FEDERAL ELECTION COMMISSION
Washington, DC 20463

April 27, 2012

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

ADVISORY OPINION 2012-14

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Dear Messrs. Hoersting, Backer and Najvar:

We are responding to your advisory opinion request on behalf of Shaun McCutcheon, concerning the application of the Federal Election Campaign Act of 1971, as amended (the "Act"), and Commission regulations to Mr. McCutcheon's desire to make aggregated contributions to Federal candidates totaling $54,400 during the 2011-2012 election cycle. The Commission concludes that the Act prohibits Mr. McCutcheon from making aggregated contributions to Federal Candidates in excess of $46,200 during the 2011-2012 election cycle.

Background

The facts presented in this advisory opinion are based on your letter received on March 9, 2012, and a review of the Commission's disclosure database.

Shaun McCutcheon is an individual who has currently made contributions totaling $7,500 to Federal candidates and their principal campaign committees for the 2011-2012 election cycle.[1] Mr. McCutcheon wishes to make one additional contribution of $2,500

[1] Your request stated that Mr. McCutcheon has made contributions totaling only $5,000 this election cycle — $2,500 to Scott Beason in the 6th Congressional District race in Alabama and $2,500 to Josh Mandel in the U.S. Senate race in Ohio. Commission records show, however, that Mr. McCutcheon has made contributions to Josh Mandel's campaign committee totaling $5,000 — $2,500 for the 2012 primary election and $2,500 for the 2012 general election — and thus a total of $7500 to all authorized committees.

and 25 contributions of $1,776 to Federal candidates in the 2011-2012 election cycle. You ask whether Mr. McCutcheon's proposed activity is permissible.

Question Presented

May Mr. McCutcheon make contributions to Federal candidates during the 2011-2012 election cycle that will total in the aggregate $54,440?

Legal Analysis and Conclusions

No, the Act prohibits Mr. McCutcheon from making contributions to Federal candidates during the 2011-2012 election cycle that will exceed in the aggregate $46,200.

Pursuant to 2 U.S.C. 441a(a)(3)(A), during the period which begins on January 1 of an odd-numbered year, and ends on December 31 of the next even-numbered year, no individual may make contributions to candidates and the authorized committees of candidates aggregating more than $37,500, as adjusted by inflation pursuant to 2 U.S.C. 441a(c) and 11 CFR 110.5(b)(3). For the 2011-2012 election cycle, an individual may make contributions aggregating no more than $46,200 to candidates and the authorized committees of candidates. *See* Price Index Adjustments for Contribution and Expenditure Limits and Lobbyist Bundling Disclosure Threshold ("Price Index Adjustments"), 76 FR 8368, 8370 (Feb. 14, 2011). Thus, Mr. McCutcheon is limited to contributions to candidates and candidate committees aggregating no more than $46,200 during the 2011-2012 election cycle. Consequently, if he makes contributions totaling in the aggregate $54,400, Mr. McCutcheon will be in violation of 2 U.S.C. 441a(a)(3).

You ask us to find that Mr. McCutcheon may make contributions in excess of the express limits of section 441a(a)(3)(A) because you contend these congressionally imposed limits are unconstitutional. The Commission, however, lacks the power to make such a finding. *See Johnson v. Robison*, 415 U.S. 361, 368 (1974) (adjudication of constitutionality is generally outside an administrative agency's authority); *Robertson v. FEC*, 45 F.3d 486,489 (D.C. Cir. 1995) (noting in the context of the Commission's administrative enforcement process that "[i]t was hardly open to the Commission, an administrative agency, to entertain a claim that the statute which created it was in some respect unconstitutional"). Because no court has invalidated the limitation in section 441a(a)(3)(A) on constitutional grounds, we are required to give it full force.

In *Buckley v. Valeo*, 424 U.S. 1, 38 (1976), the Supreme Court upheld the Act's then-limit on aggregate contributions by individuals of $25,000 per calendar year as a "quite modest restraint upon protected political activity [that] serves to prevent evasion" of the limit on contributions to candidates. The overall limit on contributions to candidates, political party committees, and other political committees passed constitutional muster, the Court found, because it was "no more than a corollary of the basic individual contribution limitation." *Id.*

In the Bipartisan Campaign Reform Act of 2002 (BCRA), 116 Stat. 102-103, Congress increased the overall individual contribution limitation to $95,000, an increase designed to reflect increases in the price index since the limit had passed in 1974. Congress divided the overall limit between a limitation on contributions to candidates at $37,500, and a limit on contributions to other committees at $57,500. *Id.* (codified at 2 U.S.C. 441a(a)(3)). Congress then indexed each of these limits to reflect increases in inflation, and the current overall limit on contributions to candidates, as indexed to reflect increases in the price index, is $46,200. Price Index Adjustments, *supra*. You contend that Congress's separation of the aggregate biennial limits by type of recipient renders the portion attributable to contributions to candidates unconstitutional, but no court has struck down such a limitation.

Accordingly, Mr. McCutcheon may not make contributions to Federal candidates during the 2011-2012 election cycle in excess of the $46,200 aggregate limit.

This response constitutes an advisory opinion concerning the application of the Act and Commission regulations to the specific transaction or activity set forth in your request. *See* 2 U.S.C. 437f. The Commission emphasizes that, if there is a change in any of the facts or assumptions presented, and such facts or assumptions are material to a conclusion presented in this advisory opinion, then the requestor may not rely on that conclusion as support for its proposed activity. Any person involved in any specific transaction or activity which is indistinguishable in all its material aspects from the transaction or activity with respect to which this advisory opinion is rendered may rely on this advisory opinion. *See* 2 U.S.C. 437f(c)(1)(B). Please note that the analysis or conclusions in this advisory opinion may be affected by subsequent developments in the law, including, but not limited to, statutes, regulations, advisory opinions, and case law.

On behalf of the Commission,

(signed)
Caroline C. Hunter
Chair