FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

BEFORE THE FEDERAL ELECTION COMMISSION

CONCURRENCE IN ADVISORY OPINION 2009-13 (BLACK ROCK GROUP)

Vice Chairman MATTHEW S. PETERSEN and
Commissioners CAROLINE C. HUNTER AND DONALD F. MCGAHN II

The Commission recently approved an advisory opinion in response to a request from a newly formed consulting group, the Black Rock Group ("BRG"), concerning the application of the Federal Election Campaign Act of 1971, as amended (the "Act"), and Commission regulations to its contemplated activities. In the opinion, the Commission concluded that BRG may serve as a commercial vendor to one single-member natural-person limited liability company ("LLC") that makes independent expenditures concerning Federal elections or candidates without triggering political committee status. Assuming that BRG does not facilitate communications between the LLCs and does not convey information from one LLC to another, the opinion further concludes that BRG also may serve as a commercial vendor to two or more single-member natural-person LLCs without triggering political committee status. That BRG can have clients, and that those clients can spend without limit is, to us, obvious and well-established. Equally clear is the ability of individuals to spend *via* LLCs, as this was already decided by the Commission in another recent advisory opinion.[1]

Although we voted to approve the advisory opinion, we write separately to note that a key question presented by BRG remains unresolved: whether its proposed activities, specifically the sharing of information among its clients, would somehow subject it or its clients to regulation as a political committee. The Act defines a political committee, in relevant part, as:

> [A]ny 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]

[1] Advisory Opinion 2009-02 (True Patriot Network).

[2] 2 U.S.C. § 431(4).

This is a key question because once an entity becomes a political committee it faces a number of complex reporting obligations[3] and, in some instances, other regulation.[4]

First, some argued that the proposed activity might constitute a political committee because funds were to be "pooled." But as the requestor explained, and as confirmed during Commission deliberations, there will be no "pooling" of money.[5] Instead, BRG is a vendor that proposes to work for LLCs that each spend and control their own money. BRG has stated that the LLCs would not be depositing funds into a single bank account; the LLCs would remain their own separate and distinct entities. The LLCs would not be "contributing" to anyone or to any political committee; rather, they would be individually spending their own funds with BRG advising them. Thus, no funds will be "pooled."[6]

Second, others argued that the potential sharing of information among BRG's clients somehow converted the activity into a political committee. For example, Draft B, which was supported by two of our colleagues (the third having recused), would leave BRG and its clients (the LLCs) wondering whether their anticipated activity would likely trigger political committee status. The draft weakly concludes that political committee status would "likely" be found, basing its conclusory statement on two novel approaches to political committee status: that BRG would "facilitate collaboration" and "aid and actualize LLC efforts to act as a group."

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[3] *See FEC v. GOPAC, Inc.*, 917 F. Supp. 851, 858 (D.D.C. 1996) (A political committee must "submit to an elaborate panoply of FEC regulations requiring the filings of dozens of forms, the disclosing of various activities, and the limiting of the group's freedom of political action to make expenditures or contributions.") (quoting *FEC v. Machinists Non-Partisan Political League*, 655 F.2d 380, 392 (D.C. Cir.), *cert. denied*, 454 U.S. 897 (1981)).

[4] *See Calif. Med. Ass'n v. FEC* ("*Cal Med*"), 453 U.S. 182, 198 (1981) (upholding contribution limits on multicandidate political committees that make contributions to candidates).

[5] The pooling of resources, which the Supreme Court identified as characteristic of political committees, and thus subject to contribution limits – to wit, the pooling of financial resources akin to the associational relationship between an individual and a political party, which "affiliates a person with a candidate" – is not contemplated by BRG's request. *See Buckley v. Valeo*, 424 U.S 1, 22 (1976) ("The Act's contribution ceilings thus limit one important means of associating with a candidate or committee, but leave the contributor free to become a member of any political association and to assist personally in the association's efforts on behalf of candidates."); *McConnell v. FEC*, 540 U.S. 93, 135 (2003) (noting that "contributions serve 'to affiliate a person with a candidate' and 'enabl[e] like-minded persons to *pool their resources*,'" (internal citations omitted)). *See also Cal Med*, 453 U.S. at 203 ("By *pooling their resources*, adherents of an association amplify their own voices . . . Accordingly, I believe that contributions to political committees can be limited only if those contributions implicate the governmental interest in preventing actual or potential corruption . . . .") (Blackmun, J., concurring in part and dissenting in part) (emphasis added).

[6] Some comments seem to imply the facts as presented would not be the way the requestor would actually operate. However, in the Advisory Opinion context, the facts of the request are presumed to be true; and if the facts are different, the shield of the advisory opinion simply does not cover that activity. *See* 2 U.S.C. § 437f(c). Comments on draft advisory opinions are helpful, but to be most useful, they should recognize this presumption. The requestor is entitled to the presumption of the accuracy of the request's own facts.

Somehow, the imposition of these new standards – which are not based on the statute or any other legal precedent or authority of which we are aware – results in a "group of persons" under the statute. But this has not been the approach taken by the Commission in the past. For example, in one recent Advisory Opinion (AO 2009-02), the Commission approved activity contemplated by the True Patriot Network, whose own website made clear that it did not envision itself as working alone, but instead in a manner much more collective than that posed by BRG:

> The True Patriot Network is a *network* of people.
>
> We aim to *connect* 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.
>
> We will do so through public events, publishing projects, educational *ventures*, creative contests, online *communities* and any other means we—and you—can think of. If you want to be part of this *movement* and want to help create a wave of change in our civic life, join us! [7]

Thus, True Patriot Network's activities appear much more like a "group of persons" than those proposed by BRG. Its own website (and the LLC's name, literally) indicates that other entities are being actively approached to be part of the organization's ventures. And unlike BRG's potential single-member natural-person LLC clients, more than one individual is associated with the LLC of True Patriot Network. There, two individuals formed the LLC, and the LLC had two employees and a paid consultant.[8] Finally, like BRG's contemplated advice to its clients, True Patriot Network's "employees and consultants might advise [it] in the making of [its] communications."[9] By any measure, the same concerns our colleagues and some commenters have voiced in this matter regarding a "group of persons" and "pooling" of resources were present, but apparently disregarded, in AO 2009-02. We, however, believe they ought to be treated similarly, as in both cases, no money will be pooled, and the LLCs will be the final decision-maker regarding their respective actions.

To claim that BRG's contemplated activities "might" result in a regulable "group of persons" ignores a number of practical concerns and problems. Assuming *arguendo* that a political committee exists under the facts presented, who is part of that entity? Certainly not the LLCs; the request states they will not act in concert. Who is the leader of the effort? Certainly not BRG; they lack any control over the funds, which we know

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[7] Advisory Opinion 2009-02 (True Patriot Network), Request at 2 (citing True Patriot Network's website, http://www.truepat.org/about (last visited October 12, 2009) (emphasis added)).

[8] Advisory Opinion 2009-02 (True Patriot Network) at 1-2.

[9] *Id.* at 2.

as a factual matter will not be pooled. A political committee must have a treasurer, and a bank account – neither of which are present here. We would be left in the awkward position of finding that a political committee exists notwithstanding the denials by alleged participants and no centralized authority directing, nor a common bank account funding, its activities.

Similarly, there is no way to ascertain with any sort of predictability how much communication among BRG and its clients would result in the imposition of political committee status. Under the principles articulated in Draft B, those who attend dinner parties and discuss political plans would be shocked to learn that some think they might trigger political committee status. Also, what if registered PACs share information? Do they become "mega-PACs," that then might share a single contribution limitation? This road would open up a Pandora's Box of unintended consequences. We cannot begin to comprehend how such political participants could possibly attempt to successfully complete the sort of detailed reporting required of political committees.

And even if the logistics of imposing political committee status were not so hopelessly muddied, our colleagues have not said what the practical effect of that status would be. Specifically, could the contemplated activity – undertaken independently of any candidate or party committee – be subject to political committee contribution limits? We do not see how it could. After all, as we have previously observed,[10] the courts have already recognized a fundamental distinction between contributions that can be limited, and independent spending that cannot.

Certainly, the Court has upheld contribution limits for multicandidate political committees that made contributions to candidates. But in so holding, the Court acknowledged the distinction between such permissible regulation of a true "political committee," and impermissible regulation of individuals acting together – a point we have already made repeatedly. Of course, the D.C. Circuit has resolved who was being true to the law, having recently confirmed our view of this already-recognized distinction:

> After all, 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 [and in excess of the $5,000 political committee limit] to a non-profit group that will run advertisements supporting a candidate."[11]

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[10] *See* MUR 5541 (November Fund), Statement of Reasons of Vice Chairman Matthew Petersen and Commissioners Caroline Hunter and Donald McGahn; MURs 5977 and 6005 (American Leadership Project), Statement of Reasons of Vice Chairman Matthew Petersen and Commissioners Caroline Hunter and Donald McGahn; and MURs 5694 and 5910 (Americans for Job Security), Statement of Reasons of Vice Chairman Matthew Petersen and Commissioners Caroline Hunter and Donald McGahn.

[11] *Emily's List v. F.E.C.*, 2009 WL 2972412 at *6 (D.C.Cir. Sept. 18, 2009) (footnote omitted).

Our view is further confirmed by comments filed in this Advisory Opinion by a number of notable campaign finance specialists,[12] and the prior statement of least one former Commissioner.[13] Ultimately, to impose a limit here, under the guise of limiting "contributions," would be nothing more than a back-door spending limit of the sort already rejected in *Buckley* and its progeny.[14]

Given the well-established limitations on the Commission's jurisdiction – of which the *Emily's List* court recently reminded us – we had hoped that the Commission could have answered what we believed to be the central question presented in the advisory opinion request. Unfortunately, this did not occur. Certainly, we have made clear that we do not view our role as advocates tasked with circumventing the restrictions placed upon the reach of the law by the courts. Nor are we to invent new regulatory standards that are not grounded in the statute (such as the ones suggested here, like "de facto pooling of money" and "functional equivalent of a political committee"[15]), or standards that are not based upon an anti-corruption rationale.[16] This proscription is especially pertinent in the context of issuing an advisory opinion.[17] Thus, given the long-standing teachings of *Buckley* and its progeny, as recently summarized by the D.C. Circuit, even if the contemplated activity somehow constituted a political committee, none of the contemplated spending by any of BRG's potential clients can be subject to "contribution" limits.

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[12] Draft Advisory Opinion 2009-13, Comments of Michael B. Trister, B. Holly Schadler, Laurence E. Gold, Joseph E. Sandler, Neil P. Reiff, James Lamb, Patricia A. Fiori, Eric F. Kleinfeld, Margaret E. McCormick, Lyn Utrecht, and Karen A. Zeglis (available at http://saos.nictusa.com/aodocs/1082802.pdf).

[13] AO 2007-32 (SpeechNow.org), Dissenting Opinion of Chairman David Mason.

[14] This critical constitutional distinction must always be considered when analyzing the reach of the statute. *See Emily's List*, 2009 WL 2972412 at *9, n.13 ("Limits on donations to non-profit entities are analytically akin to limits on expenditures by the donors."). *See also* MUR 5541 (November Fund), Statement of Reasons of Vice Chairman Matthew Petersen and Commissioners Caroline Hunter and Donald McGahn at 9 ("*Survival Education Fund* [65 F.3d 285, 295 (2d Cir. 1995)] cannot be read in a vacuum to define what can be regulated under the label of 'contribution' – it must be read through the lens of *Buckley*. To read it otherwise obliterates the critical distinction drawn by the *Buckley* Court between contributions that can be limited and expenditures and other spending that cannot."); MURs 5977 and 6005 (American Leadership Project), Statement of Reasons of Vice Chairman Matthew Petersen and Commissioners Caroline Hunter and Donald McGahn at 16 ("Although the Court has upheld the ability of the Government to limit 'contributions,'" the Court in *Buckley* drew a critical distinction between what could be deemed a 'contribution' that could be limited and expenditures and other spending that cannot.").

[15] Draft Advisory Opinion 2009-13, Comments of Democracy 21 and Campaign Legal Center (July 15, 2009) at 1, 3.

[16] *See* Notice of Proposed Rulemaking, Political Committee Status, 69 Fed. Reg. 11736 (Mar. 11, 2004), Comments of Democracy 21, Campaign Legal Center & Center for Responsive Politics (Apr. 5, 2004) at 1-2 (criticizing "the spending of tens of millions of dollars of soft money explicitly for the purpose of influencing the presidential election by section 527 groups").

[17] 2 U.S.C. § 437f(b) ("Any rule of law which is not stated in this Act or in chapter 95 or chapter 96 of title 26 may be initially proposed by the Commission only as a rule or regulation pursuant to procedures established in section 438(d) of this title.").

MATTHEW S. PETERSEN
Vice Chairman

10/15/09
Date

CAROLINE C. HUNTER
Commissioner

10/15/09
Date

DONALD F. MCGAHN II
Commissioner

10/15/09
Date