



FEDERAL ELECTION COMMISSION
Washington, DC 20463

AGENDA DOCUMENT NO. 16-52-B
AGENDA ITEM
For meeting of October 27, 2016
Submitted Late

October 26, 2016

MEMORANDUM

TO: The Commission

FROM: Lisa J. Stevenson *NFS for LS*
Acting General Counsel

Adav Noti *NFS for AN*
Associate General Counsel

Neven F. Stipanovic *NFS*
Acting Assistant General Counsel

Jessica Selinkoff *JS*
Attorney

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

2016 OCT 26 PM 5:55

Attached is a proposed draft of the subject advisory opinion.

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.

DRAFT B

4 Troy A. McCurry, Esq.

5 The Gober Group

6 2308 Mt. Vernon Ave., Suite 762

7 Alexandria, VA 22301

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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 requestor may inform the authorized committee about the proposed public
16 communication before publicly disseminating it, but if the candidate or authorized committee
17 manifests assent to its dissemination, the public communication would become a coordinated
18 communication and, therefore a contribution from Citizen Super PAC to the authorized
19 committee.

20 ***Background***¹

21 Citizen Super PAC is registered with the Commission as an independent expenditure-
22 only political committee. Advisory Opinion Request (“AOR”) at AOR002. The requestor has
23 worked with a vendor to produce a video advertisement expressly advocating the election of
24 Representative Joe Heck, a candidate for U.S. Senate; the requestor has placed that video on a
25 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 to crowdfund 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.* The requestor will disseminate the advertisement as a public communication
5 only if the advertisement project meets its funding goal by a given deadline. *Id.*; AOR006.

6 Citizen Super PAC proposes to contact Representative Heck’s authorized committee by
7 email to notify it of the project, sending the link to the Citizen Super PAC webpage on which the
8 requestor has posted the video, and seeking funding to pay for the video’s distribution on
9 Facebook. AOR004. In that email to the candidate’s committee, Citizen Super PAC would ask
10 the committee to email its supporters and solicit them to contribute up to \$5,000 to the requestor
11 to finance the requestor’s distribution of the advertisement. AOR004-006. Although the
12 committee could solicit contributions in support of a particular Citizen Super PAC advertisement
13 or, more generally, solicit supporters “to make a contribution to a Citizen Super PAC project of
14 their own choosing, without mentioning a specific advertisement project,” AOR009, Citizen
15 Super PAC “currently has no mechanism for supporters to make contributions . . . except via
16 contributions in support of particular advertisement projects.” *Id.*

17 ***Questions Presented***

18 *Question 1: May Citizen Super PAC contact a federal candidate’s authorized committee via*
19 *email and provide a public internet hyperlink to Citizen Super PAC’s website containing one of*

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.

1 *Citizen Super PAC's advertisement projects that contains express advocacy in support of that*
2 *candidate?*

3 *Question 2: In its email referenced in Question 1, may Citizen Super PAC request that the*
4 *authorized committee distribute an email to its general email lists that contains a solicitation for*
5 *up to \$5,000 in support of Citizen Super PAC, and may the authorized committee solicit*
6 *contributions via email up to \$5,000 on behalf of Citizen Super PAC?*

7 *Question 3: If Citizen Super PAC pays to distribute the advertisement project referenced in*
8 *Question 1, would it result in a contribution in the form of a coordinated communication from*
9 *Citizen Super PAC to that candidate's authorized committee if, in advance of distributing the*
10 *advertisement:*

11 *(a) Citizen Super PAC contacts the candidate's authorized committee via the email*
12 *referenced in Question 1;*

13 *(b) the candidate's authorized committee places on its own website a public internet*
14 *hyperlink to the Citizen Super PAC webpage for the advertisement project supporting that*
15 *candidate;*

16 *(c) the candidate's authorized committee, at Citizen Super PAC's request, emails the*
17 *committee's supporters to solicit contributions of up to \$5,000 in support of Citizen Super PAC;*
18 *and*

19 *(d) the candidate committee's email solicitation referenced in 3(c) contains a public*
20 *internet hyperlink — either to the candidate committee's website or to Citizen Super PAC's*
21 *website — that then links to the Citizen Super PAC webpage for the advertisement project*
22 *supporting that candidate?*

1 ***Legal Analysis and Conclusions***³

2 *Question 3: If Citizen Super PAC pays to distribute the advertisement referenced in Question 1,*
3 *would it result in a contribution in the form of a coordinated communication from Citizen Super*
4 *PAC to that candidate's authorized committee if, in advance of distributing the advertisement:*

5 (a) *Citizen Super PAC contacts the candidate's authorized committee via email to*
6 *provide a public internet hyperlink to the Citizen Super PAC webpage for the advertisement*
7 *project supporting that candidate;*

8 (b) *the candidate's authorized committee places on its own website a public internet*
9 *hyperlink to the Citizen Super PAC webpage for the advertisement project supporting that*
10 *candidate;*

11 (c) *the candidate's authorized committee, at Citizen Super PAC's request, emails the*
12 *committee's supporters to solicit contributions of up to \$5,000 in support of Citizen Super PAC;*
13 *and*

14 (d) *the candidate committee's email solicitation referenced in 3(c) contains a public*
15 *internet hyperlink — either to the candidate committee's website or to Citizen Super PAC's*
16 *website — that then links to the Citizen Super PAC webpage for the advertisement project*
17 *supporting that candidate?*

18 Yes, if Citizen Super PAC pays to place the advertisement described in Question 1 on
19 Facebook as proposed after the candidate's authorized committee takes the actions described

³ The Commission is answering the questions in a sequence different from that presented in the AOR, but has retained the AOR's numbering throughout this opinion.

1 above, the advertisement would result in a contribution in the form of a coordinated
2 communication to the candidate’s authorized committee.

3 The Act defines a “contribution” to include “any gift . . . or anything of value made by
4 any person for the purpose of influencing any election for Federal office.” 52 U.S.C.
5 § 30101(8)(A); 11 C.F.R. § 100.52(a). A “coordinated expenditure” — which is an expenditure
6 made by any person “in cooperation, consultation, or concert, with, or at the request or
7 suggestion of,” a candidate or his agents — is also a contribution to the candidate. 52 U.S.C.
8 § 30116(a)(7)(B); *see also* 11 C.F.R. § 109.20.

9 A “coordinated communication” is one form of coordinated expenditure that constitutes
10 an in-kind contribution to the candidate with whom it is coordinated. 11 C.F.R. § 109.21(b).
11 Commission regulations provide a three-prong test to determine if a communication is a
12 “coordinated communication.” 11 C.F.R. § 109.21(a). First, a person other than the federal
13 candidate or the candidate’s authorized committee must pay for all or part of the communication.
14 11 C.F.R. § 109.21(a)(1). Second, the communication must satisfy at least one content standard.
15 11 C.F.R. § 109.21(a)(2), (c). Third, the communication must satisfy at least one conduct
16 standard. 11 C.F.R. § 109.21(a)(3), (d).

17 The Commission concludes that Citizen Super PAC’s proposed Facebook advertisement
18 would be a coordinated communication if the candidate acts as described because all three
19 prongs of the coordinated communication test would be satisfied. First, the communication
20 would be paid for by Citizen Super PAC. Second, Citizen Super PAC represents in its request
21 that the communication would be a “public communication” within the meaning of Commission

1 regulations⁴ that expressly advocates the election of a clearly identified federal candidate, and
2 thus the communication would satisfy the content prong at 11 C.F.R. § 109.21(c)(3). Third, as
3 explained below, the communication would satisfy the “request or suggestion” standard of the
4 conduct prong at 11 C.F.R. § 109.21(d)(1).

5 The “request or suggestion” conduct standard is satisfied when the communication is
6 created, produced, or distributed (i) at the request or suggestion of a candidate or authorized
7 committee; or (ii) at the suggestion of the person paying for the communication, and the
8 candidate or authorized committee assents to the suggestion. 11 C.F.R. § 109.21(d)(1). The
9 Commission has explained that the latter provision — the “assent” provision in section
10 109.21(d)(1)(ii) — “is intended to prevent circumvention of the statutory ‘request or suggestion’
11 test . . . by, for example, the expedient of implicit understandings without a formal request or
12 suggestion.” Coordinated and Independent Expenditures, 68 Fed. Reg. 421, 432 (Jan. 3, 2003).
13 The request or suggestion standard is satisfied “whether or not there is agreement or formal
14 collaboration.” 11 C.F.R. § 109.21(d); *see also* 11 C.F.R. § 109.21(e).

15 In this matter, Citizen Super PAC has worked with a vendor to produce a video expressly
16 advocating the election of a federal candidate. It has created a webpage on which persons may
17 view that video alongside a solicitation for contributions to effectuate Citizen Super PAC’s
18 distribution of the video as a public communication. Under Citizen Super PAC’s proposal,
19 Citizens Super PAC would provide the authorized committee of the candidate identified in the
20 video with a public internet hyperlink to the webpage for the advertisement project, and the

⁴ 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 authorized committee would, at Citizen Super PAC’s request, place the hyperlink on its own
2 website, send an email to the candidate’s supporters soliciting contributions to Citizen Super
3 PAC, and include in the email a public internet hyperlink to the advertisement project supporting
4 that candidate. AOR004-005. Although Citizen Super PAC states that the authorized committee
5 “can send an email solicitation in general support of Citizen Super PAC,” Citizen Super PAC
6 currently “has no mechanism for supporters to make contributions . . . except via contributions in
7 support of particular advertisement projects.” AOR007, 009. Moreover, Citizen Super PAC will
8 disseminate the advertisement as a public communication only if the advertisement project meets
9 its funding goals by a given deadline. AOR006.

10 In light of these facts, the Commission concludes that the candidate’s authorized
11 committee would manifest assent to Citizen Super PAC’s suggested distribution of the
12 advertisement if it takes the actions requested by Citizen Super PAC. *See* Coordinated and
13 Independent Expenditures, 68 Fed. Reg. at 432 (recognizing that “the assent of a candidate may
14 take many different forms”). Thus, under the plain text of 11 C.F.R. § 109.21(d)(1)(ii), the
15 Facebook advertisement would meet the conduct prong of the Commission’s coordinated
16 communication test.

17 This result would not change even though the information that Citizen Super PAC would
18 convey to the candidate would be publicly available on Citizen Super PAC’s website. *See*
19 AOR005-007. Although the Commission’s conduct standards exclude certain conduct relating to
20 publicly available information, those “publicly available” provisions “appropriately appl[y] to
21 only four of the five conduct standards” — not to the “request or suggestion” standard.
22 Coordinated Communications, 71 Fed. Reg. 33,190, 33,205 (June 8, 2006) (creating “safe
23 harbor” for use of publicly available information); *see also* 11 C.F.R. § 109.21(d)(2), (3), (4)(iii),

1 (5)(ii) (incorporating exception in other conduct standards for information or materials obtained
2 from “publicly available source”). Indeed, the Commission intentionally did not exclude public
3 materials from satisfying the “request or suggestion” standard out of concern that doing so might
4 lead to circumvention through coordinated communications like those proposed here:
5 Communications that rely on publicly available information but are triggered by “a candidate
6 privately convey[ing] a request that a communication be made.” Coordinated Communications,
7 71 Fed. Reg. at 33,205.⁵ Unlike the coincidental use by two parties of public information, a
8 payor’s action taken after making a private suggestion to a candidate and receiving the
9 candidate’s assent is coordinated because it represents “something more than what one might call
10 passive simultaneous action.” Hearing before the Subcomm. on Privileges and Elections of the
11 S. Comm. on Rules and Admin., 94th Cong. 145 (Feb. 18, 1976) (testimony of Antonin Scalia,
12 Asst. Att’y Gen’l) (discussing difference between coordinated and independent expenditures).
13 And the Commission has made clear that the request or suggestion standard is “intended to cover
14 requests or suggestions made to a select audience,” such as by “electronic mail directly to a
15 discrete group of recipients.” Coordinated and Independent Expenditures, 68 Fed. Reg. at 432.

16 Accordingly, here, where the payor would make the request or suggestion directly and
17 privately to the most discrete group of recipients — the candidate or his committee, AOR007 —
18 the conduct standard of section 109.21(d)(1)(ii) would be satisfied by the candidate or candidate
19 committee’s assent to Citizen Super PAC’s request. For these reasons, the proposed
20 advertisement would be a coordinated communication in light of the assent, as described above,

⁵ 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 from of a request.”); *see* 11 C.F.R. § 109.21(d)(1).

1 of the candidate or the candidate’s authorized committee to the suggested distribution, and
2 therefore it would also be a contribution to the authorized committee. As an independent
3 expenditure-only committee, Citizen Super PAC may not make contributions to candidates. *See*
4 Advisory Opinion 2010-09 (Club for Growth) at n.5 (quoting *SpeechNow v. FEC*, 599 F.3d 686,
5 693 (D.C. Cir. 2010)).⁶

6 *Question 1: May Citizen Super PAC contact a federal candidate’s authorized committee via*
7 *email and provide a public internet hyperlink to Citizen Super PAC’s website containing one of*
8 *Citizen Super PAC’s advertisement projects that contains express advocacy in support of that*
9 *candidate?*

10 Yes, Citizen Super PAC may contact a federal candidate’s authorized committee via
11 email and provide a public internet hyperlink to Citizen Super PAC’s website containing one of
12 Citizen Super PAC’s advertisement projects that contains express advocacy in support of that
13 candidate.

14 Nothing in the Act or Commission regulations prohibits a non-authorized committee like
15 the requestor from informing a candidate or authorized committee about its activities. The
16 Commission has previously stated that coordination does not result “where [the person paying
17 for a public communication] merely informs a candidate . . . of its plans.” Coordinated and
18 Independent Expenditures, 68 Fed. Reg. at 432 (internal quotation marks omitted). Accordingly,
19 the passive receipt by an authorized committee of publicly available information about Citizens

⁶ *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 Super PAC's activities would not, by itself, constitute assent or otherwise meet the conduct
2 prong of 109.21(d).

3 *Question 2: In its email referenced in Question 1, may Citizen Super PAC request that the*
4 *authorized committee distribute an email to its general email lists that contains a solicitation for*
5 *up to \$5,000 in support of Citizen Super PAC, and may the authorized committee solicit*
6 *contributions via email up to \$5,000 on behalf of Citizen Super PAC?*

7 Under the facts presented here, the authorized committee would be deemed to have
8 assented to Citizen Super PAC's public dissemination of the advertisement under 11 C.F.R.
9 § 109.21(d)(ii) if the authorized committee sends an email soliciting funds to support Citizen
10 Super PAC's dissemination of the advertisement, for the reasons provided in response to
11 Question 3, above.

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 requestor may not rely on that conclusion as support for its
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,
22 regulations, advisory opinions, and case law. Any advisory opinions cited herein are available
23 on the Commission's website.

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On behalf of the Commission,

Matthew S. Petersen
Chairman