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August 11, 2010

By Courier

OFFICE OF GENERAL
COUNSEL

Thomasenia Duncan, Esq.
General Counsel
Federal Election Commission
999 E Street NW
Washington, DC 20013

AOR 2010-20

Re: National Defense PAC Advisory Opinion Request

Dear Ms. Duncan:

Pursuant to 2 USC §437(f), National Defense PAC (NDPAC) requests an advisory opinion from the Federal Election Commission (FEC). This request addresses a highly significant and time sensitive issue and pertains to communications referencing clearly identified federal candidates and contributions to those candidates, some with primary elections less than 60 days away. NDPAC requests the FEC expedite this request and render an opinion within 20 days pursuant to 74 Fed. Reg. 32,160 (July 7, 2009) or, in the alternative, within 30 days under its general expedited procedures.

I. INTRODUCTION

This request is to verify that the planned conduct of NDPAC is within the scope of the law as it stands subsequent to *Citizens United v FEC*, 130 S.Ct. 876 (2010) and *SpeechNOW v FEC*, 599 F.3d 686 (D.C.Cir. 2010)(en banc), and in light of recently issued FEC Advisory Opinion (AO) 2010-09 and 2010-11 (July 2010).

NDPAC, a qualified non-connected political action committee (PAC), seeks to confirm that its conduct shall be lawful if it:

- (a) accepts unlimited contributions from individuals, other political committees, corporations, and unions for the express purpose of making independent expenditures (IEs), including paying any or all of its own administrative & operating expenses, and
- (b) accepts contributions from individuals and other political committees only, subject to the limits at 2 USC §§441a(a)(1)(C) and (2)(C), to expend as campaign contributions to candidates, pursuant to 2 USC §441a(a)(2), and

(c) records and segregates all such contributions by type and maintains separate bank accounts for each type, applying for the purpose of campaign contributions only those contributions expressly made for that purpose as indicated by the contributor at the time of the contribution and subject to the limits at 2 USC §§441a(a)(1)(C) and (2)(C).

II. BACKGROUND

NDPAC is a qualified, non-connected PAC that raises and expends funds in support of candidates who (a) are military veterans and (b) agree with the values of NDPAC. NDPAC currently accepts contributions from individuals subject to the amount and source limits at 2 USC §441a(a)(1)(C), and makes contributions to individual federal candidates up to the applicable limit, as well as making independent expenditures from such funds. NDPAC does not accept or intend to accept donations from foreign nationals or government contractors.

In response to the rulings in *Citizens United v FEC*, 130 S.Ct. 876 (2010) and *SpeechNOW v FEC*, 599 F.3d 686 (D.C.Cir. 2010)(en banc), as well as AO 2010-09 and AO 2010-11, NDPAC intends to expand the scope of its activities. NDPAC now intends to accept unlimited contributions from individuals, other political committees, corporations, and unions in order to make independent expenditures. NDPAC will also continue to accept contributions from individuals and other committees pursuant to 2 USC §441a(a)(1)(C) for the purpose of making candidate contributions pursuant to 2 USC §441a(a)(2)(A).

NDPAC intends to verify the source of each contribution and the intent of its use for either independent expenditures or candidate contributions (if from an acceptable source of candidate contribution funds). NDPAC will maintain separate bank accounts and otherwise maintain separate accounting for each pool of funds, and provide full reporting to the FEC of all receipts and expenditures by category. NDPAC will pay administrative or operating costs from either account, but most likely wholly from the independent expenditure account. NDPAC will continue to refuse any contribution from foreign nationals or government contractors.

III. DISCUSSION

Recent rulings by the Supreme Court in *Citizens United v FEC*, 130 S.Ct. 876 (2010) and the U.S. Court of Appeals for the District of Columbia in *SpeechNOW v FEC*, 599 F.3d 686 (D.C.Cir. 2010)(en banc) have had a significant impact on permissible and Constitutionally protected election related activities. Core to the holding of each ruling, and as cited in AO 2010-09 and AO 2010-11, was “*that independent expenditures, including those made by corporations,*

do not give rise to corruption or the appearance of corruption.” Citizens United, 130 S. Ct at 909; see SpeechNow, 599 F.3d at 693. See also AO 2010-09, page 3, and AO 2010-11, page 3.

Therefore, a corporation or union may, subject to applicable reporting requirements, (a) spend an unlimited amount of treasury funds on IE’s, *Citizens United*, 130 S. Ct at 913, (b) spend an unlimited amount of treasury funds to pay some or all of the administrative or operating costs of an IE-only PAC, AO 2010-09 pg. 4 ¶ 1, that need not be an SSF, *id.*, pg. 5 ¶ 6, directly or through contribution to that PAC, *id.*, pg. 5 ¶ 6, and (c) spend an unlimited amount of treasury funds to pay some or all of the administrative or operating costs of an SSF which may conduct IE’s and raise funds from its restricted class to contribute to candidates, 2 USC §441b(b)(2)(C).

Individuals or group of individuals may expend unlimited personal funds on IE’s themselves, AO 2010-11, pg. 3 ¶ 2, or in contribution to an IE-only PAC, *id.*, pg. 3 ¶ 3, including paying for any or all of the administrative or operating costs of that committee directly or through their contributions. However, no individual or group of individuals has an equivalent vehicle as an SSF to make unlimited contributions to the administrative or operating expenses of a committee that may raise and expend funds for direct campaign contributions.

As a result, corporations and unions now have greater political rights and greater ability to affect the outcome of elections of federal candidates than any individual and in most cases even very large groups of individuals. A cursory analysis of FEC data indicates that SSF’s (corporations and unions) outnumber non-connected committees (largely grassroots and citizens organizations) by nearly 2-to-1, with an even greater disparity in funds raised and expended. Further, non-connected committees expend on average 40% of funds raised for administrative or operating expenses, up to 75% for smaller PACs. SSFs generally have these costs paid by their connected organization, allowing use of virtually all funds raised for direct candidate contributions.

A non-connected political committee has two choices with virtually identical reporting obligations. It may operate as an IE-only PAC and raise and expend unlimited funds from any corporation, union, or individual for IE’s only. Or, it may operate as a non-IE-only PAC, raise and expend amount-limited contributions from individuals and other political committees only, and make amount-limited direct contributions to candidates as well as unlimited expenditures for IE’s. Either approach requires the same accounting of receipts, sources, and expenditures.

Non-connected PACs must therefore choose between (a) unlimited receipts and unlimited distributions for IE’s, and (b) strict limitations on the sources and amounts of receipts in order to enjoy a greater degree of free speech. In short, speakers are being forced to choose between two forms of protected speech, either of which they may engage in, but not at the same time.

There is no constitutional basis to prohibit a non-connected committee from performing both lawful, constitutionally protected functions – engaging in political speech - at the same time. There is no constitutional basis to restrict political speech such that speakers must sacrifice one mode of speech for another. There is no constitutional basis to restrict freedom of association such that individuals and entities may not do in concert what they may lawfully do individually.

The Commission has expressly recognized that *“Following Citizens United and SpeechNow, corporations, labor organizations, and political committees may make unlimited independent expenditures from their own funds, and individuals may pool unlimited funds in an independent expenditure-only political committee. It necessarily follows that corporations, labor organizations and political committees also may make unlimited contributions to organizations such as the Committee that make only independent expenditures. Given the holdings in Citizens United and SpeechNow, that “independent expenditures do not lead to, or create the appearance of, quid pro quo corruption,” Citizens United, 130 S.Ct. at 910, the Commission concludes that there is no basis to limit the amount of contributions to the Committee from individuals, political committees, corporations and labor organizations.”* AO 2010-11, page 3.

A non-IE-only, non-connected committee has long been able to directly contribute to candidates and, further, expend unlimited amounts on IE’s. Therefore, there is clearly no “appearance of or actual quid pro quo corruption,” from a PAC performing both functions. The receipts and expenditures for each function can be separately accounted for through as simple a mechanism as separate bank accounts to insure no funds are used for candidate contributions other than those raised, subject to applicable limits, from individuals and other committees for that purpose. This eliminates any greater risk of actual or apparent quid pro quo corruption than currently exists.

If both functions are individually constitutionally protected, there is no basis to prohibit them from being conducted at the same time by the same committee, provided that they are separately accounted for. If funds are raised, received, held, and accounted for separately, they are not susceptible to improper allocation between categories. Therefore, these activities pose no greater risk of apparent or actual quid pro quo corruption than has long existed from non-connected committees making both contributions and IE’s. Prohibiting non-connected committees – the vehicle by which individuals engage in collaborative political speech – from pursuing this proposed course of action would violate individual rights of free speech and free association while providing corporate entities greater political rights than individuals.

IV. QUESTIONS PRESENTED

1. May a non-connected political action committee (a) raise unlimited contributions from individuals, other committees, corporations, and unions to make independent expenditures only, and (b) raise amount and source restricted funds from individuals and other committees only for the purpose of making candidate contributions, provided such receipts are held in separate bank accounts by intended use and separately accounted for in FEC reporting?
2. May a non-connected political action committee pursuing the course of action outlined above allocate any or all of its administrative or operating expenses between its accounts as it sees fit, including paying all expenses from its independent expenditure account?

V. CONCLUSION

As a result of the rulings in *Citizens United* and *SpeechNow*, and as recognized by the commission in AO 2010-09 and AO 2010-11, the permitted and constitutionally protected conduct of participants in the campaign finance regime administered by the FEC has changed. Participants in this system, specifically the non-connected committee, now enjoy greater protection and range of operations, including to insure that individuals enjoy at least the same political rights and opportunity to engage free political speech as corporations and unions.

NDPAC therefore seeks confirmation that it may pursue the outlined course of action, namely (a) accepting unlimited contributions from individuals, corporations, unions, and other committees to make independent expenditures; (b) accepting limited contributions from individuals and other committees only to make candidate contributions; (c) separately raising, holding, expending, and accounting for these two activities; and (d) reporting all sources of all funds and all expenditures within the FEC reporting structure and adhering to all other applicable FEC regulations.

We would appreciate an expedited response to our request. If you need additional information, please call me at 202-210-5431 or email me at dbacker@DBCapitolStrategies.com.

Sincerely,



Dan Backer, Esq.
Counsel & Assistant Treasurer
National Defense PAC

RECEIVED
FEDERAL ELECTION
COMMISSION

2010 AUG 17 PM 3: 21

OFFICE OF GENERAL
COUNSEL



"Dan Backer"
<DBacker@DBCapitolStrategies.com>
08/16/2010 10:03 PM

To <WPowers@fec.gov>
cc
bcc
Subject RE: National Defense PAC

Dear Mr. Powers,

1. I confirm your understanding of my use of that term as per our conversation, except that I would additionally consider an "in-kind" contribution within the scope of a "political contribution" even though not directly made to a candidate or committee, and not an "administrative and operating expense."
2. Yes, that is correct.

Please feel free to contact me at any time for additional information. Thank you for your time and consideration of our request.

Regards,

Dan Backer, Esq.
202-210-5431

DB Capitol Strategies

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Home of The Strategist, a monthly PAC update
www.DBCapitolStrategies.com

From: WPowers@fec.gov [mailto:WPowers@fec.gov]
Sent: Monday, August 16, 2010 5:19 PM
To: dbacker@DBCapitolStrategies.com
Subject: National Defense PAC

Dear Mr. Backer:

Following up on our telephone conversation from this afternoon (Aug. 16, 2010) regarding your advisory opinion request, please confirm our understanding of the following facts:

1. On page 1 of the request, and elsewhere, when you use the term "administrative and operating expenses" you mean: all expenditures or disbursements that are not direct contributions to candidates, political parties, or political committees, or that are not direct independent expenditures (or other electoral-based disbursements). These expenses would include such items as salary, rent, advertising expenses related to running the PAC, telephone bills, etc. It would also include fundraising costs, which would be paid out of the general accounts of the PAC unless a commission was paid directly from the funds raised.
2. The PAC is a volunteer-based organization, and at this time does not have a physical office. It is incorporated in Virginia, and receives its mail at a post office box in the District of Columbia.

Thank you very much.

William A. Powers
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Federal Election Commission
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Washington, DC 20463
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