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FEDERAL ELECTION COMMISSION
Washington, DC 20463

2007 DEC 10 A 10: 51

December 10, 2007

MEMORANDUM

AGENDA ITEM
For Meeting of: 12-14-07

SUBMITTED LATE

TO: The Commission

FROM: Thomasenia P. Duncan *JPD*
General Counsel

Rosemary C. Smith *RCS by RBK*
Associate General Counsel

Ron Katwan *RBK*
Assistant General Counsel

Adam J. Schwartz *AJS by RBK*
Attorney

Subject: Draft AO 2007-28

Attached are two alternative proposed drafts of the subject advisory opinion. We request that this draft be placed on the agenda for December 14, 2007.

Attachment

1 ADVISORY OPINION 2007-28

2

3 Charles H. Bell, Jr., Esq.

DRAFT A

4 Ashlee N. Titus, Esq.

5 Bell, McAndrews & Hiltachk, LLP

6 455 Capitol Mall

7 Suite 801

8 Sacramento, CA 95814

9

10 Dear Mr. Bell and Ms. Titus:

11

12 We are responding to your advisory opinion request on behalf of United States

13 Representatives Kevin McCarthy and Devin Nunes, concerning the application of the Federal

14 Election Campaign Act of 1971, as amended (the "Act"), and Commission regulations to

15 whether Representatives McCarthy and Nunes may freely raise funds for one or more

16 independently run ballot measure committees in connection with the qualification and passage

17 of a redistricting ballot initiative for the June 3, 2008 California statewide primary election or

18 the November 4, 2008 California statewide general election.

19 The Commission concludes that Representatives McCarthy and Nunes may, subject to

20 the conditions set forth in 2 U.S.C. 441i(e)(4), raise funds beyond Federal limits for

21 redistricting ballot initiative committees that are neither directly nor indirectly established,

22 financed, maintained, or controlled by, or acting on behalf of, either officeholder and that are

23 organizations described in section 501(c) and exempt from taxation under section 501(a) of

24 the Internal Revenue Code.

25 ***Background***

26 The facts of this request are presented in your letter dated October 12, 2007, and in

27 your e-mail dated October 25, 2007.

1 Representatives McCarthy and Nunes are United States Representatives from
2 California. They are also candidates for re-election to the House of Representatives in 2008
3 and Federal officeholders under the Act and Commission regulations. *See* 2 U.S.C. 431(2)
4 and (3); 11 CFR 100.3 and 100.4. Representatives McCarthy and Nunes will both appear on
5 the June 3, 2008 primary ballot, and, should they win their party's nomination, would also
6 appear on the November 4, 2008 general election ballot.

7 The People's Advocate Initiative Committee ("PAIC") is a registered State General
8 Purpose committee described in Section 501(c)(4) of the Internal Revenue Code.¹ 26 U.S.C.
9 501(c)(4). On June 25, 2007, PAIC submitted a request asking the California Attorney
10 General to qualify a ballot initiative regarding the redistricting of California State and
11 Congressional districts. PAIC is attempting to qualify the ballot initiative for either the June
12 3, 2008 California statewide primary election or the November 4, 2008 California statewide
13 general election. According to the advisory opinion request, PAIC may engage in get-out-
14 the-vote activity in connection with the passage of the ballot initiative.

15 Representatives McCarthy and Nunes have supported redistricting ballot initiatives in
16 the past and would like to support actively the qualification and adoption of the proposed
17 redistricting ballot initiative. Specifically, Representatives McCarthy and Nunes would like
18 to raise funds for PAIC, a ballot initiative committee not directly or indirectly established,
19 financed, maintained, or controlled by them, formed to support the qualification and passage

¹ PAIC is not registered as a political committee under the Act.

1 of the redistricting ballot initiative.² None of the funds raised by Representatives McCarthy
2 and Nunes will be used for public communications referring to them. In addition,
3 Representatives McCarthy and Nunes will not participate in, or coordinate with PAIC
4 regarding, other public communications paid for by PAIC.

5 ***Questions Presented***

- 6 1. *May Representatives McCarthy and Nunes freely raise funds for PAIC or other*
7 *committees that are neither directly nor indirectly established, financed, maintained, or*
8 *controlled by, or acting on behalf of, persons covered by 2 U.S.C. 441i(a) or 441i(e), to*
9 *support the qualification of a ballot initiative on the subject of redistricting for the June 3,*
10 *2008 California statewide primary election or the November 4, 2008 California statewide*
11 *general election?*
- 12 2. *May Representatives McCarthy and Nunes freely raise funds for PAIC or other*
13 *committees that are neither directly nor indirectly established, financed, maintained, or*
14 *controlled by, or acting on behalf of, persons covered by 2 U.S.C. 441i(a) or 441i(e), to*
15 *campaign for the passage of a ballot initiative on the subject of redistricting that has*
16 *qualified to be voted on at the June 3, 2008 California statewide primary election or the*
17 *November 4, 2008 California statewide general election?*

² Representatives McCarthy and Nunes have stated that they currently do not intend to raise funds for other ballot initiative committees. Should they later decide to raise funds for additional ballot initiative committees, they have stated that their activities will be conducted in accordance with the terms of this advisory opinion.

1 ***Legal Analysis and Conclusions***

2 Yes, Representatives McCarthy and Nunes may raise funds beyond Federal limits to
3 support PAIC or other redistricting ballot initiative committees that are not directly or
4 indirectly established, financed, maintained, or controlled by, or acting on behalf of, either
5 officeholder subject to the conditions set forth in 2 U.S.C. 441i(e)(4).

6 Under the Act, as amended by the Bipartisan Campaign Reform Act of 2002
7 ("BCRA"), Public Law 107-155, 116 Stat. 81 (2002), Federal candidates and officeholders,
8 agents of Federal candidates and officeholders, or entities directly or indirectly established,
9 financed, maintained, or controlled by, or acting on behalf of, Federal candidates or
10 officeholders, may not raise or spend funds in connection with an election for Federal office,
11 including funds for any FEA, unless the funds are subject to the limitations, prohibitions, and
12 reporting requirements of the Act. *See* 2 U.S.C. 441i(e)(1)(A); 11 CFR 300.61. Nor may
13 Federal candidates and officeholders raise or spend funds in connection with an election other
14 than an election for Federal office, unless the funds do not exceed the amounts permitted with
15 respect to contributions to candidates and political committees under 2 U.S.C. 441a(a)(1), (2),
16 and (3), and do not come from sources prohibited under the Act. *See* 2 U.S.C. 441i(e)(1)(B);
17 11 CFR 300.62.

18 The advisory opinion request indicates that PAIC may engage in voter registration or
19 get-out-the-vote efforts. Section 441i(e)(1)(A) restricts solicitations by Federal candidates
20 and officeholders "in connection with an election for Federal office, including funds for any
21 Federal election activity" to Federally permissible sources and amounts. FEA includes voter
22 registration activity if conducted within 120 days of a primary or general election (Type I

1 FEA). 2 U.S.C. 431(20)(A)(i); 11 CFR 100.24(a)(2) and (b)(1). The Type I FEA time
2 periods in California run from October 8, 2007 to June 3, 2008 and from July 7, 2008 to
3 November 4, 2008. FEA also encompasses voter identification, get-out-the-vote, and generic
4 campaign activity that occurs “[i]n connection with an election in which a candidate for
5 Federal office appears on the ballot” (Type II FEA).³ 2 U.S.C. 431(20); 11 CFR 100.24(a)(1)
6 and (b)(2). The Commission defines “[i]n connection with an election in which a candidate
7 for Federal office appears on the ballot” for purposes of Type II FEA as the period from the
8 earliest deadline for access to the primary election ballot to the general election, including any
9 runoff election. *See* 11 CFR 100.24(a)(1)(i). The Type II FEA time period in California, if
10 there is no general runoff election, runs from November 23, 2007 to November 4, 2008.
11 Thus, any voter identification, voter registration, get-out-the-vote, or generic campaign
12 activity that a redistricting ballot initiative committee engages in during any of the FEA time
13 periods would qualify as FEA.⁴

14 Notwithstanding these provisions, 2 U.S.C. 441i(e)(4)(A) and (B) provide specific
15 exceptions that would permit Representatives McCarthy and Nunes to make certain
16 solicitations on behalf of ballot initiative committees that are organizations described in
17 section 501(c) of the Internal Revenue Code and exempt from taxation under section 501(a),
18 or have applied for tax exempt status. Representatives McCarthy and Nunes may make
19 general solicitations on behalf of PAIC or other ballot initiative committees neither directly
20 nor indirectly established, financed, maintained, or controlled by, or acting on behalf of,

³ Although it does not appear relevant to the facts set forth in the advisory opinion request, FEA is also comprised of the activities described in 11 CFR 100.24(b)(1), (b)(3), and (b)(4).

1 either officeholder and described in section 501(c) and exempt from taxation under section
2 501(a) of the Internal Revenue Code so long as the committee's principal purpose is not to
3 conduct activities "in connection with an election" or FEA and the solicitation is not to obtain
4 funds for activities "in connection with an election" or FEA. *See* 2 U.S.C. 441i(e)(4)(A); 11
5 CFR 300.65(a). Representatives McCarthy and Nunes may make specific solicitations on
6 behalf of PAIC or other similar ballot initiative committees not directly or indirectly
7 established, financed, maintained, or controlled by, or acting on behalf of, either officeholder
8 if the committees are described in section 501(c) and exempt from taxation under section
9 501(a) of the Internal Revenue Code, where the committees' principal purpose is FEA or to
10 obtain funds for FEA, so long as the solicitation is made only to individuals and the amount
11 solicited does not exceed \$20,000 during any calendar year. *See* 2 U.S.C. 441i(e)(4)(B); 11
12 CFR 300.65(b).

13 In determining whether the principal purpose of a 501(c) organization is to conduct
14 election activity, Representatives McCarthy and Nunes may rely on the safe harbor provisions
15 set forth in 11 CFR 300.65(e). Pursuant to section 300.65(e), a Federal candidate or
16 officeholder, or an individual agent acting on behalf of a Federal candidate or officeholder,
17 may rely upon a certification from the 501(c) organization signed by an officer or authorized
18 representative of the organization with knowledge of its activities, stating that the
19 organization's principal purpose is not to conduct election activities, including FEA, and that
20 the organization does not intend to pay debts incurred in a prior election cycle from the

⁴ For example, get-out-the-vote efforts to obtain votes for a ballot initiative would constitute FEA when the ballot initiative appears on the same ballot as a candidate for Federal office.

1 making of expenditures or disbursements in connection with an election for Federal office,
2 including FEA. *See* 11 CFR 300.65(e).

3 The Commission notes that the provisions of section 441i(e)(4) would not apply in
4 situations where the section 501(c) organization is directly or indirectly established, financed,
5 maintained, or controlled by, or acting on behalf of, a Federal candidate or officeholder. *See*
6 Advisory Opinion 2003-12 (Flake).

7 The Commission expresses no opinion regarding the application of State law or the
8 Internal Revenue Code to the proposed activities, because those questions are not within the
9 Commission's jurisdiction.

10 This response constitutes an advisory opinion concerning the application of the Act
11 and Commission regulations to the specific transaction or activity set forth in your request.
12 *See* 2 U.S.C. 437f. The Commission emphasizes that, if there is a change in any of the facts
13 or assumptions presented, and such facts or assumptions are material to a conclusion
14 presented in this advisory opinion, then the requestor may not rely on that conclusion as
15 support for its proposed activity. This cited advisory opinion is available on the
16 Commission's website at <http://saos.nictusa.com/saos/searchao>.

17 Sincerely,

18
19 Robert D. Lenhard
20 Chairman

1 ADVISORY OPINION 2007-28

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3 Charles H. Bell, Jr., Esq.
4 Ashlee N. Titus, Esq.
5 Bell, McAndrews & Hiltachk, LLP
6 455 Capitol Mall
7 Suite 801
8 Sacramento, CA 95814

DRAFT B

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10 Dear Mr. Bell and Ms. Titus:

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We are responding to your advisory opinion request on behalf of United States

13

Representatives Kevin McCarthy and Devin Nunes, concerning the application of the Federal

14

Election Campaign Act of 1971, as amended (the "Act"), and Commission regulations to

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whether Representatives McCarthy and Nunes may freely raise funds for one or more

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independently run ballot measure committees in connection with the qualification and passage

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of a redistricting ballot initiative for the June 3, 2008 California statewide primary election or

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the November 4, 2008 California statewide general election.

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The Commission concludes that Representatives McCarthy and Nunes may freely

20

raise funds for PAIC or other ballot initiative committees not established, financed,

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maintained, or controlled by, either officeholder for the purpose of supporting the

22

qualification and passage of a redistricting ballot initiative because the activity is not "in

23

connection with an election" for purposes of 2 U.S.C. 441i(e).

24

Background

25

The facts of this request are presented in your letter dated October 12, 2007, and in

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your e-mail dated October 25, 2007.

27

Representatives McCarthy and Nunes are United States Representatives from

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California. They are also candidates for re-election to the House of Representatives in 2008

1 and Federal officeholders under the Act and Commission regulations. *See* 2 U.S.C. 431(2)
2 and (3); 11 CFR 100.3 and 100.4. Representatives McCarthy and Nunes will both appear on
3 the June 3, 2008 primary ballot, and, should they win their party's nomination, would also
4 appear on the November 4, 2008 general election ballot.

5 The People's Advocate Initiative Committee ("PAIC") is a registered State General
6 Purpose committee described in Section 501(c)(4) of the Internal Revenue Code.¹ 26 U.S.C.
7 501(c)(4). On June 25, 2007, PAIC submitted a request asking the California Attorney
8 General to qualify a ballot initiative regarding the redistricting of California State and
9 Congressional districts. PAIC is attempting to qualify the ballot initiative for either the June
10 3, 2008 California statewide primary election or the November 4, 2008 California statewide
11 general election. According to the advisory opinion request, PAIC may engage in get-out-
12 the-vote activity in connection with the passage of the ballot initiative.

13 Representatives McCarthy and Nunes have supported redistricting ballot initiatives in
14 the past and would like to support actively the qualification and adoption of the proposed
15 redistricting ballot initiative. Specifically, Representatives McCarthy and Nunes would like
16 to raise funds for PAIC, a ballot initiative committee not established, financed, maintained, or
17 controlled by them, formed to support the qualification and passage of the redistricting ballot
18 initiative.² None of the funds raised by Representatives McCarthy and Nunes will be used for
19 public communications referring to them. In addition, Representatives McCarthy and Nunes

¹ PAIC is not registered as a political committee under the Act.

² Representatives McCarthy and Nunes have stated that they currently do not intend to raise funds for other ballot initiative committees. Should they later decide to raise funds for additional ballot initiative committees,

1 will not participate in, or coordinate with PAIC regarding, other public communications paid
2 for by PAIC.

3 ***Questions Presented***

- 4 1. *May Representatives McCarthy and Nunes freely raise funds for PAIC or other*
5 *committees that are neither established, financed, maintained, or controlled by, or acting*
6 *on behalf of, persons covered by 2 U.S.C. 441i(a) or 441i(e), to support the qualification*
7 *of a ballot initiative on the subject of redistricting for the June 3, 2008 California*
8 *statewide primary election or the November 4, 2008 California statewide general*
9 *election?*
- 10 2. *May Representatives McCarthy and Nunes freely raise funds for PAIC or other*
11 *committees that are neither established, financed, maintained, or controlled by, or acting*
12 *on behalf of, persons covered by 2 U.S.C. 441i(a) or 441i(e), to*
13 *campaign for the passage of a ballot initiative on the subject of redistricting that has*
14 *qualified to be voted on at the June 3, 2008 California statewide primary election or the*
15 *November 4, 2008 California statewide general election?*

Representatives McCarthy and Nunes stated that they will not establish, finance, maintain, or control the ballot initiative committees for which they raise funds.

1 ***Legal Analysis and Conclusions***

2 Yes, Representatives McCarthy and Nunes may freely raise funds for PAIC or other
3 redistricting ballot initiative committees that are not established, financed, maintained, or
4 controlled by, either officeholder for the purpose of qualifying and securing passage of the
5 ballot initiative.

6 Under the Act, as amended by the Bipartisan Campaign Reform Act of 2002
7 (“BCRA”), Public Law 107-155, 116 Stat. 81 (2002), Federal candidates and officeholders
8 may not raise or spend funds in connection with an election for Federal office, including
9 funds for any Federal election activity, unless the funds are subject to the limitations,
10 prohibitions, and reporting requirements of the Act. *See* 2 U.S.C. 441i(e)(1)(A); 11 CFR
11 300.61. Nor may Federal candidates and officeholders raise or spend funds in connection
12 with an election other than an election for Federal office, unless the funds do not exceed the
13 amounts permitted with respect to contributions to candidates and political committees under
14 2 U.S.C. 441a(a)(1), (2), and (3), and do not come from sources prohibited under the Act. *See*
15 2 U.S.C. 441i(e)(1)(B); 11 CFR 300.62.

16 In analyzing the application of sections 441i(e)(1)(A) & (B), the threshold question is
17 whether the funds are “in connection with an election for Federal office” or “in connection
18 with any election other than an election for Federal office.” *See* Advisory Opinion 2003-20
19 (Reyes). If they are, then the Act’s contribution limitations and source prohibitions would
20 apply to funds solicited, received, directed, transferred, or spent by a Federal officeholder or
21 candidate unless the exemption set forth in section 441i(e)(4) applies. If the funds are not in
22 connection with an election, then section 441i(e) does not apply and the Federal officeholder

1 or candidate may solicit, receive, direct, transfer, or spend funds outside the Act's
2 contribution limitations and source prohibitions.

3 The statutory definition of election states that the term election means "a general,
4 special, primary, or runoff election," a political party caucus or convention which has
5 authority to nominate a candidate, a primary election held for nominating national party
6 convention delegates, and a primary election held for expressing a preference for the
7 nomination of an individual for election to the office of President. 2 U.S.C. 431(1). The
8 Commission defines an election as "the process by which individuals, whether opposed or
9 unopposed, seek nomination for election, or election, to Federal office." 11 CFR 100.2(a).

10 Based on these definitions, the phrases "in connection with an election for Federal office" and
11 "in connection with any election other than an election for Federal office" unambiguously
12 refer only to elections involving candidates for public office and do not include ballot
13 initiatives or referenda.

14 In addition to the general exclusion of activities related to ballot initiatives and
15 referenda from consideration as "in connection with an election for Federal office" or "in
16 connection with any election other than an election for Federal office," the Commission has
17 previously treated redistricting-related activities by Federal officeholders and candidates as
18 political, rather than electoral, in nature. Prior to the passage of BCRA, the Commission
19 permitted Federal officeholders to establish and raise funds for entities founded to engage in
20 redistricting related activities. *See* Advisory Opinions 1982-37 (Edwards) and 1981-35
21 (Thomas). The Commission reasoned that donations to a redistricting or reapportionment
22 committee are meant to affect the political process, and are not necessarily for the purpose of

1 influencing an election. There is no indication that Congress intended to change this outcome
2 with the passage of BCRA.³

3 Representatives McCarthy and Nunes therefore may freely raise funds for PAIC or
4 other redistricting ballot initiative committees that are not established, financed, maintained,
5 or controlled by, either officeholder for the purpose of qualifying and securing passage of the
6 ballot initiative.

7 The Commission expresses no opinion regarding the application of State law to the
8 proposed activities, because those questions are not within the Commission's jurisdiction.

³ While BCRA broadened the application of Federal contribution limits and source prohibitions to solicitations by Federal candidates and officeholders from "for the purpose of influencing any election for Federal office" to solicitations "in connection with an election for Federal office" or "in connection with any election other than an election for Federal office," it did not broaden the definition of election, which the Commission previously had not construed to include redistricting related activities.

In Advisory Opinion 2003-38 (Engel), the Commission was unable to resolve whether donations to a redistricting committee established by a Federal officeholder for the purpose of paying legal fees related to redistricting litigation would constitute "funds in connection with an election for Federal office" or "funds in connection with an election other than an election for Federal office." In this instance, the Federal officeholders will not establish, finance, maintain, or control the redistricting initiative committee.

1 This response constitutes an advisory opinion concerning the application of the Act
2 and Commission regulations to the specific transaction or activity set forth in your request.
3 *See* 2 U.S.C. 437f. The Commission emphasizes that, if there is a change in any of the facts
4 or assumptions presented, and such facts or assumptions are material to a conclusion
5 presented in this advisory opinion, then the requestor may not rely on that conclusion as
6 support for its proposed activity. All cited advisory opinions are available on the
7 Commission's website at <http://saos.nictusa.com/saos/searchao>.

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Sincerely,

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Robert D. Lenhard
Chairman