

January 18, 2008

AO DRAFT COMMENT PROCEDURES

The Commission permits the submission of written public comments on draft advisory opinions when on the agenda for a Commission meeting.

DRAFT ADVISORY OPINION 2007-33 is available for public comments under this procedure. It was requested by Carol A. Laham, Esq., and D. mark Renaud, Esq., on behalf of Club for Growth PAC.

Draft Advisory Opinion 2007-33 is scheduled to be on the Commission's agenda for its public meeting of Thursday, January 24, 2008.

Please note the following requirements for submitting comments:

1) Comments must be submitted in writing to the Commission Secretary with a duplicate copy to the Office of General Counsel. Comments in legible and complete form may be submitted by fax machine to the Secretary at (202) 208-3333 and to OGC at (202) 219-3923.

2) The deadline for the submission of comments is 12:00pm noon (Eastern Time) on January 23, 2008.

3) No comments will be accepted or considered if received after the deadline. Late comments will be rejected and returned to the commenter. Requests to extend the comment period are discouraged and unwelcome. An extension request will be considered only if received before the comment deadline and then only on a case-by-case basis in special circumstances.

4) All timely received comments will be distributed to the Commission and the Office of General Counsel. They will also be made available to the public at the Commission's Public Records Office.

CONTACTS

Press inquiries: Robert Biersack (202) 694-1220

Commission Secretary: Mary Dove (202) 694-1040

Other inquiries:

To obtain copies of documents related to AO 2007-33, contact the Public Records Office at (202) 694-1120 or (800) 424-9530 or visit the Commission's website at www.fec.gov.

For questions about comment submission procedures, contact Rosemary C. Smith, Associate General Counsel, at (202) 694-1650.

MAILING ADDRESSES

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Associate General Counsel
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January 18, 2008

AGENDA ITEM

For Meeting of: 01-24-08

MEMORANDUM

TO: The Commission

FROM: Thomasenia P. Duncan *TPD (by RBK)*
General Counsel

Rosemary C. Smith *RCS (by RBK)*
Associate General Counsel

Ron B. Katwan *RBK*
Assistant General Counsel

Robert M. Knop *RMK*
Attorney

Subject: Draft AO 2007-33

SUBMITTED LATE

Attached is a proposed draft of the subject advisory opinion. We request that this draft be placed on the agenda for January 24, 2008.

Attachment

1 ADVISORY OPINION 2007-33

2

3 Carol A. Laham, Esq.

DRAFT

4 D. Mark Renaud, Esq.

5 Wiley Rein LLP

6 1776 K Street, N.W.

7 Washington, D.C. 20006

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9 Dear Ms. Laham and Mr. Renaud:

10 We are responding to your advisory opinion request on behalf of Club for Growth
11 PAC asking if, under the Federal Election Campaign Act of 1971, as amended (the
12 "Act"), and Commission regulations, its ten- and fifteen-second television advertisements
13 must carry the full spoken "stand-by-your-ad" disclaimer.

14 The Commission concludes that the ten- and fifteen-second television
15 advertisements that Club for Growth PAC plans to air must carry the full spoken "stand-
16 by-your-ad" disclaimer required by the Act and Commission regulations.

17 ***Background***

18 The facts presented in this advisory opinion are based on your letter received on
19 November 15, 2007 and your e-mail received on November 28, 2007.

20 Club for Growth PAC is the separate segregated fund of the Club for Growth, an
21 incorporated nonprofit membership organization. Club for Growth PAC has qualified as
22 a multicandidate committee under the Act and Commission regulations.

23 Club for Growth PAC plans to purchase television time in 2008 for ten- and
24 fifteen-second advertisements that expressly advocate the election or defeat of a clearly
25 identified Federal candidate. For example, you indicate that it plans to run a television
26 advertisement in support of Representative Jeff Flake. These advertisements will not be

1 coordinated with, or authorized by, any candidate, candidate's committee, political party,
2 or their agents.

3 Each of these advertisements will include the following two written statements:

- 4 ▪ "Paid for by Club for Growth PAC, www.clubforgrowth.org, and not
5 authorized by any candidate or candidate's committee."
- 6 ▪ "Club for Growth PAC is responsible for the content of this advertising"
7 (the written, "stand-by-your-ad" disclaimer).

8 The written stand-by-your-ad disclaimer will be aired for four seconds at the end of each
9 ten- or fifteen-second advertisement in letters equal to or greater than four percent of the
10 vertical picture height. Due to the brevity of the ten- and fifteen-second advertisements,
11 however, Club for Growth PAC wishes to dispense with, or truncate, the spoken, stand-
12 by-your-ad disclaimer required by the Act and Commission regulations.

13 ***Question Presented***

14 *Must the ten- and fifteen-second television advertisements that Club for Growth*
15 *PAC plans to air during 2008 carry the full spoken stand-by-your-ad disclaimer required*
16 *by the Act and Commission regulations?*

17 ***Legal Analysis and Conclusions***

18 Yes, the ten- and fifteen-second television advertisements that Club for Growth
19 PAC plans to air during 2008 must carry the full spoken stand-by-your-ad disclaimer
20 required by the Act and Commission regulations. *See* 2 U.S.C. 441d and 11 CFR 110.11.

21 All public communications made by a political committee must include certain
22 disclaimers. *See* 2 U.S.C. 441d(a)(1); 11 CFR 110.11(a)(1). In addition, all public
23 communications made by any person, including a political committee, that expressly

1 advocate the election or defeat of a clearly identified Federal candidate must include
2 disclaimers. *See* 2 U.S.C. 441d(a); 11 CFR 110.11(a)(2). Club for Growth PAC has
3 qualified as a multicandidate committee, which is a type of political committee under the
4 Act and Commission regulations. *See* 2 U.S.C. 431(4); 11 CFR 100.5(e)(3). In addition,
5 because the advertisements that Club for Growth PAC plans to air will be broadcast via
6 television, such communications will constitute “public communications.” *See* 2 U.S.C.
7 431(22); 11 CFR 100.26. Moreover, Club for Growth PAC has indicated that the
8 proposed advertisements will expressly advocate the election or defeat of a clearly
9 identified Federal candidate. Accordingly, the ten- and fifteen-second television
10 advertisements that Club for Growth PAC intends to air during the 2008 election cycle
11 must carry disclaimers under both 11 CFR 110.11(a)(1) and (a)(2). *See also* 2 U.S.C.
12 441d(a).

13 Because the advertisements would be paid for by Club for Growth PAC but
14 would not be authorized by any candidate, authorized committee of a candidate, or agent
15 of either, they must contain a written disclaimer that clearly states the full name and
16 permanent street address, telephone number, or World Wide Web address of the person
17 who paid for the communication, and indicates that the communication is not authorized
18 by any candidate or candidate’s committee. *See* 2 U.S.C. 441d(a)(3); 11 CFR
19 110.11(b)(3). The written disclaimer must be presented in a clear and conspicuous
20 manner to give the viewer adequate notice of the identity of the person or political
21 committee that paid for and/or authorized the communication. 11 CFR 110.11(c)(1).
22 Club for Growth PAC intends to comply with these requirements.

1 In addition, because the advertisements will be television communications not
2 authorized by a candidate they must also include an audio statement that identifies the
3 person paying for the communication. *See* 2 U.S.C. 441d(d)(2); 11 CFR 110.11(c)(4)(i).
4 An example of a statement that would satisfy this requirement is: “Club for Growth PAC
5 is responsible for the content of this advertising.”

6 Club for Growth PAC’s request to dispense with, or truncate, the spoken, stand-
7 by-your-ad requirement relies on two previous advisory opinions applying Commission
8 regulations establishing exceptions to the disclaimer requirements. 11 CFR 110.11(f)(1).
9 First, in Advisory Opinion 2004-10 (Metro Networks), the Commission concluded that
10 specific physical and technological limitations made it “impracticable” to require that the
11 candidate himself deliver the spoken stand-by-your-ad disclaimer for the candidate’s
12 radio communication. *See* 11 CFR 110.11(f)(1)(ii). Due to the live nature of the reports
13 broadcast from aboard a helicopter and the limitations of the broadcasting equipment
14 used, it was “physically impossible” for Metro Networks to include any statements
15 spoken by the candidate who paid for the advertisement. *See* Advisory Opinion 2004-10
16 (Metro Networks). However, the Commission neither dispensed with, nor truncated, the
17 spoken stand-by-your-ad requirement but merely permitted someone other than the
18 candidate to deliver the spoken statement. Thus, Advisory Opinion 2004-10 (Metro
19 Networks) does not support dispensing with, or truncating, the spoken stand-by-your-ad
20 disclaimer for the advertisements proposed in this request. Nor are there physical or
21 technological limitations that would make it “impracticable” to include the full spoken
22 stand-by-your-ad disclaimer in a television advertisement. *See* 11 CFR 110.11(f)(1)(ii).

1 Second, the facts presented in Advisory Opinion 2002-09 (Target Wireless) also
2 differed materially from those presented in Club for Growth PAC's request. In Advisory
3 Opinion 2002-09 (Target Wireless), the portion of each candidate-sponsored text
4 message devoted to the candidate's entire message (including the stand-by-your-ad
5 disclaimer) was severely limited. It was subject not only to an overall limit on the
6 number of characters but also to an internal limit, as well, because the candidate was
7 including other content within the message, such as sports scores or information about
8 news events. The Commission concluded that the technological limitations on both the
9 size and the length of information that the text messages were able to contain made the
10 proposed communications eligible for the "small items" exception at 11 CFR
11 110.11(f)(1)(i). Because the "small items" exception applies only to "bumper stickers,
12 pins, buttons, pens, and similar items upon which the disclaimer cannot be conveniently
13 printed," it does not justify dispensing with, or truncating, the spoken stand-by-your-ad
14 disclaimer for the television advertisements that Club for Growth PAC plans to sponsor.
15 11 CFR 110.11(f)(1)(i).

16 The Commission notes that when Congress amended the Act to add the spoken
17 stand-by-your-ad disclaimer requirement for television and radio advertisements, it did
18 not create an exception for television communications of ten or fifteen seconds or any
19 other duration, even though it was aware of the Commission's already-existing regulatory
20 exceptions for "impracticability" and "small items." *See* Bipartisan Campaign Reform
21 Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 (2002). Therefore, the Commission
22 concludes that Club for Growth PAC's ten- and fifteen-second television advertisements
23 do not qualify for the "small items" exception at 11 CFR 110.11(f)(i). Accordingly, Club

1 for Growth PAC must include the full spoken stand-by-your-ad disclaimer in its ten- and
2 fifteen-second television communications.

3 This response constitutes an advisory opinion concerning the application of the
4 Act and Commission regulations to the specific transaction or activity set forth in your
5 request. *See* 2 U.S.C. 437f. The Commission emphasizes that, if there is a change in any
6 of the facts or assumptions presented, and such facts or assumptions are material to a
7 conclusion presented in this advisory opinion, then the requestor may not rely on that
8 conclusion as support for its proposed activity. All cited advisory opinions are available
9 on the Commission's website at <http://saos.nictusa.com/saos/searchao>.

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Sincerely,

David M. Mason
Chairman