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OFFICE OF GENERAL  
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May 21, 2010

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**VIA HAND DELIVERY**

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

ACR 2010-09

**Re: Advisory Opinion Request**

Dear Commissioners:

On behalf of the Club for Growth ("Club"), we respectfully request an advisory opinion from the Federal Election Commission ("FEC" or "Commission") pursuant to 2 U.S.C. § 437f, regarding the establishment and operation of a political committee that accepts unlimited donations from individuals but only makes independent expenditures.

In short, the Club intends to establish and administer an independent expenditure-only political committee ("IEOPC") that, after registering with the FEC, accepts unlimited donations from individuals. The Club wants to confirm that its IEOPC may solicit and accept donations from the general public. Further, the Club wants to confirm that there is no prohibition on soliciting funds earmarked for specific independent expenditures.

**FACTS**

**A. Background on the Club**

The Club is an incorporated social welfare membership organization exempt from taxation under section 501(c)(4) of the Internal Revenue Code. Further, the Club also is a qualified nonprofit corporation under 11 C.F.R. § 114.10 and has made and properly reported independent expenditures under the qualified nonprofit corporation regulations (which implemented the Supreme Court's decision in *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986) ("MCFL")). The Club does not accept donations from corporations, labor organizations, foreign nationals, or government contractors. The Club is organized under the laws of the District of Columbia and has its principal place of business in Washington, D.C. The Club has a connected separate segregated fund, Club for Growth PAC ("Club PAC").



Federal Election Commission  
May 21, 2010  
Page 2

**B. Background on the Planned IEOPC**

The Club intends to establish and administer its IEOPC as a political organization exempt from taxation under section 527 of the Internal Revenue Code. The IEOPC will be incorporated for liability purposes under the laws of the District of Columbia and will have its principal place of business in the District. The Club may pay for some or all of the IEOPC's establishment, administrative, and solicitation expenses.

The Club, per the decision of the unanimous en banc U.S. Court of Appeals for the D.C. Circuit in *SpeechNow.org v. FEC*, 2010 WL 1133857 (D.C. Cir. 2010), intends to register the IEOPC as a political committee with the FEC. The President of the Club will serve as the Treasurer of the IEOPC and will be listed as such on the IEOPC's Statement of Organization. The IEOPC will file regular reports as a federal PAC and file independent expenditure reports and notifications as appropriate. All contributors of more than \$200 per calendar year to the IEOPC will be reported to the FEC for public disclosure. The IEOPC will include all required disclaimers and notices in its solicitations and independent expenditures.

As stated above, the IEOPC only will make independent expenditures. The IEOPC will not make any contributions or transfer any funds to any political committee if the amount of a contribution to the recipient committee is regulated by the Federal Election Campaign Act of 1971, as amended (the "Act"). This includes, but is not limited to, candidate committees, political party committees, and Club PAC. The IEOPC will not, per the regulations of the FEC or applicable federal law, coordinate any communication or other expenditure with any candidate, candidate committee, political party committee, or their agents.

The IEOPC intends to solicit and accept unlimited donations solely from individuals. The IEOPC will not accept any donations from corporations, labor organizations, foreign nationals, or government contractors. It also would not accept any donations from any political committee or separate segregated fund, candidate, candidate committee, or political party committee.

Finally, the IEOPC intends regularly to solicit funds specifically for particular independent expenditures by showing copies of current or proposed independent expenditure communications to prospective contributors. The IEOPC, before conducting such a solicitation, will ensure that the prospective donors are not agents of candidates, campaign committees, or political party committees.



Federal Election Commission  
May 21, 2010  
Page 3

### **QUESTIONS PRESENTED**

*May the IEOPC solicit and accept donations from the general public?*

*May the IEOPC solicit and accept funds earmarked for specific independent expenditures?*

*In the alternative, would the analysis to either or both of the questions above be different if the IEOPC paid its own establishment, administrative, and solicitation expenses?*

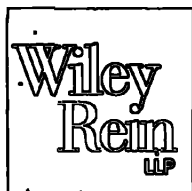
### **DISCUSSION**

Based on the *SpeechNow.org* decision, the Club may establish and administer an independent expenditure-only political committee, solicit and accept donations to this political committee from the general public, and solicit and accept funds earmarked for specific independent expenditures.

#### **A. Legal Background**

On March 26, 2010, an en banc U.S. Court of Appeals for the District of Columbia Circuit issued an important unanimous decision in the case of *SpeechNow.org v. FEC*. The political organization SpeechNow.org ("SpeechNow") wanted to collect funds from individuals in order to run independent expenditures expressly advocating the election or defeat of federal candidates and asked the FEC for an advisory opinion allowing it to do so. While the FEC had no quorum to issue an advisory opinion, the draft issued by the General Counsel's office contended that, by doing so, SpeechNow would become a political committee subject to the FEC's registration and reporting requirements as well as the Act's contribution limit of \$5,000 per person per calendar year. In the wake of the recently decided case of *Citizens United v. FEC*, 130 S.Ct. 876 (2010), the court disagreed. In short, the court upheld, under the First Amendment, the right of a group solely making independent expenditures to accept unlimited donations from individuals.

Before this decision, it was a longstanding principle of campaign finance law that individuals may make unlimited independent expenditures from personal funds. *Buckley v. Valeo*, 424 U.S. 1, 20-21 (1976). On the other hand, although groups that had express advocacy as their major purpose could make unlimited independent expenditures, such groups were limited in the funds they could accept by virtue of



Federal Election Commission

May 21, 2010

Page 4

the contribution limits applicable to all political committees. *SpeechNow.org* changed this underlying assumption and uniform treatment of independent expenditure groups. In arriving at its decision and relying on recent Supreme Court precedent, the court drew a clear constitutional distinction between entities making contributions to candidates and other political committees, in which case limitations could be applied, and entities solely making independent expenditures, in which case limitations could not be applied.

Relying on applicable campaign finance precedent, the court found that the only permissible government interest upheld by the Supreme Court with respect to the restrictions on political speech was the anticorruption interest, that is the prevention of actual corruption or the appearance of corruption. The court then found the anticorruption interest to be insufficient to support limitations on contributions to the independent expenditure-only group. Citing and quoting from *Citizens United*, the unanimous D.C. Circuit concluded (at \*6): "contributions to groups that make only independent expenditures also cannot corrupt or create the appearance of corruption." As a result (at \*7), "we must conclude that the government has no anti-corruption interest in limiting contributions to an independent expenditure group."

In deference to the Supreme Court's different treatment of disclosure issues, the D.C. Circuit did rule (at \*9-10), however, that the organization accepting the contributions and undertaking the independent expenditures must register and report as a political committee. Although the court continued to use the term "contribution" and "political committee" in its opinion, from its decision it is clear that the independent expenditure-only group and the funds that it received were outside the construct of the current campaign finance rules for contribution limits and other purposes.

**B. The IEOPC May Solicit and Accept Donations from the General Public**

The Club, as a 501(c)(4) organization, may accept unlimited donations from individuals in the general public to achieve its purposes. Even so, pursuant to campaign finance law, *see MCFL*, the Club also may make independent expenditures directly from its operating account. In order to make contributions to candidates, however, the Club was required to establish a separate segregated fund.

The Act and Commission regulations promulgated thereunder generally limit a membership organization and its separate segregated fund with respect to the



Federal Election Commission  
May 21, 2010  
Page 5

persons who may be solicited for the organization's separate segregated fund. The individuals who may be solicited are two-fold: (1) members of the organization and their families, 2 U.S.C. § 441b(b)(4)(C), 11 C.F.R. § 114.7(a); and (2) the executive and administrative personnel of the organization and their families, 2 U.S.C. § 441b(b)(4)(A)(i); 11 C.F.R. § 114.5(g)(1). This is the "solicitable class limitation."

The Club's proposed IEOPC would not be a separate segregated fund and the funds raised would not be contributions as understood in the Act apart from the registration and reporting provisions. Rather, pursuant to *SpeechNow.org*, the IEOPC would be a group registered as a "political committee" permitted to accept unlimited donations. Nothing in the pre-*SpeechNow.org* campaign finance jurisprudence addresses such an organization or such unlimited funds because the organization previously could not have existed without being subject to contribution limits. As a result, because it would not be a separate segregated fund and the funds it raised would not be "contributions" as previously understood, the Club's proposed IEOPC may solicit donations from the general public and would not be subject to the solicitable class limitation.<sup>1</sup> Although the FEC may wish for the IEOPC to identify the Club for Growth as a connected organization for disclosure purposes – to show its tie to the Club – such registration would not make the IEOPC a separate segregated fund and would not subject it to the separate segregated fund limitations just as the D.C. Circuit's mandate that *SpeechNow* register as a political committee did not subject *SpeechNow* to the Act's contribution limits.<sup>2</sup> The same holds for the funds received: just because the funds would be considered

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<sup>1</sup> The fact that the IEOPC will be incorporated does not affect this analysis. See 11 C.F.R. § 114.12(a) (permitting political committees to incorporate for liability purposes).

Further, the fact that the IEOPC is established and administered by the Club is an immaterial difference with the facts undergirding the decision in *SpeechNow.org*. First, the Club, as a qualified nonprofit corporation operating under the Supreme Court pronouncements in *MCFL*, may make independent expenditures and such expenditures for the IEOPC would be independent of candidates and political party committees and their agents. Second, in light of *Citizens United*, any corporation may undertake unlimited independent expenditure activity. A corporation choosing to exercise these First Amendment rights through the use of an FEC-registered and reporting independent expenditure-only political committee should incur no greater burden than if the corporation undertook the independent expenditures itself.

<sup>2</sup> The current FEC Form 1 has not been updated to accommodate independent expenditure-only political committees. Thus, based on current choices, the IEOPC plans to register as a committee that supports/opposes more than one federal candidate and is not a "separate segregated fund." See FEC Form 1.



Federal Election Commission

May 21, 2010

Page 6

contributions for purposes of the registration and reporting provisions of the Act, this would not make the funds received "contributions" for purposes of the contribution limits or other restrictions of the Act.<sup>3</sup>

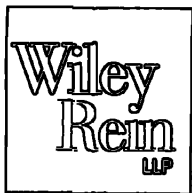
The divide between pre- and post-*SpeechNow.org* regimes is clear. Whereas past precedent with respect to separate segregated funds and the solicitable class involved contribution limits on the recipients – limits on contributions to the PAC itself and aggregate contributions applicable to the contributor – no contribution limits are involved, post *SpeechNow.org*, with independent expenditure-only groups. Although, as stated above, donations to such groups may still be considered "contributions" under the Act for registration and reporting purposes, they are not treated as regular "contributions" when it comes to limitations. Per the D.C. Circuit (at \*7), "Limits on direct contributions to candidates, 'unlike limits on independent expenditures, have been an accepted means to prevent quid pro quo corruption.'" (quoting *Citizens United*, 130 S.Ct. at 909) (emphasis added).

Thus, such donations may not be limited in amount – whether through dollar limits or through a limit on who can be solicited or not solicited for the donations. The latter limitation is a restriction on speech rights as well as associational rights, and the indirect solicitation limit is just as pernicious as a restriction directly on the amount of the IEOPC contributions itself. The court in *SpeechNow.org* indicated that the FEC has no justification in restricting the independent expenditure activity of individuals, and to impose the solicitable class limitations on the proposed IEOPC would do just that. See *SpeechNow.org* at \*8 (striking down both the limits on the contributions by the individuals and the prohibition on the independent expenditure-only group to accept the unlimited funds).

Finally, the Club's proposed IEOPC presents no risk to the contribution-to-candidates part of the nation's campaign finance law (in which part limits may constitutionally be imposed), for the Club stipulates above that its IEOPC will not make any contributions to any candidate or party committee and that it will not make any coordinated communications or transfer any funds to Club PAC or other groups subject to contribution limits. Club PAC's ability to engage in political activity will not change, and members of the Club will not have any amplified

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<sup>3</sup> As a result, even if the FEC found the proposed IEOPC to be a separate segregated fund, it still could not impose the solicitable class limitation on the IEOPC since the funds solicited would not be "contributions" for purposes of 2 U.S.C. § 441b(b)(4).



Federal Election Commission

May 21, 2010

Page 7

method of making contributions to candidates through Club PAC, the IEOPC, or otherwise.<sup>4</sup>

**C. The IEOPC May Solicit and Accept Donations Earmarked for Specific Independent Expenditures**

The *SpeechNow.org* decision and the constitutional jurisprudence behind it also permit the IEOPC to solicit donations earmarked for certain independent expenditures, meaning that funds may be raised specifically to expressly advocate the election or defeat of a clearly identified candidate. This right holds notwithstanding any purported pre-existing regulatory restriction to the contrary.

In 11 C.F.R. § 110.1(h), the FEC places limits on contributions. A person that has contributed to a specific candidate also may contribute to an unauthorized political committee that has supported or "anticipates supporting" that specific candidate, but only if, among other things:

The contributor 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.

*Id.* § 110.1(h)(2). This regulation can be read to ban contributions to a PAC from individuals already supporting a candidate if the PAC states that it will use the contributed funds specifically to support the candidate or shows the potential contributor an independent advertisement that his or her contribution would specifically support and the ad expressly advocates the election of that candidate.

Per *SpeechNow.org*, the FEC may not impose this limitation on an independent expenditure-only group. To begin, such a group stands in the shoes of its individual contributors. Section 110.1(h) by its plain language does not, and constitutionally may not, prevent an individual from making his or her own independent

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<sup>4</sup> This holds true whether Club PAC is considered to be affiliated with the IEOPC or not, since the receipt limitations and outgoing contribution limitations normally associated with affiliated PACs have no effect on the IEOPC since donations to the IEOPC may not, per *SpeechNow.org*, be limited and the IEOPC will make no contributions to candidates or other receipt-limited political committees. For example, Emily's List has created an affiliated political committee that has made independent expenditures, Emily's List Women Vote, and that has accepted large-dollar contributions.

Federal Election Commission

May 21, 2010

Page 8

expenditures in favor of a candidate after he or she has contributed to that very candidate. Likewise, section 110.1(h) may now not prevent an individual from paying for the same ad through the auspices of an independent expenditure-only group.

Moreover, unlike past instances where the Commission has considered section 110.1(h), even where independent expenditures were concerned, *see, e.g.*, FEC Advisory Opinion 1984-2, FEC Response to AOR 1976-20, no contribution limits are involved with independent expenditure-only groups. The reasoning behind section 110.1(h) is to prevent the circumvention of contribution limits, *see, e.g.*, 52 Fed. Reg. 760, 764 (Jan. 9, 1987) (aggregation “for the purposes of the contribution limits of § 110.1”), and such limits simply are not present with the Club’s proposed IEOPC (so no circumvention is possible/necessary).

Finally, as discussed above, the independent expenditure-only groups are “political committees” only in the registration and reporting sense and not in the sense of limits. These groups, such as the proposed IEOPC, are not subject to the limitations otherwise placed on PACs that make contributions to candidates and political party committees.

### **CONCLUSION**

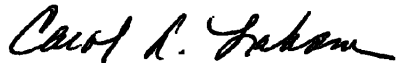
As a result of the D.C. Circuit’s unanimous en banc decision in *SpeechNow.org*, the campaign finance regime administered by the FEC has changed. There is a new, constitutionally-mandated entity that, although registering and reporting as a political committee, is protected by the First Amendment from contribution limits and other substantive campaign finance restrictions. This new entity is the independent expenditure-only political committee.



Federal Election Commission  
May 21, 2010  
Page 9

Therefore, in the wake of *Citizens United* and *SpeechNow.org*, we seek confirmation the Club may establish and administer an independent expenditure-only political committee that will register and report all of its activities while soliciting donations from the general public and soliciting funds earmarked for specific independent expenditures.

Sincerely,



Carol A. Laham  
D. Mark Renaud