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FEDERAL ELECTION COMMISSION
Washington, DC 20463

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AGENDA ITEM

For Meeting of 07-22-10

SUBMITTED LATE

MEMORANDUM

TO: The Commission

FROM: Thomasenia P. Duncan *pch*
General Counsel

Rosemary C. Smith *rcs*
Associate General Counsel

Robert M. Knop *RMK*
Assistant General Counsel

Neven F. Stipanovic *NFS*
Attorney

David C. Adkins *DA*
Attorney

Subject: Draft AO 2010-11 (Commonsense Ten)

Attached is a proposed draft of the subject advisory opinion. We have been asked to place this draft on the agenda for July 22, 2010.

Attachment

1 ADVISORY OPINION 2010-11

2

3 Marc E. Elias, Esq.

4

4 Ezra Reese, Esq.

5

5 Perkins Coie LLP

DRAFT

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6 607 Fourteenth Street, N.W.

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7 Washington, D.C. 20005-2003

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9 Dear Messrs. Elias and Reese:

10 We are responding to your advisory opinion request on behalf of Commonsense
11 Ten (the "Committee"), a registered nonconnected political committee, concerning the
12 application of the Federal Election Campaign Act of 1971, as amended (the "Act"), and
13 Commission regulations to its proposed plan to solicit and accept unlimited contributions
14 from individuals, political committees, corporations, and labor organizations to fund its
15 independent expenditures.

16 Based on the representations in the request and the analysis below, the
17 Commission concludes the Committee's planned course of action complies with the Act.

18 ***Background***

19 The facts presented in this advisory opinion are based on your letter received on
20 June 11, 2010 and emails received on June 15, 2010.

21 The Committee organized itself as a nonconnected committee and is located in
22 Washington, D.C. It registered with the Commission on June 11, 2010, and will file
23 regularly scheduled disclosure reports with the Commission as a nonconnected
24 committee.

1 The Committee intends to make only independent expenditures.¹ It will not make
2 any monetary or in-kind contributions to any other political committee or organization.
3 The Committee is not affiliated with any other political committee or organization that
4 makes contributions within the meaning of the Act.

5 The Committee intends to solicit and accept unlimited contributions from
6 individuals, political committees, corporations, and labor organizations. The Committee
7 intends to deposit these contributions into its Federal account, commingled with existing
8 contributions that were solicited and accepted by the Committee in accordance with the
9 Act's source prohibitions and amount limitations. The Committee intends to screen for
10 and refuse contributions from foreign nationals, Federal contractors, national banks, or
11 corporations organized by act of Congress. The Committee will report contributions
12 received on its regularly scheduled reports to the Commission and will also report its
13 independent expenditures.

14 ***Question Presented***

15 *Does the Committee's planned course of action, which involves soliciting and*
16 *accepting unlimited contributions from individuals, political committees, corporations,*
17 *and labor organizations for the purpose of making independent expenditures, as well as*
18 *registering and reporting with the Commission as a nonconnected political committee,*
19 *comply with the Act?*

20 ***Legal Analysis and Conclusions***

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. See 2 U.S.C. § 431(17).

1 Yes, based on the representations in the request and consistent with the analysis
2 below, the Committee's planned course of action, which involves soliciting and accepting
3 unlimited contributions from individuals, political committees, corporations, and labor
4 organizations for the purpose of making independent expenditures, as well as registering
5 and reporting with the Commission as a nonconnected political committee, complies with
6 the Act.

7 The Committee intends to make only independent expenditures. It will not make
8 any monetary or in-kind contributions (including coordinated communications) to any
9 other political committee or organization.²

10 The U.S. Court of Appeals for the District of Columbia Circuit recently held that
11 "the contribution limits of 2 U.S.C. 441a(a)(1)(C) and 441a(a)(3) are unconstitutional as
12 applied to individuals' contributions to SpeechNow," an independent expenditure-only
13 group. *See SpeechNow.org v. FEC*, 599 F.3d 686, 689 (D.C. Cir. 2010) ("*SpeechNow*");
14 *see also EMILY's List v. FEC*, 581 F. 3d 1, 10 (D.C. Cir. 2009) ("... individual citizens
15 may spend money without limit (apart from the limit on their own contributions to
16 candidates or parties) in support of the election of particular candidates"). In addition,
17 the court held that the "reporting requirements of 2 U.S.C. 432, 433, and 434(a) and the
18 organizational requirements of 2 U.S.C. 431(4) and 431(8) can constitutionally be applied
19 to SpeechNow." *See id.*

20 Moreover, the United States Supreme Court held in *Citizens United* that
21 corporations may make unlimited independent expenditures using corporate treasury

² In this context, the Commission notes that a payment for a coordinated communication is an in-kind contribution to the candidate, authorized committee, or political party with whom the communication is coordinated. *See* 11 CFR 109.21(b).

1 funds. *See Citizens United v. FEC*, 130 S. Ct. 876, 913 (2010). The court in *SpeechNow*
2 relied extensively on the Supreme Court's decision in *Citizens United*. *See SpeechNow*,
3 599 F.3d at 692-96. Following *Citizens United* and *SpeechNow*, corporations, labor
4 organizations,³ and political committees may make unlimited independent expenditures
5 from their own funds, and individuals may pool unlimited funds in an independent
6 expenditure-only political committee. It necessarily follows that corporations, labor
7 organizations and political committees also may make unlimited contributions to
8 organizations such as the Committee that make only independent expenditures. Given
9 the holdings in *Citizens United* and *SpeechNow*, that "independent expenditures do not
10 lead to, or create the appearance of, *quid pro quo* corruption," *Citizens United*, 130 S.Ct.
11 at 910, the Commission concludes that there is no basis to limit the amount of
12 contributions to the Committee from individuals, political committees, corporations and
13 labor organizations.

14 Accordingly, the Commission concludes that the Committee may solicit and
15 accept unlimited contributions from individuals, political committees, corporations, and
16 labor organizations.⁴ The Committee has registered with the Commission as a political
17 committee, and it will report the contributions it accepts and the independent

³ Although *Citizens United* did not directly address whether labor organizations also have a First Amendment right to use their general treasury funds for independent expenditures and electioneering communications, the Act and Commission regulations generally treat labor organizations in the same way as corporations. The Court's decision suggests no basis for treating labor organization communications differently than corporate communications under the First Amendment.

⁴ 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 these rulemakings 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.

1 expenditures it makes. The Commission concludes that this course of action complies
2 with sections 432, 433, and 434 of the Act and accompanying Commission regulations.

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

6 This response constitutes an advisory opinion concerning the application of the
7 Act and Commission regulations to the specific transaction or activity set forth in your
8 request. *See* 2 U.S.C. 437f. The Commission emphasizes that, if there is a change in any
9 of the facts or assumptions presented, and such facts or assumptions are material to a
10 conclusion presented in this advisory opinion, then the requestor may not rely on that
11 conclusion as support for its proposed activity. Any person involved in any specific
12 transaction or activity which is indistinguishable in all its material aspects from the
13 transaction or activity with respect to which this advisory opinion is rendered may rely on
14 this advisory opinion. *See* 2 U.S.C. 437f(c)(1)(B). Please note the analysis or
15 conclusions in this advisory opinion may be affected by subsequent developments in the
16 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