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FEDERAL ELECTION COMMISSION
Washington, DC 20463

February 3, 2000

MEMORANDUM

AGENDA ITEM

For Meeting of: 2-09-00

TO: The Commission

THROUGH: James A. Pehrkon
Staff Director

FROM: Lawrence M. Noble
General Counsel

N. Bradley Litchfield
Associate General Counsel

Michael G. Marinelli
Staff Attorney

SUBJECT: Draft AO 1999-37

Attached is a proposed draft of the subject advisory opinion. We request that this draft be placed on the agenda for February 9, 2000.

Attachment

1
2 **ADVISORY OPINION 1999-37**

3
4 **Michael J. Panetta, Executive Director**
5 **X-PAC**
6 **3509 Connecticut Avenue, NW #175**
7 **Washington, DC 20008**

DRAFT

8
9 **Dear Mr. Panetta:**

10
11 **This refers to your letters dated November 11 and October 18, 1999, on behalf of**
12 **X-PAC: The Political Action Committee for Generation X ("X-PAC") concerning the**
13 **application of the Federal Election Campaign Act of 1971, as amended ("the Act"), and**
14 **Commission regulations to X-PAC's proposed political advertising that would promote**
15 **use of the Internet to make independent expenditures.**

16 **FACTS**

17 **You are the executive director of X-PAC which has created several political**
18 **advertisements or communications in various electronic formats. These communications**
19 **have content that advocates the election or defeat of specific candidates for Federal office.**
20 **You explain that they were made without consultation with any candidate's campaign or**
21 **committee, and you assert that the advertisements would be considered "independent**
22 **expenditures" under the Act. You further state that these advertisements are "native" to**
23 **the Internet in that they were created specifically for electronic distribution and were**
24 **never intended to be shown or presented as "paid media" on either television or radio.**

25 **In addition, you explain that these communications, were developed "in-house"**
26 **by X-PAC using commercially available software and will be hosted on its web site at no**

1 additional cost beyond what the committee has previously reported.¹ You characterize
2 the costs for the making and hosting of these ads as "very minimal."

3 X-PAC plans to distribute these ads through the Internet in two ways:
4 downloading from the X-PAC website (www.x-pac.org) and through electronic mail.
5 You state that X-PAC will choose the e-mail addresses to which it will send the ads in
6 several ways. On its website (<http://www.x-pac.org>), X-PAC currently has a section
7 where site visitors can subscribe to the X-PAC e-mail lists. These people have indicated
8 they would like to receive additional material from X-PAC when it is available. You state
9 that X-PAC will send its advertisements as e-mail attachments to these addresses. You
10 further explain that there are various bulletin boards that discuss politics on the Internet.
11 Examples include Usenet newsgroups such as "*altpolitics*." Using these groups, X-PAC
12 would not actually send the advertisement file content to the newsgroup, but would
13 instead post a text message describing the advertisement with a link back to the
14 advertisement hosted on the X-PAC web site. As resources permit, X-PAC will also
15 promote its website through traditional paid print media and on the Internet, with banner
16 advertisements that will link back to X-PAC's web page.

17 A large part of this venture will be to encourage the viewers of these
18 advertisements to forward them to others through their own e-mail accounts and with a
19 "send this ad to a friend" link on the X-PAC website. You explain that while these files
20 can be accessed via the X-PAC website, they also can be viewed "independently of the

¹ These communications will be in executable programs for Microsoft Windows operating systems (.exe) and Real Media files (.ra, .rm, .ram), a proprietary digital media format by Real Networks. The two main software packages used, you state, are "Flash 4" by Macromedia and "Real Converter" by Real Networks.

1 Internet." Users will create a copy of the communication on to their own computers, and
2 would then use their own e-mail accounts to forward it to others.

3 You ask several questions about the described proposal:

- 4 1. Considering the minimal costs involved in the making and hosting of these ads, what
5 does the Commission need to see in terms of financial documentation?
- 6 2. Is it sufficient to report the cost of the advertisement once as an independent
7 expenditure made by X-PAC, or does X-PAC have to multiply that cost by the
8 number of times the advertisement was downloaded from the web site?
- 9 3. Does each e-mail X-PAC sends with one of the described advertisements need to be
10 reported as a separate independent expenditure?
- 11 4. As X-PAC will be encouraging others, via its "send this ad to a friend" link on the X-
12 PAC website, to forward these ads, what type of information does X-PAC need to
13 collect from those who want to forward the ads and about the intended recipients?
- 14 5. Will X-PAC need to take any steps to stop non-U.S. citizens from forwarding these
15 ads?

16 ACT AND COMMISSION REGULATIONS.

17 The definition of "expenditure" in 2 U.S.C. §431(9) includes "any purchase,
18 payment, distribution, loan, advance, deposit, or gift of money or anything of value, made
19 by any person for the purpose of influencing any election for" Federal office. See also 11
20 CFR 100.8(a)(1). The definition of "contribution" in 2 U.S.C. §431(8) includes "any
21 gift, subscription, loan, advance, deposit, or gift of money or anything of value, made by

You also state that X-PAC previously reported the expenditures for its domain name (x-pac.org) and for its website hosting.

1 any person for the purpose of influencing any election for" Federal office. See also 11
2 CFR 100.7(a)(1). An independent expenditure is defined at 11 CFR 100.16 as an
3 expenditure for a communication by a person expressly advocating the election or defeat
4 of a clearly identified candidate which is made without cooperation or consultation with
5 any candidate, or any authorized committee or agent of such candidate, and which is not
6 made in concert with, or at the request or suggestion of, any candidate or any authorized
7 committee or agent of such candidate. See also 2 U.S.C. §431(17) and 11 CFR 109.1(a).
8 An expenditure which does not meet the above standard is considered an in-kind
9 contribution. 11 CFR 109.1(c).

10 Under 11 CFR 104.3(b)(3)(viii) and 104.4(a) political committees (those not
11 authorized by a candidate) are required to itemize any independent expenditure which by
12 itself or when added to other independent expenditures made to the same payee during
13 the same calendar year, exceeds \$200. Independent expenditures are to be itemized on
14 Schedule E. Independent expenditures of \$200 or less do not need to be itemized, though
15 the committee must report the subtotal of those expenditures on Line(b) of Schedule E.
16 See 2 U.S.C. §434(b)(6)(B)(iii). Such a political committee is also required to itemize
17 each payee to whom it makes an expenditure to meet a committee operating expense if
18 that payee has received more than \$200 in the calendar year from the reporting
19 committee; the itemized information shall also include the date, amount and purpose of
20 payment. 2 U.S.C. §434(b)(5)(A), 11 CFR 104.3(b)(3)(i).

21 Under 11 CFR 106.1(a)(1), expenditures, including independent expenditures,
22 made on behalf of more than one clearly identified Federal candidate shall be attributed to
23 each such candidate according to the benefit reasonably expected to be derived.

1 However, expenditures for rent, personnel, overhead, general administrative, fund-
2 raising, and other day-to-day costs of political committees need not be attributed to
3 individual candidates, unless these expenditures are made on behalf of a clearly identified
4 candidate and the expenditure can be directly attributed to that candidate. 11 CFR
5 106.1(c)(1).

6 Whenever any person makes an expenditure to finance communications expressly
7 advocating the election or defeat of a clearly identified candidate or those that solicit any
8 contribution, and does so through various types of mass media (e.g., a broadcasting
9 station) or via "any other type of general public political advertising," the communication
10 is required to include a statement of sponsorship or disclaimer. 2 U.S.C §441d, 11 CFR
11 110.11. The disclaimer must clearly state if the communication has been paid for and
12 authorized by a candidate, or the candidate's authorized political committee. If the
13 communication is not authorized by a candidate (including an authorized political
14 committee of a candidate or its agents), the disclaimer shall clearly state the name of the
15 person who paid for the communication and state that it is not authorized by any
16 candidate or the candidate's committee. 2 U.S.C §441d; see 11 CFR 109.3, 110.11(a)(1).

17 Whenever a political committee (not authorized by a candidate) makes a contribution
18 solicitation through any form of general public political advertising, the solicitation shall
19 clearly state the full name of the committee (or other person) who paid for such
20 communication. 11 CFR 110.11(a)(1)(iv).

21 The Act and Commission regulations prohibit a foreign national from making a
22 contribution, directly or through any other person in connection with an election to any

1 political office. 2 U.S.C. §441e(a); 11 CFR 110.4(a).² The regulations further provide
2 that this prohibition extends to any expenditure by a foreign national in any United States
3 election. 11 CFR 110.4(a)(1).

4 **APPLICATION TO PROPOSAL**

5
6

Reporting requirements of expenditure program

7 Your first three questions relate to the reporting requirements that apply to X-
8 PAC in conducting its independent expenditure program. The last two questions pertain
9 to the possible obligations of X-PAC with respect to others who may join in its program.

10 Question one relates to the "financial documentation" for the expenditure program
11 in view of its "minimal costs." In Advisory Opinion 1998-22, the Commission
12 delineated certain expenses which might need to be accounted for in assessing the value
13 of a web site which expressly advocated the election of a candidate and which was
14 created by an individual using equipment and facilities partly owned by an
15 unincorporated business. However, since X-PAC is a political committee, rather than an
16 individual who is making independent expenditures, its situation differs significantly
17 from that of the requester in Advisory Opinion 1998-22. All of the expenses presented in
18 your factual situation would appear to come within the category of overhead expenses
19 which are required to be reported as operating expenses by the committee. This would
20 include expenses for registering and maintaining X-PAC's domain name (x-pac.org) and
21 the website hosting, as well as any costs relating to the purchase and use of computer

² Unlike most of the other provisions of the Act, section 441e applies to any election for any political office, including state and local offices. *United States v. Kanchanalak*, Nos. 99-3019 & 99-3034, 1999 WL 798065, at *9-10 (D.C. Cir. Oct. 8, 1999) [concluding that Commission interpretations of 2 U.S.C. §441e in both its regulations and an advisory opinion have "consistently interpreted 441e as applicable to federal, state, and local elections since 1976."]

1 hardware and software. As overhead, under 11 CFR 106.(c)(1), X-PAC would not be
2 obligated to report these expenses as part of its independent expenditures, unless they are
3 directly related to a particular communication that expressly advocates the election or
4 defeat of a clearly identified candidate.³ Therefore, the Commission acknowledges that
5 the committee may, in fact, have no costs that must be allocated to its independent
6 expenditure program and reported as such under the regulations.

7 In the event that X-PAC has such expenses, as a political committee, rather than
8 an individual, X-PAC would be required to report them as costs of producing or
9 distributing a communication that represents its independent expenditure activity. In
10 addition, if such expenses exceed \$200 during a calendar year, X-PAC must itemize them
11 and provide the requisite certifications of independence. 2 U.S.C. §434(b)(6)(B)(iii), 11
12 CFR 104.3(b)(3)(vii)(B).

13 In response to your second and third questions, any downloading of X-PAC's
14 political advertisements (with content expressly advocating the election or defeat of a
15 clearly identified candidate for Federal office) would not impose reporting obligations on
16 X-PAC since it has no costs or expenses that are directly attributable to downloading by
17 others. However, X-PAC's initial distribution of such advertisements as attachments to
18 e-mail messages that it sends, or as text (or graphic) content of the e-mail itself, would be
19 X-PAC's own communications. Accordingly, they would represent X-PAC's
20 independent expenditures with concomitant reporting obligations if the costs exceed the
21 \$200 calendar year threshold described above.

³ An example where this might be the case is if X-PAC maintained separate web sites supporting or opposing specific individual candidates. The separate costs to register and maintain the domain name for

1 In addition, X-PAC's e-mails with express advocacy or contribution solicitation
2 content would require the appropriate disclaimer statement under the Act and
3 Commission regulations. 2 U.S.C. §441d, 11 CFR 110.11(a)(1)(iii) & (a)(1)(iv). The
4 disclaimer requirements apply even if X-PAC's expenses do not exceed the \$200
5 aggregate because the cited provisions mention "an expenditure" for a covered
6 communication without regard to any dollar amount of such expenditure. The
7 Commission notes, however, that the cited regulations have a definition of "direct
8 mailing" for purposes of the disclaimer rules: "*direct mailing* includes any number of
9 substantially similar [in content] pieces of mail but does not include a mailing of one
10 hundred pieces or less by any person." Therefore, although primarily intended to apply
11 with respect to paper document mailings, the Commission concludes that this regulation
12 can be applied to e-mails sent by X-PAC in the following respect. If within calendar year
13 2000, X-PAC sends e-mails to no more than 100 separate e-mail addresses, and the e-
14 mails have substantially similar content, in either the message text or in any attachments
15 thereto, then the disclaimer requirements discussed herein will not apply to such activity.
16 In contrast, X-PAC e-mails sent in the current calendar year to more than 100 e-mail
17 addresses and with substantially similar content (which includes a covered express
18 advocacy or contribution solicitation message) will require that an appropriate disclaimer
19 be presented in a "clear and conspicuous manner" to give adequate notice to the viewer or
20 reader. 11 CFR 110.11(a)(5).

21 *Informational requirements*

1 Your fourth and fifth questions involve the type of information that X-PAC would
2 be required either to collect or provide regarding its expenditure program. You ask
3 whether X-PAC would be required to collect information from individuals who want to
4 use these ads for their own Internet political activity. The Act and Commission
5 regulations do not require that a political committee or individual making independent
6 expenditures collect information from others who might replicate or utilize that
7 committee's or person's political message even if they do so at the committee's (or
8 individual's) behest.⁴

9 Your last question concerns the actions that X-PAC may be required to take
10 regarding the possible use of the express advocacy communications that it sends via e-
11 mails which may be received by foreign nationals. The Commission notes that section
12 441e does not prohibit the distribution of messages that expressly advocate the election or
13 defeat of a clearly identifiable Federal candidate to a list of recipients that may include
14 foreign nationals. Therefore, the committee would not be required to take any actions
15 regarding the manner in which its election advocacy materials may be used.⁵ You have
16 not indicated that X-PAC's e-mails would also solicit contributions to Federal, State or
17 local candidates or to X-PAC itself, although the committee's web site does include a

⁴ In Advisory Opinions 1995-9, 1999-9, and 1999-22 the Commission examined the obligation of committees or their vendors to collect information from the committees' contributors who made contributions through the Internet. These opinions did not suggest similar requirements for those making independent expenditures. Furthermore in Advisory Opinion 1999-17, the authorized committee of a Federal candidate inquired as to its obligation to determine the existence of (and monitor) the web sites of other committees that were independently supporting that Federal candidate or opposing other candidates seeking the same office. The Commission determined there was not such an obligation.

⁵ The Act requires the Commission to respond to "a complete written [advisory opinion] request concerning the application of this Act . . . or a rule or regulation prescribed by the Commission with respect to a specific transaction or activity by the person." 2 U.S.C. §437f(a)(1). For this reason, any further comment on the activity of third parties would not be an appropriate subject for this advisory opinion. See Advisory Opinion 1999-17.

1 contribution solicitation message. The Commission notes that section 441e prohibits the
2 solicitation by any person of political contributions from a foreign national.⁶

3 This response constitutes an advisory opinion concerning the application of the
4 Act, or regulations prescribed by the Commission, to the specific transaction or activity
5 set forth in your request. See 2 U.S.C. §437f.

6 Sincerely,

7
8 Darryl R. Wold
9 Chairman

10
11 Enclosures (AOs 1999-22, 1999-17, 1999-9, 1998-22, and 1995-9)
12

⁶ In Advisory Opinion 1995-9, the Commission reviewed a political committee's contribution solicitation message that would appear on its web site and advised that the message should be more explicit with respect to restating the prohibitions of section 441e. See also Advisory Opinions 1999-9 and 1999-22 (dealing with similar language used by Presidential campaign committees).