

PUBLIC COMMENTS ON DRAFT ADVISORY OPINIONS

Members of the public may submit written comments on draft advisory opinions.

DRAFT B of ADVISORY OPINION 2010-09, from Commissioner Walther, is now available for comment. The advisory opinion request was submitted by counsel, Carol Laham, Esq., and Mark Renaud, Esq., on behalf of Club for Growth, Inc.

If you wish to comment on DRAFT B of ADVISORY OPINION 2010-09, please note the following requirements:

- 1) Comments must be in writing, and they must be both legible and complete.
- 2) Comments must be submitted to the Office of the Commission Secretary by hand delivery or fax ((202) 208-3333), with a duplicate copy submitted to the Office of General Counsel by hand delivery or fax ((202) 219-3923).
- 3) Comments must be received by 5:00 p.m. (Eastern Time) on July 21, 2010.
- 4) The Commission generally will not accept comments received after the deadline. Requests to extend the comment period are discouraged and unwelcome. An extension request will be considered only if received before the comment deadline and then only on a case-by-case basis in special circumstances.
- 5) All timely received comments will be made available to the public at the Commission's Public Records Office and will be posted on the Commission's website at <http://saos.nictusa.com/saos/searchao>.

FOR FURTHER INFORMATION:

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Press Officer
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Commission Secretary: (202) 694-1040

Comment submission procedure: Rosemary C. Smith
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(202) 694-1650

Other inquiries:

To obtain copies of documents related to 2010-09, please contact the Public Records Office at (202) 694-1120 or (800) 424-9530 or visit the Commission's website at <http://www.saos.nictusa.com/saos/searchao>.

ADDRESSES

Office of Commission Secretary
Federal Election Commission
999 E Street, NW
Washington, DC 20463

Office of the General Counsel
ATTN: Rosemary C. Smith, Esq.
Federal Election Commission
999 E Street, NW
Washington, DC 20463



FEDERAL ELECTION COMMISSION
Washington, DC 20463

FEDERAL ELECTION
COMMISSION
SECRETARIAT

2010 JUL 20 P 6: 36

MEMORANDUM

TO: The Commission

FROM: Steven T. Walther *Stu Walther*
Commissioner

DATE: July 20, 2010

SUBJECT: AO 2010-09 (Club for Growth)

Attached is a proposed draft of the subject advisory opinion for public comment.

Thank you for your consideration.

Attachment

1 ADVISORY OPINION 2010-09

2

3 Carol A. Laham, Esq.

4

4 D. Mark Renaud, Esq.

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5 Wiley Rein LLP

DRAFT B

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6 1776 K Street, N.W.

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7 Washington, DC 20006

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9 Dear Ms. Laham and Mr. Renaud:

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10 We are responding to your advisory opinion request on behalf of Club for

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11 Growth, an incorporated non-profit social welfare organization exempt from Federal

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12 taxes under section 501(c)(4) of the Internal Revenue Code (the "Corporation"),

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13 concerning the application of the Federal Election Campaign Act of 1971, as amended

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14 (the "Act"), and Commission regulations to the Corporation's plans to establish,

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15 administer, and financially support a new political committee (the "Committee"). The

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16 Corporation has represented that it plans (a) for the Committee to make only independent

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17 expenditures and (b) for the Committee to solicit and accept contributions only from

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18 individuals in the general public, including contributions given for specific independent

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19 expenditures.¹

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20 The principal rationale underlying your request for an advisory opinion is that

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21 "the campaign finance regime administered by the FEC has changed" as a result of the

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22 recent decision by the Court of Appeals for the District of Columbia Circuit in

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23 *SpeechNow.org v. FEC*, 599 F.3d 686 (D.C. Cir. 2010) (en banc) ("*SpeechNow*").

24

24 In *SpeechNow*, the court held that the Act's contribution limits were

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25 unconstitutional as applied to funds from individuals received by SpeechNow.org, a

¹ Under the Act, an "independent expenditure" is an expenditure by a person that expressly advocates the election or defeat of a clearly identified candidate and that is not made in concert or cooperation with or at the request or suggestion of the candidate, the candidate's authorized political committee, a political party committee or the agents of any of the foregoing. 2 U.S.C. § 431(17).

1 political committee that (1) only makes independent expenditures; (2) is not connected to
2 any corporation; and (3) is not affiliated with any other political committee. In
3 *SpeechNow*, the court granted SpeechNow.org’s as-applied challenge to the Act’s
4 contribution limits precisely because SpeechNow.org only makes independent
5 expenditures and therefore the Act’s contribution limits advanced no “anti-corruption
6 interest.” The holding in the *SpeechNow* decision was expressly limited to the “as-
7 applied” challenge brought before the court by an entity that (a) is not connected to any
8 corporation and (b) operates wholly independently of all other political committees, and
9 the court’s decision does not have force beyond the facts presented by SpeechNow.org to
10 the court.²

11 The Committee, as proposed by the Corporation, would be materially
12 distinguishable from SpeechNow.org because (a) the Committee would be connected to
13 the Corporation³ and (b) the Committee would be affiliated with Club for Growth PAC,
14 the Corporation’s already existing separate segregated fund (“SSF”) that itself makes
15 contributions to Federal candidates. Nevertheless, the Corporation is asking the
16 Commission to issue an advisory opinion that would apply the holding in *SpeechNow* to
17 the Committee and its activities.

18 Because of its connections to the Corporation and to Club for Growth PAC, and
19 because the Corporation plans to have its President, who already currently serves as

² “We should be clear . . . that we only decide these questions [regarding the constitutionality of the Act] as applied to contributions to SpeechNow, an independent expenditure-only group.” *SpeechNow*, 599 F.3d at 696; “In an as-applied challenge, there is a narrow focus on the particular plaintiff’s behavior and whether the statute is constitutional as applied to her.” *Roulette v. City of Seattle*, 97 F.3d 300 (9th Cir. 1996) (citing *Broadrick v. Oklahoma*, 413 U.S. 601, 612, 93 S.Ct. 2908 (1973)).

³ In fact, the Corporation represent that the President of the Corporation will also serve as the Committee’s Treasurer. See Advisory Opinion Request at 2.

1 Treasurer of the Club for Growth PAC,⁴ also serve as Treasurer of the proposed
2 Committee, the Committee and its activities would be materially distinguishable from
3 SpeechNow.org precisely in a way that would not insulate the Committee and its
4 activities from the possibility of corruption, or the appearance of corruption, in the same
5 way that SpeechNow.org was insulated from these concerns.

6 Accordingly, the Commission concludes that the Corporation's proposal would
7 require the Commission to broaden the reach of the DC Circuit Court's holding in
8 *SpeechNow* to the Committee and therefore would require modification of the
9 applicability of the Commission's regulations, which can only be properly achieved
10 though a notice-and-comment rulemaking conducted pursuant to the requirements of the
11 Administrative Procedure Act ("APA"), 5 U.S.C. 551 *et seq.*⁵ Specifically, the APA
12 requires that the Commission publish a Notice of Proposed Rulemaking in the Federal
13 Register and that "interested persons" be afforded "an opportunity to participate in the
14 rulemaking through submission of written data, views, or arguments" in response to such
15 a Notice. 5 U.S.C. 553(b)-(c).

16 The Commission's advisory opinion process is one in which the Commission
17 interprets existing law and is limited to requests "concerning the application of th[e] Act .
18 . . or a rule or regulation prescribed by the Commission" and therefore cannot be used to

⁴ See www.clubforgrowth.org/aboutus/?id=96 (Chris Chacola serves as President and Chief Executive Officer of the Corporation); <http://query.nictusa.com/pdf/913/29991940913/29991940913.pdf#navpanes=0> (Club for Growth PAC's Statement of Organization filed with the Commission lists Chris Chacola as the Treasurer) (both last visited July 16, 2010).

⁵ "The APA's general rulemaking section, 5 U.S.C. § 553, sets down certain procedural requirements with which agencies must comply in promulgating legislative rules: there must be publication of a notice of proposed rulemaking; opportunity for public comment on the proposal; and publication of a final rule accompanied by a statement of the rule's basis and purpose." *Utility Solid Waste Group v. EPA*, 236 F.3d 749, 752 (D.C. Cir. 2001). See generally Jeffrey S. Lubbers, *A Guide to Federal Agency Rulemaking* (American Bar Association, 4th ed. 2006).

1 modify the Commission's regulations. 2 U.S.C. 437f(a); 11 CFR 112.1. *See also* 2
2 U.S.C. 437f(b) ("Any rule of law not stated in th[e] Act must be initially proposed by the
3 Commission only as a rule or regulation pursuant to procedures established in [2 U.S.C.
4 438(d)].⁶ No opinion of an advisory nature may be issued by the Commission or any of
5 its employees except in accordance with the provisions of this section.").

6 Although the Commission concludes that, after considering all the facts, the better
7 course of action at this time is to not broaden the reach of the DC Circuit Court's holding
8 in *SpeechNow* to the Committee through the advisory opinion process, these issues can,
9 and will be, appropriately considered in the Commission's upcoming rulemaking
10 proceedings.⁷ Additionally, the Corporation may use the Commission's procedures for
11 filing a petition for rulemaking to seek modifications of the Commission's regulations.
12 *See* 11 CFR 200.2.

13 ***Background***

14 The facts presented in this advisory opinion are based on your letter received on
15 May 21, 2010.

16 As indicated above, the Corporation is an incorporated non-profit social welfare
17 organization exempt from Federal taxes under section 501(c)(4) of the Internal Revenue
18 Code. The Corporation has already established, and currently supports and controls an
19 SSF, Club for Growth PAC, which makes contributions to Federal candidates, as well as

⁶ Although 2 U.S.C. 438(d) was invalidated as a result of the Supreme Court's decision in *INS v. Chadha*, 462 U.S. 919 (1983), the subsequently enacted Congressional Review Act, 5 U.S.C. 801 *et seq.*, requires the Commission to submit similar reports to Congress prior to promulgating any new or revised regulations.

⁷ The Commission has posted a proposed rulemaking schedule, which contemplates completion of the Commission's *EMILY's List* and *SpeechNow* rulemakings by the end of the calendar year (available at <http://www.fec.gov/agenda/2010/mtgdoc1020.pdf>).

1 independent expenditures.⁸ The Corporation now plans to establish, administer, and
2 financially support the proposed Committee, a second “connected” political committee,
3 which would be organized as a tax-exempt organization under section 527 of the Internal
4 Revenue Code and would be incorporated under the laws of the District of Columbia.
5 The President of the Corporation currently serves as the Treasurer of Club for Growth
6 PAC and would also serve as the Treasurer of the Committee.⁹ The Corporation intends
7 to have the Committee register with the Commission, and the Corporation represents that
8 the Committee will file regular reports and independent expenditure reports as required
9 by law.

10 Although Club for Growth PAC currently makes contributions to Federal
11 candidates, the Corporation represents that the Committee will only make independent
12 expenditures, which will include all the disclaimers and notices required by the Act and
13 Commission regulations. The Corporation indicates that it plans for the Committee to
14 solicit and accept contributions only from individuals, which may be unlimited in
15 amount, and which may be solicited or given for specific independent expenditures.
16 Such solicitations will also include all disclaimers and notices required by the Act and
17 Commission regulations. The costs of the solicitations would be paid by the Corporation
18 if permissible, or otherwise would be paid by the Committee.

19 The Corporation represents that the Committee will not accept contributions from
20 any political committee (including Club for Growth PAC or any other SSF, authorized
21 committee, or political party committee), candidate, labor organization, foreign national,

⁸ Information related to Club for Growth PAC’s contributions and expenditures is available through the FEC Disclosure Database at www.fec.gov/finance/disclosure/imaging_info.shtml.

⁹ See notes 3-4, above,

1 government contractor, or corporation, except that the Corporation will pay for some or
2 all of the Committee's establishment, administrative, and solicitation costs.

3 The Committee will not, itself, make any contributions or transfer any funds to
4 any political committee if the amount of a contribution to the recipient committee is
5 governed by the Act, nor will the Committee make any coordinated communications or
6 coordinate any expenditures with any candidate, authorized committee, political party
7 committee, or agent of such persons.

8 ***Legal Background***

9 On March 26, 2010, the United States Court of Appeals for the District of
10 Columbia Circuit issued its opinion in *SpeechNow. Id.* As discussed above, the court
11 held that the Act's contribution limits were unconstitutional as applied to contributions
12 from individuals given to, and received by, SpeechNow.org, a nonconnected political
13 committee making only independent expenditures, because the Act's contribution limits,
14 as applied to SpeechNow.org, advanced no "anti-corruption interest."¹⁰ *Id.* at 696; *see*
15 *also Citizens United v. FEC*, 130 S. Ct. 876, 909 (2010) (finding that "independent
16 expenditures . . . do not give rise to corruption or the appearance of corruption"). The
17 court made clear, however, that it was "only decid[ing] these questions as applied to
18 SpeechNow, an independent expenditure-only group."¹¹ *SpeechNow*, 599 F.3d at 696.

¹⁰ The court also upheld the Act's "organizational and reporting requirements" as applied to SpeechNow.org. Upon meeting the applicable thresholds, the group would be required to register with the Commission as a political committee and abide by the disclosure and reporting requirements applicable to political committees. *SpeechNow*, 599 F.3d at 696-98.

¹¹ On May 27, 2010, in compliance with the D.C. Circuit's opinion, the United States District Court of the District of Columbia issued an order that the Act's contribution limits (2 U.S.C. 441a(a)(1)(C) and 441a(a)(3)) and implementing regulations could not be constitutionally applied against SpeechNow.org or those who contribute to it. On June 11, 2010, the Commission filed a Motion to Alter or Amend the Judgment to reflect that the organizational, administrative, and reporting provisions of the Act are constitutional as applied to the plaintiffs. The Commission's motion remains pending. These, as well as

1 Any issues regarding contributions to candidates, for example, were not before the court
2 and therefore were not reached in the *SpeechNow* opinion. *See id.* Likewise, the
3 *SpeechNow* opinion did not reach the issue of contributions to independent expenditure-
4 only groups made by persons other than individuals. *See id.*

5 Unlike the proposed Committee, SpeechNow.org has no “connected” corporation.
6 *Memorandum and Findings in SpeechNow.org v. FEC*, Civ. No. 08-0248 (2009 WL
7 3101036) (D.D.C. Sept. 28, 2009) at 20 (“If SpeechNow were deemed to be a political
8 committee, it would be classified as a ‘non-connected’ committee,” citing Scott Dep. at
9 17:14-18:2) (*hereinafter* “Findings”). Under its bylaws, SpeechNow.org could accept
10 donations solely from individuals and could not “accept, directly or indirectly, any
11 donations *or anything of value* from business corporations, labor organizations, national
12 banks, federal government contractors, foreign nationals, political parties, or political
13 committees. *Id.* at 5 (emphasis added). Its bylaws further require SpeechNow.org to
14 operate wholly independently of all political committees. *Id.* at 6. Accordingly,
15 SpeechNow.org was required to pay its establishment, administrative, and solicitation
16 costs from the contributions it received from individuals.

17 These Findings are in sharp contrast to the representations made by the
18 Corporation regarding the planned Committee. Specifically, the planned Committee will
19 (a) be “connected” to the Corporation and (b) will be affiliated with Club for Growth
20 PAC, a political committee established, supported and controlled by the Corporation that
21 makes contributions directly to candidates.

other documents related to the *SpeechNow* litigation, are available at www.fec.gov/law/litigation/speechnow.shtml. The Solicitor General is not petitioning the Supreme Court to review the court’s decision, but SpeechNow.org has requested and received an extension of time to file a Petition for a Writ of Certiorari on the questions addressing registration, disclosure, and reporting.

1 ***Questions Presented***

- 2 1. *May the Committee solicit and accept donations from the general public if the*
3 *Corporation pays the costs of the solicitations?*
4
5 2. *May the Committee solicit and accept funds for specific independent expenditures*
6 *if the Corporation pays for the costs of the solicitations?*
7
8 3. *Are the answers to Questions 1 or 2 different if the Committee pays all of its own*
9 *establishment, administrative, and solicitation expenses?*

10

11 ***Legal Analysis and Conclusions***

12 As indicated above, SpeechNow.org was organized (indeed, is required by its own
13 bylaws) to operate wholly independently of any candidate or other political committees,
14 including political party committees. *Findings* at 6. Its operations are funded solely by
15 contributions from individuals; it could not – per its bylaws – accept “directly or
16 indirectly, any donation or anything of value” from, among others, corporations. *Id.* at 5.
17 Further, SpeechNow.org is prohibited under its bylaws from making “contributions or
18 donations of any kind directly or indirectly to any FEC-regulated candidate or political
19 committee” *Id.* at 6.

20 The Committee, unlike SpeechNow.org, will not operate independently. Instead,
21 the Corporation – serving as the Committee’s connected organization – will establish and
22 administer the Committee, *see* 11 CFR 100.6(a), and the Committee will receive financial
23 support (payment of its establishment, administrative, and solicitation expenses) from the
24 Corporation – thereby providing a significant corporate subsidy to the Committee.

25 The Corporation, like any connected organization, will enjoy the inherent right to
26 control the Committee. *See* 11 CFR 114.5(d); *see also* *Pipefitters Local Union No. 562 v.*
27 *U.S.*, 407 U.S. 385, 426 (1972) (“In these circumstances, it is difficult to conceive how a

1 valid political fund can be meaningfully ‘separate’ from the sponsoring union in any way
2 other than ‘segregated.’”), *Bread Political Action Committee v. Federal Election*
3 *Commission*, 635 F.2d 621, 624, n.3 (7th Cir. 1980) (en banc), *rev’d on jurisdictional*
4 *grounds*, 455 U.S. 577 (1982) (stating that “separate segregated funds are simply political
5 arms of the parent organizations”). Moreover, the Committee will be affiliated with the
6 Corporation’s SSF, Club for Growth PAC, which regularly makes contributions to
7 Federal candidates as well as contributions to other political committees, and may receive
8 contributions from persons other than individuals.¹²

9 SpeechNow.org was established to aggregate the contributions of individuals for
10 the purpose of making independent expenditures independently. The Committee, by
11 contrast, proposes engaging in this activity, with the aid of a corporate subsidy, while
12 controlled by a corporation, that also establishes, administers, and financially supports a
13 separate, contribution-making political committee.

14 The Commission concludes that the Committee, as well as its activities, are
15 materially different from SpeechNow.org and its activities and it would not be
16 appropriate for the Commission to broaden the reach of the jurisdiction of the *SpeechNow*
17 court, and the scope of its decision, especially when the court itself made clear that its
18 holding was limited to the as-applied challenge before it.

19 Accordingly, the Commission concludes that it will not issue an advisory opinion
20 broadening the reach of the holding in *SpeechNow* to the Committee and its proposed

¹² According to Commission regulations, “[a]ll committees (including a separate segregated fund . . .) established, maintained or controlled by the same corporation . . . are affiliated.” 11 CFR 100.5(g)(2); *see also* 11 CFR 102.6(a) (“Transfers of funds may be made without limit on amount between affiliated committees . . .”).

1 activities and therefore the answers that follow are based on the Act and Commission
2 regulations as they currently exist. *See* 2 U.S.C. 437f(b). However, as indicated above,
3 these issues can, and will, be appropriately considered in the Commission's upcoming
4 rulemakings.

5 *1. May the Committee solicit and accept donations from the general public if the*
6 *Corporation pays the costs of the solicitations?*
7

8 The Commission concludes that the Corporation's proposal to fund the
9 Committee's solicitations is prohibited by the Act and Commission regulations. As set
10 forth in the request, the Corporation will serve as the Committee's connected
11 organization thereby making it an SSF of the Corporation. *See* 2 U.S.C. 431(7), 11 CFR
12 100.6. As an SSF, the Committee may solicit voluntary contributions at any time only
13 from its "restricted class," which consists of the connected corporation's executive and
14 administrative personnel, its stockholders, and the families of such persons. 2 U.S.C.
15 441b(b)(4)(A)(i), 11 CFR 114.1(c) and 114.5(g)(1); *see also* 2 U.S.C. 441b(b)(4)(B), 11
16 CFR 114.6 (prescribing conditions under which other employees may be solicited twice
17 yearly in writing).

18 Therefore the Commission concludes that neither the Corporation nor the
19 Committee – as the Corporation's SSF – may solicit contributions for its independent
20 expenditures (or any other purpose) from the general public.

21 *2. May the Committee solicit and accept funds for specific independent expenditures*
22 *if the Corporation pays the costs of the solicitations?*
23

24 Section 110.1(h) of the Commission regulations states that a person may
25 contribute both to a candidate (or his or her authorized committee) and a political
26 committee which has supported or anticipates supporting that same candidate only if

1 (among other things) that person “does not give with the knowledge that a substantial
2 portion will be contributed to, or expended on behalf of, that candidate for the same
3 election.” 11 CFR 110.1(h). *See also* Advisory Opinion 1984-02 (Gramm).

4 Accordingly, if the Committee solicits contributions to fund specific independent
5 expenditures that benefit clearly identified Federal candidates, the amount of any
6 contribution would be attributable to a contributor's maximum allowable contribution to
7 that same candidate. *See* 11 CFR 110.1(h).

8 For the reasons set forth above, the Commission concludes that a rulemaking
9 proceeding, properly conducted pursuant to the APA,¹³ is required in order to broaden the
10 reach of the holding in *SpeechNow* to the Corporation's plans to have the Committee
11 accept contributions for specific independent expenditures that expressly advocate the
12 election or defeat of a clearly identified Federal candidate without regard for a
13 contributor's previous contributions to that same Federal candidate.

14 3. *Do the answers to Questions 1 or 2 change if the proposed political committee*
15 *pays its own establishment, administrative, and solicitation expenses?*
16

17 No. Even if the Corporation does not use its own treasury funds to finance the
18 Committee's establishment, administrative, and solicitation expenses, the Corporation
19 would still be the Committee's connected organization and, thus, would still control the
20 Committee. Accordingly, the Commission concludes that even if the Corporation does
21 not finance the Committee's expenses, as a connected organization, the Committee would
22 still be materially different from *SpeechNow.org* and the Commission will not broaden
23 the reach of the holding in *SpeechNow* to the Committee in an advisory opinion.

¹³ *See* note 5, above.

1 This response constitutes an advisory opinion concerning the application of the
2 Act and Commission regulations to the specific transaction or activity set forth in your
3 request. *See* 2 U.S.C. 437f. The Commission emphasizes that, if there is a change in any
4 of the facts or assumptions presented, and such facts or assumptions are material to a
5 conclusion presented in this advisory opinion, then the requestor may not rely on that
6 conclusion as support for its proposed activity. Any person involved in any specific
7 transaction or activity which is indistinguishable in all its material aspects from the
8 transaction or activity with respect to which this advisory opinion is rendered may rely on
9 this advisory opinion. *See* 2 U.S.C. 437f(c)(1)(B). Please note that the analysis or
10 conclusions in this advisory opinion may be affected by subsequent developments in the
11 law including, but not limited to, statutes, regulations, advisory opinions, and case law.
12 The cited advisory opinion is available on the Commission's Web site at
13 <http://saos.nictusa.com/saos/searchao>.

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On behalf of the Commission,

Matthew S. Petersen
Chairman