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November 6, 2015

MEMORANDUM

TO: The Commission

FROM: Daniel A. Petalas DAP by AN
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Subject: AO 2015-09 (Senate Majority PAC and House Majority PAC)
Draft E

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 12:00 pm (Eastern Time) on November 9, 2015.

Members of the public may also attend the Commission meeting at which the draft will be considered. The advisory opinion requestor may appear before the Commission at this meeting to answer questions.

For more information about how to submit comments or attend the Commission meeting, go to http://www.fec.gov/law/draftaos.shtml.

Attachment

ADVISORY OPINION 2015-09

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DRAFT E

Dear Messrs. Elias, Reese, 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. §§ 30101-46 (the "Act"), and Commission regulations to Requestors' proposed activities. Requestors ask 12 questions about their proposed activities involving individuals contemplating federal candidacy ("prospective candidates"), individuals who are federal candidates, and certain independent expenditure-only political committees. As discussed below, the Commission concludes that some of the proposed activities would be permissible and some of the proposed activities would not be permissible under the Act and Commission regulations.

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

1 PACs, they represented that they planned to "raise funds in unlimited amounts" but would "not
2 use those funds to make contributions, whether direct, in-kind, or via coordinated
3 communications to federal candidates or committees." AOR001 n.1; Letter from Senate
4 Majority PAC, Misc. Rep. to FEC (July 27, 2010); House Majority PAC, FEC Form 1 at 1 (Apr.
5 11, 2011).[1]

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

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

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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.

1 Requestors would ask the prospective candidates to share "information about their
2 strategic plans, projects, activities, or needs" with Requestors and the Single-Candidate
3 Committees. AOR006. This would include the prospective candidates' "input" regarding
4 whether Requestors and the Single-Candidate Committees should "sponsor positive advertising
5 or negative advertising." *Id*. Requestors also propose to ask the prospective candidates to "share
6 their campaign messaging and scheduling plans," so that Requestors and the Single-Candidate
7 Committees "can most efficiently complement the campaigns' strategies with their own." *Id.* If
8 the prospective candidates became candidates, Requestors and the Single-Candidate Committees
9 would use this information "immediately" in public communications that would satisfy the
10 "content prong" of the Commission's coordinated communication regulation, 11 C.F.R.
11 § 109.21(c). AOR006-07. Requestors and the Single-Candidate Committees would also film the
12 prospective candidates in a studio setting, discussing their achievements, experiences, and
13 qualifications for office. AOR007-08. If the prospective candidates became candidates,
14 Requestors and the Single-Candidate Committees would then use that footage in public
15 communications that satisfy the "content prong" of the coordinated communication regulation.
16 Additionally, in conjunction with the Single-Candidate Committees and prospective
17 candidates, Requestors propose to establish new political organizations under section 527 of the
18 Internal Revenue Code. AOR008. These 527 organizations would raise nonfederal funds ("soft
19 money") to pay for certain "testing-the-waters" expenses for the prospective candidates,
20 including travel to meet with prospective voters, office space, research, consulting, and polling.
21 AOR008.
22 Requestors are concerned that "working closely" with prospective candidates might
23 expose them to liability if those individuals were to be deemed candidates. AOR009, 011, 015.

1 Requestors thus plan to “stop working closely with these individuals” when they become
2 “candidates” under the Act. AOR009.

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

21 Requestors propose to involve the candidates themselves in fundraisers at which funds are
22 solicited in excess of $5,000 per contributor or from corporations or labor organizations.
23 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,*

1 *experiences, and qualifications for office, and use that footage in public communications that*
2 *satisfy the "content prong" under 11 C.F.R. § 109.21?*
3 *4. May Requestors and the Single-Candidate Committees work with the individuals to*
4 *establish separate 527 organizations to pay for "testing-the-waters" activities with soft money?*
5 *5. Assuming that an individual has raised or spent more than $5,000 on "testing-the-waters"*
6 *activities, does an individual become a candidate when he or she makes a private determination*
7 *that he or she will run for federal office?*
8 6. *Assuming that an individual has raised or spent more than $5,000 on "testing-the-waters"*
9 *activities, does an individual "testing the waters" for six months or longer trigger candidacy?*
10 *Nine months? One year?*
11 *7. Would the activities described in Question 1 trigger candidacy once the Single-Candidate*
12 *Committee had raised more than $5,000? If not, would the Single-Candidate Committee's*
13 *receipt of $1 million, $5 million, $10 million, $25 million, $50 million, or $100 million trigger an*
14 *individual's candidacy?*
15 *8. Assuming that an individual has raised or spent more than $5,000 on "testing-the-waters"*
16 *activities, does an individual's public statement that he or she is running for office trigger*
17 *candidacy, even if the individual subsequently attempts to withdraw that statement?*
18 *9. Assuming that an individual has raised or spent more than $5,000 on "testing-the-waters"*
19 *activities, if the individual or his or her advisers inform the media that the individual will*
20 *announce candidacy on a date certain in the future, has the individual triggered candidacy?*
21 *10. Assuming that an individual has raised or spent more than $5,000 on "testing-the-waters"*
22 *activities, would the activity described in Question 3 trigger candidacy?*

1 *11. Can individuals who are "agents" of candidates solicit soft money for Requestors and the*
2 *Single-Candidate Committees, as long as the steps described in the Request are taken to ensure*
3 *that the fundraising is not undertaken in their capacity as "agents"?*
4 *12. Does 11 C.F.R. § 300.64 require that there be a minimum number of expected attendees*
5 *before the candidate can permissibly speak, attend, or be featured as a special guest?*
6 **Legal Analysis and Conclusions**[3]
7 *7. Would the activities described in Question 1*[4] *trigger candidacy once the Single-Candidate*
8 *Committee had raised more than $5,000? If not, would the Single-Candidate Committee's*
9 *receipt of $1 million, $5 million, $10 million, $25 million, $50 million, or $100 million trigger an*
10 *individual's candidacy?*
11 Yes, the activities described in Question 1 would trigger candidacy status once the
12 Single-Candidate Committee has raised more than $5,000 because those proposed activities
13 would cause the individual to satisfy the Act's definition of "candidate" and would not be
14 "testing-the-waters" activities.
15 Under the Act and Commission regulations, an individual is a "candidate" if the
16 individual "has given his or her consent to another person to receive contributions or make
17 expenditures on behalf of such individual and if such person has received such contributions
18 aggregating in excess of $5,000 or has made such expenditures aggregating in excess of

[3] The Commission is answering the questions in a sequence different from that presented in the AOR, but because some of the questions explicitly refer to other questions by number, the Commission has retained the AOR's numbering throughout this opinion.

[4] The "activities described in Question 1" are as follows: "[A]n individual, who would not otherwise be a candidate, participates in the formation of a single-candidate super PAC (either directly or through agents), whose purpose is to support the individual's prospective candidacy" and "the individual or his or her agents ask, request, or appoint the individual who would exercise control over the single-candidate super PAC." AOR004-06.

1 $5,000."[5] 52 U.S.C. § 30101(2)(B); 11 C.F.R. § 100.3(a)(2). *See generally* Advisory Opinion
2 1983-05 (Ronnie G. Flippo Committee) ("The threshold for candidate status is reached when an
3 individual, or another person (such as the committee) on behalf of and with the consent of such
4 individual, receives contributions or makes expenditures that in either case aggregate in excess of
5 $5,000."). *Cf.* First Gen. Counsel's Rpt. at 3, MUR 1515 (Rattley *et al.*) (concluding that
6 individual did not become candidate due to "write-in" effort where individual "had not
7 participated in, nor requested, the write-in campaign").
8 Here, Requestors propose to have the prospective candidates (1) participate in the
9 formation of Single-Candidate Committees whose stated purpose is to "support the individuals'
10 candidacies if they decide to run for office," AOR004-05; (2) appoint the Single-Candidate
11 Committees' leadership, *id.*; and (3) "share . . . information about their strategic plans, projects,
12 activities, or needs" and "campaign messaging and scheduling plans" to enable the Single-
13 Candidate Committees "immediately" to run communications after the prospective candidates
14 become candidates, including "independent expenditures in support of" the candidates, AOR004-
15 06. Thus, the proposal specifically entails the prospective candidates' involvement in and
16 consent to the Single-Candidate Committees' receiving contributions and making expenditures to
17 undertake these activities on behalf of the prospective candidates. *See* Advisory Opinion 1985-
18 40 (Republican Majority Fund *et al.*) at 9-10 (concluding that "steering committees" organized
19 by individual's "political associates and representatives" could trigger candidacy status for
20 individual "if the steering committees engage in activities on behalf of [the individual's]

[5] An individual may also become a candidate if the individual receives contributions or makes expenditures in excess of $5000, 52 U.S.C. § 30101(2)(A), or fails to disavow that the activities of "any other person" in receiving contributions or making expenditures in excess of $5000 are "on the individual's behalf." 11 C.F.R. § 100.3.

1 candidacy").[6] Accordingly, the individuals will become candidates once the Single-Candidate
2 Committees receive contributions or make expenditures in excess of $5,000.

3 Although funds used to "test the waters" for an individual's potential candidacy are not
4 contributions or expenditures until the individual decides to become a candidate, that exemption
5 does not apply here: The active participation of the "prospective candidates" in the formation
6 and operation of the Single-Candidate Committees indicates that those individuals would have
7 decided to become candidates and would not be merely testing the waters. The Commission
8 established the limited "testing-the-waters" exemption from the definitions of "contribution" and
9 "expenditure" "so that an individual would not be discouraged from pursuing a variety of
10 activities to determine whether a candidacy for Federal office is feasible." Advisory Opinion
11 1981-32 (Askew); *see also* Payments Received for Testing the Waters Activities, 50 Fed. Reg.
12 9992, 9993 (Mar. 13, 1985) (exemption "explicitly limited 'solely' to activities designed to
13 evaluate a potential candidacy"). Under that exemption, funds received or spent "solely for the
14 purpose of determining whether an individual should become a candidate" are subject to the
15 Act's source restrictions and amount limitations but are not treated as contributions or
16 expenditures unless the individual becomes a candidate. Such testing-the-waters activities
17 include, but are not limited to, payments for polling, telephone calls, and travel. 11 C.F.R.
18 §§ 100.72(a), 100.131(a).

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[6] In MUR 6775 (Ready for Hillary), the Commission considered an allegation that an individual "triggered candidate status" when her authorized committee from a past election rented its mailing list to a nonconnected committee whose purpose was to encourage that candidate to run for office in the future. Factual and Legal Analysis at 4-7. The Commission found no reason to believe that the individual had become a candidate by renting out the mailing list because (1) the nonconnected committee's purpose was only to encourage the candidate to run, not to support her if she did run, (2) the individual and the nonconnected committee "confined their activities solely to evaluating a *potential* candidacy," and (3) there was no information before the Commission indicating that either the rental or the nonconnected committee's other activities were "designed to amass campaign funds for a future candidacy." *Id.* at 7-8 (emphasis in original). Each of those considerations — plus the additional fact that the potential candidate in MUR 6775 played no role in the formation of the nonconnected committee — distinguishes that MUR from the facts presented in this advisory opinion.

1 Once an individual decides to become a candidate, funds that were raised or spent to test
2 the waters apply to the $5,000 threshold for qualifying as a candidate. *Id.*; Factual and Legal
3 Analysis at 3, MUR 6533 (Haney *et al.*); Factual and Legal Analysis at 5, MUR 6449 (Bruning
4 *et al.*). After an individual reaches candidate status, the candidate must register with the
5 Commission and report all testing-the-waters funds as contributions and expenditures on the
6 candidate committee's first report filed with the Commission. *See* 11 C.F.R. §§ 100.72(a),
7 100.131(a), 101.3, 104.3(a), (b).

8 Commission regulations include a non-exhaustive list of activities indicating that an
9 individual has decided to become a candidate: (1) using general public political advertising to
10 publicize his or her intention to campaign for federal office; (2) raising funds in excess of what
11 could reasonably be expected to be used for exploratory activities, or undertaking activity
12 designed to amass campaign funds that would be spent after he or she becomes a candidate; (3)
13 making or authorizing written or oral statements that refer to him or her as a candidate for a
14 particular office; (4) conducting activities in close proximity to the election or over a protracted
15 period of time; and (5) taking action to qualify for the ballot under state law. 11 C.F.R.
16 §§ 100.72(b), 100.131(b). These regulations seek to draw a distinction between activities
17 directed to an evaluation of the feasibility of one's candidacy and conduct signifying that a
18 decision to become a candidate has been made. *See* Advisory Opinion 1981-32 (Askew).

19 Here, the prospective candidates would participate in the formation of Single-Candidate
20 Committees whose stated purpose is to "support the individuals' candidacies if they decide to run
21 for office." AOR004-05. Specifically, the Single-Candidate Committees would air
22 "independent expenditures in support of" the individuals' candidacies (AOR004-05) —
23 communications that would "expressly advocate[] the election or defeat of a clearly identified

1 candidate." *See* 52 U.S.C. § 30101(17)(A). Because independent expenditures, by definition,
2 are made only after the individual becomes a candidate, an individual's formation of a Single-
3 Candidate Committee whose purpose is to make such expenditures necessarily means that the
4 individual would not be forming the Single-Candidate Committee merely "to determine whether
5 [the] individual should become a candidate." 11 C.F.R. § 100.72(a); *cf.* Advisory Opinion 1982-
6 19 (Cranston Presidential Advisory Committee) at 1 ("[T]he Committee has been formed for the
7 sole purpose of advising Senator Cranston on the desirability and feasibility of becoming a
8 candidate for President."). Furthermore, any such funds that the Single-Candidate Committee
9 raises would be "funds that would be spent after he or she becomes a candidate," and therefore
10 outside the scope of the testing-the-waters exception. 11 C.F.R. § 100.72(b)(2). Thus,
11 participating in the formation of an organization whose purpose is to support an individual's
12 candidacy by raising and spending funds for independent expenditures in support of the
13 candidacy "indicat[es] that [the prospective candidate] has decided to become a candidate." 11
14 C.F.R. § 100.72(b).

15 Accordingly, the activities described in Question 1 would trigger candidacy status once
16 the Single-Candidate Committees had raised or spent more than $5,000.

17 *1. If an individual, who would not otherwise be a candidate, participates in the formation of a*
18 *Single-Candidate Committee (either directly or through agents), whose purpose is to support the*
19 *individual's prospective candidacy, is the Single-Candidate Committee barred from raising or*
20 *spending soft money after the individual becomes a candidate? Would the answer be the same if*
21 *the individual or his or her agents ask, request, or appoint the individual who would exercise*
22 *control over the Single-Candidate Committee?*

1 Yes, the proposed Single-Candidate Committees would be prohibited from raising funds
2 that do not comply with the amount limitations, source prohibitions, and reporting requirements
3 of the Act in connection with a federal election because those committees would be established,
4 financed, maintained, or controlled by federal candidates.

5 The Act prohibits federal candidates and officeholders, their agents, and entities directly
6 or indirectly established, financed, maintained, or controlled by them, or acting on their behalf,
7 from "solicit[ing], receiv[ing], direct[ing], transferr[ing], or spend[ing] funds in connection with
8 an election for Federal office . . . unless the funds are subject to the limitations, prohibitions, and
9 reporting requirements of th[e] Act." 52 U.S.C. § 30125(e)(1)(A); *see also* 11 C.F.R. § 300.61;
10 Advisory Opinion 2011-12 (Majority PAC) at 4 (applying section 30125 to super PACs).

11 Commission regulations identify a number of factors to consider in determining whether
12 a candidate or officeholder "directly or indirectly establish[ed], finance[s], maintain[s], or
13 control[s]" an entity. 11 C.F.R. § 300.2(c)(2). These factors are not exhaustive and "must be
14 examined in the context of the overall relationship between [the candidate] and the entity to
15 determine whether the presence of any factor or factors is evidence that the [candidate] directly
16 or indirectly established, finances, maintains, or controls the entity." 11 C.F.R. § 300.2(c)(2);
17 *see also* Advisory Opinion 2011-21 (Constitutional Conservatives Fund PAC) at 4 (concluding
18 that leadership PAC "may not receive unlimited funds from individuals or any funds from
19 corporations or labor organizations" because leadership PACs are directly or indirectly
20 established, financed, maintained or controlled by federal candidates and officeholders); Factual
21 and Legal Analysis at 4-5, MUR 6753 (People for Pearce) (citing factors at section 300.2(c) in
22 dismissing allegation that candidate directly or indirectly established, financed, maintained or
23 controlled super PAC).

1 Applying these factors to the facts presented here, the Commission concludes that the
2 prospective candidate would directly or indirectly establish, finance, maintain, or control the
3 Single-Candidate Committee. *Id.* Although it is only necessary for one of the factors to be met,
4 the Commission concludes that several are satisfied by the facts presented in the AOR.
5 First, Requestors propose to have the prospective candidate "participate fully in the
6 [Single-Candidate Committee's] formation." AOR004. From the beginning, therefore, the
7 individual would have "established" the Single-Candidate Committee. 11 C.F.R.
8 § 300.2(c)(2)(ix) (providing that standard is satisfied by individual's "active or significant role in
9 the formation of the entity"); *see also* Advisory Opinion 2003-12 (Stop Taxpayer Money for
10 Politicians Committee *et al.*) at 7 (concluding that officeholder "had an active and significant
11 role in the formation" of ballot committee where officeholder was "among [those] who formed"
12 committee and signed paperwork to create it).
13 Second, Requestors propose to have the prospective candidate "select and appoint the
14 individuals who would exercise control over" the Single-Candidate Committee. AOR004. Thus,
15 the prospective candidate will have the "authority or ability to hire, appoint, . . . or otherwise
16 control the officers or other decision-mak[ers]," which constitutes at least initial control over the
17 Single-Candidate Committee. 11 C.F.R. § 300.2(c)(2)(iii).
18 Third, "the context of the overall relationship" demonstrates that the prospective
19 candidate will *retain* control over the Single-Candidate Committee after becoming a candidate.
20 11 C.F.R. § 300.2(c)(2). Such control is demonstrated by the fact that the prospective candidate
21 would "share . . . information about their strategic plans, projects, activities, or needs" and
22 "campaign messaging and scheduling plans" — to enable the Single-Candidate Committee to
23 "most efficiently complement [the individual's] campaign messaging and strategies" (AOR006)

1 — and then, as soon as the individual announced his or her candidacy, the Single-Candidate
2 Committee would "immediately" run communications including "independent expenditures in
3 support of" the candidate (*see* AOR004-006).

4 In sum, the Single-Candidate Committees, which would be established by the candidate
5 to advocate the candidate's election and managed by the candidate's appointees, would pay for
6 express advocacy supporting the candidate's election using information and materials that the
7 candidate provided and pursuant to a strategy that the candidate designed to "complement" his or
8 her campaign. These facts — plus the close temporal proximity in which they would occur —
9 strongly indicate that the formal control that the candidate would have over the committee when
10 establishing it would carry over into "informal practices" that play a role in "direct[ing]" the
11 committee's decisions. *See* 11 C.F.R. § 300.2(c)(2)(ii); Advisory Opinion 1986-42 (Dart &
12 Kraft) at 5 (determining that parent company retained control over former subsidiary where
13 parent selected subsidiary's board and "took steps . . . to perpetuate the control" of board); *see*
14 *also* Advisory Opinion 1987-21 (MAXUS Energy *et al.*) at 3 (determining that former parent
15 "established and continues to maintain an affiliated relationship" with spun-off subsidiary where
16 parent "originally established and appointed those who control" former subsidiary and there was
17 "considerable overlap in . . . interests of both corporations," among other factors).

18 Thus, given the facts presented by Requestors, the proposed Single-Candidate
19 Committees would be established, financed, maintained or controlled by federal candidates.[7]
20 Accordingly, the Single-Candidate Committees would be able to "solicit, receive, direct, transfer,

[7] As noted above, the prospective candidates will trigger candidacy once the Single-Candidate Committees raise or spend $5000.

1 or spend" only funds subject to the limitations, prohibitions, and reporting requirements of the
2 Act in connection with an election for federal office.

3 *10. Assuming that an individual has raised or spent more than $5,000 on "testing-the-waters"*
4 *activities, would the activity described in Question 3*[8] *trigger candidacy?*

5 Yes, if the prospective candidate participates in the production of communications to be
6 used to promote his or her candidacy, such participation would indicate that the individual is no
7 longer testing the waters but instead has decided to become a candidate.

8 As explained above, Commission regulations provide examples of activities that indicate
9 that an individual has decided to become a candidate. 11 C.F.R. §§ 100.72(b), 100.131(b).
10 These examples include "us[ing] general public political advertising to publicize his or her
11 intention to campaign for federal office," 11 C.F.R. §§ 100.72(b)(1), 100.131(b)(1), and
12 "mak[ing] or authoriz[ing] written or oral statements that refer to him or her as a candidate for a
13 particular office." 11 C.F.R. §§ 100.72(b)(3), 100.131(b)(3). Such activities, "signif[ying] that a
14 private decision to become a candidate has been made," trigger candidacy. Advisory Opinion
15 1981-32 (Askew) at 5.

16 The Commission has also explained, however, that "the mere preparation, rather than
17 dissemination, of campaign materials in advance of a declaration of candidacy" does not by itself
18 indicate that an individual has "decided to become a candidate." Factual and Legal Analysis at
19 6, MUR 6533 (Haney). In MUR 6533 (Haney), the Commission considered whether an
20 individual became a candidate when videos that included "clear references to [the individual] as
21 a candidate" were uploaded to YouTube. *Id.* at 4-5. At the time, the videos were available only

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[8] The "activity described in Question 3" is that "Requestors and the single-candidate super PACs 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." AOR007.

1 by private hyperlink provided to "a small group" of individuals "to obtain their reaction and
2 advice." *Id.* at 5 (internal quotations omitted). The Commission dismissed the complaint and
3 explained that creating the videos for this purpose was consistent with testing-the-waters
4 activities. *Id.* at 6.

5 Accordingly, here, the question is whether the proposed filming of the prospective
6 candidates discussing their achievements, experiences, and qualifications for office would be
7 used to evaluate a prospective candidacy, and thus testing-the-waters activity, or whether it
8 would be used to create video that would be used in campaign advertising. The facts presented
9 in the AOR indicate the latter: The only proposed use of the film at issue would be for
10 communications that promote or refer to the individual as a candidate. *See* AOR006-07 (noting
11 that communications would "satisfy the 'content prong' under 11 C.F.R. § 109.21"). There is no
12 indication that the footage would be used to test the waters of a potential candidacy, such as by
13 obtaining the "reaction and advice" of a small, trusted group of advisers as in MUR 6533
14 (Haney). Thus, the individual's participation in the filming of video intended to be used to
15 promote the individual's candidacy indicates that the individual is no longer testing the waters
16 but has instead made "a decision . . . to seek nomination for election, or election, to a Federal
17 office." Advisory Opinion 1981-32 (Askew) at 4.

18 Accordingly, the Commission concludes that if a prospective candidate raises or spends
19 more than $5,000 on testing-the-waters activities and participates in the filming described in
20 Question 3, then he or she would be a candidate.

21 *2. If individuals, who would not otherwise be candidates, share with the Single-Candidate*
22 *Committees and Requestors (either directly or through agents) information about the*
23 *individuals' plans, projects, activities, or needs, may the Single-Candidate Committees and*

1 *Requestors use that information to create public communications that satisfy the "content"*
2 *prong under 11 C.F.R. § 109.21 and air after the individuals become candidates? If yes, does*
3 *there need to be a cooling-off period before the Single-Candidate Committees and Requestors*
4 *can use the information and if so, how long is the cooling-off period?*
5 *3. May Requestors and the Single-Candidate Committees film footage in a studio of*
6 *individuals, who would not then otherwise be candidates, discussing their achievements,*
7 *experiences, and qualifications for office, and use that footage in public communications that*
8 *satisfy the "content prong" under 11 C.F.R. § 109.21?*
9 As super PACs, Requestors may not conduct the proposed activities because the
10 proposed communications would be "coordinated communications" — and therefore
11 contributions — under the Act and Commission regulations. Requestors represent that the
12 Single-Candidate Committees are super PACs, which would also not be permitted to finance
13 coordinated communications. However, because the Single-Candidate Committees would be
14 established, financed, maintained, or controlled by a candidate — and thus would not be super
15 PACs — they may finance the coordinated communications within the Act's limitations and
16 prohibitions.
17 The Act defines a "contribution" to include "any gift . . . or anything of value made by
18 any person for the purpose of influencing any election for Federal office." 52 U.S.C.
19 § 30101(8)(A); 11 C.F.R. § 100.52(a). A "coordinated expenditure" — which is an expenditure
20 made by any person "in cooperation, consultation, or concert, with, or at the request or
21 suggestion of," a candidate, a candidate's authorized committee, or the agents of either — is also
22 a contribution to the candidate. 52 U.S.C. § 30116(a)(7)(B); *see also* 11 C.F.R. § 109.20.

1 A "coordinated communication" is one form of coordinated expenditure. *See* 11 C.F.R.
2 § 109.21(b). Commission regulations provide a three-prong test to determine if a
3 communication is a "coordinated communication." 11 C.F.R. § 109.21(a). First, a person other
4 than the federal candidate or the candidate's authorized committee must pay for all or part of the
5 communication. 11 C.F.R. § 109.21(a)(1). Second, the communication must satisfy at least one
6 content standard. 11 C.F.R. § 109.21(a)(2), (c). Third, the communication must satisfy at least
7 one conduct standard. 11 C.F.R. § 109.21(a)(3), (d).
8 The Commission concludes that the proposed public communications here would be
9 coordinated communications because they would satisfy all three prongs of the coordinated
10 communication test. First, the communications would be paid for by Requestors or the Single-
11 Candidate Committees, rather than the federal candidates or the candidates' authorized
12 committees. Thus, they would satisfy the payment prong. Second, Requestors posit in their
13 request that the communications would "satisfy the 'content prong,'" 11 C.F.R. § 109.21(c)(3).
14 AOR006. Third, the communications would satisfy the "material involvement" and "substantial
15 discussion" standards of the "conduct prong," 11 C.F.R. § 109.21(d). As the Commission has
16 previously concluded, a federal candidate's appearance in an advertisement renders "highly
17 implausible" any claim that he or she was not "materially involved" in its creation. Advisory
18 Opinion 2003-25 (Weinzapfel for Mayor Committee); *see also* Advisory Opinion 2004-01
19 (Bush-Cheney '04 *et al.*) (citing Advisory Opinion 2003-25 (Weinzapfel for Mayor
20 Committee)).[9] Indeed, because the candidate would decide what statements to give on camera

[9] After issuing these advisory opinions, the Commission amended the coordinated communication regulations to create a "safe harbor" for certain public communications in which federal candidates merely endorse other candidates or solicit funds for other persons. *See* 11 C.F.R. § 109.21(g); *see also* Coordinated Communications, 71 Fed. Reg. 33,190, 33,202 (Jun. 8, 2006) (superseding Advisory Opinion 2004-01 (Bush-Cheney '04) and Advisory Opinion 2003-25 (Weinzapfel for Mayor Committee) to extent they apply to such communications). That

1 regarding his or her "achievements, experiences, and qualifications for office" (AOR007),
2 knowing that such statements would be used in the future for campaign-related advertising, this
3 arrangement would inherently grant the candidate a material amount of control over the content
4 of the eventual communications.[10] By itself, the candidates' appearance in the advertisements
5 would satisfy the conduct prong as the communications as proposed do not appear to meet any
6 coordinated communication "safe harbor" provided for in the regulations. *See* 11 C.F.R.
7 109.21(f)-(i). In addition, the request specifically states that the communications would be
8 created, produced, or distributed after one or more "substantial discussions" about them between
9 the entities paying for the communications and the candidates appearing in them, thus satisfying
10 the conduct prong, 11 C.F.R. § 109.21(d)(2), (3). *Compare id.* ("A discussion is substantial . . .
11 if information about the candidate's . . . campaign plans, projects, activities, or needs is conveyed
12 to a person paying for the communication, and that information is material to the . . .
13 communication."), *with* AOR006 (stating that candidates would "share . . . information about
14 their strategic plans, projects, activities, or needs" and "share their campaign messaging and
15 scheduling plans" to enable Requestors and Single-Candidate Committees to "complement the
16 campaigns' strategies with their own").

17 For these reasons, the communications described in Questions 2 and 3 of the AOR would
18 be coordinated communications, and therefore also contributions to the candidates appearing in
19 them. Accordingly, Requestors may not engage in the proposed activities because, as super

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regulatory revision is not relevant to the communications at issue here, which would promote the federal candidates who created the Single-Candidate Committees, not endorse other candidates. *See* AOR007.

[10] Because the Commission has concluded above in response to Question 10 that the prospective candidates would become candidates by participating in the filming of this advertising material under the facts presented here, the Commission need not and does not address whether material involvement in a communication by an individual before he or she becomes a candidate might meet the conduct standards in 11 C.F.R. § 109.21(d).

1 PACs, they may not make contributions to candidates. But given the Commission's conclusion
2 above in response to Question 1 that the Single-Candidate Committees would be established,
3 financed, maintained, or controlled by a candidate, they would not be super PACs like
4 Requestors. The Single-Candidate Committees may therefore air the communications as
5 proposed so long as these committees comply with the contribution limitations, source
6 prohibitions, and reporting requirements of the Act.

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

9 No, the proposed 527 organizations may not use "soft money" — that is, funds raised
10 outside of the Act's limitations and prohibitions — to pay for testing-the-waters activities.

11 As discussed above, funds received or spent "solely for the purpose of determining
12 whether an individual should become a candidate" are not treated as contributions or
13 expenditures under the Act. 11 C.F.R. §§ 100.72(a), 100.131(a). Nonetheless, "[o]nly funds
14 permissible under the Act may be used for such [testing-the-waters] activities." 11 C.F.R.
15 §§ 100.72(a), 100.131(a). If the individual later becomes a candidate, the funds received or spent
16 to test the waters must be reported to the Commission by the candidate's principal campaign
17 committee as contributions or expenditures, *see id.*, and the funds "otherwise [must be] treated as
18 contributions and expenditures for purposes of the Act and regulations." Advisory Opinion
19 1982-03 (Cranston) at 3; Advisory Opinion 1982-19 (Cranston Presidential Advisory
20 Committee) at 2.

21 Here, the sole stated purpose of the proposed 527 organizations is to pay for the potential
22 candidates' testing-the-waters activities. Commission regulations explicitly require that such
23 payments be made only with "funds permissible under the Act," 11 C.F.R. §§ 100.72(a),

1 100.131(a), and the fact that an organization — rather than the individual exploring potential
2 candidacy — would pay for the testing-the-waters activities is immaterial. *See, e.g.*, Advisory
3 Opinion 1982-19 (Cranston Presidential Advisory Committee) at 2 (applying testing-the-waters
4 regulations to organization authorized by prospective candidate and to "advisory groups" formed
5 by authorized organization); Advisory Opinion 1985-40 (Republican Majority Fund) at 10
6 (applying testing-the-waters regulations to "steering committees" established by multicandidate
7 political committee "closely identified" with prospective candidate); *see also* Factual and Legal
8 Analysis at 4-5, MUR 6267 (Paton) (finding reason to believe candidate's state committee
9 violated Act by paying for federal testing-the-waters activities with nonfederal funds).

10 Accordingly, the 527 organizations may not use funds raised outside of the Act's
11 limitations and prohibitions to pay for testing-the-waters activities.

12 *5. Assuming that an individual has raised or spent more than $5,000 on "testing-the-waters"*
13 *activities, does an individual become a candidate when he or she makes a private determination*
14 *that he or she will run for federal office?*

15 Yes, an individual who has raised or spent more than $5,000 on "testing-the-waters"
16 activities would become a candidate when he or she makes a private determination that he or she
17 will run for federal office.

18 As noted above, an individual is a "candidate" if he or she receives contributions or
19 makes expenditures in excess of $5,000 or consents to another person's receiving contributions
20 or making expenditures in excess of $5,000 on the individual's behalf. 52 U.S.C. § 30101(2)(A);
21 11 C.F.R. § 100.3(a). Although an individual may raise or spend more than $5,000 on testing-
22 the-waters activity without becoming a candidate, the testing-the-waters exemption does not
23 apply "to individuals who have decided to become candidates." 11 C.F.R. §§ 100.72(b),

1 100.131(b); *see also* Advisory Opinion 1981-32 (Askew) at 4 (explaining that regulation
2 distinguishes "activities directed to an evaluation of the feasibility of one's candidacy . . . from
3 conduct signifying that a private decision to become a candidate has been made"). Thus, under
4 the plain text of the regulations, whether the testing-the-waters exemption applies depends on
5 whether an individual has decided to run for office. *See id.*; Statement of Reasons, Chairman
6 Lenhard, Vice Chairman Mason, and Comm'rs Toner, von Spakovsky, and Weintraub at 3,
7 MURs 5672, 5773 (Davis) ("SOR") ("[T]he Commission's 'testing-the-waters' regulation
8 includes an intent element . . . ."); Advisory Opinion 1982-03 (Cranston) at 4 (explaining that
9 testing-the-waters regulation distinguishes activity used to evaluate potential candidacy from
10 activity "seeking some affirmation or reinforcement of a private decision he [or she] has already
11 made to be a candidate"). Accordingly, if an individual has raised or spent more than $5,000 on
12 "testing-the-waters" activities, the individual becomes a candidate when he or she decides that he
13 or she will run for federal office.

14 *6. Assuming that an individual has raised or spent more than $5,000 on "testing-the-waters"*
15 *activities, does an individual "testing the waters" for six months or longer trigger candidacy?*
16 *Nine months? One year?*

17 The time period that an individual has engaged in testing-the-waters activities is one
18 factor in determining whether the individual has become a candidate.

19 Testing-the-waters activities conducted by an individual "in close proximity to the
20 election or over a protracted period of time" indicate that the individual has decided to become a
21 candidate. 11 C.F.R. §§ 100.72(b)(4), 100.131(b)(4). But the Commission regulations do not
22 prescribe a specific time limit for such activities. *See* Factual and Legal Analysis at 6, MUR
23 5722 (Friends for Lauzen) ("The testing the waters provisions . . . do not contain a timing

1 prerequisite, and often potential candidates will engage in testing the waters activity well in
2 advance of an election.”). Rather, as discussed above, the relevant question in each application
3 of the Commission’s testing-the-waters regulation is whether the individual’s activities indicate
4 that he or she has decided to run for office. “[T]he time period during which any or all of the . . .
5 activities occur” may “signif[y] that the individual’s private decision has been made,” *see*
6 Advisory Opinion 1981-32 (Askew) at 4-5, but the length of time is one of several factors in
7 determining whether an individual has become a candidate.

8 Neither the Act nor Commission regulations require an individual to test the waters
9 before deciding to become a candidate. An individual who has decided to run for office without
10 engaging in exploratory activities would thus trigger candidate status immediately upon
11 receiving or spending more than $5,000.

12 In short, the length of time that an individual spends deliberating whether to become a
13 candidate does not, in and of itself, determine whether the individual has become a candidate.

14 *8. Assuming that an individual has raised or spent more than $5,000 on “testing-the-waters”*
15 *activities, does an individual’s public statement that he or she is running for office trigger*
16 *candidacy, even if the individual subsequently attempts to withdraw that statement?*

17 As discussed above, the testing-the-waters exemption does not apply to individuals who
18 have decided to become candidates. 11 C.F.R. §§ 100.72(b), 100.131(b). The “mak[ing] or
19 authoriz[ing] written or oral statements that refer to [an individual] as a candidate for a particular
20 office” indicates that the individual has decided to become a candidate. 11 C.F.R. §§
21 100.72(b)(3), 100.131(b)(3). Thus, if an individual makes or authorizes such a statement, it
22 would reflect the individual’s decision to become a candidate, and so the statement may trigger
23 candidacy regardless of subsequent retraction attempts. In MUR 5363 (Sharpton), for example,

1 an individual repeatedly referred to himself as a candidate in various settings — including many
2 times in a book he authored — but he subsequently stated that he had not firmly decided whether
3 to run for office. Factual and Legal Analysis at 4-6. The Commission concluded that once an
4 individual's actions trigger candidate status, "equivocal statements of intent . . . do not eradicate
5 the [candidate] registration and reporting requirements." *Id.* at 8 (finding reason to believe
6 individual failed to report as candidate before officially announcing candidacy). Thus, where the
7 circumstances demonstrate that an individual's statement regarding candidacy reflects a decision
8 to run for office, mere assertions that the individual's subjective intent differ from his or her
9 statement will not negate the objective indication of candidacy arising from the statement.[11]
10 *9. Assuming that an individual has raised or spent more than $5,000 on "testing-the-waters"*
11 *activities, if the individual or his or her advisers inform the media that the individual will*
12 *announce candidacy on a date certain in the future, has the individual triggered candidacy?*
13 Yes, an individual who has raised or spent more than $5,000 on testing-the-waters
14 activities and who informs the media (either directly or through an advisor) that he or she "will
15 announce candidacy" would be a candidate.
16 An individual becomes a candidate when he or she "move[s] beyond the deliberative
17 process of deciding to become a candidate, and into the process of planning and scheduling
18 public activities." Advisory Opinion 1981-32 (Askew) at 5. A non-conditional statement by an
19 individual (directly or indirectly) that he or she "*will*" announce his or her candidacy on a given
20 date unambiguously indicates that the individual has decided to become a candidate. *See, e.g.*,
21 Gen. Counsel's Rpt. at 10, MUR 2262 (Robertson) (concluding that individual stating to

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[11] The Commission may recognize that a demonstrably inadvertent misstatement does not necessarily indicate that the individual has decided to become a candidate.

1 supporters "he will declare officially within the year" had decided to become candidate). The
2 fact that the public announcement postdates the individual's statement of intent "do[es] not
3 eradicate the registration and reporting requirements that have been triggered" by the decision.
4 Factual and Legal Analysis at 8, MUR 5363 (Sharpton).

5 Accordingly, the Commission concludes that an individual who has raised or spent more
6 than $5,000 on testing-the-waters activities and who informs the media that he or she "will
7 announce candidacy" on a date certain would no longer be testing the waters and would be a
8 candidate.

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

12 No, individuals who are agents of federal candidates are not permitted to raise nonfederal
13 funds on behalf of Single-Candidate Committees or on behalf of Requestors.

14 First, individuals who are agents of federal candidates are not permitted to raise
15 nonfederal funds on behalf of the Single-Candidate Committees. As explained in response to
16 Question 1, the Single-Candidate Committees would be established, financed, maintained, or
17 controlled by federal candidates; as such, the Act would prohibit the Single-Candidate
18 Committees from raising or spending nonfederal funds. 52 U.S.C. § 30125(e)(1).

19 Second, individuals who are agents of federal candidates are not permitted to solicit
20 nonfederal funds for Requestors because such solicitations would be on behalf of those
21 candidates.

22 The Commission's rules that govern agency and fundraising almost exclusively pre-date
23 *Citizens United v. FEC,* 558 U.S. 310 (2010), and *SpeechNow.org v. FEC*, 599 F.3d 686 (D.C.

1 Cir. 2010) (*en banc*), the decisions that created super PACs. The Act generally prohibits an
2 "agent" of a federal candidate or officeholder from raising or spending nonfederal funds in
3 connection with an election for federal office. 52 U.S.C. § 30125(e)(1)(A); 11 C.F.R. § 300.61.
4 Commission regulations define an "agent" of a federal candidate or officeholder as "any person
5 who has actual authority, either express or implied . . . [t]o solicit, receive, direct, transfer, or
6 spend funds in connection with any election." 11 C.F.R. § 300.2(b)(3).

7 Before the advent of super PACs, the Commission explained that while the Act "restricts
8 the ability of Federal officeholders, candidates, and national party committees to raise non-
9 Federal funds," it does not prohibit agents of the foregoing from raising soft money for parties or
10 outside groups when they are not acting "on behalf of" the candidate, officeholder, or party
11 committee. Definition of "Agent" for BCRA Regulations on Non-Federal Funds or Soft Money
12 and Coordinated and Independent Expenditures, 71 Fed. Reg. 4975, 4979 (Jan. 31, 2006).[12]
13 Accordingly, in advisory opinions before the *Citizens United* and *SpeechNow* decisions, the
14 Commission concluded that individuals who were agents of federal candidates could solicit
15 funds on behalf of other organizations if the individuals acted in their own capacities
16 "exclusively on behalf of" the other organizations when fundraising for them, "not on the
17 authority of" the candidates, and raised funds on behalf of the candidates and the other
18 organizations "at different times." Advisory Opinion 2003-10 (Nevada State Democratic Party
19 *et al.*) at 5; Advisory Opinion 2007-05 (Iverson) at 5. Thus, the relevant consideration in
20 Commission regulations and past advisory opinions was whether the agent solicited funds "on
21 behalf of" or "on the authority of" the candidate.

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[12] 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).

1 To date, no Commission guidance contemplates agents of candidates raising nonfederal
2 funds on behalf of super PACs, like Requestors, that would make independent expenditures in
3 support of those same candidates. Unlike Advisory Opinion 2003-10 (Nevada State Democratic
4 Party *et al.*) and Advisory Opinion 2007-05 (Iverson), which addressed agents of candidates
5 soliciting nonfederal funds to support state and local candidates, Requestors here state that they
6 will fund independent expenditures in support of the same federal candidates. It is not possible,
7 as Requestors represent, for a candidate's agent to "mak[e] the solicitation on his or her own and
8 not at the direction of [the candidate]," if the candidate's agent has "actual authority to solicit,
9 receive, direct, transfer, [and] spend funds on behalf of [the candidate]," AOR at 18, *and* also
10 fundraises for a super PAC that funds independent expenditures to support that same candidate.
11 Because the candidate's agent would be soliciting funds for an organization that makes
12 independent expenditures in support of the candidate, it is irrelevant whether the agent solicits
13 funds for the super PAC at the explicit direction of the candidate. Accordingly, individuals who
14 are agents of federal candidates are not permitted to solicit nonfederal funds on behalf of
15 Requestors.

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

18 Rather than identify a minimum number of expected attendees, the Commission
19 considers on a case-by-case basis whether a fundraiser meets the specific formal requirements
20 for nonfederal fundraising events at 11 C.F.R. § 300.64.[13] For the Commission to specify a

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[13] 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

1 specific minimum number of attendees would require a rulemaking. 52 U.S.C. § 30108(b); *see*
2 11 C.F.R. § 112.4(d)-(f) ("Any rule of law which is not stated in this Act . . . may be initially
3 proposed by the Commission only as a rule or regulation," and "[n]o opinion of an advisory
4 nature may be issued by the Commission or any of its employees except in accordance with this
5 section.").

6 Apart from a general request for a minimum number, Requestors identify only one
7 proposal for an event. Requestors ask if, assuming the event comports with the list of factors in
8 the Request,[14] a federal candidate may appear, speak, or be a featured guest if the number of
9 expected attendees is two. The answer to this question is no. The case-by-case evaluation the
10 Commission will conduct when asked if a gathering qualifies as an event under 11 C.F.R. §
11 300.64 is based on a common-sense understanding of the term "event." It is unlikely that any

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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).

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 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. The federal candidate or host may also decide to make a similar disclaimer orally. *Id*.

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).

[14] Requestors represent that they would send potential attendees a written invitation that 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. Requestors also represent that there would be a formal program for the event, including a host who would introduce the federal candidate to the attendees and "formal remarks" made by the federal candidate. Finally, Requestors represent that the federal candidate would make known to the attendees, in a clear and conspicuous manner, that he or she is not soliciting nonfederal funds.

1 observer would consider a gathering with two attendees to be a fundraising "event" rather than a
2 private meeting with a very small number of prospective donors where a fundraising request is
3 made.

4 In the absence of a rulemaking that would specify a minimum number of expected
5 attendees for a gathering to qualify as an event under 11 C.F.R. § 300.64, the Commission
6 advises that a gathering is not a nonfederal fundraising event if it is so small it looks like a
7 private meeting under any reasonable standard.

8 This response constitutes an advisory opinion concerning the application of the Act and
9 Commission regulations to the specific transaction or activity set forth in your request. *See*
10 52 U.S.C. § 30108. The Commission emphasizes that, if there is a change in any of the facts or
11 assumptions presented, and such facts or assumptions are material to a conclusion presented in
12 this advisory opinion, then Requestors may not rely on that conclusion as support for their
13 proposed activity. Any person involved in any specific transaction or activity which is
14 indistinguishable in all its material aspects from the transaction or activity with respect to which
15 this advisory opinion is rendered may rely on this advisory opinion. *See id.* § 30108(c)(1)(B).
16 Please note that the analysis or conclusions in this advisory opinion may be affected by
17 subsequent developments in the law including, but not limited to, statutes, regulations, advisory
18 opinions, and case law. Any advisory opinions and enforcement materials cited herein are
19 available on the Commission's website.
20
21 On behalf of the Commission,
22
23
24 Ann M. Ravel
25 Chair