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FEDERAL ELECTION COMMISSION
Washington, DC 20463

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October 3, 2011

AGENDA ITEM

For Meeting of 10-6-11

MEMORANDUM

SUBMITTED LATE

TO: The Commission

FROM: Anthony Herman
General Counsel

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Rosemary C. Smith
Associate General Counsel

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Robert M. Knop
Assistant General Counsel

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Anthony Buckley
Attorney

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Subject: AO 2011-18 (Western Representation PAC) - Drafts A and B

Attached are proposed drafts of the subject advisory opinion. We have been asked to have these drafts placed on the Open Session agenda for October 6, 2011.

Attachments

1 ADVISORY OPINION 2011-18

2

3 Dan Backer, Esq.

4 DB Capitol Strategies

5 209 Pennsylvania Avenue, SE

6 Suite 2109

7 Washington, D.C. 20003

DRAFT A

8

9 Dear Mr. Backer:

10 We are responding to your advisory opinion request on behalf of Western
11 Representation PAC (the “Committee”), concerning the application of the Federal
12 Election Campaign Act of 1971, as amended (the “Act”), and Commission regulations to
13 the Committee’s reporting obligations for independent expenditures to be made by email
14 during the 2012 Presidential primary elections. The Commission concludes that the
15 Committee may modify the way it discloses the cost of sending independent expenditure
16 emails on its 24-hour reports. Further, when reporting the monthly cost of its
17 independent expenditure emails on its monthly reports, the Committee does not have to
18 attribute these costs to the various States' Presidential primaries.

19 ***Background***

20 The facts presented in this advisory opinion are based on your letter received on
21 August 17, 2011.

22 The Committee is a nonconnected committee. It plans to send an as-yet-
23 undetermined number of emails to its proprietary email list in connection with the 2012
24 Republican Presidential primary elections. Many of these emails, but not all of them,
25 will expressly advocate the election or defeat of a clearly identified Federal candidate,
26 and will constitute independent expenditures.

1 The Committee plans to retain a mass email service provider to send out the
2 Committee's emails. The provider will charge a fixed monthly amount for its services,
3 between \$1,500 and \$3,000, regardless of the number of emails to be sent. The
4 Committee has not yet determined how many emails it will send, but states that the
5 number of both independent expenditure and non-independent expenditure emails will be
6 "from as few as four a month to as many as thirty." All of the emails will be sent to the
7 entire email list, which includes voters in every state.

8 The Committee seeks to exclude the costs of sending the emails from its 24-hour
9 and 48-hour notifications of independent expenditures. In filing its monthly reports, the
10 Committee seeks to avoid attributing the costs of sending the independent expenditure
11 emails to various States' Presidential preference primary elections. The Committee
12 claims that meeting these obligations will require it to determine, for every independent
13 expenditure email sent: 1) to which State primaries the email applies; 2) whether that
14 email falls within that particular primary election's 24-hour or 48-hour reporting period;
15 and 3) the cost of sending each individual email.

16 ***Questions Presented***

17 1. *May the Committee exclude the cost of sending each independent*
18 *expenditure email from the calculation of costs included in its 24-hour and 48- hour*
19 *reports, provided such costs are included in the Committee's regular monthly reports?*

20 2. *May the Committee report the actual monthly cost of its independent*
21 *expenditure emails on its regular monthly reports without attributing these costs to the*
22 *various States' Presidential primary elections?*

1 ***Legal Analysis and Conclusions***

2 1. *May the Committee exclude the cost of sending each independent*
3 *expenditure email from the calculation of costs included in its 24-hour and 48-hour*
4 *reports, provided such costs are included in the Committee's regular monthly reports?*

5 Yes, the Committee may exclude the actual cost of sending each independent
6 expenditure email from the calculation of its expenses included on its 24-hour and
7 48-hour reports, provided that it reports the total monthly fees paid to its email vendor on
8 a 24-hour report.

9 An "independent expenditure" is an expenditure by a person expressly advocating
10 the election or defeat of a clearly identified candidate, that is not made in concert or
11 cooperation with or at the request or suggestion of, among others, the candidate.

12 2 U.S.C. 431(18)(A) and (B); 11 CFR 100.16(a).

13 A political committee that makes independent expenditures aggregating \$1,000 or
14 more after the 20th day, but more than 24 hours, before the date of a given election, must
15 file a report describing the expenditures within 24 hours. 2 U.S.C. 434(g)(1)(A); 11 CFR
16 104.4(c). The 24-hour filing period begins when the independent expenditure is publicly
17 distributed or otherwise publicly disseminated. 11 CFR 104.4(c). Additional reports
18 must be filed within 24 hours each time the political committee makes independent
19 expenditures aggregating \$1,000 or more with respect to the same election as that to
20 which the initial report relates. 2 U.S.C. 434(g)(1)(B); 11 CFR 104.4(c).

21 A political committee that makes independent expenditures aggregating \$10,000
22 or more at any time up to and including the 20th day before the date of a given election
23 must file a report describing the expenditures within 48 hours. 2 U.S.C. 434(g)(2)(A);

1 11 CFR 104.4(b)(2). The 48-hour reporting period begins when the independent
2 expenditure is publicly distributed or otherwise publicly disseminated. 11 CFR
3 104.4(b)(2). Additional reports must be filed within 48 hours each time the political
4 committee makes additional independent expenditures aggregating \$10,000 or more with
5 respect to the same election as that to which the initial report relates. 2 U.S.C.
6 434(g)(2)(B); 11 CFR 104.4(b)(2). In Advisory Opinion 1999-37 (X-PAC), the
7 Commission concluded that a political committee's distribution of an express advocacy
8 message by email would be an independent expenditure by that committee with
9 concomitant reporting obligations if the costs exceed the \$200 threshold. Thus, the costs
10 the Committee will incur to send out its independent expenditure emails are the type of
11 costs the Commission has previously determined in Advisory Opinion 1999-37 (X-PAC)
12 require disclosure.¹

13 The Commission does not possess general authority to waive reporting
14 obligations. *See* Advisory Opinion 1994-35 (Alter). In fact, the Commission has specific
15 authority to waive reporting requirements only in connection with special elections. *See*
16 2 U.S.C. 434(a)(9). Advisory Opinion 1995-44 (Forbes for President) interpreted the
17 reporting requirements of the Act but did not waive them.

18 Independent expenditures are aggregated with respect to a given election
19 regardless of which candidate is identified in the communication. 11 CFR 104.4(a),
20 (b)(1)-(2), and (c); *see* Advisory Opinion 2003-40 (Navy Veterans) (concluding that two

¹ In AO 1999-37 (X-PAC) the Commission concluded that expenses such as "registering and maintaining X-PAC's domain name . . . and the website hosting as well as any costs related to the purchase and use of hardware and software" should be reported as operating expenses. However the Commission went on to explain that if the expenses are attributable to communications such as an email containing express advocacy or to a separate website supporting or opposing specific individual candidates, they would be reportable as independent expenditure activity. *Id.*

1 separate ads for the same election, one favoring Candidate A (costing \$9,000) and the
2 other favoring Candidate B (costing \$4,000), had to be aggregated for purposes of filing a
3 48-hour report because the ads were related to the same election); *see also* Explanation
4 and Justification, Bipartisan Campaign Reform Act of 2002 Reporting; Coordinated and
5 Independent Expenditures, 68 FR 404, 406 (January 3, 2003). For purposes of
6 aggregating independent expenditures, each State's Presidential primary election is
7 considered a separate election. *See* Advisory Opinion 2003-40.²

8 Under the circumstances described in your request, ordinarily the calculation
9 would entail a two-step process.³ First, to calculate the cost of sending a single email to
10 the entire list of recipients residing in every single state, the fixed monthly price for
11 sending emails would be divided by the number of emails sent to the entire email list.
12 Thus, the cost of sending the first email to the list would be \$3,000. However, if five
13 emails are sent to the list in the same month, sending each email would cost \$600. The
14 second step would usually be to determine the cost per election. As noted above, each
15 State's Presidential primary election is considered a separate election for purposes of
16 aggregating independent expenditures. Thus, any express advocacy email sent before the
17 first primary election or caucus would relate to all 50 subsequent presidential primary

² The Commission notes that Advisory Opinion 1995-44 (Forbes for President) is distinguishable from Western Representation PAC's situation. In Advisory Opinion 1995-44 (Forbes for President), the Commission concluded that a Presidential candidate's principal campaign committee need not file 48-hour notifications of contributions received. Advisory Opinion 1995-44 (Forbes for President) recognizes that the 48-hour notification requirement is intended to apply to contributions received just before an election that can be used for that election. When presidential primaries follow one another in rapid succession, it can be "difficult or arbitrary" to attribute contributions received to a particular primary election given that the candidate committee may not know which primary or primaries it will spend these contributions on. In contrast, by sending emails to voters in all states where primary elections will be held, the Committee has determined that it will make independent expenditures to sway voters in all these States.

³ The Commission is assuming a monthly vendor fee of \$3,000 for purposes of this advisory opinion.

1 elections. Therefore, the cost of the first email would be \$60 per primary election. When
2 additional emails are sent, the initial \$60 cost per email would be reduced.

3 The Commission recognizes, however, that requiring the Committee to aggregate
4 costs in this manner would be difficult, given that the number of additional emails to be
5 sent in a given month may not be ascertained until close to the end of the month.
6 Moreover, any reasonable estimate used to prepare a 24-hour or 48-hour report early in
7 the month may often be subject to revision later in the month, thereby necessitating
8 multiple amendments to previously filed 24-hour or 48-hour reports. Numerous
9 amendments would not further the statutory goals of providing transparency at critical
10 times before elections.

11 Accordingly, the Commission concludes that the Committee may satisfy its
12 reporting obligations by reporting this monthly vendor fee as follows. If the first
13 independent expenditure email in any given month is sent before the vendor is paid, the
14 Committee must file a 24-hour notice on Schedule E of FEC Form 3X at that time. If the
15 Committee pays the vendor before the first independent expenditure email is sent, then
16 the Committee may file its 24-hour notice on Schedule E of FEC Form 3X either at the
17 time of payment or at the time the first independent expenditure email.⁴ The Committee
18 must include memo text stating the amount has been disbursed to pay for express
19 advocacy emails to be sent and the number of people on its email list. For example, the
20 memo text might read: "To pay for emails to be sent to our 500,000 member email list."

⁴ The Commission presumes that either one of these dates will be within 20 days of a presidential primary election. Accordingly, the Commission is requiring that the amount must be disclosed by 24-hour rather than 48-hour reporting.

1 However, the Committee need not aggregate these costs in the amount it spent for the
2 calendar year-to-date total for each State's Presidential primary election.

3 2. *May the Committee report the actual monthly cost of sending its*
4 *independent expenditure emails on its regular monthly reports without attributing these*
5 *costs to the various States' Presidential primary elections?*

6 Yes, the Committee may report the actual monthly cost of sending its independent
7 expenditure emails on its regular monthly reports without attributing these costs to the
8 various States' Presidential primaries, as described below.

9 Every political committee must file reports of its receipts and disbursements.
10 2 U.S.C. 434(a)(1); 11 CFR 104.1(a). Nonconnected committees shall file either
11 quarterly reports, or monthly reports which shall be filed no later than the 20th day after
12 the last day of the month. *See* 2 U.S.C. 434(a)(4)(B); 11 CFR 104.5(c)(3).
13 Nonconnected committees must disclose their independent expenditures on their monthly
14 or quarterly reports. 2 U.S.C. 434(b)(4)(H)(iii); 11 CFR 104.3(b)(3)(vii). As noted
15 above, for purposes of aggregating independent expenditures, each State's Presidential
16 primary election is considered a separate election. *See* Advisory Opinion 2003-40. The
17 Committee will file monthly reports.

18 Because the Committee need not aggregate the costs of its express advocacy
19 emails on a per-election basis for the purposes of its 24-hour reports, it also need not
20 aggregate these costs on a per-election basis on its monthly reports. Rather, the
21 Committee must report the full amount spent on the express advocacy emails.⁵ So that its

⁵ If the Committee's monthly report reflects an amount less than the amount disclosed on the 24-hour notice as a consequence of the Committee having calculated the percentage of emails that were independent expenditure emails, then the Committee must file an amended 24-hour notice.

1 ADVISORY OPINION 2011-18
2
3 Dan Backer, Esq.
4 DB Capitol Strategies
5 209 Pennsylvania Avenue, SE
6 Suite 2109
7 Washington, D.C. 20003

DRAFT B

8

9 Dear Mr. Backer:

10 We are responding to your advisory opinion request on behalf of Western
11 Representation PAC (the “Committee”), concerning the application of the Federal
12 Election Campaign Act of 1971, as amended (the “Act”), and Commission regulations to
13 the Committee’s reporting obligations for independent expenditures to be made by email
14 during the 2012 Presidential primary elections. The Commission concludes that the costs
15 of the Committee’s email service provider are properly treated as overhead or general
16 administrative expenses. Accordingly, these costs are not required to be included in the
17 Committee’s calculation of its expenses included on its 24- and 48- hour reports, nor are
18 they required to be attributed to the various States' Presidential primaries on its monthly
19 reports.

20 ***Background***

21 The facts presented in this advisory opinion are based on your letter received on
22 August 17, 2011.

23 The Committee is a nonconnected committee. It plans to send an as-yet-
24 undetermined number of emails to its proprietary email list in connection with the 2012
25 Republican Presidential primary elections. Many of these emails, but not all of them,

1 will expressly advocate the election or defeat of a clearly identified Federal candidate,
2 and will constitute independent expenditures.

3 The Committee plans to retain a mass email service provider to send out the
4 Committee's emails. The provider will charge a fixed monthly amount for its services,
5 between \$1,500 and \$3,000, regardless of the number of emails to be sent. The
6 Committee has not yet determined how many emails it will send, but states that the
7 number of both independent expenditure and non-independent expenditure emails will be
8 "from as few as four a month to as many as thirty." All of the emails will be sent to the
9 entire email list, which includes voters in every state.

10 The Committee seeks to exclude the costs of sending the emails from its 24- and
11 48-hour notifications of independent expenditures. In filing its monthly reports, the
12 Committee seeks to avoid attributing the costs of sending the independent expenditure
13 emails to various States' Presidential preference primary elections. The Committee
14 claims that meeting these obligations will require it to determine, for every independent
15 expenditure email sent: 1) to which State primaries the email applies; 2) whether that
16 email falls within that particular primary election's 24- or 48-hour reporting period; and
17 3) the cost of sending each individual email.

18 ***Questions Presented***

19 1. *May the Committee exclude the cost of sending each independent*
20 *expenditure email from the calculation of costs included in its 24- and 48- hour reports,*
21 *provided such costs are included in the Committee's regular monthly reports?*

1 2. *May the Committee report the actual monthly cost of its independent*
2 *expenditure emails on its regular monthly reports without attributing these costs to the*
3 *various States' Presidential primary elections?*

4 ***Legal Analysis and Conclusions***

5 1. *May the Committee exclude the cost of sending each independent*
6 *expenditure email from the calculation of costs included in its 24- and 48-hour reports,*
7 *provided such costs are included in the Committee's regular monthly reports?*

8 Yes, the Committee may exclude the actual cost of sending each independent
9 expenditure email from the calculation of its expenses included on its 24- and 48- hour
10 reports.¹

11 An “independent expenditure” is an expenditure by a person expressly advocating
12 the election or defeat of a clearly identified candidate, that is not made in concert or
13 cooperation with or at the request or suggestion of, among others, the candidate.

14 2 U.S.C. 431(18)(A) and (B); 11 CFR 100.16(a).

15 A political committee that makes independent expenditures aggregating \$1,000 or
16 more after the 20th day, but more than 24 hours, before the date of a given election, must
17 file a report describing the expenditures within 24 hours. 2 U.S.C. 434(g)(1)(A); 11 CFR
18 104.4(c). The 24-hour filing period begins when the independent expenditure is publicly
19 distributed or otherwise publicly disseminated. 11 CFR 104.4(c). This will be the date
20 the Committee sends its emails to the list. Additional reports must be filed within 24
21 hours each time the political committee makes independent expenditures aggregating

¹ This advisory opinion addresses the costs of the Committee's email service provider only. The Request does not ask about, nor does this advisory opinion address, any additional marginal costs the Committee may incur, such as contracting with an outside vendor to design or develop any particular independent expenditure emails.

1 \$1,000 with respect to the same election as that to which the initial report relates.

2 2 U.S.C. 434(g)(1)(B); 11 CFR 104.4(c).

3 A political committee that makes independent expenditures aggregating \$10,000

4 or more at any time up to and including the 20th day before the date of a given election

5 must file a report describing the expenditures within 48 hours. 2 U.S.C. 434(g)(2)(A);

6 11 CFR 104.4(b)(2). The 48-hour reporting period begins when the independent

7 expenditure is publicly distributed or otherwise publicly disseminated. 11 CFR

8 104.4(b)(2). This will also be the date the Committee sends its emails to the list.

9 Additional reports must be filed within 48 hours each time the political committee makes

10 additional independent expenditures aggregating \$10,000 with respect to the same

11 election as that to which the initial report relates. 2 U.S.C. 434(g)(2)(B); 11 CFR

12 104.4(b)(2).

13 In Advisory Opinion 1999-37 (X-PAC), a political committee asked about the

14 reporting requirements for independent expenditure emails it planned to make available

15 by downloading from its website as well as through email messages sent directly to

16 subscribers of its email list. The Commission, citing 11 CFR 106.1(c)(1), concluded that

17 X-PAC's costs of registering and maintaining its domain name and website hosting, as

18 well as any costs relating to the purchase and use of computer hardware and software,

19 were properly treated as overhead and operating expenses that were not required to be

20 included in calculating its expenses included on its independent expenditure reports,

1 unless those expenses were made on behalf of clearly identified candidates and could be
2 directly attributed to those candidates.²

3 Here, the Committee represents that it will pay a fixed monthly fee for its mass
4 email service provider, regardless of the number of emails to be sent, and regardless of
5 whether those emails constitute independent expenditures. Accordingly, as with the
6 requester's website and other computer-related expenses in AO 1999-37, the costs of the
7 Committee's email service provider are properly treated as operating expenses and are
8 not required to be included in its calculation of expenses included on its 24- and 48- hour
9 reports.

10 2. *May the Committee report the actual monthly cost of sending its*
11 *independent expenditure emails on its regular monthly reports without attributing these*
12 *costs to the various States' Presidential primary elections?*

13 This question is moot, given the answer to Question 1, above. Because the
14 Commission concludes the costs of the Committee's mass email service provider are
15 properly treated as operating expenses, they are not required to be reported as actual costs
16 related to particular independent expenditure emails on the Committee's Form 3X
17 Schedule E, nor are they required to be attributed to the various States' Presidential
18 primary elections. Rather, these costs should be included as part of the Committee's

² The Commission also noted that "X-PAC's initial distribution of such [independent expenditure] advertisements as attachments to e-mail messages that it sends, or as text (or graphic) content of the e-mail itself, would be X-PAC's own communications. Accordingly, they would represent X-PAC's independent expenditures with concomitant reporting obligations if the costs exceed the \$200 calendar year threshold described above." However, pursuant to the main holding of the advisory opinion, such "concomitant reporting obligations" would only have attached to X-PAC's initial distribution of e-mail independent expenditures to the extent X-PAC incurred marginal costs directly attributable to those particular e-mails, as opposed to administrative and overhead costs attributable to X-PAC's e-mail service provider generally. Here, given the facts as described by the requester, the Commission concludes Western Representation PAC will incur a monthly fixed cost for its e-mail service provider, and which cost is not directly attributable to its particular e-mail independent expenditures.

