

December 15, 2009

AO DRAFT COMMENT PROCEDURES

The Commission permits the submission of written public comments on draft advisory opinions when on the agenda for a Commission meeting.

DRAFT ADVISORY OPINION 2009-28 is available for public comments under this procedure. It was requested by Jonathan Zucker, Esq., on behalf of Democracy Engine Inc., PAC.

Draft Advisory Opinion 2009-28 is scheduled to be on the Commission's agenda for its public meeting of Thursday, December 17, 2009.

Please note the following requirements for submitting comments:

1) Comments must be submitted in writing to the Commission Secretary with a duplicate copy to the Office of General Counsel. Comments in legible and complete form may be submitted by fax machine to the Secretary at (202) 208-3333 and to OGC at (202) 219-3923.

2) The deadline for the submission of comments is 12:00pm (Eastern Time) on December 16, 2009.

3) No comments will be accepted or considered if received after the deadline. Late comments will be rejected and returned to the commenter. Requests to extend the comment period are discouraged and unwelcome. An extension request will be considered only if received before the comment deadline and then only on a case-by-case basis in special circumstances.

4) All timely received comments will be distributed to the Commission and the Office of General Counsel. They will also be made available to the public at the Commission's Public Records Office.

CONTACTS

Press inquiries: Judith Ingram (202) 694-1220

Commission Secretary: Mary Dove (202) 694-1040

Other inquiries:

To obtain copies of documents related to AO 2009-28, contact the Public Records Office at (202) 694-1120 or (800) 424-9530 or visit the Commission's website at www.fec.gov.

For questions about comment submission procedures, contact Rosemary C. Smith, Associate General Counsel, at (202) 694-1650.

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2009 DEC 15 P 2:10

AGENDA ITEM
For Meeting of: 12-17-09

December 15, 2009

SUBMITTED LATE

MEMORANDUM

TO: The Commission

FROM: Thomasenia P. Duncan *JPD*
General Counsel

Rosemary C. Smith *RC*
Associate General Counsel

Amy L. Rothstein *ALR*
Assistant General Counsel

Cheryl F. Hemsley *SW for CPH*
Attorney

Joanna Waldstreicher *SW*
Attorney

Subject: Draft AO 2009-28 (Democracy Engine Inc., PAC)

We have been asked to circulate the attached draft of the subject advisory opinion.
Please place this draft on the agenda for December 17, 2009.

Attachment

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DRAFT B

2009 DEC 15 P 2:10

ADVISORY OPINION 2009-28

Jonathan Zucker, Esq.
Treasurer
Democracy Engine, Inc., PAC
2125 14th Street, NW #101W
Washington, DC 20009

Dear Mr. Zucker:

We are responding to your request for an advisory opinion on behalf of the Democracy Engine, Inc., PAC (the "Committee") concerning the application of the Federal Election Campaign Act of 1971, as amended (the "Act"), and Commission regulations to the Committee's plan to solicit the general public to send contributions to the Committee earmarked for Federal candidates.

The Commission concludes that the Committee may not solicit the general public to send contributions to the Committee earmarked for Federal candidates, as proposed.

Background

The facts presented in this advisory opinion are based on your letter received on November 6, 2009 and telephone conversations with Commission staff.

The Committee is a political committee, registered with the Commission as a separate segregated fund ("SSF"). Its connected organization is Democracy Engine, Inc., a Delaware corporation. The Committee was not established by, and is not financed, maintained, or controlled by, any Federal candidate or political party committee, and is not affiliated with any other Federal political committee within the meaning of the Act and Commission regulations.

1 The Committee intends to solicit individual contributions from the general public,
2 earmarked for specific candidates for Federal office, and to act as a “conduit” or
3 “intermediary” for these contributions under 2 U.S.C. 441a(a)(8) and 11 CFR
4 110.6(b)(2). The Committee intends to include more than one candidate in this proposed
5 program.

6 The Committee will not solicit or accept any contributions for its own use under
7 the proposed program. Instead, the Committee will receive and forward only
8 contributions earmarked to certain candidates. The Committee will refund any
9 contribution from a solicited individual that is not earmarked for a specific candidate,
10 along with an explanation that only earmarked contributions will be accepted. The
11 Committee has not yet decided which candidates to include in the program, but multiple
12 candidates will be included, and the Committee represents that it “will not exercise any
13 direction or control over the contributor’s choice of recipient candidate or authorized
14 committee in accordance with 110.6(d)(1).”

15 Each solicitation by the Committee will include all disclaimers required under
16 11 CFR 110.11. They will inform the solicited individuals that: (1) they must be lawful
17 individual contributors under the Act; (2) they must identify a Federal candidate as the
18 intended recipient of their contribution, and the contribution will be treated as earmarked
19 for that candidate; (3) any contributions not earmarked for a candidate will not be
20 accepted by the Committee and will be refunded to the contributor; and (4) earmarked
21 contributions, when aggregated with any other contributions the individual makes to the
22 same candidates, must comply with the contribution limits established by the Act and the
23 Commission’s regulations. *See* 2 U.S.C. 441(a)(1); 11 CFR 110.1(b). The solicitations

1 by the Committee may take a variety of forms and may be made via a variety of media
2 such as on the Committee's website or by email.

3 The Committee will not coordinate its solicitations of earmarked contributions
4 with any candidate or authorized committee. The Committee intends to secure the
5 mailing address for recipient candidates or authorized committees from the recipients'
6 filings with the Commission, and avoid contact with candidates and authorized
7 committees prior to the first transmission of contributions earmarked for the candidate or
8 authorized committee.

9 All earmarked contributions must be made by personal credit card. The
10 Committee will deposit all earmarked contributions in a Committee account that is
11 separate from the account containing the Committee's operating funds.

12 The Committee will forward earmarked contributions to the recipient candidates
13 within ten days of receipt. The Committee will initially send a check for the amount of
14 contributions earmarked for each candidate to the address listed on the candidate's
15 authorized committee's FEC Form 1, as filed with the Commission. After the first
16 transmission, the Committee will communicate with recipient candidates and authorized
17 committees only with respect to administrative matters necessary to continue to transmit
18 earmarked contributions, such as the nature and method of the transmission, compliance
19 data, updated mailing addresses, etc.

20 The Committee will pay all costs associated with its solicitation of earmarked
21 contributions, including a proportionate share of its overhead expenses, using
22 contributions it receives from the restricted class of Democracy Engine, Inc. The amount
23 of contributions transmitted to each recipient candidate or authorized committee will be

1 reduced by the full processing costs, including credit card processing fees and other
2 expenses such as check printing and postage, incurred by the Committee for the
3 earmarked transaction. The Committee intends to contract with a vendor who will
4 provide all processing services for a flat percentage of each contribution. However, if the
5 Committee is unable to do so, all costs will be allocated among the recipients in
6 proportion to their earmarked contributions from a particular contributor. The
7 Committee's connected organization, Democracy Engine, Inc., will not pay any costs
8 associated with these solicitations or the administration of this program.

9 The Committee will report to the Commission and to the candidate or authorized
10 committee all transactions related to the earmarked contributions in accordance with
11 Commission regulations at 11 CFR 110.6(c)(1).

12 ***Questions Presented***

13 *1. May the Committee solicit the general public to send the Committee contributions*
14 *earmarked for Federal candidates?*

15 *2. If the answer to question 1 is yes, then will the solicitation costs paid by the*
16 *Committee be contributions to the candidates who receive the earmarked contributions?*

17 ***Legal Analysis and Conclusions***

18 *1. May the Committee solicit the general public to send the Committee contributions*
19 *earmarked for Federal candidates?¹*

20 No, the Committee may not solicit the general public to send the Committee
21 contributions earmarked for Federal candidates.

¹ This question is similar to one presented in Advisory Opinion Request 2006-14 (NRA PAC). No opinion was issued in that instance, however, because none of the drafts received the affirmative votes of four Commissioners.

1 A solicitation by the Committee of contributions from the general public that are
2 earmarked to the Committee's preferred candidates, which the Committee then collects
3 and forwards to the candidates, would be contrary to the Act because it would be
4 equivalent to the Committee soliciting contributions from the public to the Committee
5 itself. *See* 2 U.S.C. 441b(b)(4)(A)(i). Moreover, a corporate SSF that serves as a conduit
6 for political contributions from individuals who have no connection whatsoever to the
7 SSF's connected organization would disrupt the careful balance struck by Congress in the
8 Act. Additionally, the collection and transmittal by the Committee of contributions from
9 the general public to candidates would go well beyond the forms of "communicat[ion]"
10 with the general public that SSFs are permitted to engage in pursuant to Commission
11 regulations implementing the Act. 11 CFR 114.5(i).

12 The Act generally prohibits corporations from making contributions or
13 expenditures in connection with a Federal election. 2 U.S.C. §441b; 11 C.F.R. § 114.2.²
14 However, the Act does allow for certain limited exceptions to this general ban; of
15 relevance to this request, the Act allows corporations to participate in the Federal
16 electoral process by establishing and maintaining SSFs.³ Though funded by contributions
17 from the sponsoring corporation's restricted class, corporate SSFs are directed and
18 controlled by the corporation itself. The Supreme Court has acknowledged that an SSF
19 "may be completely controlled by the sponsoring corporation . . . , whose officers may
20 decide which political candidates contributions to the fund will be spent to assist. The

² The Supreme Court sought additional briefing and held a rehearing on September 9, 2009, in *Citizens United v. FEC*, S. Ct., No. 08-205. Specifically, the Court asked whether the proper disposition of that case requires overruling either or both *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990), and the part of *McConnell v. Federal Election Comm'n*, 540 U.S. 93 (2003), addressing the facial validity of 2 U.S.C. §441b. As of the time of this Opinion, the Court had yet to issue an opinion.

³ *See FEC v. National Right to Work Comm.*, 459 U.S. 197, 201 (1982).

1 fund must be separate from the sponsoring . . . corporation only in the sense that there
2 must be a strict segregation of its monies from the corporation's other assets."⁴ As such,
3 corporate SSFs may operate as extensions of the sponsoring corporation. Indeed,
4 Commission regulations assume that a corporation has control of its SSF. *See* 11 CFR
5 114.5(d); Advisory Opinion 1996-01 (Ass'n of Trial Lawyers of America). This identity
6 of interest between a corporation and its SSF is reflected in the requirement that an SSF
7 include in its name the full name of the fund's sponsoring organization. *See* 2 U.S.C.
8 432(e)(5); 11 CFR 102.14(c).

9 The unique relationship between a sponsoring corporation and its SSF results in
10 opportunities and limitations that are not applicable to nonconnected committees. In the
11 former category, the Committee's connected corporation is permitted to pay the
12 establishment and administrative costs of the Committee, as well as the cost of soliciting
13 contributions to the Committee. *See* 2 U.S.C. 441b(b)(2)(C); 11 CFR 114.5(b).
14 However, in exchange for being permitted to use corporate funds to pay these costs, the
15 Act limits a corporate SSF to soliciting contributions to itself only from the employees of
16 its connected corporation and their families twice a year, and from those in the
17 corporation's restricted class at any time. *See* 2 U.S.C. 441b(b)(4)(A)(i) and
18 441b(b)(4)(B); 11 CFR 114.5(g) and 114.6. By contrast, an SSF is not permitted to
19 solicit the public at large for contributions to itself. *See* 2 U.S.C. 441b(b)(4)(A)(i);
20 11 CFR 114.5(g). As a result of this unique relationship, solicitations and contributions
21 made by a corporate PAC are, in many ways, attributed to the sponsoring corporation.

⁴ *FEC v. National Right to Work Comm.*, 459 U.S. at 200 n.4 (internal quotation marks and brackets omitted).

1 The Commission concludes that the Committee's proposal to solicit the general
2 public for earmarked contributions to candidates of its own choosing and then to serve as
3 a conduit for those contributions would effectively be the same as impermissibly
4 soliciting the general public for contributions to itself, from which the Committee would
5 then make its own contributions to its chosen candidates. Successful solicitations to the
6 general public of earmarked contributions would not only relieve the Committee of the
7 need to use its own limited funds for making contributions to candidates, thereby
8 enabling the Committee to redirect its own funds for other purposes, such as express
9 advocacy communications. Such earmarked contributions would also be attributed by the
10 recipients to the Committee and the Committee's sponsoring corporation. No purpose
11 would be served by restricting an SSF to soliciting contributions to itself only from its
12 connected organization's restricted class and employees if the SSF could generate
13 unlimited contributions for its chosen candidates by soliciting earmarked contributions
14 from the general public, which it could then bundle and deliver to a candidate. *See*
15 11 CFR 110.6.

16 SSFs were created by the Act to serve as political alter egos for their connected
17 corporations in order to give the corporation a voice in Federal elections that reflected the
18 collective voice of those people associated with the corporation, *i.e.*, the collective voice
19 of the corporation's restricted class and, to a lesser extent, the corporation's employees.
20 Allowing a corporate SSF to serve as a conduit for political contributions from
21 individuals who have no connection whatsoever to the SSF's connected corporation
22 would disrupt the careful balance struck by Congress in the Act. Specifically,
23 contributions from individuals outside the restricted class received and forwarded by a

1 corporate SSF would be attributed by the recipient of the contribution to the SSF and the
2 sponsoring corporation. As the Supreme Court has acknowledged, “[i]t is not only
3 plausible, but likely, that candidates would feel grateful for such donations and that
4 donors would seek to exploit that gratitude.” *McConnell v. FEC*, 540 U.S. 93, 145
5 (2003). While the forwarding of occasional, unsolicited earmarked contributions is
6 unlikely to significantly affect the relationship between the recipients of such
7 contributions and the forwarding SSF, allowing corporate SSFs to solicit and transfer
8 such contributions pursuant to an organized plan or program would undermine the Act’s
9 primary purpose – “to limit the actuality and appearance of corruption.” *Buckley v.*
10 *Valeo*, 424 U.S. 1, 26 (1976). Contributions raised under such a program would be
11 readily attributable to the sponsoring corporation. The amount of contributions raised
12 under such a program would be limited only by the program’s effectiveness, and would
13 not be circumscribed by the size of the corporation’s restricted class.

14 Moreover, an SSF that collects and transmits earmarked contributions from the
15 general public would exceed its authority under Commission regulations to
16 “communicate with the general public.” 11 CFR 114.5(i). Although the Commission has
17 not previously addressed the scope of an SSF’s authority to communicate with the
18 general public under 11 CFR 114.5(i), the Commission has commented on the scope of a
19 corporation’s right to communicate with its restricted class under 2 U.S.C. 441b(b)(2)(A).
20 In Advisory Opinion 1987-29 (Nat’l Ass’n of Life Underwriters), for example, the
21 Commission concluded that a corporation’s right to communicate with its restricted class
22 included the right to solicit its restricted class to send contributions directly to Federal
23 candidates, where the solicitations would be limited to providing information and the

1 corporation would not assist the actual making of any contributions. Under the
2 Committee's proposal, by contrast, the Committee would not only provide information to
3 the general public in the form of solicitations, but it would also collect and forward
4 contributions to candidates. This collection and forwarding activity on the part of the
5 Committee, like the assistance addressed in Advisory Opinion 1987-29 (Nat'l Ass'n of
6 Life Underwriters), would go beyond merely communicating with the general public. As
7 such, it would exceed the Committee's authority under 11 CFR 114.5(i).

8 The facts of this advisory opinion differ materially from those in Advisory
9 Opinions 2003-23 (WE LEAD) and 2006-30 (ActBlue), in which the Commission
10 approved proposals by nonconnected committees to solicit earmarked contributions from
11 the general public that they would then collect and forward to a Federal candidate.

12 Unlike the Committee, WE LEAD and ActBlue did not have a sponsoring corporation to
13 control and subsidize its operations. The Act permits nonconnected committees, such as
14 WE LEAD and ActBlue, to solicit contributions to themselves from the general public,
15 unlike connected SSFs, such as the Committee, which are generally limited to soliciting
16 their connected organizations' restricted class. *See* 2 U.S.C. 441b(b)(4). In fact,
17 nonconnected political committees depend entirely on public solicitations to fund their
18 operations. Because nonconnected committees do not have connected organizations to
19 fund their establishment, administration, and solicitation costs, they do not present the
20 same concerns regarding disproportionate corporate influence as do corporate SSFs.

21 Thus, unlike SSFs, nonconnected committees may solicit contributions for themselves
22 from the general public and they may also solicit, collect and forward contributions
23 earmarked to clearly identified Federal candidates from the general public. "The

1 differing structures and purposes of different entities may require different forms of
2 regulation in order to protect the integrity of the electoral process.”⁵

3 *2. If the answer to question 1 is yes, then are the solicitation costs paid by the Committee*
4 *contributions to the candidates who receive the earmarked contributions?*

5 Because the answer to question 1 is no, the Commission does not reach question
6 2.

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

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⁵ *FEC v. National Right to Work Comm.*, 459 U.S. at 210 (internal quotation marks and citations omitted).

1 The cited advisory opinions are available on the Commission's Web site at
2 <http://saos.nictusa.com/saos/searchao>.

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On behalf of the Commission,

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Steven T. Walther
Chairman

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