In the recent decision by the Court of Appeals for the District of Columbia Circuit in *SpeechNow.org v. FEC*, 599 F.3d 686 (D.C. Cir. 2010) (en banc) ("SpeechNow"), the court held that the Act’s contribution limits were unconstitutional “as applied” to funds from individuals received by SpeechNow.org, a political committee that (a) only makes independent expenditures, (b) is not connected to any corporation, and (c) is not affiliated with any other political committee. In *SpeechNow*, the court granted SpeechNow.org’s “as-applied” challenge to the Act’s contribution limits precisely because SpeechNow.org only makes independent expenditures and therefore, consistent with the Supreme Court’s holding in *Citizens United*, the Act’s contribution limits advanced no “anti-corruption interest.”

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1 In *Citizens United*, the Supreme Court held that the Act’s prohibition on corporate independent expenditures, 2 U.S.C. 441b(a), violated the First Amendment rights of corporations because “independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption.” *Citizens United v. FEC*, 130 S. Ct. 876, 909 (2010).
Advisory Opinion 2010-09 (Club for Growth)

The attached draft of Advisory Opinion 2010-09 (Club for Growth), which I released for public comment through the Commission's usual procedures, presents my view that the holding in *SpeechNow* was expressly limited to the "as-applied" challenge brought before the court by a nonconnected political committee that only solicits and accepts contributions from individuals, and that the court's decision does not have force beyond the material facts presented by *SpeechNow.org* to the court. Moreover, it is my view that broadening the reach of the DC Circuit Court's holding in *SpeechNow* to the requestors in both Advisory Opinion 2010-09 (Club for Growth) and Advisory Opinion 2010-11 (Commonsense Ten) would require modification of the applicability of several Commission regulations (and the possible decision to ignore certain statutory provisions still on the books), which would best be achieved through a notice-and-comment rulemaking conducted pursuant to the requirements of the Administrative Procedure Act, 5 U.S.C. 551 *et seq.*, which could be done in our upcoming rulemaking proceedings.

Although the Commission received very helpful comments on the drafts of these Advisory Opinions, unfortunately, commenters were afforded less than 24-hours to review the drafts and submit their comments. It is likely that the Commission may have received significantly more comments if additional time was provided. Notwithstanding the benefit of an additional comment period in this case, in contrast, a notice-and-comment rulemaking would provide the public even greater notice through publication in the *Federal Register*, by which all interested persons would be afforded adequate time to participate fully in the rulemaking through submission of written data, views, or arguments, taking into consideration all of the issues emanating from *EMILY's List, Citizens United* and *SpeechNow*.  

2
Moreover, the landscape of Federal campaign finance regulation has undergone a paradigmatic shift as the result of several recent court decisions including *EMILY's List*,2 *Citizens United*, and *SpeechNow*. In my view, it is better practice for the Commission to address the consequences of these fundamental changes in a rulemaking proceeding than piecemeal through the advisory opinion process. These issues are better addressed in a plenary fashion, taking into account the full breadth of the shifted landscape.

**Advisory Opinion 2010-11 (Commonsense Ten)**

Although I did not prepare a draft of Advisory Opinion 2010-11 (Commonsense Ten), I agree with my colleagues in the answer provided to Commonsense Ten’s proposal regarding solicitation and acceptance of unlimited contributions from *individuals*. I agree with this answer precisely because Commonsense Ten is materially indistinguishable from SpeechNow.org with respect to contributions from *individuals*. However, I cannot, in this Advisory Opinion proceeding (although I may later), support my colleagues conclusions with respect to the permissibility of Commonsense Ten’s proposal to solicit and accept contributions from political committees in excess of $5,000 or from corporations and labor organizations in any amount. There are provisions of the Act and Commission regulations *not addressed by the court in SpeechNow* that continue to prohibit Commonsense Ten from soliciting or accepting

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2 In *EMILY's List*, a three-judge panel of the Court of Appeals for the District of Columbia Circuit held that sections 106.6(c), 106.6(f), and 100.57 of Commission regulations were not closely drawn to serve a cognizable anti-corruption interest. 581 F.3d 11, 18 (D.C. Cir. 2009). As an immediate step to comply with the *EMILY's List* decision, the Commission deleted these regulations. See Final Rules, Funds Received in Response to Solicitations; Allocation of Expenses by Separate Segregated Funds and Nonconnected Committees, 75 FR 13223 (Mar. 19, 2010). Importantly, the court did not invalidate the Act’s prohibition on contributions by corporations or labor organizations. Moreover, the court’s direct holding did not include the annual limit on contributions by political committees.
contributions from political committees in excess of $5,000 annually or any contributions from
 corporations or labor organizations. These are: 2 U.S.C. 441b(a), 2 U.S.C. 441a(a)(1)(C), and
 2 U.S.C. 441a(a)(2)(C); 11 CFR 114.2(b)(1), 11 CFR 110.1(d), 11 CFR 110.2(d).

No court - neither the court in EMILY's List, nor the Court in Citizens United,3 nor the court in
SpeechNow - has invalidated these provisions of the Act or Commission regulations. Particularly
in the context of an advisory opinion, it is not best practice for the Commission to announce that
a political committee may ignore a statutory provision duly enacted by Congress where no court
has held that provision to be invalid.

Therefore, consistent with my views as reflected in the attached draft, I must conclude that the
better course of action at this time is to not broaden the reach of the DC Circuit Court's holding
in SpeechNow to either Club for Growth or Commonsense Ten through the advisory opinion
process, but rather to await the Commission's consideration of these issues in the upcoming
rulemaking proceedings where all outstanding issues can be considered globally, in context with
each other, with greater opportunity for in-depth analysis and wider participation by the public.

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3 Although the Supreme Court concluded in Citizens United that the Act's prohibition on corporate independent
 expenditures violated the First Amendment rights of corporations, the Court's holding did not extend to the Act's
 prohibition on corporate or labor organization contributions. See Citizens United, 130 S. Ct. at 909 ("Citizens
 United has not made direct contributions to candidates, and it has not suggested that the Court should reconsider
 whether contribution limits should be subjected to rigorous First Amendment scrutiny.") Moreover, the Court's
 holding did not address the annual limit on contributions by political committees.
MEMORANDUM

TO: The Commission

FROM: Steven T. 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
Dear Ms. Laham and Mr. Renaud:

We are responding to your advisory opinion request on behalf of Club for Growth, an incorporated non-profit social welfare organization exempt from Federal taxes under section 501(c)(4) of the Internal Revenue Code (the "Corporation"), concerning the application of the Federal Election Campaign Act of 1971, as amended (the "Act"), and Commission regulations to the Corporation’s plans to establish, administer, and financially support a new political committee (the "Committee"). The Corporation has represented that it plans (a) for the Committee to make only independent expenditures and (b) for the Committee to solicit and accept contributions only from individuals in the general public, including contributions given for specific independent expenditures.¹

The principal rationale underlying your request for an advisory opinion is that "the campaign finance regime administered by the FEC has changed" as a result of the recent decision by the Court of Appeals for the District of Columbia Circuit in SpeechNow.org v. FEC, 599 F.3d 686 (D.C. Cir. 2010) (en banc) ("SpeechNow").

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

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

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

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

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

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

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

Background

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

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

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

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

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

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

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

**Legal Background**

On March 26, 2010, the United States Court of Appeals for the District of Columbia Circuit issued its opinion in *SpeechNow*. Id. As discussed above, the court held that the Act's contribution limits were unconstitutional as applied to contributions from individuals given to, and received by, SpeechNow.org, a nonconnected political committee making only independent expenditures, because the Act's contribution limits, as applied to SpeechNow.org, advanced no "anti-corruption interest."\(^{10}\) *Id.* at 696; see also *Citizens United v. FEC*, 130 S. Ct. 876, 909 (2010) (finding that "independent expenditures . . . do not give rise to corruption or the appearance of corruption"). The court made clear, however, that it was "only decid[ing] these questions as applied to 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
Any issues regarding contributions to candidates, for example, were not before the court and therefore were not reached in the SpeechNow opinion. See id. Likewise, the SpeechNow opinion did not reach the issue of contributions to independent expenditure-only groups made by persons other than individuals. See id.

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

These Findings are in sharp contrast to the representations made by the Corporation regarding the planned Committee. Specifically, the planned Committee will (a) be “connected” to the Corporation and (b) will be affiliated with Club for Growth PAC, a political committee established, supported and controlled by the Corporation that 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.
Questions Presented

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

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

3. Are the answers to Questions 1 or 2 different if the Committee pays all of its own establishment, administrative, and solicitation expenses?

Legal Analysis and Conclusions

As indicated above, SpeechNow.org was organized (indeed, is required by its own bylaws) to operate wholly independently of any candidate or other political committees, including political party committees. Findings at 6. Its operations are funded solely by contributions from individuals; it could not – per its bylaws – accept "directly or indirectly, any donation or anything of value" from, among others, corporations. Id. at 5.

Further, SpeechNow.org is prohibited under its bylaws from making "contributions or donations of any kind directly or indirectly to any FEC-regulated candidate or political committee . . . ." Id. at 6.

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

The Corporation, like any connected organization, will enjoy the inherent right to control the Committee. See 11 CFR 114.5(d); see also Pipefitters Local Union No. 562 v. U.S., 407 U.S. 385, 426 (1972) ("In these circumstances, it is difficult to conceive how a
valid political fund can be meaningfully ‘separate’ from the sponsoring union in any way other than ‘segregated.’”), *Bread Political Action Committee v. Federal Election Commission*, 635 F.2d 621, 624, n.3 (7th Cir. 1980) (en banc), *rev’d on jurisdictional grounds*, 455 U.S. 577 (1982) (stating that “separate segregated funds are simply political arms of the parent organizations”). Moreover, the Committee will be affiliated with the Corporation’s SSF, Club for Growth PAC, which regularly makes contributions to Federal candidates as well as contributions to other political committees, and may receive contributions from persons other than individuals.\(^\text{12}\)

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

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

Accordingly, the Commission concludes that it will not issue an advisory opinion 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 ...”).
activities and therefore the answers that follow are based on the Act and Commission regulations as they currently exist. See 2 U.S.C. 437f(b). However, as indicated above, these issues can, and will, be appropriately considered in the Commission's upcoming rulemakings.

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

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

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

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

Section 110.1(h) of the Commission regulations states that a person may contribute both to a candidate (or his or her authorized committee) and a political committee which has supported or anticipates supporting that same candidate only if
(among other things) that person "does not give with the knowledge that a substantial portion will be contributed to, or expended on behalf of, that candidate for the same election." 11 CFR 110.1(h). See also Advisory Opinion 1984-02 (Gramm).

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

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

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

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

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

On behalf of the Commission,

Matthew S. Petersen
Chairman