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January 18, 2012

Anthony Herman, Esq.
Office of General Counsel
Federal Election Commission
999 E Street, N.W.
Washington, DC 20463

Re: ActRight Advisory Opinion Request

Dear Mr. Herman:

Pursuant to 2 U.S.C. § 437(f), this is an advisory opinion request on behalf of ActRight, a registered nonconnected political committee (the "Committee"), concerning the application of the Federal Election Campaign Act of 1971, as amended (the "Act"), and Commission regulations to its proposed plan to establish a "Non-Contribution Account" for the purpose of soliciting and accepting unlimited contributions from individuals, political committees, corporations, and labor organizations to fund contributions to other independent expenditure-only committees and non-contribution accounts.

Based on the representations and analysis below, the Committee requests a Commission advisory opinion approving the Committee's planned course of action and finding that it complies with the Act.

Background

ActRight organized itself as a nonconnected committee and is located in Washington, D.C. It registered with the Commission on September 2, 2010 and files regularly scheduled disclosure reports with the Commission as a nonconnected committee.

The Committee is a conduit or intermediary that solicits and accepts contributions earmarked for federal candidates on the website ActRight.com, which it bundles, and then contributes to the designated candidates within ten days. See 11 CFR 110.6 ("Earmarked Contributions"). Consistent with the stipulated judgment in *Carey v. FEC* and the Commission's Advisory Opinion 2010-11, this Committee intends to establish a separate bank account (i.e., a non-contribution account) to deposit and withdraw funds raised in unlimited amounts from

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individuals, corporations, labor organizations, and/or other political committees.¹ The funds maintained in this separate account will not be used to make contributions to candidates, candidate committees, or other political committees or organizations that make contributions to candidates, whether direct, in-kind, or via coordinated communications, or coordinated expenditures. Instead, the funds will be bundled according to the direction of the contributors and distributed to the independent expenditure-only committee or non-contribution account designated by the contributors.

The contributors designate their contribution when they click on the web page "donate" button next to the name of the independent expenditure committee or non-contribution account on the website that they wish to support. They then complete the website donation form that includes a request for all required information and disclaimers. Thus the funds maintained in this separate account will only be used for independent expenditures² because the bundled contributions will be transferred to independent expenditure-only committees and non-contribution accounts as designated by contributors. The ActRight non-contribution account will not exercise any direction or control over the funds, except to deposit them in its account, bundle them, and forward them to the designated independent expenditure committee or non-contribution account designated by the contributor.

For earmarked contributions over \$50, the accompanying report to the recipients will contain the full name and mailing address of the original contributor, the date the contribution was received by the conduit, and the amount. For earmarked contributions over \$200, the contributor's identification of occupation and employer will also be provided. For earmarked contributions over \$50, the bundled contributions and accompanying report will be forwarded to the designated independent expenditure committee or non-contribution account within 10 days. For earmarked contributions of \$50 or less, the bundled contributions and accompanying report will be forwarded within 30 days. 11 CFR § 102.8. The Committee will report contributions received on its regularly scheduled reports to the Commission and will also report its disbursements pursuant to the guidelines in the Commission's October 5, 2011 "Statement on *Carey v. FEC*, Reporting Guidance for Political Committees that Maintain a Non-Contribution Account."

¹The Committee does not accept contributions from foreign nationals, government contractors, national banks, and corporations organized by authority of any law of Congress. 2 U.S.C. §§ 441b, 441c, and 441e.

²Under 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).

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Question Presented

Can a nonconnected committee, which solicits and accepts unlimited contributions from individuals, political committees, corporations, and labor organizations into a "Non-Contribution Account," make contributions from that Account to other independent expenditure-only committees and non-contribution accounts, report all such contributions and disbursements to the Commission, and comply with the Act?

Proposed Conclusion and Legal Analysis

Yes, the Committee's planned course of action, which involves soliciting and accepting unlimited contributions from individuals, political committees, corporations, and labor organizations for the purpose of making independent expenditures, as well as making contributions to other independent expenditure-only committees and non-contribution accounts, and reporting to the Commission as a nonconnected committee, complies with the Act.

The Committee intends to contribute only to independent expenditure-only committees and non-contribution accounts as designated by the contributors to the ActRight Non-Contribution Account through the ActRight.com website. It will not make any monetary or in-kind contributions (including coordinated contributions) to any candidate, candidate committee, or other political committee or organization that makes contributions to candidates.³

Recent Precedents Support this Conclusion

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

Moreover, the United States Supreme Court held in *Citizens United* that corporations may make unlimited independent expenditures using corporate treasury funds. See *Citizens United v.*

³A 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).

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FEC, 130 S. Ct. 876, 913 (2010). The court in *SpeechNow* relied extensively on the Supreme Court's decision in *Citizens United*. See *SpeechNow*, 599 F.3d at 692-96. Following *Citizens United* and *SpeechNow*, corporations, labor organizations, and political committees may make unlimited independent expenditures from their own funds, and individuals may pool unlimited funds in an independent expenditure-only political committee. It necessarily followed that corporations, labor organizations and political committees also may make unlimited contributions to organizations that make only independent expenditures. Since that is true, it also necessarily follows, that independent expenditure-only committees and non-contribution accounts may make contributions to other independent expenditure-only committees and non-contribution accounts.

The Commission's Recent Actions Support this Conclusion

Given the holdings in *Citizens United* and *SpeechNow*, that "independent expenditures do not lead to, or create the appearance of, *quid pro quo* corruption," *Citizens United*, 130 S.Ct. at 910, the Commission concluded in Advisory Opinion 2010-11 that there is no basis to limit the amount of contributions to a non-contribution account from individuals, political committees, corporations and labor organizations. Accordingly, the Commission concluded that committees may solicit and accept unlimited contributions from individuals, political committees, corporations, and labor organizations for the purpose of making independent expenditures.⁴ It is only one logical step further to the conclusion that committees may also make contributions to other independent expenditure-only committees and non-contribution accounts.⁵

The Committee has registered with the Commission as a political committee, and it will report the contributions it accepts, the independent expenditures it makes, and the contributions

⁴The Commission noted in Advisory Opinion 2010-11 that it 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 will notify the Commission's Reports Analysis Division clarifying that it intends to accept unlimited contributions into a "Non-Contribution Account" for the purpose of making independent expenditures and, upon receipt of the Commission's advisory opinion as requested herein, contributions to other independent-expenditure only committees and non-contribution accounts.

⁵Advisory Opinion 2010-09 concluded that independent expenditure-only SSFs may solicit from the general public. Since independent expenditure-only SSFs may solicit from the general public, it follows that conduits like ActRight may also solicit the general public on their behalf.

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to other independent expenditure-only committees, and non-contribution accounts pursuant to the guidelines in the Commission's October 5, 2011 "Statement on *Carey v. FEC*, Reporting Guidance for Political Committees that Maintain a Non-Contribution Account" and 11 CFR § 110.6. The Commission may thus conclude that this course of action complies with sections 432, 433, and 434 of the Act and accompanying Commission regulations.

Although the name "Non-Contribution Account" appears inconsistent with this conclusion, it is only inconsistent if the "non-contribution" appellation applies to all contributions. But the only contributions prohibited by the Act are contributions to candidates, candidate committees, and other committees that make contributions to candidates. There is no rational basis for excluding contributions to other independent expenditure-only committees and non-contribution accounts.

The Commission Need Not Wait for Rulemaking

While it is evident that the Commission must engage in rulemaking to conform its regulations to *Citizens United*, *SpeechNow.org*, and *EMILY's List*, it need not wait for that process to be completed before granting the relief that ActRight seeks. The Commission has issued advisory opinions relying on court precedent even when outdated regulations are still in place. As is evident in Advisory Opinions 2010-09, 2010-11, and the October 5, 2011 FEC Statement on *Carey v. FEC*, there is no reason to delay in permitting this additional lawful activity.

For the above reasons, ActRight requests that the Commission issue an advisory opinion in this matter answering the Question Presented in the affirmative.

Sincerely,



Barry A. Bostrom
General Counsel
ActRight