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July 12, 2010

Late Comment
AOR 2010-11

BY HAND DELIVERY

Thomasenia Duncan, Esq.
General Counsel
Federal Election Commission
999 E. Street, N.W.
Washington, D.C. 20463

Re: Advisory Opinion Requests 2010-09 & 2010-11
Club for Growth and Commonsense Ten

Dear Ms. Duncan:

I appreciate the opportunity to comment on the pending advisory opinion requests in these two matters. While our firm represents corporations and trade associations active in the political process, I submit these comments in my personal capacity and not on behalf of any firm client.

Whether one applauds the U.S. Supreme Court's decision in *Citizens United v. FEC* or laments it, the conclusion is inescapable that the Court has significantly redefined the scope of permissible campaign finance regulation. All of the implications of that decision are not yet clear. What is clear is that citizens, corporations and labor unions, operating completely independently of any candidate or party, may fund unlimited political speech, even speech that calls explicitly for the election or defeat of a federal candidate. These two advisory opinion requests ask this agency to clarify that citizens, corporation and unions can exercise these rights collectively, as a registered political committee, as well as individually.

The FEC has an opportunity here to provide a clear workable system for the exercise of the rights enunciated in *Citizens United*, within the FEC's existing framework for political committees. The FEC's rules for political committees, provides for robust disclosure and transparency, and could be the preferred system for exercising those rights in the 2010 election. To achieve that goal, however, will require the FEC to act now. If the hydraulic effect of money is truly an apt analogy for campaign finance (a point open to debate), this is an opportunity for the agency to influence, in a positive way, the course through which that money will flow.

> **For the reasons explained above, we now conclude that independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption.** *Citizens United*, 130 S.Ct. 876, 909.

In what can fairly be described as a sea change in the law, the Supreme Court has issued three decisions since 2006 that make clear that the basis for many restrictions on corporate and union political spending are no longer valid. *FEC v. Wisconsin Right to Life Committee*, 551 U.S. 449 (2007), *Davis v. FEC*, 128 S.Ct. 2759 (2008), *FEC v. Citizens United*, 130 S.Ct. 876 (2010). For the purposes of this discussion, the two most relevant principles that the court has articulated are that: (1) corporations and unions have a First Amendment right to make unlimited independent expenditures that expressly advocate the election or defeat of particular candidates for public office; and (2) the only recognized state interest justifying the regulation of political speech in this context is the interest in preventing *quid pro quo* corruption, or the appearance thereof. *WRTL* at p. 479-81, *Davis* at 2773-74, *Citizens United* at p. 908-909. To reach that end, the Supreme Court went so far as conclude 2 U.S.C. 441b's prohibition on the use of corporate treasury funds for express advocacy to be invalid and to overrule *Austin v. Michigan Chamber of Commerce*. *Citizens United* at 913.

If citizens, corporations and unions have a First Amendment right to make unlimited expenditures to advocate a candidate's election or defeat, it follows that they should be equally protected in the exercise of that right in association with others. While a permissible rational existed to prohibit this sort of aggregation of wealth while *Austin v. Michigan Chamber of Commerce* was still good law, with that case now formally overturned, we must acknowledge that the sole remaining legitimate state interest in this area - the prevention of corruption and the appearance thereof - does not justify regulations prohibiting groups of individuals, corporations and unions from pooling their funds, without regard to the contribution limits, if they use those funds exclusively to make independent expenditures. It cannot be that the level of constitutional protection afforded the right to speech is reduced when that right is exercised in association with others.

> **A campaign finance system that pairs corporate independent expenditures with effective disclosure has not existed before today.** *Citizens United*, 130 S.Ct. at 916.

The requests presented by Commonsense Ten and Club for Growth are both a permissible application of these principles.[1] Both would establish a political committee which would comply with the registration and reporting obligations of the Federal Election Campaign Act of 1971, as amended. Both would operate completely independently of any federal candidate or political party. Both would solicit contributions in unlimited sums from persons otherwise entitled to make independent expenditures, and would use those sums solely for that purpose.

Importantly, both Commonsense Ten and Club for Growth seek permission to use a disclosure regime for political committees that is more robust than what would be required of them if they avoided registration and complied instead with the disclosure requirements for non-political committees that undertake independent expenditures. *See*, 11 C.F.R. §§ 104.4 & 109.10. Approving these requests will allow each organization to operate under the FEC's political committee regulations, and thereby provide voters with more information as to the identity of donors to the groups, as well as to their expenditures.

In sum, the Commission has an opportunity to make clear that a robust disclosure regime is consistent with the rights articulated in *Citizens United*. To do so now, while many spending decisions about the 2010 election have yet to be made, would benefit those who wish to speak, as well as those who will hear those messages.

Sincerely,

Robert D. Lenhard

cc: FEC Commissioners

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[1] Club for Growth's request presents two proposals, one in which it would pay the administrative costs of the independent expenditure committee and one in which it would not. The proposal in which the Club would not pay for the administrative expenses of the independent expenditure committee presents the same issues as the Commonsense Ten proposal, and both requests should be approved. In the proposal in which the Club would pay the administrative costs of the independent expenditure committee, it would make an in-kind contribution of staff and services to the independent expenditures committee, which, if properly reported, would be permissible under the Supreme Court's analysis noted above.