

July 14, 2010

**PUBLIC COMMENTS ON DRAFT ADVISORY OPINIONS**

Members of the public may submit written comments on draft advisory opinions that are on the agenda of a Commission public meeting.

DRAFT ADVISORY OPINION 2010-10 is now available for comment. It was requested by counsel, Barry A. Bostrom, Esq., James Bopp, Jr., Esq., and Zachary S. Kester, Esq. on behalf of the National Right to Life Political Action Committee., and is scheduled to be considered by the Commission at its public meeting on Thursday, July 15, 2010.

If you wish to comment on the DRAFT ADVISORY OPINION 2010-10, 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 14, 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>.

**REQUESTOR APPEARANCES BEFORE THE COMMISSION**

The Commission has implemented a pilot program to allow advisory opinion requestors, or their counsel, to appear before the Commission to answer questions at the open meeting at which the Commission considers the draft advisory opinion. This program took effect on July 7, 2009.

**Under the program:**

- 1) A requestor has an automatic right to appear before the Commission if any public draft of the advisory opinion is made available to the requestor or requestor's counsel less than one week before the public meeting at which the advisory opinion request will be considered. Under these circumstances, no advance written notice of intent to appear is required. This one-week period is shortened to three days for advisory opinions under the expedited twenty-day procedure in 2 U.S.C. 437f(a)(2).
- 2) A requestor must provide written notice of intent to appear before the Commission if all public drafts of the advisory opinion are made available to requestor or requestor's counsel at least one week before the public meeting at which the Commission will consider the advisory opinion request. This one-week period is shortened to three days for advisory opinions under the expedited twenty-day procedure in 2 U.S.C. 437f(a)(2).

The notice of intent to appear must be received by the Office of the Commission Secretary by hand delivery, email [Secretary@fec.gov](mailto:Secretary@fec.gov), or fax ((202) 208-3333), no later than 48 hours before the scheduled public meeting. Requestors are responsible for ensuring that the Office of the Commission Secretary receives timely notice.

- 3) Requestors or their counsel unable to appear physically at a public meeting may participate by telephone, subject to the Commission's technical capabilities.
- 4) Requestors or their counsel who appear before the Commission may do so only for the limited purpose of addressing questions raised by the Commission at the public meeting. Their appearance does not guarantee that any questions will be asked.

**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 2010-10, 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  
SECRETARIAT

2010 JUL 14 A 7:59



FEDERAL ELECTION COMMISSION  
Washington, DC 20463

July 14, 2010

**AGENDA ITEM**  
For Meeting of 07-15-10

**SUBMITTED LATE**

**MEMORANDUM**

TO: The Commission

FROM: Thomasenia P. Duncan *JPD*  
General Counsel

Rosemary C. Smith *RCS*  
Associate General Counsel

Amy L. Rothstein *ALR*  
Assistant General Counsel

Jonathan M. Levin *JL*  
Senior Attorney

Heather R. Abraham *H.A.*  
Law Clerk

Subject: Draft AO 2010-10 (National Right to Life PAC)

Attached is a proposed draft of the subject advisory opinion. We request that this draft be placed on the agenda for July 15, 2010.

Attachment

1 ADVISORY OPINION 2010-10

2

3 Barry A. Bostrom, Esq.

4 James Bopp, Jr., Esq.

5 Zachary S. Kester, Esq.

**DRAFT**

6 Bopp, Coleson & Bostrom

7 The National Building

8 1 South Sixth Street

9 Terre Haute, IN 47807-3510

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11 Dear Messrs. Bostrom, Bopp and Kester:

12 This responds to your advisory opinion request dated June 10, 2010 on behalf of  
13 the National Right to Life Political Action Committee (NRL PAC), concerning the  
14 application of the Federal Election Campaign Act of 1971, as amended (“the Act”), and  
15 Commission regulations, to the attribution of independent expenditures for reporting  
16 purposes to candidates identified in several different advertisements.

17 The Commission concludes that:

18 (1) independent expenditures for communications that expressly advocate the election  
19 of a clearly identified Federal candidate and that do not identify any other  
20 candidate may be reported as having been made in support of the candidate  
21 identified in the communication;

22 (2) independent expenditures for communications that expressly advocate the election  
23 of a clearly identified Federal candidate and that identify the opposing candidate  
24 in the same race may be reported as having been made in support of the advocated  
25 candidate;

26 (3) independent expenditures for communications that expressly advocate the election  
27 of more than one clearly identified Federal candidate and that identify those  
28 candidates’ respective opponents may be reported as having been made in support

1 of the advocated candidates, and are allocated among the different elections based  
2 on a time or space analysis;

3 (4) independent expenditures for communications that expressly advocate the defeat  
4 of one clearly identified candidate and that do not identify any other candidate  
5 may be reported as having been made in opposition to the candidate identified in  
6 the communication; and

7 (5) independent expenditures for communications that expressly advocate the election  
8 of a presidential-vice presidential ticket and expressly advocate the defeat of a  
9 senatorial candidate are allocated among the different elections based on a time or  
10 space analysis and may be reported as having been made in support of the  
11 presidential-vice presidential ticket and in opposition to the senatorial candidate.

12 ***Background***

13 The facts presented in this advisory opinion are based on your letter received  
14 June 10, 2010, and on publicly available information on the Commission's website  
15 regarding NRL PAC's status as a separate segregated fund.<sup>1</sup>

16 NRL PAC is a separate segregated fund of the National Right to Life Committee,  
17 Inc. and is registered with the Commission as a political committee. NRL PAC intends  
18 to make independent expenditures for communications that expressly advocate the  
19 election or defeat of one or more Federal candidates in one or more elections.

20 The request presents five scenarios illustrated by twelve exhibits. Four of the five  
21 scenarios involve advertisements expressly advocating the election of at least one clearly

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<sup>1</sup> See NRL PAC's most recently amended Statement of Organization, available at <http://images.nictusa.com/pdf/898/29933986898/29933986898.pdf>.

1 identified Federal candidate. With respect to those scenarios, NRL PAC proposes to  
2 attribute the full amount of the independent expenditures to the candidate or candidates  
3 supported, on its FEC Form 3X, Schedule E. With respect to the remaining scenario,  
4 involving an advertisement expressly advocating the defeat of a clearly identified Federal  
5 candidate and not mentioning any other candidate, NRL PAC proposes to report the full  
6 amount of the independent expenditure to that candidate.

7 ***Questions Presented***

8 *How should NRL PAC attribute its independent expenditures on FEC Form 3X,*  
9 *Schedule E<sup>2</sup> in the following scenarios:*

- 10 *(1) advertisements expressly advocating the election of one clearly identified candidate*  
11 *that do not identify any other candidate;*
- 12 *(2) advertisements expressly advocating the election of one clearly identified candidate*  
13 *and identifying, and comparing the positions of, that candidate's opponent;*
- 14 *(3) advertisements expressly advocating the election of several clearly identified*  
15 *candidates in different races and identifying, and comparing the positions of, those*  
16 *candidates' respective opponents;*
- 17 *(4) advertisements expressly advocating the defeat of one clearly identified candidate*  
18 *that do not identify any other candidate; and*
- 19 *(5) advertisements expressly advocating the election of a presidential-vice presidential*  
20 *ticket, and expressly advocating the defeat of a candidate for U.S. Senate.<sup>3</sup>*

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<sup>2</sup> NRL PAC also asks about attribution on FEC Form 5, Schedule E. However, NRL PAC is a political committee and FEC Form 5 is for the reporting of independent expenditures by all persons other than political committees. See 11 CFR 104.4(a), 109.10; see also Instructions for FEC Form 5 and Related Schedules, available at <http://www.fec.gov/pdf/forms/fecfrm5i.pdf>. Therefore, the question of how independent expenditures should be reported on FEC Form 5, Schedule E is hypothetical and does not qualify for an advisory opinion. See 11 CFR 112.1(b).

1 ***Legal Analysis and Conclusions***

2           The Act and Commission regulations require political committees to report any  
3 independent expenditures that they make.<sup>4</sup> See 2 U.S.C. 434(b)(4)(H)(iii),  
4 434(b)(6)(B)(iii) and 434 (g)(1) and (2); 11 CFR 104.3(b)(1)(vii), 104.3(b)(3)(vii)(B),  
5 104.4(b) and (c). Political committees must also report whether an independent  
6 expenditure is “in support of, or in opposition to” a particular candidate. 2 U.S.C.  
7 434(b)(6)(B)(iii); 11 CFR 104.3(b)(3)(vii)(B), 104.4(b)(2), 104.4(c).

8           Separate segregated funds making expenditures on behalf of more than one  
9 clearly identified candidate for Federal office must allocate the expenditure among  
10 candidates pursuant to 11 CFR part 106. 11 CFR 104.10(a). Part 106 provides that  
11 independent expenditures made on behalf of more than one clearly identified Federal  
12 candidate shall be attributed to each such candidate “according to the benefit reasonably  
13 expected to be derived.” 11 CFR 106.1(a)(1). The expenditure for a broadcast  
14 communication or publication shall be attributed to each candidate according to the  
15 “proportion of space or time devoted to each candidate [in the broadcast communication  
16 or publication] as compared to the total space or time devoted to all candidates.” *Id.*  
17 Commission regulations do not explicitly address the allocation of independent

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<sup>3</sup> NRL PAC asks a sixth question concerning the attribution of independent expenditures for a communication that identifies two opposing candidates, and that expressly advocates the election of one of the candidates but does not expressly advocate the defeat of the opponent. The Commission concludes that this is essentially the same fact pattern described in Questions 2 and 3. The Commission addresses the sixth question in its responses to those questions.

<sup>4</sup> Political committees must report their independent expenditures on their regularly scheduled disclosure reports and on special reports for independent expenditures made in excess of specific thresholds and during certain time frames before an election (that is, on “48-hour Reports” and “24-hour Reports”). See 2 U.S.C. 434(b)(6)(B)(iii), 434 (g)(1)-(2); 11 CFR 104.3(b)(3)(vii)(B), 104.4(b)(2), 104.4(c). The requirements for filing these special reports are described in “Instructions for FEC Form 3X and Related Schedules,” available at <http://www.fec.gov/pdf/forms/fecfrm3xi.pdf>.

1 expenditures among candidates when a communication is made on behalf of a candidate,  
2 and that candidate's opponent is also identified in the same communication.

3 *1. Advertisements Expressly Advocating the Election of One Clearly Identified*  
4 *Candidate That Do Not Identify Any Other Candidate*

5 The Commission concludes that no allocation is necessary for advertisements  
6 expressly advocating the election of one clearly identified Federal candidate that do not  
7 identify any other candidate. Commission regulations provide for allocation of  
8 independent expenditures made "on behalf of *more than one* clearly identified Federal  
9 candidate." See 11 CFR 106.1(a)(1), 104.10(a) (emphasis added). Thus, the entire  
10 independent expenditure may be reported as having been made in support of the  
11 candidate identified in the communication.

12 *2. Advertisements Expressly Advocating the Election of One Clearly Identified*  
13 *Candidate and Identifying, and Comparing the Positions of, That Candidate's Opponent*

14 The Commission concludes that no allocation is necessary for advertisements  
15 expressly advocating the election of one clearly identified Federal candidate and  
16 identifying, and comparing the positions of, that candidate's opponent. Commission  
17 regulations provide for allocation of independent expenditures made "on behalf of more  
18 than one clearly identified Federal candidate." See 11 CFR 106.1(a)(1), 104.10(a).

19 Where, as here, an independent expenditure is made on behalf of only one candidate, the  
20 entire expenditure may be reported as having been made in support of that candidate. See  
21 11 CFR 104.3(b)(3)(vii)(B).

1     **3.     *Advertisements Expressly Advocating the Election of Several Candidates in***  
2     ***Different Elections and Identifying, and Comparing the Positions of, Those Candidates'***  
3     ***Respective Opponents***

4             For advertisements expressly advocating the election of several Federal  
5 candidates in different races and identifying, and comparing the positions of, those  
6 candidates' respective opponents, the Commission concludes that NRL PAC should  
7 allocate the independent expenditure among the different races, based on a time or space  
8 analysis. NRL PAC may report the corresponding portions of the independent  
9 expenditure as having been made in support of the candidates whose elections will be  
10 expressly advocated.

11            Question 3 presents a communication involving several different races. To  
12 allocate the expenditure for the communication among the races, the first step is to  
13 determine the proportion of the space or time devoted to each race in the communication,  
14 as compared to the total space or time devoted to all races in the communication. *See* 11  
15 CFR 106.1(a)(1). As in the scenario presented in Question 2, the expenditure pertaining  
16 to each race is made in support of or opposition to one or more candidates. Thus, the  
17 proportion of the expenditure attributed to that race may be reported as having been made  
18 in support of the candidate advocated.<sup>5</sup> *See* 11 CFR 104.3(b)(3)(vii)(B).

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<sup>5</sup> For example, if NRL PAC airs a 30-second advertisement in which 16 seconds is devoted to expressly advocating Senate Candidate A's election and contrasting the positions of Senate Candidate A and his opponent, 8 seconds is spent expressly advocating the election of House Candidate B and contrasting the positions of House Candidate B with her opponents, and 6 seconds is devoted to a disclaimer, then NRL PAC may report two-thirds of the total amount of the expenditure as having been made in support of Senate Candidate A, and one-third as having been made in support of House Candidate B. The transaction is reported as follows: (1) on FEC Form 3X, Schedule E, reporting a payment of the full amount to the vendor, listing the full amount of the expenditure in the amount line and indicating "See memo entries below" in the box entitled "Name of Federal Candidate Supported or Opposed by Expenditure;" and (2)

1    **4.     *Advertisements Expressly Advocating the Defeat of One Clearly Identified***  
2    ***Candidate That Do Not Identify Any Other Candidate***

3           The Commission concludes that no allocation is necessary for advertisements  
4 expressly advocating the defeat of one clearly identified Federal candidate that do not  
5 identify any other candidate. *See* 11 CFR 104.10(a). When an expenditure is made  
6 solely to oppose a single candidate, the entire expenditure may be reported as having  
7 been made in opposition to that candidate.

8    **5.     *Advertisements Expressly Advocating the Election of a Presidential-Vice***  
9    ***Presidential Ticket and Expressly Advocating the Defeat of a Senatorial Candidate***

10           Independent expenditures expressly advocating the election of a presidential-vice  
11 presidential ticket and expressly advocating the defeat of a candidate for U.S. Senate are  
12 allocated among the electoral races, based on a time or space analysis. For example,  
13 NRL PAC may report the resulting portions of the independent expenditure as having  
14 been made (1) in support of the presidential-vice presidential ticket, and (2) in opposition  
15 to the senatorial candidate.<sup>6</sup>

16           As in the scenario presented in Question 3, this scenario involves different races.  
17 Thus, NRL PAC first divides its expenditure for the communication between the two  
18 races by determining the time or space devoted to each race compared to the time or  
19 space devoted to both races. *See* 11 CFR 106.1(a)(1). The proportion of the expenditure  
20 attributed to the presidential race is attributable to the presidential-vice presidential  
21 election, and may be reported accordingly (see response to Question 1, above). *See*

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following this entry, itemizing the amounts to be attributed to each race as separate entries disclosed as "MEMO" entries.

<sup>6</sup> For the purposes of this allocation, the presidential-vice presidential ticket is treated as a single Federal candidate because voters cannot vote separately for presidential and vice presidential nominees.

1 104.3(b)(3)(vii)(B). The proportion of the expenditure attributed to the Senate race may  
2 be reported accordingly (see response to Question 4, above). *See id.* The proportion of  
3 the expenditure attributed to the disclaimer is allocated between the presidential-vice  
4 presidential election and the Senate race in the same proportion as the time or space  
5 devoted to the races.<sup>7</sup>

6 This response constitutes an advisory opinion concerning the application of the  
7 Act and Commission regulations to the five specific types of advertisements set forth in  
8 your request and illustrated by your Exhibits. *See* 2 U.S.C. 437f. The Commission  
9 emphasizes that if there is a change in any of the facts or assumptions presented, and such  
10 facts or assumptions are material to a conclusion presented in this advisory opinion, then  
11 the requestor may not rely on that conclusion as support for its proposed activity. Any  
12 person involved in any specific transaction or activity which is indistinguishable in all its  
13 material aspects from the transaction or activity with respect to which this advisory  
14 opinion is rendered may rely on this advisory opinion. *See* 2 U.S.C. 437f(c)(1)(B).  
15 Please note that the analysis or conclusions in this advisory opinion may be affected by  
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<sup>7</sup> For example, if NRL PAC airs a 30-second advertisement in which 16 seconds is devoted to expressly advocating the election of Presidential-Vice Presidential Ticket A, 8 seconds is spent expressly advocating the defeat of Senate Candidate B, and 6 seconds is devoted to a disclaimer, then NRL PAC may report two-thirds of the total amount of the expenditure as having been made in support of Presidential-Vice Presidential Ticket A, and one-third as having been made in opposition to Senate Candidate B. The transaction is reported as follows: (1) on FEC Form 3X, Schedule E, reporting a payment of the full amount to the vendor, listing the full amount of the expenditure in the amount line and indicating "See memo entries below" in the box entitled "Name of Federal Candidate Supported or Opposed by Expenditure;" and (2) following this entry, itemizing the amounts to be attributed to each race as separate entries disclosed as "MEMO" entries.

1 subsequent developments in the law, including, but not limited to, statutes, regulations,  
2 advisory opinions, and case law.

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On behalf of the Commission,

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Matthew S. Petersen  
Chairman