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Late Comment on AOR 2010-11

Thomasenia Duncan, Esq.
General Counsel
Federal Election Commission
999 E Street, NW
Washington, DC 20463

Re: Comments on Advisory Opinion Request 2010-11

Dear Ms. Duncan,

We submit the following comments in the matter of Advisory Opinion Request 2010-11 (Commonsense Ten). These comments are submitted in our own personal capacities, based on our own experiences, and not on behalf of any client.

If the Commission votes to approve Commonsense Ten's proposal, we urge you to make clear in your response that while Commonsense Ten *may* pursue its proposed plan of action, it is *not required* to do so under the cited court decisions, the current Federal Election Campaign Act, as amended (FECA), or current Federal Election Commission regulations.

We agree with the requester's conclusion that "[t]he clear result of *Citizens United* and *SpeechNow.org* is that the FECA source prohibitions and amount limitations may no longer be constitutionally applied to organizations making only independent expenditures." These decisions allow more free speech than was previously permitted without creating any new legal burdens. Commonsense Ten, however, presents its request – namely, that the Commission agree to allow it to voluntarily consent to the political committee reporting regime – as a request for "relief." With respect to Commonsense Ten, there is no relief to be sought from any particular legal burden. If anything, Commonsense Ten is asking to be *burdened by* Commission regulations. The only "relief" Commonsense Ten seeks is relief from what is perhaps a generally unclear legal landscape, or perhaps the "relief" of forcing others to do what it proposes.

We urge the Commission, if it chooses to approve Commonsense Ten's request, to make clear that, under the law as it exists today, the Commission is not mandating any particular course of action for any other entity. We caution the Commission against approving an Advisory Opinion that can be used as a "sword" against other organizations as a result of certain factual statements and presumptions contained in this Advisory Opinion Request.

Analysis

It is plainly evident that FECA does not identify or even contemplate the new "independent expenditure committees" that recent court decisions created. Nor do Commission regulations, as would be expected. The Commission has not issued reporting forms for these new entities, and using the existing forms, as Commonsense Ten proposes to do, is an exercise in placing a square peg in a round hole.

FECA and the Commission's regulations identify several varieties of "political committees," including principal campaign committees, single candidate committees, multi-candidate committees, several types of political party committees, delegate committees, Leadership PACs, Lobbyist/Registrant PACs, authorized committees, unauthorized committees, affiliated committees, and separate segregated funds. In each instance, current law assumes that these committees accept contributions subject to amount limitations and source prohibitions, make contributions to candidates and/or other committees, and make expenditures and/or disbursements. The new "independent expenditure committee" does not fit this framework.

As noted above, neither the statute nor the regulations contemplate anything like an "independent expenditure committee." Current reporting forms are ill-suited to capture the information that would be reported by an "independent expenditure committee" that accepts unlimited contributions not subject to the usual source prohibitions. Any "independent expenditure committee" that followed the path of Commonsense Ten would likely generate Requests For Additional Information from the Reports Analysis Division, because the proper forms do not exist and there are no known reporting standards or guidelines. We also ask the Commission to consider whether it is even possible at this time to file electronically using the FEC-provided reporting software.

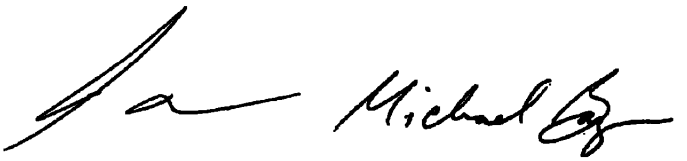
In *SpeechNow.org*, the D.C. Circuit held that "[t]he FEC *may* constitutionally require SpeechNow to comply with 2 U.S.C. §§ 432, 433, and 434(a), and it *may* require SpeechNow to start complying with those requirements as soon as it becomes a political committee under the current definition of § 431(4)" (emphasis added). *SpeechNow.org* v. *FEC*, 599 F.3d 686, 698 (D.C. Cir. 2010). The Court's conclusion that the FEC *may* constitutionally take some action is a far cry from ordering the FEC to implement that conclusion in a specific regulatory manner.

All organizations subject to the Commission's jurisdiction rely heavily on Commission regulations when preparing their reports. Reporting regulations for "independent expenditure committees" do not exist at this time, and new regulations cannot be created through the advisory opinion process. **"Any rule of law which is not stated in this Act . . . may be initially proposed by the Commission only as a rule or regulation pursuant to procedures established section 438(d) of this title . . . ."** 2 U.S.C. § 437f(b); *see also* 11 CFR 112.4(e). While the Commission (presumably) may allow Commonsense Ten to voluntarily comply with inapplicable rules, regulations, and standards, it is our view that the Commission may only *require* "independent expenditure committees" to register and file disclosure reports with the Commission via the formal rulemaking process.

Commonsense Ten recognizes this, and notes in its request that "it is evident that the Commission must engage in a rulemaking to conform its regulations to *Citizens United*, *SpeechNow.org*, and *EMILY's List* . . . ." The requester, however, urges you to ignore clear statutory language and "not wait for [the rulemaking] process to unfold." The requester refers to Advisory Opinion 1997-5, in which the Commission issued an opinion interpreting/applying a court decision prior to adopting a formal rule. We take no position as to whether Advisory Opinion 1997-5 is consistent with 2 U.S.C. § 437f(b), but note that that the decision did not rewrite the Commission's detailed reporting requirements or apply plainly incompatible reporting rules to a type of organization not previously known to exist.

If the Commission chooses to bless the proposal submitted by Commonsense Ten, it should: (1) make clear that it is not creating, via the Advisory Opinion process, a mandatory new reporting regime for every other similarly-situated organization and; (2) indicate that any new reporting requirements will be the product of a formal rulemaking, as required by Congress.

Sincerely,



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