



FEDERAL ELECTION COMMISSION
Washington, DC 20463

MEMORANDUM

TO: THE COMMISSION
STAFF DIRECTOR
GENERAL COUNSEL
CHIEF COMMUNICATIONS OFFICER
FEC PRESS OFFICE
FEC PUBLIC DISCLOSURE

FROM: COMMISSION SECRETARY *msd*

DATE: JULY 25, 2008

SUBJECT: COMMENT ON DRAFT AO 2007-33
Club for Growth PAC

Agenda Document No. 08-12

Transmitted herewith is a timely submitted comment from Carol A. Laham, Esq. and D. Mark Renaud, Esq. regarding the above-captioned matter.

Proposed Advisory Opinion 2007-33 is on the agenda for the open meeting of Monday, July 28, 2008.

Attachment



1776 K STREET NW
WASHINGTON, DC 20006
PHONE 202.719.7000
FAX 202.719.7049

7925 JONES BRANCH DRIVE
McLEAN, VA 22102
PHONE 703.905.2800
FAX 703.905.2820

www.wileyrein.com

FEDERAL ELECTION
COMMISSION
SECRETARIAT

2008 JUL 25 A 11: 10

July 25, 2008

Carol A. Laham
202.719.7301
claham@wileyrein.com

VIA HAND DELIVERY

Mary W. Dove
Secretary of the Commission
999 E Street, NW
Washington, DC 20463

Re: Advisory Opinion Request 2007-33

Dear Madame Secretary:

On behalf of the Club for Growth PAC ("Club PAC"), we respectfully submit this response to the July 21, 2008, draft advisory opinion designated 2007-33 issued by the staff of the Federal Election Commission ("FEC" or "Commission"), regarding spoken stand-by-your-ad disclaimers.

The rigid application of FEC spoken disclaimer requirements imposed by the draft advisory opinion upon ten- and 15-second television advertisements will effectively eliminate this form of political communication from use, in contravention of the Constitution and federal law. In previous advisory opinions, the Commission has recognized that advances in political advertising require judicious application of regulatory exceptions so that the audience can actually receive the political message. Similar application of the regulatory exceptions is needed here.

As noted in Club PAC's advisory opinion request, Club PAC plans to run ten- and 15-second independent expenditure television ads. Strict application of the disclaimer requirement without regard to the exceptions would supplant the intended political speech, rendering it ineffective. Therefore, as is permitted under the disclaimer requirement exceptions at 11 C.F.R. § 110.11(f), Club PAC wishes to dispense with or, at the very least, truncate the burdensome spoken stand-by-your-ad disclaimers.

In doing so, the general public will not be deprived of any information. Specifically, each ad will include both the general written disclaimer as required under 11 C.F.R. § 110.11(b)(3) and the written stand-by-your-ad disclaimer as required under 11 C.F.R. § 110(c)(4)(iii). Club PAC only seeks to dispense with or abbreviate the duplicative verbal stand-by-your-ad disclaimer in order to make short television ads practical.



Federal Election Commission
July 25, 2008
Page 2

A. Ignoring the Exceptions to the Disclaimer Requirements Will Foreclose the Use of Short Television Political Advertisements.

The draft advisory opinion (at 4) states that there are no “physical or technological limitations that would make it ‘impracticable’ to include the full spoken stand-by-your-ad disclaimer in a television advertisement.” This ignores the very real time limitation inherent in television advertisements that are shorter than thirty seconds. This limitation is no different than those found in the exceptions to the regulations at 11 C.F.R. § 110.11(f)(1) (exempting items that are too small for disclaimers and items where inclusion of the disclaimer would be impracticable), or in Advisory Opinions 2002-09 (Aug. 23, 2002) (eliminating the need for disclaimers in text messages) and 2004-10 (Apr. 30, 2004) (deviating from the disclaimer requirements in “live read” radio ads by allowing a non-candidate to read a truncated disclaimer). The Commission, therefore, has recognized that limitations inherent in a message’s length (either time or space) are burdens sufficient to permit the application of the regulatory exceptions in order to make room for core political speech.

Clearly the speakers in those advisory opinions could have chosen means or media other than text messages or “live read” sponsorship messages in order to meet federal disclaimer requirements. Federal law, though, is not intended to limit the means or media in which protected speech is made. Speakers are free to select the form of communication they deem best and the need for disclaimers is not so acute as to justify impairing the effective use of those chosen means. Had the Commission ignored the applicable exceptions and required the full disclosures provided in federal regulations for text messages or sponsorship radio messages, those means would have been foreclosed as useful advertising tools. The Commission, however, recognized this obvious consequence and instead applied the regulatory exceptions in a manner as “practical and as faithful as possible to the ‘stand-by-your-ad’ statute while avoiding unnecessary burdens on political speech that could result from rigid application of all disclaimer provisions in all instances.” Advisory Opinion 2004-10 at 3. Such an approach is exactly what Club PAC suggests in its advisory opinion request.

B. Advisory Opinion 2004-10 Did Allow the Truncation of a Spoken Disclaimer.

Contrary to the assertion made in the draft advisory opinion (at 4), Advisory Opinion 2004-10 did truncate the spoken stand-by-your-ad requirement. Under



Federal Election Commission
July 25, 2008
Page 3

FEC regulations, the following spoken statements for radio and television communications authorized by candidates are provided:

- I am [insert name of candidate], a candidate for [insert Federal office sought], and I approved this advertisement.
- My name is [insert name of candidate]. I am running for [insert Federal office sought], and I approved this message.

11 C.F.R. § 110.11(c)(3)(iv).

In Advisory Opinion 2004-10 (at 4), the Commission permitted the radio station and candidates advertising thereon to use the following, shortened stand-by-your-ad disclaimer for the proposed ten-second spots: "ABC approved this message." For a candidate named Jane Smith, the approved shortened disclaimer is only five words long. By contrast, using "Jane Smith" for the name of the candidate and "Congress" for the office sought, the stand-by-your-ad verbal disclaimers provided under federal regulation are 13 and 15 words long, respectively.¹

Moreover, because the ads in Advisory Opinion 2004-10 were radio ads, they did not contain any additional disclaimers, yet the Commission allowed the use of an abbreviated disclaimer that did not contain, for example, the office sought by the candidate. The draft advisory opinion fails to address why a truncated disclaimer (read by a person other than the candidate in question) is permissible in a ten-second radio ad where no additional disclaimers are provided but is not permissible in a television ad of the same length that already includes all of the information that the disclaimer regulations require.

¹ If Club PAC were required to include the scripted stand-by-your-ad text of "Club for Growth PAC is responsible for the content of this advertising," the disclaimer would take up approximately one-third of a ten-second ad and one-quarter of a 15-second ad. By contrast, the proposed truncated disclaimers would take approximately two seconds to recite – approximately one-fifth of a ten-second ad and one-seventh of a 15-second ad. While such a disclaimer still burdens unnecessarily the audio message provided in the proposed ads (since all of the required information will be disclosed visually according to federal regulation), truncating the audio disclaimer would provide an additional one to one and a half seconds for political dialogue without providing any less information to the general public.

Federal Election Commission
July 25, 2008
Page 4

C. The Existence of the Impracticability Exception Prior to Congress's Amendment of Campaign Finance Law Does Not Support Requiring a Spoken Disclaimer in All Circumstances.

The draft advisory opinion (at 5) states that, because Congress did not "create an exception for television communications of ten or fifteen seconds or any other duration even though it was aware of the Commission's already existing regulatory exceptions for 'impracticability' and 'small items'" when it added the spoken stand-by-your-ad disclaimer requirement, Club PAC is required to include the full spoken disclaimer in its ten- or 15-second television advertisement. This argument that legislative silence somehow eliminated application of the exceptions to television ads is deeply flawed.

First, the silence cuts the other way. Since Congress knew the Commission had granted exceptions for "impracticability" and "small items" in the past, its silence suggests an intent for the Commission to continue such practical adjustments. If Congress had not wanted such exceptions to apply to the new requirement, it would have explicitly negated them in the statute. This implies continued similar power in the Commission.

Moreover, if the draft advisory opinion is correct, then Advisory Opinion 2004-10 has been wrongly decided. The draft opinion asserts that the impracticability and small item exceptions do not apply to any disclaimer created by Congress in its 2002 amendments. Yet Advisory Opinion 2004-10 allowed deviation from disclaimer requirements for "live read" radio ads. Like the verbal disclaimer for noncandidates, the verbal disclaimer for candidates addressed in Advisory Opinion 2004-10 was added in 2002 and does not include specific reference to the federal regulatory exceptions already in existence at the time. Yet the Commission prudently applied the impracticability exception because of the time and technological limitations inherent in that uncommon form of advertising and allowed a variance from the specific language and delivery of the spoken disclaimer requirement. Club PAC likewise seeks wise application of the impracticability exception to its similarly short proposed ten- and 15-second advertisements.

D. The Visual Disclaimer Provides the Public With All Information Required Under Federal Law.

Unlike the text message in Advisory Opinion 2002-09 or the radio spot in Advisory Opinion 2004-10, Club PAC's ten- or 15-second television ad would still contain



Federal Election Commission
July 25, 2008
Page 5

the full stand-by-your-ad written disclaimer and the general written disclaimer. The audience, therefore, would still know that Club PAC is the sponsor of the ad and approves the ad's message. In fact, because of the written disclaimers, the television audience will be provided much more information than the audiences who receive communications of the types considered in the above-referenced advisory opinions.

E. The Draft Advisory Opinion Throws Into Doubt the Scope of the Elimination of the Disclaimer Requirement for Text Messages.

The draft advisory opinion (at 5), in differentiating the text messages reviewed in Advisory Opinion 2002-09 from brief television ads, states that the text messages in question were exempt from the disclaimer requirements because they were "subject not only to an overall limit on the number of characters but also to an internal limit, as well, because the candidate was including other content within the message, such as sports scores or information about news events." Such a narrow interpretation implies that text messages that do not contain the "internal limit" of sports scores or news events must include a full disclaimer.

Because of Advisory Opinion 2002-09, political text messages have become ubiquitous in the 2008 election campaign. *See, e.g.,* Bob Bentz, *Can SMS Get McCain Elected?*, Adontas.com (July 14, 2008) at <http://www.adotas.com/2008/07/can-sms-get-mccain-elected/> (last visited July 22, 2008) (noting that the Obama, Clinton, and Edwards campaigns used text messaging throughout the 2008 Democratic primary). It appears, however, that these text messages routinely do not include disclaimers.² If the interpretation included in the draft advisory opinion is true, then these text messages violated federal law.

² *See, e.g.,* Posting of Jose Antonio Vargas to The Trail, http://blog.washingtonpost.com/the-trail/2008/02/12/obama_txting_his_way_forward.html (Feb. 12, 2008, 4:02 p.m. EST) (quoting the following text messages from the Obama campaign: "One voice can make a difference. Make that voice yours! Fwd this msg and make sure all your friends vote today for Barack. Questions, call 866-675-2008." and "People who love their country can change it. Make sure all your friends vote tonight for Barack! Polls open in DC until 8 p.m. For info: 866-675-2008.").



Federal Election Commission
July 25, 2008
Page 6

If, on the other hand, this narrow interpretation is not true and the exemption from the disclaimer requirement extends to all text messages, then the exemption should apply equally to brief television ads. To exempt text messages from a disclaimer requirement while mandating full and redundant disclaimers, both visual and audio, for a ten-second television advertisement in which the audio section contains fewer characters than the 160-character text message maximum is a highly arbitrary and fundamentally inconsistent application of the disclaimer requirement exceptions. A ten-second ad's audio message is basically a text message on television with fewer characters. The disclaimer is as impractical for the short television ad as it is for a text message.

CONCLUSION

Club PAC respectfully urges the Commission to follow the precedent established in its earlier advisory opinions when encountering similarly novel advertising approaches. Advances that allow speakers to better communicate with the general public must not be held hostage to a rigid application of federal regulation where, as here, all required information will be disclosed to the general public. This is especially true where there are exceptions to the rules directly on point. The Commission, therefore, should confirm that the ten- and 15-second television political communications proposed by Club PAC conform to the requirements of the Federal Election Campaign Act of 1971, as amended, without inclusion of the duplicative spoken stand-by-your-ad disclaimer, or, in the alternative, by inclusion of the proposed truncated spoken disclaimers.

Sincerely,

A handwritten signature in black ink that reads "D. Mark Renaud / KJP".

Carol A. Laham
D. Mark Renaud

cc: Office of General Counsel