FEDERAL ELECTION COMMISSION
Washington, DC 20463

MEMORANDUM

TO: THE COMMISSION
STAFF DIRECTOR
GENERAL COUNSEL
CHIEF COMMUNICATIONS OFFICER
FEC PRESS OFFICE
FEC PUBLIC DISCLOSURE

FROM: COMMISSION SECRETARY

DATE: OCTOBER 7, 2008

SUBJECT: COMMENT ON DRAFT AO 2008-10
VoterVoter.com

Transmitted herewith is a timely submitted comment from Bradley A. Smith, Esquire, on behalf of SaysMe.tv, regarding the above-captioned matter.

Proposed Advisory Opinion 2008-10 is on the agenda for Wednesday, October 8, 2008.

Attachment

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October 7, 2008

VIA FACSIMILE

Ms. Thomasena Duncan, General Counsel
Ms. Mary W. Dove, Commission Secretary
Federal Election Commission
999 E Street, NW
Washington, DC 20463

Re: Comments of SaysMe.tv regarding Advisory Opinion 2008-10
(Wide Orbit, Inc. dba Voter Voter.com)

Dear Ms. Duncan and Ms. Dove:

The following comments are submitted on behalf of SaysMe.tv, in regards to Advisory Opinion 2008-10, requested by Joseph Birkenstock, Esq. on behalf of Wide Orbit, Inc. dba Voter Voter.com.

Interest of SaysMe.tv

SaysMe.tv is a for-profit corporation whose commercial services empower citizens by providing a means for citizens to get their political voices heard on TV as well as on the internet. Sharing a business goal with the requestor, VoterVoter.com, SaysMe.tv is focused on providing individual citizens direct access to the political process by allowing them to create and upload 30 second advertisements to SaysMe.tv's website, and then allowing these or other citizens to place those ads on cable television. For as little as $50 or even less, citizens are able to place their own television ads on cable TV. What both SaysMe.tv and Voter Voter.com have done is to use modern technology to create an exciting new means for ordinary citizens to directly participate in politics. Until recently, independent action by ordinary, middle class citizens was limited to contributing to someone else – a PAC, or a political party or candidate committee. By providing a means for these citizens to meaningfully participate more directly, SaysMe.tv and Voter

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Voter.com hold forth the potential to democratize politics and to reduce the importance of large contributions. But this will not be done if the FEC stifles the process in the cradle.

Comments on AO 2008-10 and FEC Agenda Document No. 08-29.

SaysMe.tv believes that there are a number of problems with the both of the Drafts offered to the Commission in Agenda Document No. 08-29. In the comments below these are discussed in the order in which they appear in the draft. However, we wish to stress that perhaps the most important flaws in the Drafts are addressed in points four and five below.

Before turning to problems with the Draft, we note that the Draft are correct in holding that Voter Voter.com operates within the commercial exemption and that its activities do not, therefore, constitute "contributions" or "expenditures" under 2 U.S.C. § 441b. The drafts are correct in holding that ads uploaded by individuals are exempt from the definition of contributions and expenditures pursuant to the internet exemptions at 11 C.F.R. § 100.94 and 100.155. The Drafts are correct that purchasers and creators do not become "political committees," though as discussed below, both drafts contain major flaws in this area that must be corrected lest they cause considerable confusion with the public. The drafts are correct that purchasers do not become a "political committee" through common use and review of FEC Form 5, though we suggest some improvements could be made in the language of the drafts on this point (see fn. 8 below). Finally, the answers proposed in the drafts to questions 6a and 6b are correct.

Nonetheless, substantial problems exist with the drafts which threaten to undermine the FEC's recent and much applauded exemptions for internet activity; to overreach Commission authority; to create havoc and uncertainty in the regulated community; and to stifle grassroots political expression that poses no threat of corruption and is not clearly prohibited by the statute or regulations – indeed, which in some cases is clearly protected by the statute and regulations.

1. **The Commission Does Not Have the Authority to Require the Corporation to Confirm that Funds Used to Purchase an Ad are not from a Source Prohibited by the Act.**

In response to Question 1, "Will the Corporation act solely as a commercial vendor when it creates ads for which purchasers may buy airtime," both Draft A and Draft B state that, "to avoid making a corporate expenditure... the Corporation must receive confirmation that neither the creators nor the purchasers use funds from prohibited sources to pay for the creation of the ads or the purchase of airtime." See Agenda Document No. 08-29 (hereinafter ADN 08-29), p. 12, lines 3, 13-15, and generally p. 12 line 3 through p. 13, line 7. This requirement is beyond

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the Commission's authority and, it should be noted, is not required of other vendors providing services to persons seeking to make expenditures regulated under the Act.

It is significant that the FEC cites to no portion of the statute or the regulations that would justify conditioning Voter Voter.com's approval as a commercial enterprise on its policing the activities of its customers. That is because no such authority and exists, and it cannot be created under the guise of an Advisory Opinion.

As a practical matter, commercial vendors in the situation of Voter Voter.com and SaysMe.tv seek to assure that all activity using their facilities and services is lawful, as do most businesses in any type of enterprise. In particular, given the newness of the approach offered by these companies to supplying political advertising services, and the heavy web of regulation that surrounds political advertising, of which most users are vaguely aware, users want to be certain that their activities in uploading and purchasing ads are legal. Requiring purchasers to confirm that their sources of funds comply with the Act's prohibitions is, therefore, a smart business practice. However, the FEC cannot condition the company's ability to sell goods and services on the company obtaining such certification.

By comparison, note that the FEC does not require this of any other vendors. If a person were to choose not to use the services of Voter Voter.com to make independent expenditures, but instead approached traditional XYZ Political Advertising to produce and place ads in a more traditional fashion, XYZ Political Advertising would have no obligation, in order to retain its status as a commercial vendor, to demand that the purchaser verify that none of its funds came from sources prohibited by the Act. If a political committee seeks to rent an auditorium, the owner of the auditorium is under no obligation to demand that the purchaser verify that none of its funds come from sources prohibited by the Act. If a political committee purchases tickets for air travel, the airline is under no obligation to verify that only permissible funds are used. In each of these cases, the fact that the vendor does not verify the sources of funds has no effect on whether or not the vendor may claim the commercial exemption so as not to have its own provision of goods or services to the purchaser constitute an illegal corporate contribution.

It is inconceivable that the Commission would or could successfully prosecute a traditional for-profit advertising company on the grounds that it made illegal corporate contributions by providing its services to a political committee, individual, or other entity simply because the for-profit company did not verify that the source of funds used as payment complied with the Act. There is no basis for singling out Voter Voter.com or other commercial vendors for such a requirement simply because these vendors have unique business models that utilize the web to market their services, and with which the FEC is unfamiliar, and there is no authority for

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the FEC to regulate commercial transactions in this manner. If funds used to produce or purchase ad time through Voter Voter.com turn out to be from prohibited sources, the FEC's recourse is to pursue an enforcement action against the purchaser and other contributor who violated the law, not against the innocent vendor.

2. Costs Incurred by an Individual in Creating an Ad should be Exempt from the Definition of Independent Expenditure.

In response to the question of whether, "Costs individuals incur in creating ads posted on VoterVoter.com [are] exempt from the definition of 'contribution' and 'expenditure,'" both Drafts A and B would correctly find that an individual's production costs are covered by the internet exemption. However, Draft B would hold that these costs become an independent expenditure as soon as any other entity pays to broadcast the ad, whereas Draft A holds that these production costs become an independent expenditure only when the person incurring those costs pays to broadcast the ad in question.

If adopted, the approach of Draft B would eviscerate much of the FEC's much-lauded exemption for internet activity, hinder the effective use of the internet to democratize campaigns, and subject the rights of some citizens to actions taken by other citizens, over which the former have no control. Such an interpretation is also contrary to 11 C.F.R. § 100.155.[1]

As the Commission noted in the Explanation and Justification for it's internet rulemaking in 2006, the internet provides a mechanism of popular expression for citizens with very low entry barriers. But because most individuals lack the resources to hire attorneys or monitor Commission regulations, it was important that individuals not unintentionally trigger regulation or drop out of the process under the threat of regulation and civil and even criminal enforcement. *See* Explanation and Justification, 71 Fed. Reg. 18589, 18591 (April 12, 2006). Under Draft B, a citizen might upload an ad with no intention of having to file with the FEC, only to discover that the success of his internet ad in fact does subject him to regulation. That is precisely the type of scenario that the FEC correctly sought to avoid in the 2005-2006 internet rulemaking.

Draft B would also create compliance difficulties for small ad purchasers under the model used by companies such as SaysMe.tv to provide low cost options that almost anyone can afford. Draft B suggests that when any person purchases an ad, the production costs of that ad become "part of the expenses for an independent expenditure." ADN 2008-29, Draft B, p. 14,

[1] Both drafts would hold that an ad produced by a political committee is an expenditure which must be reported by the committee. That is not contested.

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lines 6-9. In one interpretation, this could be interpreted to mean that if an individual spent $50 in production costs to make an ad, and 6 other individuals then each spent $50 to air the ad, the creator of the ad (and, it would seem, each of the six individuals purchasing ads) would suddenly have to report their spending as an independent expenditure, even though no individual reached the statutory threshold of $250.01 for reporting.

Under the more modest interpretation, Draft B would mean only that an individual who spent over $250 to produce an internet ad would have to report an independent expenditure as soon as anyone else bought the ad. At a minimum, this increases the administrative costs for a company such as SaysMe.tv, which would need to notify the creator as soon as the ad was purchased. But as a practical matter, this would mean that anyone spending over $250 to produce an ad appearing on a site such as SaysMe.tv would need to report to the FEC, since the obligation to report would exists as soon as any other person bought the ad. For citizens who do not want to report to the FEC, this will effectively mean that the internet exemption no longer exists for this activity. 11 C.F.R. § 100.155 states that uncompensated internet activity is not an expenditure. It does not say that uncompensated internet activity is not an expenditure so long as no one else takes advantage of it to reproduce it.[2] Draft B thus is contrary to the FEC's regulations at 11 C.F.R. § 100.155, and more broadly contrary to both the internet regulations themselves, and to the Commission's goals in adopting those regulations just two years ago.

While the language of Draft A on this question is preferable, SaysMe.tv believes that even where an individual creates an ad and then pays to air the ad, only the costs of airing the ad should count as an independent expenditure. Both drafts agree that creating the ad and uploading it to the web is exempt from the definition of expenditure. 11 C.F.R. § 100.155. Nothing changes that regulation merely because the creator then pays to air the ad, so that this draft, while not so obvious a violation of 100.155 as Draft B, also violates the regulation.

The Commission's concern appears to be that such a ruling would allow an individual to create an ad with the intention of broadcasting it, but reducing his "expenditures" by hiding the production costs under the internet exemption. A more thoughtful analysis, however, suggests that this is an imaginary problem. First, independent expenditures are unlimited. Thus, the issue is irrelevant to how much money the ad creator can spend. If the creator spends over $250 for broadcasting his ad, that will be reported. Thus even a small ad buy will require reporting. So

[2] By way of analogy, if a person spends $100 to produce a flyer in support of a candidate, and another person who has obtained a copy then spends $350 to reproduce the pamphlet, the first spender is not suddenly required to file an independent expenditure report. This is true even though such recopying may be a predictable consequence of distribution.

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the only serious question is whether the creation and posting of the ad on the internet by an individual will be reported.[3] If it would not matter to the Commission that the costs of creating the ad is normally not reported, per the internet exemption, it is hard to see what public interest dramatically changes the minute an extra $35 is spent by the creator to air the ad through a service such as SaysMe.tv. As a price for this most modest added disclosure, this approach would increase the administrative costs to companies such as SaysMe.tv that are seeking to lower the costs for individuals to directly present their message to the public.

Thus we recommend that to maximize participation by ordinary citizens and to comply with 11 C.F.R. 100.155, only disbursements by individuals to place ads on television should be treated as expenditures. However, at a minimum Draft A must be adopted over Draft B.

3. **The Commission Should Require Disclaimers to List Only the Person Paying the Costs of Placing the Ad on the Air**

The Commission's drafts would require that an ad produced by a political committee bear two disclaimers, one for the political committee and one for the purchaser. 26 U.S.C. § 441d and 11 C.F.R. § 110.11 require that disclaimers name the person or committee that "paid for" the advertisement. However, neither the statute nor Commission regulations define what it means to "pay for" an advertisement, and specifically whether that means the actually costs of placing the advertisement or includes production costs. Although the drafts list multiple authorities for the proposition that the person paying for the ad must be included in the disclaimer, none of the authorities listed in the draft answer the question of whether two disclaimers are required, because none address this question of definition, because the FEC has never addressed it.

In interpreting its similar provisions, the Federal Communications Commission requires only that the person providing compensation to the station be identified in a disclaimer so long as that person has editorial control over the contents of the broadcast. *See Trumper Communications*, 11 FCC Rcd. 20415 (1996); *In re Graham Williams Group*, 22 FCC Rcd. 18092 (2007).[4] The name of the party paying for the air time is sufficient unless the party is acting as the agent of another. *Trumper*.[5] The Commission should follow the FCC's approach.

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[3] Political committees are required to report all expenditures.

[4] 47 U.S.C. § 317 (a) provides: (1) All matter broadcast by any radio station for which any money, service or other valuable consideration is directly or indirectly paid, or promised to or charged or accepted by, the station so broadcasting, from any person, shall, at the time the same is so broadcast, be announced as paid for or furnished, as the case may be, by such person: Provided, That "service or other valuable consideration" shall not include any service or property furnished without charge or at a nominal charge for use on, or in connection with, a broadcast unless it is so furnished in consideration for an identification in a broadcast of any person, product, service,

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In a situation such as that presented in this AO, where a political committee has uploaded an ad to the Voter Voter.com web site, the purchaser is not acting as an agent of the political committee and is not compensated by the political committee for airing the ad. Rather, the appropriate analogy is to an ad creator in any context using material in the public realm to create an ad.[6] Where an ad uses material created by someone else but obtained for free in the public realm, the only disclaimer that either the FCC or the FEC now require is that of the party paying for the broadcast time. It is not required to include in the disclaimer the name of the party that originally produced the material.

Under the facts set forth by Voter Voter.com, the full editorial control is with the purchaser of the ad. The purchaser receives no compensation of any kind from the political committee for his or her decision to pay for broadcast of the ad, and suffers no loss of compensation by deciding not to purchase the ad. The broadcast station receives no compensation from any party other than the purchaser, directly or indirectly, as the broadcaster is receiving its full fee for the ad from the purchaser. The creator has not broadcast the speech, and has no guarantee that the ad will air, nor any right to have the ad aired.

In fact, because Voter Voter.com will not display the names of ad creators, under the proposed Draft language the purchaser cannot know until after the ad airs what names will appear on the ad. This has two ramifications. First, this further demonstrates that the ad is truly the speech of the purchaser – it is the purchaser alone who chooses to place that speech on the airwaves. This emphasizes that the purchaser in fact has editorial control over the message. The speech is that of the purchaser, regardless of where the purchaser obtained the script. There is no deception of the public, as in *In re Graham Williams Group*. Indeed, requiring the name of the political committee creator to appear actually misleads the public by disguising the spontaneous,

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trademark, or brand name beyond an identification which is reasonably related to the use of such service or property on the broadcast;
(2) Nothing in this section shall preclude the Commission from requiring that an appropriate announcement shall be made at the time of the broadcast in the case of any political program or any program involving the discussion of any controversial issue for which any films, records, transcriptions, talent, scripts, or other material or service of any kind have been furnished, without charge or at a nominal charge, directly or indirectly, as an inducement to the broadcast of such program.

[5] The FCC relies on a station's good faith judgment in determining whether or not the sponsorship requirements have been met, that is, including whether or not the some other party is the "real" sponsor of an ad. *See In the Matter of Codification of the Commission's Political Programming Policies*, 7 FCC Rcd. 678, at 6 (1991).

[6] Note that ad creators grant a "royalty free, perpetual, irrevocable and non-exclusive worldwide right to use, modify, or distribute such material (in whole or in part)." ADN 2008-29 at 6. Effectively, the material is placed in the public realm for anyone who wishes to use it.

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grassroots nature of the individual decisions to purchase ads. If an ad is produced by ABC PAC and a thousand citizens independently determine that that is a message they wish to broadcast, the disclaimers should indicate that popularity. Having the second disclaimer mentioning the ABC PAC will tend to lead the public to a different conclusion, that all of the expenditures in fact represent the PAC in action, rather than individual citizens.[7]

Second, the FEC's policy will discourage the democratic use of the internet that companies such as Voter Voter.com and SaysMe.tv promise by forcing purchasers to lose control of editorial content, in the sense that purchasers will be forced to identify themselves with persons or entities with whom they have had no contact, and with whom they may not wish to associate, but whose names will, unbeknownst to them, appear next to theirs on the ad.

Before ordering that an ad purchased through Voter Voter.com must include two disclaimers on an ad created by a political committee (thereby consuming over one quarter of a 30 second ad), the Commission should also recognize what is not at stake. Because all expenditures by a political committee must be reported, and because the costs incurred by the purchaser will be reported as an independent expenditure, requiring a second disclaimer will not increase public knowledge of expenditures and contributions made on campaigns. Both the creation cost and the broadcast costs will be reported to the Commission and available to the public.

Thus, only the name of the purchaser of the ad, as the person who is actually paying for the ad to air, should be required on the disclaimer.

4. **The Draft Opinion Mistakenly Suggests that Cooperation Between Ad Creators and Purchasers May Create a Political Committee**

The most serious error in the draft AO (both Draft A and Draft B) may be that it suggests that lawful, cooperative activity may be regulated in ways that go beyond the Commission's authority under the Act. Specifically, the drafts state that, "[i]f the creator and a purchaser cooperated on the placement of one or more express advocacy communications, they might constitute a ... 'political committee.'" Draft A, p. 16, lines 5-7, and Draft B, p. 16, lines 16-19. It is not entirely clear what the Commission has in mind here, but since it is obvious that the parties don't otherwise "cooperate" in any other way, the Commission seems to suggest that

[7] Almost certainly, the name of the PAC on the ad will bury the name of the individual who is actually paying to broadcast the ad.

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exhorting others to purchase ads or to purchase them in particular markets, and other routine political conversations between citizens somehow establish political committee status. Here, the Commission mistakes simple communication between citizens for the creation of a political committee. Such an interpretation is incorrect under the statute and the regulations and would create havoc and lead to the chilling of citizen speech.

The statute defines a political committee as a group that "receives contributions" or "makes expenditures" in excess of $1000 in a calendar year. This requires some type of pooling of resources. No political committee is formed merely because citizens discuss their political interests, strategies, and intentions. With Voter Voter.com, each purchaser makes his or her own decision to spend his or her own money. Money is not entered into any common pot and each individual purchaser retains full control of his or her own funds. This is even more pronounced in the case of SaysMe.tv, which exists specifically to enable small dollar individuals can get their own ads on television as individuals, without having to become part of a larger group.

Never has the FEC ever suggested that the discussion of political strategy and/or intentions could create result in political committee standing. The ramifications of this suggestion are potentially enormous. For example, it is routine for various PAC officials to share information about races and candidates they intend to support. The language in the proposed drafts suggests that if the treasurers of PAC A and PAC B discuss legislative races and strategies in the coming election, they "might" create a new organization, PAC C that must register as a political committee. Alternatively, an MCFL qualified exempt non-profit and its qualified exempt state affiliate might have discussions on whether to run ads in the state in support of a particular candidate. If they "cooperate," on strategy, even though each makes its own independent expenditures, this AO suggests that these two organizations, neither of which has a major purpose of electing candidates, would suddenly become a political committee by virtue of cooperating on a limited political strategy.

Taken to the level of the citizens using the services of companies such as Voter Voter.com and SaysMe.tv, it suggests that if Voter A makes a $100 ad buy through SaysMe.tv, then sends out an email to all his contacts urging them to buy ads through SaysMe.tv for airing in a particular state, and as a result over $1000 is spent by the combination of these individuals, this somehow results in the formation of a political committee. Note that such a committee could be formed even though not one of the individuals involved intended to form a committee, and in fact all of the individuals involved sought specifically not to form a committee by limiting their expenditures to an amount below $1000. The alternative interpretation is that a new committee is formed by the creator and each individual purchaser. Under this alternative interpretation, if the creator political committee spent over $1000 to produce an ad, then urged citizens to

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purchase the ad, every ad purchaser would, in combination with the creator, constitute a new committee – a "group" spending more than $1000. The result, of course, is absurd.

The Commission seems to reach this expansive, bizarre conclusion by mistaking citizen communication with the legal definition of "coordination." 2 U.S.C. § 441a (7)(B) specifies, in pertinent part, that expenditures made by any person "in cooperation, consultation, or concert with, or at the request or suggestion of, a candidate" or "a national, State, or local committee of a political party," along with "dissemination, distribution, or republication" of a candidate's campaign material, shall be "considered to be contributions" to such candidate or party committee. The Commission has enacted detailed regulations regarding what constitutes such "coordination" at 11 C.F.R. § 109.20 - § 109.23. What is important here is what is not covered. Neither the statute nor the regulations prohibit coordination of political activity between citizens, or between citizens and political committees other than candidate and party committees. The reason for this is clear and simple – the Act exists to prevent the corruption of candidates, including their corruption through the conduits of political parties. Citizens do not corrupt one another, however (at least not in ways relevant to the Act).

If discussion or cooperation among citizens and political committees (other than candidate and party committees) were sufficient to establish political committee status, there would be no point in the 2 U.S.C. § 441a (7)(B), as any of the actions covered by § 441a (7)(B) as the regulations would establish a new political committee subject to all the limitations of the Act anyway.

There is no need at all for the Commission to indulge in this destabilizing speculation on what behavior "might" result in political committee status. All the FEC needs to do is advise the requestor that under the facts as presented, no political committee is created through Voter Voter.com activities. [8] However, if the Commission feels it must speculate on facts beyond those presented, it should make clear that a political committee is not created by the mere cooperation of two or more citizens, unless those citizens actually relinquish control of their funds by making contributions to a common, jointly administered fund, or by jointly purchasing an ad.

[8] This is largely the approach taken by the Drafts in response to question 4, in which the Commission specifically limits its discussion to the facts of the opinion. If this course is adopted, however, the Commission should make clear that its decision does not hinge on all of the particular facts being present, which would have the same effect, or worse, than the speculation now appearing in the draft. It would do better to clarify, in response to question 4 as in response to question 3 that communications between makers of independent expenditures do not create a political committee, since the approach taken may still suggest by implication that the opposite is true. But at least the proposed answer to question 4 does not affirmatively raise the possibility of this extreme and incorrect interpretation of the law.

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5. **The Draft Errs in Finding that Ad Purchases By Individuals Can Constitute "In-Kind Contributions" to Political Committees Other than Candidate and Party Committees**

Finally, the drafts err in finding that purchases of an ad created by any political committee are in-kind contributions to that committee.

Here the FEC mistakes republication with coordination. What is occurring here, of course, is the republication of material produced by a committee. However, to be clear, nothing of any value is given to the committee – the committee cannot use the money spent for its own purposes, nor does any money pass from the purchaser to the committee. No services are put at the Committee's disposal, as would be the case, for example, when an individual is assigned by his employer to do work for a committee. No facilities or supplies or equipment are placed at the committee's disposal, as when an individual might waive the rental charge on a meeting facility, or donate office supplies or phones to a committee. Rather, the purchaser is paying independently to republish material produced by a political committee. Under the Commission regulations and the statute, republication is treated as a "coordinated expenditure," and hence as a "contribution," only when the republication is of material produced by a candidate or party committee. The statute and regulations do not limit coordinated activity between individuals or other entities and non-candidate or non-party committees. 2 U.S.C. § 441a (7)(B); 11 C.F.R. §§ 109.20, 109.21, 109.23. Thus, only in the case of ads produced by a candidate or party committee will a contribution result through the use of Voter Voter.com's services.[9]

The draft opinions attempt to bridge this gap by arguing that the republication of the ad would "enable the committee's ad to be aired, and thus would provide the committee with something of value." But that conflates the definition of an in-kind contribution with anything that a political committee might value, which is clearly not correct. Airing the ad would indeed do something that the creator committee might value – just as, in fact, the candidate or party named (or, where applicable, their opponents) might value having citizens run the ad – but that is not the same as providing the committee with something of value. The very concept of independent expenditures hinges on the difference between an individual engaging in actions valued by a candidate, and an individual giving a candidate something of value. The former is an independent expenditure; the latter is an in-kind contribution. The Commission has long recognized this distinction in its advisory opinions dealing with commercial vendors. *See e.g.*

[9] A contribution might also result, of course, in other circumstances not at issue in this AO, as where, for example, a company might rebate a portion of the ad buy to the political committee. The point is that such circumstances are not at issue.

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AO 1994-30 (sale of t-shirts expressly advocating for candidates would not lead to contributions being made by the purchasers where, in fact, no contribution was made by purchasers to the campaign). Though a committee may benefit from the activity of individuals, no contribution results unless a contribution of money, goods, or services is made to the committee – that is, placed under the committee's control. The exception comes in the case of candidate and party committees, but only in the case of candidate and party committees, not, as the drafts state, any political committee.

As with the rules on republication, neither the statute nor the regulations provides that coordination between individuals and/or entities creates an in-kind contribution, except in the case of coordination with candidate or party committees. 2 U.S.C. § 441a (7)(B); 11 C.F.R. §§ 109.20, 109.21. It might be a plausible interpretation of the statute for the FEC to rule that coordinated activity with any political committee constitutes an in-kind contribution, but that is contrary to the current FEC regulations and the FEC may not overturn those regulations through the Advisory Opinion process.

Conclusion

Based on the foregoing, we urge the Commission to reject both Drafts A and B absent substantial amendment along the lines discussed above.

We thank the Commission for the opportunity to submit these comments and their careful consideration of the arguments and authorities herein.

Very Truly,

Bradley A. Smith, Of Counsel
Counsel to SaysMe.tv

Cc: Donald F. McGahn II, Chairman *(via e-mail)*
Steven T. Walther, Vice Chairman *(via e-mail)*
Cynthia L. Bauerly, Commissioner *(via e-mail)*
Caroline C. Hunter, Commissioner *(via e-mail)*
Matthew S. Petersen, Commissioner *(via e-mail)*
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