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FEDERAL ELECTION COMMISSION
Washington, DC 20463

August 13, 2009

AGENDA ITEM
For Meeting of: 8-27-09

MEMORANDUM

TO: The Commission

FROM: Thomasenia P. Duncan *JPD*
General Counsel

Rosemary C. Smith *RCS*
Associate General Counsel

Amy L. Rothstein *ALR*
Assistant General Counsel

Esther D. Heiden *EDH*
Attorney

Subject: Draft AO 2009-19 (Club for Growth)

We have been asked to circulate the two attached alternative drafts of the subject advisory opinion. Please place these drafts on the agenda for August 27, 2009.

Attachments

1 ADVISORY OPINION 2009-19

2

3 Mr. David Keating

4 Executive Director

5 Club for Growth

6 2001 L Street, NW

7 Suite 600

8 Washington, DC 20036

9

10 Dear Mr. Keating:

DRAFT A

11 We are responding to your advisory opinion request on behalf of Club for Growth
12 and Club for Growth PAC, concerning the application of the Federal Election Campaign
13 Act of 1971, as amended (the “Act”), and Commission regulations to the use of
14 contributor information contained in reports filed with the Commission.

15 The Commission concludes that Club for Growth and Club for Growth PAC may
16 use contributor information contained in reports filed with the Commission to notify
17 contributors to Senator Arlen Specter’s 2010 Senate re-election campaign that Senator
18 Specter has switched his party affiliation, and has publicly offered to refund contributions
19 upon request.

20 ***Background***

21 The facts presented in this advisory opinion are based on your letter received on
22 June 25, 2009, and conversations with Commission attorneys.

23 Club for Growth (“Club”) is an incorporated nonprofit membership organization
24 exempt from taxation under section 501(c)(4) of the Internal Revenue Code. Club for
25 Growth PAC (“Club PAC”) is the separate segregated fund of the Club and is a
26 multicandidate committee under Commission regulations.

1 Senator Arlen Specter represents the Commonwealth of Pennsylvania. Citizens
2 for Arlen Specter (“Specter Committee”) is his authorized campaign committee. On
3 April 28, 2009, Senator Specter announced that he had decided to switch his party
4 affiliation and to run as a Democrat for the 2010 Senate election. *See* Press Release,
5 Citizens for Arlen Specter, Statement by Arlen Specter (April 28, 2009) (attached to
6 advisory opinion request). In his press release, Senator Specter stated that he would
7 return campaign contributions made during the 2010 election cycle upon request.

8 The Club and Club PAC wish to communicate with individual contributors to the
9 Specter Committee to inform them of Senator Specter’s decision to run as a Democrat in
10 the 2010 election. The Club and Club PAC propose to compile a list of contributors from
11 information contained in campaign finance reports that the Specter Committee has filed
12 with the Commission. The communications would notify contributors about Senator
13 Specter’s policy of providing refunds upon request to those who contributed to his
14 campaign while he was running as a Republican. The communications would not contain
15 any express advocacy or mention any other candidate.

16 Either the Club or Club PAC would send a one-time letter to contributors to the
17 Specter Committee, or alternatively, for those contributors with published phone
18 numbers, the Club or Club PAC may make a one-time telephone call. The letter would
19 inform contributors to the Specter Committee of Senator Specter’s decision to switch to
20 the Democratic Party and his policy of refunding contributions upon request. A
21 preprinted form letter requesting a contribution refund and envelope addressed directly to
22 the Specter Committee would be enclosed with the letter. Neither the Club nor Club
23 PAC would know who sends this form letter to the Specter Committee. If the Club or

1 Club PAC makes a phone call to a contributor, the phone call would inform the
2 contributor of Senator Specter's decision to switch parties and his refund policy. The
3 contributor would be asked if he or she would like to have the Club or Club PAC either
4 send the contributor information on how to request the refund, or provide this information
5 during the telephone call. Both the letter and the telephone call would inform
6 contributors that the Specter Committee is not required by statute or regulations to refund
7 these contributions.

8 The communications would not contain any solicitation of any kind for the Club,
9 Club PAC, any candidate, or any other entity. No follow up mailings or telephone calls
10 would be made unless, during the initial telephone call, the contributor requests further
11 information from the Club or Club PAC on how to request a refund. The
12 communications would be made independently of any candidate or political party.

13 The Club and Club PAC would not use the list for any purpose other than the
14 communication proposed in the advisory opinion request, and would not retain the list for
15 any other purpose. The Club and Club PAC would not put any of the contact information
16 obtained from the Specter Committee's Commission filings into either the Club or the
17 Club PAC's general membership database. The Club and Club PAC would not make the
18 list of contributors to the Specter Committee available to any other entity.

19 ***Question Presented***

20 *May the Club or Club PAC use information obtained from campaign finance*
21 *reports filed with the Commission to communicate with contributors to the Specter*
22 *Committee informing them of Senator Specter's decision to switch parties and his refund*
23 *policy?*

1 ***Legal Analysis and Conclusion***

2 Yes, the Club and Club PAC may use contributor information contained in reports
3 filed with the Commission for the purpose of making communications informing
4 contributors to the Specter Committee of Senator Specter's decision to run as a Democrat
5 and his policy of refunding contributions upon request.

6 Under the Act and Commission regulations, political committees are required to
7 file reports with the Commission identifying the names and mailing addresses of
8 contributors. 2 U.S.C. 434(b)(2)(A) and (b)(3)(A); 11 CFR 104.8(a). The Act provides
9 that the Commission shall make reports and statements filed with it available to the
10 public for inspection and copying within 48 hours after receipt. 2 U.S.C. 438(a)(4). Any
11 information copied from such reports or statements, however, "may not be sold or used
12 by any person for the purpose of soliciting contributions or for commercial purposes,"
13 other than using the name and address of a political committee to solicit contributions
14 from that political committee. *Id.*; *see also* 11 CFR 104.15(a). Under Commission
15 regulations, "soliciting contributions" includes soliciting any type of contribution or
16 donation, such as political or charitable contributions. 11 CFR 104.15(b).

17 Thus, in addition to requiring the disclosure of contributor information, Congress
18 provided limitations to ensure that such information was not misused. Congress was
19 concerned that the Act's reporting requirements "open up the citizens who are generous
20 and public spirited enough to support our political activities to all kinds of harassment
21" 117 Cong. Rec. 30057 (daily ed. Aug. 5, 1971) (statement of Sen. Bellmon).
22 Specifically, Senator Bellmon, sponsor of the prohibition on the use of individual
23 contributors' names and addresses, stated that the purpose of the prohibition was to

1 “protect the privacy of the generally very public-spirited citizens who may make a
2 contribution to a political campaign or a political party.” *Id.* In his remarks on the
3 Senate floor, however, Senator Bellmon acknowledged the limitations of the prohibition.
4 *See id.* at 30058 (The prohibition “is intended to protect, at least to some degree, the men
5 and women who make contributions to candidates or political parties from being
6 victimized by” having their names sold to list brokers). Indeed, in his response to a
7 question from Senator Nelson, Senator Bellmon confirmed that the “only purpose” of the
8 prohibition is to “prohibit the lists [of contributor names and addresses] from being used
9 for commercial purposes.” 117 Cong. Rec. 30058 (daily ed. Aug. 5, 1971) (statements of
10 Sen. Nelson and Sen. Bellmon).

11 The Commission has applied this solicitation and commercial use prohibition in
12 several advisory opinions. In Advisory Opinion 1981-05 (Findley), the Commission
13 concluded that a candidate could use information obtained from disclosure reports to mail
14 letters to contributors to his opponent’s campaign to correct allegedly defamatory charges
15 made by his opponent. In Advisory Opinion 1984-02 (Gramm), a non-connected
16 political committee calling itself “Americans for Phil Gramm in ‘84” solicited
17 contributions without the permission of Phil Gramm or his authorized campaign
18 committee. The Commission concluded that Representative Gramm and his authorized
19 campaign committee could use contributor information contained in Americans for Phil
20 Gramm in ‘84’s disclosure reports to inform contributors that the non-connected
21 committee was not Phil Gramm’s authorized committee.

22 In both of these advisory opinions, the Commission noted that the purpose of the
23 prohibition is to prevent contributor information from being used for commercial

1 purposes or for making solicitations. The prohibition does not “foreclose the use of this
2 information for other, albeit political, purposes, such as correcting contributor
3 misperceptions.” Advisory Opinion 1984-02 (Gramm).

4 This application of 2 U.S.C. 438(a)(4) is also consistent with the courts’ treatment
5 of the statute and regulatory provision. *See, e.g., FEC v. Int’l Funding Inst., Inc.*, 969
6 F.2d 1110 (D.C. Cir. 1992) (holding that the commercial use prohibition is constitutional
7 because political committees have a property interest in their contributor lists); *FEC v.*
8 *Political Contributions Data, Inc.*, 943 F.2d 190 (2nd Cir. 1991) (finding that the sale of
9 contributor lists that did not include addresses or phone numbers and that explicitly stated
10 that the lists could not be used for the purpose of solicitation or any commercial use did
11 not violate the prohibition at 2 U.S.C. 438(a)(4)).

12 In this situation, the Club and Club PAC will not solicit contributions for any
13 reason, and will not use the contributor information for any commercial purpose. Instead,
14 the Club and Club PAC intend to use contributor information obtained from the Specter
15 Committee’s disclosure reports only for the limited purpose of notifying contributors that
16 Senator Specter has switched parties and of his refund policy. The communication will
17 be one time only, and will not necessitate any further contact between the Club or Club
18 PAC and the contributors to the Specter Committee. Furthermore, the Club and Club
19 PAC will safeguard the contributor information obtained from the reports by keeping it
20 separate from their general membership database, to avoid using the contributor
21 information for solicitation or commercial purposes. Additionally, the requestors do not
22 intend to provide the contributor information to any other entity. Therefore, the
23 Commission concludes that this limited use of contributor information obtained from the

1 Specter Committee's disclosure reports does not violate the solicitation and commercial
2 use prohibition at 2 U.S.C. 438(a)(4).

3 This determination is consistent with Advisory Opinion 2003-24 (NCTFK). In
4 that advisory opinion, the Commission concluded that the use of contributor information
5 obtained from disclosure reports by the National Center for Tobacco-Free Kids
6 ("NCTFK") for the purpose of sending contributors direct mail communications about
7 the health effects of smoking and efforts to control tobacco use would violate the
8 prohibition at 2 U.S.C. 438(a)(4). Advisory Opinion 2003-24 (NCTFK) differs from the
9 present advisory opinion request because NCTFK sought to use contributor names and
10 addresses in order to change the commercial practices of an industry. The purpose of the
11 use of contributor information proposed by the Club and Club PAC here, by contrast, is
12 not commercial in nature.

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

1 All cited advisory opinions are available on the Commission's website at

2 <http://saos.nictusa.com/saos/searchao>.

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On behalf of the Commission,

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Steven T. Walther

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Chairman

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11

1 ADVISORY OPINION 2009-19

2

3 Mr. David Keating

4 Executive Director

5 Club for Growth

6 2001 L Street, NW

7 Suite 600

8 Washington, DC 20036

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10 Dear Mr. Keating:

DRAFT B

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18 Specter has switched his party affiliation and has publicly offered to refund contributions
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20 ***Background***

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4 affiliation and to run as a Democrat for the 2010 Senate election. *See* Press Release,
5 Citizens for Arlen Specter, Statement by Arlen Specter (April 28, 2009) (attached to
6 advisory opinion request). In his press release, Senator Specter stated that he would
7 return campaign contributions made during the 2010 election cycle upon request.

8 The Club and Club PAC wish to communicate with individual contributors to the
9 Specter Committee to inform them of Senator Specter’s decision to run as a Democrat in
10 the 2010 election. The Club and Club PAC propose to compile a list of contributors from
11 information contained in campaign finance reports that the Specter Committee has filed
12 with the Commission. The communications would notify contributors about Senator
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14 campaign while he was running as a Republican. The communications would not contain
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17 Specter Committee, or alternatively, for those contributors with published phone
18 numbers, the Club or Club PAC may make a one-time telephone call. The letter would
19 inform contributors to the Specter Committee of Senator Specter’s decision to switch to
20 the Democratic Party and his policy of refunding contributions upon request. A
21 preprinted form letter requesting a contribution refund and envelope addressed directly to
22 the Specter Committee would be enclosed with the letter. Neither the Club nor Club
23 PAC would know who sends this form letter to the Specter Committee. If the Club or

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2 contributor of Senator Specter's decision to switch parties and his refund policy. The
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9 Club PAC, any candidate, or any other entity. No follow up mailings or telephone calls
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11 information from the Club or Club PAC on how to request a refund. The
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16 obtained from the Specter Committee's Commission filings into either the Club or the
17 Club PAC's general membership database. The Club and Club PAC would not make the
18 list of contributors to the Specter Committee available to any other entity.

19 ***Question Presented***

20 *May the Club or Club PAC use information obtained from campaign finance*
21 *reports filed with the Commission to communicate with contributors to the Specter*
22 *Committee informing them of Senator Specter's decision to switch parties and his refund*
23 *policy?*

1 ***Legal Analysis and Conclusion***

2 No, neither the Club nor Club PAC may use contributor information contained in
3 reports filed with the Commission for the purpose of making communications informing
4 contributors to the Specter Committee of Senator Specter's decision to run as a Democrat
5 and his policy of refunding contributions upon request.

6 Under the Act and Commission regulations, political committees are required to
7 file reports with the Commission identifying the names and mailing addresses of
8 contributors. 2 U.S.C. 434(b)(2)(A) and (b)(3)(A); 11 CFR 104.8(a). The Act provides
9 that the Commission shall make reports and statements filed with it available to the
10 public for inspection and copying within 48 hours after receipt. 2 U.S.C. 438(a)(4). Any
11 information copied from such reports or statements, however, "may not be sold or used
12 by any person for the purpose of soliciting contributions or for commercial purposes,"
13 other than using the name and address of a political committee to solicit contributions
14 from that political committee. *Id.*; *see also* 11 CFR 104.15(a). Under Commission
15 regulations, "soliciting contributions" includes soliciting any type of contribution or
16 donation, such as political or charitable contributions. 11 CFR 104.15(b).

17 Thus, in addition to requiring the disclosure of contributor information, Congress
18 provided limitations to ensure that such information was not misused. Congress was
19 concerned that the Act's reporting requirements "open up the citizens who are generous
20 and public spirited enough to support our political activities to all kinds of harassment,
21 and in that way tend to discourage them from helping out as we need to have them do."
22 117 Cong. Rec. 30057 (daily ed. Aug. 5, 1971) (statement of Sen. Bellmon).

23 Specifically, Senator Bellmon, sponsor of the prohibition on the use of individual

1 contributors' names and addresses, stated that the purpose of the prohibition was to
2 "protect the privacy of the generally very public-spirited citizens who may make a
3 contribution to a political campaign or a political party." *Id.*

4 The Commission recognizes that 2 U.S.C. 438(a)(4) is a "broad prophylactic
5 measure intended to protect the privacy of contributors about whom information is
6 disclosed in [Commission] public records." Advisory Opinion 2003-24 (NCTFK).
7 Without this protection, anyone would be free to obtain contact information about an
8 opponent's contributors, or about contributors who support an opposing ideological
9 perspective, from reports that are required by law to be filed with the Commission, and
10 use that contact information to harass the contributors. As discussed on the Senate floor,
11 individuals might well be discouraged from contributing to candidates and political
12 committees if they know that their contributions may expose them to unwanted
13 communications in this way.

14 The Commission applied this interpretation to communications proposed by
15 National Center from Tobacco-Free Kids ("NCTFK"). Advisory Opinion 2003-24
16 (NCTFK). In that advisory opinion, NCTFK wanted to send direct mailers to
17 contributors to various political committees. These mailers were to consist of
18 information concerning the health effects of smoking and efforts to control tobacco use.
19 *Id.* Some of the mailers would also refer to the Federal candidate to whom the
20 contributor contributed, and "include a 'call-to-action' to contact that officeholder to
21 express an opinion about the need to adopt effective tobacco controls." *Id.* The
22 communications would not be intended to raise funds for any organization, and would not

1 contain any kind of solicitation. *Id.* The information obtained from the disclosure reports
2 would not be sold, leased, or exchanged. *Id.*

3 Despite the fact that the communications did not include any solicitation, and the
4 contributor information was not to be used for any commercial purpose, the Commission
5 found that NCTFK's proposed use of contributor information would expose contributors
6 to harassment and would violate 2 U.S.C. 438(a)(4). Advisory Opinion 2003-24
7 (NCTFK). In NCTFK, the Commission distinguished two prior advisory opinions in
8 which it had allowed the use of contributor information for the purpose of making
9 political communications. In Advisory Opinion 1984-02 (Gramm), a non-connected
10 political committee calling itself "Americans for Phil Gramm in '84" solicited
11 contributions without the permission of Phil Gramm or his authorized campaign
12 committee. The Commission concluded that Representative Gramm and his actual
13 authorized campaign committee could use contributor information contained in
14 Americans for Phil Gramm in '84's disclosure reports to inform contributors that the non-
15 connected committee was not in fact Phil Gramm's authorized committee and the
16 contributors could ask for their money back from the unauthorized committee. Also, in
17 Advisory Opinion 1981-05 (Findley) the Commission stated that a candidate could use
18 information from an opponent's campaign finance reports to mail letters to the
19 opponent's contributors to correct allegedly defamatory charges made by the requestor's
20 opponent. The Commission noted that the prior advisory opinions concerned one-time,
21 one-way communications that did not involve a solicitation or commercial purpose or the
22 possibility of either, and were for the purpose of correcting misleading information. The

1 NCTFK communications, however, presented the possibility of repetitive and intrusive
2 communications to contributors.

3 In the situation presented here, the communications proposed by the Club and
4 Club PAC are not necessary to correct a misunderstanding, because Senator Specter has
5 already publicly announced that he is running for re-election as a Democrat and that he
6 will refund contributions made during the 2010 election cycle upon request. Thus, the
7 communications are materially different from those at issue in Advisory Opinions 1984-
8 02 (Gramm) and 1981-05 (Findley).

9 As stated above, Congress was concerned that the Act's reporting requirements
10 "open up the citizens who are generous and public spirited enough to support our political
11 activities to all kinds of harassment, and in that way tend to discourage them from
12 helping out as we need to have them do." 117 Cong. Rec. 30057 (daily ed. Aug. 5, 1971)
13 (statement of Sen. Bellmon). Here, Club or Club PAC proposes to contact the
14 contributors by mail, or alternatively, by phone for those contributors with published
15 phone numbers, to provide unsolicited information regarding Senator Specter's decision
16 to switch to the Democratic Party, and his policy of refunding contributions upon request.

17 Furthermore, the telephone communications proposed by the requestors here
18 would involve asking the contributor if he or she wished to receive additional information
19 from the Club or Club PAC, thereby possibly opening the door to additional
20 communications from the Club or Club PAC. Thus, the situation is materially different
21 from those at issue in Advisory Opinions 1984-02 (Gramm) and 1981-05 (Findley),
22 because in those opinions, it was unnecessary for the requestors to make repeated

1 communications to correct the misleading information, whereas here, Club or Club PAC
2 may have an interest in making repeated communications with the same message.

3 Such unsolicited communications intrude into the privacy of the “generally very
4 public-spirited citizens who may make a contribution to a political campaign or a
5 political party” that Congress intended to protect. 117 Cong. Rec. 30057 (daily ed. Aug.
6 5, 1971) (statement of Sen. Bellmon); *see also* MUR 6096 (Americans for Limited
7 Government Research Foundation) (Statement of Reasons of Chairman Walther,
8 Commissioner Bauerly, and Commissioner Weintraub) (“A political contributor should
9 be able to contribute freely to organizations and causes without fear of threats,
10 harassment or reprisal”). Regardless of the message, intrusive communications
11 themselves can cause the harassment that Congress intended to prevent.

12 Because the communications that the Club and Club PAC wish to make using the
13 Specter Committee’s list are not necessary to correct misleading information and could
14 open the door to further communications from the Club or Club PAC, this use of the
15 Specter Committee’s list falls within the scope of the type of communication that the
16 Commission prohibited in Advisory Opinion 2003-24 (NCTFK). Further, there is no
17 indication in the legislative history of this provision that Congress intended for the
18 contributor information made public by the Commission to be used by political
19 opponents to encourage donors to ask for their contributions back, based on later
20 positions taken by the recipient candidate. Approving this request could open the door to
21 the kind of harassment of donors that Section 438(a)(4) was intended to prevent.
22 Accordingly, neither the Club nor Club PAC may use the Specter Committee’s list to

