

**PUBLIC COMMENTS ON DRAFT ADVISORY OPINIONS**

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

DRAFT ADVISORY OPINION 2010-09 is now available for comment. It was requested by counsel, Carol Laham, Esq., and Mark Renaud, Esq., on behalf of Club for Growth, Inc.

If you wish to comment on the DRAFT 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:**

Press inquiries: Judith Ingram  
Press Officer  
(202) 694-1220

Commission Secretary: (202) 694-1040

Comment submission procedure: Rosemary C. Smith  
Associate General Counsel  
(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:** Thomasenia P. Duncan *TPD*  
General Counsel

Rosemary C. Smith *RCS*  
Associate General Counsel

Robert M. Knop *RMK*  
Assistant General Counsel

David C. Adkins *DAK*  
Attorney

**Subject:** Draft AO 2010-09 (Club for Growth, Inc.)

Attached is a proposed draft of the subject advisory opinion. We set July 21, 2010 as the deadline for public comments on the attached draft advisory opinion. We plan to circulate the attached draft for a 24-hour tally vote on July 21, 2010.

Attachment

1 ADVISORY OPINION 2010-09

2

3 Carol A. Laham, Esq.

4 D. Mark Renaud, Esq.

5 Wiley Rein LLP

6 1776 K Street, N.W.

7 Washington, DC 20006

8

9 Dear Ms. Laham and Mr. Renaud:

**DRAFT**

10 We are responding to your advisory opinion request on behalf of Club for  
11 Growth, Inc. (the "Club") concerning the application of the Federal Election Campaign  
12 Act of 1971, as amended (the "Act"), and Commission regulations to its plans to  
13 establish, administer, and pay the solicitation costs of a new independent expenditure-  
14 only political committee (the "Committee"). The Committee plans to make only  
15 independent expenditures, and to solicit unlimited contributions solely from individuals  
16 in the general public, including contributions given for specific independent expenditures.  
17 The Committee does not intend to coordinate its communications or expenditures with  
18 any candidate, candidate committee, or political party committee.

19 Based on the representations in the request and the analysis below, the  
20 Commission concludes that the Club may establish and administer the Committee, and  
21 the Committee may solicit and accept unlimited contributions from individuals in the  
22 general public, including contributions given for specific independent expenditures.

23 ***Background***

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

26 The Club is an incorporated non-profit social welfare organization exempt from  
27 Federal taxes under section 501(c)(4) of the Internal Revenue Code. It has a separate

1 segregated fund (“SSF”), Club for Growth PAC (“Club PAC”). The Club plans to  
2 establish, administer, and pay the solicitation costs of the Committee, which would be  
3 organized as a tax-exempt organization under section 527 of the Internal Revenue Code  
4 and would be incorporated under the laws of the District of Columbia. The Club intends  
5 to register the Committee with the Commission, and the Committee will file regular  
6 reports and independent expenditure reports.<sup>1</sup> The President of the Club will serve as the  
7 Treasurer of the Committee.<sup>2</sup>

8       The Committee intends to make only independent expenditures, which will  
9 include all the disclaimers and notices required by the Act and Commission regulations.  
10 It plans to solicit contributions solely from individuals that may be unlimited in amount  
11 and solicited or given for specific independent expenditures. The Club states that such  
12 solicitations will also include all disclaimers and notices required by the Act and  
13 Commission regulations. The costs of the solicitations would be paid by the Club if  
14 permissible, or otherwise would be paid by the Committee.

15       The Committee will not accept contributions from any political committee  
16 (including any separate segregated fund, authorized committee, or political party  
17 committee), candidate, labor organization, foreign national, government contractor, or  
18 corporation, except that the Club will pay for some or all of the Committee’s  
19 establishment, administrative, and solicitation costs.

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<sup>1</sup> The Commission notes that this advisory opinion implicates issues that will be the subject of forthcoming rulemakings in light of the *Citizens United*, *EMILY’s List*, and *SpeechNow* decisions. The results of that rulemaking may require the Commission to update its registration and reporting forms to facilitate public disclosure. In the meantime, the Committee may include a letter with its Form 1 Statement of Organization clarifying that it intends to accept unlimited contributions for the purpose of making independent expenditures. See Attachment A. Electronic filers may include such a letter as a Form 99.

<sup>2</sup> Currently, the President of the Club serves as Treasurer of Club PAC. Statement of Organization, Club for Growth PAC (Apr. 14, 2009), available at: [www.fec.gov](http://www.fec.gov) (last visited Jul. 16, 2010).

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

8           ***Questions Presented***

- 9           1. *If the Club pays the Committee's establishment, administrative, and solicitation*  
10 *expenses, may the Committee solicit and accept contributions from the general*  
11 *public?*  
12  
13           2. *If the Club pays the Committee's establishment, administrative, and solicitation*  
14 *expenses, may the Committee solicit and accept funds earmarked for specific*  
15 *independent expenditures?*  
16  
17           3. *Are the answers to Questions 1 or 2 different if the Committee pays all of its own*  
18 *establishment, administrative, and solicitation expenses?*  
19

20           ***Legal Analysis and Conclusions***

- 21           1. *If the Club pays the Committee's establishment, administrative, and solicitation*  
22 *expenses, may the Committee solicit and accept contributions from the general*  
23 *public?*  
24

25           Yes, based on the representations in the request and consistent with the analysis  
26 below, the Committee may solicit and accept contributions from the general public.

27           The United States Supreme Court recently held that corporations may make  
28 unlimited independent expenditures using corporate treasury funds. *Citizens United v.*  
29 *FEC*, 558 U.S. \_\_\_, 130 S. Ct. 876 (2010).<sup>3</sup> In addition, the U.S. Court of Appeals for the

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<sup>3</sup> Even before *Citizens United*, incorporated membership organizations like the Club could spend unlimited amounts from their general treasury on the administrative and overhead costs associated with a separate

1 District of Columbia Circuit recently held that “the contribution limits of 2 U.S.C.  
2 441a(a)(1)(C) and 441a(a)(3) are unconstitutional as applied to individuals’ contributions  
3 to SpeechNow,” an independent expenditure group.<sup>4</sup> *SpeechNow v. FEC*, 599 F.3d 686,  
4 689 (D.C. Cir. 2010); *see also EMILY’s List v. FEC*, 581 F. 3d 1, 10 (D.C. Cir. 2009) (“ .  
5 . individual citizens may spend money without limit (apart from the limit on their own  
6 contributions to candidates or parties) in support of the election of particular  
7 candidates”). The decision in *SpeechNow* was predicated on the Supreme Court’s  
8 holding in *Citizens United* “that independent expenditures, including those made by  
9 corporations, do not give rise to corruption or the appearance of corruption.” *Citizens*  
10 *United*, 130 S. Ct. at 909; *see SpeechNow*, 599 F.3d at 693.

11 The court made clear, though, that it was “only decid[ing] these questions as  
12 applied to contributions to SpeechNow, an independent expenditure-only group.”  
13 *SpeechNow*, 599 F.3d at 696. Its holding did not affect limits on direct contributions to  
14 candidates or political party committees, including in-kind contributions in the form of  
15 coordinated communications” *Id.* In addition, the court held that the “reporting  
16 requirements of 2 U.S.C. 432, 433, and 434(a) and the organizational requirements of 2  
17 U.S.C. 431(4) and 431(8) can constitutionally be applied to SpeechNow.” *Id.* at 689.

18 Relying on these two cases, the Club asks whether it may solicit and accept  
19 contributions from the general public if the Club pays the Committee’s establishment,

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segregated fund, even if that SSF made independent expenditures. *See* 2 U.S.C. § 441b(b)(2)(C) (exempting corporate payment of administrative and fundraising costs from definitions of contribution and expenditure); 11 CFR114.1(a)(2)(iii) (same).

<sup>4</sup> On May 27, 2010, in accordance with the circuit court’s order, the United States District Court of the District of Columbia entered 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 or the individuals who contribute to it.

1 administrative and solicitation expenses. In *Citizens United*, the Supreme Court held  
2 that independent corporate political spending cannot be limited. Therefore, a corporation  
3 may establish and administer a political committee that makes only independent  
4 expenditures. Moreover, because the Committee, like SpeechNow, intends to make only  
5 independent expenditures, there is no basis to impose contribution limits on the  
6 Committee.<sup>5</sup>

7 As noted above, the President of the Club, who currently serves as Club PAC's  
8 Treasurer, will also serve as the Treasurer of the Committee. Because a corporation,  
9 through its restricted class events<sup>6</sup> or its SSF, may lawfully coordinate with Federal  
10 candidates and party committees under certain circumstances, the overlap of duties could  
11 potentially compromise the independence of communications made by the Committee.  
12 However, the Club represents that the Committee will not engage in coordinated activity,  
13 and will comply with the requirements of 11 CFR 109.21(d).<sup>7</sup> Specifically, the  
14 Commission assumes that candidates or authorized committees will not request or  
15 suggest communications to agents of the Committee, nor will candidates or their agents  
16 assent to communications suggested by the Committee or any of its agents. See 11 CFR  
17 109.21(d)(1). Candidates or authorized committees will not be materially involved in  
18 communications made by the Committee and will not substantially discuss  
19 communications or the candidate's plans, projects, activities, or needs with the

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<sup>5</sup> See *SpeechNow*, 599 F.3d at 693 (the court's holding was predicated on the "independence of independent expenditures").

<sup>6</sup> See 11 CFR 114.2(c).

<sup>7</sup> The request states that the Committee "will not, per the regulations of the FEC or applicable Federal law, coordinate any communications or other expenditure with any candidate, candidate committee, political party committee, or their agents." Request at 2. Moreover, the Committee will not accept contributions from Club PAC, nor will it make any contributions or transfer any funds to Club PAC. *Id.*

1 Committee or its agents. *See* 11 CFR 109.21(d)(2) - (3). In sum, the Commission  
2 assumes that the President will manage the Corporation and his responsibilities as  
3 Treasurer of the Committee and Club PAC without causing the Committee to engage in  
4 coordinated activities.<sup>8</sup> Therefore, based on the representations in the request and the  
5 analysis above, the Committee may solicit and accept unlimited contributions from the  
6 general public even if the Club pays the Committee's establishment, administrative and  
7 solicitation expenses.

8 2. *If the Club pays the Committee's establishment, administrative, and solicitation*  
9 *expenses, may the Committee solicit and accept funds earmarked for specific*  
10 *independent expenditures?*  
11

12 Yes, consistent with the analysis in Question 1, the Committee may solicit and  
13 accept funds earmarked for specific independent expenditures.

14 The Commission's current regulation at 11 CFR 110.1(h) limits a person that has  
15 already contributed to a specific candidate from also contributing to an unauthorized  
16 political committee if the contributor "give[s] with the knowledge that a substantial  
17 portion will be contributed to, or expended on behalf of, that candidate for the same  
18 election." Section 110.1(h) "governs the circumstances under which contributions to a  
19 candidate and his or her authorized campaign committee(s) must be aggregated with  
20 contributions to other political committees for the purposes of the contribution limits of §  
21 110.1." Explanation and Justification, Contribution and Expenditure Limitations and

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<sup>8</sup> Although the firewall provided for in the Commission's regulations is not mandatory, establishing such effective prophylactic measures would be one sufficient way to address potential concerns with respect to the conduct standards of the Commission's coordination rule. *See* 11 CFR 109.21(h) (Safe harbor for establishment and use of a firewall); *see also* MUR 5506 (EMILY's List), First General Counsel's Report at 5-8 (concluding that there was no reason to believe that the organization made excessive contributions in the form of coordinated communications, based in large part on the organization's establishment of "firewall" measures).

1 Prohibitions, 52 F R 760, 765 (Jan. 9, 1987). In other words, the Commission's  
2 earmarking regulation is designed to prevent the circumvention of contribution limits.

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

8 Thus, because there is no possibility of circumvention of any contribution limit, section  
9 110.1(h) and its rationale do not apply to the Committee's solicitations or any  
10 contributions it receives that are earmarked for specific independent expenditures.

11 3. *Do the answers to Questions 1 or 2 change if the Committee pays its own*  
12 *establishment, administrative, and solicitation expenses?*  
13

14 No, the answers to Questions 1 and 2 do not change if the Committee pays its  
15 own establishment, administrative, and solicitation expenses.

16 The Club's proposed payment of the Committee's establishment, administrative,  
17 and solicitation expenses are not exempt from the definition of "contribution" or  
18 "expenditure" because the Committee is not an SSF.<sup>9</sup> Therefore, any establishment,  
19 administrative, or solicitation expenses paid by the Club must be reported by the  
20 Committee as contributions from the Club.<sup>10</sup> Alternatively, the proposed political  
21 committee may pay its own establishment, administrative, and solicitation expenses.

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<sup>9</sup> Under the Act and Commission regulations, a corporation may use its general treasury funds to pay the costs of establishing, administering, or soliciting contributions to its SSF, without a resultant contribution or expenditure. See 2 U.S.C. 441b(b)(2)(C); see also 2 U.S.C. 431(8)(B)(vi).

<sup>10</sup> See 2 U.S.C. 431(8), 434(b); 11 CFR 104.3(a).

1           The Commission expresses no opinion regarding the possible applicability of any  
2 Federal or State tax laws or other laws to the matters presented in your request, as those  
3 issues are outside its jurisdiction.

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

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On behalf of the Commission,

Matthew S. Petersen  
Chairman

[COMMITTEE NAME]

[DATE]

Federal Election Commission  
999 E Street, NW  
Washington, DC 20463

Re: Form 1, Statement of Organization—Unlimited Contributions

To Whom It May Concern:

This committee intends to make independent expenditures, and consistent with the U.S. Court of Appeals for the District of Columbia Circuit decision in *SpeechNow v. FEC*, it therefore intends to raise funds in unlimited amounts. This committee will not use those funds to make contributions, whether direct, in-kind, or via coordinated communications, to federal candidates or committees.

Respectfully submitted,

Treasurer