



FEDERAL ELECTION COMMISSION  
Washington, DC 20463

SECRETARIAT

2009 AUG 26 P 3: 10

**AGENDA ITEM**  
For Meeting of: 8-27-09

August 26, 2009

**SUBMITTED LATE**

**MEMORANDUM**

TO: The Commission

FROM: Thomasenia P. Duncan *JPD*  
General Counsel

Rosemary C. Smith *RCS*  
Associate General Counsel

Amy L. Rothstein *AR*  
Assistant General Counsel

Esther Heiden *EHD*  
Attorney

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

We have been asked to circulate the attached alternative draft of the subject advisory opinion. Draft C reaches the same conclusion as Draft A. Please place this draft on the agenda for August 27, 2009.

Attachment

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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

**DRAFT C**

9  
10 Dear Mr. Keating:

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, your comment received on August 20, 2009, and conversations with  
23 Commission attorneys.

24 Club for Growth (“Club”) is an incorporated nonprofit membership organization  
25 exempt from taxation under section 501(c)(4) of the Internal Revenue Code. Club for  
26 Growth PAC (“Club PAC”) is the separate segregated fund of the Club and is a  
27 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 a communication 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.*,  
6 969 F.2d 1110 (D.C. Cir. 1992) (holding that the commercial use prohibition is  
7 constitutional because political committees have a property interest in their contributor  
8 lists); *FEC v. Political Contributions Data, Inc.*, 943 F.2d 190 (2nd Cir. 1991) (finding  
9 that the sale of contributor lists that did not include addresses or phone numbers and that  
10 explicitly stated that the lists could not be used for the purpose of solicitation or any  
11 commercial use did 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 will 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.<sup>1</sup> The communication will  
17 be made only once to each donor and will not require any further contact between the  
18 Club or Club PAC and the contributors to the Specter Committee.<sup>2</sup> Furthermore, the

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<sup>1</sup> The communication will inform contributors that the Specter Committee is not required by statute or regulations to refund these contributions.

<sup>2</sup> In your comment on behalf of Club for Growth, you state that “We have no interest in making repeated communications and have stated we would not do so.” Comment of David Keating, Executive Director, Club for Growth on Draft AO 2009-19 at 3 (August 20, 2009). In Advisory Opinion 2003-24, the Commission concluded that the National Center for Tobacco-Free Kids (“NCTFK”) could not use contributor information obtained from disclosure reports to send contributors direct mail communications about the health effects of smoking or for other efforts to control tobacco use. In reaching this conclusion, the Commission stated that the requestor’s broad “open-ended interaction” presented the “possibility of

1 Club and Club PAC will safeguard the contributor information obtained from the reports  
2 by keeping it separate from their general membership database, to avoid using the  
3 contributor information for any purpose not presented in the request. Additionally, the  
4 requestors will not make the contributor information available to any other entity for any  
5 use. Therefore, the Commission concludes that this limited use of contributor  
6 information obtained from the Specter Committee's disclosure reports does not violate  
7 the solicitation and commercial use prohibition at 2 U.S.C. 438(a)(4).

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

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

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

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On behalf of the Commission,

Steven T. Walther  
Chairman