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FEDERAL ELECTION COMMISSION  
Washington, DC 20463

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November 13, 2012

MEMORANDUM

**AGENDA ITEM**

TO: The Commission

FROM: Anthony Herman *AH*  
General Counsel

Kevin Deeley *KD*  
Acting Associate General Counsel

Amy Rothstein *AR by KD*  
Assistant General Counsel

Neven Stipanovic *NS by KD*  
Attorney

**For Meeting of 11-15-12**

**SUBMITTED LATE**

Subject: AO 2012-34 (Freedom PAC and Friends of Mike H) (Draft B)

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 November 15, 2012.

Attachment

1 ADVISORY OPINION 2012-34

2

3 Laurence A. Levy, Esq.  
4 Bracewell & Giuliani LLP  
5 1251 Avenue of the Americas  
6 49<sup>th</sup> Floor  
7 New York, NY 10020-1104  
8

**DRAFT B**

9 Dear Mr. Levy:

10 We are responding to your advisory opinion request on behalf of Freedom PAC  
11 and Friends of Mike H concerning the application of the Federal Election Campaign Act  
12 (the “Act”) and Commission regulations to a proposed contribution by Friends of Mike  
13 H, the principal campaign committee of former Federal candidate Mike Haridopolos, to  
14 Freedom PAC, an independent expenditure-only committee.

15 The Commission concludes that Freedom PAC may not accept contributions of  
16 \$10,000 or more in excess funds from Friends of Mike H. Freedom PAC may, however,  
17 accept contributions of up to \$5,000 per calendar year from Friends of Mike H.

18 ***Background***

19 The facts presented in this advisory opinion are based on your letter received on  
20 September 24, email received on October 2, 2012, and publicly available information on  
21 the Commission’s website.

22 Freedom PAC is a nonconnected political committee that makes only independent  
23 expenditures. It does not make contributions to Federal candidates or political  
24 committees. Freedom PAC makes decisions about the raising and spending of its funds  
25 “without the donor providing advice [or] guidance, or having any operational control.”

26 Friends of Mike H is the principal campaign committee of Mike Haridopolos.  
27 Mike Haridopolos was a candidate in Florida’s 2012 Senate primary election but

1 withdrew his candidacy before the primary election, which was held on August 14, 2012.  
2 He was not a candidate in the 2012 general election and does not hold any Federal office.

3 Friends of Mike H reported having more than \$1 million cash on hand as of June  
4 30, 2012 and would like to contribute some of those funds to Freedom PAC.<sup>1</sup> Friends of  
5 Mike H will contribute only funds received for Mr. Haridopolos's primary election  
6 campaign. The requestors represent that Friends of Mike H will not direct, control, or in  
7 any way be involved in the specific content, timing or target audience of Freedom PAC's  
8 communications.

9 ***Question Presented***

- 10 1. *May Freedom PAC accept contributions of \$10,000 or more in excess funds from*  
11 *Friends of Mike H, after the candidate has withdrawn from the election and is no*  
12 *longer seeking Federal office?*  
13  
14 2. *If the answer to Question 1 is no, may Freedom PAC accept a contribution of up*  
15 *to \$5,000 from the aforementioned committee?*  
16

17 ***Legal Analysis and Conclusions***

18  
19 *Question 1: May Freedom PAC accept contributions of \$10,000 or more in excess funds*  
20 *from Friends of Mike H, after the candidate has withdrawn from the election and is no*  
21 *longer seeking Federal office?*  
22

23 No, Freedom PAC may not accept contributions of \$10,000 or more in excess  
24 funds from Friends of Mike H, because Friends of Mike H may not make contributions in  
25 excess of \$5,000 per calendar year to Freedom PAC.

26 Contributions to a political committee are generally subject to amount limitations  
27 and source prohibitions. 2 U.S.C. 441a(a)(1)(C); 11 CFR 110.1(d). Contributions to  
28 political committees other than candidates' authorized committees and Federal and State

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<sup>1</sup> See Report of Receipts and Disbursements by Friends of Mike H, July 9, 2012,  
<http://images.nictusa.com/pdf/424/12020490424/12020490424.pdf>.

1 committees of political parties are limited under the Act to \$5,000 per year. 2 U.S.C.  
2 441a(a)(1). Prohibited sources include foreign nationals, government contractors,  
3 national banks and corporations organized by authority of any law of Congress. 2 U.S.C.  
4 441b, 441c, 441e.

5 A. Permissible Use

6 The Act and Commission regulations identify six categories of permissible uses  
7 of contributions accepted by a Federal candidate, including “for any other lawful  
8 purpose” that does not constitute “personal use” under 2 U.S.C. 439a(b). 2 U.S.C.  
9 439a(a)(6); *see also* 11 CFR 113.2(e). A principal campaign committee’s use of its  
10 campaign funds to make contributions to other political committees is a lawful purpose  
11 under the Act and Commission regulations. *See* 2 U.S.C. 441a(a)(1)(C); 11 CFR  
12 110.1(d); *see also, e.g.*, Advisory Opinion 1988-41 (Stratton) (permitting transfer of  
13 campaign funds from a principal campaign committee to other political committees).  
14 Such contributions therefore are permitted unless the funds will be converted to the  
15 “personal use” of any person. 2 U.S.C. 439a(b)(1); 11 CFR 113.2(e). Conversion to  
16 personal use occurs when funds in a campaign account of a present or former candidate  
17 are used “to fulfill a commitment, obligation or expense of any person that would exist  
18 irrespective of the candidate’s campaign or duties as a Federal officeholder.” 11 CFR  
19 113.1(g); *see also* 2 U.S.C. 439a(b)(2).

20 Friends of Mike H plans to use campaign funds for a lawful purpose – that is, to  
21 make a contribution to Freedom PAC, a registered independent expenditure-only  
22 committee. Based on the facts as presented in the request, there is no indication that the  
23 proposed contribution would result in the conversion of campaign funds to personal use.

1           Accordingly, based on the facts presented by the request, Friends of Mike H may  
2 use funds accepted for Mr. Haridopolos’s primary election campaign to make a  
3 contribution to Freedom PAC, provided requestors adhere to the contribution limits and  
4 restrictions in the Act, as set forth below.

5           B.       Applicable Contribution Limits

6           Although Friends of Mike H may contribute to Freedom PAC, in doing so it must  
7 adhere to the contribution limits in the Act. Friends of Mike H is the authorized  
8 committee of a Federal candidate. As such, it is subject to the provisions of the Act that  
9 apply to activities of Federal candidates, their agents, and entities directly or indirectly  
10 established, financed, maintained, or controlled by them, or acting on their behalf. The  
11 Act prohibits such persons from soliciting, receiving, directing, transferring, or spending  
12 funds in connection with an election for Federal office, “unless the funds are subject to  
13 the limitations, prohibitions, and reporting requirements” of the Act. 2 U.S.C.  
14 441i(e)(1)(A);<sup>2</sup> 11 CFR 300.61. Thus, here, Friends of Mike H may not make  
15 contributions in excess of \$5,000 per calendar year to Freedom PAC. 2 U.S.C.  
16 441a(a)(1).

17           The statutory contribution limit continues to apply notwithstanding that Freedom  
18 PAC, as a registered independent expenditure-only committee, may generally accept  
19 unlimited contributions from individuals, political committees, corporations, and labor  
20 organizations.

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<sup>2</sup> Congress passed the prohibitions at 2 U.S.C. 441i(e) as part of the Bipartisan Campaign Reform Act of 2002 (“BCRA”).

1           Shortly after the Supreme Court’s decision in *Citizens United v. FEC*, 558 U.S.  
2   310, 130 S. Ct. 876, 913 (2010), the U.S. Court of Appeals for the District of Columbia  
3   Circuit held the Act’s contribution limits to be unconstitutional as applied to individuals’  
4   contributions to political committees that make only independent expenditures.  
5   *SpeechNow.org v. FEC*, 599 F.3d 686, 696 (D.C. Cir. 2010) (*en banc*); *see also EMILY’s*  
6   *List v. FEC*, 581 F.3d 1, 11 (D.C. Cir. 2009) (holding that political committees and other  
7   non-profit groups may finance certain independent political activity with funds outside  
8   the amount limitations and certain source prohibitions of the Act because “those  
9   expenditures are not considered corrupting”). The Commission subsequently concluded  
10   that corporations, labor organizations, political committees, and individuals may each  
11   make unlimited contributions to independent expenditure-only committees, and that these  
12   committees may solicit unlimited contributions from these sources. Advisory Opinion  
13   2010-11 (Commonsense Ten).

14           *SpeechNow*, however, involved an entity that was “wholly independent” from any  
15   candidate or authorized committee, *see SpeechNow.org v. FEC*, No. 08-0248 (JR), 2009  
16   WL 3101036, at \*3 (D.D.C. Sept. 28, 2008), and neither that case nor *EMILY’s List*  
17   addressed the circumstances under which a candidate’s authorized committee may  
18   contribute to an independent expenditure-only committee with funds the candidate or his  
19   agents raised. Section 441i(e) places explicit limits and restrictions on such spending.  
20   The Commission confronted an analogous circumstance in Advisory Opinion 2011-12  
21   (Majority PAC and House Majority PAC), where it determined that Federal officeholders  
22   and candidates could only solicit funds on behalf of independent expenditure-only  
23   political committees subject to the limitations and prohibitions of the Act. Just as the

1 Federal officeholders and candidates in Advisory Opinion 2011-12 (Majority PAC and  
2 House Majority PAC) could not *solicit* more than \$5,000 for an independent expenditure-  
3 only committee pursuant to section 441i(e), the authorized committee of a Federal  
4 candidate may not *direct, transfer, or spend* more than \$5,000 for an independent  
5 expenditure-only committee. *See* Advisory Opinion 2004-25 (Corzine) (2 U.S.C.  
6 441i(e) “addresses not just the solicitation and receipt of funds by a Federal candidate or  
7 officeholder, but also his or her ability to use funds that have been either solicited for, or  
8 received by, a committee or entity that is directly or indirectly established, financed,  
9 maintained, or controlled by, or acting on behalf of, the candidate or officeholder.”).

10 Section 441i(e) and the Act’s contribution limits and source prohibitions were  
11 upheld by the Supreme Court in *McConnell v. FEC*, 540 U.S. 93, 181-184 (2003), and  
12 were not disturbed by either *Citizens United* or *SpeechNow*. *See, e.g., RNC v. FEC*, 698  
13 F. Supp. 2d 150, 156-60 (D.D.C. 2010) (three judge court), *aff’d*, 130 S. Ct. 3544 (2010);  
14 *see also* Advisory Opinion 2011-12 (Majority PAC and House Majority PAC). The  
15 Commission must continue to enforce these provisions until instructed otherwise by a  
16 court. *See Johnson v. Robison*, 415 U.S. 361, 368 (1974) (adjudication of  
17 constitutionality is generally outside an administrative agency’s authority); *Robertson v.*  
18 *FEC*, 45 F.3d 486, 489 (D.C. Cir. 1995) (noting in the context of the Commission’s  
19 administrative enforcement process that “[i]t was hardly open to the Commission, an  
20 administrative agency, to entertain a claim that the statute which created it was in some  
21 respect unconstitutional”).<sup>3</sup>

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<sup>3</sup> Also at issue is the limit on contributions to political committees other than candidates’ authorized committees to \$5,000 per year. 2 U.S.C. 441a(a)(1). Requestors seek to have the Commission declare section 441a(a)(1) unconstitutional as applied to contributions from former candidates’ authorized

1           Because Friends of Mike H may not contribute more than \$5,000 per calendar  
2 year to Freedom PAC, Freedom PAC may not accept contributions of \$10,000 or more  
3 from Friends of Mike H.

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5           *Question 2: If the answer to Question 1 is no, may Freedom PAC accept a contribution of*  
6 *up to \$5,000 from Friends of Mike H?*

7  
8           Yes, Freedom PAC may accept a contribution of up to \$5,000 from Friends of  
9 Mike H, for the reasons given in the answer to Question 1, above.

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

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

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On behalf of the Commission,

Caroline C. Hunter  
Chair