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For meeting of Sept. 20, 2017
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Sept. 19, 2017

MEMORANDUM

TO: The Commission

FROM: Lisa Stevenson *LJS by EDG*
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Assistant General Counsel

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Subject: Draft AO 2017-10 (Citizens Against Plutocracy) Draft B

Attached is a proposed draft of the subject advisory opinion.

Members of the public may submit written comments on the draft advisory opinion. We are making this draft available for comment until 9:00 am (Eastern Time) on Sept. 20, 2017.

Members of the public may also attend the Commission meeting at which the draft will be considered. The advisory opinion requestor may appear before the Commission at this meeting to answer questions.

For more information about how to submit comments or attend the Commission meeting, go to <https://www.fec.gov/legal-resources/advisory-opinions-process/>.

Attachment

1 ADVISORY OPINION 2017-10

2

3 Victor S. Tiffany
4 Citizens Against Plutocracy
5 1540 Danby Road
6 Ithaca, NY 14850

DRAFT B

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8 Dear Mr. Tiffany:

9 We are responding to your advisory opinion request on behalf of Citizens Against
10 Plutocracy concerning the application of the Federal Election Campaign Act, 52 U.S.C.
11 §§ 30101-45 (the “Act”), and Commission regulations to your proposal to ask candidates for
12 federal office to sign a “Contract for American Renewal.” The Commission concludes that the
13 proposed activities would not result in coordinated communications.

14 ***Background***

15 The facts presented in this advisory opinion are based on your letter received on August
16 2, 2017 (“Advisory Opinion Request”), and your email dated August 23, 2017 (“AOR Supp.”).

17 Citizens Against Plutocracy (the “Committee”) is an independent expenditure-only
18 political committee registered with the Commission. Advisory Opinion Request at AOR001.
19 The Committee has developed a document it calls a Contract for American Renewal (the
20 “Contract”), which it plans to make available for candidates to sign. The Contract includes a list
21 of specific issues on which candidates would commit to take legislative action if elected.
22 AOR003. The specific issues in each Contract are negotiable; the Committee will encourage
23 candidates to remove policy positions or add issues of particular relevance to the candidates and
24 their constituents. AOR002. The Committee proposes to include signed Contracts in emails to
25 potential or current supporters or to place them on the Committee’s website and to encourage
26 voters via email and social media to pledge support to the candidates that signed them.
27 AOR001-02. In asking a candidate to sign a Contract, the Committee will explain that it is

1 “building a movement of voters who will only vote for candidates who have signed a
2 [Contract].” AOR002. The Committee will not discuss with a candidate whether or how it will
3 spend money or whether it will set up additional political committees. *Id.* The Committee may
4 run advertisements in support of or in opposition to a candidate, but it has no current plans to
5 communicate with any candidate, at any time, about any advertisements that it may run, or other
6 public communications that it may make. AOR Supp. Moreover, upon signing a contract with a
7 candidate, the Committee will cease all communication with that candidate and the candidate’s
8 campaign. AOR002.

9 ***Question Presented***¹

10 *Would Citizens Against Plutocracy’s proposal to ask candidates to sign a Contract*
11 *constitute a coordinated communication?*

12 ***Legal Analysis and Conclusion***

13 No, the Committee’s proposal to ask candidates to sign a Contract would not constitute a
14 coordinated communication.

15 Under the Act, expenditures that are coordinated with a candidate are treated as
16 contributions to that candidate. 52 U.S.C. § 30116(a)(7)(B). More specifically, Commission
17 regulations provide that a payment for a communication coordinated with a candidate, a
18 candidate’s authorized committee, or an agent of either, is an in-kind contribution to the
19 candidate. 11 C.F.R. § 109.21(a), (b)(1). An independent expenditure-only political committee

The Committee also asks about the permissibility of the activities of “movement activists,” who would “follow[] in [the Committee’s] footsteps.” AOR002. The Committee would recruit, train, advise, and serve as a role model for the activists. To the extent that the activists’ activities are indistinguishable in all material aspects from the activity with respect to which this advisory opinion is rendered, they may rely on the Commission’s conclusions in this advisory opinion. *See* 52 U.S.C. § 30108(c)(1)(B).

1 may not make contributions to candidates, “including in-kind contributions such as coordinated
2 communications.”²

3 To determine whether a communication is a “coordinated communication,” Commission
4 regulations provide a three-prong test. 11 C.F.R. § 109.21(a). The three prongs relate to (1) the
5 person paying for the communication, (2) the content of the communication, and (3) the conduct
6 resulting in the communication. *Id.* § 109.21(a), (c), (d). Under the regulations, a
7 communication must satisfy all three prongs to be deemed a “coordinated communication.”

8 The Committee’s proposed interaction with candidates would not result in coordinated
9 communications because it would not meet the “conduct prong” of the coordinated
10 communication test. To meet the conduct prong, a communication must satisfy one of several
11 conduct standards in Commission regulations. *Id.* § 109.21(a)(3), (d). These conduct standards
12 include, for example, the creation, production, or distribution of a communication at the request
13 or suggestion of a candidate, or to which a candidate assents, or after substantial discussion about
14 the communication between the person paying for the communication and the candidate clearly
15 identified in it. *Id.* § 109.21(d)(1), (3).

16 But the Commission has made clear that the coordinated communication rules “are not
17 intended to restrict communications or discussions regarding pending legislation or other issues
18 of public policy.” Coordinated and Independent Expenditures, 68 Fed. Reg. 421, 441 (Jan. 3,
19 2003). Thus, the regulations provide a “safe harbor” for candidates’ responses to questions about
20 their positions on legislation or policy. 11 C.F.R. § 109.21(f). Specifically, “[a] candidate’s . . .

² Advisory Opinion 2016-21 (Great America PAC) at 3-4 (citing Press Release, FEC Statement on *Carey v. FEC* Reporting Guidance for Political Committees that Maintain a Non-Contribution Account (Oct. 5, 2011), <https://www.fec.gov/updates/fec-statement-on-carey-fec>, concerning hybrid committees maintaining independent expenditure-only accounts); *see also* Advisory Opinion 2010-11 (Commonsense Ten) at 3 (stating that independent expenditure-only committee may receive unlimited funds and funds from corporations and labor organizations).

1 response to an inquiry about that candidate's . . . positions on legislative or policy issues, but not
2 including a discussion of campaign plans, projects, activities or needs, *does not satisfy any of the*
3 *conduct standards.*" *Id.* § 109.21(f) (emphasis added).

4 Here, the Committee proposes to limit its discussions with candidates to legislative and
5 policy issues. The Committee will (1) ask candidates to sign a Contract listing specific issues on
6 which they would commit to take legislative action if elected, AOR003; (2) encourage
7 candidates to customize the Contract by removing policy positions or adding issues of particular
8 relevance to them and their constituents, AOR002; and (3) cease all communications with a
9 candidate who signs a Contract and the candidate's campaign, *id.* Significantly, the Committee
10 does not propose to discuss with any candidate whether or how the Committee will spend
11 money, *id.*, or communicate with any candidate, at any time, about any advertisements that it
12 may run or about any other public communications that it may make, AOR Supp.

13 The Commission concludes that the discussions would qualify for the safe harbor under
14 these facts, and thus would not meet the conduct prong in 11 C.F.R. § 109.21(d). Accordingly,
15 the Committee's proposed activities would not result in coordinated communications under the
16 Act or Commission regulations.

17 The Committee's plan to tell candidates that it is building a movement of voters who will
18 vote only for candidates who have signed a Contract does not change this result. *See* AOR002.
19 But if a candidate or campaign representative conveys information to the Committee about the
20 candidate's "campaign plans, projects, activities, or needs that is material to the [Committee's]
21 creation, production, or distribution of a subsequent communication," then the safe harbor would
22 not be available. *Coordinated and Independent Expenditures*, 68 Fed. Reg. at 440. Even if the
23 conduct prong is met, however, the Committee's proposed posting of signed Contracts on its

1 website and emails and social media postings to supporters would not be coordinated
2 communications, because they would not meet the *content* prong of the coordinated
3 communication test. To satisfy the content prong, a communication must be a “public
4 communication.” 11 C.F.R. 109.21(c). The term “public communication” does not include
5 internet communications other than those placed for a fee on another person’s website. *Id.*
6 § 109.26; *see also* Internet Communications, 71 Fed. Reg. 18589, 18596 (Apr. 12, 2006) (“[A]n
7 Internet communication can qualify as a ‘public communication’ only if it is a form of
8 advertising and . . . [b]y definition, the word ‘advertising’ connotes a communication for which a
9 payment is required”). Accordingly, the Committee’s proposed use of the Contracts and emails
10 and social media postings to supporters would not be coordinated communications, even if its
11 discussions with candidates venture well beyond legislative and policy issues.

12 This response constitutes an advisory opinion concerning the application of the Act and
13 Commission regulations to the specific transaction or activity set forth in your request.
14 *See* 52 U.S.C. § 30108. The Commission emphasizes that, if there is a change in any of the facts
15 or assumptions presented, and such facts or assumptions are material to a conclusion presented in
16 this advisory opinion, then the requestor may not rely on that conclusion as support for its
17 proposed activity. Any person involved in any specific transaction or activity which is
18 indistinguishable in all its material aspects from the transaction or activity with respect to which
19 this advisory opinion is rendered may rely on this advisory opinion. *See* 52 U.S.C.
20 § 30108(c)(1)(B). Please note that the analysis or conclusions in this advisory opinion may be
21 affected by subsequent developments in the law including, but not limited to, statutes,
22 regulations, advisory opinions, and case law. Any advisory opinions cited herein are available
23 on the Commission’s website.

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On behalf of the Commission,

Steven T. Walther,
Chairman.