

August 26, 2009

AO DRAFT COMMENT PROCEDURES

The Commission permits the submission of written public comments on draft advisory opinions when on the agenda for a Commission meeting.

ALTERNATIVE DRAFT C of ADVISORY OPINION 2009-19 is available for public comments under this procedure. The advisory opinion was requested by David Keating, Executive Director, on behalf of Club for Growth and Club for Growth PAC.

The Alternative Draft C of Advisory Opinion 2009-19 is scheduled to be on the Commission's agenda for its public meeting of Thursday, August 27, 2009.

Please note the following requirements for submitting comments:

1) Comments must be submitted in writing to the Commission Secretary with a duplicate copy to the Office of General Counsel. Comments in legible and complete form may be submitted by fax machine to the Secretary at (202) 208-3333 and to OGC at (202) 219-3923.

2) The deadline for the submission of comments is 9:00am (Eastern Time) on August 27, 2009.

3) No comments will be accepted or considered if received after the deadline. Late comments will be rejected and returned to the commenter. Requests to extend the comment period are discouraged and unwelcome. An extension request will be considered only if received before the comment deadline and then only on a case-by-case basis in special circumstances.

4) All timely received comments will be distributed to the Commission and the Office of General Counsel. They will also be made available to the public at the Commission's Public Records Office.

CONTACTS

Press inquiries: Judith Ingram (202) 694-1220

Commission Secretary: Mary Dove (202) 694-1040

Other inquiries:

To obtain copies of documents related to AO 2009-19, contact the Public Records Office at (202) 694-1120 or (800) 424-9530 or visit the Commission's website at www.fec.gov.

For questions about comment submission procedures, contact Rosemary C. Smith, Associate General Counsel, at (202) 694-1650.

MAILING ADDRESSES

Commission Secretary
Federal Election Commission
999 E Street, NW
Washington, DC 20463

Rosemary C. Smith
Associate General Counsel
Office of General Counsel
Federal Election Commission
999 E Street, NW
Washington, DC 20463



FEDERAL ELECTION COMMISSION
Washington, DC 20463

2009 AUG 26 P 3:10

AGENDA ITEM
For Meeting of: 8-27-09

August 26, 2009

SUBMITTED LATE

MEMORANDUM

TO: The Commission

FROM: Thomasenia P. Duncan *JPD*
General Counsel

Rosemary C. Smith *RCS*
Associate General Counsel

Amy L. Rothstein *AR*
Assistant General Counsel

Esther Heiden *EDH*
Attorney

Subject: AO 2009-19 (Club for Growth) – Alternative Draft C

We have been asked to circulate the attached alternative draft of the subject advisory opinion. Draft C reaches the same conclusion as Draft A. Please place this draft on the agenda for August 27, 2009.

Attachment

2009 AUG 26 P 3: 10

1 ADVISORY OPINION 2009-19

2
3 Mr. David Keating
4 Executive Director
5 Club for Growth
6 2001 L Street, NW
7 Suite 600
8 Washington, DC 20036

DRAFT C

9
10 Dear Mr. Keating:

11 We are responding to your advisory opinion request on behalf of Club for Growth
12 and Club for Growth PAC, concerning the application of the Federal Election Campaign
13 Act of 1971, as amended (the "Act"), and Commission regulations to the use of
14 contributor information contained in reports filed with the Commission.

15 The Commission concludes that Club for Growth and Club for Growth PAC may
16 use contributor information contained in reports filed with the Commission to notify
17 contributors to Senator Arlen Specter's 2010 Senate re-election campaign that Senator
18 Specter has switched his party affiliation, and has publicly offered to refund contributions
19 upon request.

20 ***Background***

21 The facts presented in this advisory opinion are based on your letter received on
22 June 25, 2009, your comment received on August 20, 2009, and conversations with
23 Commission attorneys.

24 Club for Growth ("Club") is an incorporated nonprofit membership organization
25 exempt from taxation under section 501(c)(4) of the Internal Revenue Code. Club for
26 Growth PAC ("Club PAC") is the separate segregated fund of the Club and is a
27 multicandidate committee under Commission regulations.

1 Senator Arlen Specter represents the Commonwealth of Pennsylvania. Citizens
2 for Arlen Specter (“Specter Committee”) is his authorized campaign committee. On
3 April 28, 2009, Senator Specter announced that he had decided to switch his party
4 affiliation and to run as a Democrat for the 2010 Senate election. *See* Press Release,
5 Citizens for Arlen Specter, Statement by Arlen Specter (April 28, 2009) (attached to
6 advisory opinion request). In his press release, Senator Specter stated that he would
7 return campaign contributions made during the 2010 election cycle upon request.

8 The Club and Club PAC wish to communicate with individual contributors to the
9 Specter Committee to inform them of Senator Specter’s decision to run as a Democrat in
10 the 2010 election. The Club and Club PAC propose to compile a list of contributors from
11 information contained in campaign finance reports that the Specter Committee has filed
12 with the Commission. The communications would notify contributors about Senator
13 Specter’s policy of providing refunds upon request to those who contributed to his
14 campaign while he was running as a Republican. The communications would not contain
15 any express advocacy or mention any other candidate.

16 Either the Club or Club PAC would send a one-time letter to contributors to the
17 Specter Committee, or alternatively, for those contributors with published phone
18 numbers, the Club or Club PAC may make a one-time telephone call. The letter would
19 inform contributors to the Specter Committee of Senator Specter’s decision to switch to
20 the Democratic Party and his policy of refunding contributions upon request. A
21 preprinted form letter requesting a contribution refund and envelope addressed directly to
22 the Specter Committee would be enclosed with the letter. Neither the Club nor Club
23 PAC would know who sends this form letter to the Specter Committee. If the Club or

1 Club PAC makes a phone call to a contributor, the phone call would inform the
2 contributor of Senator Specter's decision to switch parties and his refund policy. The
3 contributor would be asked if he or she would like to have the Club or Club PAC either
4 send the contributor information on how to request the refund, or provide this information
5 during the telephone call. Both the letter and the telephone call would inform
6 contributors that the Specter Committee is not required by statute or regulations to refund
7 these contributions.

8 The communications would not contain any solicitation of any kind for the Club,
9 Club PAC, any candidate, or any other entity. No follow up mailings or telephone calls
10 would be made unless, during the initial telephone call, the contributor requests further
11 information from the Club or Club PAC on how to request a refund. The
12 communications would be made independently of any candidate or political party.

13 The Club and Club PAC would not use the list for any purpose other than the
14 communication proposed in the advisory opinion request, and would not retain the list for
15 any other purpose. The Club and Club PAC would not put any of the contact information
16 obtained from the Specter Committee's Commission filings into either the Club or the
17 Club PAC's general membership database. The Club and Club PAC would not make the
18 list of contributors to the Specter Committee available to any other entity.

19 ***Question Presented***

20 *May the Club or Club PAC use information obtained from campaign finance*
21 *reports filed with the Commission to communicate with contributors to the Specter*
22 *Committee informing them of Senator Specter's decision to switch parties and his refund*
23 *policy?*

1 ***Legal Analysis and Conclusion***

2 Yes, the Club and Club PAC may use contributor information contained in reports
3 filed with the Commission for the purpose of making a communication informing
4 contributors to the Specter Committee of Senator Specter's decision to run as a Democrat
5 and his policy of refunding contributions upon request.

6 Under the Act and Commission regulations, political committees are required to
7 file reports with the Commission identifying the names and mailing addresses of
8 contributors. 2 U.S.C. 434(b)(2)(A) and (b)(3)(A); 11 CFR 104.8(a). The Act provides
9 that the Commission shall make reports and statements filed with it available to the
10 public for inspection and copying within 48 hours after receipt. 2 U.S.C. 438(a)(4). Any
11 information copied from such reports or statements, however, "may not be sold or used
12 by any person for the purpose of soliciting contributions or for commercial purposes,"
13 other than using the name and address of a political committee to solicit contributions
14 from that political committee. *Id.*; *see also* 11 CFR 104.15(a). Under Commission
15 regulations, "soliciting contributions" includes soliciting any type of contribution or
16 donation, such as political or charitable contributions. 11 CFR 104.15(b).

17 Thus, in addition to requiring the disclosure of contributor information, Congress
18 provided limitations to ensure that such information was not misused. Congress was
19 concerned that the Act's reporting requirements "open up the citizens who are generous
20 and public spirited enough to support our political activities to all kinds of harassment
21" 117 Cong. Rec. 30057 (daily ed. Aug. 5, 1971) (statement of Sen. Bellmon).
22 Specifically, Senator Bellmon, sponsor of the prohibition on the use of individual
23 contributors' names and addresses, stated that the purpose of the prohibition was to

1 “protect the privacy of the generally very public-spirited citizens who may make a
2 contribution to a political campaign or a political party.” *Id.* In his remarks on the
3 Senate floor, however, Senator Bellmon acknowledged the limitations of the prohibition.
4 *See id.* at 30058 (The prohibition “is intended to protect, at least to some degree, the men
5 and women who make contributions to candidates or political parties from being
6 victimized by” having their names sold to list brokers). Indeed, in his response to a
7 question from Senator Nelson, Senator Bellmon confirmed that the “only purpose” of the
8 prohibition is to “prohibit the lists [of contributor names and addresses] from being used
9 for commercial purposes.” 117 Cong. Rec. 30058 (daily ed. Aug. 5, 1971) (statements of
10 Sen. Nelson and Sen. Bellmon).

11 The Commission has applied this solicitation and commercial use prohibition in
12 several advisory opinions. In Advisory Opinion 1981-05 (Findley), the Commission
13 concluded that a candidate could use information obtained from disclosure reports to mail
14 letters to contributors to his opponent’s campaign to correct allegedly defamatory charges
15 made by his opponent. In Advisory Opinion 1984-02 (Gramm), a non-connected
16 political committee calling itself “Americans for Phil Gramm in ‘84” solicited
17 contributions without the permission of Phil Gramm or his authorized campaign
18 committee. The Commission concluded that Representative Gramm and his authorized
19 campaign committee could use contributor information contained in Americans for Phil
20 Gramm in ‘84’s disclosure reports to inform contributors that the non-connected
21 committee was not Phil Gramm’s authorized committee.

22 In both of these advisory opinions, the Commission noted that the purpose of the
23 prohibition is to prevent contributor information from being used for commercial

1 purposes or for making solicitations. The prohibition does not “foreclose the use of this
2 information for other, albeit political, purposes, such as correcting contributor
3 misperceptions.” Advisory Opinion 1984-02 (Gramm).

4 This application of 2 U.S.C. 438(a)(4) is also consistent with the courts’ treatment
5 of the statute and regulatory provision. *See, e.g., FEC v. Int’l Funding Inst., Inc.*,
6 969 F.2d 1110 (D.C. Cir. 1992) (holding that the commercial use prohibition is
7 constitutional because political committees have a property interest in their contributor
8 lists); *FEC v. Political Contributions Data, Inc.*, 943 F.2d 190 (2nd Cir. 1991) (finding
9 that the sale of contributor lists that did not include addresses or phone numbers and that
10 explicitly stated that the lists could not be used for the purpose of solicitation or any
11 commercial use did not violate the prohibition at 2 U.S.C. 438(a)(4)).

12 In this situation, the Club and Club PAC will not solicit contributions for any
13 reason, and will not use the contributor information for any commercial purpose. Instead,
14 the Club and Club PAC will use contributor information obtained from the Specter
15 Committee’s disclosure reports only for the limited purpose of notifying contributors that
16 Senator Specter has switched parties and of his refund policy.¹ The communication will
17 be made only once to each donor and will not require any further contact between the
18 Club or Club PAC and the contributors to the Specter Committee.² Furthermore, the

¹ The communication will inform contributors that the Specter Committee is not required by statute or regulations to refund these contributions.

² In your comment on behalf of Club for Growth, you state that “We have no interest in making repeated communications and have stated we would not do so.” Comment of David Keating, Executive Director, Club for Growth on Draft AO 2009-19 at 3 (August 20, 2009). In Advisory Opinion 2003-24, the Commission concluded that the National Center for Tobacco-Free Kids (“NCTFK”) could not use contributor information obtained from disclosure reports to send contributors direct mail communications about the health effects of smoking or for other efforts to control tobacco use. In reaching this conclusion, the Commission stated that the requestor’s broad “open-ended interaction” presented the “possibility of

1 Club and Club PAC will safeguard the contributor information obtained from the reports
2 by keeping it separate from their general membership database, to avoid using the
3 contributor information for any purpose not presented in the request. Additionally, the
4 requestors will not make the contributor information available to any other entity for any
5 use. Therefore, the Commission concludes that this limited use of contributor
6 information obtained from the Specter Committee's disclosure reports does not violate
7 the solicitation and commercial use prohibition at 2 U.S.C. 438(a)(4).

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

1 law including, but not limited to, statutes, regulations, advisory opinions, and case law.

2 All cited advisory opinions are available on the Commission's website at

3 <http://saos.nictusa.com/saos/searchao>.

4

5

On behalf of the Commission,

6

7

8

Steven T. Walther

9

Chairman

10

11

12