

AGENDA DOCUMENT NO. 11-37



FEDERAL ELECTION COMMISSION
Washington, DC 20463

SECRETARIAT

2011 JUN 23 P 5:44

June 23, 2011

AGENDA ITEM

MEMORANDUM

TO: The Commission

FROM: Christopher Hughey *pch*
Acting General Counsel

For Meeting of 6-30-11

Rosemary C. Smith *RS*
Associate General Counsel

Robert M. Knop *RMK*
Assistant General Counsel

Joanna S. Waldstreicher *JSW*
Attorney

Theodore M. Lutz *TML*
Attorney

Subject: Draft AO 2011-12 (Majority PAC and House Majority PAC)

Attached is a proposed draft of the subject advisory opinion. We have been asked that this draft be placed on the agenda for June 30, 2011.

Attachment

1 ADVISORY OPINION 2011-12

2

3 Marc E. Elias, Esq.

4 Ezra W. Reese, Esq.

5 Jonathan S. Berkon, Esq.

6 Perkins Coie LLP

7 700 Thirteenth St., NW Suite 600

8 Washington, DC 20005-3960

9

DRAFT

10 Dear Messrs. Elias, Reese, and Berkon:

11 We are responding to your advisory opinion request on behalf of Majority PAC
12 and House Majority PAC (the “Committees”), concerning the application of the Federal
13 Election Campaign Act of 1971, as amended (the “Act”), and Commission regulations to
14 the Committees’ plan to ask Federal officeholders and candidates, and national party
15 officers, to solicit unlimited individual, corporate, and labor organization contributions on
16 behalf of the Committees.

17 The Commission concludes that Federal officeholders and candidates, and
18 national party officers, may not solicit unlimited individual, corporate, and labor
19 organization contributions on behalf of the Committees. The Commission further
20 concludes that Federal officeholders and candidates, and national party officers, may
21 attend, speak at, and be featured guests at fundraisers for the Committees at which
22 unlimited individual, corporate, and labor organization contributions are solicited, so long
23 as they do not, themselves, solicit such contributions.

24 ***Background***

25 The facts presented in this advisory opinion are based on your letter received on
26 May 19, 2011, and on publicly available reports filed with the Commission.

1 Majority PAC, under its previous name, Commonsense Ten, filed its Statement
2 of Organization on June 11, 2010. On July 27, 2010, Commonsense Ten filed a letter
3 stating its intent to make independent expenditures, and not to make any contributions to
4 Federal candidates or political committees, whether direct, in-kind, or by means of
5 coordinated communications.¹ On March 9, 2011, Majority PAC filed an amended
6 Statement of Organization indicating its name change from Commonsense Ten to
7 Majority PAC.

8 House Majority PAC filed its Statement of Organization, including a letter stating
9 its intent to make independent expenditures and not to make any contributions to Federal
10 candidates or political committees, on April 11, 2011.

11 ***Questions Presented***

12 1. *May Federal officeholders and candidates, and national party officers,*
13 *solicit unlimited contributions from individuals, corporations, and labor organizations on*
14 *behalf of political committees that make only independent expenditures?*

15 2. *If the answer to Question One is no, may Federal officeholders and*
16 *candidates, and national party officers, attend, speak at, and be featured guests at*
17 *fundraisers for such political committees, at which unlimited individual, corporate, and*
18 *labor organization contributions will be solicited, so long as the officeholders,*
19 *candidates, and officers do not themselves solicit such contributions?*

20

¹ The Commission approved the use of a template for this type of letter in Advisory Opinion 2010-09 (Club for Growth).

1 ***Legal Analysis and Conclusions***

2 1. *May Federal officeholders and candidates, and national party officers,*
3 *solicit unlimited contributions from individuals, corporations, and labor organizations on*
4 *behalf of political committees that make only independent expenditures?*

5 No, Federal officeholders, candidates, and national party officers may not solicit
6 unlimited contributions from individuals, corporations, and labor organizations on behalf
7 of independent expenditure-only political committees.

8 The Act governs the conduct of Federal officeholders and candidates when they
9 raise or spend funds in connection with Federal and non-Federal elections, as well as the
10 conduct of national party officers when they raise or solicit funds. Specifically, section
11 441i(e)(1) provides that a Federal candidate or officeholder shall not “solicit, receive,
12 direct, transfer, or spend funds in connection with an election for Federal office,
13 including funds for any Federal election activity, unless the funds are subject to the
14 limitations, prohibitions, and reporting requirements of this Act” 2 U.S.C.
15 441i(e)(1)(A); 11 CFR 300.61.² The Act also provides that national political party
16 committees, including any officer or agent acting on behalf of such a committee, “may
17 not solicit, receive, or direct to another person a contribution, donation, or transfer of
18 funds or any other thing of value, or spend any funds, that are not subject to the
19 limitations, prohibitions, and reporting requirements of this Act.” 2 U.S.C. 441i(a); *see*
20 *also* 11 CFR 300.10(a)(1) and (c).

² Persons subject to section 441i(e) also may not raise or spend funds in connection with any election other than an election for Federal office unless the funds are raised within the Act’s contribution limits and are not from prohibited sources. 2 U.S.C. 441i(e)(1)(B); 11 CFR 300.62.

1 The U.S. Supreme Court held in *Citizens United* that corporations may make
2 unlimited independent expenditures and electioneering communications using corporate
3 treasury funds. *Citizens United v. FEC*, 558 U.S. ___, 130 S. Ct. 876, 913 (2010).
4 Shortly after the *Citizens United* decision, the U.S. Court of Appeals for the District of
5 Columbia Circuit held that the Act's contribution limits are unconstitutional as applied to
6 individual contributions to a political committee that makes only independent
7 expenditures. *SpeechNow.org v. FEC*, 599 F.3d 686, 696 (D.C. Cir. 2010) (en banc).

8 Consistent with the *Citizens United* and *SpeechNow* opinions, corporations and
9 labor organizations³ may make unlimited independent expenditures from their own funds
10 as individuals and political committees may do. The Commission recently concluded,
11 moreover, that corporations, labor organizations, political committees, and individuals
12 may each make unlimited contributions to political committees that make only
13 independent expenditures, and that these independent expenditure-only committees may
14 solicit unlimited contributions from these sources. *See* Advisory Opinion 2010-11
15 (Commonsense Ten). The Committees have registered as independent expenditure-only
16 committees, and therefore they may accept unlimited contributions from individuals,
17 political committees, corporations, and labor organizations.

18 The Committees now ask whether Federal officeholders and candidates, and
19 national party officers, may solicit unlimited individual, corporate, and labor organization

³ Although *Citizens United* did not directly address whether labor organizations also have a First Amendment right to use their general treasury funds for independent expenditures and electioneering communications, the Act and Commission regulations generally treat labor organizations in the same way as corporations. *See* 2 U.S.C. 441b; *see generally* 11 CFR Part 114. Accordingly, the Commission has concluded that labor organizations have the same right as corporations to make unlimited expenditures from their own funds and to pool unlimited funds in an independent expenditure-only political committee. Advisory Opinion 2010-11 (Commonsense Ten) at 3.

1 contributions on the Committees' behalf. The Commission concludes that they may not
2 do so because section 441i prohibits Federal officeholders and candidates, and national
3 party officers, from soliciting funds in connection with a Federal election "unless the
4 funds are *subject to the limitations, prohibitions, and reporting requirements*" of the Act.
5 2 U.S.C. 441i(e)(1)(A) (emphasis added); *see also id.* at 441i(a)(1) (providing that
6 national party officers may not "solicit . . . funds . . . that are not subject to the
7 limitations, prohibitions, and reporting requirements" of the Act).

8 In *SpeechNow*, the U.S. Court of Appeals for the District of Columbia Circuit
9 held that "[t]he contribution limits of 2 U.S.C. § 441a(a)(1)(C) and 441a(a)(3) violate the
10 First Amendment by preventing [individuals] from donating to SpeechNow in excess of
11 the limits." *SpeechNow*, 599 F.3d at 696. Following that decision, the Commission has
12 recognized that sections 441a(a)(1)(C) and 441a(a)(3) no longer apply to prohibit
13 unlimited individual, corporate and labor organization contributions to independent
14 expenditure-only political committees. *See* Advisory Opinion 2010-11 (Commonsense
15 Ten).

16 *SpeechNow* invalidated the limit on contributions to political committees as
17 applied to committees like SpeechNow. It did not strike down the limit on its face or as
18 applied to the activities of Federal officeholders and candidates, and national party
19 officers through section 441i. Therefore, the contribution limit of 2 U.S.C. 441a(a)(1)(C)
20 remains in force, as does the reference to that limit in section 441i. Nor did *SpeechNow*
21 provide any basis to conclude that the solicitation restrictions contained in 441i(a)(1) and
22 441i(e)(1)(A) are unconstitutional. Indeed, the plaintiffs in *SpeechNow* stated that the
23 committee would operate entirely independently of Federal officeholders and candidates,

1 and explicitly stated that they understood the solicitation ban of section 441i to prohibit
2 Federal officeholders and candidates from soliciting contributions on the committee's
3 behalf. Reply Brief of Appellants at 13, *SpeechNow*, 599 F.3d 686 (No. 08-5223).

4 The Supreme Court's opinion in *McConnell v. FEC* also supports this conclusion.
5 In *McConnell*, the Court recognized that section 441i(e)'s restrictions are intended to
6 prevent Federal officeholders and candidates from circumventing the limits on direct
7 contributions. *See McConnell v. FEC*, 540 U.S. 93, 182 (2003).⁴ The Court reasoned
8 that "[l]arge soft-money donations at a candidate's or officeholder's behest give rise to all
9 of the same corruption concerns posed by contributions made directly to the candidate or
10 officeholder." *Id.* Given the "substantial threat of corruption or its appearance posed by
11 donations to or at the behest of federal candidates and officeholders," the Court held,
12 section 441i(e) is "clearly constitutional." *Id.* at 183-84.

13 Nor did *Citizens United* affect the constitutionality of that section. *See Citizens*
14 *United*, 130 S. Ct. at 910-11.⁵ Indeed, a three-judge panel of the U.S. District Court for
15 the District of Columbia recently concluded that *Citizens United* did not "disturb"
16 *McConnell's* conclusion that 441i is constitutional. *See RNC v. FEC*, 698 F. Supp. 2d
17 150, 153 (D.D.C. 2010).

⁴ Neither the Supreme Court nor any other court has subsequently invalidated or even called into question the validity of these statutory restrictions on solicitations.

⁵ The only discussion of section 441i in *Citizens United* came in Justice Stevens' dissenting opinion, which did not betray any suspicion that the majority had impliedly struck down the solicitation restrictions in the Bipartisan Campaign Reform Act of 2002 (BCRA). *Citizens United*, 130 S. Ct. at 940 (Stevens, J., dissenting) ("Political parties are barred under BCRA from soliciting or spending 'soft money,' funds that are not subject to the statute's disclosure requirements or its source and amount limitations. 2 U.S.C. § 441i; *McConnell*, 540 U.S. at 122-126, 124 S. Ct. 619. Going forward, corporations and unions will be free to spend as much general treasury money as they wish on ads that support or attack specific candidates, whereas national parties will not be able to spend a dime of soft money on ads of any kind.").

1 *McConnell* presented a facial challenge to numerous provisions of BCRA,
2 including the provisions at section 441i representing “Congress’ effort to plug the soft-
3 money loophole.” *McConnell*, 540 U.S. at 133. The Court upheld the limitations at 441i,
4 noting that Congress enacted it to “vindicate the Government’s important interest in
5 preventing corruption and the appearance of corruption.” *Id.* at 142. Precisely the same
6 concerns would be raised if Federal officeholders and candidates, and national party
7 officers, were to solicit unlimited contributions on behalf of independent expenditure-
8 only committees. Indeed, the Court’s description of the circumvention that would be
9 possible without Section 441i’s restrictions applies equally to the subject of the request:
10 “Though the candidate may not ultimately control how the funds are spent, the value of
11 the donation to the candidate or officeholder is evident from the fact of the solicitation
12 itself. Without some restriction on solicitations, federal candidates and officeholders
13 could easily avoid FECA’s contribution limits by soliciting funds from large donors and
14 restricted sources to like-minded organizations engaging in federal election activities.”
15 *Id.* at 182-83. The Commission also notes that former Senators Bob Kerrey and Warren
16 Rudman, in comments on the Committees’ request, drew the Commission’s attention to
17 the fact that they had testified in *McConnell* about the corrupting influence exerted by
18 large donations made at the behest of Federal candidates and officeholders. They stated
19 that they “firmly believe the same would be true of unlimited donations made to Super
20 PACs in response to solicitations by federal candidates and officeholders”

21 If the Committees were permitted to do as they ask in the advisory opinion
22 request, Federal officeholders and candidates, and national party officers, would be able
23 to solicit unlimited contributions to the Committees from individuals and political

1 committees who have already made the maximum statutorily permissible contributions
2 directly to these candidates and national party committees, as well as from otherwise
3 prohibited sources such as corporations and labor organizations. The Federal
4 officeholders and candidates, and national party officers, could do so with the expectation
5 that the “like-minded” Committees would use the solicited funds to make independent
6 expenditures advocating the election of the soliciting candidates and other candidates
7 supported by the national party committees. This circumvention of the Act’s contribution
8 limits is precisely what Congress enacted Section 441i to prevent.⁶ In light of “the
9 substantial threat of corruption or its appearance posed by donations to or at the behest of
10 federal candidates and officeholders,” *McConnell*, 540 U.S. at 183-84, and the conclusion
11 that large soft money contributions made at the request of a national committee or its
12 officers gives rise to the threat of corruption or the appearance thereof, *id.* at 154, the
13 Commission concludes that Federal officeholders and candidates, and national party
14 officers, may not solicit unlimited contributions from individuals, corporations, and labor
15 organizations on behalf of independent expenditure-only political committees.

16 2. *If the answer to Question One is no, may Federal officeholders and*
17 *candidates, and national party officers, participate in fundraisers for such political*
18 *committees, at which unlimited individual, corporate, and labor organization*

⁶ One comment on the request suggests that, for purpose for applying section 441i, the Commission should look to the recipient to determine whether solicited funds are FECA compliant. However, recent cases have explained that the key distinction between “hard money” and “soft money” is the source and amount limitations of the Act. *See EMILY’s List v. FEC*, 581 F.3d 1, 27 (D.C. Cir. 2009) (explaining that a “general treasury account that is not subject to source and amount limits” is a soft money account); *see also Carey v. FEC*, No. 11-259 (RMC) (D.D.C. June 14, 2001) (order granting preliminary injunction) at 4 (same). Because Section 441i was enacted as a response to the raising of soft money by candidates, officeholders, and parties, and its restrictions apply to those entities, the Commission cannot limit its inquiry to the question of whether the solicited funds would be FECA compliant from the perspective of the recipient.

1 *contributions will be solicited, so long as the officeholders, candidates, and officers do*
2 *not themselves solicit such contributions?*

3 Yes, Federal officeholders and candidates, and national party officers, may attend,
4 speak at, or be featured guests at fundraisers for the Committees, at which unlimited
5 individual, corporate, and labor organization contributions will be solicited, so long as the
6 covered officials do not solicit such contributions themselves.

7 While the Act prohibits Federal officeholders and candidates from soliciting
8 unlimited or prohibited contributions in connection with Federal and non-Federal
9 elections, not every form of participation at a fundraising event constitutes solicitation.
10 Commission regulations define “to solicit” as “to ask, request, or recommend, explicitly
11 or implicitly, that another person make a contribution, donation, transfer of funds, or
12 otherwise provide anything of value.” 11 CFR 300.2(m). The regulation further defines
13 “a solicitation” as “an oral or written communication that, construed as reasonably
14 understood in the context in which it is made, contains a clear message asking,
15 requesting, or recommending that another person make a contribution, donation, transfer
16 or funds, or otherwise provide anything of value.” *Id.* In addition, “a solicitation does
17 not include mere statements of political support” *Id.*

18 Thus attending, speaking at, or being a featured guest does not, in and of itself,
19 constitute a solicitation, and therefore these activities are not subject to the Act’s
20 restrictions on Federal candidates and officeholders. *See generally Shays v. FEC*, 528
21 F.3d 914, 933-34 (D.C. Cir. 2008); *Final Rules for 11 CFR 300.64: Participation by*
22 *Federal Candidates and Officeholders at Non-Federal Fundraising Events*, 75 FR 24375
23 (May 5, 2010). Therefore, the Commission concludes that Federal officeholders and

1 candidates, and national party officers, may attend, speak at, and be featured guests at the
2 Committees' fundraisers at which unlimited individual, corporate, and labor organization
3 contributions are solicited, so long as the officeholders, candidates, and national party
4 officers do not solicit such contributions themselves.

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 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>.

19

20
21
22
23
24
25

On behalf of the Commission,

Cynthia L. Bauerly
Chair