FEDERAL ELECTION COMMISSION
Washington, DC 20463

October 10, 2012

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

ADVISORY OPINION 2012-32

Stephen M. Hoersting, Esq.
Dan Backer, Esq.
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209 Pennsylvania Avenue, SE, Suite 2109
Washington, DC 20003

Dear Messrs. Hoersting and Backer:

We are responding to your advisory opinion request on behalf of the Tea Party Leadership Fund ("TPLF"), Sean Bielat, and John Raese, concerning the application of the Federal Election Campaign Act (the "Act") and Commission regulations to contributions by an aspiring multicandidate political committee to Federal candidates. The requestors ask whether the Act's definition of a "multicandidate political committee" prevents TPLF from making contributions at this time in excess of $2,500 per election to Mr. Bielat and Mr. Raese, who are candidates for Federal office, and whether Mr. Bielat and Mr. Raese are currently prohibited from accepting such contributions. The Commission concludes that, at this time, the Act prohibits TPLF from making contributions over $2,500 per election to Mr. Bielat and Mr. Raese, and that it currently prohibits Mr. Bielat and Mr. Raese from accepting such contributions.

Background

The facts presented in this advisory opinion are based on your letter received on September 21, 2012.

TPLF is a nonconnected political committee. It registered as a political committee on May 9, 2012. TPLF represents that it has made contributions to seven candidates and has received contributions from at least 4,500 persons to its contribution account and from more than 70 persons to its non-contribution account.[1] Mr. Bielat is a candidate for the U.S. House of

[1] *See Carey v. FEC*, 791 F. Supp. 2d 121, 131 (D.D.C. 2011) (noting that a nonconnected political committee that makes direct contributions to candidates may receive unlimited funds into a separate bank account for the purpose of financing independent expenditures); *see also* Press Release, FEC Statement on *Carey v. FEC*: Reporting Guidance for Political Committees that Maintain a Non-Contribution Account, Oct. 5, 2011, http://www.fec.gov/press20111006postcarey.shtml.

Representatives for Massachusetts's Fourth Congressional District. Mr. Raese is a candidate for the U.S. Senate for West Virginia. TPLF states that it has made contributions of $2,500 each to Mr. Bielat and Mr. Raese, as well as to five other candidates. TPLF wishes to contribute an additional $2,500 each to Mr. Bielat and Mr. Raese, as well as to other candidates. Mr. Bielat and Mr. Raese wish to accept an additional $2,500 each.

Questions Presented

1. May the Tea Party Leadership Fund make contributions to candidates of up to $5,000 per election before the six-month waiting period of 2 U.S.C. 441a(a)(4) has run?

2. May Messrs. Raese and Bielat accept contributions above $2,500, but not exceeding $5,000, per election from Tea Party Leadership Fund before the six-month waiting period has run?

Legal Analysis and Conclusion

No, TPLF may not make contributions to candidates in excess of $2,500 per election until it has qualified as a multicandidate committee, nor may candidates accept such contributions.[2]

The Act provides that "no person shall make contributions to any candidate and his authorized political committees with respect to any election for Federal office which, in the aggregate, exceed $2,[500][3]." 2 U.S.C. 441a(a)(1)(A); *see also* 11 CFR 110.1(b). The Act also provides that "no multicandidate political committee shall make contributions to any candidate and his authorized political committees with respect to any election for Federal office which, in the aggregate, exceed $5,000." 2 U.S.C. 441a(a)(2)(A); *see also* 11 CFR 110.2(b). And the Act also provides that no candidate or political committee shall knowingly accept any contribution that is in violation of the applicable contribution limits. 2 U.S.C. 441a(f); *see also* 11 CFR 110.9. The Act defines a "multicandidate political committee" for purposes of the contribution limits of section 441a(a)(2) as "a political committee which has been registered under section 433 of this title for a period of *not less than 6 months*, which has received contributions from more than 50 persons, and, except for any State political party organization, has made contributions to 5 or more candidates for Federal office." 2 U.S.C. 441a(a)(4) (emphasis added); *see also* 11 CFR 100.5(e)(3) (defining "multicandidate committee").

TPLF has not yet qualified as a multicandidate committee. Although it has received contributions from more than 50 persons and made contributions to more than five candidates, it only registered with the Commission on May 9, 2012, and therefore has not been a registered political committee for a period of six months. As a result, TPLF is subject to the contribution

[2] Because the requestors' two questions are analyzed under the same provisions of the Act and Commission regulations, the Commission addresses both questions together.

[3] The limit on contributions to candidates by persons other than multicandidate political committees is indexed for inflation. 2 U.S.C. 441a(c); *see also* 11 CFR 110.1(b)(1)(i)-(iii). The limit for the 2011-2012 election cycle is $2,500. *See* Price Index Adjustments for Contribution and Expenditure Limits and Lobbyist Bundling Disclosure Threshold, 76 FR 8368 (Feb. 14, 2011).

limits of section 441a(a)(1)(A), and may not make contributions to any candidate with respect to any election which, in the aggregate, exceed $2,500. Moreover, candidates such as Mr. Bielat and Mr. Raese may not knowingly accept contributions from TPLF that are in excess of $2,500 per election.[4] Despite the plain language of the Act and Commission regulations, the requestors ask the Commission to determine that TPLF may make, and Mr. Bielat and Mr. Raese may accept, contributions in excess of the express limits of section 441a(a)(1)(A) because they contend the congressionally prescribed definition of a multicandidate committee is unconstitutional. The Commission, however, lacks the power to make such a determination. *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)(1)(A) or the definition of "multicandidate committee" in section 441a(a)(4) on constitutional grounds, we are required to give these provisions full force.

The requestors contend that Congress's later enactment of other anti-circumvention provisions renders the six-month qualification period unconstitutional, but no court has struck down the qualification requirements of the Act. The Supreme Court has ruled that this limitation does not offend the Constitution. In *Buckley v. Valeo*, 424 U.S. 1, 35-36 (1976), the Court upheld the then-existing higher limit on contributions to candidates of $5,000 for political committees that had registered with the Commission for at least six months. The Court found the qualification requirements did not "unconstitutionally discriminate against *ad hoc* organizations," and that "the registration, contribution, and candidate conditions serve the permissible purpose of preventing individuals from evading the applicable contribution limitations by labeling themselves committees." *Id.* Accordingly, TPLF may not make contributions to any candidate with respect to any election that exceed $2,500, and Mr. Bielat and Mr. Raese may not knowingly accept contributions from TPLF that exceed $2,500 per election.

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).

[4] Assuming nothing changes otherwise, once TPLF has been registered as a political committee for six months, it will qualify as a multicandidate political committee and it will be able to make contributions to candidates up to the limits applicable to multicandidate political committees.

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