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FEDERAL ELECTION COMMISSION
OFFICE OF GENERAL COUNSEL
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Lawrance Norton, Esq.
General Counsel
Federal Election Commission
999 E Street, NW – Sixth Floor
Washington, DC 20463

Re: Draft Advisory Opinion 2006-2

Dear Mr. Norton:

We have reviewed the draft of the General Counsel, finding that as presented to the FEC, the membership organization now planned by Mr. Titley and his associates does not qualify as such under applicable FEC criteria and may not expend resources for PAC formation or partisan communications with its members. This draft, short and cursory in its treatment of the issue, does not properly state the law, which results in a mistaken conclusion about its application

The rules do not limit membership organization status to trade associations, or other nonprofit entities. This is clear from the defined terms used to construct the rule, and it distinguishes this rule from others, such as the one governing the activities of qualified nonprofits, 11 C.F.R. § 114.10(b)(3)(i), specifically barred from the conduct of business activities as a condition of the right to make independent expenditures from general treasury sources. In fact, the General Counsel's office seems to concede the point, noting that "corporations without capital stock" are among the membership organizations contemplated by the rule. OGC Draft at 6. It is at this point that the OGC errs, in two material respects.

First, it makes much of the reference in *FEC v. National Right to Work Committee*, 459 U.S. 197 (1982), to the "analogy" by which members may be considered "at least in part" like the corporate shareholders. OGC Draft at 6. For this reason, the draft concludes that the Participating Members, because they do not share in any profits and do not conduct certain business-related activities of the proposed organization, are

unlike shareholders—and hence cannot be *bona fide* members under FEC rules. This is completely inconsistent with the developed law on this question. The "analogy" is a loose one—always qualified as little more than "at least in part" (*see, e.g.*, FEC Advisory Opinion 1999-16 (July 26, 1999))—and it cannot supersede the requirements set out in the rule. Those rules authorize membership organizations with a variety of classes of members, including ones in which the members participate in the formulation of policy, which is precisely what the members in this instance would do. And the activities which they are permitted to direct and determine are central, as Mr. Titley's request notes, to the purposes of the organization. Titley AOR at 4.

It is curious that the draft would, on these facts, suggest a lesser organizational stake by these members than by shareholders more generally. Shareholders for PAC solicitation and partisan communication purposes need not have any voting stock at all: they are no different than members who pay dues, but have no right of participation in organizational policy or governance. 11 C.F.R. § 114.1(h). The members before the FEC in this proposal would pay dues, and in this way have a financial stake in the organization, but they would also direct and determine the very activities that motivated them to join in the first instance. The "analogy" to which the draft appeals actually undercuts its case. These members have more of an organizational "attachment" than a shareholder, possibly holding a handful of shares, who cannot vote them and is voiceless in the affairs of the company.

Second, the draft attempts to diminish the participatory rights of the members, contrasting them unfavorably to the responsibility for core business management vested in the Founding Members. In the language of the draft, only the Founding Members will be "vested with the power and authority to operate or administer the Company." OGC Draft at 7. This is a fundamental mistake, which assigns exclusive significance to this aspect of the Company's affairs but ignores the allocation of responsibility for its central purpose: "to provide a vehicle for civic expression that is independent of the partisan political environment." Request at 2. The proposed members—the Participating Members—have "power and authority" to direct the affairs of the Company in this sphere of central significance to the organization's mission. *See* 11 C.F.R. § 100.134(f)(3). This is plainly more than sufficient under Commission rules, reflected in numerous Opinions since issued, for *bona fide* membership status, and it is well-established that membership organizations may have

multiple classes of membership. *See, e.g.*, FEC Advisory Opinion 2003-13 (June 13, 2003) (membership organization operating with "16 categories of membership"). The OGC draft seeks to dismiss this participation in these matters, referring to it as nothing more than the "ability to be polled," OGC Draft at 7, n.6, when the request makes clear that the right is one to determine and direct—that the Participating Members are joining precisely to exercise this authority. *See* FEC Advisory Opinion 1997-5 (May 16, 1997) (organizational attachment demonstrated by service on "policy formulating committees").

Of course, in this instance, the Members would also pay dues, satisfying as well the other requirements for membership specified in the rules. What is critical to the OGC's analysis, however, is the incorrect statement and application of the law on governance rights. Here, too, the "analogy" to corporate shareholders confirms the conclusion indicated by the request, rather than by the draft produced by the OGC. To the extent that the membership rules focus in part on governance rights, they do so by allowing for far more of this kind of relationship or attachment between member and organization than obtain between many shareholders and the corporations in which they hold shares.

What the draft does reflect, perhaps more than confidence about the law, is suspicion, which may account for the short shrift given by the OGC draft to its legal analysis and conclusion. An unstated concern may be that this organization, as proposed, is somehow less a membership than a political organization. This is indeed an LLC with a unique mission, one of encouraging political speech and association for the stated purposes. Through the use of web-based information systems, members would be empowered to shape and view political content, commentary and polling information, and to encourage one another in the support of candidates and policies consistent with their interests and commitments, regardless of party affiliation. This is undoubtedly still a membership organization, structured as such within the requirements of the rules.

The organization of the membership around common issue and related political interests (along with other benefits of membership, such as access to special events) cannot support, under the law, disregard of the plain application of the membership rules. As set out in the Request, the membership organization would conduct all election-influencing activities through partisan communications restricted to its

membership, and through the formation of a PAC to which only Members could contribute. Any legitimate statutory requirements are fully satisfied in this way, assuring that, for example, corporate funds are channeled only in the manner authorized by § 441b. The balance of these activities—issue discussion and policy formulation—are entirely lawful goals of membership activity. They may not be unlawfully restricted by denial of membership recognition to an organization not functionally different in this respect than countless others exempt from tax under provisions of 501(c) of the Internal Revenue Code. An organization is not compelled to seek a tax exemption as a condition of encouraging speech about and other involvement with issues.

For these reasons, the OGC draft wrongly analyzes the law, and the result is one that, it is respectfully suggested, the Commission should reject. We ask that the organization described in the draft be accorded recognition as a membership organization, as provided in clear terms under the agency's rules.

Very truly yours,

Robert F. Bauer

cc: Mr. Robert Titley