FEDERAL ELECTION COMMISSION
Washington, DC 20463

MEMORANDUM

TO: THE COMMISSION
STAFF DIRECTOR
GENERAL COUNSEL
CHIEF COMMUNICATIONS OFFICER
FEC PRESS OFFICE
FEC PUBLIC DISCLOSURE

FROM: ACTING COMMISSION SECRETARY AND CLERK

DATE: SEPTEMBER 22, 2010

SUBJECT: COMMENTS RELATED TO:
AO 2010-20 (NDPAC) DRAFT A AND B

Transmitted herewith is a timely submitted commonts from Dan Backer, Esq. Counsel and Assistant Treasurer to NDPAC regarding the above-captioned matter.

Proposed Advisory Opinion 2010-20 is on the agenda for Thursday, September 23, 2010.

Attachment

DB Capitol Strategies

PAC • GRASSROOTS • ADVOCACY • NON-PROFIT

FACSIMILE TRANSMISSION

September 22, 2010

FROM:
National Defense PAC
PO BOX 75021
Washington, DC 20013

TO:
Shawn Woodhead Werth
Commission Secretary
Federal Election Commission
(202) 208-3333

Christopher Hughey, Esq.
Acting General Counsel
Federal Election Commission
(202) 219-3923

RECEIVED
FEDERAL ELECTION
COMMISSION
2010 SEP 22 PM 3:17
OFFICE OF GENERAL
COUNSEL

Re: Comments related to: Advisory Opinion Request 2010-20 (NDPAC)
Draft AO, Agenda Document No. 10-60 (DRAFT A)
Draft AO, Agenda Document No. 10-60-A (DRAFT B)
Comment on AOR by Campaign Legal Center and Democracy 21

Please find enclosed a public comment by the National Defense PAC (NDPAC) in regards to the above referenced Advisory Opinion Request 2010-20 and related Draft AO and comments.

September 22, 2010

BY FAX

Christopher Hughey, Esq.
Acting General Counsel
Federal Election Commission
999 E Street NW
Washington, DC 20013

Re: Comments related to: Advisory Opinion Request 2010-20 (NDPAC)
Draft AO, Agenda Document No. 10-60 (DRAFT A)
Draft AO, Agenda Document No. 10-60-A (DRAFT B)
Comment on AOR by Campaign Legal Center and Democracy 21

Dear Mr. Hughey:

These comments are filed on behalf of the National Defense PAC (NDPAC) in regard to AOR 2010-20, and Draft AO, Agenda Document No. 10-60 (DRAFT A); Draft AO, Agenda Document No. 10-60-A (DRAFT B); and Comment on AOR by Campaign Legal Center and Democracy 21. NDPAC filed AOR 2010-20 concerning the application of the Federal Election Campaign Act of 1971 (the "Act") and Commission regulations to NDPACs proposed activity.

NDPAC seeks to (a) solicit and accept unlimited contributions from individuals, other political committees, corporations, and labor union organizations to fund Independent Expenditures (IEs) from a separate bank account while (b) soliciting and accepting amount and source restricted contributions from individuals only for the purpose of direct candidate contributions from a second bank account. NDPAC further sought clarification regarding its discretion in paying operating and administrative expenses from either account.

For the following reasons, NDPAC respectfully requests that the commission adopt DRAFT B in response to AOR 2010-20.

Recent court decisions and FEC AO's did not resolve the questions presented. The rulings in *Citizens United v. FEC*, 130 S. Ct. 876 (2010), and *SpeechNow.org v. FEC*, 599 F.3d 686 (2010), as well as AO 2010-09 and AO 2010-11, were based on the specific facts and questions presented. These cases each dealt exclusively with IEs and IE-only PACs. The limitation in these opinions to IEs and IE-only PACs does not translate to a prohibition on the activity proposed by NDPAC as the type of hybrid PAC referenced in DRAFT B. That question was never presented nor argued to either court, or the FEC, in light of the ruling in *Citizens United.* There is no reason that Courts or FEC would have had to (and in fact did not) broaden the scope of those rulings to address non-connected PACs acting as proposed by NDPAC. The questions

presented in AOR 2010-20, therefore, must be considered based not on the absence of a ruling to a question not presented, but on the underlying legal reasoning as to what constitutes actual or apparent *quid pro quo* corruption that may be regulated, and how. Therefore, DRAFT B correctly applies the legal reasoning of this line of cases and AOs to the different set of facts and questions here in reaching the correct conclusion.

Corruption is not in the money, but in its flow. In *Citizens United*, the Supreme Court held that "Independent Expenditures do not lead to, or create the appearance of, *quid pro quo* corruption," *Citizens United*, 130 S. CT at 910. The Court concluded that IEs may not be regulated as to amount and source of contributions because they do not pose the same risk, and that based on the specific facts and question presented that corporations and unions could, like individuals, spend unlimited sums on IEs. The DC Circuit and FEC subsequently upheld this provision to apply to IE-only PACs.

For example, Individual "A" may contribute up to $2400 to a given candidate "B", and up to $5000 per year to a PAC that also supports candidate "B", and up to and exceeding $5,000,000 to fund IEs that support candidate "B". The Supreme Court protects this pattern of giving while recognizing the obvious ingratiating effect of large IEs, and flatly stating that it is not *quid pro quo* corruption. Moreover, non-connected PACs have always been able to spend unlimited sums on IEs, though only from amount and source restricted contributions. Clearly, there is no basis to consider any IE expenditure to be *quid pro quo* corruption when made by individuals, corporations, unions, connected committees, or non-connected PACs.

The amount of money spent is, therefore, not at issue, nor who expends it. At issue is only the actual or apparent *quid pro quo* corruption of direct candidate contributions. If IE's are in fact independent, their being conducted by parties that also engage in another form of legal political speech does not make them suddenly corrupt. In fact, were that the case, *Citizens United* would likely have held that no corporation or union could both make IEs and sponsor an SSF. It is the independent nature of the IE that underlies the outcome in *Citizens United*. Moreover, if an IE were not independent, it would become a coordinated communication which, if made by a corporation or union, would create an illegal contribution to a candidate. The rules governing coordinated communications, therefore, more than adequately prevent actual or apparent *quid pro quo* corruption where political speakers engage in both forms of lawful conduct.

Strict Scrutiny applies. Restrictions on political speech are accorded strict scrutiny by the courts. This necessarily implies a compelling government interest in the restriction, a narrowly tailored remedy to meet that interest, and no less restrictive a remedy available. The compelling government interest here is the prevention of actual or apparent *quid pro quo* corruption. In *Citizens United*, the Court held that IEs by themselves pose no such risk and therefore amount and source limitations are invalid. NDPAC concedes that the comingling of unlimited

contributions for IEs and amount and source limited contributions for direct candidate support would, indeed, pose exactly such a risk. NDPAC further concedes the appropriateness of the remedy in DRAFT B regarding the allocation of expenses between accounts as presented in question 2. The simple expedient of maintaining separate accounting of receipts and expenditures and the use of separate bank accounts for each category of contribution and expense eliminates the risk of actual or apparent *quid pro quo* corruption presented by potential comingling. Therefore, the additional restrictions on free speech embodied by preventing speakers from exercising the full range of their protected speech is unnecessarily burdensome and does not meet the strict scrutiny standard.

The Commission is empowered to determine this matter. Contrary to the argument proffered by the Campaign Legal Center and Democracy 21, the Commission is charged with interpreting and enforcing federal election law, including that governing campaign finance. That law as passed by Congress has fundamentally changed as a consequence of the ruling in *Citizens United*. To ignore the implications of this ruling and not adjust its regulations accordingly is an absurd proposition. In essence, that view holds that the Commission had no authority to issue AO 2010-09 or 2010-11 since those specific circumstances were not expressly addressed by the Court, and that it may not assess the application of strict scrutiny based on the underlying change in the law to any new or proposed activity. On the contrary, it is precisely the role of the Commission to do just what it did – apply the change in underlying law to the facts at hand. Similarly, the Commission is certainly empowered to do the same here.

"Dual committees" are not an appropriate remedy. It is a tenet of the law that one may not do in concert with others what he may not do himself. Nor should speakers be forced to choose from only one of two lawful forms of political speech – such a forced choice would facially violate their right to engage in political speech. If NDPAC is not able to pursue its proposed activity as a single PAC, neither could it or its organizers do so by having two separate committees. This would result in shared management, facilities, and use of resources that would indicate affiliation between committees. That affiliation would impute the political contributions of the one committee to the other, IE-only, PAC - placing both in violation for the other's independently lawful conduct.

Additionally, this raises practical problems, including how to split operating costs between the two entities; the necessity and cost of maintaining separate websites and donation platforms, the ownership of shared resources, potential liability issues, the added reporting burdens, and so on.

Preferential First Amendment treatment of corporate and union restricted class members. Corporations and unions are significantly advantaged by the use of treasury funds to pay the operating expenses of their SSF. In many cases, such expenses dwarf what is actually raised by SSFs from the restricted class, thereby effectively and heavily subsidizing political speech of

restricted class members. This subsidization means that virtually 100% of each dollar raised through a PAC may be contributed to a candidate. The net result is that greater than 2/3 of all PACs are SSFs, and an even greater portion of PAC contributions come from SSFs.

By contrast, individuals not within a restricted class of an SSF must pay the operating costs of any non-connected PAC through their contributions. This discriminates between the political speech of individuals based on (a) their employment (by a corporation that can support a PAC), or (b) membership in an organization (union or trade association), or (c) based on the content of their speech in support of the policy agenda of the SSF, as opposed to that in support of an agenda not supporting particular corporate or unions interests. Permitting non-connected PACs to raise unlimited funds in support of IEs and related administrative expenses has an obvious outcome: Non-connected PACs will likely shift some portion of their activities into this category, allowing at least partial subsidization of overall PAC operations. This, in turn, will reduce the burden and cost of entry on non-restricted Class individuals who wish to exercise something closer to equal First Amendment rights with their restricted class peers.

Preferential First Amendment treatment of large corporations and unions. Larger entities and richer individuals have greater ability to deploy capital for political speech. Small businesses – the engine of America's economy and those most sensitive to government activity – are disadvantaged in their individual ability to engage in political speech. Individual small businesses and business owners face significant cost barriers to entry in creating an SSF or making an IE. Such entities and individuals may now cooperate in the mutual support of IE-only PACs. However, they may not mutually cooperate in the support of the administrative costs of a PAC that may (also) make direct contributions subject to amount and source limitations. NDPACs proposed activity would reduce the barrier to entry facing many political speakers by doing exactly what large corporations and unions can do – spend money on both IEs and in administrative support of direct contributions – by reducing the economic barriers to entry that functionally exclude the voice of America's small businesses and business owners.

For the above stated reasons, National Defense PAC urges the Commission to adopt Draft AO, Agenda Document No. 10-60-A (DRAFT B) in response to AOR 2010-20.

We appreciate the opportunity to submit these comments.

Sincerely,

Dan Backer

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