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FEDERAL ELECTION COMMISSION
Washington, DC 20463

AGENDA DOCUMENT NO. 17-39-A
AGENDA ITEM
For meeting of September 14, 2017

September 7, 2017

MEMORANDUM

TO: The Commission

FROM: Lisa J. Stevenson *LJS*
Acting General Counsel

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Acting Associate General Counsel

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Attorney

Subject: AO 2017-10 (Citizens Against Plutocracy) 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 12:00 pm] (Eastern Time) on September 13, 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 A

7

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 constitute a coordinated communication with a candidate.

14 ***Background***

15 The facts presented in this advisory opinion are based on your advisory opinion request
16 (“AOR”) received on August 2, 2017.

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. Advisory Opinion Request Supplement (“AOR
7 Supp.”). Moreover, upon signing a contract with a candidate, the Committee will cease all
8 communication with that candidate and the candidate’s 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 or political party
16 committee are treated as contributions to that candidate or political party committee. 52 U.S.C.
17 § 30116(a)(7)(B). More specifically, Commission regulations provide that a payment for a
18 communication “coordinated with a candidate, an authorized committee, a political party
19 committee, or an agent of any of the foregoing” is an in-kind contribution to the candidate or the

¹ The request also asks about the activities of unidentified “movement activists” and other unspecified activists “following in [the Committee’s] footsteps.” AOR002. The request indicates that these individuals or groups will “self-organize” and “may or may not form” political committees. AOR001. Although the Committee has placed unsigned examples of the Contract on its website for any activist to use, the request states that the Committee will not “direct the activity” of individuals or other political committees. AOR001. The Commission thus declines to provide an opinion on the permissibility of activities of unidentified third parties, which is not an appropriate subject of an advisory opinion request. 11 C.F.R. 112.1(b); *see* Advisory Opinion 2006-30 (ActBlue) at 6 n.3.

1 political party committee. 11 C.F.R. § 109.21(a), (b)(1). An independent expenditure-only
2 political committee “may not make contributions to candidates or political party committees,
3 including in-kind contributions such as coordinated communications.” Advisory Opinion 2016-
4 21 (Great America PAC) at 3-4 (citing Press Release, FEC Statement on *Carey v. FEC*
5 Reporting Guidance for Political Committees that Maintain a Non-Contribution Account (Oct. 5,
6 2011), <https://www.fec.gov/updates/fec-statement-on-carey-fec>, concerning hybrid committees
7 maintaining independent expenditure-only accounts); *see also* Advisory Opinion 2010-11
8 (Commonsense Ten) at 3 (stating that independent expenditure-only committee may receive
9 unlimited funds and funds from corporations and labor organizations).

10 To determine whether a communication constitutes a “coordinated communication,”
11 Commission regulations apply a three-prong test. 11 C.F.R. § 109.21(a). Under that test, a
12 communication must satisfy a “content prong,” it must satisfy a “conduct prong,” and it must be
13 paid for, in whole or in part, by a person other than the candidate committee or political party
14 committee (the “payment prong”). 11 C.F.R. § 109.21(a), (c), (d). A communication must
15 satisfy all three prongs to be deemed a “coordinated communication.”

16 The Committee’s proposal does not satisfy the content prong of the coordinated
17 communications test. Commission regulations provide that a communication satisfies the
18 content prong if it is an electioneering communication under 11 C.F.R. § 100.29. 11 C.F.R.
19 § 109.21(c)(1). An electioneering communication is “any broadcast, cable, or satellite
20 communication” that refers to a clearly identified candidate for federal office, is publicly
21 distributed within certain timeframes, and, in the case of a candidate for the United States Senate
22 or House of Representatives, is targeted to the relevant electorate. 11 C.F.R. § 100.29(a). The
23 Committee’s proposal to encourage candidates to sign a Contract concerning their legislative

1 positions, and to place those Contracts on its website or email the Contracts to current or
2 potential supporters, would not constitute an electioneering communication.

3 Commission regulations further provide that certain “public communications,” as that
4 term is defined at 11 C.F.R. § 100.26, also satisfy the content prong. 11 C.F.R. § 109.21(c)(2)-
5 (5). A public communication is “a communication by means of any broadcast, cable, or satellite
6 communication, newspaper, magazine, outdoor advertising facility, mass mailing, or telephone
7 bank to the general public, or any other form of general public political advertising.” 11 C.F.R.
8 § 100.26. “General public political advertising” specifically excludes communications over the
9 Internet, except for communications placed for a fee on another person’s website. *Id.*; *see also*
10 Coordinated and Independent Expenditures, 68 Fed. Reg. 421, 430 (Jan. 3, 2003) (“Although the
11 term ‘public communication’ covers a broad range of communications, it does not cover . . .
12 those transmitted using the Internet and electronic mail.”). The Committee’s proposed use of the
13 Contracts would not constitute public communications.

14 Because the Committee’s proposed use of the Contracts would not constitute
15 electioneering communications or public communications, the Committee’s proposed activities
16 do not meet the content prong of the coordinated communications test. Moreover, because a
17 communication must meet all three prongs of the coordinated communication test in section
18 109.21 to be deemed coordinated, it is unnecessary for the Commission to consider whether the
19 Committee’s proposed activities would meet the conduct or payment prongs of the test. The
20 Commission concludes that the Committee’s proposed activities, as described in the request,

1 would not constitute coordinated communications under the Act or Commission regulations.²

2 This response constitutes an advisory opinion concerning the application of the Act and

3 Commission regulations to the specific transaction or activity set forth in your request.

4 *See* 52 U.S.C. § 30108. The Commission emphasizes that, if there is a change in any of the facts

5 or assumptions presented, and such facts or assumptions are material to a conclusion presented in

6 this advisory opinion, then the requestor may not rely on that conclusion as support for its

7 proposed activity. Any person involved in any specific transaction or activity which is

8 indistinguishable in all its material aspects from the transaction or activity with respect to which

9 this advisory opinion is rendered may rely on this advisory opinion. *See* 52 U.S.C.

10 § 30108(c)(1)(B). Please note that the analysis or conclusions in this advisory opinion may be

11 affected by subsequent developments in the law including, but not limited to, statutes,

12 regulations, advisory opinions, and case law. The advisory opinion cited herein is available on

13 the Commission's website.

14 On behalf of the Commission,

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Steven T. Walther,
Chairman.

² This advisory opinion is limited to the proposed uses of the Contracts specified in the request and does not cover any other activities the Committee may seek to undertake in the future. In particular, the Commission does not express any opinion as to whether any future communications between the Committee and any candidates about any hypothetical advertisements the Committee may run would constitute coordinated communications. *See* AOR002 (indicating that Committee “does plan to run advertisements in support of or in opposition to candidates if [it] can raise the required money,”); AOR Supp. (clarifying that Committee “currently does not plan to communicate with any candidate at any time about any advertisements that CAP may run or other public communications that CAP may make”).