



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

May 24, 2018

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

ADVISORY OPINION 2018-07

Dan Backer, Esq.
political.law
203 South Union Street
Suite 300
Alexandria, VA 22314

Dear Mr. Backer:

We are responding to your advisory opinion request on behalf of South Carolina State Representative Nancy Mace concerning the application of the Federal Election Campaign Act, 52 U.S.C. §§ 30101-45 (the "Act"), and Commission regulations to the requestor's proposal to establish, maintain, and control a nonconnected federal independent expenditure-only political committee that will make public communications promoting, supporting, attacking, or opposing clearly identified federal candidates. The Commission concludes that the proposed political committee would be acting as Representative Mace's agent in making the proposed public communications, and thus may not use contributions from corporations or from individuals in amounts above the Act's contribution limits to pay for such public communications.

Background

The facts presented in this advisory opinion are based on your letter received on April 5, 2018 and your email received on May 10, 2018.

Nancy Mace is a State Representative from South Carolina who is running for re-election to her seat. Advisory Opinion Request at AOR001, AOR008 n.3. Representative Mace plans to "establish, maintain, and control" a nonconnected federal independent expenditure-only political committee (the "Committee"). AOR001-002. The Committee will pay for newspaper, magazine, broadcast, cable, and/or mass mailing political communications that promote or support clearly identified conservative female candidates for federal office. AOR001, AOR003. The Committee "will not make contributions to candidates for any local, state, or federal office, and will not coordinate its expenditures with any federal candidate, officeholder, or political party committee." AOR002. Representative Mace will initially fund the Committee by

transferring the remaining funds from her federal campaign committee for her 2014 campaign for the United States Senate. *Id.* Once the Committee is formed, Representative Mace plans to solicit contributions to the Committee from individuals in excess of \$5,000 and from small businesses (including incorporated entities). *Id.*, AOR010. The Committee will be under Representative Mace's "direct control." AOR003. She will exercise exclusive substantive decision-making authority over the Committee, including approving all Committee communications; determining which federal candidates will be the beneficiaries of independent expenditures and endorsements; and making managerial decisions, such as hiring.¹ AOR011. Any expenditures that the Committee makes will be the result of Representative Mace's "direct decision and action." AOR003. Representative Mace does not have any current plans to invite other individuals to join the Committee's board, although she may do so in the future. AOR011.

Questions Presented

1. *Would the Committee be acting as Representative Mace's agent for the purposes of 52 U.S.C. § 30125(f)(1)?*
2. *Would expenditures by the Committee be expenditures by Representative Mace?*
3. *If the answer to either Question 1 or Question 2 is yes, may the Committee use funds from individuals in excess of the Act's amount limitations or from corporations to make independent expenditures for public communications that promote, support, attack, or oppose clearly identified candidates for federal office?*

Legal Analysis and Conclusions

1. *Would the Committee be acting as Representative Mace's agent for the purposes of 52 U.S.C. § 30125(f)(1)?*

Yes, the Committee would be acting as Representative Mace's agent in making public communications for the purposes of 52 U.S.C. § 30125(f)(1).

Under section 30125(f)(1), candidates for state or local office, state or local officeholders, and agents of such candidates or officeholders are prohibited from paying for a public communication described in 52 U.S.C. § 30101(20)(A)(iii), except with funds that are subject to the limitations, prohibitions, and reporting requirements of the Act. 52 U.S.C. § 30125(f)(1); *see also* 11 C.F.R. § 300.71. That restriction applies to "a public communication that refers to a clearly identified candidate for [f]ederal office (regardless of whether a candidate for [s]tate or local office is also mentioned or identified) and that promotes or supports a candidate for that office, or attacks or opposes a candidate for that office" regardless of whether the communication contains express advocacy. 52 U.S.C. § 30101(20)(A)(iii); *see* 11 C.F.R. § 100.24(b)(3). A public communication, in turn, is defined as "a communication by means of

¹ Representative Mace may engage vendors who will have limited authority to make routine decisions relating to the services they provide. AOR011.

any broadcast, cable, or satellite communication, newspaper, magazine, outdoor advertising facility, mass mailing, or telephone bank to the general public, or any other form of general public political advertising.” 52 U.S.C. § 30101(22); 11 C.F.R. § 100.26. The term “clearly identified” means that the candidate’s name or a photograph or drawing of the candidate appears, or the identity of the candidate is “apparent by unambiguous reference.” 52 U.S.C. § 30101(18); 11 C.F.R. § 100.17.

In the case of an individual who is a state or local candidate or officeholder, an “agent” is “any person who has actual authority, either express or implied” to spend funds for a public communication on behalf of the state or local candidate or officeholder. 11 C.F.R. § 300.2(b)(3); *see also* Regulations on Prohibited and Excessive Contributions; Non-Federal Funds or Soft Money, 67 Fed. Reg. 49,064, 49,082 (July 29, 2002) (explaining that this definition of agent does not include “apparent authority”); *Moriarty v. Glueckert Funeral Home*, 155 F.3d 859, 865-66 (7th Cir. 1998) (distinguishing actual authority, under which principal’s words or other conduct are reasonably interpreted by agent to mean that principal desires agent to act on principal’s behalf, with apparent authority, under which principal’s words or other conduct “reasonably interpreted, causes the third person to believe that the principal consents to have the act done on his behalf by the person purporting to act for him”); *see also* Restatement (Third) of Agency § 2.01 (“An agent acts with actual authority when, at the time of taking action having legal consequences for the principal, the agent reasonably believes, in accordance with the principal’s manifestations to the agent, that the principal wishes the agent to act”). Under Commission regulations, a “person” includes an individual, political committee, and any other organization, or group of persons. 11 C.F.R. § 100.10.

Representative Mace is a state officeholder and candidate, and accordingly, she and her agents are subject to the requirements of section 30125(f)(1). The Committee that Representative Mace plans to establish will pay for newspaper, magazine, broadcast, cable, and/or mass mailing political communications that promote or support clearly identified federal candidates. AOR003. Because these communications are public communications subject to the restrictions in section 30125(f)(1), the Committee will act as Representative Mace’s agent for purposes of that section if the Committee will have actual authority to make the communications on Representative Mace’s behalf.

Representative Mace will exercise exclusive decision-making authority over the Committee, including approving all Committee communications and determining which federal candidates to promote or support, and she will provide all initial funding for the Committee. Because Representative Mace will exclusively direct all of the Committee’s public communications, the Commission concludes that the Committee will have actual authority to spend funds for public communications on behalf of Representative Mace. The Committee thus will be Representative Mace’s agent for the purposes of 52 U.S.C. § 30125(f)(1) and 11 C.F.R. § 300.71, and any public communications paid for by the Committee that promote or support clearly identified federal candidates will be made on behalf of Representative Mace.

2. *Would expenditures by the Committee be expenditures by Representative Mace?*

This question is moot in light of the Commission's conclusion in response to Question 1 that the Committee will be acting on behalf of Representative Mace as her agent in financing the public communications presented in this request.

3. *If the answer to either Question 1 or Question 2 is yes, may the Committee use funds from individuals in excess of the Act's amount limitations or from corporations to make independent expenditures for public communications that promote, support, attack, or oppose clearly identified candidates for federal office?*

No, because the Committee will be acting as Representative Mace's agent in making expenditures for public communications that promote, support, attack, or oppose a clearly identified candidate for federal office, it must pay for such expenditures with funds that are subject to the Act's source and amount limitations.

Under the Act and Commission regulations, individuals are prohibited from making contributions to any nonconnected political committee in any calendar year which, in the aggregate, exceeds \$5,000. 52 U.S.C. § 30116(a)(1)(C); 11 C.F.R. § 110.1(d). The Act and Commission regulations also prohibit corporations from making contributions in connection with any federal election, 52 U.S.C. § 30118(a); *accord* 11 C.F.R. § 114.2(b).² However, a nonconnected committee that makes only independent expenditures, such as the Committee established by Representative Mace, may receive unlimited contributions from individuals, corporations, and labor organizations. *See, e.g.*, Advisory Opinion 2011-11 (Colbert); Advisory Opinion 2010-11 (Commonsense Ten) at 3 (concluding that independent expenditure-only committee may receive unlimited funds from individuals, corporations, and labor organizations); *SpeechNow.org v. FEC*, 599 F.3d 686, 696 (D.C. Cir. 2010) (*en banc*) (holding that independent expenditure-only political committee may receive unlimited contributions from individuals); *Carey v. FEC*, 791 F. Supp. 2d 121, 131 (D.D.C. 2011) (nonconnected political committee that makes direct contributions to candidates may receive unlimited funds from individuals, corporations, and labor organizations into separate bank account for purpose of financing independent expenditures).

As explained above, the Act prohibits a state or local candidate or officeholder, or that individual's agent, from using nonfederal funds to pay for public communications that promote, support, attack, or oppose a clearly identified federal candidate.³ 52 U.S.C. § 30125(f)(1); 11 C.F.R. § 300.71. Thus, while the Committee may *accept* unlimited funds from individuals,

² The Act and Commission regulations also require nonconnected political committees to report contributions in accordance with 52 U.S.C. § 30104(a)(4) and (b). *See* 52 U.S.C. § 30104(a)(1); 11 C.F.R. §§ 104.1(a), 104.3.

³ This limitation on the use of nonfederal funds does not apply to a communication by a state or local candidate or officeholder, or the agent of such an individual, "if the communication involved is in connection with an election for such [s]tate or local office and refers only to such individual or to any other candidate for the [s]tate or local office held or sought by such individual, or both." 52 U.S.C. § 30125(f)(2); 11 C.F.R. § 300.72.

corporations, and labor organizations, the Committee may use only funds that are subject to the limits, prohibitions, and reporting requirements of the Act to pay for public communications that promote, support, attack, or oppose a clearly identified federal candidate.⁴

As the request recognizes, “the types of communications [Representative Mace] intends to fund would fall within the scope of the statute.” AOR003. The request argues, however, that the statute is unconstitutional as applied to such activities. AOR003-AOR008. The Commission finds that argument unavailing for several reasons.

First, the Supreme Court upheld section 30125(f) against a First Amendment challenge in *McConnell v. FEC*, stating that “[w]e will not upset Congress’ imminently reasonable prediction that . . . state and local candidates and officeholders will become the next conduits for the soft-money funding of sham issue advertising.” 540 U.S. 93, 185 (2003).⁵ The Court explained that the provision “limits only the source and amount of contributions that state and local candidates can draw upon to fund expenditures that directly impact federal elections,” and that “by regulating only contributions used to fund ‘public communications,’ [section 30125(f)] focuses narrowly on those soft-money donations with the greatest potential to corrupt or give rise to the appearance of corruption of federal candidates and officeholders.” *Id.* at 684.

Second, no subsequent court decision has undermined or otherwise questioned the legal validity of section 30125(f) or its application to the requestor’s proposal here. Indeed, although the requestor provides a lengthy discussion of various court decisions issued since *McConnell* concerning the financing of independent expenditures, AOR003-AOR008, the requestor also acknowledges that none of those decisions “considered the issue [presented here] of SuperPACs run by state candidates or officeholders, or the validity of . . . 52 U.S.C. § 30125(f)(1).”

Third, in the absence of a court decision finding section 30125(f)(1) unconstitutional, the Commission lacks the authority to make such a determination in the context of an advisory opinion. *See Johnson v. Robison*, 415 U.S. 361, 368 (1974) (adjudication of constitutionality is generally outside an administrative agency’s authority); *Robertson v. FEC*, 45 F.3d 486, 489 (D.C. Cir. 1995) (noting, in the context of the Commission’s administrative enforcement process, that “[i]t was hardly open to the Commission, an administrative agency, to entertain a claim that the statute which created it was in some respect unconstitutional”). As the Commission has previously recognized in other contexts, “[b]ecause no court has invalidated the [statutory] limitation . . . on constitutional grounds, we are required to give the[] provision[] full force.” Advisory Opinion 2012-32 (Tea Party Leadership Fund *et al.*) at 3; *cf.* Advisory Opinion 2011-12 (Majority PAC *et al.*) at 4 (declining to interpret the Supreme Court’s decision in *Citizens United v. FEC*, 558 U.S. 310 (2010), as a basis for not applying statutory contribution limits that

⁴ Similarly, the Act and Commission regulations require state, district, and local party committees or organizations of a political party to use federal funds to pay for federal election activity, even if the committee or organization is not a “political committee” under the Act and Commission regulations and, thus, is not prohibited from accepting nonfederal funds. 11 C.F.R. §§ 300.30(a), (c), 300.32.

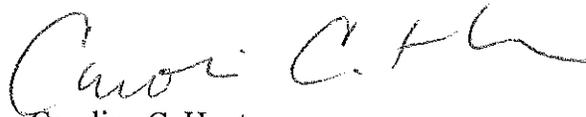
⁵ At the time *McConnell* was decided, the restriction currently codified at 52 U.S.C. § 30125(f) was codified at 2 U.S.C. § 441i.

were not considered in that case).

The Committee, as explained in the Commission's response to Question 1 above, will act as Representative Mace's agent in making public communications that promote or support clearly identified federal candidates. Therefore, the Committee may not pay for such public communications using contributions from corporations or from individuals that exceed that \$5,000 per-calendar-year limit.

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

On behalf of the Commission,

A handwritten signature in black ink, appearing to read "Caroline C. Hunter". The signature is fluid and cursive, with a long horizontal stroke at the end.

Caroline C. Hunter
Chair