

AGENDA DOCUMENT NO. 12-06-A



FEDERAL ELECTION COMMISSION
Washington, DC 20463

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AGENDA ITEM

January 18, 2012 For Meeting of 1-19-12

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MEMORANDUM

TO: The Commission

FROM: Anthony Herman *AH*
General Counsel

Kevin Deeley *KE*
Acting Associate General Counsel

Robert M. Knop *RMK*
Assistant General Counsel

Tony Buckley *TB*
Attorney

Subject: Withdrawal and Resubmission of Draft A of AO 2011-28 (Western Representation PAC)

The Office of General Counsel is withdrawing Draft A of the subject advisory opinion. That was not the draft this Office had been asked to place on the Open Session agenda for January 19, 2012. Attached is the correct Draft A we have been asked to place on the Open Session agenda for January 19, 2012.

Attachment

1 ADVISORY OPINION 2011-28

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 to place
14 advertisements on Facebook during the 2012 Presidential primary elections. The
15 Commission concludes that the Committee may not exclude the actual costs of
16 independent expenditure advertisements placed on Facebook from the calculation of its
17 expenses included on its 24-hour and 48-hour reports. Further, the Commission
18 concludes that the Committee must attribute these costs to the various States' Presidential
19 primary elections when reporting the monthly cost of its independent expenditure
20 advertisements placed on Facebook on its regular monthly reports.

21 ***Background***

22 The facts presented in this advisory opinion are based on your letter received on
23 November 21, 2011, your emails received on December 6 and 13, 2011, and telephone
24 conversations with the Office of General Counsel on December 2, 6, and 13, 2011.

25 The Committee is a nonconnected committee. It plans to place advertisements on
26 Facebook in connection with the 2012 Republican Presidential primary elections. These

1 advertisements will expressly advocate the election or defeat of a clearly identified
2 Federal candidate and will constitute independent expenditures. Most of these
3 advertisements, but not all of them, will not reference a specific Presidential primary
4 election.

5 The Committee will budget \$2,000 per day for these advertisements. Although
6 the Committee may not spend this amount every day, the Committee asks the
7 Commission to assume that the Committee will spend a maximum of \$2,000 per day.

8 The Committee seeks to exclude the costs of placing its advertisements on
9 Facebook from its 24-hour and 48-hour reports of independent expenditures. The
10 Committee also seeks to avoid attributing the costs of placing these advertisements to
11 various States' Presidential preference primary elections on its monthly reports. The
12 Committee claims that meeting these obligations "constitutes a significant legal
13 encumbrance upon [the Committee's] First Amendment rights," in that it will require it to
14 determine, for every advertisement placed: 1) the State primary elections to which the ad
15 applies; 2) whether that advertisement falls within that particular primary election's 24-
16 or 48-hour reporting period; and 3) the cost of placing each individual advertisement.

17 ***Questions Presented***

18 1. *May the Committee exclude the cost of placing each independent*
19 *expenditure advertisement on Facebook from the calculation of costs included in its 24-*
20 *and 48-hour reports, provided such cost is included in the Committee's regular monthly*
21 *reports?*

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

4 ***Legal Analysis and Conclusions***

5 1. *May the Committee exclude the cost of placing each independent*
6 *expenditure advertisement on Facebook from the calculation of costs included in its 24-*
7 *and 48-hour reports, provided such cost is included in the Committee's regular monthly*
8 *reports?*

9 No, the Committee may not exclude the actual costs of independent expenditure
10 advertisements placed on Facebook from the calculation of its expenses included on its
11 24-hour and 48-hour reports.

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

15 2 U.S.C. 431(17)(A) and (B); 11 CFR 100.16(a).

16 Under the Act and Commission regulations, a political committee that makes
17 independent expenditures aggregating \$1,000 or more after the 20th day, but more than 24
18 hours, before the date of a given election, must file a report describing the expenditures
19 within 24 hours. 2 U.S.C. 434(g)(1)(A); 11 CFR 104.4(c). The 24-hour filing period
20 begins when the independent expenditure is publicly distributed or otherwise publicly
21 disseminated. 11 CFR 104.4(c). Reports must be filed by 11:59 p.m. of the day
22 following the date on which an advertisement is publicly disseminated. *Id.* Additional
23 reports must be filed within 24 hours each time the political committee makes

1 independent expenditures aggregating \$1,000 or more with respect to the same election
2 as that to which the initial report relates. 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). Reports must be filed by 11:59 p.m. of the second day following the date on
9 which an advertisement is publicly disseminated. *Id.* Additional reports must be filed
10 within 48 hours each time the political committee makes additional independent
11 expenditures aggregating \$10,000 or more with respect to the same election as that to
12 which the initial report relates. 2 U.S.C. 434(g)(2)(B); 11 CFR 104.4(b)(2).

13 The Act does not empower the Commission with general statutory authority to
14 waive reporting obligations. *See* Advisory Opinion 1994-35 (Alter). Under the Act, the
15 Commission has specific authority to waive reporting requirements only in connection
16 with special elections. *See* 2 U.S.C. 434(a)(9). *Cf.* Advisory Opinion 1995-44 (Forbes
17 for President) (interpreting the reporting requirements of the Act not to require 48-hour
18 notification reports of contributions received).

19 Independent expenditures are aggregated with respect to a given election
20 regardless of which candidate is identified in the communication. 11 CFR 104.4(a),
21 (b)(1)-(2), and (c); *see* Advisory Opinion 2003-40 (Navy Veterans) (concluding that two
22 separate advertisements for the same election, one favoring Candidate A (costing \$9,000)
23 and the other favoring Candidate B (costing \$4,000), had to be aggregated for purposes of

1 filing a 48-hour report because the advertisements were related to the same election); *see*
2 *also* Explanation and Justification, Bipartisan Campaign Reform Act of 2002 Reporting;
3 Coordinated and Independent Expenditures, 68 FR 404, 406 (January 3, 2003). For
4 purposes of aggregating independent expenditures, each State’s Presidential primary
5 election is considered a separate election. *See* Advisory Opinion 2003-40 (Navy
6 Veterans).

7 The treasurer of a political committee “shall keep an account of . . . the name and
8 address of every person to whom any disbursement is made, the date, amount and
9 purpose of the disbursement, and the name of the candidate and the office sought by the
10 candidate, if any, for whom the disbursement was made. . . .” 2 U.S.C. 432(c)(5); *see*
11 *also* 11 CFR 102.9(b)(1)(i)-(iv). In performing recordkeeping duties, the treasurer must
12 use his or her best efforts to obtain, maintain and submit the required information.
13 2 U.S.C. 432(i); 11 CFR 102.9(d).

14 Under the circumstances described in your request, the calculation for
15 advertisements that do not reference or target a specific election is straightforward. The
16 Committee would simply divide the cost of placing each advertisement by the number of
17 upcoming primary elections.¹ For example, an advertisement for which the Committee
18 paid \$2,000 that was placed before the first primary election or caucus would relate to all
19 subsequent presidential primary elections. Therefore, the cost of this advertisement
20 would be divided by the total number of subsequent presidential primary elections.

¹ As noted above, each State’s Presidential primary election is considered a separate election for purposes of aggregating independent expenditures.

1 The Committee may choose, of course, to target certain advertisements to specific
2 elections. For example, the Committee could include in the advertisement language
3 identifying a specific State's election or the date of an election. Additionally, Facebook
4 provides the ability to limit an advertisement so that it appears only in certain geographic
5 locations.² In these instances, the cost of the advertisement would be divided by the
6 number of states to which the advertisement relates. For example, an advertisement that
7 encourages people vote for a specific candidate on April 24, 2012 would be divided by
8 five, because five States (Connecticut, Delaware, New York, Pennsylvania, and Rhode
9 Island) will be holding primary elections on that day. Thus, assuming the advertisement
10 cost \$2,000, the cost per State primary election would be \$400.³

11 Facebook charges its advertisers once per calendar day for each advertisement.⁴
12 Thus, for example, an advertisement running on February 5, 2012 will be billed at the end
13 of that day regardless the number of hours it was accessible on that day. In the case of a
14 24-hour report, the Committee will have at least one full day to determine that it has

² Facebook allows advertisers to limit the exposure of their advertisements to certain geographic regions by selecting criteria which must be established before the advertisement will appear, such as zip code. *See* <http://www.facebook.com/help/?page=203882222982239> (last accessed December 21, 2011).

³ The Commission notes that Advisory Opinion 1995-44 (Forbes for President) is inapposite here. In Advisory Opinion 1995-44 (Forbes for President), the Commission concluded that the statute did not require a Presidential candidate's principal campaign committee to 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 primary elections follow one another in rapid succession, it can be difficult to attribute numerous contributions received to a particular primary election particularly when those contributions may be used to pay expenses not tied to any particular State or that benefit the campaign nationally and the Commission declined to interpret the statutory reporting obligation in a way that would lead to an arbitrary result. In contrast, here, for those advertisements that the Committee places on Facebook that are geographically limited, the Committee will know in advance the elections to which the advertisements relate; and, for those advertisements that are not geographically limited, it is neither difficult nor especially burdensome to attribute an equal amount to each subsequent election.

⁴ *See* <http://www.facebook.com/help/?page=121272714621547> (last accessed December 20, 2011).

1 reached the \$1,000 threshold and to file the report.

2 In sum, the obligation to file 24-hour and 48-hour reports for advertisements
3 placed on Facebook is not onerous, and will further the statutory goal of providing
4 transparency at critical times before elections.⁵ Accordingly, the Commission concludes
5 that the Committee is required to file such reports as set forth in the Act and the
6 Commission's regulations.

7 2. *May the Committee report the actual monthly costs of its independent*
8 *expenditure advertisements on Facebook on its regular monthly reports without*
9 *attributing these costs to the various States' Presidential primary elections?*

10 No, the Committee may not report the actual monthly costs of its independent
11 expenditure advertisements on Facebook on its regular monthly reports without
12 attributing these costs to the various States' Presidential primary elections.

13 Every political committee must file reports of its receipts and disbursements.
14 2 U.S.C. 434(a)(1); 11 CFR 104.1(a). Nonconnected committees shall file either
15 quarterly reports, or monthly reports which shall be filed no later than the 20th day after
16 the last day of the month. *See* 2 U.S.C. 434(a)(4)(B); 11 CFR 104.5(c)(3).
17 Nonconnected committees must disclose their independent expenditures on their monthly
18 or quarterly reports. 2 U.S.C. 434(b)(4)(H)(iii); 11 CFR 104.3(b)(3)(vii). These reports
19 must disclose all independent expenditures aggregating less than \$10,000 with respect to

⁵ *See Citizens United v. FEC*, 130 S. Ct. 876, 914-15 (2010) (recognizing that disclosure requirements “do not prevent anyone from speaking” and that “the public has a right to know who is speaking about a candidate shortly before an election”); and *McConnell v. FEC*, 540 U.S. 93, 200-01 (2003) (“Given the relatively short timeframes in which electioneering communications are made, the interest in assuring that disclosures are made promptly and in time to provide relevant information to the voters is unquestionably significant.”)

1 a given election any time during the calendar year up to and including the 20th day before
2 an election. 11 CFR 104.4(b)(1).

3 As noted above, for purposes of aggregating independent expenditures, each
4 State's Presidential primary election is considered a separate election. *See* Advisory
5 Opinion 2003-40 (Navy Veterans). The Committee will file monthly reports in 2012.

6 The examples and calculations set forth above demonstrate how the Committee
7 must determine its costs for placing independent expenditure advertisements on Facebook
8 with respect to the various States' primary elections. Once the Committee has done so, it
9 must aggregate costs for each State's Presidential primary election during the reporting
10 period and list the States and amounts per State on Form 3X, Schedule E. Because the
11 Committee does not have to file its monthly report until the 20th day after the last day of
12 the month, it has sufficient time to aggregate its costs and report them to the Commission.
13 These statutory reporting obligations further the important goal of providing transparency
14 at critical times during the Presidential primary season.

15 This response constitutes an advisory opinion concerning the application of the
16 Act and Commission regulations to the specific transaction or activity set forth in your
17 request. *See* 2 U.S.C. 437f. The Commission emphasizes that, if there is a change in any
18 of the facts or assumptions presented, and such facts or assumptions are material to a
19 conclusion presented in this advisory opinion, then the requestor may not rely on that
20 conclusion as support for its proposed activity. Any person involved in any specific
21 transaction or activity which is indistinguishable in all its material aspects from the
22 transaction or activity with respect to which this advisory opinion is rendered may rely on
23 this advisory opinion. *See* 2 U.S.C. 437f(c)(1)(B). Please note that the analysis or

1 conclusions in this advisory opinion may be affected by subsequent developments in the
2 law, including, but not limited to, statutes, regulations, advisory opinions, and case law.
3 The cited advisory opinions are available on the Commission's website, www.fec.gov, or
4 directly from the Commission's Advisory Opinion searchable database at
5 <http://www.fec.gov/searchao>.

6 On behalf of the Commission,

7
8
9 Caroline C. Hunter
10 Chair

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