FEDERAL ELECTION COMMISSION
Washington, DC 20463

MEMORANDUM

TO: The Commission
Staff Director
General Counsel
FEC Press Office
FEC Public Disclosure

FROM: Office of the Commission Secretary

DATE: November 30, 2011

SUBJECT: Comment on Draft AO 2011-21
(Constitutional Conservatives Fund PAC)

Transmitted herewith is a timely submitted comment from Dan Backer, Esq., counsel, regarding the above-captioned matter.

Draft Advisory Opinion 2011-21 is scheduled for the open meeting agenda of December 1, 2011.

Attachment

FAX COVER SHEET

TO	Shawn Woodhead Werth
COMPANY	Commission Secretary, FEC
FAX NUMBER	12022083333
FROM	Dan Backer
DATE	2011-11-30 15:52:16 GMT
RE	Public Comment on AOR 2011-21 (CCF)

COVER MESSAGE

FROM:
Constitutional Conservatives Fund PAC
By Counsel, Dan Backer, Esq.

TO:
Shawn Woodhead Werth
Commission Secretary
Federal Election Commission
(202) 208-3332

Anthony Herman, Esq.
General Counsel
Federal Election Commission
(202) 219-3923

Re: Public Comment on Advisory Opinion Request 2011-21 (CCF)

Please find enclosed a public comment by the Constitutional Conservatives Fund PAC (CCF) in regards to the above referenced Advisory Opinion Request 2011-21 and related Draft AO and comments.

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FACSIMILE TRANSMISSION

November 30, 2011

FROM:
Constitutional Conservatives Fund PAC
By Counsel, Dan Backer, Esq.

TO:
Shawn Woodhead Werth
CommissionSecretary
Federal Election Commission
(202)208-3333

Anthony Herman, Esq.
General Counsel
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Re: Public Comment on Advisory Opinion Request 2011-21 (CCF)

Please find enclosed a public comment by the Constitutional Conservatives Fund PAC (CCF) in regards to the above referenced Advisory Opinion Request 2011-21 and related Draft AO and comments.

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November 30, 2011

BY FAX
Shawn Woodhead Werth, CommissionSecretary
Anthony Herman, Esq., General Counsel
Federal Election Commission
999 E Street NW
Washington, DC 20013

Re: Public Comment on Advisory Opinion Request 2011-21 (CCF)

Dear Mr. Herman:

These comments are filed on behalf of the Constitutional Conservatives Fund PAC (CCF) in regard to AOR 2011-21 and the Commissions Draft AO, Agenda Document No. 11-67. CCF filed AOR 2011-21 concerning the application of the Federal Election Campaign Act of 1971 (the "Act") and Commission regulations to CCFs proposed activity.

CCF seeks to accept contributions from individuals and incorporated entities into a "non-contribution account" (as that term is used by the Commission subsequent to *Carey v FEC*) for the purpose of conducting Independent Expenditures (IEs), in addition to accepting contributions subject to the amount and source limitations of 2 USC §441a(a) for the purpose of making direct contributions to candidates for federal office.

For the following reasons, CCF respectfully disagrees with the language of the Draft AO in response to AOR 2011-21.

Contributions made to a non-contribution account are subject to the Act's limitations, prohibitions, and reporting requirements. The Draft AO is predicated entirely on a single premise, that funds contributed to a non-contribution account are not subject to FECA, and therefore outside the permissible conduct within 2 USC §441i(e). This is simply an inaccurate statement of law. The limitations, prohibitions, and reporting requirements of the Act that *may* be constitutionally imposed upon Independent Expenditure activities apply.

First, any such contribution is subject to the reporting requirements of the Act (2 USC §434), as evidenced by the Commission's issuance of reporting guidance for non-contribution accounts subsequent to *Carey v FEC*, http://www.fec.gov/press/Press2011/20111006postcarey.shtml. Second, any such contribution is subject to the prohibition on foreign contributions (2 USC §441e) and government contractor contributions of the Act (2 USC §441c), and other relevant

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prohibitions (e.g. 2 USC §441f, prohibition on contributions in the name of another, 2 USC §441g prohibition on cash contributions, etc.).

However, the Supreme Court, and subsequent lower courts, have clearly and repeatedly admonished that Independent Expenditures as a matter of law do not create actual, or apparent, *quid pro quo* corruption. Therefore, Independent Expenditures – and by necessity the contributions made to finance such expenditures – may not constitutionally be limited as to amount, or as to the right of incorporated entities to make such contributions. This in no way places such contributions and expenditures outside the scope of the Act, which defines Independent Expenditures, 2 USC §431(17), and the reporting requirements, 2 USC §434(d)(1), and a variety of other relevant limitations on them, but rather that the Act may only regulate Independent Expenditure activity to the extent permitted by the Constitution. To argue that the limitation on government interference with free speech amounts to the government's ability to ban that protected speech is unsupportable.

The Draft AO would allow prohibitions on leadership PACs, and individuals associating & speaking through them, from engaging in any Independent Expenditure activity & other absurd outcomes. Just as the Act may not constitutionally limit contributions made to conduct Independent Expenditures (*Citizens United v FEC*, *SpeechNow v FEC*), neither may it limit expenditures made to conduct Independent Expenditures (*Buckley v Valeo*). The Draft AO argues that *because* the Constitution and the Courts prohibit the application of certain restrictions on contributions, *therefore* they are entirely outside the scope of the Act, and may be banned.

The Constitution similarly prohibits the application of certain restrictions on the making of Independent Expenditure; namely prohibiting limitations on the amounts that may be spent (*Buckley*) and prohibiting limitations on spending by incorporated entities (*Citizens United*). The reasoning of the Draft AO would also place such activity squarely outside 2 USC §441i(e)(1)(A), and therefore arguably empower the Commission to prohibit any Independent Expenditure spending by Leadership PACs.

Moreover, treating Constitutional limitations on the Act's ability to prohibit the flow of money simply because it is not subject to a hard dollar limit as an ability to ban such activity would mean that the Act could ban candidate self-funding and directly regulate the manner, scope, and amount of spending by candidate committees. All of these activities are protected by the Constitution and have been repeatedly affirmed by the courts. To unilaterally adopt the policy embodied within the Draft AO that Constitutional protections on the scope of regulation of certain activities acts as grounds to ban them is a profoundly unreasonable and facially unconstitutional approach.

Contributions made to a non-contribution account are not "soft money". Despite the simplistic label of Independent Expenditure funds as "soft money", they are not. Soft Money was always understood as those funds outside the scope of the Act – funds that were not subject to regulation by the Act. The goal of BCRA was to bring such funds within the scope of the Act, and it does so with Independent Expenditures. Such expenditures are clearly within the scope of the Act which defines them and establishes limits – within Constitutional bounds – and reporting requirements on them. To tarnish such spending with the pejorative "soft money" merely allows for a disingenuous reading of McConnell v FEC. Moreover, the very language cited in the Draft AO (page 3, line 18) does not call for limitations on the dollar amounts of funds used for lawful Independent Expenditures, but rather that funds impacting federal elections should be subject to the Act. Contributions made to non-contribution accounts are within the scope of the Act to regulate, subject to Constitutional limitations on the government ability to regulate such activity.

Contributions made to a non-contribution account are within the scope of 2 USC §441i(e). The Constitution proscribes the limit of the Act's ability to regulate political speech, and the flow of funds necessary to carry out such speech. The "limitations, prohibitions, and reporting requirements" of the Act that *may* be constitutionally applied to Independent Expenditure activity *are* applied to any funds received by a non-contribution account, including that of a Leadership PAC. That the Act contains other "limitations, prohibitions, and reporting requirements" that may be constitutionally applied to candidate-contributable funds but not to constitutionally applied to Independent Expenditure funds does not place the latter outside the scope of the Act, and therefore Independent Expenditure funds do comply with 2 USC §441i(e).

AO 2011-12 (House Majority PAC) was decided prior to the settlement in Carey v FEC, and on its face does not preclude the conduct at issue here. The Draft AO cites to AO 2011-12, which addressed the scope of 2 USC §441i(e) and was decided barely two weeks after the issuance of the Preliminary Injunction in *Carey v FEC*, and well before the settlement and stipulated judgment in that case. In that Preliminary Injunction, the Court expressly and strongly rejected the efforts of the Commission to find new means of regulation upon activity protected by the Constitution and Supreme Court in Citizens United and the District Court in *EMILY's LIST* and *SpeechNow*. While the *Carey* Court, and others, did not specifically address 2 USC §441i(e) or the language of McConnell that the Draft AO erroneously cites to support its conclusion, the Court took strong issue with the continued attempt to ignore the clear import of this string of cases in refusing to grant the underlying Advisory Opinion Request (AOR 2010-20) of National Defense PAC.

Moreover, the express language of AO 2011-12 does not reach the question raised by AOR 2011-21 regarding the ability of Leadership PACs to accept contributions to non-contribution accounts. The express language of AO 2011-12 explicitly and exclusively refers to solicitations

by Officeholders and Candidates for the non-contribution accounts of other (non-leadership PAC) entities who, presumably, are not restrained from spending such funds on behalf of the soliciting candidate. What validity the Commission found in 2 USC 441i(e) as to that request, it is materially distinguishable in facts and law from the question presented by AOR 2011-21.

For the above stated reasons, Constitutional Conservatives Fund PAC urges the Commission to reconsider and reject the Draft AO, Agenda Document No. 11-67, in response to AOR 2011-21, and promulgate a new draft in accord with the constitutional protections at issue here.

We appreciate the opportunity to submit these comments.

Sincerely,

Dan Backer
DanBacker, Esq.
Counsel
Constitutional Conservatives Fund PAC