

AGENDA DOCUMENT NO. 12-16



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AGENDA ITEM

MEMORANDUM

TO: The Commission

For Meeting of 3-1-12

FROM: Anthony Herman
General Counsel

SUBMITTED LATE

Kevin Deeley
Acting Associate General Counsel

Robert M. Knop
Assistant General Counsel

Neven F. Stipanovic
Attorney

David C. Adkins
Attorney

Subject: Draft AO 2012-03 (ActRight)

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 2012-03
2
3 Barry A. Bostrom, Esq.
4 General Counsel
5 ActRight
6 2524 N. 8th Street
7 Terre Haute, IN 47804-1811
8

DRAFT

9 Dear Mr. Bostrom:

10 We are responding to your advisory opinion request on behalf of ActRight,
11 concerning the application of the Federal Election Campaign Act (the “Act”) and
12 Commission regulations to ActRight’s proposed plan to solicit and forward unlimited
13 contributions earmarked for nonconnected political committees that make only
14 independent expenditures or earmarked for a nonconnected political committee’s non-
15 contribution account used to finance independent expenditures¹ (collectively “Recipient
16 Committees”).

17 The Commission concludes, subject to the conditions and representations
18 described below, that ActRight may solicit unlimited contributions earmarked for the
19 Recipient Committees and forward them to the Recipient Committees.

20 ***Background***

21 The facts presented in this advisory opinion are based on your letter received on
22 January 18, 2012.

23 ActRight is a nonconnected political committee that is registered with the
24 Commission. Through its website, ActRight.com, it solicits contributions earmarked for
25 Federal candidates and then forwards them to the treasurer of candidate’s authorized

¹ See Press Release, FEC Statement on *Carey v. FEC*: Reporting Guidance for Political Committees that Maintain a Non-Contribution Account (Oct. 5, 2011), <http://www.fec.gov/press/Press2011/20111006postcarey.shtml>.

1 committee. ActRight now plans to solicit, through the same website, unlimited
2 contributions earmarked for the Recipient Committees.²

3 Donors will select the political committees to which they wish to contribute by
4 going to the ActRight website and clicking the “donate” button next to the name of the
5 political committee. Donors will then complete the website donation form that will
6 include a request for all required contributor information and disclaimers.

7 ActRight will deposit the contributions earmarked for the Recipient Committees
8 into a bank account separate from its account that contains contributions earmarked for
9 Federal candidates and then forward them to the Recipient Committees. ActRight will
10 not exercise any direction or control over the earmarked funds.

11 ActRight will forward the contributions and all necessary contributor information
12 to the Recipient Committees according to the requirements of 11 CFR 102.8(b).

13 ActRight will also report all of its non-contribution account activity related to
14 contributions earmarked for the Recipient Committees according to guidance the
15 Commission has issued. *See* Press Release, FEC Statement on *Carey v. FEC: Reporting*
16 *Guidance for Political Committees that Maintain a Non-Contribution Account* (Oct. 5,
17 2011), <http://www.fec.gov/press/Press2011/20111006postcarey.shtml>.

18 ***Question Presented***

19 *May ActRight solicit and accept unlimited contributions from individuals,*
20 *political committees, corporations, and labor organizations, into a non-contribution*

² ActRight would not solicit or accept funds from foreign nationals, Federal contractors, national banks or corporations organized by authority of any law of Congress.

1 *account and then forward the contributions earmarked for Recipient Committees to those*
2 *earmarked Recipient Committees?*

3 ***Legal Analysis and Conclusions***

4

5 Yes, ActRight may solicit unlimited contributions earmarked for Recipient
6 Committees and forward them to the earmarked Recipient Committees subject to the
7 conditions and representations described below.

8 The Act and Commission regulations require any person who receives
9 contributions on behalf of unauthorized committees to forward the contributions it
10 receives, along with certain contributor information, to the treasurers of the unauthorized
11 committees in a timely manner. 2 U.S.C. 432(b)(2); 11 CFR 102.8(b). Any person who
12 receives a contribution in excess of \$50 on behalf of an unauthorized committee must
13 forward the contribution, as well as the contributor's name, address, and receipt date, to
14 the treasurer no later than ten days after receipt. 2 U.S.C. 432(b)(2)(B); 11 CFR
15 102.8(b)(2). If the contribution exceeds \$200, the contributor's employer and occupation
16 also must be forwarded. 11 CFR 102.8(b)(2). Contributions of \$50 or less to
17 unauthorized committees must be forwarded within thirty days (with no information
18 forwarding requirement). 2 U.S.C. 432(b)(2)(A); 11 CFR 102.8(b)(1).

19 ActRight would be receiving contributions earmarked for political committees
20 that are not authorized committees of any candidates. As such, ActRight would have the
21 duty to forward the contributions it receives, along with the required contributor
22 information, to the treasurers of the Recipient Committees within the time frames
23 required by 11 CFR 102.8(b). ActRight states that it will forward all contributions and

1 the information required by the Act and Commission regulations to the Recipient
2 Committees within the time constraints of the Commission's regulations.

3 Because the contributions would not be intended for ActRight to use for its own
4 purposes, and ActRight would not have any direction or control over the earmarked
5 funds, ActRight would not need to report the earmarked contributions as contributions to
6 ActRight. *See e.g.*, Advisory Opinion 1996-18 (International Association of Fire
7 Fighters) (finding that a conduit was not accepting or making contributions because funds
8 placed in a separate conduit account remained in the control of the individual
9 contributor). However, because the earmarked contributions would be deposited into
10 ActRight's non-contribution account, ActRight would have to report them as "Other
11 Federal Receipts" on Line 17 of Form 3X with an explanation that they are earmarked by
12 the contributors for noncandidate political committees. In addition, when the funds are
13 distributed, ActRight would have to report the disbursements as "Other Disbursements"
14 on Line 29 of Form 3X. *See* Advisory Opinion 1981-57 (Coal Miners PAC); Advisory
15 Opinion 1983-18 (Stop and Shop); Press Release, FEC Statement on *Carey v. FEC*:
16 Reporting Guidance for Political Committees that Maintain a Non-Contribution Account
17 (Oct. 5, 2011), <http://www.fec.gov/press/Press2011/20111006postcarey.shtml>.

18 ActRight plans to forward funds from its separate non-contribution account
19 containing contributions of unlimited amounts from individuals, as well as from
20 corporations and labor organizations, to earmarked Recipient Committees. That plan is
21 permissible because the Recipient Committees are permitted to receive such
22 contributions. *See EMILY's List v. FEC*, 581 F.3d 1, 12 (D.C. Cir. 2009);
23 *SpeechNow.org v. FEC*, 599 F.3d 686, 696 (D.C. Cir. 2010) (*en banc*) (striking down

1 limitations on contributions from individuals to groups that make only independent
2 expenditures); *Carey v. FEC*, 791 F. Supp. 2d 121, 131 (D.D.C. 2011); Press Release,
3 FEC Statement on *Carey v. FEC*: Reporting Guidance for Political Committees that
4 Maintain a Non-Contribution Account (Oct. 5, 2011),
5 <http://www.fec.gov/press2011/20111006postcarey.shtml>; *see also* Advisory Opinion
6 2010-11 (Commonsense Ten) (independent expenditure-only committees may receive
7 unlimited contributions from corporations and labor organizations).³

8 In sum, the Commission concludes that ActRight may solicit earmarked
9 contributions and forward them to the earmarked Recipient Committees consistent with
10 the foregoing conditions and representations.

11 This response constitutes an advisory opinion concerning the application of the
12 Act and Commission regulations to the specific transaction or activity set forth in your
13 request. *See* 2 U.S.C. 437f. The Commission emphasizes that, if there is a change in any
14 of the facts or assumptions presented, and such facts or assumptions are material to a
15 conclusion presented in this advisory opinion, then the requestors may not rely on that
16 conclusion as support for its proposed activity. Any person involved in any specific
17 transaction or activity which is indistinguishable in all its material aspects from the
18 transaction or activity with respect to which this advisory opinion is rendered may rely on
19 this advisory opinion. *See* 2 U.S.C. 437f(c)(1)(B). Please note the analysis or
20 conclusions in this advisory opinion may be affected by subsequent developments in the
21 law including, but not limited to, statutes, regulations, advisory opinions, and case law.

³ The Commission notes that this advisory opinion implicates issues that may also be the subject of a forthcoming Commission rulemaking in light of recent court rulings in *SpeechNow.org v. FEC*, 599 F.3d 686 (D.C. Cir. 2010) and *EMILY's List v. FEC*, 581 F.3d 1 (D.C. Cir. 2009).

1 The cited advisory opinions are available on the Commission's Web site at,
2 www.fec.gov, or directly from the Commission's Advisory Opinion searchable database
3 at <http://www.fec.gov/searchao>.

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On behalf of the Commission,

Caroline C. Hunter
Chair