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For meeting of May 24, 2018
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May 22, 2018

MEMORANDUM

TO: The Commission

FROM: Lisa J. Stevenson *LJS by ERC*
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Subject: AO 2018-07 (Mace) 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 5:00 pm (Eastern Time) on May 23, 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

DRAFT A

8

9 Dear Mr. Backer:

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 In the case of an individual who is a state or local candidate or officeholder, an “agent” is
2 “any person who has actual authority, either express or implied” to spend funds for a public
3 communication on behalf of the state or local candidate or officeholder. 11 C.F.R. § 300.2(b)(3);
4 *see also* Regulations on Prohibited and Excessive Contributions; Non-Federal Funds or Soft
5 Money, 67 Fed. Reg. 49,064, 49,082 (July 29, 2002) (explaining that this definition of agent does
6 not include “apparent authority”); *Moriarty v. Glueckert Funeral Home*, 155 F.3d 859, 865-66
7 (7th Cir. 1998) (distinguishing actual authority, under which a principal’s words or other conduct
8 are reasonably interpreted by agent to mean that principal desires agent to act on principal’s
9 behalf, with apparent authority, under which a principal’s words or other conduct “reasonably
10 interpreted, causes the third person to believe that the principal consents to have the act done on
11 his behalf by the person purporting to act for him”); *see also* Restatement (Third) of Agency
12 § 2.01 (“An agent acts with actual authority when, at the time of taking action having legal
13 consequences for the principal, the agent reasonably believes, in accordance with the principal’s
14 manifestations to the agent, that the principal wishes the agent to act”). Under Commission
15 regulations, a “person” includes an individual, political committee, and any other organization,
16 or group of persons. 11 C.F.R. § 100.10.

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

1 on Representative Mace's behalf.

2 Representative Mace will exercise exclusive decision-making authority over the
3 Committee, including approving all Committee communications and determining which federal
4 candidates to promote or support, and she will provide all initial funding for the Committee.

5 Because Representative Mace will exclusively direct all of the Committee's public
6 communications, the Commission concludes that the Committee will have actual authority to
7 spend funds for public communications on behalf of Representative Mace. The Committee thus
8 will be Representative Mace's agent for the purposes of 52 U.S.C. § 30125(f)(1) and 11 C.F.R.
9 § 300.71, and any public communications paid for by the Committee that promote or support
10 clearly identified federal candidates will be made on behalf of Representative Mace.

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

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

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

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

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

17 As explained above, the Act prohibits a state or local candidate or officeholder, or that
18 individual's agent, from using nonfederal funds to pay for public communications that promote,
19

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.

1 support, attack, or oppose a clearly identified federal candidate.³ 52 U.S.C. § 30125(f)(1); 11
2 C.F.R. § 300.71. Thus, while the Committee may *accept* unlimited funds from individuals,
3 corporations, and labor organizations, the Committee may use only funds that are subject to the
4 limits, prohibitions, and reporting requirements of the Act to pay for public communications that
5 promote, support, attack, or oppose a clearly identified federal candidate.⁴

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

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

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.

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.

1 appearance of corruption of federal candidates and officeholders.” *Id.* at 684.

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

8 Third, in the absence of a court decision finding section 30125(f)(1) unconstitutional, the
9 Commission lacks the authority to make such a determination in the context of an advisory
10 opinion. *See Johnson v. Robison*, 415 U.S. 361, 368 (1974) (adjudication of constitutionality is
11 generally outside an administrative agency’s authority); *Robertson v. FEC*, 45 F.3d 486, 489
12 (D.C. Cir. 1995) (noting, in the context of the Commission’s administrative enforcement process,
13 that “[i]t was hardly open to the Commission, an administrative agency, to entertain a claim that
14 the statute which created it was in some respect unconstitutional”). As the Commission has
15 previously recognized in other contexts, “[b]ecause no court has invalidated the [statutory]
16 limitation . . . on constitutional grounds, we are required to give the[] provision[] full force.”
17 Advisory Opinion 2012-32 (*Tea Party Leadership Fund et al.*) at 3; *cf.* Advisory Opinion 2011-
18 12 (*Majority PAC et al.*) at 4 (declining to interpret the Supreme Court’s decision in *Citizens*
19 *United v. FEC*, 558 U.S. 310 (2010) as a basis for not applying statutory contribution limits that
20 were not considered in that case).

21 The Committee, as explained in the Commission’s response to Question 1 above, will act
22 as Representative Mace’s agent in making public communications that promote or support
23 clearly identified federal candidates. Therefore, the Committee may not pay for such public

1 communications using contributions from corporations or from individuals that exceed that
2 \$5,000 per-calendar-year limit.

3 This response constitutes an advisory opinion concerning the application of the Act and
4 Commission regulations to the specific transaction or activity set forth in your request.

5 *See* 52 U.S.C. § 30108. The Commission emphasizes that, if there is a change in any of the facts
6 or assumptions presented, and such facts or assumptions are material to a conclusion presented in
7 this advisory opinion, then the requestor may not rely on that conclusion as support for its
8 proposed activity. Any person involved in any specific transaction or activity which is
9 indistinguishable in all its material aspects from the transaction or activity with respect to which
10 this advisory opinion is rendered may rely on this advisory opinion. *See* 52 U.S.C.

11 § 30108(c)(1)(B). Please note that the analysis or conclusions in this advisory opinion may be
12 affected by subsequent developments in the law including, but not limited to, statutes,
13 regulations, advisory opinions, and case law. The advisory opinions cited herein are available on
14 the Commission's website.

15 On behalf of the Commission,
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17

18
19 Caroline C. Hunter
20 Chair