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2007 NOV 15 PM 2:36

November 15, 2007

Carol A. Laham  
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**VIA HAND DELIVERY**

Federal Election Commission  
Office of General Counsel  
999 E Street, NW  
Washington, DC 20463

AOR 2007-33

RECEIVED  
FEDERAL ELECTION  
COMMISSION  
OFFICE OF GENERAL  
COUNSEL  
2007 NOV 15 P 3:09

**Re: Advisory Opinion Request**

Dear Commissioners:

On behalf of the Club for Growth PAC ("Club PAC"), we respectfully request an advisory opinion from the Federal Election Commission ("FEC" or "Commission") pursuant to 2 U.S.C. § 437f, regarding spoken stand-by-your-ad disclaimers.

In short, Club PAC plans to run ten- and 15-second independent expenditure television ads. The application of the disclaimer requirement would supplant the intended speech, rendering it ineffective. Thus, Club PAC wishes to dispense with or, at the very least, greatly truncate the burdensome spoken stand-by-your-ad disclaimers.

**FACTS**

**A. Background on Club PAC**

Club PAC is the separate segregated fund of the Club for Growth ("Club") and is a multicandidate committee under the FEC's regulations. The Club, in turn, is an incorporated nonprofit membership organization exempt from taxation under section 501(c)(4) of the Internal Revenue Code. The Club is organized under the laws of the District of Columbia and has its principal place of business in Washington, D.C.

**B. Proposed Independent Expenditure Disclaimer**

Club PAC plans to purchase radio and television time in 2008 for independent expenditures that expressly advocate the election or defeat of a candidate. These communications will include ten-second and 15-second television advertisements and will not be coordinated with any candidate, political party, or their agents. Anyone who watches television is aware that such short ads are a common and accepted means of communication in the general advertising world.



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Each ad will include the following two disclaimers:

- A general written disclaimer: "Paid for by Club for Growth PAC, [www.clubforgrowth.org](http://www.clubforgrowth.org), and not authorized by any candidate or candidate's committee."<sup>1</sup>
- A written stand-by-your-ad disclaimer: "Club for Growth PAC is responsible for the content of this advertising."

The stand-by-your-ad written disclaimer will be aired for four seconds at the end of the advertisement in letters equal to or greater than four percent of the vertical picture height.

Because these ads will not air for 30 or 60 seconds (as do the majority of political ads), however, Club PAC wishes to dispense with the duplicative disclaimers. While Club PAC is certainly proud to stand by its ads, it also wants to get its message out in the very limited time that it has. If some spoken disclaimer is demanded, Club PAC proposes truncated disclaimers like the following:

- "Paid for by Club for Growth PAC" or "Club for Growth PAC created this ad."<sup>2</sup>

#### **QUESTIONS PRESENTED**

*May Club PAC dispense with the spoken stand-by-your-ad disclaimer in a ten- or 15-second television advertisement that otherwise contains the written stand-by-your-ad disclaimer for the requisite length of time?*

*In the alternative, may Club PAC use "Paid for by Club for Growth PAC" or "Club for Growth PAC created this ad" as its spoken stand-by-your-ad disclaimer on a ten- or 15-second television advertisement that otherwise contains the written stand-by-your-ad disclaimer for the requisite length of time?*

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<sup>1</sup> This general disclaimer will be provided in a clear and conspicuous manner.

<sup>2</sup> The spoken stand-by-your-ad disclaimer would be accomplished via a "voice-over" by a representative of Club PAC.

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**DISCUSSION**

FEC regulations mandate that all public communications by a political committee, including but not limited to express advocacy, contain certain required disclaimers. 11 C.F.R. § 110.11(a). The general disclaimer content requirement provides that all non-coordinated PAC communications to the public contain the following general disclaimer:

the full name and permanent street address, telephone number, or World Wide Web address of the person who paid for the communication, and that the communication is not authorized by any candidate or candidate's committee.

*Id.* § 110.11(b)(3).

In addition, for non-coordinated PAC ads on radio and television, the following "stand-by-your-ad" *spoken* disclaimer must be included:

XXX is responsible for the content of this advertising.

*Id.* § 110.11(c)(4)(i). The disclaimer must be "spoken clearly, with the blank to be filled in with the name of the political committee or other person paying for the communication and the name of the connected organization, if any, of the payor unless the name of the connected organization is already provided in the 'XXX is responsible' statement." *Id.*

For TV ads, the spoken disclaimer must be accomplished via a "voice-over" by a representative of the committee or by a full-screen view of the representative making the statement. *Id.* § 110.11(c)(4)(ii). At the end of independent TV ads, a PAC also must present the statement in writing on the screen for four seconds and in letters equal to or greater than four percent of the vertical picture height. *Id.* § 110.11(c)(4)(iii).

An exception to all of the above-described disclaimers exists for the following items:

- Bumper stickers, pins, buttons, pens, and similar small items upon which the disclaimer cannot be conveniently printed;



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- Skywriting, water towers, wearing apparel, or other means of displaying an advertisement of such a nature that the inclusion of a disclaimer would be impracticable;
- Checks, receipts, and similar items of minimal value that are used for purely administrative purposes and do not contain a political message; and
- Communications to the restricted class of the connected organization of a separate segregated fund.

*Id.* § 110.11(f).

**A. The FEC Should Confirm that the Spoken Stand-By-Your-Ad Disclaimer Is Not Required in Ten- and 15-Second Independent Television Ads**

In light of the burdens imposed on ten- and 15-second Club PAC independent television spots by the length of the required spoken stand-by-your-ad disclaimer, the Commission should avoid rigid application of the disclaimer provisions and confirm that Club PAC is permitted to dispense with the spoken disclaimer. Because of the inclusion of the written stand-by-your-ad disclaimer and a written general disclaimer, the ten- and 15-second ads would still convey the essential identity and approval information and would allow Club PAC to communicate its full message to the public. Pursuant to FEC precedent and to the regulatory exception for small items, the omission of the spoken disclaimer is consistent with the Federal Election Campaign Act of 1971, as amended ("FECA"), because the spots are so brief.

The Commission's regulations highlight several types of communication media for which the inclusion of any disclaimer is waived because the items are so small. These include bumper stickers, pins, buttons, pens, and "similar small items" as well as any other "means of displaying an advertisement of such a nature that the inclusion of a disclaimer would be impracticable." *Id.* § 110.11(f). It is not that disclaimers could not be forced onto these media, but that "the disclaimers cannot be conveniently printed" on them without affecting their purpose as political communications. In Advisory Opinion 2002-9, the Commission eliminated the disclaimer requirements all together for advertisements on a text messaging system. The Commission pointed to the exception for "small" items contained in what is now section 110.11(f)(1)(i) of its regulations and eliminated the text message



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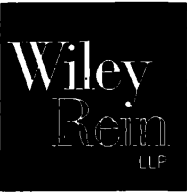
disclaimer because of the burden imposed on the advertiser. The opinion noted that even a shortened version of the required disclaimers—such as “Paid for by Smith for Congress”—would be 30 characters, which would take up approximately 18% of the available 160 characters on the text message.

These exceptions establish two key points. First, federal law is not intended to limit how an electoral communication is made. Speakers should be free to select the form of communication they deem best. Second, the need for disclaimers is not so acute as to justify impairing the effective use of a chosen means.

The Commission’s sensitivity to the problem that compelled disclaimers pose has a solid constitutional basis. The Supreme Court has held that such disclaimers are a content-based burden on speech that must be narrowly tailored and will be struck down under the First Amendment if they impose an undue burden. *Riley v. Nat’l Fed’n of the Blind of N.C., Inc.*, 487 U.S. 781, 796-97 (1988). Although the disclaimer provision may be facially valid, the Supreme Court has been clear that, where strict scrutiny is triggered, each application of a speech burden must be separately assessed. *FEC v. Wisconsin Right to Life, Inc.*, 127 S. Ct. 2652 (2007).

The ten- and 15-second television spot is, in the television world, similar to the text message in Advisory Opinion 2002-9. Its duration is very short relative (1) to the length of the spoken stand-by-your-ad disclaimer and (2) to other types of advertising. For example, when “spoken clearly” the scripted stand-by-your-ad text of “Club for Growth PAC is responsible for the content of this advertising” takes approximately 3.16 to 3.69 seconds to recite (with a pause added to separate disclaimer from the rest of the ad). This is 31.6% to 36.9% of the ten-second spot, and as much as 24.6% of a 15-second ad. The nineteen syllables in this disclaimer, then, take a larger portion of each of these short spots than the 18% disclaimer in Advisory Opinion 2002-9, which the FEC thought prohibitively lengthy and waived all disclaimers.

Unlike the text message in Advisory Opinion 2002-9 or the radio spot in Advisory Opinion 2004-10, Club PAC’s ten- or 15-second television spot would still contain the full stand-by-your-ad disclaimer. Instead of a spoken format, however, the TV ad would contain only the written disclaimer. The entire scripted statutory text for non-coordinated communications by PACs would be included at the end of each spot for four seconds in the proper vertical screen height. This means that for 40% of a ten-second television spot, the written stand-by-your-ad disclaimer would occupy a significant amount of the television screen. Moreover, the written general



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disclaimer also would be included. The audience would not be deprived of the identity of Club PAC as the sponsor of the ad, nor would the audience be deprived of the knowledge that Club PAC approved the message.

In the end, Club PAC's ten- or 15-second independent TV spot also is like a political button. A short and simple message, but lacking time to include the disclaimer without unduly burdening the message. Accordingly, the Commission should confirm that the spoken stand-by-your-ad disclaimer is not required for these ten- and 15-second TV spots, consistent with the regulatory exception for small items. Congruent with the reasons for the specific regulatory exception, forcing the disclaimer into the ad is not the answer.

**B. In the Alternative, the FEC Should Confirm that the Use of a Shortened Disclaimer by Club PAC Is in Compliance with the FECA**

If the Commission does not confirm the application of the regulatory exception for small items to the ten- and 15-second spots, the Commission should at least allow Club PAC to use a shortened disclaimer such as "Paid for by Club for Growth PAC" or "Club for Growth PAC created this ad." Although still taking a substantial amount of time relative to the length of the spots (21-23% of the ten-second ads with the necessary pause), each of these alternative disclaimers would take less time to recite than the scripted stand-by-your-ad text.

The Commission has permitted truncated disclaimers before. On practicability concerns in Advisory Opinion 2004-10, the Commission allowed a radio content provider to have a reporter read the candidate spoken stand-by-your-ad disclaimer instead of the candidate in "live-read" advertising situations. The FEC also permitted the radio station and candidates advertising thereon to use a shortened disclaimer on the ten-second spots. The stand-by-your-ad portion of the spoken disclaimer proposed by the Commission was "ABC approved this message."<sup>3</sup> This was six words if "ABC" is spelled out. For a candidate named Jane Smith, the approved shortened disclaimer would have been only five words (or seven

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<sup>3</sup> Please note that this disclaimer is shorter than the disclaimer included on the draft advisory opinion prepared by staff, which read as follows:

ABC is running for Congress and she approved this message.



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syllables). Of course it is important to note that, as radio ads, the radio messages did not contain any additional disclaimers. *See also* FEC Advisory Opinions 2004-1 (not requiring dual approval statements in a coordinated candidate television advertisement); 2004-37 (permitting the general printed disclaimer of "paid for by the authorized committees of the candidates marked with an asterisk" instead of each individual campaign's disclaimer).

The Commission should be flexible in its approach to novel forms of political communication such as ten- and 15-second independent expenditure TV spots in order not to have the disclaimer requirements essentially squelch political discourse. The proposed truncated disclaimers would take approximately the following amounts of time to recite:

- **Paid for by Club for Growth PAC:** approximately 2.1 seconds, including the necessary pause to separate the disclaimer from the rest of the advertisement, to speak seven syllables. This would take approximately 21% of a ten-second spot and 14% of a 15-second spot.
- **Club for Growth PAC created this ad:** approximately 2.3 seconds, including the necessary pause to separate the disclaimer from the rest of the advertisement, to speak nine syllables. This would take approximately 23% of a ten-second spot and 15% of a 15-second spot.

Even in their relative brevity, each of these spoken disclaimers would convey essential identity and approval information to the listening public. Moreover, as discussed above, each of the extremely short spots would contain appropriate written stand-by-your-ad and general disclaimers so that the viewing public would be fully informed. As a result, if the FEC does not confirm that the spoken disclaimer can be omitted, it should at least allow Club PAC to employ the above truncated spoken disclaimers so that some time remains for Club PAC to convey some useful information in its extremely short TV spots.

### CONCLUSION

Ten-second and 15-second TV spots are important in the current media landscape, with the multiplication of viewing choices, increased competition from the Internet, and ever-increasing costs. Since it limits the PAC's ability to say much more than a few sentences before launching into "Club for Growth PAC is responsible for the content of this advertising," the spoken disclaimer requirement severely curtails

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speech in these ten- and 15-second spots with no particular benefit to the public – especially since much of the screen is occupied by the written disclaimer for as much as 40% of the duration of the ad.

For the novel approach in the ten- and 15-second independent expenditure TV spot, the omission of the spoken disclaimer is imperative given the brevity of the ad and the length of the scripted text (often one-quarter to over one-third of the ad). No harm is done to the statutory or regulatory structure of the law, since the exception for small media is plainly applicable, and, in any event, the TV ads also would include the written stand-by-your-ad for up to 40% of the spot (as well as the written general disclaimer). The Commission, then, should confirm that the resulting communications by Club PAC conform to the requirements of the FECA and permit Club PAC to dispense with the spoken disclaimers on the ten- and 15-second TV spots.

Sincerely,



Carol A. Laham  
D. Mark Renaud





"Laham, Carol"  
<CLaham@wileyrein.com>  
11/28/2007 01:30 PM

To <rkatwan@fec.gov>, <rknop@fec.gov>  
cc  
bcc  
Subject Club for Growth PAC Advisory Opinion Request

Mr. Katwan and Mr. Knop:

This correspondence will confirm our discussion of November 21, and provide the information requested by your office in connection with the Club for Growth PAC Advisory Opinion Request submitted on November 15, 2007.

- 1) Club for Growth PAC confirms that the 10 and 15 second television ads will not be authorized by any candidate.
- 2) You requested that the Club for Growth PAC provide a story board or text of ads that it intends to air. As requested, the Club for Growth PAC is providing an ad with a spoken disclaimer and an ad without a spoken disclaimer. As you will see, the disclaimer consumes about 50% of the audio and substantially impairs the ad's advocacy content. The Club for Growth PAC will be far better able to communicate its message without the spoken disclaimer, but will still comply with the written disclaimer as required by the *FEC* regulations.
- 3) You indicated that you were not familiar with 10 and 15 second ads and wanted confirmation that such ads do exist such that a television station would be willing to sell such ads. Please find attached a letter from TNS Media Intelligence / CMAG confirming that 10 and 15 second ads are common in today's television markets.

I trust this responds to your inquiries.

Sincerely,

Carol A. Laham



Carol A. Laham  
Attorney At Law  
Wiley Rein LLP

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PDF



PDF



PDF



10 Second IE with Spoken Disclaimer.pdf 10 Second IE without Spoken Disclaimer.pdf Letter.pdf

**Club for Growth PAC**

**TV :10**

***"Hero with Disclaimer"***

Audio

Visual

<p><b>VOTE FOR JEFF FLAKE -- HE WAS PRAISED BY CITIZENS AGAINST GOVERNMENT WASTE.</b></p> <p><b>CLUB FOR GROWTH PAC IS RESPONSIBLE FOR THE CONTENT OF THIS ADVERTISING.</b></p>	<p><i>Footage of Flake. "Rated #1 at Fighting Government Waste"</i></p> <p><b>Paid for by Club for Growth PAC. Club For Growth PAC is responsible for the content of this advertising. Not authorized by any candidate or candidate's committee. <a href="http://www.clubforgrowth.org">www.clubforgrowth.org</a>.</b></p>
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**Club for Growth PAC**

**TV :10**

**"Hero"**

**Audio**

**Visual**

<p><b>TAXPAYER HERO JEFF FLAKE WAS RATED FIRST IN THE ENTIRE CONGRESS BY CITIZENS AGAINST GOVERNMENT WASTE.</b></p> <p><b>KEEP JEFF FLAKE IN CONGRESS FIGHTING FOR US.</b></p>	<p><i>Footage of Flake. "Rated #1 at Fighting Government Waste"</i></p> <p><b>Paid for by Club for Growth PAC. Club For Growth PAC is responsible for the content of this advertising. Not authorized by any candidate or candidate's committee. <a href="http://www.clubforgrowth.org">www.clubforgrowth.org</a>.</b></p>
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November 26, 2007

David Keating  
Executive Director  
Club for Growth  
2001 L St NW, Suite 600  
Washington DC 20036

Dear David:

I'm responding to your recent inquiry regarding the placement of 10 second and 15 second television advertisements in major media markets in the United States.

As you know, Campaign Media Analysis Group was founded in 1997, and since then has played a critical role in the advertising strategies of thousands of local, state, and national political and issue advocacy campaigns across the country. CMAG has also provided strategic analysis services to many of the nation's top corporations and associations. CMAG's award-winning technologies and customized databases allow it to provide its clients with the fastest, most accurate capture and tracking services available in the marketplace today.

Everyday, CMAG is alerted of numerous new political and issue advocacy ads that hit the television airwaves. These ads are then titled and categorized according to content and saved in CMAG's databases. Once the ads are saved, custom tracking systems capture and record all future occurrences of each ad. CMAG uses this recorded information to provide its clients with detailed occurrence and ad buy data in a variety of custom reports.

CMAG's parent company, TNS Media Intelligence, maintains one of the most sophisticated tracking systems in the world. CMAG's custom databases work in unison with this tracking system to store and report on each ad as it airs.

In our day to day business of monitoring television ads around the nation, the appearance of 10 second and 15 second television advertisements is very common.

Please let me know if you have any further questions.

Sincerely,

Evan Tracey  
COO, Campaign Media Analysis Group