



**FEDERAL ELECTION COMMISSION**  
Washington, DC 20463

**MEMORANDUM**

**TO:** The Commission  
Staff Director  
General Counsel  
Press Office  
Public Disclosure

**FROM:** Office of the Commission Secretary *seaf*

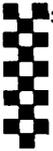
**DATE:** January 18, 2012

**SUBJECT:** Comment on Draft AO 2011-28  
(Western Representation PAC)

**Transmitted herewith is a timely submitted comment from Dan Backer, Esq.**

**Draft Advisory Opinion 2011-28 is on the agenda for Thursday, January 19, 2012.**

**Attachment**



RECEIVED  
FEDERAL ELECTION  
COMMISSION  
SECRETARIAT

# FAX COVER SHEET

TO	Office of the Commission Secretary	JAN 18 2012 5:01
COMPANY	Federal Election Commission	
FAX NUMBER	12022083333	
FROM	Dan Backer	
DATE	2012-01-18 21:51:10 GMT	
RE	Public Comment on Draft AO's 2011-28	

## COVER MESSAGE

Please find attached (sent to both OGC & OCS) a public comment on the above referenced AO Drafts.



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COMMISSION SECRETARIAT

**FACSIMILE TRANSMISSION**

2012 JAN 18 5:01

January 18, 2012

**FROM:**  
Western Representation PAC  
By Counsel, Dan Backer, Esq.

**TO:**  
Shawn Woodhead Werth  
Commission Secretary  
Federal Election Commission  
(202) 208-3333

Anthony Herman, Esq.  
General Counsel  
Federal Election Commission  
(202) 219-3923

**Re: Public Comment on Advisory Opinion Request 2011-28 (WRPAC)**

Please find enclosed a public comment by the Western Representation PAC (WRPAC) in regards to the above referenced Advisory Opinion Request 2011-28 and related Draft AOs.



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TERMINAL

2012 January 18, 2012 3:01

**BY FAX**

Shawn Woodhead Werth, Commission Secretary  
Anthony Herman, Esq., General Counsel  
Federal Election Commission  
999 E Street NW  
Washington, DC 20013

**Re: Public Comment on Advisory Opinion Request 2011-21 (CCF)**

Dear Mr. Werth & Mr. Herman:

These comments are filed on behalf of Western Representation PAC (WRPAC) in regard to Drafts A (revised) and B of AO 2011-28.

WRPAC filed AOR 2011-28 to determine whether WRPAC may exclude the costs of independent expenditure advertisement on Facebook from the calculation of costs included that may trigger a 24- or 48- hour report, provided such costs are included in the regular monthly reports; and whether WRPAC may report the actual aggregate cost of its independent expenditure advertisement on Facebook on its regular monthly reports without attributing those costs amongst the various States' Presidential preference primary elections.

For the following reasons, WRPAC respectfully requests that the commission reconsider both draft responses.

Drafts A and B of AO 2011-28 do not correctly reflect the operation of Facebook's advertising platform and, therefore, actual unreasonable burdens associated with the 24- and 48- hour reporting that will occur. Facebook's advertising algorithm is an auction system based on advertiser's bids that select the best advertisement to display to any given user based on numerous factors, including the historical performance of advertisements, user's preferences, and the advertiser's bids. The bid necessary to win a particular advertisement auction will fluctuate based on its actual performance, and as competing advertisements change. See, <https://www.facebook.com/help/?faq=112249598862949#How-do-you-determine-which-ads-to-display?> (last accessed Jan. 16, 2012). Every advertisement is bid on a cost per click (CPC) or cost per thousand impressions basis (CPM).

Each time a user views a page (an "impression") that displays an advertisement an auction takes place to determine which eligible advertisements will be shown on that impression, millions of times each day. See, <https://www.facebook.com/help/?faq=173594992698822> (last accessed Jan.



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16, 2012). The amount bid on each advertisement indicates the maximum amount an advertisement purchaser is willing to spend per click (CPC) or per thousand impressions (CPM), subject to a daily maximum. WRPAC intends to use both CPC and CPM in order to find the optimal results for its campaign. Facebook automatically discounts the price actually paid for the advertisement, based on the cost necessary to win the auction. Facebook's Help Center provides the following example:

[I]f you bid \$1.00 CPC for your ad, you're indicating that you're willing to spend up to \$1.00 for a click on that ad. However, if our system determines that your ad can win the auction with a bid of only \$0.60, you'll only be charged \$0.60 for that click. *Id*

Calculating the actual expenditure is out of a purchaser's hands until Facebook provides a billing statement, which Facebook reserves the right to provide at its discretion. <https://www.facebook.com/help/?page=121272714621547> (last accessed Jan. 16, 2012). While the commission is correct that Facebook *generally* charges once per Facebook billable day, please note that Facebook expressly "reserve[s] the right to charge you more or less frequently at our discretion." *Id* "Facebook's billable day is on a per calendar day basis and not on a 24 hour period. Advertisements begin running at 12:00 AM on the specified start date and stop running at 11:59 PM on the specified end date." *Id* "However, Facebook may choose to charge less frequently than on a per billable day basis." *Id* Therefore, WRPAC may not be able to ascertain the actual charges within a particular 24- hour period.

Facebook provides its advertisers with a list of all account charges and invoices. These reports may provide statistics totaled by month, weekly, or daily; but not all time options are always available. Moreover, Facebook explicitly disclaims that "reports may take up to 48 hours." <https://www.facebook.com/help/?page=250722798324587> (last accessed, Jan. 16, 2012). This again places WRPAC in a state of uncertainty as to whether Facebook's bidding algorithm may cause WRPAC to make expenditures that cross thresholds triggering 24- or 48- hour reports without WRPAC being able to timely report.

The multitudinous variables, the discretionary billing periods, and the uncertainty inherent in the auction model are contrary to the simplified assumptions and conclusions in the Drafts A and B. Instead, these factors create a significant burden on a Committee's treasurer in complying with the reporting requirements under 2 U.S.C. § 432(i) and 11 CFR 102.9(d) because Facebook may not provide sufficiently timely billing and WRPAC may become liable for violations of FECA.

Moreover, even if WRPAC may determine the actual expenditures during the prior calendar day the following morning, the administrative burden on the Committee is still unreasonable. WRPAC intends to run a continuous campaign with a \$2,000.00 budget (which may change day-



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to-day). This budget is a maximum cap on advertisements sold both by CPC and CPM on any given day, not the actual amount spent. When Facebook discretionarily provides billing information daily, WRPAC will be obligated to conduct at least a 7-step process. First, it must scour Facebook's billing report find the total expenditure sum. Second, it must analyze the billing report to ascertain the total number of applicable states to which that day's the advertisement applies. Third, that day's total applicable expenditure sum must be divided by that number of states. Fourth, it must compute the expenditure amount per state based on the aforementioned fluctuating bid. Fifth, each day it must enter each individual state's share so that reports will properly aggregate over time. Sixth, it must determine whether any expenditure threshold on the aggregate of all prior advertising days to date, requiring a 24- or 48- hour report has been crossed. Finally, it must individually prepare and file any necessary 24- or 48- hour report for each applicable state. All these processes must be conducted each and every day—including weekends. Failure to adhere to this costly and timely process imposes potential liability on WRPAC. This will result in unreasonable non-stop daily tracking and potentially daily reporting. The capital and human resources that must be expended to do so amount to an unconstitutional burden on free-speech.

The attempt to distinguish between the question presented here and that in Advisory Opinion 1995-44 (Forbes for President) focuses on the wrong elements. In AO 1995-44, the Commission concluded that the statute did not require a committee to file 48-hour notifications of contributions received because it was unreasonable to distinguish which primary a contribution was directed toward, even though it would clearly be received on a date after some primaries and before others, because it would result in unreasonable daily reporting. Here, because the Committee intends to use a broadly disseminated message in its Independent Expenditure activity over an extended period of time (and not a specific moment as when a check is sent or received), and which is accorded greater constitutional protection than contributions, requiring exhaustive daily monitoring, calculations, data entry and reporting for each state, and potentially file daily 24- and 48-hour reports for every state, is unreasonable.

Drafts A in particular asks the Committee to narrow its speech to more conveniently comply with unreasonably burdensome regulations, rather than to reasonably protect the free-speech of the Committee. The Draft suggests that Committee limit the scope of its message to more easily comply with the reporting requirements is not a compelling interest sufficient to justify limiting their speech by forcing them to speak thusly, or not at all. The Committee seeks to reach the broadest possible audience for its message and these burdensome requirements constitutes a legal encumbrance on the Committee's freedom of speech to monitor expenditures, ascertain the appropriate states, divide the sum by that number of states, and to file separate 24- or 48- hour reports for each and every state, each and every day.



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Draft A also inaccurately analogizes disclosure policy in regards electioneering communications to the issue here. An electioneering communication is any broadcast, cable, or satellite communication. 14 USC § 434(f)(3)(A)(i). This is distinct from an independent expenditure conducted on the internet. To treat these different forms identically is inconsistent with prior Commission decisions and contrary to the holdings in Citizens United and McConnell.

For the above stated reasons, WRPAC urges the Commission to reconsider both Drafts A and B to AO 2011-28.

We appreciate the opportunity to submit these comments.

Sincerely,

Dan Backer Digitally signed by Dan Backer  
DN: cn=Dan Backer, o=WRPAC  
c=US, email=DanBacker@wrpac.com  
Date: 2012.01.18 19:41:05-0500

DanBacker, Esq.

Counsel

Western Representation PAC