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For meeting of September 29, 2016
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September 29, 2016

MEMORANDUM

TO: The Commission

FROM: Lisa J. Stevenson *LJS*
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Subject: AO 2016-10 (Parker) Draft C

Attached is a proposed draft of the subject advisory opinion.

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 2016-10

2

3 Caroline Goodson Parker

4 1776 Emily Lane

5 Bowen Island, BC V0N 1G2

6

7

8 Dear Ms. Parker:

DRAFT C

9 We are responding to your advisory opinion request concerning the application of the
10 Federal Election Campaign Act, 52 U.S.C. §§ 30101-30146 (“the Act”), and Commission
11 regulations to your proposal to solicit contributions or donations to state and local party
12 committees. The Commission concludes that as a United States citizen living abroad, you may
13 solicit contributions or donations to state and local party committees, but that you may not
14 knowingly do so from a foreign national. The Commission also concludes that you are not
15 required to notify those whom you solicit about the prohibition on soliciting foreign nationals
16 and that you may inform a state or local party committee that you are soliciting contributions or
17 donations to that committee. The Commission could not approve a response by the required four
18 affirmative votes regarding your proposal to solicit persons who told you several years ago that
19 they were U.S. citizens but who reside abroad.

20 ***Background***

21 The facts presented in this advisory opinion are based on your letter received on August
22 26, 2016.

23 You are a U.S. citizen living in Canada. You plan to solicit friends and family by email
24 or text message for contributions or donations to state and local party committees. You would
25 also encourage these individuals to solicit contributions or donations from their friends and
26 family. You include an example of a communication you plan to send:

1 Sprinklers needed to help the grassroots grow! Donate to [link to a state/local party's
2 donation page], or Google your own favorite state or local party in a swing state and
3 sprinkle your dollars where they'll fund the most important get-out-the-vote effort ever.
4 Pass this on!

5
6 Advisory Opinion Request at AOR002. You state that you might also encourage friends to
7 include their own message or video in their solicitations. *Id.*

8 Some of the individuals you wish to solicit reside outside the U.S. but told you several
9 years ago that they were U.S. citizens. *Id.* You state that these individuals have their own
10 networks of friends and family “who might be interested to know more about supporting state
11 and local parties’ grassroots activities in swing states.” *Id.* You also state that you would like to
12 solicit friends who are Canadian citizens but have lived in the U.S. for over five years. *Id.*

13 ***Questions Presented***

14 *1) As a U.S. citizen residing abroad, may you solicit contributions or donations to state and local*
15 *party committees by email or text, using the sample language provided above?*

16 *2) Are you required to take any steps to ascertain the citizenship status of individuals that you*
17 *plan to solicit, including U.S. citizens residing abroad and individuals who moved to the U.S.*
18 *from Canada more than five years ago? Is the answer to this question different if you restrict*
19 *your email and text message solicitations to friends and family who live in the U.S. and who have*
20 *not, to your knowledge, lived abroad?*

21 *3) Are you required to warn individuals whom you solicit that they are prohibited from soliciting*
22 *foreign nationals? Does this answer change if you restrict your email and text message*
23 *solicitations to friends and family who live in the U.S. and who have not, to your knowledge,*
24 *lived abroad?*

1 4) *May you inform state and local party committees about your efforts to solicit contributions or*
2 *donations to those committees?*

3 ***Legal Analysis and Conclusions***

4 1) *As a U.S. citizen residing abroad, may you solicit contributions or donations to state and local*
5 *party committees by email or text, using the sample language provided above?*

6 Yes, you may solicit contributions and donations from other U.S. citizens to state and
7 local party committees by email or text, using the sample language provided above.

8 The Act and Commission regulations prohibit any foreign national from making a
9 contribution or donation to a committee of a political party. 52 U.S.C. § 30121(a)(1)(B); 11
10 C.F.R. § 110.20(c). Commission regulations also prohibit any person from knowingly soliciting
11 such a contribution or donation. 11 C.F.R. § 110.20(g); *see* 52 U.S.C. § 30121(a)(2). These
12 provisions do not prohibit U.S. citizens from making contributions or donations or from
13 soliciting such funds from other U.S. citizens, regardless of residence. *See, e.g.*, 52 U.S.C.
14 § 30121(b) (providing that “foreign national” does not include “any individual who is a citizen of
15 the United States”); 11 C.F.R. § 110.20(a)(3)(iii) (same);¹ *see also* 93 Cong. Rec. S4715 (daily
16 ed. March 28, 1974) (statement of Sen. Bentsen) (indicating congressional intent to ensure U.S.
17 citizens abroad could participate in U.S. elections); Factual and Legal Analysis at 14, MURs
18 6078/6090/6108/6139/6142/6214 (Obama for America) (stating that “U.S. citizen[s] living
19 abroad . . . [are] entitled to make contributions”). Therefore, the Act and Commission
20 regulations do not prohibit you from soliciting contributions and donations from U.S. citizens to
21 state and local party committees by email or text, using the sample language provided above.

¹ In addition to U.S. citizens, the foreign national prohibition also does not apply to non-citizens who are lawfully admitted to permanent residence in the U.S., or to U.S. nationals. 52 U.S.C. § 30121(b).

1 2) *Are you required to take any steps to ascertain the citizenship status of individuals that you*
2 *plan to solicit, including U.S. citizens residing abroad and individuals who moved to the U.S.*
3 *from Canada more than five years ago? Is the answer to this question different if you restrict*
4 *your email and text message solicitations to friends and family who live in the U.S. and who have*
5 *not, to your knowledge, lived abroad?*

6 Yes, you would be required to ascertain the citizenship status of some of the individuals
7 whom you plan to solicit to avoid knowingly soliciting foreign nationals, while soliciting only
8 U.S. residents would generally limit your obligation to inquire into those individuals'
9 nationalities.

10 As noted above, Commission regulations prohibit any person from knowingly soliciting a
11 contribution or donation from a foreign national. 11 C.F.R. § 110.20(g); *see also* 52 U.S.C.
12 § 30121(a)(2). For the purpose of this prohibition, the regulation defines “knowingly” as (i)
13 having actual knowledge the person solicited is a foreign national, (ii) being aware of facts that
14 would lead a reasonable person to conclude that there is a substantial probability that the person
15 solicited is a foreign national, or (iii) being aware of facts that would lead a reasonable person to
16 inquire whether the person solicited is a foreign national but failing to make such an inquiry. 11
17 C.F.R. § 110.20(a)(4). The regulation includes a non-exhaustive list of “pertinent facts” that
18 would lead a reasonable person to inquire further as to the citizenship status of a solicited person,
19 including that the potential donor provides a foreign address or resides abroad. 11 C.F.R.
20 § 110.20(a)(5). Commission regulations also provide a safe harbor, whereby a person is deemed
21 to have conducted a reasonable inquiry if she seeks and obtains copies of current and valid U.S.
22 “passport papers” for the solicited person, as long as the person conducting the inquiry does not
23 have actual knowledge that the solicited person is a foreign national. 11 C.F.R. § 110.20(a)(7).

1 Pursuant to these regulations, your responsibility to inquire into the citizenship status of a
2 person whom you solicit depends upon whether you are aware of facts that would lead a
3 reasonable person to believe — or to inquire into whether — the solicited individual is a foreign
4 national.

5 You indicate that you wish to solicit Canadian friends who have moved to the U.S. and
6 have lived here for over five years. Because you have actual knowledge that these individuals
7 were foreign nationals at some point in the past, you may not solicit them for contributions or
8 donations unless you are able to determine through a reasonable inquiry that they are no longer
9 foreign nationals. *See* 11 C.F.R. § 110.20(a)(4)(iii).

10 You ask in the alternative whether you would need to further inquire about the citizenship
11 status of solicited individuals if you solicit only friends or family who live in the U.S. and who
12 have not, to your knowledge, lived abroad. Limiting your solicitations to friends and family who
13 live in the U.S. and who have not, to your knowledge, lived abroad, would not obligate you to
14 conduct further inquiry about citizenship status due to the residence of the individuals whom you
15 solicit.²

16 Should you choose to seek and obtain copies of current and valid U.S. “passport papers”
17 for the solicited individuals, you may rely on the safe harbor provision, provided that you do not
18 have actual knowledge that the individual is a foreign national.

19 Regarding your proposal to solicit persons who told you several years ago that they were
20 U.S. citizens but who reside abroad, the Commission could not approve a response by the
21 required four affirmative votes. *See* 52 U.S. § 30106(c); 11 C.F.R. § 112.4(a).

² However, if you are aware of other facts that would indicate a substantial probability that a solicited person is a foreign national, you must still make a reasonable inquiry into that person’s citizenship status. *See* 11 C.F.R. § 110.20(a)(4)(iii), (5) (providing non-exhaustive list of facts that would lead a reasonable person to inquire further as to the citizenship status of a contributor to avoid “knowingly” soliciting a foreign national).

1 3) Are you required to warn individuals whom you solicit that they are prohibited from soliciting
2 foreign nationals? Does this answer change if you restrict your email and text message
3 solicitations to friends and family who live in the U.S. and who have not, to your knowledge,
4 lived abroad?

5 No, you are not required to warn the individuals whom you solicit, regardless of where
6 they live, that they are prohibited from soliciting foreign nationals.

7 In addition to prohibiting any person from knowingly soliciting a foreign national for
8 contributions or donations to a party committee, Commission regulations also prohibit
9 knowingly providing substantial assistance in the solicitation of a foreign national. 11 C.F.R.
10 § 110.20(h)(1). Substantial assistance “means active involvement in the solicitation, making,
11 receipt or acceptance of a foreign national contribution or donation with an intent to facilitate
12 successful completion of the transaction.” Contribution Limitations and Prohibitions, 67 Fed.
13 Reg. 69, 928, 69,945 (Nov. 19, 2002).

14 Merely including in your solicitation the phrase “Pass it on!” or a similar exhortation for
15 the individuals whom you solicit to conduct their own solicitations does not constitute “active
16 involvement” in their solicitation. *See id.* at 69,946 n.9 (citing *IIT, An Int’l Inv. Trust v.*
17 *Cornfeld*, 619 F.2d 909, 922 (2d Cir. 1980) (internal citation omitted), for proposition that to
18 satisfy “substantial assistance” standard courts have historically required “accessor[ies] to an
19 activity” to “participate in it” or take “action to make it succeed”); *cf.* Factual and Legal Analysis
20 at 5-6, MUR 6528 (Michael Grimm for Congress, *et al.*) (finding reason to believe that
21 respondent violated regulation where respondent provided foreign national’s name to
22 intermediary; requested that intermediary solicit foreign national for contribution; and informed
23 foreign national that he could not contribute unless he used intermediary to conceal source of

1 contribution). Thus, if you solicit only lawful potential contributors (as described above), and
2 then those individuals, without any further action on your part, solicit others, your solicitation
3 would not amount to knowingly providing substantial assistance in the solicitation of a foreign
4 national. Accordingly, you are not required to include a warning about the prohibition on
5 soliciting foreign nationals.

6 *4) May you inform state and local party committees about your efforts to solicit contributions to*
7 *those committees?*

8 Yes, you may inform state and local party committees about your efforts to solicit
9 donations for those committees.

10 The Act and Commission regulations do not prohibit a person from informing a political
11 party committee about that person's efforts to solicit contributions or donations to that party
12 committee. Although certain communications that are coordinated with a party committee
13 constitute in-kind contributions to the committee, 11 C.F.R. § 109.21(b), merely informing the
14 committee about the solicitations as proposed does not render the proposed solicitations
15 coordinated communications.³ See 11 C.F.R. § 109.21(a), (c), (d). Thus, as described in your
16 request, informing state and local party committees about your solicitation efforts will not cause
17 the solicitations to become in-kind contributions.⁴

18 This response constitutes an advisory opinion concerning the application of the Act and
19 Commission regulations to the specific transaction or activity set forth in this advisory opinion

³ The facts presented in your request do not indicate that you will be engaging in two-way communication with any party committees concerning your solicitations or asking those committees to take any action. Therefore, the Commission does not opine on the potential ramifications under the Act of any interactions between you and a party committee other than informing the committee of the solicitations as proposed.

⁴ In addition, your solicitations by email would constitute uncompensated internet activity that is exempt from the regulatory definitions of "contribution" and "expenditure." See 11 C.F.R. §§ 100.94, 100.155.

1 request. *See* 52 U.S.C. § 30108. The Commission emphasizes that, if there is a change in any of
2 the facts or assumptions presented, and such facts or assumptions are material to a conclusion
3 presented in this advisory opinion, then you may not rely on that conclusion as support for its
4 proposed activity. Any person involved in any specific transaction or activity which is
5 indistinguishable in all its material aspects from the transaction or activity with respect to which
6 this advisory opinion is rendered may rely on this advisory opinion. *See* 52 U.S.C.
7 § 30108(c)(1)(B). Please note that the analysis or conclusions in this advisory opinion may be
8 affected by subsequent developments in the law including, but not limited to, statutes,
9 regulations, advisory opinions, and case law. Any advisory opinions cited herein are available
10 on the Commission's website.

11 On behalf of the Commission,

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14
15 Matthew S. Petersen
16 Chairman