



FEDERAL ELECTION COMMISSION  
Washington, DC 20463

FEDERAL ELECTION  
COMMISSION  
SECRETARIAT

2012 JAN 10 A 11: 25

January 10, 2012

**AGENDA ITEM**

**MEMORANDUM**

TO: The Commission

For Meeting of 1-12-12

FROM:

Anthony Herman  
General Counsel

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**SUBMITTED LATE**

Kevin Deeley  
Acting Associate General Counsel

Handwritten signature of Kevin Deeley, appearing as "KD" in a stylized, cursive font.

Amy L. Rothstein  
Assistant General Counsel

Handwritten signature of Amy L. Rothstein, appearing as "ALR" in a stylized, cursive font.

Jessica Selinkoff  
Attorney

Handwritten signature of Jessica Selinkoff, appearing as "JS" in a stylized, cursive font.

Theodore Lutz  
Attorney

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Subject: Draft C of AO 2011-24 (StandLouder.com)

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 January 12, 2012.

Attachment

1   ADVISORY OPINION 2011-24

2   James A. Kahl, Esquire  
3   Womble Carlyle Sandridge & Rice  
4   1200 Nineteenth Street, N.W., Suite 500  
5   Washington, DC 20004

**DRAFT C**

7   Dear Mr. Kahl:

8           We are responding to your advisory opinion request on behalf of Louder  
9   Solutions, LLC, d/b/a StandLouder.com (“StandLouder.com”), concerning the  
10   application of the Federal Election Campaign Act of 1971, as amended (the “Act”), and  
11   Commission regulations to StandLouder.com’s projected business model.  
12   StandLouder.com asks (1) whether it is a political committee; (2) whether  
13   StandLouder.com, together with persons who use StandLouder.com to create, post, and  
14   fund advertisements, are a political committee or a series of political committees;  
15   (3) what disclosure and disclaimer obligations apply to these advertisements; and  
16   (4) if StandLouder.com may create an independent expenditure-only committee for the  
17   purpose of implementing its proposed business model.

18           The Commission concludes that StandLouder.com by itself is not a political  
19   committee, but together with persons who it expects will use StandLouder.com, it could  
20   become part of a political committee under certain circumstances. The Commission also  
21   concludes that the disclaimer and disclosure provisions of the Act and Commission  
22   regulations apply to StandLouder.com users who create advertisements. Finally, while  
23   StandLouder.com is free to create an independent expenditure-only committee, the  
24   disclaimer and disclosure obligations would continue to apply to advertisement creators,  
25   not StandLouder.com or its committee.

1

2 ***Background***

3           The facts presented in this advisory opinion are based on your letter received on  
4 November 22, 2011.

5           StandLouder.com is a for-profit limited liability company (“LLC”) established  
6 under the laws of North Carolina. StandLouder.com has a single natural person member  
7 and has not elected to be treated as a corporation by the Internal Revenue Service.

8 StandLouder.com represents that it will be operated exclusively for commercial purposes  
9 and not for the purpose of influencing any election; that it is not directly or indirectly  
10 established, financed, maintained, or controlled by any candidate or party committee; and  
11 that it will not conduct the activities described below in cooperation, consultation or  
12 concert with, or at the request or suggestion of, any candidate or political party.

13           StandLouder.com plans to provide services through its website that will enable  
14 users to submit proposed advertisements for posting on the website (“content creators”)  
15 and to help finance the airing of those advertisements (“funders”) on television, radio, or  
16 other media. StandLouder.com states that it will offer these services on a non-partisan  
17 basis without regard to party affiliation.

18           An advertisement submitted to StandLouder.com for posting on its website may  
19 concern any topic. StandLouder.com anticipates that advertisements will relate not only  
20 to political and social issues and candidates for public office, but also to other topics,  
21 such as charitable causes, civic groups, or products and services.

22           StandLouder.com will impose certain conditions and restrictions on  
23 advertisements posted on its website. Advertisements may not contain solicitations for

1 contributions to any political committee, nor may advertisements republish, in whole or  
2 in part, any broadcast, written, graphic or other material prepared by a candidate or  
3 candidate’s authorized committee, or their agents, unless those materials come from a  
4 public source and are used in an advertisement that advocates the defeat of the candidate  
5 or political party that created the materials. Content creators of advertisements that may  
6 qualify as independent expenditures or electioneering communications must represent  
7 that they are not Federal contractors, foreign national individuals, foreign corporations or  
8 other foreign entities, Federally-chartered organizations, candidates, or party committees.  
9 Content creators also must grant StandLouder.com the right to use, modify, or distribute  
10 their advertisements. Any content creator other than a nonconnected committee or a  
11 separate segregated fund (“SSF”) may choose to have its name displayed on  
12 StandLouder.com alongside its advertisement, but StandLouder.com will not otherwise  
13 identify the content creators.<sup>1</sup>

14 StandLouder.com will review advertisements only to screen for issues of  
15 defamation, intellectual property infringement, pornography, privacy, and fraud.  
16 StandLouder.com will reserve the right to refuse to post an advertisement only if there is  
17 such an issue or if the advertisement is “otherwise offensive or would harm the  
18 reputation” of StandLouder.com.

19 Each advertisement posted on StandLouder.com will have a corresponding  
20 message forum that is intended to facilitate discussions regarding the advertisement by  
21 website users. Messages containing offensive content or that otherwise do not comply

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<sup>1</sup> StandLouder.com proposes a policy under which nonconnected committees and SSFs will not be allowed to provide any identifying information in their advertisements or on the StandLouder.com website.

1 with the terms of service will be removed. The message forums will be moderated to  
2 ensure that rules are observed.

3 StandLouder.com will establish a two-stage process for collecting funds from  
4 users of its website who wish to finance an advertisement. When a content creator first  
5 posts an advertisement on StandLouder.com's website, a funder may pledge any amount  
6 to help finance the advertisement's distribution, but StandLouder.com will initially  
7 charge only \$1 of that pledge to the funder's credit card. StandLouder.com will ascertain  
8 the level of support for each advertisement based on the volume of the pledges that it  
9 receives. When StandLouder.com receives enough pledges to indicate that, in its  
10 judgment, the advertisement will be successfully funded, StandLouder.com will "open  
11 [the advertisement] for sponsorship."<sup>2</sup> At this second stage, funders who have already  
12 pledged funds will receive an email from StandLouder.com and will have to take  
13 affirmative steps online to pay the balance due on the pledge. Other users will also be  
14 able to provide funds, which will immediately be charged to their accounts. All funds  
15 received for advertisements will be kept in a separate account, and the amounts received  
16 for each advertisement will be accounted for separately.

17 StandLouder.com will allow individuals, partnerships, corporations,  
18 nonconnected committees, and SSFs to help finance an advertisement. Persons wishing  
19 to finance any advertisement that qualifies as an independent expenditure or that would  
20 qualify as an electioneering communications if distributed in the applicable time period  
21 must represent that they are not Federal contractors, foreign national individuals, foreign

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<sup>2</sup> If StandLouder.com receives insufficient pledges to support an advertisement, funders will be notified that their unused \$1 pledges may be redirected to another advertisement. Any funds not redirected after twelve months will be given to charities listed by StandLouder.com on its website.

1 corporations and other foreign entities, or Federally-chartered organizations.  
2 Additionally, all content creators and funders must represent that they are not candidates  
3 or employees or agents of candidates or party committees, and that their activities on  
4 StandLouder.com are not undertaken in cooperation, consultation or concert with, or at  
5 the request or suggestion of any candidate, authorized committee, or political party, or  
6 their agents.

7         Once StandLouder.com determines that sufficient funds have been collected for a  
8 given advertisement, it will purchase air time for, or otherwise distribute, the  
9 advertisement. StandLouder.com will select the most appropriate market, medium, place,  
10 and time to air or distribute the advertisement. StandLouder.com will air or distribute  
11 advertisements that support competing candidates and take opposing positions on issues  
12 in equivalent times and markets.

13         StandLouder.com states that its activities “are strictly profit-oriented and  
14 undertaken at normal and usual rates.” It generally will charge content creators a fee of  
15 \$25 or less to post their advertisements on the website. In addition, StandLouder.com  
16 plans to charge its funders a transaction fee for each online donation.

17         StandLouder.com will periodically engage in promotional activities to encourage  
18 greater use of its services. For example, StandLouder.com may occasionally waive the  
19 \$25 content fee. StandLouder.com also intends to provide limited supplemental funding  
20 for advertisements during promotional periods, because “it is in the Company’s business  
21 interests to maximize the number of [advertisements] that are aired or otherwise publicly  
22 distributed.” StandLouder.com will develop financial qualification thresholds and all  
23 advertisements that meet or exceed the thresholds will be entitled to the same amount of

1 funding. StandLouder.com will not be able to exercise any discretion to offer or deny  
2 funding to any advertisement that meets or exceeds a threshold. Further, as a means of  
3 encouraging submissions, StandLouder.com will award cash prizes or make small  
4 payments to content creators whose advertisements are broadcast. These prizes and  
5 payments would also be offered on a non-partisan basis. Finally, StandLouder.com  
6 proposes to contract with vendors to manufacture products, such as t-shirts, hats, and  
7 mugs, that contain popular messages from advertisements posted on its website. These  
8 products will be sold online at StandLouder.com.

9 StandLouder.com plans to file the reports required by Commission regulations at  
10 11 CFR 104.5, 104.20, and 109.10 for any advertisements that it determines to be  
11 independent expenditures or electioneering communications. The reports will include the  
12 total amount provided to support the advertisement, including the funds used to  
13 compensate media buyers and other third parties involved in the broadcast or distribution  
14 of the advertisement. The reports will identify each funder who provided funding in  
15 excess of \$200 for the purpose of furthering an independent expenditure or in excess of  
16 \$1,000 for the purpose furthering an electioneering communication, as well as  
17 StandLouder.com's own funding or waiver of fees, if applicable. If required,  
18 StandLouder.com also will report the identity of the content creator and the cost to create  
19 and post the advertisement, as those costs are reported to StandLouder.com by the  
20 content creator. StandLouder.com will not report the \$25 placement fee paid by a content  
21 creator or any transaction fees that it receives from website users.

22 StandLouder.com intends to include any necessary disclaimers required by 11  
23 CFR 110.11 in advertisements that qualify as independent expenditures or electioneering

1 communications. StandLouder.com proposes to include the following disclaimer, with a  
2 voiceover, on the radio and television advertisements it places:

3 StandLouder.com is responsible for the content of this advertising. Paid for by  
4 StandLouder.com. Not authorized by any candidate or candidate's committee.  
5 (www.StandLouder.com)  
6

7 Apart from the first sentence, StandLouder.com intends to include the same disclaimer on  
8 print advertisements.

9 ***Questions Presented***

- 10 1. *Is StandLouder.com a "political committee"?*
- 11 2. *Will StandLouder.com, the content creators, and the users who donate funds*  
12 *collectively become a political committee or a series of political committees?*
- 13 3. *What disclosure and disclaimer obligations apply to StandLouder.com's*  
14 *advertisements?*
- 15 4. *As an alternative, can StandLouder.com form an independent expenditure-only*  
16 *committee for the purpose of accepting advertisement content, receiving*  
17 *contributions, and funding independent expenditures or electioneering*  
18 *communications?*

19 ***Legal Analysis and Conclusions***

- 20 1. *Is StandLouder.com a "political committee"?*

21 The Act and Commission regulations define a "political committee" as "any  
22 committee, club, association or other group of persons which receives contributions  
23 aggregating in excess of \$1,000 during a calendar year or which makes expenditures  
24 aggregating in excess of \$1,000 during a calendar year." 2 U.S.C. 431(4)(A); *see also*  
25 11 CFR 100.5. An organization that has made expenditures in excess of \$1,000,



1 however, will not be considered a “political committee” unless, in addition, its “major  
2 purpose is Federal campaign activity (*i.e.*, the nomination or election of a Federal  
3 candidate).” Political Committee Status: Supplemental Explanation and Justification, 72  
4 Fed. Reg. 5595, 5597 (Feb. 7, 2007) (“Supplemental E&J”); *see Buckley v. Valeo*, 424  
5 U.S. 1, 79 (1976); *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 262  
6 (1986).

7         The Commission concludes that StandLouder.com is not a political committee  
8 because it lacks the requisite major purpose. Confronted with a similar issue in Advisory  
9 Opinion 2009-13 (Black Rock Group), the Commission concluded that the requestor, a  
10 consulting firm that offered “strategic communication and general consulting services” to  
11 its clients, was not a political committee because the firm was “organized and operated  
12 for commercial purposes.” In reaching this conclusion, the Commission emphasized that  
13 the firm provided services to “a variety of clients” and had never “advocated the election  
14 of any Federal candidate... supported any political party, or [] expressed any political  
15 goal, or stated any political purpose, or intends to do so in the future.” *Id.*

16         StandLouder.com plans to provide services on the same bases. By enabling any  
17 content creator to post advertisements to attract financing for further distribution,  
18 StandLouder.com is proposing to serve as a commercial vendor for the content creators.<sup>3</sup>  
19 StandLouder.com differs from typical commercial vendors only in the scope of the  
20 services it intends to provide. It not only proposes to serve as a media buyer, it also  
21 intends to facilitate fundraising and to make strategic choices on behalf of content  
22 creators with regard to where and when advertising content should be placed.

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<sup>3</sup> For this reason, StandLouder.com may not post content by SSFs. *See* 2 U.S.C. 441b(b)(4);  
11 CFR 114.1(c) and 114.5(g); *see also* Advisory Opinion 2007-27 (ActBlue).

1 Nonetheless, StandLouder.com’s proposed activities are “strictly profit-oriented.”  
2 StandLouder.com will be compensated for the services that it provides to content creators  
3 by collecting a \$25 fee for each advertisement posted on its website, except for limited  
4 promotions designed to increase StandLouder.com’s business. StandLouder.com will  
5 also deduct a service fee from the monies that it raises to distribute the advertisements.  
6 StandLouder.com plans to capitalize on successful advertisements by contracting with  
7 vendors to manufacture products containing popular advertising messages and selling  
8 those items on its website. Moreover, StandLouder.com will allow users to post and fund  
9 advertisements on any topic and will afford the same treatment to all advertisements –  
10 regardless of partisan orientation. Finally, StandLouder.com will not act in cooperation,  
11 consultation, or concert with, or at the request or suggestion of any candidate or political  
12 party.

13 The differences between StandLouder.com’s proposal and the facts in Advisory  
14 Opinion 2009-13 (Black Rock Group) are not dispositive. First, while unlike the Black  
15 Rock Group, StandLouder.com will select the “most appropriate” market, medium, place,  
16 and time to air advertisements, more importantly, like the Black Rock Group,  
17 StandLouder.com will not control the content of any of the advertisements that it runs on  
18 behalf of the content creators. *Id.* Second, unlike the Black Rock Group, while  
19 StandLouder.com plans to provide supplemental funding for certain advertisements, all  
20 advertisements meeting or exceeding StandLouder.com’s predetermined financial  
21 qualification thresholds will be entitled to funding, regardless of the advertisements’  
22 content – including any advertisements with competing content or views on candidates or  
23 issues.

1           In sum, like the Black Rock Group, StandLouder.com stresses that it is  
2 exclusively “organized and operated for commercial purposes.” *Id.* The Commission  
3 concludes that, based on StandLouder.com’s business plan, its major purpose is not  
4 Federal campaign activity. Accordingly, StandLouder.com is not a political committee  
5 under the Act and Commission regulations.

6           2.       *Will StandLouder.com, the content creators, and the users who donate*  
7 *funds collectively become a political committee or a series of political committees?*

8           The course of conduct described in your request will not, without more, cause  
9 StandLouder.com, the content creators, and the funders to become a political committee  
10 or a series of political committees.

11           As noted above, the definition of a “political committee” includes “a group of  
12 persons which receives contributions aggregating in excess of \$1,000 during a calendar  
13 year,” 2 U.S.C. 431(4)(A); 11 CFR 100.5(a), and whose “major purpose is Federal  
14 campaign activity.” *Buckley*, 424 U.S. at 79. In the absence of collaboration about when  
15 communications are made, which media outlets will be used, what the communications  
16 will say, and which candidates and elections they will target, the Commission concludes  
17 a group of persons constituting a political committee would not be formed. AO 2008-10  
18 (Voter Voter).

19           The request, however, states that each advertisement posted on StandLouder.com  
20 will have a corresponding message forum that is intended to facilitate discussions  
21 regarding the advertisement by website users. It is possible that this forum will be used  
22 to enable content creators, funders, and StandLouder.com to share or collaborate on their  
23 strategies to advocate the election of the same candidate, or to coordinate the messages

1 they plan to communicate. Sharing the private plans, strategies, activities, and needs of  
2 the content creators, funders, or StandLouder.com would aid and actualize their efforts to  
3 act as a group. Accordingly, under certain circumstances the content creators and  
4 funders, acting together through and with StandLouder.com as their common vendor  
5 could constitute a political committee.<sup>4</sup>

6 If a political committee is created, StandLouder.com may still provide services to  
7 a political committee so long as it does so as a *bona fide* commercial vendor.

8 11 CFR 116.1(c). If circumstances change, however, such that StandLouder.com  
9 becomes part of the “group of persons” for purposes of 2 U.S.C. 431(4)(A), it would also  
10 be a part of the political committee. *See FEC v. Malenick*, 310 F. Supp. 2d 230 (D.D.C.  
11 2004).

12 3. *What disclosure and disclaimer obligations apply to StandLouder.com’s*  
13 *advertisements?*

14 Electioneering communications<sup>5</sup> and public communications<sup>6</sup> expressly  
15 advocating the election or defeat of a clearly identified candidate generally must include  
16 disclaimers. *See* 2 U.S.C. 441d; 11 CFR 110.11(a)(2) and (4). If the communication is  
17 not authorized by a candidate, an authorized committee of a candidate, or an agent of  
18 either, the disclaimer must “clearly state the full name and permanent street address,

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<sup>4</sup> The Commission does not address whether any agreements or collaboration between a content creator and a funder not involving StandLouder.com would result in the formation of a political committee.

<sup>5</sup> An electioneering communication is any broadcast, cable, or satellite communication that refers to a clearly identified candidate for Federal office, is publicly distributed within sixty days before a general, special, or runoff election (or thirty days before a primary) for the office sought by the candidate and, in the case of a communication that refers to a candidate for an office other than that of President or Vice President, is targeted to the relevant electorate. *See* 2 U.S.C. 434(f)(3)(A); 11 CFR 100.29(a).

<sup>6</sup> The term “public communication” includes communications placed for a fee on another person’s website, as well as communications by means of any broadcast, cable, or satellite, newspaper, or magazine. 11 CFR 100.26; *see also* 2 U.S.C. 431(22).

1 telephone number, or World Wide Web address of the person who paid for the  
2 communication, and that the communication is not authorized by any candidate or  
3 candidate’s committee.” 11 CFR 110.11(b)(3); *see also* 2 U.S.C. 441d(a)(3).

4           When a content creator posts an advertisement on StandLouder.com, that creator  
5 is engaging StandLouder.com’s services in an effort to solicit contributions to fund the  
6 distribution of the content creator’s message. Accordingly, the advertisements that  
7 StandLouder.com distributes must identify the content creators as the persons who “paid  
8 for the communication[s]” because StandLouder.com is raising funds, and, ultimately,  
9 distributing the advertisements on behalf of the content creator.<sup>7</sup> *See* Advisory Opinion  
10 2007-27 (ActBlue) (determining that ActBlue would be “acting on behalf of” SSFs when  
11 soliciting for and transmitting funds to the SSFs, even in the absence of any contact  
12 between ActBlue and the SSFs or their connected organizations prior to the solicitations).  
13 By engaging Standlouder.com as a vendor, content creators do not transfer responsibility  
14 for their communications. For this reason, the Commission concludes that  
15 StandLouder.com’s proposed disclaimer, which would identify StandLouder.com as  
16 responsible for the advertisement, is inconsistent with the Act and Commission  
17 regulations.<sup>8</sup>

18           With regard to reporting, every person or group of persons or organization, other  
19 than a political committee, that makes or contracts to make independent expenditures

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<sup>7</sup> Similarly, advertisements posted on StandLouder.com’s website may also need to include a disclaimer identifying who paid for the advertisement. *See* 11 CFR 100.26 (including communications placed for a fee on another person’s website as “public communications”) and 110.11 (requiring disclaimers for certain “public communications”). Therefore, StandLouder.com cannot implement its proposed policy of prohibiting nonconnected committees and SSFs from providing any identifying information in their advertisements or on the StandLouder.com website.

<sup>8</sup> For the same reason, because StandLouder.com is not responsible for the advertisement, any independent expenditure-only committee that StandLouder.com created would also not be responsible for the advertisement and could not use the proposed disclaimer. *See* answer to Question 4, below.

1 aggregating in excess of \$250 with respect to a given election in a calendar year must  
2 report these expenditures by submitting FEC Form 5 or a signed statement satisfying the  
3 requirements of 2 U.S.C. 434(c) and 11 CFR 109.10. Any political committee that makes  
4 independent expenditures must report them on FEC Form 3X, Schedule E. *See* 2 U.S.C.  
5 434(b)(6)(B)(iii) and 11 CFR 104.4(a), 109.10(a). Similarly, persons other than political  
6 committees that make disbursements for electioneering communications aggregating in  
7 excess of \$10,000 during any calendar year must report these disbursements on FEC  
8 Form 9. *See* 2 U.S.C. 434(f) and 11 CFR 104.20(b). Political committees “that make  
9 communications that are described in 11 CFR 100.29(a) must report” those  
10 disbursements on FEC Form 3X as expenditures or independent expenditures, as  
11 appropriate. *Id.*

12 For the same reasons that content creators must be identified in disclaimers as the  
13 persons who “paid for an advertisement,” the content creators will be the persons who  
14 “make” an independent expenditure, disbursement for an electioneering communication,  
15 or a “communication[] . . . described in 11 CFR 100.29(a).” Accordingly, content  
16 creators must file the appropriate reports as required by the Act and Commission  
17 regulations.<sup>9</sup>

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<sup>9</sup> To ensure that content creators fully understand the reporting implications if their advertisements become independent expenditures or electioneering communications, StandLouder.com should provide information about Commission reporting requirements to potential content creators. Additionally, it may wish to inform potential funders that information about them could become publicly available in the form of reports filed with the Commission. Finally, because StandLouder.com’s proposed business model indicates that it could be the only entity with full information about whether and when an advertisement becomes an independent expenditure or electioneering communication and about the funders of such an advertisement, it is incumbent upon StandLouder.com to provide this information to content creators or otherwise aid content creators in preparing and filing any necessary reports, including in situations when StandLouder.com provides additional funding to air a particular advertisement. *See generally* Advisory Opinion 2008-10 (VoterVoter.com).

1 4. *As an alternative, can StandLouder.com form an independent expenditure-only*  
2 *committee for the purpose of accepting advertisement content, receiving*  
3 *contributions, and funding independent expenditures or electioneering*  
4 *communications?*

5 StandLouder.com may form an independent expenditure-only political committee  
6 (IEOPC). However, because under the proposal in the request the advertisements will be  
7 the content creators' expenditures, StandLouder.com's IEOPC would not be the entity  
8 "making" the expenditures for the purpose of reporting or the entity that "paid for" the  
9 advertisements for the purpose of a disclaimer. In other words, although  
10 StandLouder.com may form an IEOPC, the use of such a committee would not change  
11 the Commission's answer to Question 3.

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

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

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On behalf of the Commission,

Caroline C. Hunter  
Chair