

FEDERAL ELECTION COMMISSION
FIRST GENERAL COUNSEL'S REPORT

RAD Referral: 16L-21
DATE REFERRED: November 21, 2016
DATE OF NOTIFICATION: November 28, 2016
RESPONSE RECEIVED: January 13, 2017
DATE OF ACTIVATION: January 13, 2017

ELECTION CYCLE: 2016
EXPIRATION OF SOL:
Earliest: October 21, 2020
Latest: March 20, 2021

15 **SOURCE:** Internally Generated
16 **RESPONDENTS:** Right to Rise USA and Charles R. Spies
17 in his official capacity as treasurer
18
19 **RELEVANT STATUTES AND**
20 **REGULATIONS:** 52 U.S.C. § 30104(b)(6)(B)(iii)
21 52 U.S.C. § 30104(g)
22 11 C.F.R. § 104.3(b)(3)(vii)(B)
23 11 C.F.R. § 104.4

24 **INTERNAL REPORTS CHECKED:** Disclosure Reports
25 RAD Referral Materials

26 FEDERAL AGENCIES CHECKED: None

27 I. INTRODUCTION

28 The Commission’s Reports Analysis Division (“RAD”) referred Right to Rise USA and
29 Charles R. Spies in his official capacity as treasurer (“RTR”), an independent-expenditure-only
30 committee, for two apparent reporting violations stemming from its disclosure of independent
31 expenditures made in support of Jeb Bush, a candidate in the 2016 Republican primary
32 elections.¹ First, RAD referred RTR for failing to specify the election state on its 48-hour
33 independent expenditure reports disclosing \$16,123,716.50 that RTR spent on national cable

¹ See Memorandum from Patricia C. Orrock, Chief Compliance Officer, FEC, to Lisa Stevenson, Acting General Counsel, FEC (Nov. 21, 2016).

1 media buys. Second, RAD referred RTR for its failure to timely file one 48-Hour Report
2 supporting 50 independent expenditures totaling \$41,745.17.

3 In its Response to the Referral, RTR asserts that it should not be required to itemize its
4 nationwide ad buys by state, arguing that the reporting requirements for itemizing expenditures
5 on a per-state basis are not applicable when making a national cable media buy for a Presidential
6 race.² With respect to the late-filed report, RTR asserts that it was not required to file a 48-hour
7 report for the disbursements because they did not aggregate to \$10,000 or more with respect to
8 any given election, and urges the Commission to dismiss the allegation.³

9 We do not recommend that the Commission open a Matter Under Review in connection
10 with this referral. As discussed below, the language of the current rules does not provide clear
11 guidance on how election state information for nationwide advertisements should be disclosed in
12 independent expenditure reports. It also appears that RTR otherwise complied with the Act's
13 reporting requirements regarding these reports. Thus, we recommend that the Commission
14 exercise its prosecutorial discretion and take no action with respect to the allegation that RTR
15 failed to provide election state information in such reports. Further, because the late-filed report,
16 standing alone, meets the threshold for referral to the Office of Alternative Dispute Resolution
17 ("ADRO") but not the Office of General Counsel, we recommend that the Commission refer that
18 apparent violation to ADRO for further action.⁴

² Resp. at 3.

³ *Id.* at 7.

⁴ The late-filed report was included in the referral to OGC pursuant to the RAD Review and Referral Procedures to avoid duplicate consideration of matters. *See* Cover Memorandum, Referral, dated Nov. 21, 2016.

1 **II. FACTUAL BACKGROUND**

2 From November 12, 2015, through June 22, 2016, RAD sent RTR multiple Requests for
3 Additional Information ("RFAI") regarding missing election state information for nationwide
4 media buys.⁵ RTR filed the same response for each RFAI:

5 These were expenditures for a national cable media buy on the Fox News
6 Network that were not specific to any state. Unlike broadcast media buys
7 made on a local-affiliate basis, these buys were aired to every Fox News
8 cable subscriber nationwide. A combination of differing pricing models and
9 the fact of national airing makes it impossible to itemize such a buy on a
10 per-state basis. We urge the Commission to provide clarity to groups
11 participating in the 2016 Presidential primary elections and adopt a reasonable
12 interpretive rule governing these types of national advertisements.⁶

13 RTR's response to the Referral includes these same arguments. RTR also asserts that the
14 reporting requirements for 24- and 48-Hour Reports should not apply to the nationwide ad buys
15 in this matter because the ad buys were in support of a candidate running for a national office,
16 not a State or Congressional office.⁷ In addition, RTR asserts that the Commission incorrectly
17 relies on Advisory Opinion 2011-28 (Western Representation PAC) in support of its position that
18 nationwide cable ad buys require election state information, as that AO dealt with national
19 internet advertising, which it claims is significantly different from the cable ads in the current
20 matter.⁸

21 With respect to the late-filed 48-Hour Report that was referred, RTR maintains that no
22 report was required because the relevant expenditures did not exceed \$10,000 with respect to any

⁵ Referral at 2-10.

⁶ *Id* at 3-10.

⁷ Resp. at 3.

⁸ *Id.* at 6-7.

1 given election.⁹ Alternatively, RTR argues that the Referral should be dismissed because the
2 alleged unreported activity equaled less than one percent of RTR's independent expenditures in
3 2015.¹⁰

4 **III. LEGAL ANALYSIS**

5 **A. RTR's Failure to Include Election State Information Does Not Warrant**
6 **Further Enforcement Proceedings**

7 An unauthorized political committee that makes independent expenditures must report
8 them in its regularly scheduled disclosure reports.¹¹ In addition, a political committee that makes
9 independent expenditures aggregating \$10,000 or more at any time up to and including the 20th
10 day before the date of a given election must file a report describing those expenditures within 48
11 hours of their dissemination.¹² The report must disclose all independent expenditures leading up
12 to the \$10,000 threshold.¹³

14 The 48-hour filing requirements begin to run when the independent expenditures
15 aggregating to at least \$10,000, are "publicly distributed or otherwise publicly disseminated."¹⁴
16 For purposes of aggregating independent expenditures, each state's presidential primary election
17 is a separate election.¹⁵ When filing independent expenditure reports, a committee, other than an
18 authorized committee, must "provide a statement which indicates whether such independent
19 expenditure is in support of, or in opposition to a particular candidate, as well as the name of the

⁹ *Id.* at 7.

¹⁰ *Id.*

¹¹ See *id.* § 30104(b)(4)(H)(iii); 11 C.F.R. § 104.3(b)(3)(vii).

¹² 52 U.S.C. § 30104(g)(2); 11 C.F.R. § 104.4(b)(2).

¹³ 11 C.F.R. § 104.4(f); Instructions for FEC Form 05 and Related Schedules.

¹⁴ 11 C.F.R. §§ 104.4(b)(2), , (f); 109.10 (c).

¹⁵ Advisory Op. 2003-40 at 4 (Navy Veterans) ("AO 2003-40").

1 candidate and office sought by such candidate (*including State and Congressional district, when*
2 *applicable).*”¹⁶

3 The Commission’s regulations do not specifically address how the public distribution
4 criteria and other reporting requirements apply to independent expenditures made in the context
5 of a presidential primary election and distributed in multiple states. In AO 2011-28 (Western
6 Representation PAC), however, the Commission considered this question and determined that a
7 committee could not exclude from its per state expenses the amount it spent for national
8 advertisements on Facebook relating to a presidential primary.¹⁷ For such advertisements that
9 did not reference or target a specific state or primary election, the Commission instructed the
10 committee to “divide the cost of placing each advertisement by the number of upcoming primary
11 elections”¹⁸ and use the resulting amounts to determine whether it should file 24- and 48-hour
12 reports and for which states.¹⁹

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¹⁶ 11 C.F.R. § 104.3(b)(3)(vii)(B)(emphasis added); *see also* 52 U.S.C. § 30104(b)(6)(B)(iii).

¹⁷ AO 2011-28 at 2.

¹⁸ *Id.* at 3-4.

¹⁹ *Id.* at 4.

1 Since the Commission's issuance of AO 2011-28 , however,
2 the Commission has taken steps to revisit the approach taken in that advisory opinion and is
3 currently considering a rulemaking on this issue.²³

4 Here, RTR did not disclose the election state information for its independent expenditures
5 for its nationwide media buys. Nevertheless, unlike the requestor in AO 2011-28, which sought
6 to exclude all costs of placing national advertisements from its 24- and 48-hour reports, RTR did
7 not exclude any costs from its reports and included all of the information required by the
8 regulations, except for the election state information, and specified that these were national ad
9 buys. Under these circumstances and absent clear guidance as to how committees such as RTR
10 should identify the election state for multistate independent expenditures, we recommend that the
11 Commission exercise its prosecutorial discretion and decline to pursue RTR's failure to include
12 election state information in its 48-Hour Reports.

13 **B. RTR's Failure to Timely File its Independent Expenditure Report**

14
15 On December 3, 2015, RTR filed a 48-Hour Report disclosing independent expenditures
16 totaling \$100,000 — \$10,000 for each of the 2016 primary elections held in the ten states listed

²³ The Commission has considered proposals addressing this issue, but it has not promulgated a final rule. The proposals include a draft Interpretive Rule on Reporting Nationwide Independent Expenditures in Presidential Primary Elections (Agenda Document No. 14-7, Jan. 15, 2014) and a draft Notice of Proposed Rulemaking for Reporting Multistate Independent Expenditures and Electioneering Communications (Agenda Document No. 15-50-A, Sept. 29, 2015). But the Commission did not reach consensus to adopt either an Interpretive Rule or the NPRM. See Minutes of Open Meeting of the Federal Election Commission for Thursday, December 17, 2015 (Agenda Document No. 16-04-A). Recently, we have learned that RAD has been working with the Commission to try to finalize an NPRM on the Nationwide IE issue, and that the matter will be on an open meeting agenda in the near future.

1 in the referral.²⁴ However, the 48-Hour Report did not include \$41,745.17 in independent
2 expenditures that were made before December 1 — those expenditures were first disclosed on
3 the 2015 Year-End Report filed January 31, 2016.²⁵ Contrary to RTR's assertion, it was required
4 to report these expenditures once it met the \$10,000 per election reporting threshold, and by not
5 doing so, RTR violated the reporting requirements of 52 U.S.C. § 30104(g)(2).²⁶ However,
6 because this violation, standing alone, does not meet the referral threshold for OGC, we
7 recommend that the Commission refer the late-filed report to ADRO as it qualifies for such a
8 referral.²⁷

9 **IV. RECOMMENDATIONS**

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11 1. Decline to open a MUR in RR 16L-21 as to Right to Rise USA and Charles R.
12 Spies in his official capacity as treasurer for failure to include election state
13 information in its 48-Hour disclosure reports;

14 2. Refer the late-filed report by Right to Rise USA to the Alternative Dispute
15 Resolution Office.

²⁴ The states were Alabama, Arkansas, Georgia, Massachusetts, Michigan, Oklahoma, Tennessee, Texas, Virginia, and Vermont. *See 24/48 Hour Report of Independent Expenditures (Schedule E)*, filed on 12/03/2015 (Image# 201512039004146143).

²⁵ *See Referral at 11, Chart (2015 Year-End report, received January 31, 2016), Attach. 4.*

²⁶ *See also 11 C.F.R. § 104.4(b)(2), (f); Instructions for FEC Form 05 and Related Schedules.*

²⁷ *See supra n.4. 2015-2016 RAD Review and Referral Procedures for Unauthorized Committees (Standard 7) at 71.*

1 3. Approve the appropriate letter.

2 Lisa J. Stevenson
3 Acting General Counsel

4 Kathleen M. Guith
5 Associate General Counsel for Enforcement

6 Dated: 6.2.17

7 BY: Stephen Gura
8 Stephen Gura
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