



FEDERAL ELECTION COMMISSION  
Washington, DC 20463

February 3, 2012

CERTIFIED MAIL  
RETURN RECEIPT REQUESTED

ADVISORY OPINION 2011-28

Dan Backer, Esq.  
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Washington, D.C. 20003

Dear Mr. Backer:

We are responding to your advisory opinion request on behalf of Western Representation PAC (the "Committee"), concerning the application of the Federal Election Campaign Act of 1971, as amended (the "Act"), and Commission regulations to the Committee's reporting obligations for independent expenditures to be made to place advertisements on Facebook during the 2012 Presidential primary elections. The Commission concludes that the Committee may not exclude the actual costs of independent expenditure advertisements placed on Facebook from the calculation of its expenses included on its 24-hour and 48-hour reports. Further, the Commission concludes that the Committee must attribute these costs to the various States' Presidential primary elections when reporting the monthly cost of its independent expenditure advertisements placed on Facebook on its regular monthly reports.

### ***Background***

The facts presented in this advisory opinion are based on your letter received on November 21, 2011, your emails received on December 6 and 13, 2011, telephone conversations with the Office of General Counsel on December 2, 6, and 13, 2011, your comment filed on January 18, 2012, and your representations at the Commission's Open Meeting on January 19, 2012.

The Committee is a nonconnected committee. It plans to place advertisements on Facebook in connection with the 2012 Republican Presidential primary elections. These advertisements will expressly advocate the election or defeat of a clearly identified Federal candidate and will constitute independent expenditures. The Committee

currently plans to run only ads that do not reference a specific Presidential primary election and are not geographically targeted to a particular State.

The Committee will budget \$2,000 per day for these advertisements. Although the Committee may not spend this amount every day, the Committee asks the Commission to assume that the Committee will spend a maximum of \$2,000 per day.

The Committee seeks to exclude the costs of placing its advertisements on Facebook from its 24-hour and 48-hour reports of independent expenditures. The Committee also seeks to avoid attributing the costs of placing these advertisements to various States' Presidential preference primary elections on its monthly reports. The Committee claims that meeting these obligations "constitutes a significant legal encumbrance upon [the Committee's] First Amendment rights," in that it will require it to determine, for every advertisement placed: 1) the State primary elections to which the ad applies; 2) whether that advertisement falls within that particular primary election's 24- or 48-hour reporting period; and 3) the cost of placing each individual advertisement.

### ***Questions Presented***

1. *May the Committee exclude the cost of placing each independent expenditure advertisement on Facebook from the calculation of costs included in its 24- and 48-hour reports, provided such cost is included in the Committee's regular monthly reports*

2. *May the Committee report the actual monthly costs of its independent expenditure advertisement on Facebook on its regular monthly reports without attributing these costs to the various States' Presidential primary elections?*

### ***Legal Analysis and Conclusions***

1. *May the Committee exclude the cost of placing each independent expenditure advertisement on Facebook from the calculation of costs included in its 24- and 48-hour reports, provided such cost is included in the Committee's regular monthly reports?*

No, the Committee may not exclude the actual costs of independent expenditure advertisements placed on Facebook from the calculation of its expenses included on its 24-hour and 48-hour reports.

An "independent expenditure" is an expenditure by a person expressly advocating the election or defeat of a clearly identified candidate that is not made in concert or cooperation with or at the request or suggestion of, among others, the candidate.

2 U.S.C. 431(17)(A) and (B); 11 CFR 100.16(a).

Under the Act and Commission regulations, a political committee that makes independent expenditures aggregating \$1,000 or more after the 20<sup>th</sup> day, but more than 24

hours, before the date of a given election, must file a report describing the expenditures within 24 hours. 2 U.S.C. 434(g)(1)(A); 11 CFR 104.4(c). The 24-hour filing period begins when the independent expenditure is publicly distributed or otherwise publicly disseminated. 11 CFR 104.4(c). Reports must be filed by 11:59 p.m. of the day following the date on which an advertisement is publicly disseminated. *Id.* Additional reports must be filed within 24 hours each time the political committee makes independent expenditures aggregating \$1,000 or more with respect to the same election as that to which the initial report relates. 2 U.S.C. 434(g)(1)(B); 11 CFR 104.4(c).

A political committee that makes independent expenditures aggregating \$10,000 or more at any time up to and including the 20<sup>th</sup> day before the date of a given election must file a report describing the expenditures within 48 hours. 2 U.S.C. 434(g)(2)(A); 11 CFR 104.4(b)(2). The 48-hour reporting period begins when the independent expenditure is publicly distributed or otherwise publicly disseminated. 11 CFR 104.4(b)(2). Reports must be filed by 11:59 p.m. of the second day following the date on which an advertisement is publicly disseminated. *Id.* Additional reports must be filed within 48 hours each time the political committee makes additional independent expenditures aggregating \$10,000 or more with respect to the same election as that to which the initial report relates. 2 U.S.C. 434(g)(2)(B); 11 CFR 104.4(b)(2).

Independent expenditures are aggregated with respect to a given election regardless of which candidate is identified in the communication. 11 CFR 104.4(a), (b)(1)-(2), and (c); *see* Advisory Opinion 2003-40 (Navy Veterans) (concluding that two separate advertisements for the same election, one favoring Candidate A (costing \$9,000) and the other favoring Candidate B (costing \$4,000), had to be aggregated for purposes of filing a 48-hour report because the advertisements were related to the same election); *see also* Explanation and Justification, Bipartisan Campaign Reform Act of 2002 Reporting; Coordinated and Independent Expenditures, 68 FR 404, 406 (January 3, 2003). For purposes of aggregating independent expenditures, each State's Presidential primary election is considered a separate election. *See* Advisory Opinion 2003-40 (Navy Veterans).

The treasurer of a political committee "shall keep an account of . . . the name and address of every person to whom any disbursement is made, the date, amount and purpose of the disbursement, and the name of the candidate and the office sought by the candidate, if any, for whom the disbursement was made. . . ." 2 U.S.C. 432(c)(5); *see also* 11 CFR 102.9(b)(1)(i)-(iv). In performing recordkeeping duties, the treasurer must use his or her best efforts to obtain, maintain and submit the required information. 2 U.S.C. 432(i); 11 CFR 102.9(d).

Under the circumstances described in your request, the calculation for advertisements that do not reference or target a specific election is the following: The Committee would divide the cost of placing each advertisement by the number of

upcoming primary elections.<sup>1</sup> For example, an advertisement for which the Committee paid \$2,000 that was placed before the first primary election of the cycle would relate to all subsequent presidential primary elections.<sup>2</sup> And the cost of this advertisement would be \$2,000, divided by the total number of primary elections for that cycle. After a Presidential primary election has occurred, no further advertising costs are attributable to that election for that cycle.<sup>3</sup>

Facebook charges its advertisers once per calendar day for each advertisement.<sup>4</sup> Thus, for example, an advertisement running on February 5, 2012 will be billed at the end of that day regardless the number of hours it was accessible on that day. In the case of a 24-hour report, the Committee will have at least one full day to determine that it has reached the \$1,000 threshold and to file the report. Accordingly, because the statutory obligation to file 24- and 48-hour reports includes these types of advertisements placed on Facebook, the Commission concludes that the Committee is required to file such reports as set forth in the Act and the Commission's regulations.<sup>5</sup>

In a comment filed on January 18, 2012, you state that the Committee may not know the actual cost of particular Facebook advertisements until after the filing deadline has passed. The proper method for handling such a situation is spelled out on the Commission's website.<sup>6</sup> In the event the Committee does not know the actual cost of an advertisement, prior to the filing deadline, it should estimate the cost and, if, based on

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<sup>1</sup> As noted above, each State's Presidential primary election is considered a separate election for purposes of aggregating independent expenditures.

<sup>2</sup> Commission regulations explain that a primary election is one of the specific types of elections which is included within the definition of "election." 11 CFR 100.6(b). A list of the 2012 Presidential primary elections may be found at <http://www.fec.gov/pubrec/fe2012/2012dates.pdf>. A caucus or convention of a political party is an election only if it "has authority to select a nominee." 11 CFR 100.6(d). *See also* AO 1979-71 (PASPAC).

<sup>3</sup> In Advisory Opinion 1995-44 (Forbes for President), the Commission concluded that the statute did not require a Presidential candidate's principal campaign committee to file 48-hour notifications of contributions received. Advisory Opinion 1995-44 (Forbes for President) recognizes that the 48-hour notification requirement is intended to apply to contributions received just before an election that can be used for that election. When Presidential primary elections follow one another in rapid succession, it can be difficult to attribute numerous contributions received to a particular primary election particularly when those contributions may be used to pay expenses not tied to any particular State or that benefit the campaign nationally and the Commission declined to interpret the statutory reporting obligation in a way that would lead to an arbitrary result. In contrast, here, it is neither difficult nor especially burdensome to attribute an equal amount to each subsequent election.

<sup>4</sup> *See* <http://www.facebook.com/help/?page=121272714621547> (last accessed December 20, 2011).

<sup>5</sup> *Buckley v. Valeo*, 424 U.S. 1 (1976) (upholding independent expenditure reporting requirements); *see also* *Citizens United v. FEC*, 130 S. Ct. 876 (2010) (upholding reporting requirements for electioneering communications).

<sup>6</sup> *See* <http://www.fec.gov/rad/pacs/FederalElectionCommission-RAD-PACs.shtml#ie2> (last accessed January 24, 2012).

that estimate, a report is required, indicate that the reported amount is an estimate. Thereafter, once the Committee receives information regarding the actual cost of the advertisement, and if the actual cost differs from the estimate, the Committee should report the correct amount on the Committee's next regular report and reference the earlier estimate. Provided that the Committee makes a reasonable, good faith effort to estimate accurately the costs of the Facebook advertisement, following this procedure will be deemed "best efforts" by the Committee to meet its independent expenditure reporting obligations. 2 U.S.C. 432(i); 11 CFR 104.7(a).

2. *May the Committee report the actual monthly costs of its independent expenditure advertisements on Facebook on its regular monthly reports without attributing these costs to the various States' Presidential primary elections?*

No, the Committee may not report the actual monthly costs of its independent expenditure advertisements on Facebook on its regular monthly reports without attributing these costs to the various States' Presidential primary elections.

Every political committee must file reports of its receipts and disbursements. 2 U.S.C. 434(a)(1); 11 CFR 104.1(a). Nonconnected committees shall file either quarterly reports, or monthly reports which shall be filed no later than the 20<sup>th</sup> day after the last day of the month. *See* 2 U.S.C. 434(a)(4)(B); 11 CFR 104.5(c)(3). Nonconnected committees must disclose their independent expenditures on their monthly or quarterly reports. 2 U.S.C. 434(b)(4)(H)(iii); 11 CFR 104.3(b)(3)(vii). These reports must disclose all independent expenditures aggregating less than \$10,000 with respect to a given election any time during the calendar year up to and including the 20<sup>th</sup> day before an election. 11 CFR 104.4(b)(1).

As noted above, for purposes of aggregating independent expenditures, each State's Presidential primary election is considered a separate election. *See* Advisory Opinion 2003-40 (Navy Veterans). The Committee will file monthly reports in 2012.

The examples and calculations set forth above demonstrate how the Committee must determine its costs for placing independent expenditure advertisements on Facebook with respect to the various States' primary elections. Once the Committee has done so, it must aggregate costs for each State's Presidential primary election during the reporting period and list the States and amounts per State on Form 3X, Schedule E. Because the Committee does not have to file its monthly report until the 20<sup>th</sup> day after the last day of the month, it has sufficient time to aggregate its costs and report them to the Commission, as required by the statute.

This response constitutes an advisory opinion concerning the application of the Act and Commission regulations to the specific transaction or activity set forth in your request. *See* 2 U.S.C. 437f. The Commission emphasizes that, if there is a change in any of the facts or assumptions presented, and such facts or assumptions are material to a conclusion presented in this advisory opinion, then the requestor may not rely on that

conclusion as support for its proposed activity. Any person involved in any specific transaction or activity which is indistinguishable in all its material aspects from the transaction or activity with respect to which this advisory opinion is rendered may rely on this advisory opinion. *See* 2 U.S.C. 437f(c)(1)(B). Please note that the analysis or conclusions in this advisory opinion may be affected by subsequent developments in the law, including, but not limited to, statutes, regulations, advisory opinions, and case law. The cited advisory opinions are available on the Commission's website, [www.fec.gov](http://www.fec.gov), or directly from the Commission's Advisory Opinion searchable database at <http://www.fec.gov/searchao>.

On behalf of the Commission,

(signed)  
Caroline C. Hunter  
Chair