FEDERAL ELECTION COMMISSION
Washington, DC 20463

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CERTIFIED MAIL
RETURN RECEIPT REQUESTED

ADVISORY OPINION 2015-09

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Dear Messrs. Elias, Reese, and Berkon and Ms. Jacobs:

We are responding to your advisory opinion request on behalf of Senate Majority PAC and House Majority PAC (collectively, "Requestors") concerning the application of the Federal Election Campaign Act, 52 U.S.C. §§ 30101-30146 (the "Act"), and Commission regulations to Requestors' proposed activities. Requestors ask 12 questions about proposed activities involving individuals contemplating federal candidacy ("prospective candidates"), individuals who are federal candidates, and certain independent expenditure-only political committees.

Background

The facts presented in this advisory opinion are based on your letter received on September 11, 2015 (the "AOR").

Requestors are registered with the Commission as independent expenditure-only political committees (commonly referred to as "super PACs"). Senate Majority PAC makes independent expenditures in support of Democratic candidates for the U.S. Senate, and House Majority PAC makes independent expenditures in support of Democratic candidates for the U.S. House of Representatives. AOR at AOR001. When Requestors registered with the Commission as super PACs, they represented that they planned to "raise funds in unlimited amounts" but would "not use those funds to make contributions, whether direct, in-kind, or via coordinated communications to federal candidates or committees." AOR001 n.1; Letter from Senate

Majority PAC, Misc. Rep. to FEC (Jul. 27, 2010); House Majority PAC, FEC Form 1 at 1 (Apr. 11, 2011).[1]

Requestors propose to "work[] closely with [prospective candidates] and/or their agents, including establishing single-candidate Super PACs" (as described in this paragraph and throughout this opinion, the "Single-Candidate Committees"). AOR004. The Single-Candidate Committees would raise funds in unlimited amounts, including from corporations and labor organizations, to "support the [prospective candidates] if they decide to run for office." *Id*. The Single-Candidate Committees would "work closely" with Requestors to solicit, transfer, and spend funds in particular states, and would also "work directly" with the prospective candidates.[2] *Id.*

Requestors would allow the prospective candidates to "participate fully" in the Single-Candidate Committees' formation. *Id.* The prospective candidates would also select and appoint the individuals who would control the Single-Candidate Committees. *Id.* Requestors represent that "[a]llowing prospective candidates to establish [the Single-Candidates Committees] and appoint their personnel would put the prospective candidates' direct imprimatur" on the Single-Candidate Committees, "which would make it substantially easier . . . to raise and spend" funds. AOR005.

Requestors would ask the prospective candidates to share "information about their strategic plans, projects, activities, or needs" with Requestors and the Single-Candidate Committees. AOR006. This would include the prospective candidates' "input" regarding whether Requestors and the Single-Candidate Committees should "sponsor positive advertising or negative advertising." *Id*. Requestors also propose to ask the prospective candidates to "share their campaign messaging and scheduling plans," so that Requestors and the Single-Candidate Committees "can most efficiently complement the campaigns' strategies with their own." *Id.* If the prospective candidates became candidates, Requestors and the Single-Candidate Committees would use this information "immediately" in public communications that would satisfy the "content prong" of the Commission's coordinated communication regulation, 11 C.F.R. § 109.21(c). AOR006-07. Requestors and the Single-Candidate Committees would also film the prospective candidates in a studio setting, discussing their achievements, experiences, and qualifications for office. AOR007-08. If the prospective candidates became candidates, Requestors and the Single-Candidate Committees would then use that footage in public communications that satisfy the "content prong" of the coordinated communication regulation.

Additionally, in conjunction with the Single-Candidate Committees and prospective candidates, Requestors propose to establish new political organizations under section 527 of the

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[1] Senate Majority PAC initially formed under the name "Commonsense Ten" and subsequently changed its name to "Majority PAC" and then "Senate Majority PAC." It was the requestor in Advisory Opinion 2010-11 (Commonsense Ten) and one of the requestors in Advisory Opinion 2011-12 (Majority PAC *et al.*).

[2] Requestors state that they would, "[i]f required," identify the Single-Candidate Committees as affiliated committees on the relevant statements of organization. AOR004 n.12. The AOR does not ask, and this advisory opinion does not address, whether Requestors and the Single-Candidate Committees would be affiliated under the Commission's regulations or implications of such affiliation.

Internal Revenue Code. AOR008. These 527 organizations would raise nonfederal funds ("soft money") to pay for certain "testing-the-waters" expenses for the prospective candidates, including travel to meet with prospective voters, office space, research, consulting, and polling. AOR008.

Requestors are concerned that "working closely" with prospective candidates might expose Requestors to liability if those individuals were to be deemed candidates. AOR009, 011, 015. Requestors thus plan to "stop working closely with these individuals" when they become "candidates" under the Act. AOR009.

After the prospective candidates officially declare their candidacies, Requestors propose to ask individuals associated with their campaigns to raise funds for Requestors and the Single-Candidate Committees. Requestors would make this request of the campaigns' employees and consultants — those who work primarily as fundraisers, as well as those who work primarily in non-fundraising capacities — who have actual authority to solicit, receive, direct, transfer, or spend funds on behalf of the federal candidates. Acting on their own and not at the request or suggestion of the candidates, Requestors and the Single-Candidate Committees would ask each such individual to become a fundraiser. They would ask the individuals to confirm that they had not been asked to solicit soft money by the candidates or their agents before soliciting funds for Requestors and the Single-Candidate Committees. Requestors represent that, during any conversation with potential contributors, the individuals would be required to identify themselves as fundraisers for Requestors or a Single-Candidate Committee, and not by their campaign titles, and to state that they are soliciting contributions on their own and not at the direction of a candidate or candidate's agent. Requestors also represent that the individuals would not be permitted to use campaign resources (such as letterhead or email) to solicit soft money for Requestors or the Single-Candidate Committees, or to solicit funds for a candidate's authorized committee at the same time that they solicit funds for Requestors and the Single-Candidate Committees.

Requestors propose to involve the candidates themselves in fundraisers at which funds are solicited in excess of $5000 per contributor or from corporations or labor organizations. Requestors and the Single-Candidate Committees would send prospective attendees a written invitation that would note the date and time of the fundraiser, identify the candidate as a "special guest," and include a statement indicating that "[a]ll funds solicited in connection with this event are by [Requestors or a Single-Candidate Committee], and not by [the candidate]." AOR019. The program for the fundraiser would include an introduction by a host (or someone else) and formal remarks by the candidate. The attending candidate would comply with 11 C.F.R. § 300.64(b)(2) while at the fundraiser and would not disseminate publicity for, or invitations to, the event.

Questions Presented

1. *If an individual, who would not otherwise be a candidate, participates in the formation of a Single-Candidate Committee (either directly or through agents), whose purpose is to support the individual's prospective candidacy, is the Single-Candidate Committee barred from raising or spending soft money after the individual becomes a candidate? Would the answer be the*

same if the individual or his or her agents ask, request, or appoint the individual who would exercise control over the Single-Candidate Committee?

2. If individuals, who would not otherwise be candidates, share with the Single-Candidate Committees and Requestors (either directly or through agents) information about the individuals' plans, projects, activities, or needs, may the Single-Candidate Committees and Requestors use that information to create public communications that satisfy the "content" prong under 11 C.F.R. § 109.21 and air after the individuals become candidates? If yes, does there need to be a cooling-off period before the Single-Candidate Committees and Requestors can use the information and if so, how long is the cooling-off period?

3. May Requestors and the Single-Candidate Committees film footage in a studio of individuals, who would not then otherwise be candidates, discussing their achievements, experiences, and qualifications for office, and use that footage in public communications that satisfy the "content prong" under 11 C.F.R. § 109.21?

4. May Requestors and the Single-Candidate Committees work with the individuals to establish separate 527 organizations to pay for "testing-the-waters" activities with soft money?

5. Assuming that an individual has raised or spent more than $5000 on "testing-the-waters" activities, does an individual become a candidate when he or she makes a private determination that he or she will run for federal office?

6. Assuming that an individual has raised or spent more than $5000 on "testing-the-waters" activities, does an individual "testing the waters" for six months or longer trigger candidacy? Nine months? One year?

7. Would the activities described in Question 1 trigger candidacy once the Single-Candidate Committee had raised more than $5000? If not, would the Single-Candidate Committee's receipt of $1 million, $5 million, $10 million, $25 million, $50 million, or $100 million trigger an individual's candidacy?

8. Assuming that an individual has raised or spent more than $5000 on "testing-the-waters" activities, does an individual's public statement that he or she is running for office trigger candidacy, even if the individual subsequently attempts to withdraw that statement?

9. Assuming that an individual has raised or spent more than $5000 on "testing-the-waters" activities, if the individual or his or her advisers inform the media that the individual will announce candidacy on a date certain in the future, has the individual triggered candidacy?

10. Assuming that an individual has raised or spent more than $5000 on "testing-the-waters" activities, would the activity described in Question 3 trigger candidacy?

11. Can individuals who are "agents" of candidates solicit soft money for Requestors and the Single-Candidate Committees, as long as the steps described in the Request are taken to ensure that the fundraising is not undertaken in their capacity as "agents"?

12. Does 11 C.F.R. § 300.64 require that there be a minimum number of expected attendees before the candidate can permissibly speak, attend, or be featured as a special guest?

Legal Analysis and Conclusions

4. May Requestors and the Single-Candidate Committees work with the individuals to establish separate 527 organizations to pay for "testing-the-waters" activities with soft money?

If an individual becomes a candidate, payments that were made for any testing-the-waters activities must have been made with "funds permissible under the Act." 11 C.F.R. §§ 100.72(a), 100.131(a). Thus, the proposed 527 organizations' use of funds raised outside of the Act's limitations and prohibitions to pay for individuals' testing-the-waters activities would violate Commission regulations if those individuals decide to become candidates.

The Commission could not agree whether a violation of the Act would occur if the individuals never decide to become candidates.

5. Assuming that an individual has raised or spent more than $5000 on "testing-the-waters" activities, does an individual become a candidate when he or she makes a private determination that he or she will run for federal office?

Yes, an individual who has raised or spent more than $5000 on "testing-the-waters" activities would become a candidate when he or she makes a private determination that he or she will run for federal office.

An individual is a "candidate" if he or she receives contributions or makes expenditures in excess of $5000 or consents to another person's receiving contributions or making expenditures in excess of $5000 on the individual's behalf. 52 U.S.C. § 30101(2)(A); 11 C.F.R. § 100.3(a). Although an individual may raise or spend more than $5000 on "testing-the-waters" activity without becoming a candidate, the testing-the-waters exemption does not apply "to individuals who have decided to become candidates." 11 C.F.R. §§ 100.72(b), 100.131(b); *see also* Advisory Opinion 1981-32 (Askew) at 4 (explaining that regulation distinguishes "activities directed to an evaluation of the feasibility of one's candidacy . . . from conduct signifying that a private decision to become a candidate has been made"). Accordingly, if an individual has raised or spent more than $5000 on "testing-the-waters" activities, the individual becomes a candidate when he or she decides to run for federal office.

6. Assuming that an individual has raised or spent more than $5000 on "testing-the-waters" activities, does an individual "testing the waters" for six months or longer trigger candidacy? Nine months? One year?

Testing-the-waters activities conducted by an individual "in close proximity to the election or over a protracted period of time" are "[e]xamples of activities that indicate that [the] individual has decided to become a candidate." 11 C.F.R. §§ 100.72(b)(4), 100.131(b)(4). But Commission regulations do not prescribe a specific time limit for such activities. *See* Factual and Legal Analysis at 6, MUR 5722 (Friends for Lauzen) ("The testing the waters provisions . . . do not contain a timing prerequisite, and often potential candidates will engage in testing the waters activity well in advance of an election."). Thus, the length of time that an individual spends deliberating whether to become a candidate is one factor and does not, in and of itself, determine whether the individual has become a candidate.

8. Assuming that an individual has raised or spent more than $5000 on "testing-the-waters" activities, does an individual's public statement that he or she is running for office trigger candidacy, even if the individual subsequently attempts to withdraw that statement?

Commission regulations provide that "mak[ing] or authoriz[ing] written or oral statements that refer to [an individual] as a candidate for a particular office" are "[e]xamples of activities that indicate that [the] individual has decided to become a candidate." 11 C.F.R. §§ 100.72(b)(3), 100.131(b)(3). Thus, if an individual makes or authorizes such a statement, it would generally reflect the individual's decision to become a candidate, and so the statement may trigger candidacy regardless of subsequent retraction attempts. *See, e.g.*, Factual and Legal Analysis at 4-8, MUR 5363 (Sharpton) (finding that once individual's actions trigger candidate status, "equivocal statements of intent . . . do not eradicate the [Act's candidate] registration and reporting requirements"). Where the circumstances demonstrate that an individual's statement regarding candidacy reflects that individual's decision to run for office, mere assertions that the individual's subjective intent differs from his or her statement generally will not negate the objective indication of candidacy arising from the statement.[3]

9. Assuming that an individual has raised or spent more than $5000 on "testing-the-waters" activities, if the individual or his or her advisers inform the media that the individual will announce candidacy on a date certain in the future, has the individual triggered candidacy?

Yes, an individual who has raised or spent more than $5000 on testing-the-waters activities and who informs the media (either directly or through an advisor) that he or she "will announce candidacy" would be a candidate.

A non-conditional statement by an individual (directly or indirectly) that he or she "*will*" announce his or her candidacy on a given date unambiguously indicates that the individual has decided to become a candidate. *See, e.g.*, Gen. Counsel's Rpt. at 10, MUR 2262 (Robertson) (concluding that individual stating to supporters "he will declare officially within the year" had decided to become candidate). The fact that the public announcement postdates the individual's statement of intent "do[es] not eradicate the registration and reporting requirements that have been triggered" by the decision. Factual and Legal Analysis at 8, MUR 5363 (Sharpton).

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[3] A demonstrably inadvertent misstatement, however, does not necessarily indicate that the individual has decided to become a candidate.

Accordingly, the Commission concludes that an individual who has raised or spent more than $5000 on testing-the-waters activities and who informs the media that he or she "will announce candidacy" on a date certain would be a candidate.

11. Can individuals who are "agents" of candidates solicit soft money for Requestors and the Single-Candidate Committees, as long as the steps described in the Request are taken to ensure that the fundraising is not undertaken in their capacity as "agents"?

Individuals who are agents of federal candidates may solicit nonfederal funds to Requestors as proposed.[4]

The Act generally prohibits an "agent" of a federal candidate or officeholder from raising or spending nonfederal funds in connection with an election for federal office. 52 U.S.C. § 30125(e)(1)(A); 11 C.F.R. § 300.61. Commission regulations define an "agent" of a federal candidate or officeholder as "any person who has actual authority, either express or implied . . . [t]o solicit, receive, direct, transfer, or spend funds in connection with any election." 11 C.F.R. § 300.2(b)(3).

While the Act "restricts the ability of Federal officeholders, candidates, and national party committees to raise non-Federal funds," it "does not prohibit individuals who are agents of the foregoing from also raising non-Federal funds for other political parties or outside groups." Definition of "Agent" for BCRA Regulations on Non-Federal Funds or Soft Money and Coordinated and Independent Expenditures, 71 Fed. Reg. 4975, 4979 (Jan. 31, 2006).[5] Accordingly, an individual is subject to the Act's "soft money prohibitions" only when acting on behalf of a candidate, officeholder, or party committee. *Id.* at 4979 n.9. In prior advisory opinions, the Commission has concluded that individuals who are agents of federal candidates may solicit funds on behalf of other organizations if the individuals act in their own capacities "exclusively on behalf of" the other organizations when fundraising for them, "not on the authority of" the candidates, and raise funds on behalf of the candidates and the other organizations "at different times." Advisory Opinion 2003-10 (Nevada State Democratic Party *et al.*) at 5; Advisory Opinion 2007-05 (Iverson) at 5.

Requestors' proposal is consistent with those found to be permissible in prior advisory opinions. Requestors propose to have individuals who are agents of federal candidates solicit funds "on their own" and "not at the request or suggestion" of federal candidates. AOR018. In soliciting contributions, the individuals would identify themselves as raising funds only for Requestors, would not use their campaign titles or campaign resources (such as letterhead and email), and would inform potential contributors that they are "making the solicitation on [their] own and not at the direction of [the federal candidates] or their agents." *Id.* Finally, the

[4] The Commission could not approve a response by the required four affirmative votes to the question of whether the individuals would be permitted to raise nonfederal funds on behalf of the Single-Candidate Committees (as defined above). 52 U.S.C. § 30106(c); 11 C.F.R. § 112.4(a).

[5] A federal candidate "can only be held liable for the actions of an agent when the agent is acting on behalf of the [candidate], and not when the agent is acting on behalf of other organizations or individuals." Prohibited and Excessive Contributions: Non-Federal Funds or Soft Money, 67 Fed. Reg. 49,064, 49,083 (Jul. 29, 2002).

individuals would not solicit contributions for the candidates and for Requestors at the same time. *Id*. Under these circumstances, Requestors may permissibly have individuals who are also agents of federal candidates raise nonfederal funds on their behalf.[6]

12. Does 11 C.F.R. § 300.64 require that there be a minimum number of expected attendees before the candidate can permissibly speak, attend, or be featured as a special guest?

Although federal candidates generally may not solicit nonfederal funds, *see* 52 U.S.C. § 30125(e)(1), federal candidates may "attend, speak, or be a featured guest" at nonfederal fundraising events. 11 C.F.R. § 300.64(a), (b)(1). Federal candidates also may solicit federal funds at such events, provided that the solicitation is limited to funds that comply with the Act's amount limitations and source prohibitions. 11 C.F.R. § 300.64(b). Federal candidates may limit these solicitations by displaying at the fundraising event a "clear and conspicuous written notice" or "making a clear and conspicuous oral statement" that the solicitation does not seek nonfederal funds. 11 C.F.R. § 300.64(b)(2)(i). To be clear and conspicuous, a written notice or oral statement must not be "difficult to read or hear" or placed in a manner that it "is easily overlooked by any significant number of those in attendance." *Id.*; *see also* Participation by Federal Candidates and Officeholders at Non-Federal Fundraising Events, 75 Fed. Reg. 24,375, 24,379 (May 5, 2010) (explaining that section 110.11(c) further informs clear and conspicuous standard).

Further, the name or likeness of a federal candidate or officeholder may appear in publicity for nonfederal fundraising events that include a solicitation if the candidate or officeholder is identified as a special, honored, or featured guest, or as a featured or honored speaker, "or in any other manner not specifically related to fundraising." 11 C.F.R. § 300.64(c)(3)(A). Such publicity must include a "clear and conspicuous disclaimer that the solicitation is not being made by the Federal candidate." 11 C.F.R. § 300.64(c)(3)(B).

Requestors state that they would comply with the foregoing requirements. The written invitation would identify the federal candidate as a "special guest" and state that funds would be solicited by Requestors or the Single-Candidate Committees and not the federal candidate, as required by section 300.64(c)(3).[7] A host would introduce the federal candidate to the attendees, and the federal candidate would make "formal remarks," thereby satisfying section 300.64(b)(1). And, in accordance with section 300.64(b)(2), the federal candidate would make known to the attendees, in a clear and conspicuous manner, that he or she is not soliciting nonfederal funds. Although the request does not specifically identify how the disclaimer will be made, a federal candidate may satisfy the disclaimer requirement by including a "placard prominently displayed so that it cannot be overlooked at the entrance . . . or a card placed on [a] table" stating: "[s]olicitations made by Federal candidates and officeholders at this event are limited by Federal law. The Federal candidates and officeholders speaking tonight are soliciting only donations . . . up to Federally permissible amount . . . . They are not soliciting donations in any amount from

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[6] The Commission notes that this conclusion does not affect the application of the coordination regulations. 11 C.F.R. §§ 109.20, 109.21.

[7] The Commission could not agree as to whether the Single-Candidate Committees would be permitted to raise nonfederal funds.

corporations, labor organizations, national banks, Federal contractors, or foreign nationals." *See* Participation by Federal Candidates and Officeholders at Non-Federal Fundraising Events, 75 Fed. Reg. at 24,380. Or the federal candidate or host may decide to make a similar disclaimer orally. *Id.*

In light of Requestors' factual representations and their representations that they will comply with all of the requirements of 11 C.F.R. § 300.64 and any other requirements under the Act and applicable Commission regulations when engaging in the specified activity, a federal candidate may attend, speak, or be a featured guest as proposed.

* * *

The Commission could not approve a response to the remaining questions by the required four affirmative votes. *See* 52 U.S.C. § 30106(c); 11 C.F.R. § 112.4(a).

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* 52 U.S.C. § 30108. 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 Requestors may not rely on that conclusion as support for their 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 id.* § 30108(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. Any advisory opinions and enforcement materials cited herein are available on the Commission's website.

On behalf of the Commission,

Ann M. Ravel
Chair