

## **PUBLIC COMMENTS ON DRAFT ADVISORY OPINIONS**

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

DRAFT A of ADVISORY OPINION 2010-20 is now available for comment. It was requested by Dan Backer, Esq., on behalf of National Defense PAC, and is scheduled to be considered by the Commission at its public meeting on Thursday, September 23, 2010.

If you wish to comment on the DRAFT A of ADVISORY OPINION 2010-20, 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 deliver 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 noon (Eastern Time) on September 22, 2010.
- 4) The Commission will generally 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:

Shawn Woodhead Werth  
(202) 694-1040

Comment Submission Procedure:

Rosemary C. Smith  
Associate General Counsel  
(202) 694-1650

Other inquiries:

To obtain copies of documents related to 2010-20, contact the Public Records Office at (202) 694-1120 or (800) 424-9530, or visit the Commission's website at <http://saos.nictusa.com/saos/searchao>.

**ADDRESSES**

Office of the Commission Secretary  
Federal Election Commission  
999 E Street, NW  
Washington, DC 20463

Office of General Counsel  
ATTN: Rosemary C. Smith, Esq.  
Federal Election Commission  
999 E Street, NW  
Washington, DC 20463



FEDERAL ELECTION COMMISSION  
Washington, DC 20463

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**AGENDA ITEM**

September 17, 2010

For Meeting of 9-23-10

**MEMORANDUM**

TO: The Commission

FROM: Christopher Hughey *pch*  
Acting General Counsel

Rosemary C. Smith *RCS by DMK*  
Associate General Counsel

Robert M. Knop *DMK*  
Assistant General Counsel

William A. Powers *WAP by JSB*  
Attorney

Subject: Draft AO 2010-20 (NDPAC) — Draft A

**SUBMITTED LATE**

Attached is Draft A of the subject advisory opinion. We have been asked to place this draft on the agenda for September 23, 2010. We note that one or more additional drafts of this advisory opinion may be forthcoming.

Attachment

1 ADVISORY OPINION 2010-20  
2  
3 Dan Backer, Esq.  
4 DB Capitol Strategies  
5 P.O. Box 75021  
6 Washington, D.C. 20013

**DRAFT A**

7

8 Dear Mr. Backer:

9 We are responding to your advisory opinion request on behalf National Defense  
10 PAC ("NDPAC"), concerning the application of the Federal Election Campaign Act of  
11 1971, as amended (the "Act"), and Commission regulations to a proposed plan to accept  
12 unlimited contributions from individuals, other political committees, corporations, and  
13 labor organizations to fund independent expenditures from a separate bank account and to  
14 allocate the cost of all of the Committee's administrative and operating expenses between  
15 accounts as it sees fit. The Commission concludes that the Act and Commission  
16 regulations do not permit NDPAC's proposed course of action.

17 ***Background***

18 The facts presented in this advisory opinion are based on your letter received on  
19 August 11, 2010 and emails received on August 17, 2010 and September 7, 2010.

20 NDPAC is a nonconnected committee that is incorporated in Virginia and that  
21 maintains a post office box in Washington, D.C. At this time, NDPAC has no physical  
22 office. It filed a statement of organization on July 20, 2000, and has filed regular reports  
23 with the Commission since that time. NDPAC qualified as a multicandidate committee  
24 on May 17, 2004.

25 NDPAC intends to make both contributions to candidates and independent  
26 expenditures. NDPAC will incur administrative and operating expenses, as well as

1 fundraising costs. NDPAC will accept unlimited contributions from individuals, other  
2 political committees, corporations, and labor organizations for the purpose of making  
3 independent expenditures, or paying for administrative and operating expenses, but  
4 NDPAC will not accept contributions from foreign nationals or Federal contractors,  
5 national banks, or organizations organized by act of Congress. NDPAC will maintain  
6 two separate bank accounts. It will deposit in one account all contributions it receives  
7 that will be used for making independent expenditures. The second account will contain  
8 all contributions it receives to make contributions to candidates. The contributions  
9 deposited in the second account will comply with the Act's amount limitations and  
10 source prohibitions.

11 NDPAC will maintain records for each account, and fully disclose all receipts and  
12 disbursements on the reports it files with the Commission as required by the Act and  
13 Commission regulations.

14 ***Legal Background***

15 The Act and Commission regulations prohibit any individual from making  
16 contributions that in the aggregate exceed \$5,000 per year to a political committee that is  
17 not an authorized committee of a candidate or a political party committee. 2 U.S.C.  
18 441a(a)(1)(C); 11 CFR 110.1(d). In addition, the Act and Commission regulations  
19 prohibit any individual from making contributions to political committees (that are not  
20 national party committees), which in the aggregate exceed \$69,900 per biennial period.  
21 2 U.S.C. 441a(a)(3)(B); 11 CFR 110.5.<sup>1</sup> The Act and Commission regulations also limit  
22 contributions made by multicandidate political committees (that are not national party

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<sup>1</sup> Similarly, the Act prohibits political committees from knowingly accepting contributions in excess of these limitations. 2 U.S.C. 441a(f).

1 committees) to \$5,000 per year. 441a(a)(2)(C); 11 CFR 110.2(d). Finally, the Act and  
2 Commission regulations prohibit corporations and labor organizations from making  
3 contributions. 2 U.S.C. 441b(a); 11 CFR 114.2(b)(1).

4 The Supreme Court has long distinguished between limits on contributions and on  
5 independent expenditures: “Contribution limits ... unlike limits on independent  
6 expenditures, have been an accepted means to prevent *quid pro quo* corruption.” *Citizens*  
7 *United v. Federal Election Commission*, 130 S. Ct. 876, 909 (2010) (citation omitted).  
8 Restrictions on both the amount and source of contributions received by political  
9 committees have been upheld by the Supreme Court as a means of preventing corruption.  
10 *See Buckley v. Valeo*, 424 U.S. 1, 26-27 (*per curiam*) (upholding individual contribution  
11 limits); *California Medical Association v. Federal Election Commission*, 453 U.S. 182,  
12 197-98 (1981) (“*CalMed*”) (same); *Federal Election Commission v. Beaumont*, 539 U.S.  
13 146, 154 (2003) (upholding source prohibitions).

14 In *Beaumont*, the Supreme Court recognized that section 441b’s corporate  
15 contribution “ban was and is intended to prevent corruption or the appearance of  
16 corruption” and that “restricting contributions by various organizations hedges against  
17 their use as conduits for circumvention of valid contribution limits.” *Id.* at 154-55  
18 (internal quotation marks omitted). Likewise, in *CalMed*, the Supreme Court also upheld  
19 individual contribution limits to political committees that, in turn, make contributions  
20 themselves because such limits are aimed to prevent corruption. *See* 453 U.S. at 197-98  
21 (“Congress enacted § 441a(a)(1)(C) in part to prevent circumvention of the very  
22 limitations on contributions that this Court upheld in *Buckley*.”); *CalMed*, 453 U.S. 203  
23 (Blackmun, J., concurring) (“contributions to multicandidate political committees may be

1 limited to \$5,000 per year as a means of preventing evasion of the limitations on  
2 contributions to a candidate or his or her authorized campaign committee upheld in  
3 *Buckley*”).

4       Recent court decisions and Commission advisory opinions have concluded that  
5 limits on independent expenditures, and the contributions received by organizations,  
6 including political committees, that only make independent expenditures, are not  
7 supported by the same corruption and anti-circumvention rationales as contribution  
8 limits. *See SpeechNow.org v. FEC*, 599 F.3d 686, 689 (D.C. Cir. 2010) (“*SpeechNow*”)  
9 (contribution limits of 2 U.S.C. 441a(a)(1)(C) and 441a(a)(3) are unconstitutional as  
10 applied to independent expenditure-only political committees); *see also* Advisory  
11 Opinions 2010-09 (Club for Growth) and 2010-11 (Commonsense Ten) (concluding that  
12 an independent expenditure-only committee may accept unlimited contributions from  
13 individuals, political committees, corporations, and labor organizations). However, each  
14 of these decisions and Advisory Opinions was expressly limited to organizations that  
15 make only independent expenditures, and that do not make contributions. *See Citizens*  
16 *United*, 130 S.Ct. at 909 (“*Citizens United* has not made direct contributions to  
17 candidates, and it has not suggested that the Court should reconsider whether contribution  
18 limits should be subjected to rigorous First Amendment scrutiny.”); *SpeechNow* 599  
19 F.3d at 689 (“we only decide these questions as applied to contributions to *SpeechNow*,  
20 an independent expenditure-only group”); Advisory Opinion 2010-09 (Club for Growth)  
21 (“because the Committee, like *SpeechNow*, intends to make only independent  
22 expenditures, there is no basis to impose contribution limits on the Committee”).

1           Here, NDPAC, a political committee that makes contributions to candidates,  
2 proposes to establish a separate account for making independent expenditures, and to  
3 accept unlimited contributions from individuals, other political committees, corporations,  
4 and labor organizations to that account. Although the Commission has concluded that the  
5 Act's amount limitations and source prohibitions do not apply to contributions to a  
6 political committee that makes only independent expenditures, *see* Advisory Opinions  
7 2010-09 (Club for Growth) and 2010-11 (Commonsense Ten), NDPAC makes both  
8 independent expenditures and contributions. The Commission therefore concludes that  
9 neither recent court decisions nor these advisory opinions apply to NDPAC, which, like  
10 all other committees that make contributions to candidates, remains subject to the Act's  
11 amount limitations and source prohibitions.

12 ***Questions Presented***

13 1.       ***May NDPAC, a nonconnected committee that makes both contributions and***  
14 ***independent expenditures, accept unlimited contributions from individuals, other political***  
15 ***committees, corporations, and labor organizations to make independent expenditures***  
16 ***only, provided such receipts are held in separate bank accounts by intended use and***  
17 ***separately accounted for in reporting to the Commission?***

18 2.       ***May NDPAC, a nonconnected committee that makes both contributions and***  
19 ***independent expenditures, allocate any or all of its administrative or operating expenses***  
20 ***between its accounts, including allocating one hundred percent of these expenses from its***  
21 ***independent expenditure account?***

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1 ***Legal Analysis and Conclusions***

2 1. ***May NDPAC, a nonconnected committee that makes both contributions and***  
3 ***independent expenditures, accept unlimited contributions from individuals, other political***  
4 ***committees, corporations, and labor organizations to make independent expenditures***  
5 ***only, provided such receipts are held in separate bank accounts by intended use and***  
6 ***separately accounted for in reporting to the Commission?***

7 No, a nonconnected committee, such as NDPAC, may not accept unlimited  
8 contributions from individuals, corporations, labor organizations, or other political  
9 committees if it makes both contributions to candidates and independent expenditures.

10 Both the Act and Commission regulations prohibit a political committee from  
11 accepting the types of contributions contemplated by NDPAC's request. *See* 2 U.S.C.  
12 441a(a)(1)(C) and 441a(f) (limiting individual contributions to \$5,000); 2 U.S.C. 441b(a)  
13 (prohibiting corporate and labor organization contributions). Section 441a specifically  
14 limits contributions to a political committee from individuals and other political  
15 committees to \$5,000, while section 441b prohibits the receipt of corporate and labor  
16 organization contributions in any amount. Similarly, Commission regulations prohibit  
17 unlimited contributions by individuals or political committees, *see* 11 CFR 110.1(d) and  
18 110.2(d), as well as contributions by corporations and labor organizations. *See* 11 CFR  
19 114.2(b)(1). Consequently, the Act's contribution limits and prohibitions prevent  
20 NDPAC from accepting the proposed contributions.

21 Further, the Act's amount limits and source prohibitions for contributions to  
22 political committees making both contributions and independent expenditures remain  
23 fully in effect. Applying the relevant provisions of the Act and Commission regulations

1 to the request at hand, the Commission concludes that NDPAC may not accept unlimited  
2 contributions from individuals, other political committees, corporations, and labor  
3 organizations to make independent expenditures.

4 2. *May NDPAC, a nonconnected committee that makes both contributions and*  
5 *independent expenditures, allocate any or all of its administrative or operating expenses*  
6 *between its accounts, including allocating one hundred percent of these expenses from its*  
7 *independent expenditure account?*

8 No, a nonconnected committee such as NDPAC may not allocate its  
9 administrative or operating expenses, including fundraising costs, between separate bank  
10 accounts as it sees fit for two reasons. First, as explained in the answer to question one,  
11 NDPAC may not use a separate bank account containing impermissible contributions to  
12 make independent expenditures if it also makes contributions to candidates. Second,  
13 even if the answer to question 1 were yes, allocation as proposed by Requestor presents a  
14 problem because only funds that comply with the Act's limitations and source  
15 prohibitions may be used to pay the administrative expenses associated with these  
16 contributions.

17 As indicated above, the Act prohibits political committees from receiving  
18 contributions in excess of the limits and from prohibited sources. *See* 2 U.S.C. 441a and  
19 441b. The Supreme Court has upheld these amount limitations and source prohibitions as  
20 a valid means of preventing corruption in *CalMed*, 453 U.S. at 197-98, and *Beaumont*,  
21 539 U.S. at 154, as applied to political committees that make both contributions and  
22 expenditures. *Cf.*, *SpeechNow*, 599 F.3d at 689 (finding that the same corruption  
23 concerns are not present in the case of a committee that makes only independent

1 expenditures). Moreover, NDPAC's request to use unlimited contributions from  
2 individuals, other political committees, corporations, and labor organizations is directly at  
3 odds with the Act's goal of preventing the circumvention of valid contribution limits.  
4 Rather than merely being used to make and support independent expenditures, NDPAC  
5 proposes to use unlimited contributions from individuals, corporations, labor  
6 organizations, and other political committees to support all of its activity, including the  
7 making of contributions to candidates.

8 In *CalMed*, the Supreme Court concluded that the Act properly prevented such  
9 circumvention of contribution limits:

10 "[I]f an individual or association was permitted to fund the entire  
11 operation of a political committee, all moneys solicited by that committee  
12 could be converted into contributions, the use of which might well be  
13 dictated by the committee's main supporter. In this manner, political  
14 committees would be able to influence the electoral process to an extent  
15 disproportionate to their public support and far greater than the individual  
16 or group that finances the committee's operations would be able to do  
17 acting alone. In so doing, they could corrupt the political process in a  
18 manner that Congress, through its contribution restrictions, has sought to  
19 prohibit."

20  
21 453 U.S. at 199 n.19. Similarly, NDPAC's proposal would result in the subsidization of  
22 its contributions to candidates and political parties by using unlimited contributions and  
23 corporate and labor organization funds, which were raised for independent expenditures,  
24 to pay for administrative and overhead costs associated with the contributions it makes.  
25 Further, the Commission has the authority to require political committees "to use their  
26 hard-money accounts to pay an appropriately tailored share of administrative expenses  
27 associated with their contributions." See *EMILY's List*, 581 F.3d at 12, citing *CalMed*,

1 453 U.S. at 198-99 n.19. Accordingly, NDPAC cannot allocate its administrative and  
2 overhead costs as it sees fit between its accounts.

3 For these reasons, NDPAC must pay its administrative and operating expenses  
4 entirely with funds complying with the Act's amount limitations and source prohibitions.

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

18 The Commission notes that this advisory opinion implicates issues that may be  
19 the subject of a forthcoming rulemaking in response to the *Citizens United*, *SpeechNow*,  
20 and *EMILY's List* decisions. This guidance provided in this advisory opinion is,

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1 therefore, subject to change or invalidation pending the conclusion of that rulemaking.

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On behalf of the Commission,

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Matthew S. Petersen

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Chairman

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