

AGENDA DOCUMENT NO. 11-37-A



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AGENDA ITEM

MEMORANDUM

TO: The Commission

For Meeting of 6-30-11

FROM: Christopher Hughey *pch*
Acting General Counsel

SUBMITTED LATE

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

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.

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4 Ezra W. Reese, Esq.

DRAFT B

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5 Jonathan S. Berkon, Esq.

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6 Perkins Coie LLP

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7 700 Thirteenth St., NW Suite 600

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8 Washington, DC 20005-3960

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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 officers of national
15 party committees, to solicit unlimited individual, corporate, and labor organization
16 contributions on behalf of the Committees. The Commission concludes that Federal
17 officeholders and candidates, and officers of national party committees, may solicit
18 unlimited contributions from individuals, corporations, and labor organizations on behalf
19 of these two political committees because they make only independent expenditures.

20 ***Background***

21 The facts presented in this advisory opinion are based on your letter received on
22 May 19, 2011, materials submitted in connection with Advisory Opinion 2010-11
23 (Commonsense Ten), and on publicly available reports filed with the Commission.

24 Majority PAC, under its previous name, Commonsense Ten, filed its Statement
25 of Organization on June 11, 2010.¹ On the same day, it filed an Advisory Opinion
26 Request with the Commission regarding its planned activities. In its 2010 request,

¹ On March 9, 2011, Majority PAC filed an amended Statement of Organization indicating a name change from Commonsense Ten to Majority PAC.

1 Majority PAC represented that it planned to pay for independent expenditures but that it
2 would not make any direct or in-kind contributions to Federal candidates, political party
3 committees, or to any other political committee that makes contributions to Federal
4 candidates or party committees. Advisory Opinion Request 2010-11 (Commonsense
5 Ten) at 3. Majority PAC also stated that it would solicit and accept contributions from
6 corporations and labor organizations, as well as from individuals and Federal political
7 committees in excess of \$5,000 a year. *Id.* It would not, however, solicit or accept
8 contributions from foreign nationals, Federal contractors, or national banks or
9 corporations organized by any law of Congress. *Id.* Majority PAC also stated that it
10 would report all contributions aggregating in excess of \$200 a year to the Commission.
11 *Id.*

12 The Commission approved the proposal in Advisory Opinion 2010-11
13 (Commonsense Ten). On July 27, 2010, Majority PAC filed a letter² with the
14 Commission in accordance with Advisory Opinion 2010-11 (Commonsense Ten) stating
15 its intent to make independent expenditures, raise funds in unlimited amounts, and that it
16 would not make any contributions to Federal candidates or political committees, whether
17 direct, in-kind, or by means of coordinated communications.

18 House Majority PAC filed its Statement of Organization on April 11, 2011,
19 accompanied by a letter stating its intent to make independent expenditures, raise funds in
20 unlimited amounts, and that it would not make any contributions to Federal candidates or
21 political committees, whether direct, in-kind, or by means of coordinated
22 communications.

² The Commission approved the use of this same letter in Advisory Opinion 2010-09 (Club for Growth).

1 Both Committees represent that they have solicited and accepted contributions in
2 accordance with Advisory Opinion 2010-11 (Commonsense Ten), and that they report
3 these contributions to the Commission. Both Committees have filed the required
4 disclosure reports, and these reports are available on the Commission's website.

5 ***Questions Presented***

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

9 2. *If the answer to Question One is no, may Federal officeholders and*
10 *candidates, and officers of national party committees, participate in fundraisers for such*
11 *political committees, at which unlimited individual, corporate, and labor organization*
12 *contributions will be solicited, so long as the officeholders, candidates, and officers do*
13 *not themselves solicit such contributions?*

14 ***Legal Analysis and Conclusions***

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

18 Yes, Federal officeholders and candidates, and officers of national party
19 committees, may solicit unlimited contributions from individuals, corporations, and labor
20 organizations on behalf of those two political committees because the Committees make
21 only independent expenditures.

22 Federal officeholders and candidates, their agents, and entities directly or
23 indirectly established, financed, or maintained, or controlled by, or acting on behalf of,

1 Federal officeholders and candidates, may not raise or spend funds in connection with an
2 election for Federal office, “unless the funds are subject to the limitations, prohibitions,
3 and reporting requirements of the Act.” 2 U.S.C. 441i(e)(1)(A); 11 CFR 300.61.³ In
4 addition, national party committees, their officers and agents, and any entity that is directly
5 or indirectly established, financed, maintained, or controlled by a national party committee or
6 a national congressional campaign committee, may not solicit, receive, direct or spend “any
7 funds [] that are not subject to the limitations, prohibitions, and reporting requirements of the
8 Act.” 2 U.S.C. 441i(a)(1); 11 CFR 300.10(a). Funds “subject to the limitations,
9 prohibitions, and reporting requirements of the Act” are known as “Federal funds.” *See*
10 11 CFR 300.2(g) (defining “Federal funds” as those that “comply with the limitations,
11 prohibitions, and reporting requirements of the Act.”).⁴ Therefore, Federal officeholders
12 and candidates soliciting funds in connection with a Federal election and officers of
13 national party committees may only solicit Federal funds. As explained below, the funds
14 that these individuals will solicit on the Committees’ behalf are Federal funds.
15 Accordingly, the Commission determines that the covered entities may solicit those funds
16 on the Committees’ behalf.

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³ 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.

⁴ The Commission has also stated that Federal officeholders and officeholders soliciting funds in connection with a Federal election must not do so “*in excess of* the Act’s amount limitations.” Advisory Opinion 2006-24 (Republican and Democratic Senatorial Committees) (emphasis added).

1 *I. The Act's Amount Limitations*

2 The Act's amount limitations may not be applied constitutionally to Majority
3 PAC and House Majority PAC. *See SpeechNow.org v. FEC*, 599 F.3d 686, 689
4 (D.C. Cir. 2010) (*en banc*) ("*SpeechNow*"); *see also EMILY's List v. FEC*, 581 F.3d 1, 10
5 (D.C. Cir. 2009). The Commission decided in Advisory Opinion 2010-11
6 (Commonsense Ten) that "there is no basis to limit the amount of contributions to
7 [Majority PAC] from individuals, political committees" *See also* Advisory Opinion
8 2010-09 (Club for Growth). Because there is no longer an applicable amount limitation
9 for contributions to these independent expenditure-only committees, Federal
10 officeholders, candidates, and officers of national party committees would not solicit
11 funds contrary to the Act's amount limitations by soliciting unlimited funds for these
12 independent expenditure-only committees.⁵

13 The absence of an applicable amount limitation does not compel a determination
14 that the funds at issue here are not Federal funds. First, such a reading would run
15 contrary to other interpretations of the Act in the Commission's regulations. *See*
16 *generally* 11 CFR 300.36(a) (recognizing that a State, district, or local committee of a
17 political party must use Federal funds when conducting Federal election activity even
18 though the committee may not be a political committee under 11 CFR 100.5 and

⁵ Also, the solicitation of contributions for Majority PAC and House Majority PAC by Federal candidates, officeholders, and officers of national party committees poses no risk of circumvention of candidate or national party committee contribution limits. In Advisory Opinion 2010-09 (Club for Growth), the Commission considered the risk of circumvention of candidate contribution limits posed by an independent expenditure-only committee's solicitation of funds earmarked for specific independent expenditures. The Commission found that "there [was] no possibility of circumvention of any contribution limit" because the committee represented that it would not "make any contributions or transfer any funds to any political committee if the amount of a contribution to the recipient committee is governed by the Act, nor will the committee make any coordinated communications or coordinate any expenditure . . ." *Id.* Similarly, Majority PAC and House Majority PAC have also represented that they will make neither direct nor in-kind contributions.

1 therefore have no statutory reporting requirements with which to comply); 11 CFR
2 300.71 (recognizing that certain communications made by State and local candidates
3 “that [refer] to a clearly identified candidate for Federal office” must be paid for with
4 Federal funds despite the absence of any FEC reporting requirements associated with
5 those funds). Moreover, using the absence of a limitation with which to comply to create
6 a prohibition on the solicitation of those funds violates “the common mandate of statutory
7 construction to avoid absurd results.” *Rowland v. California Men’s Colony*, 506 U.S.
8 194, 200 (1993).

9 2. *The Act’s Source Prohibitions*

10 The Act prohibits contributions from Federal contractors, foreign nationals, and
11 any corporation or labor organization in connection with a Federal election. *See*
12 2 U.S.C. 441b, 441c, and 441e. Before the Supreme Court’s decision in *Citizens United*,
13 130 S.Ct. 876 (2010), section 441b also prohibited corporations and labor organizations
14 from making independent expenditures from their general treasury funds. *See*
15 *Citizens United*, 130 S. Ct. at 913. The Commission has determined, based on *Citizens*
16 *United* and *SpeechNow*, that there “exists no basis to limit . . . contributions . . . from
17 corporations and labor organizations” to Majority PAC. Advisory Opinion 2010-11
18 (Commonsense Ten). Majority PAC and House Majority PAC state that they will
19 continue to comply with the constitutionally applicable source prohibitions and will not
20 “solicit or accept funds from foreign nationals . . . federal contractors . . . or national
21 banks or corporations organized by act of Congress.” Because there is no longer an
22 applicable source prohibition on contributions from corporations and labor organizations
23 to these independent expenditure-only committees, Federal officeholders, candidates, and

1 officers of national party committees would not solicit funds contrary to the Act's source
2 prohibitions by soliciting funds from corporations and labor organizations for these
3 independent expenditure-only committees.

4 *3. The Act's Reporting Requirements*

5 The Act establishes reporting requirements for political committees. *See*
6 2 U.S.C. 432, 433, and 434. The court in *SpeechNow* upheld the constitutionality of
7 reporting requirements as applied to *SpeechNow*. *See SpeechNow*, 599 F.3d at 689;
8 Advisory Opinion 2010-11 (Commonsense Ten). Majority PAC and House Majority
9 PAC do not contest their obligation to file disclosure reports, and the PACs have filed
10 these reports. Therefore, the funds that Federal officeholders, candidates, and officers of
11 national party committees would solicit on behalf of the Committees would comply with
12 the Act's reporting requirements.

13 *2. If the answer to Question One is no, may Federal officeholders and*
14 *candidates, and officers of national party committees, participate in fundraisers for such*
15 *political committees, as which unlimited individual, corporate, and labor organization*
16 *contributions will be solicited, so long as the officeholders, candidates, and officers do*
17 *not themselves solicit such contributions?*

18 This question is moot because the answer to Question One is "yes."

19 This response constitutes an advisory opinion concerning the application of the
20 Act and Commission regulations to the specific transaction or activity set forth in your
21 request. *See* 2 U.S.C. 437f. The Commission emphasizes that, if there is a change in any
22 of the facts or assumptions presented, and such facts or assumptions are material to a
23 conclusion presented in this advisory opinion, then the requestor may not rely on that

1 conclusion as support for its proposed activity. Any person involved in any specific
2 transaction or activity which is indistinguishable in all its material aspects from the
3 transaction or activity with respect to which this advisory opinion is rendered may rely on
4 this advisory opinion. *See* 2 U.S.C. 437f(c)(1)(B). Please note the analysis or
5 conclusions in this advisory opinion may be affected by subsequent developments in the
6 law including, but not limited to, statutes, regulations, advisory opinions, and case law.
7 The cited advisory opinions are available on the Commission's website, www.fec.gov, or
8 directly from the Commission's Advisory Opinion searchable database at
9 <http://www.fec.gov/searchao>.

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On behalf of the Commission,

Cynthia L. Bauerly
Chair