



FEDERAL ELECTION COMMISSION  
Washington, DC 20463

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**AGENDA ITEM**

September 21, 2010

For Meeting of 9-23-10

**MEMORANDUM**

**SUBMITTED LATE**

TO: The Commission

FROM: Christopher Hughey *pch*  
Acting General Counsel

Rosemary C. Smith *RCS*  
Associate General Counsel

Robert M. Knop *RMK*  
Assistant General Counsel

William A. Powers *WAP*  
Attorney

Subject: Draft AO 2010-20 (NDPAC) – Draft B

Attached is a proposed draft of the subject advisory opinion. We have been asked to place this draft on the agenda for September 23, 2010.

Attachment

1 ADVISORY OPINION 2010-20

2  
3 Dan Backer, Esq.  
4 DB Capitol Strategies

5 P.O. Box 75021  
6 Washington, D.C. 20013

**DRAFT B**

7  
8 Dear Mr. Backer:

9 We are responding to your advisory opinion request on behalf of National  
10 Defense PAC (“NDPAC”), concerning the application of the Federal Election Campaign  
11 Act of 1971, as amended (the “Act”), and Commission regulations to a proposed plan to  
12 accept unlimited contributions from individuals, other political committees, corporations,  
13 and labor organizations to fund independent expenditures from a separate bank account,  
14 and to allocate the cost of all of the Committee’s administrative and operating expenses  
15 between accounts as it sees fit, including paying all expenses from its independent  
16 spending account. The Commission concludes that NDPAC may accept unlimited  
17 contributions to its separate bank account to fund independent expenditures. Consistent  
18 with the Court of Appeals for the D.C. Circuit’s decision in *EMILY’s List v. FEC*,  
19 NDPAC should allocate its administrative and operating expenses between its accounts in  
20 a manner that “‘closely’ corresponds” to the proportion of its activities funded by each  
21 account.

22 ***Background***

23 The facts presented in this advisory opinion are based on your letter received on  
24 August 11, 2010 and email received on August 17, 2010.

25 NDPAC is a nonconnected committee that is incorporated in Virginia and that  
26 maintains a post office box in Washington, D.C. At this time, NDPAC has no physical

1 office. It filed a statement of organization on July 20, 2000, and has filed regular reports  
2 with the Commission since that time. NDPAC qualified as a multicandidate committee  
3 on May 17, 2004.

4 NDPAC intends to make both contributions to candidates and independent  
5 expenditures. NDPAC will incur administrative and operating expenses, as well as  
6 fundraising costs. NDPAC will accept unlimited contributions from individuals, other  
7 political committees, corporations, and labor organizations for the purpose of making  
8 independent expenditures, or paying for administrative and operating expenses, but  
9 NDPAC will not accept contributions from foreign nationals or Federal contractors,  
10 national banks, or corporations organized by act of Congress. NDPAC will maintain two  
11 separate bank accounts. It will deposit in one account all contributions it receives that  
12 will be used for making independent expenditures. The second account will contain all  
13 contributions it receives to make contributions to candidates. The contributions deposited  
14 in the second account will comply with the Act's amount limitations and source  
15 prohibitions.

16 NDPAC will maintain records for each account, and fully disclose all receipts and  
17 disbursements on the reports it files with the Commission as required by the Act and  
18 Commission regulations.

19 ***Questions Presented***

20 1. *May NDPAC, a nonconnected committee that makes both contributions and*  
21 *independent expenditures, accept unlimited contributions from individuals,*  
22 *other political committees, corporations, and labor organizations to make*  
23 *independent expenditures only, provided such receipts are held in separate*  
24 *bank accounts by intended use and separately accounted for in reporting to*  
25 *the Commission?*  
26

- 1           2. *May NDPAC, a nonconnected committee that makes both contributions and*  
2           *independent expenditures, allocate any or all of its administrative or*  
3           *operating expenses between its accounts, including paying all expenses from*  
4           *its independent expenditure account?*  
5

6           ***Legal Analysis and Conclusions***

- 7           1. *May NDPAC, a nonconnected committee that makes both contributions and*  
8           *independent expenditures, accept unlimited contributions from individuals,*  
9           *other political committees, corporations, and labor organizations to make*  
10           *independent expenditures only, provided such receipts are held in separate*  
11           *bank accounts by intended use and separately accounted for in reporting to*  
12           *the Commission?*  
13

14           Yes, as a nonconnected committee that makes both contributions and independent  
15           expenditures, NDPAC may accept unlimited contributions from individuals, other  
16           political committees, corporations, and labor organizations so long as it deposits those  
17           funds into a separate bank account, and does not use such funds to make contributions to  
18           Federal candidates, national party committees, or political party committees' Federal  
19           accounts.

20           The Act and Commission regulations prohibit any individual from making  
21           contributions that, in the aggregate exceed \$5,000 per year to a political committee that is  
22           not an authorized committee of a candidate or a political party committee. 2 U.S.C.  
23           441a(a)(1)(C); 11 CFR 110.1(d). In addition, the Act and Commission regulations  
24           prohibit any individual from making contributions to political committees that are not  
25           national party committees which, in the aggregate, exceed \$69,900 per biennial period.  
26           2 U.S.C. 441a(a)(3)(B); 11 CFR 110.5.<sup>1</sup> The Act and Commission regulations also limit  
27           contributions made by multicandidate political committees that are not national party  
28           committees to \$5,000 per year. 441a(a)(2)(C); 11 CFR 110.2(d). Further, the Act and

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<sup>1</sup> Similarly, the Act prohibits political committees from knowingly accepting contributions in excess of these limitations. 2 U.S.C. 441a(f).

1 Commission regulations prohibit corporations and labor organizations from making  
2 contributions. 2 U.S.C. 441b(a); 11 CFR 114.2(b)(1). Finally, political committees must  
3 organize, register, and report pursuant to the Act and Commission regulations.  
4 See 2 U.S.C. 432, 433, and 434; see also 11 CFR 102.1, 102.2, 102.7, and Part 104.

5 Recently, the U.S. Court of Appeals for the District of Columbia Circuit held that  
6 “the contribution limits of 2 U.S.C. 441a(a)(1)(C) and 441a(a)(3) are unconstitutional as  
7 applied to individuals’ contributions to SpeechNow,” an independent expenditure-only  
8 group. See *SpeechNow.org v. FEC*, 599 F.3d 686, 689 (D.C. Cir. 2010) (“*SpeechNow*”).<sup>2</sup>  
9 The D.C. Circuit also held that “non-profit entities are entitled to make their expenditures  
10 – such as advertisements, get-out-the-vote efforts, and voter registration drives – out of a  
11 soft-money or general treasury account that is not subject to source and amount limits.”  
12 *EMILY’s List v. FEC*, 581 F. 3d 1, 12 (D.C. Cir. 2009); see also *id.* at 10 (“... individual  
13 citizens may spend money without limit (apart from the limit on their own contributions  
14 to candidates or parties) in support of the election of particular candidates”).

15 Moreover, the United States Supreme Court held in *Citizens United* that  
16 corporations may make unlimited independent expenditures using corporate treasury  
17 funds. See *Citizens United v. FEC*, 130 S. Ct. 876, 913 (2010). The Court of Appeals in  
18 *SpeechNow* relied extensively on the Supreme Court’s decision in *Citizens United*. See  
19 *SpeechNow*, 599 F.3d at 692-96. Following *Citizens United* and *SpeechNow*,

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<sup>2</sup> The court held, however, that the “reporting requirements of 2 U.S.C. 432, 433, and 434(a) and the organizational requirements of 2 U.S.C. 431(4) and 431(8) can constitutionally be applied to SpeechNow.” See *id.*

1 corporations, labor organizations,<sup>3</sup> and political committees may make unlimited  
2 independent expenditures from their own funds, and individuals may pool unlimited  
3 funds in an independent expenditure-only political committee.

4         The Commission recently concluded in Advisory Opinions 2010-09 (Club for  
5 Growth) and 2010-11 (Commonsense Ten), based upon these recent cases, that  
6 corporations, labor organizations and political committees also may make unlimited  
7 contributions to a nonconnected independent expenditure-only committee like  
8 Commonsense Ten or an independent expenditure-only committee established by a  
9 corporation like Club for Growth. Given the holdings in *Citizens United* and *SpeechNow*,  
10 that “independent expenditures do not lead to, or create the appearance of, *quid pro quo*  
11 corruption,” *Citizens United*, 130 S.Ct. at 910, the Commission concluded that there was  
12 no basis to limit the amount of contributions to an independent expenditure-only  
13 committee from individuals, political committees, corporations, and labor organizations.  
14 *See* Advisory Opinions 2010-09 (Club for Growth) and 2010-11 (Commonsense Ten).

15         NDPAC differs from *SpeechNow*, Commonsense Ten, and the political  
16 committee to be established by Club for Growth in that the latter three political  
17 committees sought to make only independent expenditures, while NDPAC makes both  
18 independent expenditures and contributions to candidates. However, this difference does  
19 not affect NDPAC’s ability to accept unlimited contributions from individuals,  
20 corporations, other political committees, and labor organizations in order to fund

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<sup>3</sup> Although *Citizens United* did not directly address whether labor organizations also have a First Amendment right to use their general treasury funds for independent expenditures and electioneering communications, the Act and Commission regulations generally treat labor organizations in the same way as corporations. The Court’s decision suggests no basis for treating labor organization communications differently than corporate communications under the First Amendment.

1 independent expenditures. *See EMILY's List*. It merely has to establish a separate  
2 account to do so.

3 According to the court:

4 The constitutional principles that govern such a hybrid non-profit entity  
5 follow ineluctably from the well-established principles governing the other  
6 two categories of non-profits. To prevent circumvention of contribution  
7 limits by individual donors, non-profit entities may be required to make  
8 their own contributions to federal candidates and parties out of a hard-  
9 money account-that is, an account subject to source and amount  
10 limitations (\$5000 annually per contributor). Similarly, non-profits also  
11 may be compelled to use their hard-money accounts to pay an  
12 appropriately tailored share of administrative expenses associated with  
13 their contributions. *See Cal-Med*, 453 U.S. at 198-99 n. 19, 101 S.Ct.  
14 2712 (opinion of Marshall, J.). But non-profit entities are entitled to make  
15 their expenditures-such as advertisements, get-out-the-vote efforts, and  
16 voter registration drives-out of a soft-money or general treasury account  
17 that is not subject to source and amount limits. Stated another way: A  
18 non-profit that makes expenditures to support federal candidates does not  
19 suddenly forfeit its First Amendment rights when it decides also to make  
20 direct contributions to parties or candidates. Rather, it simply must  
21 ensure, to avoid circumvention of individual contribution limits by its  
22 donors, that its contributions to parties or candidates come from a hard-  
23 money account.

24  
25 *EMILY's List*, 581 F.3d at 12. The court further noted that, “[i]f *Austin* were overruled,  
26 then non-profits would be able to make unlimited express-advocacy expenditures from  
27 their soft-money accounts even if they accepted donations from for-profit corporations or  
28 unions to those accounts.” *Id.* at 12 n.11.

29 NDPAC, like EMILY's List, is a “hybrid” entity that focuses on both direct  
30 contributions to Federal candidates as well as independent expenditures. *Id.* at 12.

31 Although 2 U.S.C. 441a(a)(1)(C) would still appear, on its face, to continue to apply even  
32 to these types of hybrid non-profit entities, under *Citizens United*, *EMILY's List*, and

1 *SpeechNow*, the rationale for limiting contributions to a political committee's  
2 independent-spending account is no longer supportable. *See* AOs 2010-09 and 2010-11.

3 Accordingly, the Commission concludes that a political committee that makes  
4 both contributions and independent expenditures, such as NDPAC, may make its  
5 independent expenditures using an independent spending account that is wholly separate  
6 from the account it uses to make contributions to candidates and political parties.<sup>4</sup>  
7 Therefore, the Commission concludes that NDPAC may accept unlimited contributions  
8 from individuals, other political committees, corporations, and labor organizations so  
9 long as it uses these contributions only for independent spending (as opposed to  
10 contributions to Federal candidates) and the administrative expenses discussed below,  
11 and so long as it uses a separate bank account to do so.

12 2. *May NDPAC, a nonconnected committee that makes both contributions and*  
13 *independent expenditures, allocate any or all of its administrative or*  
14 *operating expenses between its accounts, including paying all expenses from*  
15 *its independent expenditure account?*  
16

17 NDPAC may allocate its administrative and operating expenses between its  
18 accounts in a manner that “‘closely’ corresponds” to the proportion of its activities  
19 funded by each account, such as the amount of federal contributions as compared to its  
20 spending on independent electoral activity.

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<sup>4</sup> The Commission notes that, in the alternative, those persons who created and operate NDPAC may establish a separate political committee to make independent expenditures using contributions not subject to the amount limitations and source prohibitions of the Act. *See* Advisory Opinions 2010-09 (Club for Growth) and 2010-11 (Commonsense Ten). Through the establishment of an independent expenditure-only political committee, these persons may engage in the same type of independent speech as they seek to do through the acceptance of unlimited contributions into a separate account. Moreover, a separate political committee that engages only in independent spending would not be subject to the Act's contributions limits otherwise applicable to NDPAC under the Commission's traditional affiliation analysis at 11 CFR 110.3(a)(1), since contributions to such committees cannot constitutionally be limited under *Citizens United*, *SpeechNow*, and *EMILY's List*.

1           Neither the Act nor Commission regulations currently prescribe an allocation  
2 regime for a nonconnected committee that makes both independent expenditures and  
3 contributions to candidates. The Commission repealed 11 CFR 106.6(c), which  
4 prescribed the allocation ratio for administrative expenses, because this rule was vacated  
5 by the court in *EMILY's List*. See Final Rules, Funds Received in Response to  
6 Solicitations; Allocation of Expenses by Separate Segregated Funds and Nonconnected  
7 Committees, 75 FR 13223 (Mar. 19, 2010). Without regulations prescribing the  
8 allocation of administrative expenses, nonconnected committees should allocate their  
9 administrative expenses in a manner that “‘closely’ corresponds to the percentage of  
10 activities relating to its contributions as compared to its advertisements, get-out-the-vote  
11 efforts, and voter registration activities.” See *EMILY's List*, 581 F.3d at 12 (citing *Davis*  
12 *v. FEC*, 128 S. Ct. 2759, 2770 (2008); *CalMed*, 453 U.S. at 198-99 n.19). One  
13 acceptable method is to allocate according to the percentage of NDPAC’s Federal  
14 contributions as compared to the percentage of its disbursements for all other independent  
15 spending. In doing so, the NDPAC may determine the allocation ratio either on an  
16 estimated funds spent method (a forward looking estimate of spending over the election  
17 cycle) or an actual funds spent method (reflecting actual spending during the reporting  
18 period). This is not necessarily the only acceptable allocation method under *EMILY's*  
19 *List*.

20           NDPAC must report all contributions to, and expenditures from, its proposed  
21 independent expenditure account pursuant to the Act and Commission regulations.  
22 See 2 U.S.C. 434; 11 CFR Part 104. Though these contributions would normally be  
23 disclosed on Line 11(a) of Form 3X, there is not, at present, a clear way to distinguish on

1 Line 11(a) between contributions deposited into the general account and contributions  
2 deposited into the independent expenditure account. Accordingly, at present  
3 contributions deposited into the independent expenditure account should be reported on  
4 Line 17 of Form 3X titled “Other Federal Receipts” accompanied by a memo text to state  
5 when a receipt that is itemized on Schedule A has been deposited into the independent  
6 expenditure account.

7 For similar reasons, disbursements for administrative/operating expenses made  
8 from NDPAC’s independent expenditure account should be disclosed on Line 29 of Form  
9 3X titled “Other Disbursements” (as opposed to Line 21(b) of Form 3X) and should  
10 include a memo text to state when a disbursement that is itemized on Schedule B was  
11 made from the independent expenditure account.<sup>5</sup>

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

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<sup>5</sup> Independent Expenditures should be disclosed on Schedule E for Line 24 of Form 3X and a memo text included to state when a disbursement that is itemized on Schedule E was made from the independent expenditure account.

1 law including, but not limited to, statutes, regulations, advisory opinions, and case law.

2 The cited advisory opinions are available on the Commission's Web site at

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

4 The Commission notes that this advisory opinion implicates issues that may be

5 the subject of a forthcoming rulemaking in response to the *Citizens United*, *SpeechNow*,

6 and *EMILY's List* decisions. This guidance provided in this advisory opinion is,

7 therefore, subject to change or invalidation pending the conclusion of that rulemaking.

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On behalf of the Commission,

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Matthew S. Petersen

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Chairman