DB Capitol Strategies

PAC ● GRASSROOTS ● ADVOCACY ● NON-PROFIT

THE STRATEGIST

July 26, 2010

# *99 Days to the Election:* *FEC Advisory Opinions following Citizens United & SpeechNOW, PLUS a look at PAC spending data*

Last month, The Strategist reviewed two important FEC Advisory Opinion Requests (AORs) following the rulings in *Citizens United v FEC*, 130 S. Ct. 876 (2010) and *SpeechNOW v FEC*, 2010 WL 1133857 (D.C. Cir. 2010). The FEC has issued Advisory Opinions on both which largely follow the arguments made by the requesting entities, and by The Strategist, and which lay the groundwork for continued changes to PAC regulation. Below is a brief review of each Advisory Opinion, and the impact it will have.

But first, the Strategist was recently asked, "*What is a good burn rate for the operating expenses of a PAC?*" In searching for an answer, we reviewed FEC data through the 2nd quarter for Separate Segregated Funds (SSFs) and Non-Connected Committees (NCCs). Our findings may be of interest to practitioners grappling with internal pressures to spend more – or less – on operating expenses and candidate contributions.

**Methodology and overall receipts and contributions summary**

We analyzed data for 3284 PACs (with sufficient reported data) with net federal receipts of $750 MM and net candidate contributions of $358.5 MM. SSFs accounted for 2243 PACs with $548 MM in net federal receipts and $282.5 MM in net candidate contributions. NCCs accounted for 1041 PACs with a total of $202 MM in net federal receipts and $76 MM in net candidate contributions. Of immediate interest was that while 31.2% of PACs were NCCs, they accounted for only 21.2% of candidate contributions overall, and had significantly lower contributions as a percentage of net receipts – 37.6% as opposed to 51.5% of SSFs. The initial intuitive leap is that this results from SSFs principle benefit – unlimited corporate support for administrative expenses which, for an NCC, are paid out of limited individual contributions.

We subdivided these categories into 4 tranches based on net federal receipts. These tranches were (1) small - sub-$10K, (2) medium - up to $100K, (3) large - up to $1 MM, and (4) very large - over $1 MM. Of interest was the extent to which corporate/union SSFs trended larger than "grassroots" NCCs. with nearly equal numbers of PACs in the small range (a scant 15% more), the medium range saw SSFs outnumber NCCs by more than 2.5:1, and by more than 3:1 in the large and very large range.

| Tranche | NCC | Receipts | Contributions | SSF | Receipts | Contributions |
|---|---|---|---|---|---|---|
| Up to $10,000 (small) | 379 | $1.36 MM | $0.95 MM | 438 | $1.80 MM | $1.58 MM |
| Up to $100,000 (medium) | 436 | $16.85 MM | $7.22 MM | 1072 | $46.13 MM | $26.59 MM |
| Up to $1,000,000 (large) | 194 | $56.55 MM | $24.42 MM | 622 | $201.13 MM | $128.51 MM |
| More than $1,000,000 (very large) | 32 | $127.40 MM | $43.38 MM | 111 | $298.90 MM | $125.78 MM |
| Total | 1041 | $202.16 MM | $75.97 MM | 2243 | $547.96 MM | $282.46 MM |

**Burn rate**

Using the same data and ranges, we analyzed burn rate, based on the percentage of net receipts that were spent on total operating expenses (other than candidate contributions). A sizable number of committees – primarily small committees – did not report any operating expenditure. For NCCs, that represents largely volunteer organizations, whereas for SSFs it likely represents the unique nature of corporate support. Additionally, some non-reporting may be an error on the part of committee Treasurers. The below table summarizes the average burn rate by range, both overall and excluding those that did not report any operating expenditures. Note that the total for SSF Burn w/o non-reports includes a second total average excludes the data from small SSFs (a significant outlier).

| Tranche | NCC | Average rate of burn | Burn w/o non-reports | SSF | Average rate of burn | Burn w/o non-reports |
|---|---|---|---|---|---|---|
| Up to $10,000 (small) | 379 | 50.80% | 77.15% | 438 | 15.46% | 40.35% |
| Up to $100,000 (medium) | 436 | 27.53% | 39.58% | 1072 | 3.48% | 8.21% |
| Up to $1,000,000 (large) | 194 | 37.97% | 40.69% | 622 | 3.50% | 3.85% |
| More than $1,000,000 (very large) | 32 | 60.06% | 62.00% | 111 | 6.77% | 7.59% |
| Total | 1041 | 38.92% | 54.85% | 2243 | 5.93% | 15.00%/6.55% |

The significant disparity between SSF and NCC averages, likely a result of direct corporate administrative support for the PAC, makes a direct comparison difficult. Focusing solely on NCC data, it seems small PACs and very large PACs share very high overhead costs. For smaller PACs, this may be a result of necessary & fixed operating costs such as legal and compliance costs. For very large PACs, it is likely that more active operations and fundraising in particular yield a higher burn rate. Looking at the more than 60% of NCCs that fall in the medium and large range, it seems that a 40% burn rate is a solid target.

***What is a good burn rate for operating expenses in a PAC*?** The best answer for NCCs, seems to be targeting 75% for small (or new) PACs, and 40% for medium to large (more mature) PACs.

**Corporate sponsorship of non-SSF, Independent Expenditure-only PACs**

In AOR 2010-09, the 501(c)(4) organization Club for Growth (the Club), which has an existing SSF, sought to create a new Independent Expenditure (IE) only PAC and pay all or some of the administrative expenses of that PAC. The Club argued that the IE-only PAC need not be treated as an SSF, despite The Club providing it with direct financial support of its operations, and 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 FEC ruled, in Advisory Opinion 2010-09, that the Clubs proposed course of action was acceptable. The FEC specifically relied on the rulings in *Citizens United* and *SpeechNOW* in finding that the Club could (a) pay for the establishment, administrative, and solicitation expenses of the IE-only PAC and (b) solicit donations from any individuals including those outside of what would be the Club's restricted class. The FEC recognized that the absence of the appearance of or actual quid pro quo corruption from IE's (the holding in *Citizens United*), and the right of corporations to make unlimited contributions for IE's (the holding in *SpeechNOW*) – including related administrative costs – allow it to do so in concert with others.

**Unlimited corporate, union and individual contributions to IE-only PACs**

In AOR 2010-11, Commonsense Ten sought to register as an IE-only PAC and accept unlimited contribution from corporations, unions, other political committees and individuals. Commonsense Ten stated its intent to comply with all other FEC regulations, register and report as a political committee, and make no candidate contributions. Commonsense Ten argued that since *Citizens United* and *SpeechNOW* allowed corporations, unions, other political committees, and individuals to make unlimited expenditures for IE's on their own, there is no justification to infringe upon constitutionally protected freedom of association to prohibit these entities from doing in concert with one another what each could do on its own. The FEC accepted this argument, and held that, in the wake of *Citizens United* and *SpeechNOW*, such activity was within the scope of federal election law.

**Caveats and final thoughts**

In analyzing burn rate, we focused on revenues in and expenses out (both contributions and operating expenses). While spending less than one takes in is generally a sign of a healthy organization, it does not account for the existing funds that almost every PAC we analyzed had on hand. For the small NCC range, this resulted in contributions and operating expenses that, as a percentage, were greater than receipts.

FEC Advisory Opinions 2010-09 and 2010-11 have a powerful cumulative effect. First, they allow corporations, unions, and individuals to make unlimited contributions to IE-only PACs – in other words, so long as these contributions are used solely for IEs and administrative costs. Second, corporations & unions may also make unlimited contributions to pay for the operating costs of their own SSFs, so long as direct candidate contributions are only made from the amount-limited contributions of restricted class individuals to the SSF. The logical question – and the next step in this evolution – is to ask why have two PACs? A single PAC could – as simply as through separate bank accounts – receive both unlimited corporate, union, and individual contributions to pay for IE's and operating expenses while also receiving amount-limited contributions from individuals for direct candidate contributions.

**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.

For questions, please contact Dan Backer at DBacker@DBCapitolStrategies.com or 202-210-5431.