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May 19, 2011

BY HAND DELIVERY

Christopher Hughey, Esq.
Acting General Counsel
Federal Election Commission
999 E Street N.W.
Washington, D.C. 20463

Re: Advisory Opinion Request

Dear Mr. Hughey:

Pursuant to 2 U.S.C. § 437f, we seek an advisory opinion on behalf of Majority PAC and House Majority PAC (hereinafter, the "PACs"). The PACs pose the following questions:

1. Despite the Supreme Court's decision in *McConnell v. FEC* upholding the soft money solicitation ban, may Federal officeholders and candidates, and officers of national party committees (hereinafter, "covered officials") solicit unlimited individual, corporate, and union contributions on behalf of the PACs without violating 2 U.S.C. 441i?¹
2. If the answer to the first question is "no," please confirm that covered officials do not violate 2 U.S.C. § 441i if they participate in fundraisers for the PACs at which unlimited individual, corporate, and union contributions are raised, provided that they do not solicit such contributions by complying with 11 C.F.R. § 300.64.

While there is no doubt that covered officials may solicit federally permissible funds – *e.g.* contributions of up to \$5,000 from individuals and Federal PACs – on behalf of the PACs, the

¹ The request does not ask about how 11 C.F.R. § 109.21 would apply to these activities. Additionally, as stated in Advisory Opinion Request 2010-11, the PACs will not solicit or accept funds from foreign nationals as defined by 2 U.S.C. § 441e; federal contractors as defined by 2 U.S.C. § 441c; or national banks or corporations organized by act of Congress, as described in 2 U.S.C. § 441b(a).

restrictions set forth at 2 U.S.C. § 441i would appear to prohibit covered officials from soliciting unlimited individual, corporate, and union contributions on behalf of the PACs. However, in light of the news media reports suggesting that the Republican Super PAC plans to ask covered officials to solicit such contributions on its behalf, the PACs ask the Commission whether covered officials may solicit unlimited individual, corporate, and union contributions on their behalf as well.² If the Commission does not find that such solicitations violate 2 U.S.C. § 441i, the PACs plan to ask covered officials to make such solicitations on their behalf.

We ask the Commission to expedite this request and issue a response as soon as possible. The Commission has long adhered to an "informal practice of expediting certain highly significant, time-sensitive requests (whether or not relating to an upcoming election). The Commission endeavors to issue advisory opinions within 30 days under this general expedited process." Notice of New Advisory Opinion Procedures and Explanation of Existing Procedures, 74 F.R. 32160, 32162 (July 7, 2009). These questions are both highly significant and time-sensitive. The first question, in particular, implicates whether the solicitation restrictions set forth in the Bipartisan Campaign Reform Act continue to apply after the Supreme Court's decision in *Citizens United v. FEC*, 558 U.S. 50 (2010) and the D.C. Circuit's decision in *SpeechNow.org v. FEC*, 599 F.3d 686 (D.C. Cir. 2010). Until the Commission definitively resolves these questions, the PACs and covered officials will be left in a state of legal limbo.

I. BACKGROUND

On June 11, 2010, Majority PAC – under its previous name, Commonsense Ten – filed a Statement of Organization with the Commission.³ The same day, it filed an advisory opinion request with the Commission, asking whether it could solicit and accept unlimited individual, corporate, and union contributions, and report those contributions to the Commission, provided that it only made independent expenditures and did not make any contributions to Federal candidates or committees. The following month, the Commission issued an advisory opinion confirming that "the Committee may solicit and accept unlimited contributions from individuals, political committees, corporations, and labor organizations" provided that the Committee agrees to "not use those funds to make contributions, whether direct, in-kind, or via coordinated communications, to federal candidates or committees." Advisory Opinion 2011-11 (Commonsense Ten).⁴ In addition, the *SpeechNow* opinion made clear that the biennial limits

² See, e.g. <http://www.politico.com/news/stories/0511/55091.html>; <http://thecaucus.blogs.nytimes.com/2011/05/16/citizens-united-lawyer-creates-super-pac/> (accessed on May 19, 2011).

³ On March 9, 2011, Commonsense Ten amended its Statement of Organization to change its name to Majority PAC.

⁴ On the same day, the Commission issued Advisory Opinion Request 2011-09 (Club for Growth), which reached the same conclusion.

found at 2 U.S.C. § 441a(a)(3) do not apply to contributions made to these independent expenditure committees. *See SpeechNow.org*, 599 F.3d at 696.

Consistent with this advisory opinion, the PACs have solicited and accepted unlimited contributions from individuals, corporations, and unions, including from individuals who have reached their biennial aggregate limits, and are reporting these contributions to the Commission in accordance with Commission deadlines.⁵ Furthermore, the PACs have not used these funds to make contributions to Federal candidates, political party committees, or other political committees that make contributions to Federal candidates or party committees.

Just this week, several news media outlets reported that a new Super PAC, dubbed the Republican Super PAC, planned to ask covered persons – including Members of Congress – to solicit unlimited individual, corporate, and union contributions on its behalf, which it would then use in connection with Federal and non-Federal elections. According to a recent invitation (attached as Exhibit A), the Republican Super PAC would work as follows:

Political parties and candidates would solicit and direct federal and state contributions from donors, above the current state and federal contribution and source limitations, to [Republican Super PAC] as earmarked funds for independent expenditures supporting or opposing specifically designated federal and/or state candidates or candidates in a certain state or states.

See Exhibit A (emphasis added), available at <http://reporting.sunlightfoundation.com/2011/New-bopp-super-pac/>.

II. QUESTIONS PRESENTED

In light of these facts, the PACs request the following:

1. May covered officials solicit unlimited individual, corporate, and union contributions on behalf of the PACs without violating 2 U.S.C. § 441i?

While covered officials may clearly solicit federally permissible funds on behalf of the PACs, the restrictions set forth at 2 U.S.C. § 441i would appear to prohibit covered officials from soliciting unlimited individual, corporate, and union contributions on behalf of the PACs. *See McConnell v. FEC*, 540 U.S. 93, 142-54, 181-184 (2003) (upholding soft money solicitation ban for national parties, Federal candidates and officeholders); *RNC v. FEC*, 698 F. Supp. 2d 150, 156-60 (D.D.C. 2010) (rejecting RNC's as-applied challenge to soft money solicitation ban), *aff'd* 130 S.Ct. 3544 (2010). In fact, the plaintiffs in *Citizens United* and *SpeechNow* – the cases that led to the creation of Super PACs – did not even challenge the solicitation restrictions set forth at

⁵ House Majority PAC filed its Statement of Organization on April 8, 2011.

2 U.S.C. §§ 441i(a) and 441i(e)(1)(A), which prohibit covered persons from raising funds in connection with a Federal or non-Federal election⁶ that do not comply with the amount limitations and source prohibitions of the Act.

Despite this, the Republican Super PAC is reportedly asking covered officials to solicit unlimited individual, corporate, and union contributions on its behalf. In light of this development, the PACs ask the Commission whether covered officials may solicit unlimited individual, corporate, and union contributions on their behalf as well. If the Commission does not find that such solicitations violate 2 U.S.C. § 441i, the PACs plan to ask covered officials to make such solicitations on their behalf.

2. If the answer to Question 1 is "no," may covered officials participate in fundraisers for the PACs at which unlimited individual, corporate, and union contributions are raised, provided that they do not solicit such contributions by complying fully with 11 C.F.R. § 300.64?

In accordance with 11 C.F.R. § 300.64 – to ensure that no illegal solicitation is made – the PACs wish to clarify the legality of having covered officials participate in fundraisers for the PACs at which unlimited individual, corporate, and union contributions are raised. The Act makes it illegal for a Federal candidate or officeholder to "solicit, receive, direct, transfer, or spend funds in connection with an election for Federal office, including funds for any Federal election activity, unless the funds are subject to the limitations, prohibitions, and reporting requirements of this Act." 2 U.S.C. § 441i(e)(1)(A). Likewise, the Act makes it illegal for a "[a] national committee of a political party ... [to] solicit, receive, or direct to another person a contribution, donation, or transfer of funds or any other thing of value, or spend any funds, that are not subject to the limitations, prohibitions, and reporting requirements of this Act." *Id.* § 441i(a)(1). The ban extends to officers of national party committees. *See id.* § 441i(a)(2). The term "solicit" is a defined term under 11 C.F.R. § 300.2(m).

In 2010, the Commission amended 11 C.F.R. § 300.64, which interprets and implements the directive at 2 U.S.C. § 441i(e)(3) that "[n]otwithstanding [the general prohibition on Federal officeholders and candidates soliciting non-Federal funds], a candidate or an individual holding Federal office may attend, speak, or be a featured guest at a fundraising event for a State, district, or local committee of a political party." Initially, the Commission interpreted this statutory provision to provide "a total exemption from the general solicitation ban," and promulgated a regulation permitting Federal candidates and officeholders to "attend, speak, and appear as featured guests at State, district, and local party committee fundraising events 'without restriction or regulation.'" Explanation and Justification, Participation by Federal Candidates and

⁶ The prohibition on national party committees and their agents also applies to funds not raised in connection with an election.

Officeholders at Non-Federal Fundraising Events, 75 F.R. 24375, 24376 (May 5, 2010), *quoting* Revised Explanation and Justification, Candidate Solicitation at State, District, and Local Party Fundraising Events, 70 F.R. 37649, 37650-51 (June 30, 2005).

Yet in the *Shays III* decision, the D.C. Circuit found that 2 U.S.C. 441i(e)(3) does not create an exemption to the solicitation ban; instead, it "'merely clarifies' that Federal candidates may attend, speak, and appear as featured guests at State, district, and local party committee events without such activities constituting an unlawful 'solicitation.'" 75 F.R. at 24377, *quoting Shays v. FEC*, 528 F.3d 914, 933 (D.C. Cir. 2008) ("*Shays III*"). The amended section 300.64 reflects the determination of the *Shays III* court that an appearance by a Federal candidate or officeholder at a fundraising event in accordance with section 300.64 does *not* result in a "solicitation" of non-Federal funds. *See, e.g.* 75 F.R. at 24381 (emphasis added) ("Paragraph (c)(3) of new 11 CFR 300.64 ... is based on the Commission's determination that a Federal candidate [or] officeholder ... may approve, authorize, agree to, or consent to the use of the Federal candidate's or officeholder's name or likeness on publicity for a non-Federal fundraising event *in a manner that does not result in the solicitation being attributed to the Federal candidate or officeholder.*").

Consequently, section 300.64 permits Federal officeholders and candidates to participate in events for the PACs where unlimited individual, corporate, and union funds are raised, provided that the Federal officeholders and candidates do not solicit such funds by complying fully with section 300.64. Although 2 U.S.C. 441i(e)(3) refers only to events for a State, district, or local committee of a political party, the *Shays III* court and the Commission have already determined that "the same underlying framework applies to all fundraising events." 75 F.R. at 24379. Thus, "if the statutory ban on soliciting soft money does not prohibit a Federal candidate or officeholder from attending, speaking at, or being a featured guest at a State, district, or local party committee's non-Federal fundraising event, then the statutory ban also does not prohibit the same person from engaging in the same activities at any other ... event" at which unlimited individual, corporate, or union funds are raised. *Id.* *See also* 75 F.R. at 24378 (emphasis added) ("the rule covers participation by Federal candidates and officeholders regardless of whether the entity sponsoring the event is a State or local candidate committee, State political committee, *or any other organization that hosts a fundraising event in connection with an election for Federal office or any non-Federal election.*").

For the same reasons, national party committee officers may also participate in events for the PACs at which unlimited individual, corporate, and union funds are raised, provided that the party officers do not "solicit" such funds by complying fully with 11 C.F.R. § 300.64. Because a person participating in an event in full compliance with section 300.64 does not make a "solicitation" of funds, the restrictions set forth at 2 U.S.C. § 441i(a) are not implicated.

III. CONCLUSION

We reiterate our request that the Commission issue a response on an expedited basis. It is of

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vital importance that the Commission quickly provides clear guidance on these crucial questions.

Very truly yours,

A handwritten signature in black ink, reading "Marc E. Elias" followed by a stylized monogram "JSB".

Marc E. Elias
Ezra W. Reese
Jonathan S. Berkon
Counsel to Majority PAC and House Majority PAC

Exhibit A

Invitation to A Discussion Regarding The Republican Super PAC

Hosted by

Roger Villere, Chairman

Solomon Yue, Vice Chairman

James Bopp, Jr. Secretary/Treasurer and General Counsel

Location: Tenison Room

Westin Park Central Hotel

Dallas, Texas

Time: 9:30 - 10:30 am

Date: Wednesday, May 18, 2011

Republican Super PAC (RSPAC) is a federal independent expenditure PAC, founded by Roger Villere, Solomon Yue, and James Bopp, Jr. It is designed to give national and state Republican political party committees and local, state and, federal Republican candidates the ability to raise unlimited individual and corporate contributions for independent expenditures in support of federal and state candidates.

The RSPAC will operate as a clearance warehouse for independent expenditures as a federal IEPAC, as well as through tailor-made state IEPACs based on each state's requirements, to serve the following Republican candidates and committees:

- 1) Local and regional candidates, e.g. Mayor, State House & Senate, etc.
- 2) Statewide candidates, e.g. Governor, Secretary of State, etc.
- 3) Congressional, Senate and Presidential candidates, and
- 4) State and National political parties.

RSPAC also has the following features to establish accountability and transparency, and to ensure legality and maximum effectiveness:

- 1) Political parties and candidates would solicit and direct federal and state contributions from donors, above the current state and federal contribution and source limitations, to RSPAC as earmarked funds for independent expenditures supporting or opposing specifically designated federal and/or state candidates or candidates in a certain state or states,
- 2) Donors would make earmarked contributions to RSPAC for support of or in opposition to specifically designated federal and/or state candidates or candidates in certain states,
- 3) RSPAC would open both federal and state accounts for such earmarked funds, design independent expenditures for such candidates, solicit bids from vendors, place orders with vendors for independent expenditures, keep books to account for all contributions and expenditures, meet all federal and state legal and reporting requirements and, after the election, open their books to donors and soliciting political parties and candidates, so that the spending decisions by RSPAC are subject to total transparency,
- 4) RSPAC would coordinate spending with other independent spenders to bridge gaps in the independent campaigns supporting Republican candidates, and
- 5) RSPAC's personal would be firewalled off from appropriate political parties and candidates, and their agents, to prevent coordination and other legal concerns.

The best way to neutralize President Obama's unprecedented \$1 billion political war chest and the political spending by labor unions and wealthy Democrats is to build a super fundraising infrastructure for independent expenditure spending. We hope you would join us to discuss this new and exciting project and how it can help your state's efforts to elect Republican candidates.

Roger Villere
Solomon Yue
James Bopp, Jr.

Paid for by Republican Super PAC. Not Authorized by any Candidate.