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JUN 11 2009  
8:20 am

June 10, 2009

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**BY FACSIMILE AND EMAIL**

The Honorable Steven T. Walther  
Chairman  
Federal Election Commission  
999 E Street, NW  
Washington, DC 20463

Supplement to  
AOR 2009-13

Re: AOR 2009-13

Dear Chairman Walther:

This letter responds on behalf of our client, Black Rock Group ("BRG"), to the comment filed by the Democratic National Committee, Democratic Senatorial Campaign Committee, and Democratic Congressional Campaign Committee (collectively "Democratic Parties" and "DP Comment") regarding Advisory Opinion Request 2009-13 ("BRG AOR"). For the reasons set forth below, the basis for the Democratic Parties' opposition to the BRG AOR is misplaced and the Federal Election Commission ("Commission") should hold that BRG and its clients will not satisfy the definition of political committee under the federal statutes and Commission regulations.<sup>1</sup>

The Democratic Parties repeatedly misstate that the AOR is a "request about whether a group of individuals may pool unlimited funds" for the purpose of making independent expenditures. This inaccurate characterization is patently misleading. In the plain words of the BRG AOR:

Each LLC will be a separate and distinct entity having only one member, who is the sole manager and funder of the LLC. Ultimate control regarding the timing, placement and method of communication will reside with the individual who is the sole member, manager and funder of the LLC.

BRG AOR at 2. This makes clear that the BRG AOR does not contemplate the so-called "pooling" of money. Only one individual's Limited Liability Company ("LLC") will pay for any

<sup>1</sup> The Democratic Parties misleadingly attempt to equate the BRG AOR with a case currently pending in federal court filed by SpeechNow.org, an unregistered 527 organization that seeks to solicit and accept contributions for the purpose of making independent expenditures. BRG, in contrast, will simply provide advice concerning messaging to each individual who wishes to communicate his or her own views, using his or her own money, regarding federal candidates. Therefore, the SpeechNow.org comparison is inaccurate.

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communication. No communication will be funded by more than one LLC. The Commission must look past the Democratic Parties' attempt to recast the plain language of the BRG AOR.

Moreover, the Democratic Parties mistakenly claim in their comment that three of the Commission's prior Advisory Opinions on this subject indicate that the involvement of others in the decision-making process regarding independent expenditures may convert an LLC into a political committee.<sup>2</sup> The most relevant Advisory Opinion for the BRG AOR is Advisory Opinion 2009-02 (True Patriot Network, LLC) that was approved by the Commission earlier this year. The Democratic Parties claim that in approving the Advisory Opinion Request submitted by True Patriot Network, LLC ("TPN AOR"), "the Commission relied on representations that the requesting LLC's sole member had 'exclusive control' over how his funds would be spent – not 'ultimate control,' which vaguely implies the involvement of others." DP Comment at 2. The Democratic Parties also argue that the Commission "relied on the 'total unity' between the member and the LLC." *Id.* As explained below, the actual language of the TPN AOR tells a different story.

First, the "total unity" and "exclusive control" requirements advanced by the Democratic Parties to avoid political committee status are not consistent with the TPN AOR. The TPN AOR stated that the original organization was actually founded by two individuals and was re-organized as an

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<sup>2</sup> The other two Advisory Opinions cited by the Democratic Parties are materially different than the facts set forth in the BRG AOR. In Advisory Opinion 2008-10 (VoterVoter.com), the Requestor is an internet company that provides a website where individuals may post their own online advertisements or purchase airtime for the advertisements that they created or that someone else created. The company may also serve as an advertising vendor by assisting individuals with the creation of their advertisements. This means that the person who created an advertisement may not be the same person who purchases the airtime for the placement of advertisement. Under such a scenario, two individuals could be paying to bring one advertisement from creation to distribution over the airwaves. Such a fact pattern is materially different than the BRG AOR. As explained in the BRG AOR, each individual client will pay for the production and placement costs for his or her own advertisements – the creation and placement costs will not be split between two different individuals.

With respect to Advisory Opinion 1986-38 (Stedman), the Requestor was an individual who inquired whether a specific advertisement was subject to Commission regulation. The Advisory Opinion was issued before the passage of the Bipartisan Campaign Reform Act of 2002, and the Commission concluded that the reporting requirements would not apply to the Requestor's advertisement.

Therefore, Advisory Opinions 2008-10 and 1986-38 do not support the arguments advanced by the Democratic Parties in their comment on the BRG AOR.

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LLC to protect multiple individuals associated with TPN for liability purposes. The TPN AOR stated:

The purpose of the change in legal status was simple: to protect *Mr. Hanauer, Mr. Liu, and TPN and its staff and supporters* from any personal liability that might arise from the activities of TPN. As an LLC, TPN will have a single member, Mr. Nicolas Hanauer, and will continue to be funded exclusively by the personal funds of Mr. Hanauer.

(Letter from Judith Corley of Perkins Coie to Federal Election Commission of 02/03/2009 at 1) (emphasis added). In her February 2, 2009 email to the Commission, Ms. Corley states that TPN has two employees, and that Mr. Liu—one of the original founders of TPN—is not an employee or titled officer of TPN but a paid consultant to the organization. (Email from Judith Corley of Perkins Coie to Federal Election Commission of 02/11/2009). In addition, Ms. Corley's February 3, 2009 letter states that "all funds from Mr. Hanauer are given on an unrestricted basis, for use by TPN in its discretion." Therefore, Mr. Hanauer would contribute funds to TPN for use in "its discretion" – an LLC that was formed to provide liability protection for multiple individuals, including two employees and paid consultants. The facts presented in the TPN AOR are not consistent with the arguments advanced by the Democratic Parties here.

More importantly, Ms. Corley informed the Commission that "*Mr. Hanauer will be the final decision-maker on all TPN actions and positions, including any political communications that TPN makes, with employees and consultants playing advisory roles.*" *Id.* (emphasis added); see also FEC Adv. Op. 2009-02 at 2 ("Mr. Hanauer will be the final decision-maker on all TPN actions, although TPN's employees and consultants might advise TPN in the making of these communications"). Thus, Mr. Hanauer was merely the "final decision-maker" after receiving advice from his employees and consultants – a role which is much different than the "exclusive control" standard argued by the Democratic Parties in their comment.

In fact, the TPN AOR specifically contemplates that part of TPN's activities will be to bring together "individuals and organizations" to further their shared goals, including "communications and other activities that influence federal elections." (Letter from Judith Corley of Perkins Coie to Federal Election Commission of 02/03/2009 at 2.) A copy of the Ms. Corley's letter and email are attached for your convenience. See Exhibit A. Therefore, TPN relies on the advice of employees and consultants—individuals other than the sole member of the LLC—to decide when, where, and how to make communications for the purpose of influencing federal elections. The Democratic Parties' "exclusive control" argument is without merit. Ms. Corley's AOR and subsequent responses to the Commission, in fact, support BRG's request.

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The Commission approved TPN's AOR by a vote of 5-0 with full knowledge that TPN independent expenditures would be made with the involvement of individuals who are not the LLC's sole member and funder – and possibly other organizations. Chairman Walther, Vice Chairman Petersen, and Commissioners Bauerly, Hunter, and McGahn each voted to approve the Advisory Opinion Request. *See* Exhibit B. Commissioner Weintraub did not vote. In this regard, there does not appear to be any factual difference between the LLC at issue in Advisory Opinion 2009-02 and each LLC described in the BRG AOR. The BRG AOR states that each LLC will comply with the Commission's guidance under Advisory Opinion 2009-02. Thus, there is no basis for holding that BRG and its clients will constitute a political committee.

In addition, the Democratic Parties argue that the BRG AOR should not be approved merely because it may carry consequences for them. They claim that permitting independent expenditures would “seriously disrupt the balance Congress sought to create in McCain-Feingold so as to preserve the most vibrant role possible for the parties.” DP Comment at 3. Their request asks the Commission to restrict the First Amendment rights of BRG and its clients in order to enhance their own voices in the political marketplace. Such an outcome would run afoul of the First Amendment, and the Commission should reject their request. No Commissioner—Democrat or Republican—should be swayed by such a misguided argument. In *Buckley v. Valeo*, the United States Supreme Court made clear that equalizing speech or “leveling the playing field” are unconstitutional justifications for restricting political speech.

[T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment, which was designed to secure the widest possible dissemination of information from diverse and antagonistic sources, and to assure the unfettered interchange of ideas for the bringing about of political and societal changes desired by the people. The First Amendment's protection against governmental abridgment of free expression cannot properly be made to depend on a person's financial ability to engage in public discussion.

424 U.S. 1, 48-49 (1976). Therefore, the Commission must not go beyond the four corners of the BRG AOR and consider the impact of its decision in this matter on the Democratic Parties.

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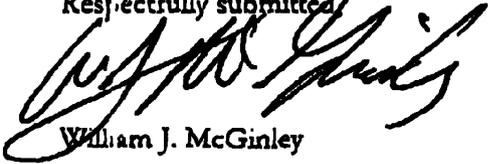
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For all of the foregoing reasons, BRG respectfully requests that the Commission take the Democratic Parties' comment for what it is: an effort to distract the Commission from the real question posed by BRG in its AOR.

Respectfully submitted,



William J. McGinley

cc: Vice Chairman Petersen  
Commissioner Bauerly  
Commissioner Hunter  
Commissioner McGahn  
Commissioner Weintraub  
Thomasenia Duncan, Esq., General Counsel

# Exhibit A

FEDERAL ELECTION COMMISSION  
OFFICE OF GENERAL COUNSEL

**Perkins  
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February 3, 2009

Thomasenia Duncan, Esq.  
General Counsel  
Federal Election Commission  
999 E. Street, NW  
Washington, DC 20463

AOR 2009-02

**Re: Advisory Opinion Request - The True Patriot Network, LLC**

Dear Ms. Duncan:

We are writing on behalf of The True Patriot Network, LLC, pursuant to 2 U.S.C. § 437f, to request an advisory opinion from the Federal Election Commission. We ask that the Commission find that an individual who seeks protection from liability through membership in a limited liability company is still treated as an individual for all purposes under the federal campaign finance laws.

#### **FACTUAL BACKGROUND**

The True Patriot Network ("TPN") was created in 2007 by Nicolas Hanauer and Eric Liu. TPN was originally an unincorporated association, with all costs associated with TPN paid by Mr. Hanauer from his personal funds. TPN has recently organized itself as a limited liability corporation ("LLC") in the state of Washington. The purpose of the change in legal status was simple: to protect Mr. Hanauer, Mr. Liu, and TPN and its staff and supporters from any personal liability that might arise from the activities of TPN. As an LLC, TPN will have a single member, Nicolas Hanauer, and will continue to be funded exclusively by the personal funds of Mr. Hanauer. TPN has not elected to be treated as a corporation under the Internal Revenue Code.

In 2007, Mr. Hanauer and Mr. Liu jointly published a book, *The True Patriot*, containing a discussion of their views on the fundamental principles of patriotism and a call to action by Americans to embrace these principles in their lives. The book is available at <http://www.truepat.org/bookreader> (last visited Jan. 31, 2009).

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Perkins Coie LLP and Affiliates

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The True Patriot Network was established to help with these efforts. As discussed on its website, TPN is designed to bring together individuals and organizations to discuss true patriotism, to promote the principals of true patriotism and to educate the public and public officials on these principles. As stated on the website: "We aim to connect with Americans, who are interested in changing our politics and culture, and bringing them more in line with the progressive patriotic values we've set forth in our book." See, <http://www.trupat.org/about> (last visited Jan. 31, 2009).

During 2007 and 2008, TPN held a number of public events and public appearances featuring Mr. Liu and Mr. Hanauer talking about the principles in their book. It began the creation a social network of individuals and organizations with a view toward linking them together to amplify their voices on this subject. They sponsored an essay contest for high school students on "What Patriotism Means to Me." The winner of the contest received a \$25,000 college scholarship from TPN. It published several newspaper and magazine advertisements and a short film discussing what true patriotism means.

TPN intends to continue to undertake these activities as its primary mission. It is anticipated that the activities described above will take the majority of the time and finances of the organization. TPN would, however, like to expand its activities to include communications and other activities that influence federal elections. After identifying federal elected officials who share the principles and ideals of TPN, TPN would like to publicly endorse and urge support for these elected officials and/or the parties that support them. These communications could take any number of forms: information on the TPN website, newspaper advertisements, mailings, or television advertisements, among others. In carrying out these federal election influencing activities, no one acting on behalf of TPN will undertake any activity that could be construed as coordination with a federal candidate or party committee, as that term is defined in the FEC's regulations at 11 C.F.R. § 109.21.

#### **ISSUE PRESENTED**

Under the Federal Election Campaign Act ("FECA") of 1971, as amended, and the Federal Election Commission ("FEC") regulations implementing those laws, is an LLC with only a single natural person as a member, funded exclusively with the personal funds of that individual, and not electing to be taxed as a corporation treated for all purposes in the same manner as an individual would be treated under the statute and regulations?

Specifically, may TPN make contributions and expenditures, as defined under FECA and FEC regulations, subject only to the limitations and disclosure requirements imposed on individuals?

## LEGAL DISCUSSION

Under regulations promulgated in 1999, the Federal Election Commission addressed how a limited liability company with a single member would be treated for contribution limit purposes. At 11 C.F.R. § 110.1(g)(4), the regulations state:

**A contribution by an LLC with a single natural person member that does not elect to be treated as a corporation by the Internal Revenue Service pursuant to 26 C.F.R. § 301.770-3 shall be attributed only to that single member.**

The regulations do not address any other activity by a single member LLC. Nor has the FEC issued any advisory opinions interpreting the regulations with respect to other activities by such an LLC.

The rationale behind this regulation supports the conclusion that expenditures by an LLC should be treated no differently than contributions. In determining how to treat contributions by LLC entities under the FECA, the FEC looked by analogy to contributions by partnership entities. Under the FECA and FEC regulations, partnership contributions are attributed to both the partnership and to the individual partners. 11 C.F.R. § 110.1(e). In comments during the LLC rulemaking, however, the IRS noted that a single member LLC may not elect to be taxed as a partnership, but is treated rather as a disregarded entity (assuming it does not elect to be treated as a corporation for tax purposes.) Relying on this IRS regulation, the Commission concluded that contributions by a single member LLC should be treated the same way – disregarding the LLC as a separate entity, contributions were attributed to the single member as an individual. The Explanation and Justification to the regulations states:

**Because of the unity of the member and the LLC in this situation, it is appropriate for attribution of the contribution to pass through the LLC and attach to the single member under these circumstances.**

**Treatment of Limited Liability Companies Under the Federal Election Campaign Act, 64 Fed. Reg. 37,397, 37,400 (July 12, 1999).**

**TPN is not a political committee: Its major purpose is non-electoral, not for the purpose of nomination or election of federal candidates. TPN does not receive funding from more than one individual and the funds it receives are not for the purpose of influencing federal elections, since all funds from Mr. Hanauer are given on an unrestricted basis, for use by TPN in its discretion. Expenditures by TPN to influence federal elections would not constitute the majority of TPN's activities. Although, as stated, TPN does not intend to coordinate any of its activities with federal candidates, if it did, the expenditures it would make to influence federal elections**

Thomasenia Duncan, Esq.  
February 3, 2009  
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would be considered contributions, subject to Section 110.1(g)(4) – that is, attributed as contributions by an individual. There is no reason to treat expenditures by TPN any differently.

Further, there is no rational basis for an individual to be treated less favorably under the law than a political committee. A political committee may incorporate for liability purposes, 11 C.F.R. § 114.12, and it remains a political committee under the FECA, not subject to the more onerous restrictions on campaign activity placed on other corporations. An individual should be able to adopt similar liability protections through membership in an LLC, and still be treated under the Act as an individual.

For these reasons, The True Patriot Network, LLC, respectfully requests issuance of an advisory opinion. Should you have any questions or need additional information, please do not hesitate to contact the undersigned.

Very truly yours,

A handwritten signature in black ink, appearing to read "Judith L. Corley", written over a circular stamp or seal.

Judith L. Corley  
Counsel to The True Patriot Network, LLC



"Corley, Judy (Perkins  
Coie)"  
<JCorley@perkinscoie.com>  
02/11/2009 04:15 PM

To <DAdkins@fec.gov>  
cc  
bcc  
Subject Information for True Patriot Network Advisory Opinion  
Request

FEB 11 2009 4:15 PM  
 OFFICE OF THE CLERK  
 FEDERAL ELECTION COMMISSION

History: This message has been forwarded.

David .

Please find attached the organizing documents for The True Patriot Network ("TPN"). In addition, I have some clarifications on the questions you all were asking in our earlier phone conversation:

- TPN currently has two employees, both of whom are paid by TPN.
- The group sign-up page on TPN's website is very new and has not been fully implemented yet. They currently do not have any groups who have signed up. They intend, as this feature becomes more active, to connect the different groups with each other to work on similar projects or to learn for one another's experiences.
- Eric Liu is not an employee of TPN and does not have a title with the organization. He will be paid as a consultant for TPN on an as-billed basis.
- This will confirm that the only funds TPN currently receives and anticipates receiving in the future are the personal funds of Mr. Hanauer. They do not accept any donations, solicited or unsolicited, and are not paid for services or appearances.
- Mr. Hanauer will be the final decision-maker on all TPN actions and positions, including any political communications that TPN makes, with employees and consultants playing advisory roles.
- TPN does not currently have a definitive budget for its operations in the future, so does not have a set amount established for spending on political communications or other electoral activities, but it does not anticipate that its political activity would exceed 5-10% of TPN's entire budget at the most.

If you have any questions or need additional information, please let me know.

Perkins Coie LLP

**IMPORTANT TAX INFORMATION:** This communication is not intended or written by Perkins Coie LLP to be used, and cannot be used by the taxpayer, for the purpose of avoiding penalties that may be imposed on the taxpayer under the Internal Revenue Code of 1986, as amended.

**NOTICE: This communication may contain privileged or other confidential information. If you have received by reply email and immediately delete the message and any attachments without copying or disclosing the con**

   
  
7471814 SDWA.PDF True Patriot LLC Agreement.DOC

# Exhibit B

