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FEDERAL ELECTION COMMISSION
Washington, DC 20463

November 2, 2016

MEMORANDUM

TO: The Commission

FROM: Lisa J. Stevenson *ljs*
Acting General Counsel

Adav Noti *AN by ljs*
Associate General Counsel

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Acting Assistant General Counsel

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Attorney

Subject: AO 2016-12 (Citizen Super 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 3:00 pm (Eastern Time) on November 3, 2016.

For more information about how to submit comments, 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 C

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. The Commission concludes
14 that Citizen Super PAC may inform a candidate committee about its activities and proposed
15 communications by emailing a link to its website and/or a webpage. However, if Citizen Super
16 PAC asks the candidate’s authorized committee to raise funds for the public communication and
17 the committee does so, that would result in a coordinated communication and, therefore, a
18 contribution from Citizen Super PAC to the candidate committee when Citizen Super PAC pays
19 to disseminate the advertisement. The Commission further concludes that Citizen Super PAC
20 may disseminate its advertisement if a candidate committee acts in support of the communication
21 unilaterally and without any request or suggestion by Citizen Super PAC.

22 ***Background***¹

23 Citizen Super PAC is registered with the Commission as an independent expenditure-
24 only political committee. Advisory Opinion Request (“AOR”) at AOR002. The requestor has

¹ The facts presented in this advisory opinion are based on your letter dated September 9 and email dated September 13, 2016 (collectively “AOR”), your comment dated October 26, 2016, and information you provided at the Commission’s open meeting on October 27, 2016.

1 worked with a vendor to produce a video advertisement expressly advocating the election of
2 Representative Joe Heck, a candidate for U.S. Senate; the requestor has placed that video on a
3 designated page of its website. AOR004; *see* A Clear Choice, Citizen Super PAC,
4 <https://www.citizensuperpac.com/176> (last visited Oct. 3, 2016) (cited at AOR004).² On that
5 webpage, the requestor seeks contributions to fund public dissemination of the video. The video
6 advocating election of Joe Heck would be disseminated as a paid Facebook advertisement during
7 a specified date range and to specifically targeted voters. *See id.*

8 Citizen Super PAC proposes three different scenarios in which it, Representative Heck's
9 authorized committee, or both, would engage in certain conduct prior to Citizen Super PAC's
10 paid distribution of the advertisement. In the first scenario, Citizen Super PAC would email
11 Representative Heck's authorized committee a link to the Citizen Super PAC website or
12 webpage that contains the video and seeks funding for the video's distribution on Facebook. *See*
13 *id.* In the second scenario, Citizen Super PAC would email Representative Heck's authorized
14 committee a link to the same webpage and ask the committee to send an email to the
15 committee's general email lists soliciting funds in support of Citizen Super PAC, and the
16 committee would do as requested. In the third scenario, Representative Heck's authorized
17 committee would engage in conduct in support of the advertisement, but Citizen Super PAC
18 would have no contact with Representative Heck or his authorized committee prior to Citizen
19 Super PAC's distribution of the advertisement.

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 ***Questions Presented***

2 *Question 1: May Citizen Super PAC contact a federal candidate's authorized committee via*
3 *email and provide a public internet hyperlink to Citizen Super PAC's website and/or webpage*
4 *featuring one of Citizen Super PAC's advertisement projects containing express advocacy in*
5 *support of that candidate?*

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

10 *Question 3: If Citizen Super PAC pays to distribute an advertisement that expressly advocates*
11 *the election of a federal candidate, would it be a coordinated communication, and therefore a*
12 *contribution from Citizen Super PAC to that candidate's authorized committee if, in advance of*
13 *distributing the advertisement:*

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

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

18 *(c) the candidate committee's email solicitation referenced in 3(b) contains a public*
19 *internet hyperlink — either to the candidate committee's website or to Citizen Super PAC's*

1 *website — that then links to the Citizen Super PAC webpage for the advertisement supporting*
2 *that candidate?*³

3 ***Legal Analysis and Conclusions***

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

8 Yes, Citizen Super PAC may contact a federal candidate’s authorized committee as
9 proposed before paying to disseminate the advertisement without the advertisement resulting in a
10 coordinated communication. Citizen Super PAC proposes to email Representative Heck’s
11 authorized committee a link to Citizen Super PAC’s website or to the webpage featuring an
12 advertisement project supporting Representative Heck, without Representative Heck or his
13 committee taking any action in response. The Commission has previously stated that
14 coordination does not result “where [the person paying for a public communication] merely
15 informs a candidate . . . of its plans.” Coordinated and Independent Expenditures, 68 Fed. Reg.
16 at 432 (internal quotation marks omitted). Therefore, the Commission concludes that the
17 candidate committee’s passive receipt of Citizen Super PAC’s email would not, by itself, turn

³ The AOR presented Question 3(a) as: “Citizen Super PAC contacts the candidate’s authorized committee via email to provide a public internet hyperlink to the Citizen Super PAC webpage for the advertisement project supporting that candidate.” AOR001, 006. At the Commission’s open meeting on October 27, 2016, Citizen Super PAC clarified that Question 3 is intended to ask whether Citizen Super PAC’s paid distribution of the advertisement would be a coordinated communication if the candidate committee unilaterally takes any of the actions described in paragraphs (b) through (d) of Question 3 in the absence of a request or suggestion from Citizen Super PAC. The Commission responds to Question 3 as clarified, addresses Question 3(a) in its response to Question 1, and has redesignated the remaining paragraphs in Question 3 accordingly.

1 Citizens Super PAC’s subsequent dissemination of the advertisement into a coordinated
2 communication under 11 C.F.R. § 109.21.

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 it sends an email soliciting funds to support Citizen Super PAC’s dissemination
10 of the advertisement in response to Citizen Super PAC’s request that it do so.

11 The Act defines a “contribution” to include “any gift . . . or anything of value made by
12 any person for the purpose of influencing any election for Federal office.” 52 U.S.C.
13 § 30101(8)(A); 11 C.F.R. § 100.52(a). A “coordinated expenditure” — which is an expenditure
14 made by any person “in cooperation, consultation, or concert, with, or at the request or
15 suggestion of,” a candidate or his agents — is also a contribution to the candidate. 52 U.S.C.
16 § 30116(a)(7)(B); *see also* 11 C.F.R. § 109.20.

17 A “coordinated communication” is one form of coordinated expenditure that constitutes
18 an in-kind contribution to the candidate with whom it is coordinated. 11 C.F.R. § 109.21(b).
19 Commission regulations provide a three-prong test to determine if a communication is a
20 “coordinated communication.” 11 C.F.R. § 109.21(a). First, to be a coordinated
21 communication, a person other than the federal candidate or the candidate’s authorized
22 committee must pay for all or part of the communication. 11 C.F.R. § 109.21(a)(1). Second, the

1 communication must satisfy at least one content standard. 11 C.F.R. § 109.21(a)(2), (c). Third,
2 the communication must satisfy at least one conduct standard. 11 C.F.R. § 109.21(a)(3), (d).

3 Commission regulations provide that explicitly or implicitly asking, requesting, or
4 recommending that another person make a contribution is a solicitation. 11 C.F.R. § 300.2(m).
5 A communication that identifies a webpage specifically dedicated to facilitating the making of a
6 contribution constitutes a solicitation. 11 C.F.R. § 300.2(m)(1)(iii).

7 Thus, Citizen Super PAC’s proposed Facebook advertisement would be a coordinated
8 communication if the candidate takes actions requested or suggested by Citizen Super PAC
9 because the advertisement would satisfy all three prongs of the coordinated communication test.
10 First, the communication would be paid for by Citizen Super PAC. Second, Citizen Super PAC
11 represents in its request that the communication would be a “public communication” within the
12 meaning of Commission regulations⁴ that expressly advocates the election of a clearly identified
13 federal candidate, and thus the communications would satisfy the content prong at 11 C.F.R.
14 § 109.21(c)(3). Third, as explained below, the communication would satisfy the “request or
15 suggestion” standard of the conduct prong at 11 C.F.R. § 109.21(d)(1).

16 The “request or suggestion” conduct standard is satisfied when the communication “is
17 created, produced, or distributed at the suggestion of a person paying for the communication and
18 the candidate [or] authorized committee . . . assents to the suggestion.” 11 C.F.R.
19 § 109.21(d)(1)(ii). The standard is satisfied by the candidate’s assent to the payor’s suggestion
20 “whether or not there is agreement or formal collaboration.” 11 C.F.R. § 109.21(d); *see also* 11

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 C.F.R. § 109.21(e) (“Agreement or formal collaboration between the [payor] and the [candidate]
2 is not required for a communication to be a coordinated communication.”); Coordinated and
3 Independent Expenditures, 68 Fed. Reg. at 432 (explaining that section 109.21(d)(1)(ii) “is
4 intended to prevent circumvention of the statutory ‘request or suggestion’ test . . . by, for
5 example, the expedient of implicit understandings without a formal request or suggestion”).

6 Unlike the coincidental use by two parties of public information, a payor’s action taken
7 after making such a private suggestion to a candidate and receiving the candidate’s assent is
8 coordinated because it represents “something more than what one might call passive
9 simultaneous action.” Hearing before the Subcomm. on Privileges and Elections of the S.
10 Comm. on Rules and Admin., 94th Cong. 145 (Feb. 18, 1976) (testimony of Antonin Scalia, Asst.
11 Att’y Gen’l) (discussing difference between coordinated and independent expenditures). And
12 the Commission has made clear that the request or suggestion standard is “intended to cover
13 requests or suggestions made to a select audience,” such as by “electronic mail directly to a
14 discrete group of recipients.” Coordinated and Independent Expenditures, 68 Fed. Reg. 421, 432
15 (Jan. 3, 2003). Accordingly here, where the payor would make the request or suggestion directly
16 and privately to the most discrete group of recipients — the candidate or his committee, AOR007
17 — the conduct standard of section 109.21(d)(1)(ii) would be satisfied by the candidate or
18 candidate committee’s assent to Citizen Super PAC’s request.

19 Thus, the communication that is the subject of this request would be a coordinated
20 communication in light of the assent of Representative Heck or his committee to the suggested
21 distribution, and therefore it would also be a contribution to Representative Heck’s committee.
22 Accordingly, Citizen Super PAC may not engage in its proposed activity because, as an
23 independent expenditure-only committee, it may not make contributions to candidates. *See*

1 Advisory Opinion 2010-09 (Club for Growth) at n.5 (quoting *SpeechNow v. FEC*, 599 F.3d 686,
2 693 (D.C. Cir. 2010)).⁵

3 *Question 3: If Citizen Super PAC pays to distribute an advertisement that expressly advocates*
4 *the election of a federal candidate, would it be a coordinated communication, and therefore a*
5 *contribution from Citizen Super PAC to that candidate’s authorized committee if, in advance of*
6 *distributing the advertisement:*

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

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

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

15 No, Citizen Super PAC’s distribution of the advertisement would not be a coordinated
16 communication if the candidate committee unilaterally takes any of the actions listed in Question
17 3 in the absence of a request or suggestion from Citizen Super PAC.

18 By definition, the request or suggestion prong of the Commission’s coordinated
19 communications regulations cannot be satisfied if there is no request or suggestion by either
20 party to the other. *See* 11 C.F.R. § 109.21(d)(1). Nor do the facts presented here indicate that

⁵ *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”).

