




FEDERAL ELECTION COMMISSION
Washington, DC 20463

MEMORANDUM

TO: The Commission

FROM: Commission Secretary's Office 

DATE: November 5, 2015

SUBJECT: Comments on Draft AO 2015-09
(Senate Majority PAC and House Majority PAC)

Attached are late submitted comments received from Charles R. Spies and James E. Tyrrell III. This matter is on the November 10, 2015 Open Meeting Agenda.

Attachment



Comments on AOR 2015-09, Drafts A and B
Tyrrell, James E. III

to:

secretary@fec.gov, AO@fec.gov

11/04/2015 05:15 PM

Hide Details

From: "Tyrrell, James E. III" <JTyrrell@ClarkHill.com>

To: "secretary@fec.gov" <secretary@fec.gov>, "AO@fec.gov" <AO@fec.gov>,

1 Attachment



AOR 2015-09 - Drafts A and B - Comments by Charles Spies and James Tyrrell.pdf

Attached please find comments on AOR 2015-09, Drafts A and B, from Charles Spies and James Tyrrell of Clark Hill PLC.

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November 4, 2015

Daniel A. Petalas
Acting General Counsel
Federal Election Commission
999 E Street, NW
Washington, DC 20463
VIA EMAIL

Re: Comments on Advisory Opinion Request 2015-09, Drafts A and B

Dear Mr. Petalas:

As attorneys in the Clark Hill PLC Political Law Group, we write to comment and seek clarification on Draft Advisory Opinions A and B in response to Hillary for America and Hillary Clinton's attorneys' Advisory Opinion Request 2015-09 (styled as being from House Majority PAC and Senate Majority PAC, hereinafter the "Requestors"). We file these comments individually, and not on behalf of any client – but as attorneys who frequently advise federal candidates, independent expenditure-only committees ("Super PACs"), and other politically-active organizations on the lawful use of their funds.

At the outset, we reject the notion in both drafts that the Federal Election Commission (the "Commission") has jurisdiction over private individuals who are not yet "candidates" under the Federal Election Campaign Act of 1971, as amended (the "Act"), and the Commission's regulations. We echo Commissioner Goodman's stated concerns about the Commission's assertion of jurisdiction over an individual, or a group supporting an individual, prior to his or her becoming a candidate. Such concerns are particularly valid in light of an array of federal court decisions that have consistently rejected such declarations of jurisdiction.¹

The Supreme Court has made clear that "political speech must prevail against laws that would suppress it by design or inadvertence," and that "[l]aws burdening such speech are subject to strict scrutiny, which requires the Government to prove that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest." *Citizens United v. FEC*, 558 U.S. 310, 312 (2010). The broad application of the Commission's jurisdiction propagated in Drafts A and B is hardly narrowly tailored, and does not serve any compelling government

¹ See *FEC v. Machinists Non-Partisan Political League*, 655 F.2d 380 (D.C. Cir. 1981); see also *Unity08 v. FEC*, 596 F.3d 861 (D.C. Cir. 2010).

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interest. In fact, should the Commission choose to adopt such a broad interpretation of its jurisdiction under the Act—one which is neither narrowly tailored nor in furtherance of a compelling government interest—it runs the risk of unintended consequences, such as capturing a wide range of activities conducted by Requestor's client's supporters at the Clinton Foundation and Clinton Global Initiative ("CGI").

With that said, should four Commissioners adopt the Office of General Counsel's ("OGC") arbitrary view that the Commission has statutory jurisdiction over private individuals prior to their becoming a candidate, we respectfully suggest that the analysis set forth in Drafts A and B should also apply to an individual's exploitation of a non-profit corporation's (such as CGI) resources to fund his or her pre-candidacy activities—and the logical extension that such activities, in and of themselves, transform that individual into a "candidate" when they exceed \$5,000.

We submit that, under OGC's rationale, an individual's utilization of a global non-profit organization's resources—even one funded largely by foreign donations²—for testing the waters activities like hiring staff, writing and booking speeches, and paying for first class airfare,³ would transform that individual into a "candidate" and subject the individual to the Act's registration and reporting regime. Furthermore, because such individual would undoubtedly have engaged in at least minimal testing the waters activities that would give them candidate status under OGC's reasoning in the draft opinions, it would logically follow that any exercise of control or directing of the global non-profit organization's corporate resources by the individual (or agents of the individual) would put him or her at odds with both the Act's "soft" money ban⁴ and its prohibition on foreign contributions.⁵

² Rosalind S. Helderman and Tom Hamburger, *Foreign governments gave millions to foundation while Clinton was at State Dept.*, WASH. POST (Feb. 25, 2015), available at https://www.washingtonpost.com/politics/foreign-governments-gave-millions-to-foundation-while-clinton-was-at-state-dept/2015/02/25/31937c1e-bc3f-11e4-8668-4e7ba8439ca6_story.html.

³ See Nicholas Confessore and Amy Chozick, *Unease at Clinton Foundation Over Finances and Ambitions*, N.Y. TIMES (Aug. 13, 2013), available at http://www.nytimes.com/2013/08/14/us/politics/unease-at-clinton-foundation-over-finances-and-ambitions.html?hp&_r=1 ("In the coming months, as Mrs. Clinton mulls a 2016 presidential bid, the foundation could also serve as a base for her to home in on issues and to build up a stable of trusted staff members who could form the core of a political campaign... And Mrs. Clinton's personal staff of roughly seven people — including Huma Abedin... will soon relocate from a cramped Washington office to the foundation's headquarters. They will work on organizing Mrs. Clinton's packed schedule of paid speeches to trade groups and awards ceremonies and assist in the research and writing of Mrs. Clinton's memoir about her time at the State Department, to be published by Simon & Schuster next summer."); see also, Brianna Keilar, *Hillary Clinton's presidential campaign quietly begins to take shape*, CNN (Nov. 4, 2014), available at <http://www.cnn.com/2014/11/03/politics/hillary-clinton-campaign/index.html> ("Dennis Cheng, who manages fundraising for the Clinton Foundation and served as Hillary Clinton's deputy chief of protocol at the State Department, is the frontrunner for finance director, according to multiple Democrats. Huma Abedin, as well as longtime Clinton aide Philippe Reines and Nick Merrill, Clinton's current spokesperson, are expected to serve in influential roles in and around the campaign."); see also, Isabel Vincent, *Charity watchdog: Clinton Foundation a 'slush fund'*, N.Y. POST (Apr. 26, 2015), available at <http://nypost.com/2015/04/26/charity-watchdog-clinton-foundation-a-slush-fund/> ("None of the Clintons is on the payroll, but they do enjoy first-class flights paid for by the foundation... 'It seems like the Clinton Foundation operates as a slush fund for the Clintons.'").

⁴ 52 U.S.C. § 30125(e).

⁵ 52 U.S.C. § 30121.

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In the unlikely event that the Commission supports either of the draft opinions in their current form, we have serious doubts that it would deliberately exempt the blatant exploitation of corporate resources from its legal rationale. However, should the Commission not disapprove of the so-called testing the waters activities outlined above—funded largely by the global non-profit corporation, and subsidized by foreign donations—we would consider advising our clients to establish similar “global initiative” type non-profit organizations to house staff, pay for luxury travel, and offset the costs of their pre-candidacy testing the waters activities. We simply cannot have our clients ceding strategic advantage to individuals who have access to a global network or foreign money that can be used to fund the exploratory stages of a prospective candidate’s run for office.

Sincerely yours,



Charles R. Spies
James E. Tyrrell III

11/04/15