hyperlink to the Citizen Super PAC webpage for the advertisement supporting that candidate;*

8 *(c) the candidate’s authorized committee, at Citizen Super PAC’s request, emails the*
9 *committee’s supporters to solicit contributions of up to \$5,000 in support of Citizen Super PAC;⁴*

10 *(d) the candidate committee’s email solicitation referenced in 3(c) contains a public*
11 *internet hyperlink — either to the candidate committee’s website or to Citizen Super PAC’s*
12 *website — that then links to the Citizen Super PAC webpage for the advertisement supporting*
13 *that candidate?*

14 Yes, if Citizen Super PAC were to pay to distribute an advertisement expressly
15 advocating the election of a federal candidate after that candidate took any of the actions
16 requested by Citizen Super PAC, the advertisement would be a coordinated communication, and
17 therefore the requestor’s payments for the advertisement would be contributions to that
18 candidate’s authorized committee.

19 The Act defines a “contribution” to include “any gift . . . or anything of value made by
20 any person for the purpose of influencing any election for Federal office.” 52 U.S.C.
21 § 30101(8)(A); 11 C.F.R. § 100.52(a). A “coordinated expenditure” — which is an expenditure

⁴ As presented in the AOR, Question 3(c) incorporates by reference Question 2, which asks: “In its email referenced in Question 1, may Citizen Super PAC request that the authorized committee distribute an email to its general email lists that contains a solicitation for up to \$5,000 in support of Citizen Super PAC, and may the authorized committee solicit contributions via email up to \$5,000 on behalf of Citizen Super PAC?” AOR001.

1 made by any person “in cooperation, consultation, or concert, with, or at the request or
2 suggestion of,” a candidate or his agents — is also a contribution to the candidate. 52 U.S.C.
3 § 30116(a)(7)(B); *see also* 11 C.F.R. § 109.20.

4 A “coordinated communication” is one form of coordinated expenditure that constitutes
5 an in-kind contribution to the candidate with whom it is coordinated. 11 C.F.R. § 109.21(b).
6 Commission regulations provide a three-prong test to determine if a communication is a
7 “coordinated communication.” 11 C.F.R. § 109.21(a). First, to be a coordinated
8 communication, a person other than the federal candidate or the candidate’s authorized
9 committee must pay for all or part of the communication. 11 C.F.R. § 109.21(a)(1). Second, the
10 communication must satisfy at least one content standard. 11 C.F.R. § 109.21(a)(2), (c). Third,
11 the communication must satisfy at least one conduct standard. 11 C.F.R. § 109.21(a)(3), (d).

12 The Commission concludes that Citizen Super PAC’s proposed Facebook advertisement
13 would be a coordinated communication because it would satisfy all three prongs of the
14 coordinated communication test. First, the communication would be paid for by Citizen Super
15 PAC. Second, Citizen Super PAC represents in its request that the communication would be a
16 “public communication” within the meaning of Commission regulations⁵ that expressly
17 advocates the election of a clearly identified federal candidate, and thus the communications
18 would satisfy the content prong at 11 C.F.R. § 109.21(c)(3). Third, as explained below, the
19 communications would satisfy the “request or suggestion” standard of the conduct prong at 11
20 C.F.R. § 109.21(d)(1).

⁵ 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” including “communications placed for a fee on another person’s Web site.” 11 C.F.R. § 100.26. Because the Representative Heck advertisement would be placed for a fee on Facebook, it would be a public communication.

1 The “request or suggestion” conduct standard is satisfied when the communication “is
2 created, produced, or distributed at the suggestion of a person paying for the communication and
3 the candidate [or] authorized committee . . . assents to the suggestion.” 11 C.F.R.
4 § 109.21(d)(1)(ii). The standard is satisfied by the candidate’s assent to the payor’s suggestion
5 “whether or not there is agreement or formal collaboration.” 11 C.F.R. § 109.21(d); *see also* 11
6 C.F.R. § 109.21(e) (“Agreement or formal collaboration between the [payor] and the [candidate]
7 is not required for a communication to be a coordinated communication.”); Coordinated and
8 Independent Expenditures, 68 Fed. Reg. at 432 (explaining that section 109.21(d)(1)(ii) “is
9 intended to prevent circumvention of the statutory ‘request or suggestion’ test . . . by, for
10 example, the expedient of implicit understandings without a formal request or suggestion”).

11 In this matter, Citizen Super PAC has worked with a vendor to produce a video expressly
12 advocating the election of a federal candidate. It has created a webpage on which persons may
13 view that video advertisement alongside a donation button to effectuate Citizen Super PAC’s
14 detailed distribution strategy. Citizen Super PAC proposes to now email the candidate to ask
15 that he notify his supporters about the advertisement, and that he solicit contributions in support
16 of the advertisement’s paid distribution. AOR004-005. For the candidate to take any of these
17 actions at the request or suggestion of Citizen Super PAC — *i.e.*, for the candidate to post a link
18 on his committee’s website to the Citizen Super PAC webpage for that advertisement, or to send
19 his supporters a link to the Citizen Super PAC webpage for that advertisement, or to ask the
20 candidate’s supporters to contribute to the advertisement’s distribution — would manifest his
21 assent to Citizen Super PAC’s suggested distribution of the advertising. Thus, under the plain
22 text of 11 C.F.R. § 109.21(d)(1)(ii), the Facebook advertisement would meet the conduct prong
23 of the Commission’s coordinated communication test.

1 Citizen Super PAC acknowledges that its proposal implicates the “request or suggestion”
2 standard but argues that its activity would not satisfy that standard because the information that
3 Citizen Super PAC would convey to the candidate would be publicly available on Citizen Super
4 PAC’s website. *See* AOR005-007. Although the Commission’s conduct standards exclude
5 certain conduct relating to publicly available information, those “publicly available” provisions
6 “appropriately appl[y] to only four of the five conduct standards” — not to the “request or
7 suggestion” standard. *Coordinated Communications*, 71 Fed. Reg. 33,190, 33,205 (June 8, 2006)
8 (creating “safe harbor” for use of publicly available information); *see also* 11 C.F.R. §
9 109.21(d)(2), (3), (4)(iii), (5)(ii) (incorporating exception in other conduct standards for
10 information or materials obtained from “publicly available source”). Indeed, the Commission
11 intentionally did not exclude public materials from satisfying the “request or suggestion”
12 standard out of concern that doing so might lead to circumvention through coordinated
13 communications like those proposed here: Communications that rely on publicly available
14 information but are triggered by “a candidate privately convey[ing] a request that a
15 communication be made.” *Coordinated Communications*, 71 Fed. Reg. at 33,205.⁶ Unlike the
16 coincidental use by two parties of public information, a payor’s action taken after making a
17 private suggestion to a candidate and receiving the candidate’s assent is coordinated because it
18 represents “something more than what one might call passive simultaneous action.” Hearing
19 before the Subcomm. on Privileges and Elections of the S. Comm. on Rules and Admin., 94th
20 Cong. 145 (Feb. 18, 1976) (testimony of Antonin Scalia, Asst. Att’y Gen’l) (discussing
21 difference between coordinated and independent expenditures). And the Commission has made

⁶ There is no legal or functional difference in this context between a suggestion from the candidate and a suggestion from the payor to which the candidate assents. *Coordinated and Independent Expenditures*, 68 Fed. Reg. at 432 (“Assent to a suggestion is merely one form of a request.”); *see* 11 C.F.R. § 109.21(d)(1)(i)-(ii).

1 clear that the request or suggestion standard is “intended to cover requests or suggestions made
2 to a select audience,” such as by “electronic mail directly to a discrete group of recipients.”
3 Coordinated and Independent Expenditures, 68 Fed. Reg. 421, 432 (Jan. 3, 2003). Accordingly
4 here, where the payor would make the request or suggestion directly and privately to the most
5 discrete group of recipients — the candidate or his committee, AOR007 — the conduct standard
6 of section 109.21(d)(1)(ii) would be satisfied by the candidate or candidate committee’s assent to
7 Citizen Super PAC’s request.

8 For these reasons, the communication that is the subject of this request would be a
9 coordinated communication in light of the assent, as described above, of Representative Heck or
10 his committee to the suggested distribution, and therefore it would also be a contribution to
11 Representative Heck’s committee.⁷ Accordingly, Citizen Super PAC may not engage in its
12 proposed activity because, as an independent expenditure-only committee, it may not make
13 contributions to candidates. *See* Advisory Opinion 2010-09 (Club for Growth) at n.5 (quoting
14 *SpeechNow v. FEC*, 599 F.3d 686, 693 (D.C. Cir. 2010)).⁸

15 This response constitutes an advisory opinion concerning the application of the Act and
16 Commission regulations to the specific transaction or activity set forth in your request. *See* 52
17 U.S.C. § 30108. The Commission emphasizes that, if there is a change in any of the facts or

⁷ Citizen Super PAC’s coordinated communications may also affect the contribution limits of contributors to Citizen Super PAC’s communications who contribute to the candidates advocated by those communications. *See* 11 C.F.R. § 110.1(h)(2) (providing that contribution to unauthorized committee must be aggregated with contributions to authorized committee if contributor gives to unauthorized committee with knowledge that substantial portion of contribution will be expended on behalf of authorized committee’s candidate); *McCutcheon v. FEC*, 134 S. Ct. 1434, 1453-56 (2014) (discussing anticircumvention purpose of section 110.1(h)); Contribution and Expenditure Limitations and Prohibitions, 52 Fed. Reg. 760, 765 (Jan. 9, 1987) (same); *cf.* Advisory Opinion 2010-09 (Club for Growth) at 5 (concluding that independent expenditure-only committee’s solicitations and communications would not implicate 11 C.F.R § 110.1(h) because they were not coordinated).

⁸ *See also* Letter from Citizen Super PAC, Misc. Rep. to FEC (Oct. 8, 2014), <http://docquery.fec.gov/pdf/605/14031302605/14031302605.pdf> (acknowledging that, pursuant to *SpeechNow*, Citizen Super PAC may not “make contributions, whether direct, in-kind, or via coordinated communications, to federal candidates or committees”).

1 assumptions presented, and such facts or assumptions are material to a conclusion presented in
2 this advisory opinion, then the requestor may not rely on that conclusion as support for its
3 proposed activity. Any person involved in any specific transaction or activity which is
4 indistinguishable in all its material aspects from the transaction or activity with respect to which
5 this advisory opinion is rendered may rely on this advisory opinion. *See* 52 U.S.C.
6 § 30108(c)(1)(B). Please note that the analysis or conclusions in this advisory opinion may be
7 affected by subsequent developments in the law including, but not limited to, statutes,
8 regulations, advisory opinions, and case law. Any advisory opinions cited herein are available
9 on the Commission's website.

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On behalf of the Commission,

Matthew S. Petersen
Chairman