



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

**ADVISORY OPINION 2015-09
(SENATE MAJORITY PAC AND HOUSE MAJORITY PAC)**

**STATEMENT OF COMMISSIONER ELLEN L. WEINTRAUB
CONCURRING IN PART**

November 13, 2015

A funny thing happened at the end of the long and contentious meeting where this Advisory Opinion was discussed. It turned out that commissioners agreed more than they disagreed on the principles underlying the requestors' plans regarding testing the waters activities and the relationships between candidates and the Super PACs that support them.

Commissioners agreed unanimously on five of the twelve questions (questions 4, 5, 6, 8, and 9), and four commissioners agreed on the answers to questions 11 and 12 (Chair Ravel and I dissented on those). But even on the questions where we disagreed, our positions were not diametrically opposed. There was some common ground. And that should give pause to anyone who is making plans based on the assumption that the testing the waters phase of a candidacy is a regulation-free zone.

Advisory Opinion 2015-09 confirms that all testing the waters activities of a candidate must have been paid for with funds subject to the contribution limits and source restrictions of the Federal Election Campaign Act (52 U.S.C. §§ 30101-30146 (the "Act")). 11 C.F.R. §§ 100.72(a), 100.131(a). Thus the payment by any organization for a candidate's testing the waters activities with non-federal funds would constitute a violation of the Act and Commission regulations. The Commission further agreed that once someone decides to run for federal office, that person becomes a candidate, covered by all the federal laws and regulations governing candidacy, if the person has already raised or spent more than \$5,000 for either testing the waters activities or candidate activities.

Now, achieving Commission consensus on when that decision has been made may prove challenging. The Commission agreed that if an individual makes public statements that he or she is running for office or that he or she will announce candidacy on a date certain, those statements indicate that the person has already decided to run. Some commissioners (myself included) expressed the view that establishing, staffing, and raising funds for a Super PAC set up to support one's candidacy and filming footage for

it to use in subsequent advertisements are automatic triggers of candidacy because they clearly indicate that the decision to run has been made. (See Drafts A and E of Advisory Opinion 2015-09, <http://www.fec.gov/agenda/2015/agenda20151110.shtml>)

But even those commissioners who do not believe such actions, at least when considered individually, are automatic triggers do not dismiss their evidentiary import. In an initial vote, Vice Chairman Petersen and Commissioners Goodman and Hunter supported Draft C, which states: "An individual's active participation in the formation and operation of the contemplated Single-Candidate Committees, the sole purpose of which is to support that individual's federal candidacy, or in the filming of video intended to be used to promote that individual's federal candidacy, *could evidence* the making of 'a decision . . . to seek nomination for election, or election, to a Federal office.'" (Draft C, at 13, emphasis added, citations omitted.) Also noteworthy is a unanimous 2007 opinion in which the Commission determined that a non-federal candidate committee established years before the same candidate successfully ran for federal office was a committee established, financed, maintained and controlled by a federal candidate and thus covered by all the fundraising restrictions of the Act, even though the individual established the committee before she became a federal candidate or officeholder. (Advisory Opinion 2007-01 (McCaskill)) That precedent has never been overturned.

It may surprise some Commission-watchers to learn that there is general agreement on the Commission that a prospective candidate's substantial involvement with a single-candidate Super PAC may provide evidence of a firm decision to run for federal office, which would subject both the candidate and the PAC to federal fundraising restrictions. And I've served on the Commission long enough to avoid predicting how such views may play out in the enforcement context. But political actors and the practitioners who counsel them would be well-advised to take notice and act accordingly.