FEDERAL ELECTION COMMISSION
Washington, DC 20463

MEMORANDUM

TO: The Commission

FROM: Commission Secretary's Office

DATE: November 9, 2015

SUBJECT: Comments on Draft AO 2015-09
(Senate Majority PAC and House Majority PAC)

Attached are late submitted comments received from counsel from requestors. This matter is on the November 10, 2015 Open Meeting Agenda.

Attachment

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BY HAND DELIVERY

Office of the Commission Secretary
Attn: Shawn Woodhead Werth
Secretary and Clerk of the Commission
Federal Election Commission
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Re: Comments on Draft Advisory Opinions for Advisory Opinion Request 2015-09

Dear Ms. Werth:

We submit these comments on behalf of Senate Majority PAC and House Majority PAC (individually "SMP" and "HMP," respectively, and collectively, the "PACs") to respond to Draft Advisory Opinions A through E.

After *Citizens United* and *SpeechNow* were decided in 2010, many argued that organizations that came to be known as "Super PACs" did not have to register with the Federal Election Commission (the "FEC" or "Commission").[1] Rather than assume that legal theory was correct, however, Senate Majority PAC (then called "Commonsense Ten") came to the FEC and sought an advisory opinion. Notwithstanding their differences, the commissioners came together to approve the request and Super PACs remained within the FEC's jurisdiction.

In 2011, some in the regulated community advanced the theory that federal officeholders and candidates could solicit unlimited funds – including from corporations and labor unions – for Super PACs. Once again, SMP (then called simply "Majority PAC") and HMP came to the FEC and sought an advisory opinion before following that course. Notwithstanding their differences, the commissioners agreed unanimously on a middle-ground approach: federal officeholders and candidates could solicit up to $5,000 from federally permissible sources and appear at events in accordance with 11 C.F.R. § 300.64, but could *not* solicit unlimited funds or solicit funds from federally prohibited sources.[2]

The FEC has yet to enact a comprehensive set of regulations to govern Super PACs. But due to these two advisory opinions, Super PACs were able to operate within a reasonably well-defined

[1] *See* Comments from Jason Torchinsky & Michael Bayes for FEC Adv. Op. Request 2010-11 (July 8, 2010); Comments from the Center for Competitive Politics for FEC Adv. Op. Request 2010-11 (July 21, 2010).
[2] FEC Adv. Op. 2011-12.

regulatory framework for the first three cycles (2010, 2012, and 2014) of their existence. This cycle, that framework has collapsed. Individuals purporting to be "testing-the-waters" for federal candidacy established Super PACs; raised funds into these Super PACs without regard to federal limits or source restrictions; and armed these Super PACs with nonpublic strategic information *and* direct-to-camera footage to be used after they formally announced their candidacies. The phenomenon began in the presidential race, migrated to Senate races, and undoubtedly will appear in House races as well.

Faced with this new competitive reality, the PACs could have simply followed suit and worked with prospective candidates to establish single-candidate Super PACs that would act jointly with SMP and HMP to raise unlimited funds and sponsor independent expenditures. But as they did in 2010 and 2011, the PACs came to the FEC to seek an advisory opinion. As they did in the two prior requests, the PACs informed the FEC that they stood ready to employ these tactics, but wished to provide the Commission an opportunity to weigh in on their legality before proceeding.

Instead of giving the PACs the legal guidance that they seek, the FEC appears poised to provide no answers at all. The FEC has produced a draft advisory opinion (Draft D) that deems all of the PACs' questions "hypothetical" and refuses to answer them. This Draft is in contravention of the Commission's historical practice and violates the Commission's own procedural rules. Meanwhile, Draft B refuses to answer two of the PACs' questions on the theory that the FEC's failure to adopt new rules in response to *Citizens United* renders it incapable of interpreting and applying the ones that already exist. And Draft C subtly alters the facts in two of the PACs' questions and thereby avoids answering them.

This approach is in violation of both the law and Commission precedent. The Supreme Court has made clear that "[w]hen speech is involved," agencies must demonstrate "rigorous adherence" to two related principles: that "regulated parties should know what is required of them so they may act accordingly" and that "precision and guidance are necessary so that those enforcing the law do not act in an arbitrary or discriminatory way."[3] By failing to answer the PACs' questions, the FEC would be violating these principles and acting in an arbitrary and capricious manner. If the FEC ducks its legal obligation to issue an advisory opinion, the PACs reserve the right to engage in this conduct on their own or bring the matter to federal court to have it resolved once and for all.[4]

[3] *See FCC v. Fox Television Stations, Inc.*, 132 S.Ct. 2307, 2317 (2012).
[4] Statement on Adv. Op. 2013-04 Democratic Governors Association/Jobs & Opportunity, Vice Chairman Donald F. McGahn, FEC Adv. Op. 2013-04; *Carey v. Fed. Election Comm'n.*, 791 F. Supp. 2d 121, 127-128 (D.D.C. 2011).

I. The Request Satisfies the Requirements of 11 C.F.R. § 112

There is nothing "hypothetical" about the PACs' request. SMP and HMP are, and will continue to be, major players in federal elections. In the 2013-2014 election cycle, SMP raised and spent nearly $67 million to support Democratic Senate candidates. In the 2011-2012 election cycle, SMP raised and spent over $42 million. Likewise, in the 2013-2014 election cycle, HMP raised and spent around $38 million to support Democratic House candidates. In the 2011-2012 election cycle, HMP raised and spent over $35 million. In fact, SMP and HMP were the top two spenders of all Super PACs in the 2013-2014 election cycle.[5] SMP and HMP will engage in outside spending this election cycle, and in future cycles, and need to know how they can permissibly structure their activities within the confines of the current law.

The mere fact that other groups have engaged in these activities does not render the PACs' request hypothetical. In 2003, a conservative 527 organization ("ABC") submitted a 21-page request to the FEC asking about the legality of certain activities that it claimed to be interested in undertaking.[6] It was well-known at the time that a progressive 527 organization ("ACT") had already undertaken these activities. As a result, the advisory opinion not only would have provided prospective guidance to ABC; it would also have reflected the FEC's judgment about the legality of ACT's conduct. Likewise, in 1998, the Republican Party of New Mexico posited that it "*might*...include absentee ballot applications or voter registration mailings and / or telephone calls prior" to a special election with one race on the ballot and asked if such activity could be treated as "generic" activity.[7] Again, it was well-known at the time that the New Mexico Democratic Party had engaged in those activities.

If the FEC is willing to provide advisory opinions to conservative and Republican groups about whether they may adopt the same tactics as their political opponents, then progressive and Democratic organizations must be afforded the same right. When "an agency applies different standards to similarly situated entities and fails to support this disparate treatment with a reasoned explanation and substantial evidence in the record, its action is arbitrary and capricious and cannot be upheld."[8] A reviewing court is required to "hold unlawful and set aside agency action, findings, and conclusions found to be...arbitrary, capricious, an abuse of discretion, or

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[5] *See* Super PACs, Opensecrets.org, *available at* https://www.opensecrets.org/pacs/superpacs.php?cycle=2014 (last accessed Nov. 7, 2015).
[6] *See* FEC Adv. Op. Request 2003-37.
[7] FEC Adv. Op. Request 1998-9 (emphasis added).
[8] *Burlington Northern & Sante Fe. Railway Co. v. Surface Transp. Bd.*, 403 F.3d 771, 776 (D.C. Cir. 2005) (internal citations omitted) (holding that the Surface Transportation Board acted arbitrarily and capriciously by treating carriers and shippers differently when both sought to vacate a rate prescription); *see also Contractors Transport Corp. v. United States*, 537 F.2d 1160, 1161 (4th Cir. 1976) (explaining that an agency's actions were arbitrary and capricious because it treated two applicants differently under similar circumstances without providing a basis for the uneven disposition of the two applicants).

otherwise not in accordance with law."[9] As the D.C. Circuit explained, "[a]n agency must provide an adequate explanation to justify treating similarly situated parties differently."[10] Unlike ABC, which never raised or spent a dime on the activities in which it proposed to engage – or any activity at all – the PACs have a record of spending tens of millions of dollars to elect candidates and of engaging in the activities that they told the FEC they would undertake in advisory opinion requests. Treating the PACs' request any differently is arbitrary and capricious.

Equally absurd is the notion that the PACs are not asking about their own prospective activities, but those of third parties. As stated in the PACs' request, "SMP and HMP would consider working closely with individuals exploring candidacy and/or their agents, including establishing single-candidate Super PACs that would support the individuals' candidacies if they decide to run for office. These single-candidate Super PACs would work closely with SMP and HMP to solicit, transfer, and spend funds in particular states and, as set forth throughout this request, SMP and HMP would also work directly with these candidates within their own organizational structures." Further, the PACs even acknowledged that if required, SMP or HMP, respectively, would each amend their Statements of Organization to reflect the new Super PACs as "affiliated." Again, the PACs have a record that backs up their claims. In the 2013-2014 election cycle, SMP worked closely with single-candidate Super PACs where it was strategically important to do so. For example, SMP contributed over $10 million to Put Alaska First, which was established to support former Senator Mark Begich's candidacy.[11] SMP's significant financial support of Put Alaska First shows that the PAC's idea of working and funding single candidate Super PACs is real, and based on their historical practice.

Nowhere is this more apparent than with questions 11 and 12. In 2011, the PACs sought an advisory opinion asking whether they could hold fundraising events featuring candidates and officeholders. After the FEC answered their question in the affirmative, the PACs frequently held such events. Now, in Question 12, the PACs simply wish to know how many people they need to invite to qualify the event under in 11 C.F.R § 300.64. Likewise, SMP and HMP regularly ask third parties to raise funds on their behalf. Now, in Question 11, they simply want to know what rules apply when they ask agents of federal officeholders and candidates to raise funds on their behalf. The law does not require that the PACs have specific events on the calendar in order to submit an advisory request, as long as they "plan[] to undertake...and intend[] to undertake in the future" the activity described in the request.[12] Because SMP and HMP plan and intend to undertake the activities described in questions 11 and 12, the request is

[9] 5 U.S.C. § 706(2)(A).
[10] *Burlington Northern*, 403 F.3d at 776 (internal citations omitted).
[11] Outside Spending Summary 2014, Put Alaska First PAC, Opensecrets.org, *available at* https://www.opensecrets.org/outsidespending/detail.php?cmte=C00544346&cycle=2014 (last accessed Nov. 7, 2015).
[12] 11 C.F.R. § 112.1(b).

not hypothetical.

The fact that the PACs have not identified a specific prospective candidate with whom they would work is immaterial. When the PACs came to the FEC in 2011 to ask whether federal officeholders or candidates could solicit funds on their behalf or appear at their events, they did not identify a specific officeholder or candidate.[13] Yet the FEC answered their question without objection. When the DSCC came to the FEC in 2013 to ask how the Supreme Court's decision affected its ability to interact with a candidate who had a spouse of the same sex, it did not identify a specific candidate.[14] Yet the FEC answered its question without objection. The FEC may not invent new grounds to deny issuance of an advisory opinion, when that same issue posed no barrier in past requests.[15]

Finally, deeming the request hypothetical at this stage in the process would violate the Commission's own regulations. "Within 60 calendar days after receiving an advisory opinion request *that qualifies under 11 CFR 112.1*, the Commission shall issue to the requesting person a written advisory opinion ...."[16] Section 112.1(b) provides that a "written advisory opinion request shall set forth a specific transaction or activity that the requesting person plans to undertake or is presently undertaking and intends to undertake in the future" and that "[r]equests presenting a general question of interpretation, or posing a hypothetical situation, or regarding the activities of third parties, do not qualify as advisory opinion requests."[17] Section 112.1(d) grants to the FEC's Office of General Counsel (the "OGC") the responsibility to determine whether an advisory opinion request qualifies under section 112.1. "If the Office of General Counsel determines that a request for an advisory opinion is incomplete or otherwise not qualified under 11 CFR 112.1, it shall, within 10 calendar days of receipt of such request, notify the requesting person and specify the deficiencies in the request."[18] Here, the OGC reviewed the request and, without specifying a single deficiency, deemed it qualified; the request was issued a number pursuant to section 112.1(f) and made available for public comment under section 112.2(a). Once the OGC deems the request qualified, as it did here, the Commission has an obligation to answer it. It may not retroactively disqualify the request after the initial 10-day window has passed. Doing so would violate the Commission's own regulations.

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[13] *See* FEC Adv. Op. Request 2011-12. SMP submitted that request with HMP under its previous name, Majority PAC. On March 8, 2013, Majority PAC changed its name to Senate Majority PAC.
[14] FEC Adv. Op. Request 2013-06.
[15] 5 U.S.C. § 706(2)(A).
[16] 11 C.F.R. § 112.4(a) (emphasis added).
[17] *Id.* § 112.1(b).
[18] *Id.* § 112.1(d).

II. The FEC Can and Should Answer Some of the Questions, Even if it Lacks Consensus on All of Them

Drafts A, B, C, and E concur on Questions 5, 6, 8, and 9. Because Draft D cannot be adopted for the reasons set forth above, the Commission should be able to issue an opinion on these questions on which no disagreement exists.

On Question 4, too, Drafts A, B, C, and E agree that a section 527 organization would violate the law by using soft money to pay for an individual's "testing-the-waters" activities *if* the individual decides to become a candidate. In other words, if the section 527 organization used soft money to pay for "testing-the-waters" activities and the individual subsequently decided to become a candidate, there would be a violation of the law. (There appears to be disagreement as to whether a violation would occur in the event the individual decides *not* to be a candidate – Drafts A, B, and E say "yes" while Draft C says "no"). Because Draft D cannot be adopted for the reasons set forth above, the Commission should be able to issue an opinion on this point of agreement.

There may be consensus on Questions 7 and 10 as well. Drafts A, B, and E agree that the activities described in Questions 7 and 10 would trigger candidacy. Draft C agrees that "[a]n individual's active participation in the formation and operation of the contemplated Single-Candidate Committees, the sole purpose of which is to support that individual's federal candidacy, or in the filming of video intended to be used to promote that individual's federal candidacy, could evidence the making of 'a decision . . . to seek nomination for election, or election, to a Federal office.'"[19] But Draft C then says that the standard "examination of objective criteria is unwarranted here because the [PACs' request] establishes that the prospective candidates would not have decided to become candidates."[20] That is incorrect. Questions 5 through 10 do *not* presume that the individual has yet to become a candidate; they ask the FEC to advise whether the activity described in each question would trigger candidacy. To avoid all doubt, the PACs respectfully reiterate that the Commission issue a response on the following questions:

- *Seven:* Does an individual trigger candidacy by participating in the formation of a Single-Candidate Super PAC whose purpose is to support that individual's prospective candidacy, once the Single-Candidate Committee had raised more than $5,000? If not, would the Single-Candidate Committee's receipt of $1 million, $5 million, $10 million, $25 million, $50 million, or $100 million trigger the individual's candidacy?

[19] Draft C, FEC Adv. Op. 2015-09 at 13.
[20] *Id.*

- *Ten:* Does an individual trigger candidacy by filming footage discussing her/his achievements, experiences, and qualifications for office for use by the PACs and Single-Candidate Committees in public communications that would air after her/his announcement of candidacy?

In addition, Drafts A and C appear to concur on Questions 11 and 12. To the extent that there are four commissioners who collectively support the answers to Questions 11 and 12 in Drafts A or C, the FEC should be able to issue an answer on these two questions as well.

III. Pre-Candidacy Questions

There appears to be no consensus on questions 1 through 3, which ask whether individuals who are "testing the waters" may engage in certain activities – namely establishing a Super PAC, soliciting unlimited funds for such Super PAC, and participating in the creation of the Super PAC's communications – in which federal candidates clearly may not engage. Draft A – and also Drafts B and E – says "no." Draft C says "yes."

We understand the legal arguments underlying Draft A and, as our request indicated, had the same concerns about the permissibility of the conduct described in questions 1 through 3. In contrast, it appears that Draft C is premised largely on the theory – explicated by Commissioner Goodman at the October 29 hearing and by Messrs. Spies and Tyrell III in their comments – that the Commission lacks "jurisdiction over an individual, or a group supporting an individual, prior to his or her becoming a candidate."[21] Yet for thirty years, the Commission's jurisdiction over individuals "testing-the-waters" for candidacy by imposing limits and source restrictions on the funds that can be used to pay for such activities has been unquestioned.[22] We are not aware of any court case that has successfully challenged this assertion of jurisdiction or has suggested that the holding in *Machinists Non-Partisan* with respect to "draft committees" applies to individuals who are "testing-the-waters" of federal candidacy.[23]

To provide more guidance to the regulated community, we ask that proponents of Draft C answer the following questions:

- Given that the FEC limits contributions to individuals who are "testing-the-waters" for federal candidacy, what is the basis for concluding that the coordinated communication regulation – the FEC's mechanism for regulating contributions by third party spenders – does not apply to "testing-the-waters" activities?

[21] Comments from Charles R. Spies & James E. Tyrell III, FEC Adv. Op. Request 2015-09 (Nov. 5, 2015).
[22] 11 C.F.R. §§ 100.72, 100.31.
[23] *Fed. Election Comm'n. v. Machinists Non-Partisan Political League*, 655 F.2d 380, 395-396 (D.C. Cir. 1981).

- If an organization established by an individual *prior to* becoming a federal candidate is not subject to the BCRA soft money restrictions, does the FEC's statement in Advisory Opinion 2007-1 ("[Senator] is both a Federal candidate and officeholder, and the Committee is an entity that is directly established, financed, maintained, and controlled by her. Thus, both [Senator] and the Committee are subject to the restrictions of 2 U.S.C. 441i(e)(1)") remain good law? Since the Senator's nonfederal committee was established prior to her becoming a federal candidate, Draft C would suggest that it can freely spend its nonfederal funds as long as the Senator did not exercise control over the spending. Is that true?

Thank you for your consideration.

Very truly yours,

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