July 1, 2010

BY HAND DELIVERY

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Late Comment on AOR 2010-11

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Re: Comments on Advisory Opinion Request 2010-11 (Commonsense Ten)

Dear Ms. Duncan:

These comments are filed on behalf of the Service Employees International Union regarding Advisory Opinion Request 2010-11 (Commonsense Ten). Commonsense Ten seeks the Commission's opinion that source restrictions and amount limitations found in the Federal Election Campaign Act of 1971, as amended,[1] do not apply to a federal political committee solely engaged in independent expenditure activity.[2] The Commission should approve Commonsense Ten's proposed conduct.

I. Introduction

Commonsense Ten is a recently formed, federal non-connected unauthorized political committee.[3] It intends to solicit contributions solely for independent expenditure purposes. In particular, Commonsense Ten intends to solicit and accept contributions from domestic corporations and labor organizations. Importantly, Commonsense Ten is committed to complying with the disclosure requirements found in the Federal Election Campaign Act of 1971, as amended.[4]

In light of *Citizens United v. FEC*, 130 S. Ct. 876 (2010), *Long Beach Area Chamber of Commerce v. City of Long Beach*, 603 F.3d 684 (9th Cir. 2010)(en banc), and *SpeechNow.org v. FEC*, 599 F.3d 686 (D.C. Cir. 2010)(en banc), the Commission should approve Commonsense Ten's proposed conduct.

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[1] 2 U.S.C. §§ 441a(a), 441b.
[2] AOR 2010-11 at 2-3.
[3] *Id.* at 2.
[4] 2 U.S.C. § 434. *See also* AOR 2010-11 at 3.

II. Discussion

In *Citizens United*, the Supreme Court overturned portions of the Bipartisan Campaign Reform Act of 2002 that prevented corporations and labor unions from using general treasury funds for independent expenditures in federal elections.[5] The Court overturned *Austin v. Mich. State Chamber of Commerce*, 494 U.S. 652 (1990), and the anti-distortion rationale undergirding that decision. The Court concluded that, as a matter of law, "independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption."[6] Without either an anti-corruption basis or an anti-distortion basis on which to limit corporate independent expenditures, the Court concluded that the government had "[n]o sufficient governmental interest [to] justif[y] limits on the political speech of nonprofit or for-profit corporations."[7]

Additionally, in *SpeechNow*, a group of citizens proposing to form an independent expenditure committee challenged a Draft Advisory Opinion that had limited individual contributions to that would-be committee to $5,000.[8] In an en banc opinion, the D.C. Circuit, following the Court's analysis in *Citizens United*, recognized that the sole government interest justifying limits on individual contributions is an anti-corruption interest. Under the Supreme Court's analysis, independent expenditures do not implicate that anti-corruption interest. Therefore, limits on individual contributions to independent expenditure committees are unconstitutional.[9] The government has recently decided not to seek *certiorari* in *SpeechNow*.[10]

Similarly, in *Long Beach*, the Ninth Circuit sitting en banc overturned a Long Beach city ordinance that prohibited political action committees from making independent expenditures if they received contributions exceeding a certain threshold.[11] Like the D.C. Circuit, the Ninth Circuit reiterated that the only governmental interest that justifies limiting campaign finances is an anti-corruption interest.[12] Quoting *Citizens United*, the court also noted that independent expenditures do not give rise to corruption or the appearance thereof.[13] In light of these two factors, the City of Long Beach was left without a governmental interest to justify its limitation

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[5] *Citizens United v. FEC*, 130 S. Ct. 876, 913 (2010).
[6] *Citizens United*, 130 S. Ct. at 909.
[7] *Id.* at 913.
[8] *SpeechNow*, 599 F.3d at 689-691.
[9] *SpeechNow*, 599 F.3d at 692-693 ("Given this precedent, the only interest we may evaluate to determine whether the government can justify contribution limits as applied to SpeechNow is the government's anticorruption interest. Because of the Supreme Court's recent decision in *Citizens United v. FEC*, the analysis is straightforward. There, the Court held that the government has *no* anti-corruption interest in limiting independent expenditures.")(emphasis in the original).
[10] *See* Lyle Denniston, *No Appeal in* SpeechNow, http://www.scotusblog.com /2010/06/no-appeal-in-speechnow/ (June 17, 2010).
[11] *Long Beach Area Chamber of Commerce v. City of Long Beach*, 603 F.3d 684, 687-688 (9th Cir. 2010).
[12] *Long Beach*, 603 F.3d at 694.
[13] *Long Beach*, 603 F.3d at 695.

on contributions to independent expenditure committees. Those limitations were therefore unconstitutional.[14]

While both *SpeechNow* and *Long Beach* addressed individual contributions to independent expenditure committees, the Court's reasoning in those cases apply fully to corporations and unions, and indeed the Court's decision in *Citizens United* dictates that the rationale applied to individuals in those cases must apply to corporations and labor unions as well. Specifically, the Court held that it is unconstitutional to impose a "categorical distinction[] based on . . . corporate identity,"[15] allowing political speech in a given context from an individual but not from a corporation or a labor union. Enforcing source restrictions and amount limitations uniquely against corporate and union contributors to Commonsense Ten would affect just such a categorical distinction.

SEIU has been, and remains, critical of the Supreme Court's decision in *Citizens United,* but for now at least it is the law of the land. In this regard, from SEIU's perspective, a critical feature of this request is Commonsense Ten's commitment to comply with the disclosure requirements of the Federal Elections Campaign Act. Even while overturning corporate campaign spending restrictions, the Supreme Court upheld disclosure and disclaimer requirements in *Citizens United,*[16] highlighting the public's interest "in knowing who is speaking."[17] Going forward, disclosure and disclaimer requirements are likely to play an increasingly prominent role in campaign finance regulation. For that reason, SEIU strongly supports efforts to enact and enforce more rigorous disclosure and disclaimer provisions, especially after the Supreme Court has struck down long-standing restrictions on corporate campaign activity

SEIU itself currently intends to make its federal independent expenditures out of its federally-registered separate segregated fund, and will fully and timely report all such expenditures under longstanding Commission rules. Notably, whether the expenditure is made from a union general treasury account, a non-federal section 527 account, or a federally-registered separate segregated fund, under current Commission rules all such entities would have to file the same FEC Form 5 reports on the same schedule. Consequently, granting this request does not weaken in any way the current disclosure regime.

III. Conclusion

For the foregoing reasons, the Commission should not enforce the source restrictions and amount limitations found in *§§ 441a(a)* and *441b* against an unauthorized, non-connected committee forming exclusively for the purposes of producing independent expenditures—like Commonsense Ten. We ask the Commission to grant expeditiously the request in Advisory Opinion Request 2010-11 (Commonsense Ten).

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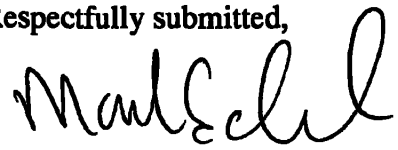
[14] *Long Beach*, 603 F.3d at 687.
[15] *Citizens United*, 130 S. Ct. at 913.
[16] *Citizens United*, 130 S. Ct. at 915-916.
[17] *Citizens United*, 130 S. Ct. at 915.

We appreciate the opportunity to comment on this matter.

Respectfully submitted,



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