



Chris Gober
cg@gobergroup.com

Troy McCurry
tm@gobergroup.com

September 9, 2016

VIA EMAIL

Adav Noti, Esq.
Associate General Counsel for Policy
Office of General Counsel
Federal Election Commission
999 E Street, N.W.
Washington, DC 20463
enoti@fec.gov

Re: Advisory Opinion Request

Dear Mr. Noti:

Pursuant to 52 U.S.C. § 30108, we seek an advisory opinion on behalf of our client, Citizen Super PAC. In summary, Citizen Super PAC poses the following questions:

1. May Citizen Super PAC contact a Federal candidate's authorized committee via email and provide a public Internet hyperlink to Citizen Super PAC's website containing one of Citizen Super PAC's advertisement projects that contains express advocacy in support of that candidate?
2. In its email referenced in Question 1, may Citizen Super PAC request that the authorized committee distribute an email to its general email lists that contains a solicitation for up to \$5,000 in support of Citizen Super PAC, and may the authorized committee solicit contributions via email up to \$5,000 on behalf of Citizen Super PAC?
3. If Citizen Super PAC aired the advertisement project referenced in Question 1, would it result in a contribution in the form of a coordinated communication from Citizen Super PAC to that candidate's authorized committee if, in advance of airing the advertisement: (a) Citizen Super PAC contacts the supported Federal candidate's authorized committee via the email referenced in Question 1; (b) the supported Federal candidate's authorized committee places a public Internet hyperlink to Citizen Super PAC's advertisement project, which contains express advocacy in support of that candidate, on its own website; (c) the

supported Federal candidate's authorized committee solicits contributions via the email referenced in Question 2; (d) the Federal candidate's authorized committee's email solicitation referenced in 3(c) contains a public Internet hyperlink – either to its own website or to Citizen Super PAC's website – that links to the Citizen Super PAC advertisement project, which contains express advocacy in support of that candidate?¹

The Commission has made it clear in previous advisory opinions that, despite the ban on Federal candidates and officeholders (“covered persons”) from soliciting funds outside of the Act's² contribution limits and source prohibitions, it is permissible for covered persons to solicit up to \$5,000 for any federally registered PAC, including an independent-expenditure-only political committee (“IEOPC”).³ The Commission has also concluded that covered persons may attend, speak at, or be a featured guest at fundraisers for IEOPCs⁴ and has stated that there is no minimum number of attendees required to make such activities permissible.⁵ There is, however, a lack of clarity in regard to (i) what level of specificity the covered persons may engage in supporting the IEOPC's activities—outside of a solicitation up to \$5,000—when that covered person speaks in support of the IEOPC; and (ii) what distinctions, if any, can be made with the covered person showing support in person versus showing support over the Internet.

Recognizing the short duration that remains in the 2016 election cycle, we ask that the Commission adhere to its “informal practice of expediting certain highly significant, time-sensitive requests” and issue an opinion within thirty days under its general expedited process.⁶ Not only do the questions posed in this advisory opinion request raise

¹ Although the questions posed may tangentially involve the activities of third parties, such activities are intertwined and instrumental to Citizen Super PAC's operations; therefore, the Commission must provide guidance on these questions so Citizen Super PAC can plan and conduct its own operations consistent with the Act and Commission regulations and obtain the protection of an advisory opinion. *See* 52 U.S.C. § 30108(c)(2). Furthermore, the questions posed are no more “regarding the activities of third parties” as stated in 11 C.F.R. § 112.1(b) than countless other questions posed to the Commission that were allowed under the review process of 11 C.F.R. § 112.1(d). *See e.g.*, Advisory Opinion Request 2015-09 (Senate Majority PAC and House Majority PAC) (asking in Question 5 whether a hypothetical person would become a candidate when that hypothetical person made a private determination to run for office when the requestors were Super PACs, not potential candidates); Advisory Opinion Request 2011-12 (Majority PAC) (asking in Question 1 whether a covered official could solicit on behalf of Super PACs when the requestor was a Super PAC, not a covered official); Advisory Opinion Request 2011-01 (Robin Carnahan for Senate) (asking in Question 1 whether a legal defense fund could be established that would *not* involve the requestor in any way).

² Federal Election Campaign Act of 1971, as amended

³ Advisory Opinion 2011-12 (Majority PAC)

⁴ *Id.*

⁵ Advisory Opinion 2015-09 (Senate Majority PAC and House Majority PAC)

⁶ Notice of New Advisory Opinion Procedures and Explanation of Existing Procedures, 74 F.R. 32160, 32162 (July 7, 2009)

important issues on the expansiveness of *SpeechNow.org v. FEC*,⁷ but they are highly significant and time sensitive given the close proximity of the 2016 general election.

I. BACKGROUND

Citizen Super PAC registered as an IEOPC with the Commission on October 1, 2014, and it subsequently launched the first crowdsourcing platform where voters can select and financially back specific ads for the candidates and issues they support.⁸ The following screenshot from Citizen Super PAC's "About Us" page can be viewed online at www.CitizenSuperPAC.com/about:

About Us

One only needs to pick up a newspaper, go online or turn on the TV to see who controls the political discourse in our nation.

In fact, The Sunlight Foundation [has reported](#) that 1% of "the 1%" controls 28% of the political discourse in our nation.

That changes today with Citizen Super PAC.

Citizen Super PAC empowers Americans like never before, by providing the first crowdsourcing platform where voters can select and financially back specific ads for the candidates, and issues they support.

For the first time, every citizen can have as much political influence as the 1%, without a personal fortune and an army of lawyers.

In summary, Citizen Super PAC's platform allows ordinary citizens to explore various projects and pledge money to fund the project(s) of their choosing. If a project meets its funding goal before the deadline, then the citizen's credit card will be charged and the project will be funded and disseminated.⁹ If a project does not meet its funding goal, then the citizen's card will not be charged. The ultimate goal of Citizen Super PAC is to "democratize" super PACs and increase participation in the political marketplace by providing citizens with the opportunity to fund political speech directly. Citizen Super PAC makes independent expenditures only and does not provide any money to candidates, and

⁷ *SpeechNow.org v. FEC*, 599 F.3d 686 (D.C. Cir. 2010)

⁸ See <https://www.citizensuperpac.com/about>; see also <https://www.citizensuperpac.com/faqs>

⁹ <https://www.citizensuperpac.com/faqs>

each online contributor to a specific project is required to affirm various facts so Citizen Super PAC can ensure the contribution is being made legally.

In order to increase participation in its platform, Citizen Super PAC would like to notify covered persons, including Federal candidates, when a project has been created that supports them. Citizen Super PAC would like to ask the candidate to notify his or her supporters about the project and, in turn, ask those supporters to support the project. Specifically, a project was recently publicly launched that is an advertisement in support of Representative Joe Heck of Nevada. The advertisement was created by a vendor with no affiliation with Representative Heck or his authorized campaign committee, Friends of Joe Heck, involved no former employees or independent contractors of Representative Heck or his authorized campaign committee, Friends of Joe Heck, and the advertisement contains no campaign materials of Friends of Joe Heck. The project to fund this advertisement, which neither Representative Heck nor his authorized campaign committee were made aware of the project by Citizen Super PAC as of the date of this writing, was launched at www.CitizenSuperPAC.com on September 2, 2016.

In light of these facts, Citizen Super PAC asks the following:

II. QUESTIONS PRESENTED

1. May Citizen Super PAC contact a Federal candidate's authorized committee (in this case, Friends of Joe Heck) via email and provide a public Internet hyperlink to Citizen Super PAC's website containing one of Citizen Super PAC's advertisement projects that contains express advocacy in support of the candidate (in this case, www.CitizenSuperPAC.com/176)?

Court precedent and Commission regulations provide wide latitude for an IEOPC and a covered person to communicate without causing the IEOPC's activities to become contributions to the covered person. Therefore, the Commission should permit Citizen Super PAC to email Friends of Joe Heck a public Internet hyperlink to the Citizen Super PAC webpage that contains the advertisement project, which contains express advocacy under 11 C.F.R. § 100.22(a).

Although the Commission's coordination regulations at 11 C.F.R. § 109.21 are extensive, they do not prohibit IEOPCs and covered persons from communicating generally about each other's activities. The standards in the conduct prong of 11 C.F.R. § 109.21(d) involve interactions where the details of potential communications are exchanged and discussed or where there are private discussions involving non-public information between covered persons and outside entities. Several of the standards specifically preclude being satisfied by information "obtained from a publicly available source."¹⁰ While the "request or suggestion" standard at 11 C.F.R. § 109.21(d)(1) does not specifically address publicly available information, the Commission noted during its enactment that the

¹⁰ 11 C.F.R. § 109.21(d)(2), (d)(3), (d)(4)(iii), (d)(5)(ii)

standard is “intended to cover requests or suggestions made to a select audience, but not those offered to the public generally.”¹¹

This standard is consistent with what the United States District Court for the District of Columbia concluded in *FEC v. The Christian Coalition*: more conduct is needed for coordination to exist than a candidate’s mere knowledge of a group’s activities.¹² The court said that “the First Amendment does not allow coordination to be inferred merely by a corporation’s possession of insider knowledge from a federal candidate’s campaign. Some more overt acts of coordination are required.”¹³ The converse of this proposition is equally true: A candidate’s possession of insider knowledge of an IEOPC cannot on its own equate to coordination. Indeed, the Commission stated in its Explanation and Justification for the request and suggestion standard that “The Commission did not . . . propose that coordination could result where a payor ‘merely informs’ a candidate or political party committee of its plans.”¹⁴ And as always, coordination would be even more lacking if the knowledge possessed by either party is public information.

Citizen Super PAC wishes to email Friends of Joe Heck a public Internet hyperlink to its website that contains an advertisement that contains express advocacy in support of Representative Heck. In other words, Citizen Super PAC would be doing nothing more than merely informing Friends of Joe Heck of its plans and sending the campaign a notification of publicly-available information. No non-public information would be shared between Citizen Super PAC and Friends of Joe Heck, nor would they engage in any other discussions, public or private besides that initial email. Therefore, none of the conduct standard prongs would be satisfied and thus, if the advertisement project aired, it would not constitute a coordinated communication. As there is nothing in the Act or Commission regulations that prohibit an IEOPC from generally communicating with Federal candidates in this manner, Citizen Super PAC should be permitted to send such an email consistent with the Commission’s explanation of those regulations and the First Amendment principles articulated in *Christian Coalition*.

2. In its email referenced in Question 1, may Citizen Super PAC request that the authorized committee (in this case, Friends of Joe Heck) distribute an email to its general email list that contains a solicitation for up to \$5,000 in support Citizen Super PAC, and may the authorized committee (in this case, Friends of Joe Heck) solicit contributions via email up to \$5,000 on behalf of Citizen Super PAC?

Prior Commission advisory opinions have made it clear that a covered person may solicit funds on behalf of an IEOPC. Although those opinions related to in-person solicitations, there is no legal distinction between that activity and solicitations over the Internet. Therefore, the Commission should permit Citizen Super PAC to request that

¹¹ Coordinated and Independent Expenditures, 68 F.R. 421, 432 (January 3, 2003)

¹² *FEC v. The Christian Coalition*, 52 F.Supp.2d 45, 95 (D.D.C. 1999)

¹³ *Id.*

¹⁴ Coordinated and Independent Expenditures, 68 F.R. 421, 432 (January 3, 2003)

Friends of Joe Heck email its supporters with a solicitation, as defined in 11 C.F.R. § 300.2(m), for up to \$5,000.

The Act generally prohibits covered persons from raising funds outside of the Act's contribution limits and source prohibitions (i.e., soft money).¹⁵ Nevertheless, covered persons still enjoy great latitude to interact with entities that raise and spend soft money. Commission regulations recognize this by allowing covered officials to "attend, speak at, or be a featured guest at a non-Federal fundraising event."¹⁶ The Commission has elaborated to say that covered officials may attend a non-Federal fundraising event, regardless of the number of attendees, as long as the requirements of 11 C.F.R. § 300.64 are met.¹⁷ Finally, the Commission has permitted candidates to solicit for IEOPCs up to a \$5,000 limit.¹⁸

As explained above, Citizen Super PAC provides a platform for users to create advertising projects where individuals can pledge support to fund those projects. Once a project reaches its funding goal, the pledges are collected and the advertisement is disseminated. In this regard, Citizen Super PAC does not have an avenue for candidates to demonstrate support and solicit for Citizen Super PAC outside of Internet solicitations. In its prior advisory opinions, the Commission did not limit the permissibility of candidate solicitations for IEOPCs to traditional in-person solicitations. Thus, it would amount to a reversal of previous rulings for the Commission to not allow candidates to solicit for IEOPCs via email or other Internet-type activities. Therefore, the Commission should permit Citizen Super PAC to request that Friends of Joe Heck send an email to its general email list that contains a solicitation of up to \$5,000 for Citizen Super PAC, and it should permit Friend of Joe Heck to send such an email on behalf of Citizen Super PAC that benefits Citizen Super PAC.

3. If Citizen Super PAC aired the advertisement project referenced in Question 1, would it result in a contribution in the form of a coordinated communication from Citizen Super PAC to that candidate's authorized committee if, in advance of airing the advertisement: (a) Citizen Super PAC contacts the supported Federal candidate's authorized committee via the email referenced in Question 1; (b) the supported Federal candidate's authorized committee places a public Internet hyperlink to Citizen Super PAC's advertisement project, which contains express advocacy in support of that candidate, on its own website; (c) the supported Federal candidate's authorized committee solicits contributions via the email referenced in Question 2; (d) the Federal candidate's authorized committee's email solicitation referenced in 3(c) contains a public Internet hyperlink – either to its own website or to Citizen Super PAC's website – that links to the Citizen Super PAC advertisement project, which contains express advocacy in support of that candidate?

¹⁵ 52 U.S.C. § 30125(e)

¹⁶ 11 C.F.R. § 300.64(b)(1)

¹⁷ Advisory Opinion 2015-09 (Senate Majority PAC and House Majority PAC)

¹⁸ Advisory Opinion 2011-12 (Majority PAC); *see also* 11 C.F.R. § 300.64(b)(2)

Just as the Act and Commission regulations lack prohibitions on Citizen Super PAC sending Friends of Joe Heck an email with a link to the advertisement project, there are similarly no prohibitions regarding Friends of Joe Heck promoting Citizen Super PAC over the Internet. Therefore, the Commission should permit Citizen Super PAC and any authorized campaign committee, including Friends of Joe Heck if they choose to do so, to engage in the various proposed Internet activities in support of Citizen Super PAC.

As stated above, Commission regulations generally do not prohibit interactions between IEOPCs and covered persons that involve public information. Four of the standards specifically preclude satisfaction by the involvement of public information,¹⁹ and the “request or suggestion” standard is meant to cover “requests or suggestions made to a select audience, but not those offered to the public generally.”²⁰ In its Explanation and Justification for that regulation, the Commission gave examples of what is and is not covered by the standard. A request on a public website, in a public speech, or placed in a newspaper is not covered, while a request in an email sent to a discrete group of individuals or in a speech to an invitation-only dinner is covered.²¹ The key distinction seems to be the breadth of the audience receiving the request and the breadth of the accessibility of the request. In addition, the Commission has stated that determining whether an assent to a suggestion is covered by the regulation should be analyzed in the same manner as whether a suggestion is covered since “[a]ssent to a suggestion is merely one form of a request.”²²

Neither Citizen Super PAC’s proposed activity, nor is Friends of Joe Heck’s potential public support of such activity, a covered request or suggestion. All of the information and discussions between Citizen Super PAC and Friends of Joe Heck, besides the initial email from Citizen Super PAC, is public in nature. Also, none of the requests, suggestions, or assents to such requests or suggestions, outside that in the initial email from Citizen Super PAC, are made to a select audience. Instead, they are all offered to the public generally. Since Friends of Joe Heck can send an email solicitation in general support of Citizen Super PAC for up to \$5,000 to its general email list, there is no reason for the committee to not be able to include a public Internet hyperlink to the advertisement project in that email. It should also be able to include a public Internet hyperlink on its own webpage to the Citizen Super PAC project and be able to send out an email to its general email list that includes a public Internet hyperlink to that webpage. All of these proposed activities are either identical to or indistinguishable from the examples the Commission has previously given as non-covered requests, suggestion, or assents. These emails are to be widely distributed and not to a “discrete group,”²³ and all of the webpages are all available to the general public.

¹⁹ See fn. 10 *supra*

²⁰ Coordinated and Independent Expenditures, 68 F.R. 421, 432 (January 3, 2003)

²¹ *Id.*

²² *Id.* (“A determination of whether an assent to a suggestion occurs is necessarily a fact based determination, but no more so than a determination of whether other forms of a request or suggestion occur.”)

²³ Indeed, no attempt will be made to scrub lists prior to distribution.

None of the emails or webpages are to be distributed to, or only available to, a select audience, besides the initial email from Citizens Super PAC.

Additionally, all of the proposed activity is "Internet activity" as defined by Commission regulations and, as such, are not expenditures under the Act.²⁴ Citizen Super PAC is proposing to send, or asking Friends of Joe Heck to send, emails that provide hyperlinks to Citizen Super PAC's website. These communications will be distributed strictly over the Internet and not placed for a fee on another person's website.²⁵ Because the proposals are "Internet activity," none of them can be qualified as expenditures.²⁶ Therefore, because Commission regulations stipulate that the proposed activities are neither expenditures nor coordinated, Citizen Super PAC and any authorized campaign committee, including Friends of Joe Heck if they choose to do so, should be able to engage in the proposed activities as requested without them resulting in a contribution from Citizen Super PAC.

III. CONCLUSION

We respectfully ask that the Commission review this request in an expedited manner and approve of the proposed activities contained herein.

Sincerely,



Chris K. Gober
Troy A. McCurry

cc: Matthew S. Petersen, Chairman
Steven T. Walther, Vice Chairman
Caroline C. Hunter, Commissioner
Ellen L. Weintraub, Commissioner
Lee E. Goodman, Commissioner
Ann M. Ravel, Commissioner

²⁴ 11 C.F.R. § 100.155(b)

²⁵ 11 C.F.R. § 100.26

²⁶ 11 C.F.R. § 100.155(a)

From: [Troy McCurry](#)
To: [Jessica Selinkoff](#)
Cc: [Neven Stipanovic](#)
Subject: RE: Citizen Super PAC Advisory Opinion Request
Date: Tuesday, September 13, 2016 10:33:03 AM
Attachments: [image001.png](#)

Dear Ms. Selinkoff,

Thank you. Please find the answers to the questions posed below:

1. Yes, the advertisements, including the Joe Heck advertisement, that Citizen Super PAC will pay to air or distribute will not satisfy the "common vendor" or "former employee or independent contractor" coordination conduct standards at 11 C.F.R. 109.21(d)(4)-(5). As we state in the first full paragraph on page 4, "The advertisement was created by a vendor with no affiliation with Representative Heck or his authorized campaign committee, Friends of Joe Heck, involved no former employees or independent contractors of Representative Heck or his authorized campaign committee, Friends of Joe Heck, and the advertisement contains no campaign materials of Friends of Joe Heck."
2. Though the Citizen Super PAC website currently has no mechanism for supporters to make contributions to Citizen Super PAC except via contributions in support of particular advertisement projects, a solicitation of a contribution from a covered official to Citizen Super PAC could take a variety of forms. It could come in the form of a solicitation for a contribution in support of a particular advertisement, as specified in Question 3(d). It could also come in a more generalized form where a covered official makes a solicitation on behalf of Citizen Super PAC to the covered official's supporters asking them to make a contribution to a Citizen Super PAC project of their own choosing, without mentioning a specific advertisement project. We believe this would be acceptable under our analysis to Question 2.

Sincerely,

Troy McCurry
Attorney | The Gober Group
2308 Mt. Vernon Ave Suite 762 | Alexandria VA 22301
tm@gobergroup.com | 202.417.3526



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From: Jessica Selinkoff [mailto:JSelinkoff@fec.gov]
Sent: Monday, September 12, 2016 5:01 PM
To: Troy McCurry <tm@gobergroup.com>
Cc: Neven Stipanovic <NStipanovic@fec.gov>
Subject: Citizen Super PAC Advisory Opinion Request

Dear Mr. McCurry,

Thank you for speaking with me about the advisory opinion request you submitted on behalf of Citizen Super PAC. I have set out below my understanding of some of the information that you provided. Please confirm the accuracy of these statements or correct them if they are not accurate.

1. The advertisements, including the Joe Heck advertisement, that Citizen Super PAC will pay to air or distribute will not satisfy the “common vendor” or “former employee or independent contractor” coordination conduct standards at 11 C.F.R. 109.21(d)(4)-(5).

2. The Citizen Super PAC website has no mechanism for supporters to make contributions to Citizen Super PAC except via contributions in support of particular advertisements. A solicitation of a contribution to Citizen Super PAC, as discussed in advisory opinion request Questions 2 and 3, would be for a contribution in support of a particular advertisement.

We would appreciate your response by email. Your response may be considered part of your advisory opinion request; if so, it will be posted as such on the Commission's website.

Sincerely,
Jessica

Jessica Selinkoff
Federal Election Commission
Office of General Counsel - Policy Division
999 E Street, N.W.
Washington, D.C. 20463

202-694-1650
jselinkoff@fec.gov