

Comment on AOR 2011-18



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September 15, 2011

BY HAND DELIVERY

Christopher Hughey, Esq.
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OFFICE OF GENERAL
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Re: Comment on Advisory Opinion Request 2011-18

Dear Mr. Hughey:

On behalf of the Perkins Coie LLP Political Law Group, we appreciate the opportunity to comment on Advisory Opinion Request 2011-18. We write as attorneys who regularly practice before the Federal Election Commission, and who represent many clients who file independent expenditure reports with the Commission. These comments represent our own views on the law, not those of any particular client.

Western Representation PAC ("WRPAC") seeks an exemption to the independent expenditure reporting rules for its proposed e-mail communications. WRPAC's position that its activities incur no reporting requirements is correct. But its request for a special exemption is unnecessary. Under existing rules, its e-mails would not trigger reporting on Schedule E – the schedule requiring itemization of independent expenditures – because WRPAC would make no disbursement in connection with any one independent expenditure.

Persons (including political committees) that make independent expenditures aggregating \$1,000 or more after the 20th day, but more than 24 hours, before the date of an election must file a report describing the expenditures within 24 hours. See 2 U.S.C. § 434(g)(1). Persons (including political committees) that make independent expenditures aggregating \$10,000 or more at any time up to and including the 20th day before an election must file a report describing the expenditures within 48 hours. See *id.* § 434(g)(2).

Only *disbursements* for independent expenditures count toward the \$1,000 and \$10,000 thresholds. *See* 11 C.F.R. § 104.4(f) ("[e]very person must include in the aggregate total all disbursements during the calendar year for independent expenditures, and all enforceable contracts, either oral or written, obligating funds for disbursements during the calendar year for independent expenditures, where those independent expenditures are made with respect to the same election for Federal office."). A "disbursement" occurs only where an actual outlay of funds has been made. *See id.* § 102.10 (requiring that "[a]ll disbursements by a political committee, except for disbursements from the petty cash fund under 11 CFR 102.11, shall be made by check or similar draft drawn on account(s) established at the committee's depository or depositories under 11 CFR part 103.").

When a political committee or a person sends an e-mail, and incurs no direct costs for that particular e-mail, it makes no "disbursements ... for independent expenditures" and triggers no reporting requirements under 2 U.S.C. §§ 434(g)(1) or (2). Accordingly, when another PAC proposed to send e-mail attachments to its mailing list as independent expenditures, the Commission replied that it would not have to report the underlying expenses as independent expenditures, "unless they are directly attributed to a particular communication that expressly advocates the election or defeat of a clearly identified candidate." Advisory Opinion 1999-37 (X-PAC). Indeed, the Commission acknowledged that the PAC "may, in fact, have no costs that must be attributed to its independent expenditure program and reported as such under the regulations." *See id.* To reach this conclusion, the Commission relied on rules that exclude expenditures for "overhead, general administrative ... and other day-to-day costs" from attribution to individual candidates, unless they are made on behalf of a specific candidate, and are attributable to that same candidate. *See* 11 C.F.R. § 106.1(c)(1).

The facts presented by WRPAC in this request are materially indistinguishable from those in Advisory Opinion 1999-37. In both cases, the PACs proposed to distribute express advocacy communications. Both proposed to incur otherwise reportable overhead expenses to facilitate the communications. Neither would incur any direct cost to distribute any one particular communication. Therefore, WRPAC's proposed e-mail communications would not trigger any reports on Schedule E, although its general day-to-day costs would be disclosable as operating expenses.¹

A contrary answer – or, indeed, any answer that sows uncertainty on the method of disclosure – would threaten to chill a mode of communication that the Commission, for the last five years, has sought specially to protect. In its comprehensive 2006 Internet rulemaking, the Commission

¹ Requestor's payment of a "fixed monthly price" to an outside vendor to send emails does not alter this conclusion. The Requestor still would not be incurring any expense "directly attributed to a particular communication," or directly attributable to a clearly identified candidate – which was the decisive fact in Advisory Opinion 1999-37.

September 15, 2011

Page 3

exempted e-mail communications from the definition of a "public communication," finding from an extensive and carefully developed record that "there is virtually no cost associated with sending e-mail communications, even thousands of e-mails to thousands of recipients, and there is nothing in the record that suggests a payment is normally required to do so." Final Rule, Internet Communications, 71 F.R. 18589, 18596 (April 12, 2006). As a result, e-mails may even be sent *in coordination* with candidates, without making a contribution. *Id.* at 18600.

The same logic should apply here. Like other persons, political committees should remain free to send emails in support of their preferred candidates, at no incremental cost, without having to go through the impossible accounting exercise of assigning an arbitrary value to each e-mail. A contrary result would regulate *independent* political activity more extensively than *coordinated* activity – an untenable result under *Citizens United v. FEC*, 130 S. Ct. 876 (2010) and *SpeechNow.org v. FEC*, 599 F.3d 686 (D.C. Cir. 2010) (*en banc*).

Thus, the Commission should inform that WRPAC that its proposed activities would not trigger any reporting requirements under 2 U.S.C. §§ 434(g)(1) or (2). It can do so by applying the rules that already exist, not by granting a new, special exemption. The Commission's opinion should not sow confusion on a proposition that is now clearly understood: that an independent expenditure report need only include costs directly attributable to the particular communication involved.

We appreciate the opportunity to provide our views on this matter.

Very truly yours,



Marc E. Elias