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Washington, DC 20463

AGENDA DOCUMENT NO. 15-10-A
AGENDA ITEM
For meeting of February 12, 2015
SUBMITTED LATE

February 10, 2015

MEMORANDUM

TO: The Commission

FROM: Lisa J. Stevenson *LJS by AN*
Deputy General Counsel

Adav Noti *AN*
Acting Associate General Counsel

Amy L. Rothstein *ALR by AN*
Assistant General Counsel

Rachel Provencher *RR*
Presidential Management Fellow

Subject: AO 2014-20 (Make Your Laws PAC) 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 February 12, 2015.

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 <http://www.fec.gov/law/draftaos.shtml>.

Attachment

1 ADVISORY OPINION 2014-20

2
3
4 Sai
5 Make Your Laws PAC, Inc.
6 c/o Nick Staddon, Secretary
7 122 Pinecrest Road
8 Durham, NC 27705
9

DRAFT A

10
11 Dear Sai:

12
13 We are responding to the advisory opinion request that you submitted on behalf of Make
14 Your Laws PAC, Inc. concerning the application of the Federal Election Campaign Act, 52
15 U.S.C. §§ 30101-46 (formerly 2 U.S.C. §§ 431-57) (the “Act”), and Commission regulations to
16 volunteer services provided by foreign nationals. The Commission concludes that the requestor
17 may accept uncompensated services from foreign national volunteers as proposed.

18 ***Background***

19 The facts presented in this advisory opinion are based on the requestor’s advisory opinion
20 request (“AOR”) received on November 24, 2014.

21 The requestor is a nonconnected political committee. The requestor and two other
22 entities (collectively, the “MYL Group”) jointly own the rights to the code, design, graphics,
23 trademarks, and trade dress¹ (collectively, “intellectual property”) of the requestor’s website and
24 brand. Nearly all of the code is open source² and open-source licensed.³

¹ The requestor describes “trade dress” as including branding and logos. AOR at 2.

² The requestor describes “open source” to mean that the code is available online “for anyone to see.” AOR at 2 n.2.

³ According to the requestor, “[b]roadly speaking, this [open source license] means a copyright license that permits anyone to re-use software so long as they give credit and publish any derivative works under the same terms.” AOR at 2 n.3; *see also Open Source License*, OPEN SOURCE INITIATIVE, <http://opensource.org/licenses> (last visited Dec. 14, 2014).

1 “To date, all services in creating the [intellectual property] have been provided by unpaid
2 volunteers who are United States citizens.” AOR at 2. The requestor states that when such
3 services might result in the creation of intellectual property, the MYL Group asks volunteers to
4 sign an intellectual property assignment to transfer all rights and ownership in the intellectual
5 property to the MYL Group. The volunteers, however, receive a perpetual license from the
6 MYL Group to use their work as they see fit, unless the MYL Group determines that there would
7 be an impact on its trademark or trade dress.

8 The requestor would like to accept the same kind of volunteer services from foreign
9 nationals as the MYL Group currently receives from United States citizens, and under the same
10 terms. These services would be “primarily aimed at improving the MYL Group’s code,” among
11 other things. AOR at 4. Because this code is open source “and *constantly* available for
12 collaboration,” the requestor expects to receive these services on an “*ad hoc*, continuous basis.”
13 *Id.* (emphasis in original). The requestor asks the Commission to assume that all requirements
14 of 52 U.S.C. § 30101(8)(B) and (9)(B) (formerly 2 U.S.C. § 431(8)(B) and (9)(B)) are met:
15 “*E.g.* out of pocket costs such as printing, distribution, web hosting, etc. will be paid for by [the
16 requestor]; volunteers will not be ‘compensated’ by anyone . . . but may use their own equipment
17 (such as a laptop) in providing such services; [the requestor] will not act as an agent of any
18 foreign national nor permit any foreign national to participate in its operations, make decisions
19 regarding contributions or expenditures, etc. . . .” AOR at 3 n.6.

20 ***Question Presented***

21 *May the requestor accept the assignment of any intellectual property in unpaid volunteer*
22 *services performed by foreign nationals and provided in accordance with 52 U.S.C.*
23 *§ 30101(8)(B)(i) (formerly 2 U.S.C. § 431(8)(B)(i))?*

1 ***Legal Analysis and Conclusions***

2 Yes, the requestor may accept uncompensated services from foreign nationals as
3 proposed.

4 The Act prohibits any foreign national from making a contribution in connection with a
5 federal election.⁴ 52 U.S.C. § 30121(a)(1)(A) (formerly 2 U.S.C. § 441e(a)(1)(A)); *see also* 11
6 C.F.R. § 110.20(b). The Act also prohibits any person from “solicit[ing], accept[ing], or
7 receiv[ing]” such a contribution from a foreign national. 52 U.S.C. § 30121(a)(2) (formerly 2
8 U.S.C. § 441e(a)(2)); *see also* 11 C.F.R. § 110.20(g).

9 Commission regulations provide that if an individual or group of individuals engages in
10 “Internet activities” for the purpose of influencing a federal election, neither uncompensated
11 personal services related to such activities nor the use of equipment or services for the
12 uncompensated activities are a “contribution.”⁵ 11 C.F.R. § 100.94(a)(1)-(2). Commission
13 regulations define “Internet activities” to include “creating, maintaining or hosting a Web site”
14 and “any other form of communication distributed over the Internet.” 11 C.F.R. § 100.94(b).
15 The term “equipment and services” includes: “[c]omputers, software, Internet domain names,
16 Internet Service Providers (ISP), and any other technology that is used to provide access to or
17 use of the Internet.” 11 C.F.R. § 100.94(c). In promulgating this exception, the Commission
18 stated that it intended to include within the exception future advances in technology and

⁴ A “foreign national” is “an individual who is not a citizen of the United States or a national of the United States . . . and who is not lawfully admitted for permanent residence.” 52 U.S.C. § 30121(b)(2) (formerly 2 U.S.C. § 441e(b)(2)); *see also* 11 C.F.R. § 110.20(a)(3)(ii). In addition to barring foreign nationals from making contributions, section 30121 also prohibits foreign nationals from making any “donation of money or other thing of value . . . in connection with a . . . State[] or local election.” 52 U.S.C. § 30121(a)(1)(A). Because the requestor is a federal committee, and because the request does not appear to contemplate any state or local election activity, this opinion does not address the application of section 30121 to volunteer services provided by foreign nationals in connection with nonfederal elections.

⁵ The exemption does not apply to certain types of payments, including payments for public communications. *See* 11 C.F.R. § 100.94(e)(1).

1 innovations in computer equipment and services. Internet Communications, 71 Fed. Reg. 18589,
2 18605 (Apr. 12, 2006).

3 The requestor indicates that foreign nationals would provide computer programming and
4 related volunteer services that are primarily aimed at improving its website code, among other
5 things. AOR at 4. Coding a website is inherently related to “creating, maintaining or hosting” a
6 website. 11 C.F.R. § 100.94(b). Thus, the value of any individual’s or group of individuals’
7 uncompensated personal services to code or otherwise design the requestor’s website and the
8 value of any equipment and services that the individual or group uses for that purpose would not
9 be a contribution. Accordingly, such services and equipment usage would not be prohibited
10 contributions from foreign nationals.

11 The request does not make clear whether certain other proposed activities — such as
12 those involving “trademarks” and “trade dress” — would be related to the requestor’s website
13 and would therefore constitute “internet activities” within the meaning of the Commission’s
14 regulations. Nonetheless, in addition to the specific exemption for internet activity, the Act and
15 Commission regulations also provide more generally that the term “contribution” does not
16 include “the value of services provided without compensation by any individual who volunteers
17 on behalf of a candidate or political committee.” 52 U.S.C. § 30101(8)(B)(i) (formerly 2 U.S.C.
18 § 431(8)(B)(i)); *see also* 11 C.F.R. § 100.74. Applying this “volunteer services exception” in the
19 context of foreign nationals, the Commission has concluded that a foreign national entertainer
20 who performed without compensation at a candidate’s fundraiser did not provide a contribution
21 to that candidate. *See* Factual & Legal Analysis at 6, MUR 5987, 5995, and 6015 (Hillary
22 Clinton For President) (Feb. 30, 2009), <http://eqs.fec.gov/eqsdocsMUR/29044230266.pdf>.
23 Similarly, in Advisory Opinion 2004-26 (Weller), the Commission found that a foreign national

1 would not provide a contribution to a candidate by participating without compensation in certain
2 of the candidate's campaign-related activities, including the solicitation of contributions,
3 attendance at political events, and meeting with the candidate and his campaign committee.
4 Because the services would not be contributions, they would not be subject to the prohibition on
5 contributions from foreign nationals. Advisory Opinion 2004-26 (Weller) at 2; *see also*
6 Advisory Opinion 2007-22 (Hurysz) at 3 (“[T]he value of volunteer services provided to your
7 campaign by Canadian nationals would not constitute a prohibited in-kind contribution to your
8 campaign.”); Advisory Opinion 1987-25 (Otaola) at 1 (concluding that foreign national’s “work
9 as a volunteer without compensation would not . . . result in a contribution to a candidate because
10 the value of uncompensated volunteer services is specifically exempted from the definition of
11 contribution under the Act”). For the same reasons, to the extent that a foreign national
12 volunteers his or her uncompensated personal services to the requestor to help design the
13 requestor’s “trademarks” and “trade dress,” the value of those services would not constitute an
14 unlawful foreign national contribution because they are exempt from the definition of
15 “contribution” under the volunteer services exemption.

16 The fact that the requestor may obtain rights to intellectual property resulting from the
17 foreign nationals’ volunteer services does not change the result. As discussed above, the
18 Commission has consistently interpreted the Act and Commission regulations as permitting
19 foreign nationals to provide volunteer services to political committees. *See* Advisory Opinion
20 2004-26 (Weller) at 2 (finding that foreign nationals’ uncompensated participation in campaign-
21 related activities are not contributions); Advisory Opinion 2007-22 (Hurysz) at 3 (same);
22 Advisory Opinion 1987-25 (Otaola) at 2 (“[A]ny individual, including a foreign national, may
23 volunteer his or her uncompensated services to a candidate without making a contribution to that

1 candidate.”). Most recently, in MURs 5987, 5996, and 6015 (Hillary Clinton For President), the
2 Commission distinguished the provision of volunteer services by a foreign national from the
3 creation and donation of a tangible good: Whereas the former is statutorily exempt from the
4 definition of “contribution” and therefore permissible, the latter is a prohibited contribution
5 because it is not “the type of uncompensated volunteer service that is specifically exempted from
6 the definition of ‘contribution’.” *See* Factual & Legal Analysis at 3-5, MUR 5987, 5995, and
7 6015 (Hillary Clinton For President) (distinguishing Advisory Opinion 1981-51 (Metzenbaum),
8 which concluded that foreign national’s provision of original artwork to political committee
9 would be prohibited contribution). Thus, because the requestor here proposes to receive only
10 intangible benefits resulting from the provision of volunteer services by foreign nationals, the
11 Commission concludes that the proposal would not result in a prohibited contribution.

12 This response constitutes an advisory opinion concerning the application of the Act and
13 Commission regulations to the specific transaction or activity set forth in your request. *See* 52
14 U.S.C. § 30108 (formerly 2 U.S.C. § 437f). The Commission emphasizes that, if there is a
15 change in any of the facts or assumptions presented, and such facts or assumptions are material
16 to a conclusion presented in this advisory opinion, then the requestor may not rely on that
17 conclusion as support for its proposed activity. Any person involved in any specific transaction
18 or activity that is indistinguishable in all its material aspects from the transaction or activity with
19 respect to which this advisory opinion is rendered may rely on this advisory opinion. *See* 52
20 U.S.C. § 30108(c)(1)(B) (formerly 2 U.S.C. § 437f(c)(1)(B)). Please note that the analysis or
21 conclusions in this advisory opinion may be affected by subsequent developments in the law
22 including, but not limited to, statutes, regulations, advisory opinions, and case law. Any

1 advisory opinions and enforcement materials cited herein are available on the Commission's
2 website.

3 On behalf of the Commission,

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Ann M. Ravel
Chair