



FEDERAL ELECTION COMMISSION
Washington, DC 20463

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February 17, 2012

AGENDA ITEM

MEMORANDUM

TO: The Commission

FROM: Anthony Herman *AH*
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Subject: AO 2012-01 (Stop this Insanity, Inc. Employee Leadership Fund) – Draft B

For Meeting of 3-1-12

Attached is a proposed draft of the subject advisory opinion. We have been asked to have this draft placed on the Open Session agenda for March 1, 2012.

Attachment

1 ADVISORY OPINION 2012-01
2
3 Dan Backer, Esq.
4 DB Capitol Strategies PLLC
5 209 Pennsylvania Avenue, SE
6 Suite 2109
7 Washington, DC 20003
8

DRAFT B

9 Dear Mr. Backer:

10 We are responding to your advisory opinion request on behalf of Stop This
11 Insanity, Inc. Employee Leadership Fund (“ELF”), the separate segregated fund of Stop
12 This Insanity, Inc. (“STI”), concerning the application of the Federal Election Campaign
13 Act (the “Act”) and Commission regulations to ELF’s plans to establish a non-
14 contribution account. ELF and STI plan to solicit for that account funds that are not
15 subject to the limitations and prohibitions of 2 U.S.C. 441a(a)(1)(C) or 441B (“unlimited
16 contributions”) from persons outside STI’s restricted class — including other political
17 committees, corporations, and labor organizations — for the purpose of financing
18 independent expenditures.

19 The Commission concludes that the Act and Commission regulations prohibit
20 ELF’s proposed plans.

21 ***Background***

22 The facts presented in this advisory opinion are based on your letter received on
23 January 4, 2012 and public disclosure reports filed with the Commission.

24 ELF is a separate segregated fund that registered with the Commission as a
25 political committee on January 4, 2012. ELF’s connected organization is STI, an

1 Arizona-based¹ nonprofit social welfare organization exempt from taxation under section
2 501(c)(4) of the Internal Revenue Code.²

3 At the present time, ELF maintains a single bank account into which it receives
4 contributions that are subject to the limitations, prohibitions, and reporting requirements
5 of the Act. ELF plans to use this account to make direct contributions to candidates. To
6 raise contributions for that account, STI and ELF will solicit funds from STI's restricted
7 class of executive and administrative personnel and their families. It also may solicit
8 funds from other STI employees twice per year. Costs for the establishment and
9 administration of this account, as well as costs for solicitations, will be financed by STI.

10 ELF and STI would like to establish and maintain a second Federal account, into
11 which they would solicit unlimited contributions.³ This non-contribution account would
12 be used to finance independent expenditures. ELF and STI plan to solicit and accept
13 contributions to this account, at any time and without limitation, from STI's employees,
14 from STI itself, and from other persons, including other individuals, other political
15 committees, corporations, and labor organizations.

16 As with ELF's existing account, the establishment, administration, and
17 fundraising costs of the proposed non-contribution account would be financed at least in
18 part by STI. To the extent ELF's two accounts jointly incur any administrative expenses,

¹ ELF uses as its mailing address the Washington, DC post office box of its counsel.

² STI itself was at one time registered as a political committee. After filing three quarterly reports, STI terminated its registration based on the view that its registration had been in error and that the organization had never met the requisite thresholds for political committee status.

³ The Committee would not receive funds from foreign nationals, Federal contractors, national banks or corporations organized by authority of any law of Congress.

1 ELF plans to allocate those costs and ensure that the proposed non-contribution account
2 pays an appropriately tailored share.

3 ***Questions Presented***

4 1. *May ELF and STI establish a non-contribution account for ELF that would*
5 *receive unlimited contributions solicited from all STI employees and the general*
6 *public for the purpose of financing independent expenditures?*

7 2. *Must ELF treat as contributions STI's payments for establishment,*
8 *administration, and solicitation costs allocable to ELF's non-contribution*
9 *account?*

10 ***Legal Analysis and Conclusions***

11 1. *May ELF and STI establish a non-contribution account for ELF that would*
12 *receive unlimited contributions solicited from all STI employees and the general*
13 *public for the purpose of financing independent expenditures?*

14 No, the Act and Commission regulations prohibit ELF and STI from establishing
15 a non-contribution account for ELF that would receive unlimited contributions solicited
16 from all STI employees and the general public for the purpose of financing independent
17 expenditures.

18 A separate segregated fund (“SSF”) is a political committee. 2 U.S.C. 431(4)(B);
19 11 CFR 100.5(b). Like all political committees, SSFs must organize, register, and report
20 pursuant to the Act and Commission regulations. *See* 2 U.S.C. 432, 433, and 434; 11
21 CFR 102.1, .2, .7, 104. Unlike other political committees, however, SSFs are creatures of
22 the connected organization (*i.e.*, corporation or labor organization) that directly or

1 indirectly establishes, administers, or financially supports the SSF. 2 U.S.C. 431(7); 11
2 CFR 100.6.

3 SSFs and nonconnected committees are subject to the same limitations on the
4 contributions they can receive. Individuals and multicandidate political committees may
5 not make contributions to a nonconnected committee or an SSF that in the aggregate
6 exceed \$5,000 per year. 2 U.S.C. 441a(a)(1)(C), (a)(2)(C); 11 CFR 110.1(d), .2(d). A
7 nonconnected committee or an SSF also may not knowingly accept contributions in
8 excess of these limitations. 2 U.S.C. 441a(f).

9 Generally speaking, neither a nonconnected committee nor an SSF may accept
10 contributions from a corporation or from a labor organization. *Id.*; 2 U.S.C. 441b(a);
11 11 CFR 114.2(b)(1). An SSF may, however, accept from the corporation or labor
12 organization that serves as its connected organization, payments for the SSF's
13 establishment, administration or solicitation costs. Such payments are not
14 "contributions" under the Act and are not prohibited. 2 U.S.C. 441b(b)(2)(C).

15 An SSF – unlike a nonconnected committee – is subject to restrictions governing
16 who may be solicited for contributions to the SSF. A corporation or its SSF may solicit
17 contributions for the SSF from the corporation's executive or administrative personnel
18 and their families, and, where applicable, stockholders or members.⁴ 2 U.S.C.
19 441b(b)(4)(A)(i), (b)(4)(C); 11 CFR 114.5(g)(1), 114.7. Twice yearly, a corporation or
20 its SSF may also solicit voluntary political contributions for the SSF from the
21 corporation's employees who are not executive or administrative personnel or

⁴ The Act and Commission regulations define "executive and administrative personnel" as (1) individuals who are employed by a corporation, (2) are paid on a salary rather than hourly basis, and (3) have "policymaking, managerial, professional, or supervisory responsibilities." 2 U.S.C. 441b(b)(7); 11 CFR 114.1(c).

1 stockholders, and from the families of those employees. 2 U.S.C. 441b(b)(4)(B); 11 CFR
2 114.6. The procedures for such twice yearly solicitations include several requirements
3 not applicable to solicitations to restricted class personnel. The solicitations must be in
4 writing, sent to employees at their residences, and conducted in such a way that
5 employees can make anonymous contributions of \$50 or less and the solicitor cannot
6 determine who makes such a contribution. 2 U.S.C. 441b(b)(4)(B); 11 CFR 114.6(c), (d).
7 Solicitations by a corporation or its SSF to the general public are prohibited. *See* 2
8 U.S.C. 441b(b)(4)(A)(i); 11 CFR 114.5(g)(1), (i).

9 Courts have recently invalidated several provisions in the Act and Commission
10 regulations that limited contributions to *nonconnected* committees as applied to financing
11 for independent spending activity. *See EMILY's List v. FEC*, 581 F.3d 1, 12 (D.C. Cir.
12 2009) (striking down regulations and noting that nonconnected political committees may
13 raise and spend funds outside the limitations and certain prohibitions of the Act for the
14 purpose of financing independent expenditures and other independent political activity);
15 *SpeechNow.org v. FEC*, 599 F.3d 686, 696, 698 (D.C. Cir. 2010) (*en banc*) (striking
16 down limitations on contributions from individuals to an unincorporated association that
17 makes only independent expenditures and affirming political committee reporting
18 requirements); *Carey v. FEC*, 791 F. Supp. 2d 121, 131 (D.D.C. 2011) (preliminarily
19 enjoining application of statutory amount and certain source and limitations under
20 *EMILY's List*).⁵

21 These decisions, however, did not address the Act and Commission regulations as
22 they apply to *connected* committees. *See EMILY's List*, 581 F.3d at 8 n.7 (“In referring

⁵ Although STI is based in Arizona, D.C. Circuit cases would constitute persuasive authority outside D.C.

1 to non-profit entities, we mean non-connected non-profit corporations ‘Non-
2 connected’ means that the non-profit is not a candidate committee, a party committee, or
3 a committee established by a corporation or labor union.”) (citing 11 CFR 106.6(a));
4 *SpeechNow.org*, 599 F.3d at 689, 696 (explaining that the court was “only decid[ing]
5 these questions as applied to contributions to” the plaintiff, an unincorporated nonprofit
6 association); *Carey*, 791 F. Supp. 2d at 126 n.1, 127 (defining non-connected committees
7 and noting that plaintiffs challenged contribution limits as applied to “a non-connected
8 political committee such as NDPAC”). SSFs are materially different from nonconnected
9 committees.⁶ In contrast with nonconnected committees:

10 The separate segregated fund may be completely controlled by the
11 sponsoring corporation or union, whose officers may decide which
12 political candidates’ contributions to the fund will be spent to assist. The
13 “fund must be separate from the sponsoring union [or corporation] only in
14 the sense that there must be a strict segregation of its monies” from the
15 corporation’s other assets.

16
17 *FEC v. Nat’l Right to Work Comm.* (“*NRWC*”), 459 U.S. 197, 200 n.4 (1982) (citing
18 *Pipefitters Local Union No. 562 v. United States*, 407 U.S. 385, 414-417, (1972) and
19 *Buckley v. Valeo*, 424 U.S. 1, 28 n. 31 (1976)). An SSF’s establishment, administration
20 and solicitation costs can be subsidized by its connected corporation, and those costs are
21 not required to be disclosed to the public. A nonconnected committee, on the other hand,
22 must pay its own administration and solicitation costs under the Act, and all of a
23 nonconnected’s disbursements above the reporting thresholds are disclosed to the public.

⁶ *EMILY’s List* discussed both entities that register with the Commission and those that do not. 581 F.3d at 8 n.7. Leadership PACs may be “nonconnected committees” under the Commission’s regulations. 11 C.F.R. 100.5(a)(6). “Nonconnected committee” as used in this advisory opinion, however, refers only to entities that register with the Commission other than leadership PACs. Leadership PACs are subject to separate restrictions as a result of their relationship to Federal officeholders or candidates for Federal office. See 2 U.S.C. 441i(e); Advisory Opinion 2011-21 (Constitutional Conservatives Fund PAC).

1 While nonconnected “multicandidate political committees are generally
2 unrestricted in the manner and scope of their solicitations; the segregated funds that . . .
3 corporations may establish pursuant to § 441b(b)(2)(C) are carefully limited in this
4 regard.” *Cal. Med. Ass’n v. FEC*, 453 U.S. 182, 201 (1981) (citing 2 U.S.C. 441b(b)(3),
5 (b)(4)). Nonprofit corporations, such as STI, may solicit voluntary contributions from the
6 corporation’s members, as well as executive and administrative personnel, their families
7 and, through twice-yearly solicitations, the corporation’s other employees. Solicitations
8 by nonprofit corporations are thus limited to “those persons attached in some way to it by
9 its corporate structure.” *NRWC*, 459 U.S. at 202.

10 No court has considered the unique characteristics of SSFs under the Act and
11 struck down as unconstitutional the source and amount limitations. Because no court has
12 invalidated the contribution limits and prohibitions and accompanying solicitation
13 restrictions for SSFs on constitutional grounds, we are required to give full force to the
14 Act and the Commission’s regulations. *See Johnson v. Robison*, 415 U.S. 361, 368
15 (1974) (adjudication of constitutionality is generally outside an administrative agency’s
16 authority); *Robertson v. FEC*, 45 F.3d 486, 489 (D.C. Cir. 1995) (noting in the context of
17 the Commission’s administrative enforcement process that “[i]t was hardly open to the
18 Commission, an administrative agency, to entertain a claim that the statute which created
19 it was in some respect unconstitutional”); *see also* 2 U.S.C. 437f(b) (“Any rule of law
20 which is not stated in this Act . . . may be initially proposed by the Commission only as a
21 rule or regulation pursuant to procedures established in section 438(d) of this title.”). The
22 Act does not empower the Commission with general authority to waive its provisions.
23 *See, e.g.,* Advisory Opinion 1994-35 (Alter).

1 Even if the Commission were permitted to address constitutional claims, we do
2 not believe that a court would answer in the affirmative the question posed by the
3 requestor. In light of the unique nature of SSFs, an advisory opinion permitting an SSF
4 to establish a non-contribution account that would receive unlimited contributions
5 solicited from all of its connected organization’s employees and the general public for the
6 purpose of financing independent expenditures does not “necessarily follow” from the
7 cases and prior Advisory Opinions addressing nonconnected committees. *Compare*
8 Advisory Opinion 2010-11 (Commonsense Ten), at 3 (unconstitutionality of limits on
9 contributions from corporations, labor organizations, and political committees
10 “necessarily follows” from rulings regarding corporate expenditures and contributions
11 from individuals) *with* Advisory Opinion 2011-21 (Constitutional Conservatives Fund
12 PAC), at 3 (constitutionality of limit on Federal candidate fundraising not disturbed by
13 earlier rulings); and Advisory Opinion 2011-28 (Western Representation PAC), at 6
14 (opting not to waive statutory independent expenditure reporting requirements).

15 The First Amendment requires that contribution limits must be “closely drawn” to
16 advance “a sufficiently important interest.” *Randall v. Sorrell*, 548 U.S. 230, 246-247
17 (2006) (plurality opinion); *Buckley v. Valeo*, 424 U.S. 1, 25 (1976). “When the
18 government attempts to regulate the financing of political campaigns and express
19 advocacy through contribution limits . . . it must have a countervailing interest that
20 outweighs the limit’s burden on the exercise of First Amendment rights.” *SpeechNow*,
21 599 F.3d at 692.

22 Here, ELF’s proposed non-contribution account fails to relieve *any* burden. STI
23 itself may solicit and accept funds from individuals in the general public, other political

1 committees, corporations and labor organizations in order to finance independent
2 expenditures. *See Citizens United v. FEC*, 558 U.S. ___, 130 S. Ct. 876, 913 (2010). The
3 provisions of the Act placing limitations on SSFs thus do not burden the connected
4 organization, STI. The Act here does not impose upon STI a more burdensome approach
5 to its independent spending activity. *Cf. Citizens United*, 130 S. Ct. at 897 (The
6 government may not force corporations to speak through SSFs, which “are burdensome
7 alternatives; they are expensive to administer and subject to extensive regulations.”); *see*
8 *also Carey*, 791 F. Supp. 2d at 131-32 (“[M]aintaining two separate accounts is . . .
9 perfectly legitimate and narrowly-tailored . . ., as opposed to the Commission’s overly
10 burdensome alternative [of requiring a speaker to establish two separate political
11 committees].”).

12 Moreover, here, any burden associated with the limitations on SSFs is self-
13 imposed. In effect, STI and ELF propose to *voluntarily* subject their independent
14 spending activity to more burdensome limitations and prohibitions contained in the Act
15 and Commission regulations.⁷ Should a court examine such a question, it would not
16 likely conclude that a corporations’s self-imposed burden – especially without
17 explanation – suffices to require that an Act of Congress be struck down. *Cf.*
18 *SpeechNow.org*, 599 F.3d at 697 (upholding the “minimal” additional reporting
19 requirements associated with political committee status because they do not “impose
20 much of an additional burden”).

⁷ Requestor does not explain why it wished to use an SSF as the vehicle for making independent expenditures as opposed to using the connected entity itself for this purpose, saying only that its reason is “immaterial.”

1 To the extent corporations may contend that financing independent expenditures
2 themselves, rather than through an SSF, would lead to the corporation becoming a
3 political committee, such a result would comport with the public’s interest in full
4 disclosure of entities having Federal campaign activity as their “major purpose.”
5 *Buckley*, 424 U.S. at 79. In such an event, the additional burden imposed would be
6 minimal and would fail to overcome the important government interest in facilitating
7 meaningful disclosure to the public of information relating to the sources of funds used
8 for campaign activity. *See SpeechNow.org*, 599 F.3d at 697.⁸ If a connected
9 organization were, in fact, a political committee, then its contributions and disbursements
10 related to administrative expenses would also have to be reported. *Id.* at 698 (“[T]he
11 public has an interest in knowing who is speaking about a candidate, no matter whether
12 the contributions were made towards administrative expenses or independent
13 expenditures.”); *see also Citizens United*, 130 S. Ct. at 916 (“[D]isclosure permits
14 citizens and shareholders to react to the speech of corporate entities in a proper way.
15 This transparency enables the electorate to make informed decisions and give proper
16 weight to different speakers and messages.”); *John Doe No. 1 v. Reed*, 130 S. Ct. 2811,
17 2820 (2010) (“Public disclosure also promotes transparency and accountability in the
18 electoral process to an extent other measures cannot.”); *id.* at 2837 (Scalia, J., concurring)

⁸ *SpeechNow.org*, 599 F.3d at 697 (“Because SpeechNow intends only to make independent expenditures, the additional reporting requirements that the FEC would impose on SpeechNow if it were a political committee are minimal. Indeed, at oral argument, plaintiffs conceded that ‘the reporting is not really going to impose an additional burden’ on SpeechNow. Oral Arg. Tr. at 14 (‘Judge Sentelle: So, just calling you a [PAC] and not making you do anything except the reporting is not really going to impose an additional burden on you right? . . . Mr. Simpson: I think that’s true. Yes.’). Nor do the organizational requirements that SpeechNow protests, such as designating a treasurer and retaining records, impose much of an additional burden upon SpeechNow, especially given the relative simplicity with which SpeechNow intends to operate.”).

1 (“Requiring people to stand up in public for their political acts fosters civic courage,
2 without which democracy is doomed.”).

3 The Supreme Court in *Citizens United* referenced – and did not question – its
4 decision in *NRWC* upholding the “restriction[s] on a corporation’s ability to solicit funds
5 for its [SSF], which made direct contributions to candidates.” *Citizens United*, 558 U.S.
6 ___, 130 S. Ct. at 909. Indeed, the Court has recognized on a number of occasions that
7 contribution limits like those governing SSFs “have been an accepted means to prevent
8 *quid pro quo* corruption.” *Id.*; *NRWC*, 459 U.S. at 209.

9 The constitutionality of the solicitation restrictions applicable to connected
10 committees – such as ELF -- is thus well established. The Supreme Court’s reference in
11 *Citizens United* to *NRWC* reflects its judgment that “the differing structures and purposes
12 of different entities may require different forms of regulation in order to protect the
13 integrity of the electoral process.” *NRWC*, 459 U.S. at 210 (internal quotation marks and
14 citations omitted).

15 For the foregoing reasons, STI and ELF may not establish a non-contribution
16 account for ELF that would receive unlimited contributions solicited from all STI
17 employees and the general public for the purpose of financing independent expenditures.
18 To the extent STI would like to finance independent expenditures from STI’s general
19 treasury funds or with unlimited funds that STI could raise from the general public, it
20 may do so without the use of its SSF. Independent expenditures financed through ELF,
21 however, must be financed only with contributions solicited pursuant to applicable SSF
22 solicitation limitations and subject to the Act’s source and amount limits.

1 2. *Must ELF treat as contributions STI's payments for establishment,*
2 *administration, and solicitation costs allocable to ELF's non-contribution*
3 *account?*

4 This question is moot in light of the answer to question 1.

5 This response constitutes an advisory opinion concerning the application of the
6 Act and Commission regulations to the specific transaction or activity set forth in your
7 request. *See* 2 U.S.C. 437f. The Commission emphasizes that, if there is a change in any
8 of the facts or assumptions presented, and such facts or assumptions are material to a
9 conclusion presented in this advisory opinion, then the requestor may not rely on that
10 conclusion as support for its proposed activity. Any person involved in any specific
11 transaction or activity which is indistinguishable in all its material aspects from the
12 transaction or activity with respect to which this advisory opinion is rendered may rely on
13 this advisory opinion. *See* 2 U.S.C. 437f(c)(1)(B). Please note that the analysis or
14 conclusions in this advisory opinion may be affected by subsequent developments in the
15 law including, but not limited to, statutes, regulations, advisory opinions, and case law.
16 The cited advisory opinions are available on the Commission's website, www.fec.gov, or
17 directly from the Commission's Advisory Opinion searchable database at
18 <http://www.fec.gov/searchao>.

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On behalf of the Commission,

Caroline Hunter
Chair
Federal Election Commission