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For meeting of August 17, 2017
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August 15, 2017

MEMORANDUM

TO: The Commission

FROM: Lisa J. Stevenson *LJS*
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Subject: AO 2017-08 (Point Bridge Capital LLC) Draft A

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 August 17, 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 2017-08

2

3 D. Eric Lycan, Esq.

4 Dinsmore & Shohl, LLP

5 Lexington Financial Center

6 250 West Main St., Suite 1400

7 Lexington, KY 40507

8

9 Dear Mr. Lycan:

DRAFT A

10 We are responding to your advisory opinion request on behalf of Point Bridge Capital,
11 LLC, concerning the application of the Federal Election Campaign Act, 52 U.S.C. §§ 30101-45
12 (the “Act”), and Commission regulations to a proposed index and exchange traded fund (“ETF”)
13 of publicly traded securities based on support of companies’ separate segregated funds (“SSFs”)
14 and employees for a particular political party and its candidates. The Commission concludes that
15 the proposal is permissible and complies with all applicable provisions of the Act and
16 Commission regulations.

17 **Background**

18 The facts presented in this advisory opinion are based on your advisory opinion request
19 received on July 18, 2017, and your email received on July 24, 2017.

20 Point Bridge Capital, LLC (“PBC”) is a for-profit limited liability company that is
21 registered with the Securities and Exchange Commission as an investment advisory firm. PBC
22 has developed an index of publicly traded equity securities that scores companies based on the
23 aggregated contributions and expenditures of the companies’ SSFs and employees. AOR001. A
24 company’s score on the index is intended to reflect its support for a particular political party and
25 that party’s candidates based on the company’s SSF and employee contributions to, and
26 expenditures in support of (or opposition to), particular political party committees, candidates,

1 and leadership PACs.¹ AOR001, AOR007. At this time, PBC plans to establish the proposed
2 index reflecting support for only one of the major political parties and its candidates; it may, at
3 some later point, establish a similar index reflecting support for the other major party, but PBC
4 has no plans to expand the proposal to identify support for any political parties beyond the two
5 major parties. AOR007.

6 PBC will obtain the aggregated contribution data from the reports submitted to the
7 Commission that are publicly available, as well as other aggregators of Commission data.
8 AOR001, AOR008. PBC will not provide or make public any individual contributor's contact
9 information in creating or marketing its index or ETF, nor will it use any individual contributor
10 information to solicit contributions or other products or services, and it will not make any such
11 information available to third parties for such use. AOR001. PBC will not use, distribute, sell,
12 or license data identifying any individual contributors. *Id.* Though PBC will have information
13 on the number of individual contributors that are included in the aggregate data, PBC will not
14 disclose that information to investors or licensees. AOR007.

15 Using the index, PBC plans to offer an ETF that will allow investors to invest in the
16 stocks of companies whose employees and SSFs evince a certain level of support for a particular
17 political party and its candidates. AOR001. The index will not provide separate scores based
18 independently on support for individual candidates. AOR007. PBC will determine whether to
19 include a company's stock in the ETF based on its score on the index. *Id.*

¹ The index will not take into account support for independent expenditure-only political committees, which make expenditures in support of specific candidates. AOR007.

1 PBC plans to license its index to other entities for the creation of other baskets of
2 securities. AOR002. PBC also plans to charge customary advisory fees and other fees on its
3 ETF. *Id.* The fees charged to investors in the ETF will not depend on any company's score on
4 the index, and the fees will be similar to those charged for other, non-political ETFs. AOR007.
5 PBC plans to advertise both the index and the ETF in order to monetize these products; the
6 advertisements will identify the particular political party associated with the index and the ETF
7 but will not mention or identify any particular candidates. AOR002.

8 PBC will not use or provide any factual information about candidates or political parties,
9 other than its use of candidates' party affiliation, in connection with the index or ETF. *Id.* Its
10 advertisements for the index and ETF will not expressly advocate the election or defeat of any
11 candidates or political parties, and PBC will not make any independent expenditures. *Id.* PBC
12 will not coordinate with any candidates or political party committees within the meaning of 11
13 C.F.R. § 109.21. *Id.* PBC will structure its advertisements so as to avoid making any
14 electioneering communications. *Id.*

15 **Questions Presented**

16 1. *May PBC create an index of companies based on the aggregated political*
17 *contributions of the company PACs and employees?*

18 2. *May PBC publicly discuss and report factual data on the aggregated political*
19 *contributions of any of these companies?*

20 3. *May PBC license the index, as described, to other parties for creation of baskets*
21 *of securities for investment purposes?*

1 4. *May PBC charge advisory fees and other fees on an ETF that tracks the*
2 *performance of the index created on the aggregated political contributions of the company PACs*
3 *and employees?*

4 5. *May PBC advertise the existence of the index?*

5 6. *May PBC advertise the existence of the ETF?*

6 7. *Under the proposed plan, is PBC required to file any reports with the*
7 *Commission?*

8 **Legal Analysis and Conclusions**

9 1. *May PBC create an index of companies based on the aggregated political*
10 *contributions of the company's PACs and employees?*

11 2. *May PBC publicly discuss and report factual data on the aggregated political*
12 *contributions of any of these companies?*

13 Yes, PBC may create an index of companies based on aggregated political contributions
14 and publicly discuss factual data regarding those aggregated contributions, as described in its
15 request.

16 The Act requires each political committee to report the name, mailing address,
17 occupation, and employer of any individual who contributes more than \$200 to the committee in
18 a calendar year. *See* 52 U.S.C. §§ 30101(13)(A), 30104(b)(3)(A); *see also* 11 C.F.R. §§ 100.12,
19 104.8(a). The Act also requires the Commission to make these reports available for public
20 inspection and copying. *See* 52 U.S.C. § 30111(a)(4); *see also* 52 U.S.C. § 30112 (requiring
21 Commission to make all reports publicly available online). In enacting these requirements,
22 Congress was concerned about “protect[ing] the privacy of the generally very public-spirited

1 citizens who may make a contribution to a political campaign or a political party.” 117 Cong.
2 Rec. S30057 (daily ed. Aug. 5, 1971) (statement of Sen. Bellmon). Accordingly, the Act
3 prohibits any information copied from Commission reports from being “sold or used by any
4 person for the purpose of soliciting contributions or for commercial purposes, other than using
5 the name and address of any political committee to solicit contributions from such committee.”
6 52 U.S.C. § 30111(a)(4); *see also* 11 C.F.R. § 104.15(a).

7 Aggregated data and data that does not contain individual contributors’ contact
8 information do not implicate the privacy concerns at the heart of section 30111(a)(4). *See*
9 Advisory Opinion 2014-07 (Crowdpac); *see also* *FEC v. Political Contributions Data*, 943 F.2d
10 190, 197-98 (2d Cir. 1991) (holding that section 30111(a)(4) prohibits uses that “could infringe
11 on the contributors’ privacy interests”). Thus, the Commission has repeatedly approved the use
12 of non-individualized contribution data obtained from reports filed with the Commission, both
13 for display to users and for internal analysis, so long as the data is not used to solicit
14 contributions and cannot be so used by third parties to whom that data is provided. *See*
15 Advisory Opinion 2015-12 (Ethiq) (approving use of aggregate contribution data to match users
16 to candidates and corporations that share their values); Advisory Opinion 2013-16
17 (PoliticalRefund.org) (approving display of aggregate number of donors requesting refunds);
18 Advisory Opinion 2014-07 (Crowdpac) (approving display of total number of contributors and
19 total amount of contributions); *see also* Advisory Opinion 2009-19 (Club for Growth PAC)
20 (approving use of Commission data to inform contributors of their right to request refunds).

21 PBC states that it will use Commission data to generate its proposed index, but that in
22 doing so it will use only aggregated data and it will not publicly disclose any individual

1 contributor's contact information in creating or marketing the index. AOR001. Nor will PBC
2 use any individual contributor information to solicit contributions or other products or services.
3 *Id.* For the reasons explained above and in the Commission's previous advisory opinions, the
4 use of aggregated, non-personally identifiable contribution data does not violate the sale and use
5 restrictions of the Act and Commission regulations.² Accordingly, PBC may use aggregated
6 data derived from reports filed with the Commission as described in the request.

7 3. *May PBC license the index, as described, to other parties for creation of baskets*
8 *of securities for investment purposes?*

9 4. *May PBC charge advisory fees and other fees on an ETF that tracks the*
10 *performance of the index created on the aggregated political contributions of the company*
11 *PACs and employees?*

12 Yes, PBC may license the index, as described, to other parties for creation of baskets of
13 securities for investment purposes, and may charge fees relating to the ETF.

14 As discussed above, the Act and Commission regulations are concerned with the sale and
15 use of individual contributor information for political or commercial solicitations. *See* 52
16 U.S.C. § 30111(a)(4); 11 C.F.R. § 104.15(a); Advisory Opinion 2009-19 (Club for Growth
17 PAC). Sale and use of Commission data that does not contain "sufficient information to
18 generate solicitations" to individual contributors is therefore permissible. Advisory Opinion
19 1995-09 (NewtWatch PAC) at 7: *see also Political Contributions Data*, 943 F.2d at 198

² To the extent that PBC intends to include in the index information about contributions that a political committee makes to another political committee (such as from a separate segregated fund to a candidate or political party), such information is not within the scope of the sale and use prohibition. Advisory Opinion 1989-19 (Johnson) (concluding that section 104.15(a) does not prohibit sale of Commission data showing contributions from one committee to another because such data does not include names of individual contributors).

1 (finding sale of contributor lists that did not include addresses or phone numbers permissible).
2 Because the index that PBC intends to license will include only aggregated contribution data,
3 and will not include any data or contact information for individual contributors, that data and
4 index cannot be used for solicitations as contemplated by section 104.15. Thus, the Act and
5 Commission regulations permit PBC to license its index as described. Similarly, PBC's use of
6 contribution data to generate the ETF will not result in the disclosure of any individual
7 contributor information that could be used to solicit contributions, so PBC may charge fees on
8 the ETF as described.

9 5. *May PBC advertise the existence of the index?*

10 6. *May PBC advertise the existence of the ETF?*

11 7. *Under the proposed plan, is PBC required to file any reports with the*
12 *Commission?*

13 PBC may advertise the existence of the index and the ETF, and PBC will not be required
14 to file any reports with the Commission as a result of the activities described in the request
15 because PBC's advertisements and other activities will not constitute independent expenditures,
16 coordinated communications, or electioneering communications, and the request does not
17 indicate that PBC's activities will otherwise subject it to the restrictions and reporting
18 requirements of the Act or Commission regulations.

19 The Act defines "independent expenditure" as a communication "expressly advocating
20 the election or defeat of a clearly identified candidate; and that is not made in concert or
21 cooperation with or at the request or suggestion of such candidate, the candidate's authorized
22 political committee, or their agents, or a political party committee or its agents." 52 U.S.C.

1 § 30101(17); *see also* 11 C.F.R. § 100.16. In contrast, Commission regulations provide that a
2 communication that is “made in cooperation, consultation or concert with, or at the request or
3 suggestion of, a candidate, a candidate’s authorized committee, or a political party committee”
4 is “coordinated” and is treated as an in-kind contribution to that candidate or political party if it
5 meets certain criteria. 11 C.F.R. §§ 109.20, 109.21(a) and (b). The Act defines “electioneering
6 communication” as “any broadcast, cable, or satellite communication which . . . refers to a
7 clearly identified candidate for Federal office” that is made within a certain period before the
8 election and in a geographically targeted area. 52 U.S.C. § 30104(f)(3)(A); *see also* 11 C.F.R.
9 § 100.29(a).

10 Corporations are permitted to make independent expenditures and electioneering
11 communications. *See Citizens United v. FEC*, 558 U.S. 310 (2010); Independent Expenditures
12 and Electioneering Communications by Corporations and Labor Organizations, 79 Fed. Reg.
13 62797, 62798-99 (Oct. 21, 2014). However, the Act and Commission regulations require
14 persons who spend above certain threshold amounts on independent expenditures or
15 electioneering communications to file reports with the Commission. *See* 52 U.S.C. § 30104(c);
16 11 C.F.R. §§ 104.20(b), 109.10.

17 PBC states that it will identify a particular political party in its advertisements, but that
18 the advertisements will not mention or identify any individual candidates, provide any
19 information about candidates or political parties, or expressly advocate for any candidate or
20 political party. AOR002. Therefore PBC will not be subject to the reporting requirements for
21 persons making independent expenditures. PBC also represents that it will structure its
22 advertisements to avoid making electioneering communications, and therefore PBC will not be

1 subject to the reporting requirements for persons making electioneering communications. *See*
2 Advisory Opinion 2015-12 (Ethiq).

3 Under Commission regulations, coordinated communications are treated as in-kind
4 contributions to the candidates or political parties with whom they are coordinated, and thus
5 corporations are prohibited from making coordinated communications. *See* 52 U.S.C.
6 § 30118(a); 11 C.F.R. §§ 109.21(b)(1), 114.2. However, PBC states that it will not coordinate,
7 within the meaning of section 109.21, with any candidates or political party committees in its
8 proposed activities, and therefore PBC is not prohibited from advertising its index and ETF as
9 described.

10 Finally, there is no indication in the request that PBC meets the definition of a “political
11 committee,”³ and therefore it is not subject to the reporting requirements for political
12 committees. *See* 52 U.S.C. § 30104(a)(1); 11 C.F.R. § 104.1.

13 The Commission expresses no opinion regarding the potential application of federal
14 securities laws or other federal, state, or local laws to the proposed activities because those
15 questions are not within the Commission’s jurisdiction.

16 This response constitutes an advisory opinion concerning the application of the Act and
17 Commission regulations to the specific transaction or activity set forth in your request. *See*
18 52 U.S.C. § 30108. The Commission emphasizes that, if there is a change in any of the facts or

³ PBC does not indicate that it plans to receive any contributions or make any expenditures. Accordingly, it would not meet the definition of a “political committee” under the Act and Commission regulations. 52 U.S.C. § 30101(4); 11 C.F.R. § 100.5(a). Nor does PBC, a for-profit limited liability company that is registered with the Securities and Exchange Commission as an investment advisory firm, appear to have the “major purpose” of nominating or electing federal candidates. *See Buckley v. Valeo*, 424 U.S. 1, 79 (1976) (construing “political committee” to “only encompass organizations that are under the control of a candidate or the major purpose of which is the nomination or election of a candidate”).

1 assumptions presented, and such facts or assumptions are material to a conclusion presented in
2 this advisory opinion, then the requestor may not rely on that conclusion as support for its
3 proposed activity. Any person involved in any specific transaction or activity which is
4 indistinguishable in all its material aspects from the transaction or activity with respect to which
5 this advisory opinion is rendered may rely on this advisory opinion. *See* 52 U.S.C.
6 § 30108(c)(1)(B). Please note that the analysis or conclusions in this advisory opinion may be
7 affected by subsequent developments in the law including, but not limited to, statutes,
8 regulations, advisory opinions, and case law. Any advisory opinions cited herein are available
9 on the Commission's website.

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On behalf of the Commission,

Steven T. Walther,
Chairman.