FEDERAL ELECTION COMMISSION
Washington, DC 20463

MEMORANDUM

TO: THE COMMISSION
STAFF DIRECTOR
GENERAL COUNSEL
CHIEF COMMUNICATIONS OFFICER
FEC PRESS OFFICE
FEC PUBLIC DISCLOSURE

FROM: DEPUTY COMMISSION SECRETARY D.H.

DATE: July 21, 2010

SUBJECT: COMMENT #2 ON DRAFT AO 2010-09 (Club for Growth) and DRAFT AO 2010-11 (Commonsense Ten)

Transmitted herewith is a timely submitted comment from Joseph E. Sandler, Esq., and Neil P. Reiff, Esq., regarding the above-captioned matters.

Attachment

SANDLER, REIFF & YOUNG, P.C.

July 21, 2010

The Honorable Matthew S. Petersen
Chairman
Federal Election Commission
999 E Street, N.W.
Washington, DC 20463

Re: Comments on AORs 2010-9 & 2010-11

Dear Chairman Petersen:

We are writing to provide comments regarding the Draft Advisory Opinion for Advisory Opinion Request 2010-11 and the two alternative draft Advisory Opinions for Advisory Opinion Request 2010-9. These comments are being submitted by our law firm, not on behalf of any specific client, but based on our experience, expertise and views developed as counsel to several political committees and non-profit organizations.

Advisory Opinion Request 2010-11

Advisory Opinion Request 2010-11 asks the Commission to permit corporations and unions to contribute to a federal political committee that is established for the sole purpose of making independent expenditures in connection with federal elections. Although no court has specifically held that corporations and unions may contribute to such committees, this conclusion is obvious in light of the triumvirate of recent Court decisions in *Emily's List v. FEC*, 581 F.3d 1 (D.C. Cir 2009), *Citizens United v. FEC*, 130 S.Ct. 913 (2010) and *SpeechNow.org v. FEC*, 599 F.3d 686 (D.C. Cir 2010).

The Commission's Draft Response properly concludes that these cases compel this result. We urge the Commission to approve the draft opinion without change. Unlike its approach in the *SpeechNow.org* case, the Commission should not defer this issue until future litigation compels the agency to do so.As the Commission notes in footnote four of the Draft Response, it is in the process of addressing several issues in light of these cases. By acknowledging this obvious conclusion now, the Commission will be able to anticipate any issues created by the

acceptance of corporation and union contributions during the rulemaking process. In addition, the result in this opinion will have a significant impact on Advisory Opinion 2010-9. Thus, a deferral in the disposition of this issue will just add additional confusion and uncertainty during the rulemaking process and likely lead to immediate litigation which the Commission has virtually no likelihood of success in prevailing.

Based upon the above, we support the adoption of the Commission's Draft Opinion in AOR 2010-11.

Advisory Opinion Request 2010-9

Draft A

As a general matter, we support the adoption of the Commission's original Draft opinion in this request (hereinafter referred to as "Draft A"). However, we believe that a few technical changes would provide additional clarity and broader applicability to similar situations that might arise.

First, on page 2, we suggest the Commission include the following footnote at the end of the sentence on Line 11:

> Although the requestor has represented that it intends to only accept contributions from individuals, it should be noted that the Commission recently concluded, in Advisory Opinion 2010-11, that committees established for the sole purpose of making independent expenditures may accept contributions from corporations and labor unions.

Second, on page 7, the Commission properly concludes that the committee established by Club for Growth is not an SSF and also properly concludes that Club for Growth may pay for the establishment, administrative and solicitation expenses of the committee. However, although we agree that the solicitation costs of the committee would result in a reportable expense by the committee, we do not believe that establishment and administrative costs are "expenditures" under the act. This conclusion stems from the *Emily's List* decision where the Court concluded that a committee's administrative expenses should not be subject to Commission's 50/50 allocation regime. *Emily's List* 581 F.3d 1, 16-19 (D.C. Cir. 2009) In response to the Court's decision, the Commission has vacated its regulation that required allocation of administrative expenses between federal and non-federal funds (11 C.F.R. § 106.6(c)) from its regulations. See Funds Received in Response to Solicitations; Allocation of Expenses by Separate Segregated Funds and Nonconnected Committees, 75 Fed. Reg. 13223 (March 19, 2010).

Therefore, establishment and administrative costs should not be subject to disclosure by the committee until and unless the Commission replaces the vacated regulation with one that requires the allocation of such expenses between federal and non-federal accounts. To conclude otherwise would require all committees that no longer allocate their expenses and pay those costs from non-federal accounts to somehow disclose those expenses on their reports. To date, the Commission has not, to our knowledge, advised the regulated community that these types of expenses would somehow be subject to disclosure.

With respect to solicitation costs, we agree that the federal portion of such expenses should be disclosed as an in-kind contribution and expenditure in accordance with 11 C.F.R. § 106.6(d). The Commission should clarify that a corporation or non-federal committee may pay these costs for this committee in light of Advisory Opinion 2010-11.

Draft B

We disagree with the conclusions of Draft B and the logic upon which it is predicated. Although Commissioner Walther's analysis would have had some validity one year ago, the three cases cited above completely remove the logic of distinguishing between a non-connected and SSF for a committee that will engage exclusively in independent expenditures. Prior to these cases, a similarly situated non-profit organization would have been required to consider the tradeoff of paying for the establishment, administrative and solicitation costs with federally permissible funds for the right to solicit contributions from the general public or using treasury funds to pay for these expenses in exchange for only soliciting contributions from a "restricted class." The cases cited above completely eliminate the logical basis for these distinctions. After these cases, combined with Advisory Opinion 2010-11, a committee may raise and spend unlimited funds received from individuals, corporations and unions without limit for independent expenditures. Therefore, problems inherent in the corporate subsidy provided by a connected corporate sponsor have been rendered completely irrelevant.

If you would like to discuss the matters addressed in this letter, or any other issues regarding these opinion, feel free to contact our office at (202) 479-1111.

Sincerely yours,

Joseph E. Sandler
Neil P. Reiff