

AGENDA DOCUMENT NO. 11-19

FEDERAL ELECTION COMMISSION
SECRETARIAT



FEDERAL ELECTION COMMISSION
Washington, DC 20463

2011 APR -1 P 12:10

AGENDA ITEM
For the Meeting of 4-7-11

April 1, 2011

SUBMITTED LATE

MEMORANDUM

TO: The Commission

FROM: Christopher Hughey *pch*
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Associate General Counsel

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Subject: Draft AO 2011-04 (AIPAC)

Attached is a proposed draft of the subject advisory opinion. We request that this draft be placed on the agenda for April 7, 2011.

Attachment

1 ADVISORY OPINION 2011-04

2

3 Philip Friedman, Esq.
4 American Israel Public Affairs Committee
5 2401 Pennsylvania Ave, N.W. Suite 410
6 Washington, DC 20037

DRAFT

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8 Dear Mr. Friedman:

9 We are responding to your advisory opinion request on behalf of the American
10 Israel Public Affairs Committee (“AIPAC”), concerning the application of the Federal
11 Election Campaign Act of 1971, as amended (the “Act”), and Commission regulations to
12 AIPAC’s plan to post candidate position papers on a portion of its website accessible
13 only to AIPAC members.

14 The Commission concludes that AIPAC may post candidate position papers on its
15 members-only website.

16 ***Background***

17 The facts presented in this advisory opinion are based on your letter received on
18 February 25, 2011.

19 AIPAC is a non-profit 501(c)(4) corporation dedicated to maintaining and
20 improving the bonds between the United States and Israel. The Commission has
21 previously determined that AIPAC is primarily a lobbying organization and qualifies as a

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1 membership organization under 11 CFR 114.1(e).¹ In addition to its lobbying activities,
2 AIPAC also encourages its members to be involved in campaign activities, such as
3 volunteering for campaigns and making contributions.

4 AIPAC compiles information on candidates and races for Federal office,
5 including the political history of the district or state, information about money raised by
6 the candidates, public polling data, recent news about the race, and a list of announced
7 candidates for the office. Although it does not rate or endorse candidates, AIPAC
8 compiles voting records of incumbents and encourages its members to review those
9 records. Because non-incumbent candidates do not have voting records, AIPAC plans to
10 encourage all Federal candidates to prepare position papers on the United States-Israel
11 relationship, which it intends to post on a portion of its website that is accessible only to
12 AIPAC members.

13 The candidate position papers would be available to all 100,000 AIPAC members
14 on the members-only portion of AIPAC's website. The position papers would be
15 prepared by the candidates or their campaign staff, and would be posted in their entirety
16 without any editing by AIPAC. The position papers would set forth the candidates'
17 views on issues affecting the United States-Israel relationship and would not contain any
18 express advocacy. The four sample position papers submitted by AIPAC with the request
19 conform to this description; they state the candidates' positions on a number of policy

¹ See MUR 2804, Certification of Commission Action dated June 16, 1992 (Commission voting 6-0 to find no probable cause to believe AIPAC violated 2 U.S.C. 433 and 434 by failing to register and report as a "political committee") and MUR 2804R, Certification of Commission Action dated March 21, 2000 (Commission voting 6-0 to find that AIPAC was a membership organization during the time period addressed in MUR 2804); *see also*, MUR 5272, Statement of Reasons Chair Ellen L. Weintraub, Vice-Chairman Bradley A. Smith, Commissioners David M. Mason, Danny L. McDonald, Scott E. Thomas, and Michael E. Toner, dated November 13, 2003 (describing the history of Commission enforcement actions and related litigation involving AIPAC).

1 issues relevant to the United States-Israel relationship and do not contain any information
2 about the candidates' campaigns or their opponents.

3 ***Question Presented***

4 *May AIPAC post candidate position papers written by candidates' campaigns on*
5 *a members-only portion of AIPAC's website?*

6 ***Legal Analysis and Conclusions***

7 Yes, AIPAC may post candidate position papers on a portion of its website
8 accessible only to its members.

9 The Act and Commission regulations prohibit corporations, including
10 incorporated membership organizations like AIPAC, from making contributions in
11 connection with a Federal election. 2 U.S.C. 441b(a); 11 CFR 114.2(b). The Act and
12 Commission regulations, however, exempt from the definition of expenditure and
13 contribution "any communication by a membership organization" to its restricted class.²
14 2 U.S.C. 431(9)(B)(iii) and (8)(B)(vi); 11 CFR 114.1(a)(2)(x). Indeed, Commission
15 regulations expressly permit an incorporated membership organization to communicate
16 with its restricted class on any subject, including communications that contain express
17 advocacy. 11 CFR 114.3(a)(2).

18 AIPAC, as a membership organization, may communicate with its members on
19 any subject. AIPAC plans to provide candidate position papers so that its members may
20 have "unvarnished access to the views of the candidate." Moreover, AIPAC states that it
21 will not post on its members-only website position papers that "contain any express
22 advocacy of a candidate's election or defeat." Rather, the position papers will be limited

² The restricted class of a membership organization includes its members. 11 CFR 114.1(j); *see also* 11 CFR 114.1(e)(2) (defining the term "members").

1 to a discussion of the candidate's position on policy issues concerning the United States-
2 Israel relationship.

3 The Commission therefore concludes that AIPAC may post candidate-prepared
4 position papers on a section of its website accessible only by its members. Because
5 posting the position papers constitutes a permissible membership communication, any
6 costs associated with posting the papers would not be contributions or expenditures.
7 2 U.S.C. 441b(b)(2)(A) and 431(9)(B)(iii); 11 CFR 100.134(a) and 114.1(a)(2)(x).

8 A membership organization must report the "costs incurred" that are "directly
9 attributable" to an express advocacy communication to its membership if those costs
10 exceed \$2,000 for any election, except that communications containing express advocacy
11 but that are "primarily devoted to subjects other than the express advocacy" need not be
12 reported. 2 U.S.C. 431(9)(B)(iii); 11 CFR 114.3(b), 100.134(a), and 104.6(a). Because
13 the member communications at issue here do not contain express advocacy, AIPAC need
14 not report any costs associated with the communications to the Commission.³
15 2 U.S.C. 431(9)(B)(iii); 11 CFR 114.3(b), 100.134(a), and 104.6(a).

16 This response constitutes an advisory opinion concerning the application of the
17 Act and Commission regulations to the specific transaction or activity set forth in your
18 request. *See* 2 U.S.C. 437f. The Commission emphasizes that, if there is a change in any
19 of the facts or assumptions presented, and such facts or assumptions are material to a
20 conclusion presented in this advisory opinion, then the requestor may not rely on that
21 conclusion as support for its proposed activity. Any person involved in any specific
22 transaction or activity which is indistinguishable in all its material aspects from the

³ For the same reasons, 11 CFR 114.3(c) is not applicable to the communications.

1 transaction or activity with respect to which this advisory opinion is rendered may rely on
2 this advisory opinion. *See* 2 U.S.C. 437f(c)(1)(B). Please note the analysis or
3 conclusions in this advisory opinion may be affected by subsequent developments in the
4 law including, but not limited to, statutes, regulations, advisory opinions, and case law.

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On behalf of the Commission,

Cynthia L. Bauerly
Chair