COMMENT ON AOR 2009-13

September 21, 2009

Steven T. Walther, Chairman
Matthew S. Petersen, Vice Chairman
Cynthia L. Bauerly, Commissioner
Caroline C. Hunter, Commissioner
Donald F. McGahn II. Commissioner
Federal Election Commission
999 E Street, NW
Washington, DC 20463

By Facsimile to (202) 219-0174

Re: Advisory Opinion Request 2009-13

Dear Mr. Chairman, Mr. Vice Chairman and Commissioners:

This letter is submitted in reference to Advisory Opinion Request ("AOR") 2009-13 (Black Rock Group). We submit this letter on our own behalf as attorneys with many years of experience advising clients, including both independent organizations and vendors of political services, regarding the Federal Election Campaign Act ("FECA") and not on behalf of any particular clients of our respective law firms. We request that the Commission accept this letter either as a comment under 11 CFR § 112.3[1] or as an ex parte communication to the Commissioners pursuant to 11 CFR Part 201.

We apologize for the lateness of the communication, but our concern regarding this AOR was heightened by the Federal Election Commission's ("FEC" or "Commission") most recent request for an additional lengthy extension of time, which raises the possibility that a substantial re-write of the response to the AOR may occur. Given that the Commission's deadline is now September 28, and that no further draft has been made public, it appears unlikely that the Commission will have the time to seek additional comments on any new draft that is circulated. Thus, we ask that these comments be considered prior to issuance of a final response.

We urge the Commission in responding to this Request to adhere to its longstanding definition of "political committee" as applied and interpreted over the years both by the FEC and by the courts. This statutory definition has remained unchanged since the original passage of FECA in 1971.[2] Under this definition, a group of persons is a political committee *only* if it raises contributions or makes expenditures together. These terms have consistently been interpreted as applying only in those situations in which funds are "pooled," i.e., commingled in an account or deposited into an account that the individual donor/spender does not control. *See, e.g., McConnell v. FEC*, 540 U.S. 93, 135 (2003), quoting *Buckley v. Valeo*, 424 U.S. 1, 22 (1976)

[1] We respectfully request that the Commission consider this letter as both a late request for an extension of time and a comment pursuant to the regulations.

[2] The term "political committee" means "any committee, club, association or other group of persons which receives contributions aggregating in excess of $1,000 during a calendar year or which makes expenditures aggregating in excess of $1,000 during a calendar year." 2 USC § 431(4)(A).

(*per curiam*) (contributions allow people to "pool their resources"). As far as we are aware, never before has the Commission or a court found that individuals or entities making their own independent expenditures in coordination with other independent spenders become a political committee, unless those individuals or entities have pooled their funds into the same bank account to make joint expenditures.[3] Parallel activity does not transform individuals or organizations acting independently into a political committee.

At the outset, it is important to note that the question of what constitutes a political committee under FECA necessarily involves significant constitutional interests, particularly the right under the First Amendment of citizens to associate for political and other purposes. As the Supreme Court stated in *Buckley v. Valeo*, "[t]he First Amendment protects political association as well as political expression. The constitutional right of association ... [stems] from the Court's recognition that '[e]ffective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association.' 424 U.S. at 15, quoting *NAACP v. Alabama*, 357 U.S. 449, 460 (1958).

Based on these principles, federal courts from the outset of FECA have narrowly construed the term "political committee" out of concern for the constitutional rights implicated by regulation of political activities. *See United States v. Nat'l Comm. For Impeachment*, 469 F. 2d 1135, 1140-1142 (2d Cir. 1972); *American Civil Liberties Union v. Jennings*, 366 F.Supp. 1041, 1055-57 (D.D.C. 1973) (three-judge court), vacated as moot *sub nom Staats v. ACLU*, 422 U.S. 1030 (1975). In *Buckley v. Valeo*, the Supreme Court similarly narrowed the scope of the statutory term, noting that "[t]o fulfill the purposes of the Act, [political committees] need only encompass organizations that are under the control of a candidate or the major purpose of which is the nomination or election of candidate." 424 U.S. at 79. *Accord*: *Federal Election Commission v. GOPAC, Inc.*, 917 F.Supp. 851, 858-859 (D.D.C. 1996).

In *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 252 (1986) ("*MCFL*"), the Court recognized that political committees are subject to "substantial" restrictions under FECA, including the appointment of a treasurer, accounting and reporting requirements, and fundraising limitations that "may create a disincentive for such organizations to engage in political speech." *See FEC v. Wisconsin Right To Life, Inc.*, 127 S. Ct. 2652, 2671 n.9 (2007) (Roberts, C.J.) ("PACs impose well-documented and onerous burdens ...."); *FEC v. Machinists Non-Partisan Political League*, 655 F.2d 380, 391-392 (D.C. Cir.) ("once any group of Americans is found to be a 'political committee' it must then submit to an elaborate panoply of FEC regulations ..."), *cert. denied*, 454 U.S. 897 (1981). Of particular relevance here, the Court in *MCFL* noted that the administrative burdens imposed by FECA on political committees might cause a "group of

[3] The comment filed by the Democratic National Committee, the Democratic Senatorial Campaign Committee, and the Democratic Congressional Campaign Committee erroneously asserts without support that funds are "pooled" when each individual or entity separately makes an independent expenditure if they do so after consultation even if acting separately and in control of their own expenditures. There is no basis for this definition of "pooled." In fact, it is not even consistent with common dictionary definitions of "pool" – *e.g.*, "an aggregation of the interests or property of different persons made to further a joint undertaking by subjecting them to the same control and a common liability;" "to combine (as resources) in a common fund." Merriam Webster Collegiate Dictionary 905 (1993).

like-minded persons" to "be turned away" from engaging in protected political activities: "Faced with the need to assume a more sophisticated organizational form, to adopt specific accounting procedures, to file periodic detailed reports, and to monitor garage sales lest nonmembers take a fancy to the merchandise on display, it would not be surprising if at least some groups decided that the contemplated political activity was simply not worth it." 479 U.S. at 255. The Court continued: "The fact that the statute's practical effect may be to discourage protected speech is sufficient to characterize [it] as an infringement of First Amendment activities." *Id.*

Last Friday's decision from the United States Court of Appeals for the District of Columbia Circuit in *EMILY's List v. FEC*, No. 08-5422 (September 18, 2009), highlights the constitutional concerns raised by any regulation of political activity by individuals and entities acting independently of candidates and parties. For example, that decision clearly indicates that a non-profit entity, whose sole purpose is to engage in independent spending, may not be limited in the size of the contributions that it receives from individuals. *Id.* at 11-16. The Court noted that "if one person is constitutionally entitled to spend $1 million to run advertisements supporting a candidate (as *Buckley* held), it logically follows that 100 people are constitutionally entitled to donate $10,000 each to a non-profit group that will run advertisements supporting a candidate." *Id.* at 14-15 (footnote omitted).[4]

Thus, in consideration of these constitutional concerns, in evaluating whether an entity is a political committee, Courts have required a two step analysis: (1) whether the entity has made contributions or expenditures in excess of $1,000; and (2) whether its major purpose to influence the election of candidates. There is no precedent under this test that would support a conclusion that a group of LLCs or other persons making separate independent expenditures with funds maintained under their individual control – even through a common vendor – could be transformed by operation of law into a political committee. Again, as far as we are aware, no court has held and the Commission has never formally advised that political committee status befalls individuals or group of persons who do not pool their funds or set up a separate organization through which to engage in their joint federal electoral activity.

Indeed, Congress specifically rejected applying political committee status to individuals acting on their own behalf. In the 1974 FECA Amendments Congress rejected a House proposal to expand the definition of political committee and specified that the duty to register as a political committee "does not apply to individuals acting on their own behalf," Committee on Conference on S. 3044, House Report No. 93-1438, 93d Cong. 2nd Sess. 83 (1974). In upholding the constitutionality of the contribution limits applicable to contributions made by an unincorporated association to a political committee, the Supreme Court distinguished those limitations from joint expenditures by individuals that are entitled to greater constitutional protection. In *California Medical Association v. FEC*, 453 U.S. 182, 197 n.17 (1981), the Court noted that under FECA,

[4] Although our comments are primarily focused on the technical aspects of whether the facts in the request would lead to the conclusion that the LLCs must form a political committee, the most important practical question that the Commission is truly addressing in this request is whether each LLC would be subject to a $5,000 expenditure limit with respect to the proposed independent expenditures. *EMILY's List v. FEC* appears to decide this question in the negative.

"multicandidate committees" are "distinct legal entities" and accordingly, "[c]ontributions to such committees are therefore distinguishable from expenditures made jointly by groups of individuals in order to express common political views." Acting collaboratively but independently simply does not result in the creation of a political committee with all the attendant registration and reporting obligations and incoming and outgoing contribution limits.

The use of a common vendor in no way changes this analysis. See, *e.g.*, Advisory Opinion No. 2006-08 (in which the Commission allowed a vendor to set up bank accounts for clients separate from the corporate vendor's accounts from which each client was permitted to direct that contributions be made based on advice from the vendor). Under the Commission's regulations, a common vendor is relevant only to the question of whether a communication is coordinated with a candidate or political party committee. 11 C.F.R. § 109.21. There is no FEC regulation that purports to extend the concept of "coordination" to activities conducted by independent individuals, groups or committees, acting in concert with *each other* but *not* in concert with any candidate or political party committee. The purpose of the coordination rule is to treat as an in-kind contribution spending by individuals or committees in cooperation with a candidate or party or their agents. But independent spending cannot be treated in that manner. The Commission has never in its revisions of the coordination regulations or the political committee regulations published a notice of proposed rulemaking that even sought comment (much less suggested) the extension of the definition of political committee to individuals or entities conducting independent activities in coordination with other individuals or entities engaged in similar independent activity.[5]

Moreover, the idea that the use of a common vendor could transform independent acting entities into a political committee would be a bizarre result given that the FEC coordination regulations themselves deal directly with common vendors and nowhere suggest that their activities could trigger political committee status among their independent clients. To the contrary, the common vendor regulations are concerned solely with the potential role that such vendors play in facilitating coordination between one or more independent groups, on the one hand, and candidates and political parties on the other – and *not* among independent groups themselves. Indeed, insofar as those rules permit organizations to establish firewalls, as a practical matter they *encourage* independent spenders to use the same vendors so long as they operate on the independent side of the wall *vis à vis* candidates and parties and provide services to other independent spenders. Thus, the FEC would essentially be saying to independent spenders that they must use the same vendors used by other independent spenders, but if they do so they will become a political committee with the other clients of that vendor.[6] There is no statutory or regulatory basis for such a conclusion.

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[5] Because this would be a new rule of law, the Commission may propose such a new rule only through the regulatory process and not through the issuance of an advisory opinion. See 2 U.S.C. § 437f(b).

[6] The use of a common vendor is not even identified as a factor in the Commission's affiliation regulations at 11 C.F.R. § 110.3(a). The concept that the mere use of a common vendor could turn independent spenders into a political committee when a common vendor is not even considered an indication of direction or control under the affiliation regulations would be a dramatic departure from the current regulations.

Nor can the existence of a so-called "central plan" be the determining factor in determining the existence of a political committee as commenters Democracy 21 and Campaign Legal Center have suggested. In the absence of pooling of funds, it would be both contrary to FECA and unconstitutionally intrusive for the Commission to determine – based on similarity of speech – that independent actors, each maintaining autonomy and separate control over its own spending and decisions became a political committee on that basis alone.

The comment suggests no limiting principle to its notion that "group" activity triggers political committee status. The fact is that there are innumerable informal gatherings, meetings, coalitions and common political causes in which like-minded independent organizations may participate; are those too to be alchemized into political committees? Restricting the ability of independent spenders to communicate with each other about their proposed speech would create a gag rule and severely chill associational activity – a clear infringement of First Amendment rights that we suggest the courts would not abide. Democracy 21 and Campaign Legal Center otherwise rely on mischaracterizations of the requester's plan by asserting that the various LLCs will "give up control" to the common vendor; but the Commission, of course, must accept the facts as presented in the request, just as the requester can only benefit from a favorable advisory opinion by acting as it explained in its request that it would.

Finally, we address two other points raised in the party committee comments in support of a finding of political committee status. First, the distinction between individuals and entities coordinating or communicating about their independent activities and individuals and entities pooling their funds in common accounts or organizations is entirely consistent with the Commission's position in *SpeechNow.org v. FEC*, Civ. No. 08-0248 (D.D.C.). Unlike the AOR from Black Rock, *SpeechNow* involves an organization that has raised funds from individuals and pooled them in a common bank account to make independent expenditures as a separate legal entity from the individual contributors involved. (Even so, for distinct First Amendment reasons articulated in *EMILY's List v. FEC* and noted above, the donations to that pool may not be limitable.)

Second, we do not believe it is appropriate for the Commission to reach an opinion on this matter in order to preserve a "balance" of political power that the party committees assert the Bipartisan Campaign Reform Act sought to create. We share the parties' aspiration that they should play "the most vibrant role possible" in the public sphere, but the governing law decidedly disfavors as a legitimate, let alone compelling, governmental interest restricting particular groups in order to enhance the relative voices of others. *See, e.g., Davis v. FEC*, 128 S. Ct 2759, 2773, (2008). The better course would be for Congress to take direct action to reduce restrictions on political parties themselves.

In conclusion, we urge the Commission, if it issues an opinion in this matter, to clearly make the distinction between a political committee in which funds are pooled and joint expenditures are made, and independent activity by individuals and other entities that may be coordinated among them without transforming the spenders, acting independently from any candidates or parties, into a political committee.

Respectfully submitted,

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cc: Thomasenia Duncan, General Counsel