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 *mwd*

**DATE:** OCTOBER 8, 2008

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

Transmitted herewith is a timely submitted comment from Joseph M. Birkenstock, Esquire , 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

Thomasenia Duncan, Esq.
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**RE: Comments on Drafts A & B for Advisory Opinion 2008-10**

Dear Ms. Duncan:

This letter presents the comments of the requestor, WideOrbit, Inc. d/b/a VoterVoter.com, in response to the drafts of Advisory Opinion 2008-10 prepared by your office for consideration by the Commission at tomorrow's open meeting. On the whole, we support the reasoning of the Drafts and write here in response only to those portions of each draft with which we respectfully disagree. Nevertheless, at the outset of these comments, we wish to acknowledge the thoughtful and considered approach taken by your office in response to an Advisory Opinion Request that clearly presented some novel and complicated issues of law.

In particular, our comments focus on two areas of the drafts for the AO: the first of these concerns the difference between the drafts regarding the potential treatment of the expenses incurred by a video creator as FECA-defined "expenditures" depending on whether anyone else later uses that video as his or her independent expenditure. In our opinion, Draft A is preferable on this point - and not only because it will be administratively simpler and less burdensome for creators.

Instead, and more importantly, we believe the Commission may lack the authority to adopt the process envisioned in Draft B since we find nothing in the Commission's internet actvities exemption at 11 CFR 100.155 that conditions the uncompensated internet activity exemption on any understanding by the individual that his or her internet communications may later be used by anyone else in communications made other than over the internet. We acknowledge that the Commission has authority to revisit the scope of that exemption, but only

in a new rulemaking and not in the context of an Advisory Opinion. If, as here, an uncompensated individual creates content which he or she will only distribute "over the internet," we conclude that the plain text of 100.155 exempts any expenses from the definition of expenditure regardless of whether that content is later used by someone else in other media.

Our second area of concern relates to the explanation in both drafts that "cooperat[ion]" between a creator and a purchaser "might constitute a 'group of persons' whose major purpose was the election or defeat of candidates and hence constitute a 'political committee.'" Draft A, p. 16, lines 4-7. In our opinion, this explanation suggests the wrong standard on the kind of collaboration required to impose PAC status, in particular by failing to acknowledge specific kinds of collaboration that would not lead to PAC status for certain known kinds of creators collaborating with known kinds of customers.

A qualified non-profit corporation, for example, should be able to post a video on VoterVoter.com with hopes that a funder will buy airtime for that ad without necessarily triggering PAC status for the QNC.[1] We believe this conclusion follows since the QNC would not be entitled to the 100.155 exemption addressed above and since both drafts would treat a payment by a customer to air ads posted by a group as an in-kind contribution to that group. Under the QNC exemption, however, this would not impose PAC status on the QNC and its funder in the absence of other circumstances supporting the major purpose conclusion which this section of the drafts could be read to take for granted, or to impose automatically as a consequence of the "collaborat[ion]" regarding the ad.

Other membership organizations should likewise be able to communicate with their members without limitation about ads on VoterVoter.com without necessarily triggering PAC status. Even though these specific circumstances were not directly presented in the AOR, we do have a concern that this language, common to both drafts, may lead to misunderstandings for QNCs and other membership organizations about the potential consequences of communicating with their members about ads on VoterVoter.com.

Sincerely,

Joseph M. Birkenstock

[1] In this event, we believe the QNC would be obliged to file a Form 5 for the ad, and itemize the VoterVoter.com customer as a donor who provided funds "for the purpose of furthering" the independent expenditure.