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AOR 2008-10

August 12, 2008

Ms. Thomasenia Duncan
General Counsel
Federal Election Commission
999 E St., NW
Washington, DC 20463

2008 AUG 12 AM 11: 32

RE: VoterVoter.com Advisory Opinion Request

Dear Ms. Duncan:

On behalf of VoterVoter.com¹, and pursuant to 2 U.S.C. § 437f, this letter requests an Advisory Opinion on the permissibility of the advertising services VoterVoter.com offers to individuals and groups, and the ramifications of those services for its users and customers.

I. Background of the Requestors

VoterVoter.com is an internet service developed and operated by WideOrbit, Inc., the leading provider of advertising management software in the United States. WideOrbit's core software products manage the advertising process at more than 1,000 TV stations, radio stations and cable networks across America. WideOrbit is a closely-held corporation, owned principally by its founder and CEO, Eric Mathewson, and a group of private investors. The company is not owned in any degree by federal candidates or political committees.²

Building on this technical expertise and industry knowledge, WideOrbit has developed VoterVoter.com to reduce the technical and logistical barriers facing individuals who wish to sponsor their own political advertisements, and to provide these individuals with a means to better leverage the efficiency of broadcast media.

¹ VoterVoter.com is a registered d/b/a in California for WideOrbit, Inc. Under this d/b/a, VoterVoter.com conducts business in its own name, including hiring staff and vendors, maintaining office space, and operating the website that is the subject of this Advisory Opinion Request. All references herein to "the company" refer to VoterVoter.com and, therefore, to WideOrbit, Inc. as the corporation underlying VoterVoter.com's d/b/a registration. In light of this structure, we understand VoterVoter.com to be subject to the corporate expenditure prohibition at 2 USC § 441b, and therefore it is in VoterVoter.com's name that we file this advisory opinion request.

² More information about WideOrbit and its corporate structure is available at www.wideorbit.com/WOcompany/index.html.

All of VoterVoter.com's services are provided on a strictly non-partisan basis. The site and the company are operated only for commercial purposes, and are not undertaking any of the activities described herein for the purpose of influencing a federal election. As detailed below, much of the content hosted on the VoterVoter.com website will be made by users and purchased by customers for the purpose of influencing a federal election, but VoterVoter.com provides its services to users and customers without regard to partisanship or political affiliation.³

II. VoterVoter.com's Business Model

Briefly described, VoterVoter.com's website allows U.S. citizens and permanent residents to choose a TV advertisement already created by VoterVoter.com itself or by another VoterVoter.com user (or to upload their own advertisement), and then to select and buy airtime for the ad which they've either chosen or created in an efficient and user-friendly process.⁴ VoterVoter.com generates revenue in two ways: by charging a \$500 licensing fee for the use of any ads created by VoterVoter.com itself, and by charging the industry-standard 15% commission on the airtime purchased by each VoterVoter.com customer.

III. Two Kinds of Advertisements Available on VoterVoter.com

As noted above, the ads available on VoterVoter.com come from two categories of creators: (1) VoterVoter.com itself and (2) other VoterVoter.com users. The actual video files maintained on the website for either kind of ad are not suitable for broadcast use. Neither the video files nor the audio tracks hosted on the website are of sufficiently high technical quality to be considered broadcast-ready by a TV or radio station.⁵ Once airtime is purchased for a given ad, VoterVoter.com will provide the station or network which will run the ad with a higher-quality video or audio file suitable for broadcast.⁶

³ As used herein, the term "user" refers to a person who posts a video to the website, and the term "customer" refers to a person who buys airtime through the VoterVoter.com service to run a given video as his, her, or its independent expenditure or electioneering communication.

⁴ While VoterVoter.com may pursue avenues to make ads available through other media, particularly radio, at present the advertisements are limited to television.

⁵ In fact, based on the experience of VoterVoter.com's founders in this industry, we understand that broadcast licensees are categorically unwilling as a matter of policy to accept the lower-quality video and audio streams that are available over the internet for use in broadcast advertisements.

⁶ As noted above, VoterVoter.com's purpose in operating this website is commercial, and is not political or ideological. It does not create ads with the purpose of influencing a federal election; rather, it creates ads for the purpose of marketing commercial airtime to politically motivated customers through the VoterVoter.com website. We believe that VoterVoter.com's actual hosting of these ads therefore is not prohibited by 2 U.S.C. 441b or 11 C.F.R. Part 114 due to the presence of the following factors previously identified by the Commission in Advisory Opinions 1989-21 and 1994-30 for merchandisers or other commercial vendors who make and sell express advocacy materials:

1. No portion of the revenue generated by VoterVoter.com will be paid or otherwise provided to any candidate or candidate's committee,
2. VoterVoter.com's interest in hosting the videos created by users is strictly commercial,
3. All airtime sold by VoterVoter.com is sold at the normal and usual charge, and
4. Any purchase of airtime for a video is made only by permissible payors for permissible independent expenditures or electioneering communications.

Accordingly, under the guidance previously provided by the Commission for express advocacy communications by commercial vendors like VoterVoter.com, we conclude that VoterVoter.com does not violate the corporate expenditure prohibition by hosting this content and making it available to website visitors. In this regard, we believe VoterVoter.com is akin to CafePress or other merchandising businesses which also host content containing express advocacy on public websites for the purpose of making a profit, and not for the purpose of influencing a federal election.

A. Ads created by VoterVoter.com

To the extent a customer chooses an ad created by VoterVoter.com, the company itself is essentially serving as both the hired content creator and the media buyer for that customer. This is similar if not identical to the way traditional media consultants create ads for customers from stock footage. Since VoterVoter.com is creating these ads for the purpose of selling advertising time through the VoterVoter.com system, since no such ad will be aired through paid broadcast media unless and until a permissible payor arranges to use it as an independent expenditure, and since VoterVoter.com will charge each customer who airs one of these ads a licensing fee (currently set at \$500 per order⁷) and an airtime commission sufficient to ensure that the company will make a profit on each discrete transaction, we believe these creative expenses are covered by the commercial vendor exemption and thus are not prohibited by 2 U.S.C. 441b.⁸

Upon request, in the event a given customer wishes to create a customized advertisement, VoterVoter.com will arrange to have that ad created for the customer at the ordinary and usual cost. Specifically, the company will outsource the creation of a completely new advertisement to a professional media creation company for any customer who requests it, and will pass along the full charge of that ad creation to the customer without markup or markdown. Accordingly, the VoterVoter.com customer who has an ad specially created will pay the normal and usual cost of those ad creation services that the ad creator charges to its other non-political customers.⁹

B. Ads created by users

The second category of ads comes from customers or other users posting their own videos to VoterVoter.com.¹⁰ No fee is charged for uploading videos as proposed ads to the site, nor for hosting these videos once they are created and posted. In short, VoterVoter.com charges no fees whatsoever for uploading proposed ads to the service or for making them available to the public, including prospective airtime buyers.¹¹

When a user posts a video, the site provides that user with brief summary information

⁷ This "per-order" charge is assessed per transaction about a specific ad from each customer, regardless of how much airtime or how many airings are purchased at one time. In other words, one order could represent only one airing of a given ad, or multiple airings of the same ad. In either instance, the licensing fee charged by VoterVoter.com for that order is \$500.

⁸ In other words, in some instances the expenses involved in creating a given stock ad may exceed \$500, such that the per order licensing fee alone would not recoup the company's costs on the first order for that ad. However, VoterVoter.com will not create a stock ad unless the future expected licensing fees and the airtime commissions combined allow the company a reasonable expectation of profitability with respect to that ad.

⁹ Under the Terms of Service for VoterVoter.com, each user who posts a video also grants VoterVoter.com (or warrants that the owner of such material grants to VoterVoter.com) "a royalty-free, perpetual, irrevocable and non-exclusive worldwide right to use, modify and distribute such material (in whole or in part)." VoterVoter.com will use these copyrights only in connection with its commercial endeavors, and will not use these copyrights to undertake its own ideological or political activities.

¹⁰ Currently, VoterVoter.com does not host content from candidates, candidate committees or party committees for airing by customers. However, in the event that such functionality is offered in the future, VoterVoter.com will advise those candidate or party committee users (and any customers who wish to buy airtime for content posted by candidates or party committees) that any airing of a candidate's or party's material by a customer would constitute the republication of campaign material and, consequently, would count as an in-kind contribution from the customer to the candidate, candidate's committee or party committee that posted the content.

¹¹ Moreover, since VoterVoter.com's business model is focused on independent expenditures about specific political candidates, there is no "normal and usual" charge assessed against users who post content to the website.

concerning the scope of the "Internet activity" exemptions at 11 C.F.R. 100.94 and 100.155, and advises that if the user was paid by anyone to create the ad they are posting, the Internet activity exemptions do not apply. This summary notice reads as follows:

Under regulations promulgated by the Federal Election Commission in 2006, individuals acting as volunteers, whether working alone or collectively as a group, may generally create and distribute communications over the internet for the purpose of influencing a federal election without restriction. These activities would not result in a "contribution" or an "expenditure" under the Federal Election Campaign Act, and would not trigger any registration or reporting requirements with the FEC. This exemption applies to individuals acting with or without the knowledge or consent of a campaign or a political party committee, but does not apply to a person or people who get paid by anyone to create or distribute these political communications.

Nevertheless, if a particular airing of an ad is undertaken in coordination with any candidate or party committee – which generally means that the candidate him- or herself, his or her representatives, or representatives of a political party committee asked or suggested that the ad be aired – the expenses of that advertisement will be considered to be an in-kind contribution to the candidate or party committee with whom the ad was coordinated, and will be subject to the dollar limits applicable to such contributions.

For more information about the FEC's internet exemptions, please see <http://www.fec.gov/pages/brochures/internetcomm.shtml>, and for more information about the distinctions between coordinated communications and independent expenditures, please see <http://www.fec.gov/pages/brochures/indexp.shtml>. Finally, please understand that this brief summary does not provide legal advice to anyone, and consult your own legal counsel for advice about how these or any other considerations may apply to your use of this service.

Underneath this disclaimer text, the website then provides a "radio button" for users to check to confirm that they were not paid by anyone else to create or post their content. Unless that button is checked, the site will not allow the user to upload their video.

Consistent with this exemption, therefore, we conclude that any expenses incurred by individuals acting as volunteers in the course of creating or posting these videos are not independent expenditures. Conversely, however, any expenses incurred by a political committee to create or post such a video on the VoterVoter.com website still would count as an independent expenditure since the internet activity exemptions summarized above are not available to political committees.

Finally, this category of "user created" ads also includes ads created by VoterVoter.com users through the "mash-up" functionality available on the VoterVoter.com website. Briefly described, this functionality provides users with a range of audio and video clips created by VoterVoter.com itself, and a rudimentary video editor built into the VoterVoter.com website. To create an ad, a user can browse through the library of clips, click and drag them into their own compilation along with any new content uploaded by that user, and then save the resulting compilation as their own new ad. VoterVoter.com incurs no incremental costs for any user or customers use of this feature and therefore charges no fee for this service. Once so created, the company hosts the resulting ads alongside the other ads created and uploaded by VoterVoter.com users on their own.

IV. Buying Airtime for Ads Through VoterVoter.com

Once a customer chooses a video to run as an ad, the site advises that airtime can be not be funded by corporations or labor unions, that any individual funder must be either a United States citizen or permanent resident, and that, when broadcast, the ad chosen by that individual customer will include the FECA-required disclaimers.¹² Specifically, the disclaimer will identify by name the individual who sponsored that airing of the ad, provide either a permanent street address or a web address for the individual, and explain that the ad was not authorized by any candidate or candidate's committee. The authorization disclaimer required by 11 C.F.R. 110.11(c)(4) will also be provided via voice-over. Anytime a different individual later chooses to sponsor the same ad, these disclaimers will be changed as necessary to accurately identify the sponsor of each successive airing of the ad.

VoterVoter.com does nothing at all to facilitate or promote any communication or sharing of information between users and customers. Although the company cannot police any such communications or arrangements outside the website, there is no functionality within the VoterVoter.com system to provide for such collaboration between users and customers. VoterVoter.com itself will likewise not communicate anything at all about the creator of a given ad, the circumstances of an ad's creation, or the schedule under which any ad will run, or whether other customers have also bought airtime for a given ad or not, to other actual or prospective customers.

VoterVoter.com does screen ads for content, but only to ensure the ads comply with broadcast standards. The company will delete any proposed ads which contain nudity, profanity, or which would otherwise fail to meet the standards required by broadcast licensees, but does not screen ads on the basis of their political content. The company does not and will not screen or create ads on the basis of which candidates or party committees the ads support or oppose.

V. Questions

- 1. Under the commercial vendor exemption, may VoterVoter.com (a d/b/a of WideOrbit, Inc.) create ads for customers to sponsor even though it is incorporated?**
- 2. Are costs of creating the ads posted by individual VoterVoter.com users covered by the Internet activities exemption, given the fact that no ad created and posted to the website will be broadcast to the general public unless and until a permissible payor uses that ad as an independent expenditure?**
- 3. May VoterVoter.com's customers sponsor ads created by another user or users without the sponsoring customer and the ad creator(s) being treated as a "group" for purposes of the PAC definition at 2 U.S.C. § 431(4), where there has been no communication or prearrangement between the customer and the ad creator(s)?**

¹² VoterVoter.com operates from the premise that the ads available through the service will contain express advocacy of a clearly identified federal candidate. The company offers to provide assistance to customers in filling out and filing Forms 5 to help each customer understand and meet its own disclosure obligations, but ultimately the responsibility for determining and meeting those obligations remains with each such customer. Accordingly, if a given customer concludes that a given ad constitutes an electioneering communication instead of an independent expenditure, VoterVoter.com will likewise assist in collecting information to help file Forms 9 (if necessary), but it will always remain the responsibility of each customer to determine whether an FEC filing obligation has been triggered, and if so, to meet it.

4. May VoterVoter.com's customers sponsor ads already sponsored for other airings by other customers, and for which Forms 5 have been filed and potentially reviewed by subsequent customers in the course of deciding whether or which ad to run, without these various customers being treated as a "group" for purposes of the PAC definition at 2 U.S.C. § 431(4), where there has been no direct communication or prearrangement between the customers themselves, nor any communication or information from VoterVoter.com to those customers about airtime orders or commercial airings by other customers?
5. If a nonconnected, unauthorized PAC posts an ad on VoterVoter.com that omits any mention of the PAC's name, logo, or any other identification (other than in any required disclaimer), can an individual sponsor an airing of that ad without making an in-kind contribution to the PAC¹³?
6. If a VoterVoter.com user creates their own footage of a candidate at a public appearance, would use of that footage in an ad created for VoterVoter.com constitute republication of campaign materials? Would this analysis change if the footage included images of physical campaign materials (such as banners, signage, buttons, or t-shirts) either in the background or on the candidate while he or she was speaking?

VI. Discussion

In the vast majority of applications, we believe the operation of the VoterVoter.com service and its usage by website visitors, video creators, and airtime customers present no unusual issues under the FECA. Nevertheless, one point we believe merits particular attention is the treatment of ads created by PACs for distribution via VoterVoter.com.

Since the goal of VoterVoter.com is to reduce the barriers to mass media political advertising broadly for all U.S. citizens and permanent residents, and not only for those with the means to make their own large-scale independent expenditures, the company has sought to structure the site and the service such that passionate Americans of any level of wealth can create their own political ad content and post it to VoterVoter.com with the hope that a likeminded individual or individuals will use that content in a broadcast independent expenditure and fund the airtime.

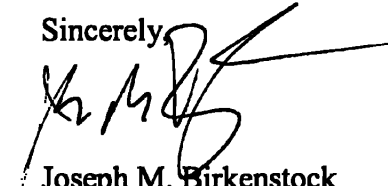
In order to avoid the result that each airtime funder would be making an in-kind contribution to the PAC which created the ad (which would thus be limited to \$5,000 instead of the unlimited expenditures available if the airtime funder contracted with a professional media consultant to create an ad), VoterVoter.com proposes to advise PACs to omit any reference to the PAC itself when creating an ad for VoterVoter.com service.

Accordingly, if a given ad omits any substantive mention of the PAC which created it – either by name, by logo, or otherwise – we believe that under the allocation principles set out in Part 106 and under the reasoning of AO 2007-20, all of the "benefit reasonably expected to be derived" would be to the candidate or party committee featured in the ad (or that candidate's or party's opponent if the ad is critical of the candidate or party featured) and none of the benefit would be allocable as a contribution to the PAC which created the ad.

¹³ As noted above, our conclusion is that for any such PAC, the expenses incurred in creating such an ad would still constitute a reportable independent expenditure by the PAC, and would be disclosed on a Form 5 by the PAC as well as on Schedule E of its next periodic receipts and disbursements report.

We appreciate the Commission's consideration of these questions and we look forward to your response at your earliest convenience.

Sincerely,



Joseph M. Birkenstock
Counsel to VoterVoter.com