



APPROVED DECEMBER 12, 2017

MINUTES OF AN OPEN MEETING

OF THE

FEDERAL ELECTION COMMISSION

THURSDAY, SEPTEMBER 14, 2017

PRESENT:

Steven T. Walther, Chairman, presiding

Caroline C. Hunter, Vice Chair

Lee E. Goodman, Commissioner

Matthew S. Petersen, Commissioner

Ellen L. Weintraub, Commissioner

Alec Palmer, Staff Director

Lisa Stevenson, Acting General Counsel

Dayna C. Brown, Secretary and Clerk

Chairman Steven T. Walther called the Federal Election Commission to order in an open meeting at 1:22 P.M. on Thursday, September 14, 2017 with a quorum present.

Chairman Walther opened the meeting by stating that item IV (Draft Advisory Opinion 2017-10) would be held over to the meeting of September 20. He also noted that Item VI (Draft Campaign Guide for Corporations and Labor Organizations) was added to the agenda for record purposes and to make the draft available for those wished to see it. He confirmed that there would be no discussion or vote on the item today.

III. DRAFT ADVISORY OPINION 2017-09

**Libertarian Association of Massachusetts by Dr. Susan M. M. Ruiz,
Treasurer**

Agenda Document No. 17-38-A (Draft A)

Chairman Walther stated his belief that the Commission was prepared to vote, without a presentation from the General Counsel's Office, in favor of the recommendation.

Chairman Walther recognized Commissioner Weintraub who

MOVED to approve Agenda Document 17-38-A, Draft A.

The motion carried by a vote of 5-0 with Commissioners Goodman, Hunter, Petersen, Walther, and Weintraub voting affirmatively for the decision.

I. DRAFT ADVISORY OPINION 2017-06

Stein and Gottlieb by Jonathan S. Berkon, Esq. and Tyler J. Hagenbuch, Esq.

Agenda Document No. 17-35-A (Draft A)

Agenda Document No. 17-35-B (Draft B)

(Held over from the meeting of August 17, 2017)

Chairman Walther recognized Ms. Joanna Waldstreicher of the General Counsel's Office who provided a brief summary of the request regarding requestors' Eli Stein and Jeremy Gottlieb's proposed mobile app that would allow users to contribute rounded up change from their purchases to Federal candidates. Both Drafts conclude that the proposal is permissible and complies with the Federal Election Campaign Act, as amended, and Commission regulations. Ms. Waldstreicher also stated that requestors' counsel, Jonathan Berkon, Esq., was present to answer Commissioners' questions.

Discussion followed with regard to edits proposed to Draft B by Commissioners Weintraub and Petersen. Commissioner Weintraub also expressed the nuances of the proposal that were most persuasive to her.

Chairman Walther recognized Commissioner Petersen who

MOVED to approve Agenda Document No. 17-35-B, Draft B, as modified by the draft circulated by Commissioner

**Weintraub's office on September 14, 2017 at 12:13p.m.
and as further modified at the Table to include the
following edits:**

- 1. Remove all references to and discussion of Advisory Opinions 2006-08 (Brooks) and 2015-08 (Repledge).**
- 2. On page 7, move lines 16 through 22, to a footnote, removing the word "importantly, " and adding the following two sentences to the end of the footnote, along with an appropriate cite to Advisory Opinion 2015-11 (FYP):**

"Some Commissioners did not consider this feature to be legally significant, while others did consider it to be legally significant. There were not four votes for either position."

- 3. On page 9, line 22 and page 10, line 1, remove the following phrase:**

"not consider offers or proposals from candidates who wish to be featured on the App, but rather will"

- 4. On page 10, lines 6 and 7, remove the following sentence:**

"Limiting the pool of recipient committees as proposed thus does not raise concerns that the Project is selecting the committees to influence the outcome of an election."

The motion carried by a vote of 4-1 with Commissioners Goodman, Hunter, Petersen, and Weintraub voting affirmatively for the decision. Commissioner Walther dissented.

II. DRAFT ADVISORY OPINION 2017-05

**Great America PAC and Committee to Defend the
President by Dan Backer, Esq.**

Agenda Document No. 17-30-A (Draft A)

Agenda Document No. 17-30-B (Draft B)

(Held over from the meeting of July 13, 2017)

Chairman Walther acknowledged Mr. Dan Backer, Esq., counsel for the requestors, who was present to answer Commissioners' questions.

Chairman Walther recognized Mr. Joseph Wenzinger of the General Counsel's Office who stated that the Commission considered the matter at the July 13, 2017 meeting and that there were no new drafts, though edits had been proposed to the existing draft.

Discussion followed.

Commissioner Goodman then

MOVED to approve Agenda Document No. 17-30-A, Draft A.

The motion failed by a vote of 3-2 with Commissioners Goodman, Hunter, and Petersen voting affirmatively for the motion. Commissioners Walther and Weintraub dissented.

Chairman Walther then recognized Commissioner Weintraub who

MOVED to approve Agenda Document No. 17-30-B, Draft B.

The motion failed by a vote of 2-3 with Commissioners Walther and Weintraub voting affirmatively for the motion. Commissioners Goodman, Hunter, and Petersen dissented.

Chairman Walther recognized Commissioner Goodman who inquired of the General Counsel's Office if they could prepare, based on the votes that just occurred, a draft that states the Commission could not agree on those issues that are not in common between the two original drafts. Ms. Erin Chlopak of the General Counsel's Office stated that this could be done. Mr. Backer offered an additional extension of time to prepare the new draft requested by Commissioner Goodman, in light of the fact that the deadline was the following day. All parties agreed to an extension to the end of the week.

IV. DRAFT ADVISORY OPINION 2017-10

Citizens Against Plutocracy by Victor Tiffany

Agenda Document No. 17-39-A (Draft A)

Item IV was held over to the meeting of September 20, 2017.

V. REG 2011-02 (INTERNET COMMUNICATION DISCLAIMERS)

**Memorandum from Commissioner Ellen L. Weintraub
dated September 7, 2017**

Agenda Document No. 17-41-A

**Federal Register Notice dated October 13, 2011
Agenda Document No. 17-42-A**

**Federal Register Notice dated October 18, 2016
Agenda Document No. 17-43-A**

Chairman Walther recognized Commissioner Weintraub who stated that last week Facebook acknowledged that some \$150,000 in political advertising was placed on their platform during the 2016 election by foreign nationals. She stated that this was troubling for a number of reasons and that many, on a bipartisan basis, are concerned about this. Commissioner Weintraub stated that she was particularly struck by the fact that political ads were being placed and nobody knew where they were coming from, which is an issue that is squarely within the Commission's jurisdiction. The Commission insures that political ads have appropriate disclaimers so that, as the Supreme Court has said, we can have an informed electorate and voters have access to the best information about the candidates and their supporters. Commissioner Weintraub further stated that with another election coming up next year, many, including high level officials from other government agencies, have pointed out that there is every expectation that these kinds of activities will continue. She stated that she was not comfortable with the Commission doing nothing between now and the 2018 election, particularly because the Commission could take a modest step with regard to Internet Disclaimers. She highlighted that the issue of Internet Disclaimers has been looked at by the Commission repeatedly over the years, noting the history of the issue going back as far as 2004. The Commissioner explained her desire to determine what the Commission can do going forward to insure that when people are seeing ads on the internet or small

devices such as their phone, that they know where the information is coming from. She noted that the Commission put out a notice of advance rulemaking in 2011 and received a few comments and tried again in 2016 and received some, but not a lot comments. Commissioner Weintraub stated that people are now very focused on the importance of this issue, which is why she is recommending that the Commission put the issue out for comment for an additional 30 days, in light of what we are learning about what happened in the last election. She further recommended that the Commission schedule the hearing that it previously agreed to have, inviting experts who can help the Commission to come up with the best possible rule, given the capabilities and restrictions on the technology, to provide information to the American public so that when they click on things they know where it is coming from. She stated that this is information the American public deserves, and if the Commission can find a way to provide it to them, it should. Commissioner Weintraub stated that she was not suggesting that revisiting the Internet Disclaimer regulations will solve the whole problem, but it will solve a piece of it and that the Commission would be taking a small, constructive step toward trying to address a serious problem. Commissioner Weintraub's comments continued.

Chairman Walther recognized Commissioner Goodman who stated that he was not adverse to going out for further comment, however, he wanted to understand the logic and justification for doing so because if the Commission

would be doing so for the purpose of addressing foreign national advertisements, he would be more concerned about how it would impact American citizens who communicate on the internet. Commissioner Goodman further stated that he was not in favor of reopening the 2006 exemptions with respect to American citizens or imposing greater, or more onerous burdens on American citizens when they speak online in order to address what may be a unique or discreet problem of foreign national advertising. He further articulated his desire to be clear that if the logic or rationale for reopening this is to address foreign national spending, he hopes that the Commission can keep that as the focus, noting that the Commission does still have the small items issue to work through, as it relates to American citizens; however, he does not want to unnecessarily restrict American citizens' ability to speak just to reach foreign national expenditures. Commissioner Goodman further stated, with regard to addressing foreign national expenditures through the regulatory mechanism of the disclaimer: 1) if the expenditures are prohibited in the first instance, why would the Commission fashion a disclaimer rule to require disclaimers on what are prohibited expenditures, thereby testing the logic as to whether disclaimers are the right mechanism to get at foreign national spending; 2) the Commission must recognize that all political information and propaganda funded by foreign nationals is currently the subject of a legal obligation to include a disclaimer under the Foreign Agents Registration Act --

which goes far beyond the Commission's narrow jurisdiction of expenditures on express advocacy —whereby any political discussion directed into the United States by foreign nationals is technically subject to registration at the Department of Justice, and then the standard disclaimer identifying who the spender is (foreign sponsorship disclaimer); and 3) Issue speech is permitted under the Foreign Agents Registration Act, such that the only requirement is that the American agents of the foreign sponsors register with the Department of Justice, file regular disclosures of all their activities on behalf of the foreign nationals, and post disclaimers on all materials they publish stating that the funding of the materials was from the foreign national.

Discussion continued.

Chairman Walther recognized Commissioner Weintraub who stated her belief that a hearing would be informative. She stated that historically when the Commission holds hearings, it allows whomever desires to testify do so, and clarified her suggestion that the Commission take a more proactive approach in this instance by also reaching out to those who may be particularly illuminating to the Commission.

Chairman Walther recognized Commissioner Goodman who stated: his agreement with the comment period; his agreement with asking the General Counsel's Office to expedite it; that when drafted for republication, the notice should focus the American public and comments on the foreign national issue;

and that he is not prepared to agree to terms at this point with regard to a hearing because he does not know what comments will be received.

Commissioner Goodman further noted that, at this point, he is not wholly convinced that the disclaimer mechanism is the proper or effective regulatory mechanism to address the problem of foreign national spending in American elections, if it is a bona fide problem; and therefore reiterated his desire to see the comments before agreeing to the next step of holding a public hearing.

Discussion continued.

Chairman Walther recognized Commissioner Petersen who articulated his desire that the scope not be too restrictive. Commissioner Petersen explained that since the 2006 rulemaking, there is no question about the extent to which the internet has revolutionized the way in which we receive and consume political information, noting that the internet has likely overtaken almost any other vehicle for fundraising, revolutionized the way people can raise money through small dollar increments, voter mobilization efforts, and the way in which citizens are gathering news and information with which to evaluate candidates. He further stated that the position the Commission took back in 2006 has given some regulatory space for the internet to flourish in a very positive direction, though not everything that happens on the internet with respect to politics is positive. Commissioner Petersen stated that his concern with regard to disclaimers is making sure that the Commission does not, in some way, impede

the positive development and flourishing of the internet as it relates to politics. As the Commission considered this issue in the Google, Facebook, Revolution Messaging, and Target Wireless Advisory Opinions involving character limited texts and whether they would require disclaimers, Commissioner Petersen stated that his primary concern was insuring that the Commission was not doing something to unnecessarily impede the ability of these and similar platforms to be vehicles for individuals to be better informed about the political discussion, including candidates and issues. He articulated his intrigue about how the online political environment interacts with the small items impractical exemption. One of the things he is most interested in is to what extent technology has evolved where this no longer garners the same concern as it did in 2006. Commissioner Petersen stated that having the ability to learn what the current state of technology is could, to a large degree, inform where the Commission goes with this to insure that whatever decision the Commission makes does not unnecessarily impede the internet as a tool for political engagement. Getting a sense of where the current state of technology is would be very helpful in allowing the Commission to know whether or not technology has now advanced to a point where the small items exception, and the consideration of its application, is no longer necessary or whether or not there still are limitations, or that there are so many distinctions between different platforms and different phone or tablet providers that it would be

difficult to have a one size fits all rule. Commissioner Petersen stated that he would, therefore, ask that the Commission not unnecessarily restrict the scope. In the same vein of Commissioner Goodman's statements, Commissioner Petersen articulated his desire to make sure that the internet and the availability of information is not impinged and that citizens continue to be able to use it, such that the Commission's decision facilitates transparency rather than adding a roadblock. He further stated that he looked forward to the comments and information the Commission would receive and, once received, would make a decision as to whether to move forward with a hearing.

Discussion continued.

Chairman Walther recognized Commissioner Goodman who

MOVED to reopen the public comment period in REG 2011-02 to invite public comment on the issues originally stated in the REG 2011-02, for an additional period of 30 days.

Chairman Walther recognized Commissioner Weintraub who stated that she would support the motion and that it was her understanding that the Commission was making a commitment to reconsider holding a hearing once the comments are received.

Commissioner Goodman stated that once the comments are received and he had an opportunity to analyze them, he would consider whether he believes a hearing is justified. He reiterated that the decision would be made after the comments are received.

The motion carried by a vote of 5-0 with Commissioners Goodman, Hunter, Petersen, Walther, and Weintraub voting affirmatively for the decision.

VI. DRAFT CAMPAIGN GUIDE FOR CORPORATIONS AND LABOR ORGANIZATIONS

Memorandum from Commissioner Steven T. Walther dated September 12, 2017

Agenda Document No. 17-44-A
(Submitted Late)

Item VI was not discussed.

VII. MANAGEMENT AND ADMINISTRATIVE MATTERS

There being no further business to come before the Commission,
the meeting adjourned at 2:44 P.M.

Signed:



Steven T. Walther

Chairman of the Commission

Attest:



Dayna C. Brown

Secretary and Clerk of the Commission