

November 18, 2011

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

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FEDERAL ELECTION
COMMISSION
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OFFICE OF GENERAL
COUNSEL

Re: Western Representation PAC Advisory Opinion Request

Dear Mr. Herman:

Pursuant to 2 U.S.C. § 437f, Western Representation PAC ("WRPAC") requests an Advisory Opinion from the Federal Election Commission regarding the interpretation of certain Independent Expenditure reporting requirements as applied to Independent Expenditures made through internet advertising by a non-connected political action committee within the various twenty-day presidential preference primary election reporting periods. As the first presidential primary election is less than sixty days away, WRPAC requests the FEC expedite this request and render an opinion within twenty days pursuant to 74 Fed. Reg. 32160 (July 7, 2009) or, in the alternative, within thirty days under its general expedited procedures.

I. INTRODUCTION

An obligation to include the cost of internet advertising when aggregating Independent Expenditure costs for 24- and 48-hour reports during the 2012 presidential primary reporting periods constitutes a significant legal encumbrance upon WRPAC's First Amendment rights. This obligation imposes an undue burden and impermissible restraint on WRPAC's freedom of speech in a manner contrary to the principles expressed in *Buckley v. Valeo*, 424 U.S. 1 (1976) and *Citizens United v. FEC*, 130 S.Ct. 876 (2010). WRPAC therefore requests that the Commission, in accord with AO 1995-44, interpret the law so that WRPAC may report these internet advertising expenses on its monthly report and not on 24- and 48-hour reports during the 2012 presidential preference primary election season.

As a non-connected political action committee, WRPAC will have its First Amendment rights unduly burdened if it is forced to report certain costs for internet advertising in conducting Independent Expenditures via email during the 2012 presidential preference primary election periods:

- a) WRPAC intends to pay to place advertising for a fee on websites such as Facebook and Google, among others, during the presidential preference primaries.
- b) All of these advertisements will be Independent Expenditures calling for the election or defeat of one or more clearly identified federal candidates in the various presidential preference primaries.

- c) Presidential preference primaries are currently scheduled for twenty-two different dates. It would be facially unreasonable to require WRPAC to file Independent Expenditure Reports each time it reaches the \$1,000 or \$10,000 reporting requirement of 2 U.S.C. §§ 434(g)(1) & (2) for each of the one or more candidates WRPAC intends to support or oppose across each of these elections.
- d) Reporting these costs is highly impracticable and a significant administrative burden, particularly to small grassroots organizations, particularly when allocating such costs across multiple, overlapping 20 day presidential preference primary election reporting periods based on the primary dates for various States. Such a burden would operate as a de facto prior restraint to deny speakers such as WRPAC their constitutional rights to associate and speak during the presidential preference primary election season.
- e) WRPAC may not know the actual daily cost of any advertisements during a fixed period of time or if the budget allotted for those advertisements will be met or exceeded, potentially rendering WRPAC incapable of meeting the Commission's transparency goals during the presidential primary elections.
- f) Even if the Independent Expenditure internet advertising costs were only calculated and reported as part of regularly scheduled monthly reports, attributing costs to each State's presidential preference primary election would result in a significant and confusing reporting burden under 11 CFR § 104.4(e)(1). Presumably, the entire cost of each Independent Expenditure internet advertising would apply to each past-Primary, triggering numerous duplicate and confusing reporting entries that would make the goal of transparency into a frosted-glass reality.

II. BACKGROUND

WRPAC is a non-connected political action committee formed to fight corruption in government and promote the ideals of limited government, fiscal sanity, free markets, and personal freedom. As the 2012 election cycle nears, WRPAC plans to conduct Independent Expenditure internet advertising supporting or opposing one or more clearly identified federal candidates as part of its overall speech on political and public policy matters. In particular, WRPAC plans to engage in numerous such campaigns with respect to one or more candidates for the Republican Presidential nomination throughout the presidential preference primary election season.

WRPAC plans to exercise its rights in the 2012 presidential preference primaries by, among other activities, communicating to voters in all fifty states with internet advertising encouraging voters to support or oppose one or more clearly identified candidates in the presidential preference primary elections.

WRPAC will pay assorted fees to place advertisements on various websites. WRPAC, however, cannot know or reasonably anticipate how much it will spend on this activity. Although in some cases a maximum daily budget can be set, this is only an upper limit. WRPAC cannot anticipate which of its many different advertisements on various platforms will be the most successful. As a result, WRPAC will monitor the success or failure of its advertisements on one or more platforms daily and making ongoing modifications to the budget for each of many different advertisements supporting or opposing one or more candidates.

However, the reporting requirements for Independent Expenditures require that filings with the Commission take place within either 24- or 48-hours from the time of public distribution of any Independent Expenditure, based on the reporting threshold crossed. 11 CFR §§ 104.4(b)(2) & (c); See also 2 U.S.C. § 434(g)(1) & (2). For Independent Expenditures aggregating \$10,000 spent up to the twentieth day before an election (48-hour reports):

Political committees must report . . . all Independent Expenditures aggregating \$10,000 or more with respect to a given election any time during the calendar year up to and including the 20th day before an election. Political committees must ensure that the Commission receives these reports by 11:59 p.m. [EST] on the second day following the date on which a communication that constitutes an Independent Expenditure is publicly distributed or otherwise publicly disseminated. Each time subsequent Independent Expenditures relating to the same election aggregate an additional \$10,000 or more, the political committee must ensure that the Commission receives a new 48-hour report of the subsequent Independent Expenditures by 11:59 p.m. Eastern Standard/Daylight Time on the second day following the date on which the communication is publicly distributed or otherwise publicly disseminated. 11 CFR § 104.4(b)(2).

For Independent Expenditures aggregating \$1,000 or more between the twentieth day before an election and 24-hours before the election (24-hour reports):

Political committees must ensure that the Commission receives reports of Independent Expenditures aggregating \$1,000 or more with respect to a given election, after the 20th day, but more than 24 hours before 12:01 a.m. of the day of the election, by 11:59 p.m. [EST] on the day following the date on which a communication is publicly distributed or otherwise publicly disseminated. Each time subsequent Independent Expenditures relating to the same election aggregate an additional \$1,000 or more, the political committee must ensure that the Commission receives a new 24-hour report of the subsequent Independent Expenditures by 11:59 p.m. [EST] on the day following the date on which a communication that constitutes an Independent Expenditure is publicly distributed or otherwise publicly disseminated. 11 CFR § 104.4(c).

It may also not be possible to determine (and thus report) the cost of WRPAC's Independent Expenditure internet advertising within the required 24- or 48-hour time periods following the determination of that day's budget. For all on-going advertisements, therefore, it may be impossible for WRPAC to comply with the 24- and 48-hour reporting requirements as they apply to WRPAC's presidential preference primary election season.

Additionally, an internet advertisement distributed on any given day during the presidential preference primary election season is almost certain to fall into one or more of the twenty-two staggered, overlapping twenty-days-prior periods during the presidential preference primary election season (See Exh. A). This compounds the difficulty of determining costs with the administrative impracticability and significant burden of applying these fluctuating costs to various staggered reporting thresholds for multiple candidates, in multiple States. The reporting requirements of 2 U.S.C. §§ 434 (g)(1) & (2) and 11 CFR § 104.4 would, therefore, pose such a significant burden on WRPAC's planned Independent Expenditures that they rise to the level of an infringement on WRPAC's First Amendment rights.

III. DISCUSSION

Under the Federal Election Campaign Act ("FECA"), internet advertising constitutes either an Independent Expenditure or a coordinated communication when, among other requirements, it calls for the election or defeat of a clearly identified candidate. 2 U.S.C. § 431(17); 11 CFR § 100.16(a); 11 CFR § 100.26. Regardless of the category under which the advertisement falls, it must be reported to the Commission. See 11 CFR § 109.21(b)(1); 11 CFR 104.5(c)(1)(ii). Any time up to and including the twentieth day before an election, any costs associated with an Independent Expenditure supporting or opposing any given candidate must be reported each time those costs aggregate a total of \$10,000 for each such candidate. 2 U.S.C. § 434(g)(2); 11 CFR § 104.4(b)(2). After the twentieth day, but more than 24-hours, before an election, Independent Expenditures supporting or opposing any identified candidate must be reported every time their total costs aggregate \$1,000 for a specific election for each such candidate. 2 U.S.C. § 434(g)(1); 11 CFR § 104.4(c). Starting from the date of public distribution, an Independent Expenditure that meets either, or both, of these thresholds must be reported to the Commission by 11:59 p.m. EST on the second day after it aggregates \$10,000 spent and by the same time on the first day after reaching \$1,000. 11 CFR § 104.4f; 11 CFR §§ 100.19(d)(1) & (2). When made in support of a candidate for President, Independent Expenditures must be reported in the committee's regularly scheduled reporting to the Commission. 11 CFR § 104.4(e)(1). WRPAC wishes to comply with these requirements, but one of its preferred means of speech, given its efficiency and reach, is effectively banned due to the sheer impracticability of complying with FECA's reporting requirements for Independent Expenditures made through internet advertising during the 2012 presidential preference primary election season.

Interpreting the reporting requirements of 2 U.S.C. §§ 434(g)(1) & (2) and 11 CFR §§ 104.4(b)(2), (c), & (e)(1) to limit the unreasonable reporting of the daily cost of Independent Expenditure internet advertising for each candidate and attributing to each subsequent primary date would be a practical and constitutionally appropriate solution. Such an interpretation would not excuse WRPAC from inclusion of such costs in its regular monthly reporting. Thus, WRPAC would be able to meet the Commission's goal of transparency by reporting all of its Independent Expenditures each month.

The *Buckley* Court described three categories of government interest served by the imposition of FECA's disclosure requirements: combating (especially, *quid pro quo*) corruption, providing information to the electorate, and aiding the detection of campaign finance violations. 424 U.S. at 67. Since, as a matter of law, "Independent Expenditures . . . do not give rise to corruption or the appearance of corruption" (*Citizens United*, at 884), FECA's reporting requirements for Independent Expenditures cannot rely on an anti-corruption interest as a justifying basis for over-burdening free expression. The remaining information-gathering and violation-detecting interests must be achieved by means "closely drawn to avoid unnecessary abridgment" of First Amendment rights. *Buckley* at 25.

While the Supreme Court has consistently upheld the facial constitutionality of reporting and disclosure requirements (*McConnell v. FEC*, 540 U.S. 93, 196 (2003); *Buckley v. Valeo*, 424 U.S. 1, 60 (1976);

SpeechNOW.org v. FEC, 599 F.3d 686, 698 (D.C. Cir. 2010)), it has recognized that measures burdening political speech “by design or inadvertence” (*Citizens United v. FEC*, 130 S.Ct. 876, 898 (2010)) are subject to strict scrutiny and must be narrowly tailored to the service of a compelling government interest. *Id.* at 898; *FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 464 (2007); *Buckley*, at 25.

WRPAC’s constitutionally protected right to engage in protected Independent Expenditure internet advertising communications will be denied as a consequence of FECA’s Independent Expenditure reporting requirements because of the impossible burden of calculating daily the spending across each Independent Expenditure, candidate, and primary date and the resulting complexity of timely filing multiple reports within the required 24- and 48-hour periods. To justify the effective ban on a specific manner of speech, the government must prove that less burdensome means of achieving its legitimate interests are not available. *Buckley*, 424 U.S. at 238. Here, the burden to protect political speech may be cured in a reasonable manner that still provides an appropriate level of reporting and disclosure. In Advisory Opinion 1995-44, the Commission illustrated that a narrow interpretation of reporting requirements as applied in unique circumstances can relieve a burden on First Amendment rights without abandoning the legitimate government interest in reporting and disclosure.

In AO 1995-44, the Commission interpreted the rules to allow the campaign committee of a candidate seeking the Republican Presidential nomination to comply with reporting requirements during the presidential preference primary election season because the committee’s monthly filing schedule satisfied the government interest at stake. Under 2 U.S.C. § 434(a)(6)(A), “the principal campaign committee of a candidate must notify the Secretary or the Commission, and the Secretary of State, as appropriate, in writing, of any contribution of \$1,000 or more received by any authorized committee of such candidate after the 26th day, but more than 48 hours before, any election.” The Commission noted that these notifications work “in conjunction with the quarterly, pre-election, and post-election reports required by section 434(a)(2) to fulfill the disclosure purposes of the Act.” AO 1995-44, pg. 2 ¶ 1. The Commission then cited the administrative and reporting difficulties posed by a “presidential primary season . . . made up of a series of separate primary elections,” which are “unlike nonpresidential primary elections, where it is clear to which election the notification requirement applies.” (*Id.*, pg. 2 ¶ 2). The Commission explained that such an interpretation of the reporting rules was necessary to avoid forcing a committee to “simultaneously track overlapping 20 day notification periods for several different primary elections” and “to submit 48 hour notifications on an almost continual basis.” *Id.* Another burden the Commission aimed to avoid forcing on the committee was “to attribute the contributions it receives to a particular primary election, a task that can be difficult or arbitrary given the national nature of most presidential primary campaigns.” *Id.*

The Commission reasoned that since the reporting requirements of section 434(a)(6)(A) were designed to supplement the quarterly, pre-election, and post-election reporting system required by section 434(a)(2), (*Id.*, pg. 2 ¶ 1) the committee’s more frequent monthly reporting schedule would obviate the need for the additional, acknowledged burdens of section 434(a)(6)(A) reporting by providing regular enough disclosure of contribution and expenditure activity to satisfy the government interests at stake. *Id.*, pg. 2 ¶ 3-4.

WRPAC's reporting burden will be greater, and the government interest in regulating its Independent Expenditure speech weaker, than the government's contribution-regulating interest described in AO 1995-44. Absent an interpretation similar to that in AO 1995-44, WRPAC would be forced into an unreasonably burdensome reporting regime. Moreover, while the committee in AO 1995-44 would only be burdened with attributing its various \$1,000 contributions to a particular election, WRPAC would be forced to apply the costs of *each* of its nation-wide Independent Expenditure advertising communications to *every* pending presidential preference primary election reporting period for each candidate.

As Independent Expenditures, unlike campaign contributions, do not as a matter of law pose any risk of actual, or apparent, quid pro quo corruption, this level of burden on speakers is wholly unjustifiable. The *Buckley* Court recognized that Independent Expenditures, like WRPAC's planned advertisements, do not "appear to pose dangers of real or apparent corruption comparable to those identified with large campaign contributions." 424 U.S. at 46. See also *Citizens United*, 130 S.Ct. at 884 (confirming *Buckley*'s reasoning that Independent Expenditures do not lead to, or create the appearance of *quid pro quo* corruption). It follows that if the monthly reporting in AO 1995-44 was sufficient to satisfy the more substantial government interest in regulation and proper reporting of contributions, a committee that would suffer additional burdens at the service of a lesser government interest should receive the same consideration so long as it too files monthly.¹ Therefore, a similar interpretation regarding the application of §§434(g)(1) & (2) to WRPAC's Independent Expenditure internet advertisements would satisfy the government interest at stake to the same extent as in AO 1995-44, and WRPAC's political speech would be free from a significant and constitutionally impermissible burden.

If WRPAC is forced to potentially report daily email individual Independent Expenditure internet advertisement, it will be further subjected to the significant administrative burden of applying these costs to multiple, overlapping twenty-day presidential preference primary election periods. This would constitute the type of burden the Commission specifically avoided forcing on a committee in AO 1995-44. These administrative burdens are illustrated by presidential preference primary election season calendar appended as Exhibit A. The Supreme Court has recognized that there are already significant burdens inherent to speaking as a PAC. *Citizens United*, 130 S.Ct. at 897. Absent an interpretation in line with AO 1995-44, the inherent burden of speaking as a PAC will be compounded by the administrative impracticality of determining for *every Independent Expenditure internet advertisement in support of or in opposition to each candidate*: A) the net daily cost of all such expenditures related to each candidate; B) to which primary election dates the Independent Expenditure applies; and C) whether they apply to each particular election's 24- or 48-hour reporting period. WRPAC asserts that the administrative burden of detailing this each time WRPAC plans to communicate its political beliefs, up to daily, amounts to an impermissible burden on its First Amendment rights.

¹ In 2010, WRPAC filed monthly reports. In 2011, like many committees, WRPAC changed its filing frequency to semi-annually to alleviate unnecessary reporting burdens. In 2012, WRPAC will change its filing frequency to monthly reporting once again.

It is an unreasonable burden to both determine the Independent Expenditure outlays and comply with 2 U.S.C. §§ 434(g)(1) & (2) for committees acting like WRPAC. WRPAC therefore requests the Commission interpret the rules for reporting Independent Expenditure costs across various individual primary elections so as to not unduly burden grassroots organizations engaging in robust speech through online Independent Expenditure advertising. Anything short of such an interpretation would constitute an unconstitutional ban on WRPACs protected speech.

IV. QUESTION PRESENTED

1. **May WRPAC exclude the actual cost of posting each Independent Expenditure advertisement from the calculation of costs relevant to the 24- and 48- hour reporting requirements, provided such actual costs are included in WRPACs regular monthly reports to the FEC?**
2. **May WRPAC report the actual monthly cost of its Independent Expenditure internet advertisements by means of its regular monthly reports without attributing these costs to the various States' presidential preference primary elections?**

V. CONCLUSION

As the Supreme Court has repeatedly held in cases from *Buckley* to *Citizens United*, burdensome regulation of speech must yield where it is not narrowly tailored to serve a legitimate government interest. WRPAC has found its planned mode of speech effectively banned due to the impracticability of compliance with FECA's Independent Expenditure reporting requirements. As the Commission demonstrated by issuing AO 1995-44, interpreting the regulations to avoid absurdities in statutory compliance would be the best solution as it offers the opportunity to reduce unnecessary barriers to speech while preserving legitimate government interests.

WRPAC therefore requests the Commission interpret FECA in a manner to permit WRPAC to exclude from the Act's 24- and 48-hour reporting requirements for Independent Expenditures the cost of Independent Expenditure internet advertisements, provided such costs continue to be reported in WRPAC's regular monthly reports, and that these costs need not be attributed by candidate and primary date.

Sincerely,



Dan Backer, Esq.

Counsel,

Western Representation PAC

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Exhibit B: An Illustration of Bureaucratic Absurdity

Beginning on December 14, WRPAC contracts to have an internet advertisement run on the Facebook Ads platform encouraging the defeat of a clearly identified candidate for the Republican Presidential nomination. This advertisement, placed for a fee on the website of another, constitutes an Independent Expenditure within 20 days of the Iowa caucus on January 3, for which a 24-hour report must be filed each time an Independent Expenditures aggregates \$1,000 or more. WRPAC will set a daily advertising budget of \$2,000 for this ad, but will not know what the actual daily advertising expense will be until the next day. On any given day from midnight to midnight, this advertisement may or may not cost \$1,000 or more depending upon the number of viewers who click on the advertisement, the number of times the advertisement is shown on Facebook's main page, the "bid" that WRPAC places on CPC or CPM, and any changes in the daily or campaign-long amount that WRPAC ultimately spends. In order to comply with the 24-hour reporting requirement, and potentially the 48-hour reporting requirement, WRPAC will access its account each day to determine how much money has been spent thus far on each advertisement, and it is easily conceivable that WRPAC will be forced to file daily 24-hour reports.

To complicate this analysis, beginning on December 21, the 20 days prior period is commended for the New Hampshire primary, requiring the same tracking and reporting for two separate primary dates each time the 24- or 48-hour reporting threshold is met, though calculated from 2 separate starting points. On January 1, this would also apply to the South Carolina primary. On January 4th, it would no longer apply to Iowa, but would apply to the primary dates for New Hampshire, and South Carolina. On January 9th, it will no longer apply to New Hampshire, but it will now apply to South Carolina and Florida.

WRPAC intends to support the election or defeat of multiple candidates in the Republican Presidential primaries, and to do so using multiple messages on a daily basis, in part to help determine which message is most effective. Based on the dates in Scenario 1, WRPAC may run 6 separate messages calling for the defeat of 3 candidates over the relevant period of December 14 through January 4. For example, WRPAC may run a single advertisement against Candidate 1, two different advertisements against Candidate 2, and 3 different advertisements against Candidate 3. Each of these advertisements has its own separate daily budget cap that may be changed each day based upon each advertisement's relative impact (how often seen, how often clicked, etc.).

In calculating the 24- and 48- hour reports that WRPAC must complete, the sum of all the advertising against each candidate is necessary to determine if and when (and how often) to file 24-hour or 48-hour reports for each candidate as to each primary date. It is possible that in that 26 days, WRPAC may be forced to file as many as 3 reports each day – 1 per candidate – and to file one each report with respect to each different primary date. This could require as many as 50 or 60 separate reports being filed – a facially unreasonable burden and restraint on speech.

In sum, WRPAC cannot reasonably be expected to comply with near constant 24- or 48-hour reporting over 22 primary dates, 193 days, opposing as many as 6 individual candidates, and reporting burdens so overwhelming that they operate as a prior restraint on speech.

This Scenario assumes that all the advertisements conducted by WRPAC would be placed on Facebook. Should WRPAC engage the services of other internet service providers, such as Google, Yahoo, Newsmax, or others, factoring in different billing models would dramatically increase the complexity associated with this activity and the reporting burden to WRPAC would grow tremendously.



"Dan Backer"
<DBacker@DBCapitolStrategies.com>

12/13/2011 03:43 PM

To <tbuckley@fec.gov>

cc

bcc

Subject RE: Advisory Opinion Request - Western Representation PAC

Mr. Buckley,

I confirm that these statements are accurate with respect to the advisory opinion request from Western Representation PAC.

Regards,

Dan Backer, Esq.
202-210-5431 office
202-478-0750 fax

DB Capitol Strategies

PAC * GRASSROOTS * ADVOCACY * NONPROFIT

Home of The Strategist, a monthly PAC update

www.DBCapitolStrategies.com

<http://twitter.com/DBCapStrategies>

From: tbuckley@fec.gov [mailto:tbuckley@fec.gov]

Sent: Tuesday, December 13, 2011 3:34 PM

To: DBacker@DBCapitolStrategies.com

Subject: Advisory Opinion Request - Western Representation PAC

Mr. Backer -

Please confirm the following statements with respect to the advisory opinion request from Western Representation PAC:

- 1) Some ads will identify specific elections.
- 2) For purposes of your request, the Commission should assume that your maximum daily advertising budget will be \$2,000.
- 3) For purposes of your request, the Commission need only consider the example illustrated in Exhibit B regarding advertising on Facebook.