



FEDERAL ELECTION COMMISSION
Washington, DC 20463

MEMORANDUM

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

FROM: Office of the Commission Secretary *Seq*

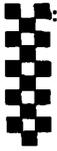
DATE: February 1, 2012

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, February 2, 2012.

Attachment



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FAX COVER SHEET

2012 FEB -1 A 11: 54

TO	Shawn Woodhead Werth
COMPANY	Commission Secretary, FEC
FAX NUMBER	12022083333
FROM	Dan Backer
DATE	2012-02-01 16:47:08 GMT
RE	Public Comment on AO 2011-28 Draft C

COVER MESSAGE



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February 1, 2012

BY FAX

Shawn Woodhead Werth, Commission Secretary
 Kevin Deeley, Esq., Acting Associate General Counsel
 Federal Election Commission
 999 E Street NW
 Washington, DC 20013

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

Dear Mr. Werth & Mr. Deeley:

These comments are filed on behalf of Western Representation PAC (WRPAC) in regard to Draft C of Advisory Opinion 2011-28.

WRPAC filed Advisory Opinion Request 2011-28 to determine whether the Committee may exclude the costs of Independent Expenditure advertisements 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 the Committee may report the actual aggregate cost of its Independent Expenditure advertisement on Facebook on its regular monthly reports without attributing such costs amongst the various States' Presidential preference primary elections.

For the following reasons, the Committee respectfully requests that the Commission reconsider the draft response.

Draft C of AO 2011-28 appears to incorrectly argue that the Commission does not have the ability to provide relief to the Committee in these circumstances involving nationwide distribution of political communications; here, Independent Expenditure advertisement on Facebook. The Commission appreciates the significant reporting burdens that such reporting may impose, which likely constitutes an unconstitutional burden on the Committee's free speech by forcing it to separately calculate and report costs applicable to each of the States' Presidential preference primary elections. Fortunately, the Commission has the benefit of statutory precedent to interpret the requirement as applied to the generic, nationwide advertising envisioned here as applying to the entire Presidential preference primary period, and not requiring as many as 40 daily reports of those seeking to engage in free political speech.

In support of its argument, Draft C cites AO 2003-40 (Navy Veterans) and incorrectly analogizes Independent Expenditures conducted over the internet to Electioneering Communications. By incorrectly treating the Committee's proposed nationwide Independent Expenditure online advertising campaign as an Electioneering Communication, Draft C arrives at the erroneous

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conclusion that the burdensome reporting is, despite the Constitutional absurdity of the outcome in its application here, unavoidable. However, by correctly treating the proposed constraint as what it is – nationwide media conducted over the internet which is expressly excluded from the definition of Electioneering Communication at 11 CFR 100.29, the Commission should adopt a statutory interpretation that does not result in a reporting scheme so outlandish that one might find it a topic of coverage on the Colbert Report.

Rather than Electioneering Communications at issue in Navy Veterans, the proposed nationwide Independent Expenditure advertisements on Facebook are more like the national advertising by authorized committees of Presidential primary candidates receiving matching funds. Additionally, regulations governing internal organization communications and limitations on contributions and expenditures provide ample precedent to interpret the regulations to allow the Presidential preference primary elections to be treated as a single election period.

11 CFR 106.2 governs the allocation of expenditures across multiple States incurred by authorized committees of Presidential primary candidates receiving matching funds. These regulations generally require expenditures by a candidate's authorized committees that are aimed at influencing the nomination of the candidate to be allocated to a particular State. 11 CFR 105.2(a)(1). However, national advertising, defined as expenditures incurred for advertisements on national networks, national cable or in publications distributed nationwide, is exempt from these allocation requirements and the costs need not be attributed to a specific State. 11 CFR 106.2(b)(2)(i)(E). State allocation is required for print and broadcast media when circulation percentages and industry market data are available, but not when the advertisement is distributed nationwide using national media sources. 11 CFR 106.2(b)(2)(i)(A) and (B). Accordingly, the rationale supporting the national advertising exemption from the State allocation requirements appears to be that it is inherently unreasonable to allocate national advertising to specific States, even if an arbitrary formula were available.

Independent Expenditure advertisement on Facebook that does not have geographic targeting or reference to a specific election is comparable to authorized committee expenditures for national advertising. In both cases, the audience is national and the advertisement is distributed nationwide, making it inherently unreasonable to allocate the costs of advertising to specific States or individual primary elections. Thus, the Commission should draw upon existing statutes and interpret the provisions at issue here in a manner that does not work to a constitutionally unreasonable burden - dozens of reports being filed daily - on political speakers.

In addition, the limitations on contributions to the authorized committees of Presidential candidates treat all primary elections as a single election. 2 U.S.C. 441a(a)(6); 11 CFR 110.1(j), 11 CFR 110.2(i). And, internal communications by corporations, labor organizations, and membership organizations are generally not considered expenditures and do not have to be



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reported, but such communications may be considered expenditures and trigger reporting requirements if the communication advocates the election or defeat of a clearly identified candidate. 2 U.S.C. 431(9)(B)(iii); 11 CFR 100.134(a). This standard uses a single reporting threshold for all primary elections combined. 11 CFR 100.134(k), 11 CFR 104.6(a)(1). Once this threshold is reached during the primary process, the reporting requirement is triggered and quarterly reporting is required for continued expenditures in connection with the same overall primary process. 11 CFR 104.6(b).

These regulations, and the Commission's own ruling in AO 1995-44 (Forbes), illustrate that the Presidential preference primary elections are considered to be a single election period more often than not, with the logical exception of those communications that by their nature only target the electorate of a specific State or are targeted to a specific election date, unlike those at issue here.

Finally, Draft C could result in the same activity being subject to one treatment for reporting purposes and an entirely different treatment for enforcement purposes. Draft C requires daily spending on this campaign to be allocated and reported separately for each state, each day, with an upcoming primary to comply with the 24- or 48- hour reporting periods and thresholds for each. However, if despite its best efforts the Committee inadvertently engaged in an act of coordination (with, for example, an agent of a campaign), the resulting Independent Expenditure would be deemed a Coordinated Communication which is an in-kind contribution, 11 CFR 109.21. Contributions made during the Presidential preference primary period are treated as having been made during a single election period. 2 U.S.C. 441a(a)(6). The Commission would hold the Committee to one unreasonably burdensome standard for civil reporting but apply a wholly different – but far more reasonable – standard in investigating potential enforcement.

The Commission certainly has the authority to follow its own established reasoning to properly interpret its own regulations in a manner that does not create unreasonable, unconstitutional burdens upon political speech. The Commission should interpret the regulations at issue here in a manner consistent with its existing regulations governing national internet advertising during the Presidential preference primary elections and treat this as a single election period.

For the foregoing reasons, the Committee urges the Commission to reconsider Draft C to Advisory Opinion 2011-28. We appreciate the opportunity to submit these comments.

Sincerely,

Dan Backer
Signature: Dan Backer
 Title: Counsel
 Date: 2/1/2012 11:54 AM

Dan Backer, Esq.
 Counsel
 Western Representation PAC