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Federal Election Commission
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VIA FACSIMILE: (202) 219-3923

Re: RR 16L-21; Response from Right to Rise USA

Dear Mr. Jordan:

We are writing this letter on behalf of Right to Rise USA ("RTR") in response to the above-referenced referral (the "Referral") from the Reports Analysis Division ("RAD") to the Office of General Counsel ("OGC"). The Referral takes issue with RTR's reporting of a number of independent expenditures during the 2016 Republican Presidential Primary, and suggests that RTR's method of reporting may be in violation of the Federal Election Campaign Act of 1971, as amended (the "Act"), and the Federal Election Commission's ("Commission") regulations. We disagree.

Specifically, RAD's referral cites RTR for "failure to provide the election state for twenty-one (21) independent expenditures totaling $16,120,606.50, which were made on behalf of a presidential candidate for 2016 primary elections," and states that "the Committee failed to provide the election state on the corresponding twenty-two (22) independent expenditures totaling $16,123,716.50; disclosed on its 2015 Year End Report, 2016 February monthly report and 2016 March Monthly Report." Lastly, the Referral maintains that RTR "also failed to timely file one (1) 48-Hour Report supporting fifty (50) independent expenditures totaling $41,745.17 disclosed on the 2015 Year-End Report."

We find it remarkable that RAD and OGC continue to push an application of the Act's reporting provisions that the Commission has already acknowledged is arbitrary and based on legal fiction. This illogical and burdensome interpretation is not supported by any reasonable reading of either the statute or the regulations, and results in entirely inaccurate and meaningless statistics that would mislead the public. This is precisely why, on January 17, 2014, the

Commission sought public comment on three alternative drafts of an interpretive rule designed to clarify how and when political committees report independent expenditures for Presidential primary elections that do not reference or target a particular state.[1] For example, in Draft B of the interpretive rule, the Commission concedes:

> Requiring committees to attribute the expenditure equally to each State in which it runs is **arbitrary and impracticable**. Rather, attributing a portion of each nationwide independent expenditure to various States for purposes of the reporting thresholds **is precisely the sort of bookkeeping requirement that the Commission rejected in Advisory Opinion 1995-44 (Forbes for President)**.
>
> In addition, the purpose of the Act's independent expenditure disclosure provisions is to ensure that the public receives accurate information regarding the financing of express advocacy about candidates. **Requiring political committees to divide a single expenditure into confusing and overlapping entries on multiple reports would not further that purpose**. To the contrary, **such reporting would misrepresent the nature of the expenditure being reported**: A single nationwide advertising campaign would appear in the Commission's records as a series of much smaller and more targeted expenditures, thereby potentially misleading the public as to the true nature of the reported spending.[2]

While the Supreme Court has consistently upheld the facial constitutionality of reporting and disclosure requirements (*McConnell v. FEC*, 540 U.S. 93,196 (2003); *Buckley v. Valeo*, 424 U.S. 1, 60 (1976); *SpeechNOW.org v. FEC*, 599 F.3d 686, 698 (D.C. Cir. 2010)), it has recognized that measures burdening political speech "by design or inadvertence" (*Citizens United v. FEC*, 558 U.S. 310, 340 (2010)) are subject to strict scrutiny and must be narrowly tailored to the service of a compelling government interest. *Id.* at 340; *FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 464 (2007); *Buckley*, at 25.

The Commission's current guidance for the reporting of nationwide ad buys is not narrowly tailored and does nothing to further a compelling government interest—it instead only results in meaningless and inaccurate statistics. The Commission's failure to adopt a reasonable rule for the reporting of nationwide ad buys is a disservice to the regulated community, and groups seeking to make nationwide ad buys should not be punished for the Commission's inaction. We urge the Commission to dismiss RAD's arbitrary Referral, or any resulting enforcement matter, and finally implement a solution to this reporting problem that has now been an issue for the past several election cycles.

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[1] *FEC Record: Regulations*, Comment Sought on Disclosure of Independent Expenditures in Presidential Primaries, Jan. 30, 2014, *available at* http://www.fec.gov/pages/fecrecord/2014/february/nationwideiereportingdrafts.shtml.
[2] Reporting Nationwide Independent Expenditures in Presidential Primary Elections (2015), Draft B at 4, *available at* http://www.fec.gov/law/policy/nationwideiereporting/draftnationwideiereporting.pdf.

Right to Rise USA Should Not Be Required To Itemize Its Nationwide Ad Buys By State

All of the 22 independent expenditures cited in the Referral were national cable media buys on national cable news stations like Fox News and CNN. Unlike broadcast media buys, made on a local-affiliate basis, these buys were aired to every cable news subscriber nationwide. A combination of differing pricing models and the fact of national airing make it impossible to itemize such a buy on a per-state basis. Taking into account the unique nature of Presidential primaries, with multiple elections in short periods of time, it would be extraordinarily and unnecessarily burdensome to attempt to take into account every state's 24/48 hour deadline when dealing with a national buy.

Statutory and Regulatory Basis for Independent Expenditure Reporting

52 U.S.C. § 30104, governing expenditure reporting, authorizes the collection of 24/48 hour reports. That section also requires certain information be collected with each report. The requirements, found in 52 U.S.C. § 30104(b)(6)(B)(iii), read:

> (B) for any other political committee, the name and address of each—
> (iii) person who receives any disbursement . . . in connection with an independent expenditure by the reporting committee, together with the date, amount, and purpose of any such independent expenditure and a statement which indicates whether such independent expenditure is in support of, or in opposition to, a candidate, as well as the name and office sought by such candidate.

Expanding on this disclosure provision, 11 C.F.R. § 104.3(b)(3), governing reporting of expenditures by non-authorized committees, states:

> (vii)(B) For each independent expenditure reported, the committee must also provide a statement which indicates whether such independent expenditure is in support of, or in opposition to a particular candidate, as well as the name of the candidate and office sought by such candidate (including State and Congressional district, *when applicable*), . . . (italics added)

As a threshold matter, it is perhaps obvious to state that reporting the State and Congressional district is not required in every report. A plain reading of the regulation simply states the information is required "when applicable." The information thus cannot be mandatorily required for every report, and no mention is made of a reading requiring State and Congressional district to be made in all cases. Therefore, if the candidate to be identified does not require identification of the State or Congressional district, it is simply not applicable. As an obvious example, an election for a U.S. Senate seat need not include Congressional district.

To determine whether the requirement is applicable in this case, the requirement should be read in the context of the entire regulation and statute. The overall subsection, §104.3(b), asks for a statement of whether the independent expenditure is in support of, or opposition to, a particular candidate. The request for "State and Congressional district, when applicable," only comes subordinate to this initial requirement. Likewise, the governing statute, 52 U.S.C. § 30104 (b)(6)(B)(iii), seeks the name and office sought by the candidate against or for whom the advertising is aired. A fair reading of these two sentences indicates the goal is candidate identification, rather than strictly, identification of where the money is being spent.

By this reasoning, State need not be identified in the context of a Presidential primary, as a Presidential candidate is, of course, running for a national office. Although the Commission's practice is to treat each state's primary as a separate election, *see* Advisory Opinion 2003-40 (Navy Veterans), the reporting requirements for identification of a state do not logically follow in this instance. Of course, each primary election is a separately administered election with potentially different candidates on the ballot and with different division of delegates or counts at stake. However, if the purpose of the expenditure requirement is to identify the office sought by the candidate, the listing of state should not be compelled in this instance when the actual office sought is not a state or congressional district, but national.

Of course, there are sound public policy reasons to enumerate the state in which expenditures are made, if known. However, in the instance of reporting national cable media buy expenditures, as explained below, listing of state for expenditure reports makes no sense, generates inaccurate and meaningless statistics, and is not "applicable" for the purposes of reporting either.

Facts Underlying a Finding of "Inapplicable"

As part of its independent expenditure activity, RTR made numerous national cable media ad buys for the purpose of airing commercials referring to a Presidential candidate. All of the applicable information required by the 24/48 hour reports, and the corresponding monthly reports, was reported to the Commission in the appropriate timeline.

National cable media ad buys consist of the purchase of national viewing time directly from a cable network, such as Fox News or CNN. Cable networks run television programming and advertisements via subscription on a national basis via co-axial or fiber-optic cable that must be installed and paid for in each viewing household. Any airtime purchased from a national cable network will be available to every subscriber to that network in the nation.

This is in contrast to traditional broadcast network programming, which is broadcast and aired wirelessly directly to televisions' internal receivers or antennas. That said, a broadcast company does not air its programming directly, or on a national basis. Rather, programming is actually broadcast through locally owned and operated affiliate stations, which then broadcast to major media markets. Thus, it is possible under this decentralized system to purchase airtime from one or several local affiliates simultaneously and target specific states or media markets.

Note that a "media market" is often not contiguous with a state, and a single state may include multiple media markets. It is, though, possible to purchase national airtime from a broadcast network that is aired to all affiliates simultaneously.

Like purchasing anything in bulk, the cost of national cable airtime differs significantly from purchasing airtime on a national broadcast network level, or local affiliate level, or even via satellite television. For any purchase of viewing time, cable or broadcast, local or national, there is no "set rate" of airtime costs, but rates that often change daily based on demand for the station, time of airing, and competition from other potential purchasers.

Thus, there is no way to accurately calculate the cost per-state of a national cable expenditure by either simple division, as the rates per market vary considerably, or by attempting to compare it to the costs of prices on a per market basis, as the cost for cable and broadcast airtime also differs with the medium. Moreover, although local stations may retain on file the general baseline price for different shows and stations, it remains effectively impossible to calculate the equivalent costs of purchasing such airtime after the fact.

Non-Application to the Reporting Requirements

Based on these facts, RTR contends that when purchasing airtime for a national cable media buy, itemizing the expenditure on a per-state basis is not applicable for the purposes of the regulation. First, of course, the purchase was not made to air in any specific state, nor target a specific state, but to air nationally with respect to a national candidate.

More importantly, the purpose of the Act and the Commission's regulations are, in part, to provide accurate disclosure. As discussed above, it is impossible to provide any meaningfully accurate per-state expenditure number. To compare a national cable media buy with a more traditional per-market broadcast affiliate buy is meaningless. Especially because local costs differ, it is certain any per-state calculation based on simple division would be grossly inaccurate. For example, the cost for many states with small media markets would likely be over-estimated. On the flip side, comparing a divided cost to the expensive New York media market would undoubtedly grossly under-estimate actual price. Intra-state differences, such as differences between the Philadelphia and Scranton media market in Pennsylvania, further makes simple division a bad way to attempt to estimate true per-state costs.

The Commission's current proposed solution, modeled on Advisory Opinion 2011-28 (Western Representation PAC), to merely divide the amount of the expenditure by the number of states with competitive primaries, would also create a meaningless and dishonest estimate. Wholly setting apart the factual impossibility of using division to estimate expenditures, the Commission's solution introduces a further complication by dividing the expenditure by too few units. As cable commercials air nationally, simply dividing the expenditure by the number of upcoming competitive primary states ignores the fact the ad is also airing in states where the primary has finished. This likewise both underestimates and overestimates the expenditure per-state.

The goal of both the statute and regulations is to provide accurate reporting of spending amounts, and consequently, an interpretation of the regulation requiring mathematics producing such an arbitrary figure cannot be required or applicable.

Additionally, because RAD requests this information on all 24/48 hour reports, producing such a number, even if possible, would be difficult and unduly burdensome. First, the mathematics of attempting to produce even estimated per-state costs is daunting, and certainly burdensome when required within a 24 hour deadline. Second, because each primary election in a Presidential race is treated as a separate election, this could potentially expose an entity to an absurd number of shifting reporting deadlines. For a single day's buy, this could, for example, encompass ten primary states within the 24 hour deadline, and another fifteen within the 48 hour deadline. If the buy is for a week instead—the usual length of time of a buy— several of those states could shift from a 48 hour to 24 hour reporting deadline.

In Advisory Opinion 1995-44, (Forbes for President), the Commission concluded that interpreting contribution reporting requirements in the context of a multi-primary Presidential election cycle to require nationally applied 24/48 hour reports would force a campaign to endure multiple, overlapping deadlines for reporting that would be "difficult or arbitrary."[3] The Commission instead concluded the entity did not have to file such reports on a 24/48 hour cycle. The conclusion that a national application of a 24/48 hour reporting regulation when applied across a national primary election with multiple elections and deadlines is "difficult [and] arbitrary" is sound, and demonstrates the Commission's current interpretation of the regulations is likewise arbitrary and capricious.

The Commission's Reliance On Advisory Opinion 2011-28 Is Misplaced

The Commission currently relies on AO 2011-28 as justification for requiring committees to itemize nationwide media buys on a per-state basis. Reliance on this Advisory Opinion is misplaced and an incorrect application of the regulations, as the facts underlying AO 2011-28 differs significantly enough to render the reasoning inapplicable to the current case.

In AO 2011-28, Western Representation PAC asked the Commission whether it could exclude the cost of national internet advertising buys from the 24/48 hour reports, and whether it could report these costs without itemizing them on a per-state basis. The Commission answered no to both questions. However, based on the way costs were calculated for national internet advertising, the Commission permitted Western Representation PAC to estimate the costs through simple division for the purposes of the 24/48 hour reports, and then report the actual per-state costs in monthly or quarterly reports.

Two critical differences exist making application of AO 2011-28 improper here. First, as discussed above, unlike a national internet buy, the actual per-state expenditures of a cable buy

[3] Advisory Opinion 1995-44 (Forbes for President), at 2.

can never be calculated. The requirement of equal division per-primary state in AO 2011-28, in contrast, was not designed to reveal the actual cost of expenditure, but to serve as a "placeholder" figure until the actual per-state costs could be calculated and reported. Such an approach makes no sense in this case where the upfront costs are definitively known, but cannot be itemized into a per-state approach.

Second, the Commission concluded Western Representation PAC was permitted to list estimates until the monthly report to accommodate the fact the per-state calculations could take several days to create and calculate. In contrast, in this case, RAD is requesting the per-state itemization be included on all 24/48 hour reports. The Commission specifically stated it was unconcerned about requiring such detailed expenditure reporting, with respect to the shifting deadlines in a primary election, because reporting the expenditures could be "neither difficult nor especially burdensome" with a monthly deadline.[4] Here, of course, a calculation is required within the 24/48 hour timeline, a short enough time period to render reporting difficult and burdensome.

"Guesstimating" Does Not Result in Accurate Reporting

The Act and Commission regulations promulgated to require 24/48 hour reports is based on principles of meaningful candidate identification and accurate expenditure reporting. Neither is applicable here based on the facts. In a Presidential contest, the office sought is national, and not amenable to identification by state or congressional district. Listing the states in which an ad buy airs is a poor fit for the underlying goal of ensuring a candidate targeted or supported by media buys is properly identified. Likewise, as the cost structure and basic facts underlying a national cable media buy differ significantly from traditional per-market broadcast buys, there is no way to calculate a meaningful—or even close to—expenditure figure. Simply "guesstimating" by dividing the expenditure into parts does not serve at all the goal of accurate reporting.

RTR Made Best Efforts To File All Required Independent Expenditure Reports

The Referral suggests that RTR failed to file one (1) 48-hour independent expenditure report supporting fifty (50) independent expenditures totaling $41,745.17. As mentioned in the Referral, RTR filed a Form 99 Miscellaneous Report on May 18, 2016 addressing this issue, which stated: "The independent expenditures cited in the attachment did not aggregate to $10,000 or more with respect to any given election. Accordingly, RTR was not required to file 48-hour independent expenditure reports for these disbursements." We stand by this Form 99 explanation.

Even if OGC makes a determination that RTR did fail to file the cited independent expenditure report, which it should not, the dollar amount of the alleged missed report amounts to less than one percent of RTR's independent expenditures made during the 2015 calendar year.

[4] Advisory Opinion 2011-28 (Western Representation PAC), at 5.

We therefore would urge the Commission to use its prosecutorial discretion to dismiss any potential enforcement matter stemming from this alleged missed report.

Conclusion

In light of the foregoing, we respectfully request that OGC and the Commission recognize the legal and factual insufficiency of the Referral, and immediately dismiss it. Please do not hesitate to contact us directly at (202) 772-0915 with any questions.

Respectfully submitted,

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