

AGENDA DOCUMENT NO. 12-70



FEDERAL ELECTION COMMISSION
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October 3, 2012

AGENDA ITEM

MEMORANDUM

TO: The Commission

FROM: Anthony Herman *AH by KB*
General Counsel

Kevin Deeley *KB*
Acting Associate General Counsel

Robert M. Knop *RMK*
Assistant General Counsel

Joanna S. Waldstreicher *JSW*
Attorney

Subject: Draft AO 2012-32 (Tea Party Leadership Fund, Bielat, and Raese)

For Meeting of 10-4-12

SUBMITTED LATE

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 October 4, 2012.

Attachment

1 ADVISORY OPINION 2012-32
2
3 Stephen M. Hoersting, Esq.
4 Dan Backer, Esq.
5 DB Capitol Strategies, PLLC
6 209 Pennsylvania Avenue, SE, Suite 2109
7 Washington, DC 20003
8

DRAFT

9 Dear Messrs. Hoersting and Backer:
10

11 We are responding to your advisory opinion request on behalf of the Tea Party
12 Leadership Fund (“TPLF”), Sean Bielat, and John Raese, concerning the application of the
13 Federal Election Campaign Act (the “Act”) and Commission regulations to contributions by an
14 aspiring multicandidate political committee to Federal candidates. The requestors ask whether
15 the Act’s definition of a “multicandidate political committee” prevents TPLF from making
16 contributions at this time in excess of \$2,500 per election to Mr. Bielat and Mr. Raese, who are
17 candidates for Federal office, and whether Mr. Bielat and Mr. Raese are currently prohibited
18 from accepting such contributions. The Commission concludes that, at this time, the Act
19 prohibits TPLF from making contributions over \$2,500 per election to Mr. Bielat and Mr. Raese,
20 and that it currently prohibits Mr. Bielat and Mr. Raese from accepting such contributions.

21 ***Background***

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

24 TPLF is a nonconnected political committee. It registered as a political committee on
25 May 9, 2012. TPLF represents that it has made contributions to seven candidates and has
26 received contributions from at least 4,500 persons to its contribution account and from more than

1 70 persons to its non-contribution account.¹ Mr. Bielat is a candidate for the U.S. House of
2 Representatives for Massachusetts's Fourth Congressional District. Mr. Raese is a candidate for
3 the U.S. Senate for West Virginia. TPLF states that it has made contributions of \$2,500 each to
4 Mr. Bielat and Mr. Raese, as well as to five other candidates. TPLF wishes to contribute an
5 additional \$2,500 each to Mr. Bielat and Mr. Raese, as well as to other candidates. Mr. Bielat
6 and Mr. Raese wish to accept an additional \$2,500 each.

7 ***Questions Presented***

8 1. *May the Tea Party Leadership Fund make contributions to candidates of up to*
9 *\$5,000 per election before the six-month waiting period of 2 U.S.C. 441a(a)(4) has run?*

10 2. *May Messrs. Raese and Bielat accept contributions above \$2,500, but not*
11 *exceeding \$5,000, per election from Tea Party Leadership Fund before the six-month waiting*
12 *period has run?*

13 ***Legal Analysis and Conclusion***

14 No, TPLF may not make contributions to candidates in excess of \$2,500 per election until
15 it has qualified as a multicandidate committee, nor may candidates accept such contributions.²

16 The Act provides that “no person shall make contributions to any candidate and his
17 authorized political committees with respect to any election for Federal office which, in the

¹ See *Carey v. FEC*, 791 F. Supp. 2d 121, 131 (D.D.C. 2011) (noting that a nonconnected political committee that makes direct contributions to candidates may receive unlimited funds into a separate bank account for the purpose of financing independent expenditures); see also 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/press20111006postcarey.shtml>.

² Because the requestors' two questions are analyzed under the same provisions of the Act and Commission regulations, the Commission addresses both questions together.

1 aggregate, exceed \$2,[500]³.” 2 U.S.C. 441a(a)(1)(A); *see also* 11 CFR 110.1(b). The Act also
2 provides that “no multicandidate political committee shall make contributions to any candidate
3 and his authorized political committees with respect to any election for Federal office which, in
4 the aggregate, exceed \$5,000.” 2 U.S.C. 441a(a)(2)(A); *see also* 11 CFR 110.2(b). And the Act
5 also provides that no candidate or political committee shall knowingly accept any contribution
6 that is in violation of the applicable contribution limits. 2 U.S.C. 441a(f); *see also* 11 CFR
7 110.9. The Act defines a “multicandidate political committee” for purposes of the contribution
8 limits of section 441a(a)(2) as “a political committee which has been registered under section
9 433 of this title for a period of *not less than 6 months*, which has received contributions from
10 more than 50 persons, and, except for any State political party organization, has made
11 contributions to 5 or more candidates for Federal office.” 2 U.S.C. 441a(a)(4) (emphasis added);
12 *see also* 11 CFR 100.5(e)(3) (defining “multicandidate committee”).

13 TPLF has not yet qualified as a multicandidate committee. Although it has received
14 contributions from more than 50 persons and made contributions to more than five candidates, it
15 only registered with the Commission on May 9, 2012, and therefore has not been a registered
16 political committee for a period of six months. As a result, TPLF is subject to the contribution
17 limits of section 441a(a)(1)(A), and may not make contributions to any candidate with respect to
18 any election which, in the aggregate, exceed \$2,500. Moreover, candidates such as Mr. Bielat
19 and Mr. Raese may not knowingly accept contributions from TPLF that are in excess of \$2,500

³ The limit on contributions to candidates by persons other than multicandidate political committees is indexed for inflation. 2 U.S.C. 441a(c); *see also* 11 CFR 110.1(b)(1)(i)-(iii). The limit for the 2011-2012 election cycle is \$2,500. *See* Price Index Adjustments for Contribution and Expenditure Limits and Lobbyist Bundling Disclosure Threshold, 76 FR 8368 (Feb. 14, 2011).

1 per election.⁴ Despite the plain language of the Act and Commission regulations, the requestors
2 ask the Commission to determine that TPLF may make, and Mr. Bielat and Mr. Raese may
3 accept, contributions in excess of the express limits of section 441a(a)(1)(A) because they
4 contend the congressionally prescribed definition of a multicandidate committee is
5 unconstitutional. The Commission, however, lacks the power to make such a determination. *See*
6 *Johnson v. Robison*, 415 U.S. 361, 368 (1974) (adjudication of constitutionality is generally
7 outside an administrative agency’s authority); *Robertson v. FEC*, 45 F.3d 486, 489 (D.C. Cir.
8 1995) (noting in the context of the Commission’s administrative enforcement process that “[i]t
9 was hardly open to the Commission, an administrative agency, to entertain a claim that the
10 statute which created it was in some respect unconstitutional”). Because no court has invalidated
11 the limitation in section 441a(a)(1)(A) or the definition of “multicandidate committee” in section
12 441a(a)(4) on constitutional grounds, we are required to give these provisions full force.

13 The requestors contend that Congress’s later enactment of other anti-circumvention
14 provisions renders the six-month qualification period unconstitutional, but no court has struck
15 down the qualification requirements of the Act. The Supreme Court has ruled that this limitation
16 does not offend the Constitution. In *Buckley v. Valeo*, 424 U.S. 1, 35-36 (1976), the Court
17 upheld the then-existing higher limit on contributions to candidates of \$5,000 for political
18 committees that had registered with the Commission for at least six months. The Court found
19 the qualification requirements did not “unconstitutionally discriminate against *ad hoc*
20 organizations,” and that “the registration, contribution, and candidate conditions serve the
21 permissible purpose of preventing individuals from evading the applicable contribution

⁴ Assuming nothing changes otherwise, once TPLF has been registered as a political committee for six months, it will qualify as a multicandidate political committee and it will be able to make contributions to candidates up to the limits applicable to multicandidate political committees.

1 limitations by labeling themselves committees.” *Id.* Accordingly, TPLF may not make
2 contributions to any candidate with respect to any election that exceed \$2,500, and Mr. Bielat
3 and Mr. Raese may not knowingly accept contributions from TPLF that exceed \$2,500 per
4 election.

5 This response constitutes an advisory opinion concerning the application of the Act and
6 Commission regulations to the specific transaction or activity set forth in your request. *See*
7 2 U.S.C. 437f. The Commission emphasizes that, if there is a change in any of the facts or
8 assumptions presented, and such facts or assumptions are material to a conclusion presented in
9 this advisory opinion, then the requestor may not rely on that conclusion as support for its
10 proposed activity. Any person involved in any specific transaction or activity which is
11 indistinguishable in all its material aspects from the transaction or activity with respect to which
12 this advisory opinion is rendered may rely on this advisory opinion. *See* 2 U.S.C. 437f(c)(1)(B).
13 Please note that the analysis or conclusions in this advisory opinion may be affected by
14 subsequent developments in the law, including, but not limited to, statutes, regulations, advisory
15 opinions, and case law.

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On behalf of the Commission,

Caroline C. Hunter
Chair