

*The Changing Face of PACs:***Recent FEC advisory opinion requests
may lead to major changes for PACs**

As the 2nd quarter comes to a close and PACs gear up for a busy summer, two new advisory opinion requests (AORs) filed with the FEC may have a profound impact in the coming months. Understanding that possible impact of these AOR's may help PACs better plan their 2010 – and 2012 – action plans.

The core of *SpeechNOW*

In *SpeechNOW v FEC*, 2010 WL 1133857 (D.C. Cir. 2010), the US Court of Appeals for the DC Circuit, following the holding of *Citizens United v FEC*, 130 S. Ct. 876 (2010), held that independent expenditure's (IE's) do not create the appearance of or actual quid pro quo corruption, and therefore may not be subject to expenditure limits. Additionally, corporations and unions are entitled to make IE's from their own treasuries. Those making IE's may still be required to (a) register with the FEC as any other PAC, and (b) disclose the amount spent, the donors paying for it, and the target of the expenditure. In short, the DC Circuit upheld unlimited spending on IE's, so long as the activity is disclosed and reported. With the Election only 125 days away, PACs have begun to seek out the parameters of the law as it stands today.

May an organization financially support an IE-only PAC without it being a Separate Segregated Fund?

In AOR 2010-09, the 501(c)(4) organization Club for Growth (the Club), which has an existing Separate Segregated Fund (SSF) PAC, seeks to create a new IE-only PAC and pay all or some of the administrative expenses of that PAC. The Club argues that the new IE-only PAC need not be treated as an SSF despite providing it with direct financial support of its operations. The critical benefit sought by the Club is that the IE-only PAC could freely solicit and accept contributions from any individual, not just the "restricted class" of the Club who may be solicited by its SSF. The Club is not seeking to accept corporate or union contributions for IE-only PAC, nor does it state an intent to use its own contributed funds for IE's.

As a result of *SpeechNOW*, corporations may spend unlimited treasury funds on IE's. This would naturally include any administrative costs related to making the IE. There is no little reason why a corporation, like the Club, cannot do with others what it can do itself, and there is a strong constitutional argument that it has every right to do so (a subject discussed below). Since the Club should be free to contribute funds to an IE-only PAC, and those funds could pay for the administrative expenses of that IE-only PAC, it is illogical to prohibit the Club from paying such costs directly and reporting them as a contribution. Therefore, the Club should be free to establish an IE-only PAC, fund its administrative costs without it becoming an SSF, and be able to solicit and accept unlimited contributions from any individual for its IE activities.

May IE-only PACs accept unlimited individual, corporate, and union contributions?

In Advisory Opinion Request 2010-11, Commonsense Ten seeks to register as an IE-only PAC and accept unlimited contributions from individuals, corporations, and unions. Commonsense Ten states that it intends to comply with all other FEC regulations, register and report as a political committee, and make no candidate contributions. Commonsense Ten relies on the same core analysis as **The Strategist** made in May's edition and as argued by the Club for Growth. Following *SpeechNOW*, individuals, corporations, and unions may make unlimited expenditures for IE's. As such, there is no justification to restrict these contributors' Constitutional rights of free speech and association such that they may not make the same expenditure in concert. Commonsense Ten's argument relies on the express holdings of *Citizens United* and *SpeechNOW* while adding the element of associational rights, and is likely to be sustained.

Commonsense Ten's argument has far reaching potential. This approach would allow PAC contributions by corporations for the first time outside of their SSFs, and may hasten the death of the SSF. While limited in application to IE-only PACs, this creates opportunities for this new breed of IE-only PAC to invade the fundraising turf of existing PACs and public policy organizations. The emergence of IE-only PACs may shift funding away from other groups. Conversely, the ability to accept unlimited corporate and union funds may allow new organizations to emerge in support of particular issues. It is impossible to speculate how this will reshape the distribution of political dollars, but one likely outcome is the emergence of single-issue IE-only PACs, either organically or as part of a broader strategy in support of candidates and causes.

The shape of things to come?

These AORs may shift the compliance landscape towards two very significant possibilities. First, that any non-connected committee PAC may accept both unlimited individual, corporate, and union contributions for IE's, and accept limited individual contributions for direct candidate contributions (provided that the two activities are separately accounted for). Secondly, the death of the SSF.

As framed by the Commonsense Ten Advisory Opinion Request, there is no longer a rational justification to prohibit individuals, corporations, and unions from making unlimited contributions to an IE-only PAC. IE's by themselves do not create the appearance of or actual quid pro quo corruption which the Supreme Court held in *Citizens United* was the sole grounds to restrict this form of free speech. As a result, individuals may now lawfully support a cause or candidate through (a) limited direct candidate contributions, (b) limited PAC contributions, and (c) unlimited IE expenditures or contributions to IE-only PACS - but are forced to do so in separate transactions. This is an unnecessary and possibly unconstitutional restriction of free speech and association. Individual *should* be free to contribute to a single PAC both for IE's and candidate contributions provided that the amount applied to direct contributions is (a) intended by the donor (though this is speculative), (b) within the existing limits, and (c) accounted for separately from that unlimited amount intended for IE's. While *SpeechNOW* laid the foundation for IE-only PACs, we need not create added bureaucracy nor is there sufficient rationale to limit the free speech and association rights of individual donors. At the same time, since corporations and unions are likely to now able to contribute to IE-only PACs – the issue brought forth by Commonsense Ten – it is likely that the same PAC can accept unlimited corporate and union contributions so long as accounted for separately from individual contributions used for direct candidate contributions. Thus, a

single non-connected committee PAC should be able to accept both unlimited individual, corporate, and union contributions for IE's (and administrative expenses), and limited individual contributions for direct campaign contributions (and administrative expenses), provided that these contributions are accounted for separately and likely requiring a firewall between IE and direct contribution activities.

Under current law, the Separate Segregated Fund (SSF) has two major features – the benefit of receiving the support of its corporate parent for administrative expenses and the limitation of accepting contributions only from its restricted class. Should the all-inclusive model of non-connected committees come to pass, it is likely the death knell for the SSF. If a corporation or union may make unlimited contributions to any PAC, restricted to IE's but including administrative/operating costs, and that PAC may also raise funds from individuals for both IE's (unlimited) and direct candidate contributions (limited), what is the purpose of having an SSF? The primary benefit – parent company financial support – is achieved without any limitation, and the primary detriment – limited solicitation only to the restricted class – is removed. As a consequence, it seems likely that corporations may spin-off their SSF PACs, while still retaining nominal control as a function of their principle financial support even as other corporations, unions, organizations, and non-restricted class individuals are potentially solicited. Conversely, as these PACs absorb political capital from more sources and enhance their influence, they will likely drown out the effectiveness of smaller "Citizen's PACs" – those grassroots activist organizations without a leading personality that will be unable to compete for dollars raised or expenditures made.

Caveats and final thoughts

These trends, if they bear out, continue to auger for an even more substantial shift to the political financing landscape – direct corporate contributions to campaigns and candidates, subject to the same contribution limitations as individuals. If it occurs, this would likely be the last step in the equalization of political speech (and spending) rights of individuals and associational (corporate, union) entities.

As today marks the end of the second quarter, a reminder to all PACs that quarterly filings are due July 15 and the deadline for monthly filers is July 20. Late filing is both the most common PAC compliance error, and the easiest to avoid. Don't let complex or uncertain compliance issues cause you to file late – seek outside guidance when in doubt so you can submit your filing on time.

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.