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***FEC deadlocks on PAC Advisory Request: How the lack of a ruling impacts  
the future of PACs***

DB Capitol Strategies filed Advisory Opinion Request (AOR) 2010-20 with the FEC On behalf of our client, the National Defense PAC. The request called for allowing non-connected PACs to solicit and accept unlimited corporate, union, and individual contributions to pay for independent expenditures (IEs) from one bank account, while continuing to solicit and accept amount (up to \$5000) and source (individuals only) restricted contributions to be used for direct candidate support from a second account. This request also sought guidance on the appropriate allocation of operating expenses between such accounts, up to and including paying for all PAC operating expenses out of IE-designated funds. Functionally, approval of this request would have significantly increased (a) the fundraising capability of non-connected PACs, (b) the ability of these PACs to support candidates both directly and through IEs, and (c) the ability of individuals and small businesses and business owners to engage in political speech at a level that is currently the sole province of large corporations, unions, and the very rich.

THE FEC WAS UNABLE TO RULE ON THIS REQUEST. Despite preparing two draft Advisory Opinions – one largely in favor of and one wholly opposed to the request – the 6-member Commission broke evenly on each draft. The Strategist reviews this lack of decision and what the future holds for PACs and PAC practitioners.

The full text of AOR 2010-20, the draft AO's, public comments, and final letter from the FEC may be downloaded via the [FEC website](#) (look for AO 2010-20) or downloaded in a single PDF by clicking [HERE](#). Special thanks to Paul Kamenar, Esq. for his expert legal advice throughout this process and to our crack law student research team of Scott Galla (UVA), John Flynn (USC), and Mike Flynn (American) for their assistance.

With less than 3 weeks until 3rd quarter reports are due, don't get stuck in the mud! If you're having trouble with your FEC reporting, now is the time to seek guidance on complying with your FEC reporting obligations. For more information, contact us at [dbacker@dbcapitolstrategies.com](mailto:dbacker@dbcapitolstrategies.com)

### **The current regime**

The law governing PACs has evolved in the wake of the Supreme Courts' seminal ruling in *Citizens United v FEC*, 130 S.Ct. 876 (2010), the subsequent decision in *SpeechNOW v FEC*, 599 F.3d 686 (D.C.Cir. 2010)(en banc), and most recently though FEC Advisory Opinion (AO) 2010-09 and 2010-11 (July 2010). The core principle is that spending money on elections is constitutionally protected speech and the only government interest in restricting that speech (through amount and source limits) is preventing the appearance of, or actual, quid pro quo corruption. Because Independent Expenditures (IEs) do not meet that standard, spending limits on IEs are therefore unconstitutional (though reporting requirements are enforceable).

The current regulatory regime has several newer elements. First, corporations and unions may spend unlimited treasury funds on IEs. Second, they may do so directly, in concert with others, or through unlimited contribution to "IE-only" PACs that need not be Separate Segregated Funds (SSFs). Third, an IE-only PAC may solicit and accept unlimited contributions from any individual, union, corporation, or committee (including operating costs). However, such an IE-only PAC must (currently) remain distinct from a PAC that makes candidate contributions. Non-connected PACs that make candidate contributions remain subject to source and amount limitations on contributions but may also make IEs, though only with their limited contributions.

### **Why it matters**

We argued that two individual, lawful, and constitutionally protected acts that may be independently conducted – direct candidate contributions from amount & source restricted funds AND independent expenditures through unlimited contributions – should not suddenly become unlawful or lose their constitutional protection because they are done by a single organization. Such activity ought to be protected under the law as it currently stands since *Citizens United* and other rulings, provided that each activity & the funds involved are separately accounted for.

Sustaining regulations to the contrary would have the perverse effect of further empowering large economic actors – unions, major corporations, and the very rich, all of whom can achieve this outcome on their own – in the political process at the expense of individuals, small businesses and their owners, and grassroots organizations. For want of as simple a mechanism as separate bank accounts, the free speech rights of the many are dwarfed by the capabilities of the few.

### **The IE-only PAC debate**

While the FEC did not rule that the activity proposed by AOR 2010-20 was unlawful, neither did it say that it was permitted. While we stand by the legal and constitutional analysis in AOR 2010-20 and subsequent comments, PAC practitioners should err on the side of caution. We advise our clients to NOT engage in this proposed activity until there is greater clarity from the courts or FEC, and to seek legal counsel should they find themselves faced with these questions.

For Non-connected PACs, this non-decision evokes a new question: is it better to continue as-is, or could the PAC raise more money from a few key contributors in order to grow faster as an IE-only PAC. For many smaller PACs, this is a tempting proposition. The relative value of even a maxed-out \$5,000 contribution by a PAC has declined markedly as the average cost of a successful House campaign has soared to over \$1 Million, and Senate campaigns to \$6 Million. No commentator believes this trend will abate and, unlike individual contribution limits, PAC contribution limits are not adjusted for inflation. The ability to raise and expend significant sums from a few select donors as IEs may lead to a greater impact than the combination of direct contribution and IEs that are limited in scope by amount and source restricted contributions. Grassroots and movement-oriented PACs, in particular, may benefit from well-designed IEs that drive interest and increased

support to the PAC. These are just some of the considerations already driving a shift by some PACs and quite a bit of political money into IE-only PACs.

### **IE-only PACs face significantly enhanced Coordination risks**

Coordination by an IE-only PAC with a candidate or campaign is particularly risky because of the PACs ability to receive unlimited individual, union, and corporate contributions. Such coordination – even when inadvertent – may convert an IE into a Coordinated Communication, which is treated as a contribution to a campaign. For non-connected PACs, if that contribution aggregates in excess of \$5,000 to the candidate for that election, it becomes an excessive contribution. By contrast, when an IE-only PAC engages in the same activity it may effectively violate several regulations. First, it has contributed to a candidate, which it is expressly prohibited from doing. Second, it may have done so in an amount in excess of the contribution limits. Third, if the IE-only PAC received contributions from individuals in excess of \$5,000, this may further aggravate the offense. Lastly, and by far the most significant concern, is that if the IE-only PAC receives corporate or union contributions and has engaged in Coordinated Communication, it has effectively made an unlawful contribution with corporate/union dollars.

IE-only PACs should pay very close attention to the rules regarding coordination and take proactive steps to prevent such activity, such as firewalls and internal pre-clearance. It is likely that the 2010 election cycle, the first with IE-only PACs, will yield a few enforcement actions in this regard to test the boundaries of the law and create a few suitable examples to ward off future misconduct.

### **Caveats and final thoughts**

By not providing definitive guidance in either direction in response to AOR 2010-20, the FEC has introduced greater uncertainty into the current regulatory void. The inability to reach a consensus based on the law reflects the dynamism of change in this area. Look for more Advisory Opinion Requests that further explore these issues, and possible legal action in the coming months. Some of the more obvious questions are the most technical – may an existing non-connected PAC convert to an IE-only PAC, and vice versa, how often, and what happens with the money?

### **About DB Capitol Strategies and Dan Backer, Esq.**

DB Capitol Strategies provides legal, strategic & operational guidance to political committees with a focus on PAC treasury and FEC reporting and compliance through its lead attorney Dan Backer. Mr. Backer is a graduate of the University of Massachusetts Amherst and George Mason University School of Law. In 2009, Mr. Backer earned the Professional Lobbying Certification (PLC) from the American League of Lobbyists. He is admitted to practice law in Virginia and Washington DC, and before the U.S. District Court for both the Eastern & Western Districts of Virginia. Mr. Backer has extensive experience with public policy & advocacy programs, grassroots organizations, and Political Action Committees, and is Treasurer or Assistant Treasurer of several PACs.

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