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FEDERAL ELECTION COMMISSION
Washington, DC 20463

AGENDA DOCUMENT NO. 18-28-B
AGENDA ITEM
For meeting of May 24, 2018
SUBMITTED LATE

May 23, 2018

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 2018-07 (Mace) 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 May 24, 2018.

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 2018-07

2

3 Dan Backer, Esq.

4 political.law

5 203 South Union Street

6 Suite 300

7 Alexandria, VA 22314

8

9 Dear Mr. Backer:

DRAFT B

10 We are responding to your advisory opinion request on behalf of South Carolina State
11 Representative Nancy Mace concerning the application of the Federal Election Campaign Act,
12 52 U.S.C. §§ 30101-45 (the “Act”), and Commission regulations to the requestor’s proposal to
13 establish, maintain, and control a nonconnected federal independent expenditure-only political
14 committee that will make public communications promoting, supporting, attacking, or opposing
15 clearly identified federal candidates. The Commission concludes that the proposed political
16 committee would be acting as Representative Mace’s agent in making the proposed public
17 communications, and thus may not use contributions from corporations or from individuals in
18 amounts above the Act’s contribution limits to pay for such public communications.

19 ***Background***

20 The facts presented in this advisory opinion are based on your letter received on April 5,
21 2018 and your email received on May 10, 2018.

22 Nancy Mace is a State Representative from South Carolina who is running for re-election
23 to her seat. Advisory Opinion Request at AOR001, AOR008 n.3. Representative Mace plans to
24 “establish, maintain, and control” a nonconnected federal independent expenditure-only political
25 committee (the “Committee”). AOR001-002. The Committee will pay for newspaper,
26 magazine, broadcast, cable, and/or mass mailing political communications that promote or
27 support clearly identified conservative female candidates for federal office. AOR001, AOR003.

1 The Committee “will not make contributions to candidates for any local, state, or federal office,
2 and will not coordinate its expenditures with any federal candidate, officeholder, or political
3 party committee.” AOR002. Representative Mace will initially fund the Committee by
4 transferring the remaining funds from her federal campaign committee for her 2014 campaign
5 for U.S. Senate. *Id.* Once the Committee is formed, Representative Mace plans to solicit
6 contributions to the Committee from individuals in excess of \$5,000 and from small businesses
7 (including incorporated entities). *Id.*, AOR010. The Committee will be under Representative
8 Mace’s “direct control.” AOR003. She will exercise exclusive substantive decision-making
9 authority over the Committee, including approving all Committee communications; determining
10 which federal candidates will be the beneficiaries of independent expenditures and
11 endorsements; and making managerial decisions, such as hiring.¹ AOR011. Any expenditures
12 that the Committee makes will be the result of Representative Mace’s “direct decision and
13 action.” AOR003. Representative Mace does not have any current plans to invite other
14 individuals to join the Committee’s board, although she may do so in the future. AOR011.

15 ***Questions Presented***

- 16 1. *Would the Committee be acting as Representative Mace’s agent for the purposes of 52*
17 *U.S.C. § 30125(f)(1)?*
- 18 2. *Would expenditures by the Committee be expenditures by Representative Mace?*
- 19 3. *If the answer to either Question 1 or Question 2 is yes, may the Committee use funds from*
20 *individuals in excess of the Act’s amount limitations or from corporations to make independent*

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

1 *expenditures for public communications that promote, support, attack, or oppose clearly*
2 *identified candidates for federal office?*

3 ***Legal Analysis and Conclusions***

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

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

8 Under section 30125(f)(1), candidates for state or local office, state or local officeholders,
9 and agents of such candidates or officeholders are prohibited from paying for a public
10 communication described in 52 U.S.C. § 30101(20)(A)(iii), except with funds that are subject to
11 the limitations, prohibitions, and reporting requirements of the Act. 52 U.S.C. § 30125(f)(1); *see*
12 *also* 11 C.F.R. § 300.71. That restriction applies to “a public communication that refers to a
13 clearly identified candidate for [f]ederal office (regardless of whether a candidate for [s]tate or
14 local office is also mentioned or identified) and that promotes or supports a candidate for that
15 office, or attacks or opposes a candidate for that office” regardless of whether the
16 communication contains express advocacy. 52 U.S.C. § 30101(20)(A)(iii); *see* 11 C.F.R.
17 § 100.24(b)(3). A “public communication,” in turn, is defined as “a communication by means of
18 any broadcast, cable, or satellite communication, newspaper, magazine, outdoor advertising
19 facility, mass mailing, or telephone bank to the general public, or any other form of general
20 public political advertising.” 52 U.S.C. § 30101(22); 11 C.F.R. § 100.26. The term “clearly
21 identified” means that the candidate’s name or a photograph or drawing of the candidate appears,
22 or the identity of the candidate is “apparent by unambiguous reference.” 52 U.S.C. § 30101(18);
23 11 C.F.R. § 100.17.

1 Representative Mace is a state officeholder and candidate, and accordingly, she and her
2 agents are subject to section 30125(f)(1). An “agent” in this context is “any person who has
3 actual authority, either express or implied,” to spend funds for a public communication on behalf
4 of a state or local candidate or officeholder.² 11 C.F.R. § 300.2(b), (b)(4). The Committee that
5 Representative Mace plans to establish will pay for newspaper, magazine, broadcast, cable,
6 and/or mass mailing political communications that promote or support clearly identified federal
7 candidates. AOR003. These are public communications subject to the restrictions in section
8 30125(f)(1).³ Moreover, the Committee will be under Representative Mace’s exclusive and
9 direct control; it will make only the expenditures that she has approved for public
10 communications that she has authorized for federal candidates that she has selected. The
11 Commission concludes that the Committee thus will be Representative Mace’s agent for the
12 purposes of 52 U.S.C. § 30125(f)(1) and 11 C.F.R. § 300.71.

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

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

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

² Under Commission regulations, a “person” includes a political committee. 11 C.F.R. § 100.10.

³ As the request recognizes, “the types of communications [Representative Mace] intends to fund would fall within the scope of the statute.” AOR003.

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

5 Under the Act and Commission regulations, individuals are prohibited from making
6 contributions to any nonconnected political committee in any calendar year which, in the
7 aggregate, exceeds \$5,000. 52 U.S.C. § 30116(a)(1)(C); 11 C.F.R. § 110.1(d). The Act and
8 Commission regulations also prohibit corporations from making contributions in connection with
9 any federal election, 52 U.S.C. § 30118(a); *accord* 11 C.F.R. § 114.2(b).⁴ However, a
10 nonconnected committee that makes only independent expenditures, such as the Committee
11 established by Representative Mace, may receive unlimited contributions from individuals,
12 corporations, and labor organizations. *See, e.g.*, Advisory Opinion 2011-11 (Colbert); Advisory
13 Opinion 2010-11 (Commonsense Ten) at 3 (concluding that independent expenditure-only
14 committee may receive unlimited funds from individuals, corporations, and labor organizations);
15 *SpeechNow.org v. FEC*, 599 F.3d 686, 696 (D.C. Cir. 2010) (*en banc*) (holding that independent
16 expenditure-only political committee may receive unlimited contributions from individuals);
17 *Carey v. FEC*, 791 F. Supp. 2d 121, 131 (D.D.C. 2011) (nonconnected political committee that
18 makes direct contributions to candidates may receive unlimited funds from individuals,
19 corporations, and labor organizations into separate bank account for purpose of financing
20 independent expenditures).

⁴ 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.

1 As explained above, the Act prohibits a state or local candidate or officeholder, or that
2 individual’s agent, from using nonfederal funds to pay for public communications that promote,
3 support, attack, or oppose a clearly identified federal candidate.⁵ 52 U.S.C. § 30125(f)(1); 11
4 C.F.R. § 300.71. Thus, while the Committee may *accept* unlimited funds from individuals,
5 corporations, and labor organizations, the Commission concludes that the Committee may use
6 only funds that are subject to the limits, prohibitions, and reporting requirements of the Act to
7 pay for public communications that promote, support, attack, or oppose a clearly identified
8 federal candidate.⁶

9 The requestor’s argument that section 30125(f) is unconstitutional as applied to its
10 proposed activity, AOR003-AOR008, is unavailing. The Supreme Court upheld section
11 30125(f) against a First Amendment challenge in *McConnell v. FEC*, stating that “[w]e will not
12 upset Congress’ imminently reasonable prediction that . . . state and local candidates and
13 officeholders will become the next conduits for the soft-money funding of sham issue
14 advertising.” 540 U.S. 93, 185 (2003).⁷ No subsequent court decision has held otherwise.
15 Indeed, even the requestor acknowledges that none of the post-*McConnell* court decisions that
16 concern the financing of independent expenditures has “considered the issue [presented here] of
17 SuperPACs run by state candidates or officeholders, or the validity of . . . 52 U.S.C.

⁵ 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.

⁶ 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.

⁷ 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.

