

New Advisory Opinion Request:**Unlimited corporate and union
support for operating costs of
any non-connected PAC**

On behalf of our client, the National Defense PAC, DB Capitol Strategies has filed an Advisory Opinion Request (AOR 2010-20) with the FEC. The outcome of this request may have far reaching impact on all PACs and practitioners. Functionally, non-connected PACs would be able to accept unlimited corporate, union, and individual contributions to pay all the operating costs of a PAC, including that of raising amount-restricted funds from any individual for use in candidate contributions. The full text of AOR 2010-20 may be downloaded [HERE](#) or via the [FEC website](#).

As noted in the last few editions of *The Strategist*, 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 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 regime

The currently regulatory regime has several new 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 raise and accept unlimited contributions from any union, corporation, individual, or political committee for independent expenditures (including operating costs). However, such an IE-only PAC must (currently) remain distinct from a PAC that makes candidate contributions. PACs that make candidate contributions and are subject to source and amount limitations on contributions may also make IEs – but under the current regime they are limited to doing so only with their limited contributions.

IE's are by definition made independently of the beneficiary candidate. Any "coordination" between the PAC and candidate results in an IE becoming a coordinated communication, which is an "in-kind" contribution to the candidate. Corporations and unions are still prohibited from contributions to candidates, and PACs and individuals may only do so up to the applicable limit. Avoiding coordination has become a greater concern since *Citizens United*, and PACs that make both contributions and IE's have (or should have) existing mechanisms to ensure IEs are independent.

An unnecessary choice

A non-connected PAC is now forced between two choices, each with identical reporting of receipts, sources, and expenditures. A PAC may operate as an IE-only PAC to raise and expend unlimited funds from any corporation, union, or individual for IE's only (and the PACs operating costs). Or, a non-connected PAC may operate ordinarily, raise and expend amount-limited contributions only from individuals and PACs, make amount-limited contributions to candidates, and make unlimited expenditures for IE's. This is an unnecessary choice.

Non-connected PACs have long been able to both directly contribute to candidates and expend unlimited amounts on IE's. Therefore, there is clearly no "appearance of or actual quid pro quo corruption," from a PAC performing both functions, provided it insures IEs are in fact independent. Restricting PACs to only one of these two options is neither constitutionally justifiable nor particularly necessary. There is no reasonable basis to restrict the broader range of IE activity in a PAC that also makes direct contributions. So long as receipts used for candidate contributions themselves meet amount and source limits, and are not comingled with funds from sources that may only support IEs (all corporations and unions, and individual contributions above the limit), there is no greater risk of actual or apparent quid pro quo corruption. This can be achieved through as simple a mechanism as separate bank accounts and accounting.

A non-connected PAC should be able to accept both amount and source limited funds for use in candidate contributions, and unlimited funds from all sources (eligible to participate in US elections) for use in IEs. To the extent that a PAC may engage in both activities, it should be free to apply funds from either separate income stream to pay any – or all – of its operating costs. Thus, unlimited contributions made for the purpose of IEs may be used to pay for all the operating costs of the PAC. As a result, a corporation, union, or individual may wholly pay for the operating costs of any PAC without being subject to contribution limits.

The potential impact

Corporations and unions currently enjoy greater political rights and greater ability to impact elections than individuals – even extremely wealthy individuals and in most cases even large groups. Corporations, through the SSF, may wholly underwrite the entire operations, and fundraising capabilities, of a PAC while simultaneously being able to expend unlimited amounts on IEs. Individuals have no comparable vehicle – they may spend unlimited sums on IEs, and enjoy the unique ability to contribute to individual candidates, but cannot support a PAC in the same manner. The analysis of FEC data in the last edition of The Strategist showed that SSFs outnumber non-connected committees by nearly 2-to-1, with an even greater disparity in funds raised and expended. Further, non-connected committees expend on average 40% of funds raised for administrative or operating expenses, up to 75% for smaller PACs. SSFs generally have these costs paid by their connected organization, allowing use of virtually all funds raised for direct candidate contributions. While unintended, the system tilts heavily towards corporations and unions.

Should the FEC adopt the rationale within AOR 2010-20, there is virtually no remaining benefit to a corporation or union in having an SSF. SSFs remain constrained in soliciting only their restricted class, limiting the scope of candidate contributions they can make. The new regime would allow a corporation or union to contribute to a non-connected committee it helped create that could then raise money from the general public to use for candidate contributions, and other corporations and unions for IEs. If the benefits of an SSF are no longer unique, but the burden remains, why bother?

The ability to accept corporate or union funding – and to use it for operating costs – will significantly enhance the budgets and capabilities of most non-connected PACs. Increased emphasis will be placed on having key corporate and union decision makers, who can drive contributions, involved in non-connected PAC boards. Prominent and/or wealthy individuals in fields outside of politics may also seek to be more active in this arena – expanding the realm of “player PACs” beyond prominent political figures – based on the ability to contribute both a usable core of funds for candidate contributions as well as the operating costs to grow the organization around a particular vision. This may also open the political process up to individuals who are not typically engaged (for example, wealthy professional sports and entertainment figures), but who have the resources to seed and support PACs around their own public popularity. Ultimately, the long term effect will likely be further and very significant increases in the number of PACs and the net dollar amounts spent on political financing.

Caveats and final thoughts

We are trending towards more fully equalized political speech rights between corporations and individuals. If the Constitution provides for all political speakers to be treated equally – despite the ability to speak loudly from deeper pockets – then direct corporate and union contribution to candidates seems increasingly likely, subject to the same limits as individuals and/or PACs.

About DB Capitol Strategies and Dan Backer, Esq.

DB Capitol Strategies provides legal & 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, DC pending, 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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