

AGENDA DOCUMENT NO. 11-48-A



FEDERAL ELECTION COMMISSION
Washington, DC 20463

ELECTION
MISSION
AT

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September 1, 2011

AGENDA ITEM

MEMORANDUM

TO: The Commission

For Meeting of 9-1-11

FROM: Christopher Hughey *CH*
Acting General Counsel *(b), RCS/*

SUBMITTED LATE

Rosemary C. Smith *RCS*
Associate General Counsel

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Subject: Draft AO 2011-15 (Hassan) - Draft C

Attached is a proposed draft of the subject advisory opinion. We have been asked that this draft be placed on the Open Session agenda for September 1, 2011.

Attachment

1 ADVISORY OPINION 2011-15

2
3 Abdul Karim Hassan, Esq.
4 215-28 Hillside Avenue
5 Queens Village, New York 11427

6
7 Dear Mr. Hassan:

DRAFT C

8 We are responding to your advisory opinion request concerning the application of
9 the Federal Election Campaign Act of 1971, as amended (the “Act”), the Presidential
10 Primary Matching Payment Account Act, as amended, and Commission regulations to
11 your campaign for President of the United States, given your status as a naturalized
12 citizen.

13 The Commission concludes that the Act does not prohibit Mr. Hassan, a
14 naturalized citizen, from becoming a “candidate” as that term is defined under the Act.
15 However, Mr. Hassan will not be eligible to receive Federal matching funds under the
16 Presidential Primary Matching Payment Account Act. The Commission also concludes
17 that Mr. Hassan will not be in violation of 2 U.S.C. 441h(b) if he solicits and receives
18 contributions. Finally, Mr. Hassan will be required to comply with the Act’s provisions
19 regarding expenditures, contributions, recordkeeping, and reporting.

20 ***Background***

21 The facts presented in this advisory opinion are based on Mr. Hassan’s letter
22 received on July 7, 2011, as supplemented by emails received on July 19 and 20 and
23 August 25, 2011.

24 Mr. Hassan is a naturalized U.S. citizen who announced his candidacy for
25 President in March 2008 on his website. Subsequently, he made statements related to his
26 candidacy and used his website to communicate to voters. In order to further

1 communicate his message and platform to the public, Mr. Hassan also purchased
2 campaign advertisements through a contract with Google.

3 Mr. Hassan indicates that he satisfies all of the constitutional requirements for
4 serving as President, except the natural born citizen requirement in Article II, Section 1,
5 Clause 5 of the Constitution.

6 ***Questions Presented***

7 1. *As a naturalized American citizen, will Mr. Hassan be considered a*
8 *"candidate" or "person" running for President under the Act?*

9 2. *As a naturalized American citizen, is Mr. Hassan eligible to receive*
10 *presidential matching funds under the Presidential Primary Matching Payment Account*
11 *Act?*

12 3. *As a naturalized American citizen, will Mr. Hassan violate 2 U.S.C.*
13 *441h(b) if he solicits and receives contributions for his presidential campaign?*

14 4. *Is Mr. Hassan required to comply with the Act's provisions regarding*
15 *expenditures, contributions, recordkeeping, and reporting?*

16 ***Legal Analysis and Conclusions***

17 1. *As a naturalized American citizen, will Mr. Hassan be considered a*
18 *"candidate" or "person" running for President under the Act?*

19 The Act defines "candidate" as "an individual who seeks nomination for election,
20 or election, to Federal office." 2 U.S.C. 431(2); *see also* 11 CFR 100.3. An individual
21 becomes a candidate when he or she "has received contributions aggregating in excess of

1 \$5000 or has made expenditures aggregating in excess of \$5000.” 2 U.S.C. 431(2); *see*
2 *also* 11 CFR 100.3.

3 The Act and the Commission’s regulations do not address a candidate’s
4 citizenship or any other qualifications for office. Indeed, the Act’s definition of
5 “candidate” applies to those who seek nomination for election or election to Federal
6 office rather than those eligible to be nominated or elected to, or to serve in Federal
7 office. Thus, the Act’s definition of “candidate” does not turn on whether an individual
8 is a natural born citizen or a naturalized citizen, so long as that person meets the other
9 criteria that define a “candidate.”¹

10 Mr. Hassan states that he seeks election to Federal office. Mr. Hassan has not yet
11 fulfilled the statutory definition of candidate, by either receiving more than \$5000 in
12 contributions or making more than \$5000 in expenditures, and therefore he is not a
13 candidate at this time. If he either raises more than \$5000 in contributions or makes more
14 than \$5000 in expenditures, he will satisfy the definition and will become a candidate
15 under the Act. Mr. Hassan states he is not eligible to be seated for the Office of President
16 because he is a naturalized citizen. The Act, however, does not prevent him from holding
17 himself out as a candidate because the statutory definition does not turn on a person’s
18 eligibility to be seated for the office he or she seeks.

19 The Act defines “person” to include “an individual, partnership, committee,
20 association, corporation, labor organization, or any other organization or group of
21 persons, but such term does not include the Federal Government or any authority of the

¹ The Act does not contain separate definitions for candidates for different Federal offices. The Constitution’s “natural born Citizen” provision only pertains to “the Office of President.” U.S. Const., art. II, sec. 1, cl. 5.

1 Federal Government.” 2 U.S.C. 431(11); *see also* 11 CFR 100.10. Like the definition of
2 “candidate,” the definition of “person” makes no reference to natural born or naturalized
3 citizens. Thus, as an individual, Mr. Hassan is a “person” under the Act.²

4 2. *As a naturalized American citizen, is Mr. Hassan eligible to receive*
5 *presidential matching funds under the Presidential Primary Matching Payment Account*
6 *Act?*

7 No, as a naturalized American citizen, Mr. Hassan is not eligible to receive
8 presidential matching funds under the Presidential Primary Matching Payment Account
9 Act (“Matching Payment Act”).

10 The United States Constitution provides that “[n]o Person except a natural born
11 Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution,
12 shall be eligible to the Office of President” U.S. Const. art. II, sec. 1, cl. 5.

13 Although the Matching Payment Act does not specifically address the citizenship
14 requirement for serving as President, it sets forth the eligibility requirements to receive
15 matching funds. *See* 26 U.S.C. 9033; 11 CFR 9033.2. *See also, e.g.,* Advisory Opinion
16 1996-07 (Browne for President) (describing the steps a candidate must take to become
17 eligible for matching funds). These provisions collectively reflect Congressional intent to
18 ensure that U.S. Treasury funds in the form of matching funds are only paid to eligible
19 candidates.³

² Mr. Hassan also asks whether he qualifies as an “individual” under the Act. Neither the Act nor the Commission’s regulations define “individual.” The term “individual” is used throughout the text of the Act, without any reference to either natural born or naturalized citizens. Mr. Hassan is an individual under the common usage of the term.

³ *See* S. Rep. 93-689, at 7 (1974).

1 The Commission is charged under the Matching Payment Act with administering
2 the Federal matching funds program and has some discretion when certifying eligibility
3 for matching funds. While the Commission may not “appraise candidates' good faith,
4 honesty, probity or general reliability when reviewing the agreements and other forward-
5 looking commitments required” by the Matching Payment Act, *see LaRouche v. FEC*,
6 996 F.2d 1263, 1269 (D.C. Cir. 1993), situations may exist in which, “without assessment
7 of subjective candidate intent, the Commission might conceivably withhold funds despite
8 formal compliance with the statutorily expressed criteria.” *Id.* Clear and self-avowed
9 constitutional ineligibility for office is one of the few instances where the Commission's
10 exercise of its discretion to withhold funds is appropriate.

11 Because Mr. Hassan has clearly stated that he is a naturalized citizen of the
12 United States, and not a natural born citizen under the constitutional requirement in
13 Article II, Section 1, Clause 5, the Commission concludes that Mr. Hassan is not eligible
14 to receive matching funds.

15 3. *As a naturalized American citizen, will Mr. Hassan violate 2 U.S.C.*
16 *441h(b) if he solicits and receives contributions for his presidential campaign?*

17 No, Mr. Hassan will not violate 2 U.S.C. 441h(b) if he solicits and receives
18 contributions for his presidential campaign because the Act's definition of “candidate”
19 does not turn on his citizenship status.

20 Section 441h(b) states that “no person shall . . . fraudulently misrepresent the
21 person as speaking, writing, or otherwise acting for or on behalf of any candidate or
22 political party or employee or agent thereof for the purpose of soliciting contributions or

1 donations.” 2 U.S.C. 441h(b)(1); *see also* 11 CFR 110.16(b). Additionally, “no person
2 shall . . . willfully and knowingly participate in or conspire to participate in any plan,
3 scheme, or design” to partake in such fraudulent misrepresentation. 2 U.S.C. 441h(b)(2);
4 *see also* 11 CFR 110.16(b).

5 Senator Bill Nelson of Florida introduced the amendment that led to this provision
6 in the debate over the Bipartisan Campaign Reform Act of 2002. Senator Nelson stated
7 that the need for such a provision arose from the Commission “receiving a number of
8 complaints that people have fraudulently raised donations by posing as political
9 committees or candidates.” 147 Cong. Rec. S3122 (daily ed. Mar. 29, 2001) (statement
10 of Sen. Bill Nelson). He described the types of situations the amendment aimed to
11 prevent, including “phony fundraising letters” sent from supposed lawyers for
12 presidential candidates that “urged \$1,000 contributions to seemingly prestigious
13 Pennsylvania Avenue addresses.” *Id.*

14 Although Mr. Hassan is a naturalized citizen running for President, he would not
15 be engaging in fraudulent misrepresentation as described in section 441h(b) by soliciting
16 or receiving contributions for his presidential campaign committee because nothing in the
17 Act requires a candidate to be eligible for the office he or she seeks. Mr. Hassan does not
18 intend to falsely represent or solicit funds for a campaign that is not his own, as was
19 contemplated by Congress when it enacted this provision. Thus, Mr. Hassan would not
20 be in violation of section 441h(b) when soliciting and receiving contributions for his
21 presidential campaign committee.

1 4. *Is Mr. Hassan required to comply with the Act's provisions regarding*
2 *expenditures, contributions, recordkeeping, and reporting?*

3 Yes, Mr. Hassan must comply with the Act's provisions regarding expenditures,
4 contributions, recordkeeping, and reporting.

5 Once an individual seeking election to Federal office has either made more than
6 \$5000 in expenditures or received more than \$5000 in contributions, that individual
7 becomes a candidate for the purposes of the Act. 2 U.S.C. 431(2); 11 CFR 100.3.

8 Candidates must comply with several requirements under the Act.

9 No later than 15 days after becoming a candidate, an individual must file a
10 Statement of Candidacy with the Commission in which he or she designates a principal
11 campaign committee with a treasurer who will accept contributions and make
12 expenditures. *See* 2 U.S.C. 432(e); 11 CFR 101.1. Within 10 days of being designated as
13 a candidate's principal campaign committee, the campaign committee must file a
14 Statement of Organization. The committee must also file a report detailing the
15 contributions received and the expenditures made before the individual became a
16 candidate. Specifically, these reporting requirements mandate that the treasurer "shall
17 keep records of the name of each contributor, the date of receipt and amount of all
18 contributions received, and all expenditures made in connection with . . . the individual's
19 campaign prior to becoming a candidate." 11 CFR 101.3; *see also* 2 U.S.C. 432(e)(2).

20 Following this initial report, the committee must continue to file quarterly reports of
21 contributions and expenditures. 2 U.S.C. 434(a)(2); 11 CFR 104.5. These reports must
22 detail the total amounts of receipts and disbursements for the reporting period and for the

1 calendar year. *See* 2 U.S.C. 434; 11 CFR 104.3. The principal campaign committee
2 must also comply with recordkeeping requirements related to contributions it receives
3 and expenditures it makes. 11 CFR 102.9. All records required to be kept pursuant to
4 these provisions must be retained for three years. *Id.*

5 Candidates must also comply with the Act's contribution limits (*see* 2 U.S.C.
6 441a(a); *see also* 11 CFR 110.1, 110.2, and 110.5) and source prohibitions (*see* 2 U.S.C.
7 441b, 441c, 441e, 441f, and 441k; *see also* 11 CFR 110.4, 110.20, 114.2, and 115.2).

8 Once Mr. Hassan has received more than \$5000 in contributions or made more
9 than \$5000 in expenditures for his campaign, he will become a candidate under the Act.
10 As a candidate, Mr. Hassan will be subject to the statutes and regulations applicable to all
11 candidates. Upon obtaining candidate status, he therefore will need to take the steps
12 outlined above to register his principal campaign committee with the Commission and
13 comply with the provisions of the Act regarding expenditures, contributions,
14 recordkeeping, and reporting. In order to comply with these requirements, prior to
15 becoming a candidate, in the testing-the-waters phase, Mr. Hassan will need to maintain
16 records of all funds received and payments made in connection with his campaign, and he
17 will need to comply with all contribution limitations and source prohibitions set forth in
18 the Act and Commission regulations.

19 This response constitutes an advisory opinion concerning the application of the
20 Act and Commission regulations to the specific transaction or activity set forth in your
21 request. *See* 2 U.S.C. 437f. The Commission emphasizes that, if there is a change in any
22 of the facts or assumptions presented, and such facts or assumptions are material to a

1 conclusion presented in this advisory opinion, then the requestor may not rely on that
2 conclusion as support for its proposed activity. Any person involved in any specific
3 transaction or activity which is indistinguishable in all its material aspects from the
4 transaction or activity with respect to which this advisory opinion is rendered may rely on
5 this advisory opinion. *See* 2 U.S.C. 437f(c)(1)(B). Please note the analysis or
6 conclusions in this advisory opinion may be affected by subsequent developments in the
7 law including, but not limited to, statutes, regulations, advisory opinions, and case law.
8 The cited advisory opinion is available on the Commission's website, www.fec.gov, or
9 directly from the Commission's Advisory Opinion searchable database at
10 <http://www.fec.gov/searchao>.

11

12 On behalf of the Commission,
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15
16 Cynthia L. Bauerly
17 Chair
18