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AGENDA ITEM
For Meeting of: 10-23-08

SUBMITTED LATE

MEMORANDUM

TO: The Commission

FROM: Commissioner Cynthia L. Bauerly *CB*
Commissioner Matthew S. Petersen *MSP*

DATE: October 22, 2008

RE: Draft AO 2008-10 (Voter Voter) – DRAFT C

Attached is a revised proposed Draft C of the subject advisory opinion for consideration at the Open Meeting scheduled for October 23, 2008.

Thank you very much for your consideration.

1 ADVISORY OPINION 2008-10

2

3 Joseph M. Birkenstock, Esquire

4 Caplin & Drysdale

5 One Thomas Circle, N.W.

6 Suite 1100

7 Washington, D.C. 20005

8

9 Dear Mr. Birkenstock:

DRAFT C

10 We are responding to your advisory opinion request on behalf of WideOrbit, Inc.
11 d/b/a VoterVoter.com (the “Corporation”) concerning the application of the Federal
12 Election Campaign Act of 1971, as amended (the “Act”), and Commission regulations to
13 advertising services provided to individuals and nonconnected political committees. The
14 Corporation asks whether a proposed plan to use the VoterVoter.com website to sell
15 political ads is permissible under the Act.

16 The Commission concludes that, under the facts presented and the conditions set
17 forth in this opinion, the Corporation’s proposed services are permissible.

18 ***Background***

19 The facts presented in this advisory opinion are based on your letter received on
20 August 12, 2008, publicly available materials, and telephone conversations with
21 Commission attorneys.

22 WideOrbit, Inc., a privately held corporation, sells software packages to manage
23 advertising, including the management of spot placement, inventory, sales, and the billing
24 process, at more than 1,000 television stations, radio stations, and cable networks in the
25 U.S. Building on its technical expertise and industry knowledge, WideOrbit, Inc. has
26 developed and operates an Internet service named VoterVoter.com, “to reduce the
27 technical and logistical barriers facing individuals who wish to sponsor their own

1 political advertisements, and to provide these individuals with a means to better leverage
2 the efficiency of broadcast media.” Neither WideOrbit, Inc., nor its VoterVoter.com
3 component, is owned or controlled by a candidate, political party, or political committee.¹

4 **A. General Overview of the Business Model for VoterVoter.com**

5 The VoterVoter.com website would allow individuals to view advertisements
6 already created by the Corporation, or by others, that are posted on the VoterVoter.com
7 website. These individuals may also use software tools on the VoterVoter.com website
8 to create their own political advertisements. Then, through the Corporation, individuals
9 may purchase TV airtime for the advertisements they have either chosen or created.²

10 The Corporation receives revenue in two ways: (1) by charging the airtime purchaser a
11 licensing fee for the use of ads created by the Corporation itself; and (2) by obtaining a
12 15 percent commission from the TV stations on the airtime bought by each purchaser
13 through the Corporation.³ The Corporation anticipates that the advertisements will
14 expressly advocate the election or defeat of clearly identified Federal candidates.

15 Currently, the VoterVoter.com website hosts content from creators who are individuals
16 and nonconnected political committees, but not from candidates, candidate committees,

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, maintaining office space, and operating the website that is the subject of this advisory opinion. VoterVoter.com is not a separate business entity.

² The person who posts a video to the website is referred to as a “creator.” The person who buys airtime through the Corporation is referred to as a “purchaser.” A creator who pays to have his or her ad broadcast would be a “purchaser” as well.

³ The actual video files (including audio tracks) maintained on the VoterVoter.com website are not suitable for broadcast use. Once a customer purchases TV airtime for an advertisement, the Corporation will provide the TV station or network with a higher quality video or audio file suitable for broadcast.

1 or party committees.⁴ The Corporation does not establish or facilitate any contact
2 between the candidate whose election is advocated (including the candidate's committee
3 and agents) and the creator or purchaser. Its business model involves the creation of
4 advertisements for those who will make independent expenditures, not coordinated
5 communications. In addition, none of the advertisements will solicit contributions.

6 All of the Corporation's services are provided on a strictly non-partisan basis.
7 The Corporation states that the VoterVoter.com website and the Corporation are operated
8 for commercial purposes only and not for the purpose of influencing any Federal election.
9 The Corporation provides its services to creators and purchasers without regard to
10 partisanship or political affiliation.

11 **B. Two Kinds of Ads Available on VoterVoter.com**

12 **1. Ads Created by the Corporation**

13 To the extent a purchaser chooses an ad created by the Corporation, the
14 Corporation itself essentially serves as both the hired content creator and the media buyer
15 for that purchaser, just as media consultants might create ads for customers from stock
16 footage. The business plan contemplates that no ad will be aired on television until a
17 permissible purchaser arranges to finance its placement as an independent expenditure.
18 Also, the Corporation will charge each purchaser a "licensing fee," and will receive an
19 airtime commission that it believes will be sufficient to make a profit on each discrete
20 transaction.

⁴ In the event the Corporation decides to host ads from such committees in the future on VoterVoter.com, it will advise them (and any customers wishing to buy airtime for such ads) that any airing of a candidate's material would constitute a republication of campaign material resulting in in-kind contributions. See 2 U.S.C. 441a(a)(7)(B)(iii); 11 CFR 109.23(a).

1 The licensing fee is currently set at \$500 “per order.” An “order” may be for one
2 or more airings of a specific ad. In some instances, the expenses involved in creating an
3 ad may exceed \$500, so that the “per order” licensing fee alone would not recoup the
4 Corporation’s production costs when the first purchaser purchases placements for that ad.
5 However, the Corporation will not create a stock ad unless the future expected licensing
6 fees and airtime commissions combined, for that particular ad, provide the company with
7 a reasonable expectation of profit on the ad.

8 If a purchaser desires a completely new, customized advertisement, the
9 Corporation will arrange to have the ad created by a professional media creation
10 company. The Corporation will pass along the media creation company’s full, usual and
11 normal charge to the purchaser without markup or markdown. Accordingly, the
12 purchaser will pay the Corporation the usual and normal charge that the media creation
13 company charges to its non-political customers, and the Corporation will pass on that
14 payment to the media creation company.

15 **2. Ads Created by Others**

16 The other source of ads is creators who post their own videos on the
17 VoterVoter.com website. These creators will be either individuals or nonconnected
18 political committees. VoterVoter.com will not display the creators’ names. The
19 Corporation will charge the creator no fee for uploading videos to the website or for
20 hosting those videos once they are created and posted.⁵ When a creator posts a video, the
21 website provides the creator with brief summary information concerning the scope of the

⁵ The Corporation has not charged for the posting of any videos or other materials to VoterVoter.com or the WideOrbit, Inc. website.

1 Internet activity exemptions at 11 CFR 100.94 and 100.155 and advises that, if an
2 individual creator was paid by anyone to create that ad, such exemptions would not
3 apply.⁶ Beneath this information, the website provides a “radio button” that creators
4 must click to confirm that they were not paid by anyone else to create or post their
5 content. Unless the creator clicks that button, the site will not allow the creator to upload
6 the video.

7 Some of the ads may be created using the “mash-up” feature available on the
8 VoterVoter.com website. This feature provides creators with a range of audio and video
9 clips created by the Corporation itself, and a rudimentary editor built into the website. A
10 creator can browse through the library of clips, then click and drag them into his or her
11 own video, and combine them with new content, thereby creating a new ad. The
12 VoterVoter.com website will host the new ad alongside other ads created by creators.
13 Because the costs per creator of the mash-up feature would be miniscule and the
14 Corporation incurs no incremental costs for the use of this feature, the Corporation would
15 charge no fee for its use.

16 When a purchaser chooses an ad created by a creator, the Corporation will charge
17 no licensing fee. Because the Corporation will incur no expense to create the ad, the
18 Corporation will be compensated by the 15 percent commission it receives on the airtime
19 purchased by the purchaser.

⁶ The summary notice also states that, if a particular television airing of an ad is undertaken in coordination with any candidate or party committee, the expenses of that ad will be an in-kind contribution to the candidate or party committee with whom the ad was coordinated, and subject to the Act’s contribution limits. The notice refers the reader to information about the Internet exemptions and coordinated and independent expenditures on the Commission’s website.

1 Under the Terms of Service for use of VoterVoter.com, each creator who posts a
2 video also grants the Corporation (or warrants that the owner of such material grants to
3 the Corporation) “a royalty-free, perpetual, irrevocable and non-exclusive⁷ worldwide
4 right to use, modify, or distribute such material (in whole or in part).” The Corporation
5 will use these copyrights only in connection with its commercial endeavors, and will not
6 use these copyrights to undertake ideological or political activities of its own.

7 **C. Buying Airtime for Ads Using VoterVoter.com**

8 Once a purchaser chooses an ad to run, the Corporation will advise that airtime
9 cannot be funded by corporations or labor organizations, that any individual purchaser
10 must be either a U.S. citizen or a permanent resident and that, when broadcast, the ad will
11 include the disclaimers required by the Act.⁸ If a subsequent purchaser chooses to
12 purchase airtime for the same ad, the disclaimers will be changed to identify accurately
13 the purchaser for that particular airing of the ad.

14 The Corporation does not facilitate or promote any communication or sharing of
15 information between creators and purchasers. Although it cannot police any such
16 communications or arrangements offline, there is no mechanism on VoterVoter.com to
17 provide for such collaboration between creators and purchasers. In addition, the
18 Corporation will not provide any information to actual or prospective purchasers
19 regarding the creator of a given ad, whether any other purchasers have also bought

⁷ The creator still retains the right to use the posted ad outside of its placement on VoterVoter.com.

⁸ Specifically, the disclaimer will identify by name the person purchasing the time for the ad, provide the purchaser’s permanent street address or web address, and state that the ad was not authorized by any candidate or candidate’s committee. The authorization disclaimer required by 2 U.S.C. 441d(d)(2) and 11 CFR 110.11(c)(4) will also be provided via voice-over.

1 airtime for the ad, or the schedule under which the ad has run. Similarly, the Corporation
2 will not convey information about the purchasers of an ad, or the scheduling or airing of
3 such ads, to the creator. The Corporation will offer to provide assistance to purchasers in
4 filling out and filing FEC Form 5 (“Report of Independent Expenditures Made and
5 Contributions Received,” to be used by persons other than political committees), but
6 ultimately the responsibility for complying with the Act’s disclosure requirements rests
7 with the purchasers.

8 The Corporation will screen ads for content only to ensure that ads comply with
9 broadcast standards. For example, the website will not post any proposed ads that
10 contain nudity or profanity, but will not create or screen ads on the basis of their political
11 content or on the basis of which candidates or party committees the ads support or
12 oppose.

13 ***Questions Presented***

- 14 1. *Will the Corporation act solely as a commercial vendor when it creates ads for*
15 *which purchasers may buy airtime?*
- 16 2. *Are costs individuals incur in creating the ads posted on VoterVoter.com exempt*
17 *from the definitions of “contribution” and “expenditure”?*
- 18 3. *For the purposes of the definition of “political committee” at 2 U.S.C. 431(4),*
19 *will the Corporation and an advertisement’s creator and its purchaser become a “group*
20 *of persons” if there is no communication or prearrangement between the purchaser and*
21 *the creator?*

1 4. *If purchasers using VoterVoter.com obtain airtime for an ad that was already*
2 *purchased by other purchasers using VoterVoter.com after reviewing FEC Form 5s filed*
3 *by those other purchasers, are all these purchasers a “group of persons” for purposes of*
4 *the definition of “political committee,” even if there is no direct communication or*
5 *prearrangement between the purchasers themselves, and the Corporation has not*
6 *communicated with any purchaser about airtime orders or purchases by others?*

7 5. *If a nonconnected political committee posts an ad on VoterVoter.com that omits*
8 *any mention of the political committee's name, logo, or any other identification (other*
9 *than in a required disclaimer), does an individual purchaser who pays to broadcast that*
10 *ad make an in-kind contribution to the nonconnected political committee?*

11 6. (a) *Does the use of footage of a candidate at a public appearance, in an ad posted*
12 *on VoterVoter.com constitute republication of campaign materials?*

13 (b) *Would this analysis change if the footage includes images of campaign*
14 *materials, such as banners, signs, buttons, or t-shirts, either in the background or worn*
15 *by the candidate at the event?*

16

1

2 ***Legal Analysis and Conclusions***

3 1. *Will the Corporation act solely as a commercial vendor when it creates ads for*
4 *which purchasers may buy airtime?*

5 Under the conditions set forth in this opinion, the Corporation would be
6 considered a commercial vendor engaging in *bona fide* commercial activity and therefore
7 may create ads, and display ads created and posted by individuals, for purchase.

8 Under the Corporation's proposed business model, the ads created by the
9 Corporation will be available to the general public on the VoterVoter.com website, which
10 is a corporate website of WideOrbit, Inc. In addition, the ads posted by creators will also
11 be displayed on VoterVoter.com's website for viewing by the general public. However,
12 the Commission has concluded that the distribution of express advocacy messages to the
13 general public is permissible as "*bona fide* commercial activity," if done by an entity
14 organized and maintained for commercial purposes only and not for the purpose of
15 influencing any elections, and the activities themselves are for purely commercial
16 purposes.

17 For example, in the context of the manufacture, advertising, and sale of political
18 paraphernalia, such as t-shirts and bumper stickers containing express advocacy, the
19 Commission explained that whether or not certain commercial activity results in an
20 expenditure or contribution depended upon a number of factors including: (1) whether the
21 activity is engaged in by the vendor for genuinely commercial purposes and not for the
22 purpose of influencing an election; (2) whether the sales of the merchandise involved

1 fundraising activity for candidates (*e.g.*, resulting in the transfer of proceeds to
2 candidates) or solicitations for political contributions; (3) whether the items are sold at
3 the vendor's usual and normal charge; and (4) whether the purchases are made by
4 individuals for their personal use. *See* Advisory Opinions 1994-30 (Conservative
5 Concepts/Pence) and 1989-21 (Create-a-Craft). Other factors considered in concluding
6 that a business entity's activities were *bona fide* commercial activities, rather than
7 corporate expenditures, have included whether the entities: (1) were owned, controlled, or
8 affiliated with a candidate or political committee; (2) were "in the business" of
9 conducting the type of activity involved; and (3) followed usual and normal business
10 practices and industry standards. *See* MURs 5474 and 5539 (Dog Eat Dog Films/Michael
11 Moore), General Counsel's Report, dated May 25, 2005; MUR 5485 (Conversagent),
12 General Counsel's Report, dated October 25, 2005.

13 Here, the facts set out in the request indicate the Corporation will be acting as a
14 commercial vendor engaging in the proposed activity for genuinely commercial purposes
15 and not for the purpose of influencing any Federal election.⁹ Neither WideOrbit, Inc. nor
16 VoterVoter.com is owned or controlled by any candidate, political party, or political
17 committee. The Corporation's business model does not involve fundraising for, or the
18 transfer of proceeds to, any candidate or political committee. The Corporation will sell

⁹ *See* 11 CFR 116.1(c), which defines "commercial vendor," for the purposes of permissible extensions of credit to political committees, as "any persons providing goods or services to a candidate or political committee whose usual and normal business involves the sale, rental, lease or provision of those goods or services." *See also* 11 CFR 114.2(f)(1) (providing that a corporation does not facilitate contributions to a candidate or political committee if it provides services in the ordinary course of business as a commercial vendor at the usual and normal charge). Although VoterVoter.com was formed only a few months ago and does not yet account for a significant part of WideOrbit, Inc.'s business, the operations of VoterVoter.com are a natural outgrowth of WideOrbit, Inc.'s business of making more efficient the TV and radio advertising process. In addition, VoterVoter.com is a way for WideOrbit, Inc. to build on its pre-existing relationship with TV stations to commercial advantage.

1 television airtime to the purchasers at the usual and normal charge, and the purchasers
2 will pay the Corporation in advance of the Corporation's purchase of the media time
3 requested for the ads and, hence, in advance of the airing of the ads. These practices are
4 consistent with the usual and normal industry practice as to payment for TV ad airtime.

5 In the context of this request, which involves a corporation posting express
6 advocacy messages on a website viewable by the general public, it is also significant that
7 the Corporation will accept and post ads on a nonpartisan basis. To maximize its
8 prospective revenues, the Corporation seeks to attract creators without regard to the
9 candidates their ads support or oppose. The Commission also notes that the Corporation
10 has itself posted ads on the website supporting both major party presidential nominees
11 and, before the major party national conventions, ads supporting another presidential
12 candidate, Senator Clinton. Thus, it appears that the Corporation intends to create ads for
13 the purpose of maximizing its commercial success, not for the purpose of supporting
14 candidates.¹⁰

15 2. *Are costs individuals incur in creating the ads posted on VoterVoter.com exempt*
16 *from the definitions of "contribution" and expenditure"?*

17 The costs incurred by an individual in creating an ad will be covered by the
18 Internet exemption from the definition of "expenditure" as long as the creator is not also
19 purchasing TV airtime for the ad he or she created.

20 Commission regulations provide that, if an individual or a group of individuals
21 engages in uncompensated Internet activities for the purpose of influencing a Federal

¹⁰ The Commission understands that WideOrbit, Inc., through VoterVoter.com, would also create ads advocating the election of minor party candidates, if the Corporation determines that offering them would increase its net revenues.

1 election, neither the uncompensated personal services provided by the individual nor,
2 generally speaking, the individual's use of equipment or services for the uncompensated
3 activity will be a "contribution" or "expenditure" by that individual or group of
4 individuals. 11 CFR 100.94 and 100.155. This exemption does not apply to several
5 types of payments, including payments for "public communications." 11 CFR
6 100.94(e)(1) and 100.155(e)(1). However, communications over the Internet are not
7 "public communications," except for communications placed for a fee on another
8 person's website. *See* 11 CFR 100.26.

9 The posting by an uncompensated individual or group of individuals of ads
10 created by them on the VoterVoter.com website, where such ads are not posted for a fee,
11 would not be a contribution or expenditure by the individual(s) at the time of the
12 posting.¹¹ However, if the creator then pays to have the ad broadcast on television the
13 individual's costs in creating the ad will no longer be covered by the Internet exemption,
14 and these costs will be part of the expenses for an independent expenditure.¹² *See* 11
15 CFR 109.10; *see also* 104.4(f) and 100.29(b)(3) (which defines "publicly distributed" for
16 electioneering communications but is also applicable to independent expenditures).

17 If a political committee posts an ad it creates on VoterVoter.com, its costs will
18 constitute expenditures and will be reportable as such, even if the ad is never televised.

¹¹ It is also significant that WideOrbit, Inc. and VoterVoter.com have never charged for the posting of any videos or other materials to VoterVoter.com or the WideOrbit website. If they had a customary practice of charging for such posting, the Corporation's allowance for free posting would constitute an impermissible corporate expenditure. *See* 2 U.S.C. 441b(a) and (b)(2); 11 CFR 100.111(a) and (e), 114.2(b)(2). *See also Explanation and Justification for Final Rules on Internet Communications*, 71 Fed. Reg. 18589, 18599 (April 12, 2006) (stating that that a vendor would make an in-kind contribution to a political committee if the vendor allowed free use of website space outside the vendor's customary business practice) .

¹² For purposes of reporting under 11 CFR 109.10, the creation costs would not become reportable independent expenditures until the ad is publicly distributed or otherwise publicly disseminated.

1 Please note that the Internet activity exemptions in 11 CFR 100.94 and 100.155 do not
2 apply to political committees. If the creator is a political committee that has made any
3 payments for the creation of an advertisement that is aired on television, the ad's written
4 and voice-over disclaimers must include the required information about the political
5 committee, as well as the purchaser. 2 U.S.C. 441d(a)(3) and (d)(2); 11 CFR
6 110.11(b)(3) and (c)(4); *see also* Advisory Opinion 2007-20 (XM Radio). The
7 Commission notes that, when the ad created by the political committee is posted on the
8 website, the ad is not posted for a fee. Thus, the ad is not general public political
9 advertising, and therefore is not a public communication under 11 CFR 100.26. *See* 2
10 U.S.C. 431(22). Accordingly, a disclaimer need not appear on the ad posted on the
11 website. *See* 2 U.S.C. 441d(a); 11 CFR 110.11(a)(1) and (2).

12 3. *For the purposes of the definition of "political committee" at 2 U.S.C. 431(4),*
13 *will the Corporation and an advertisement's creator and its purchaser become a "group*
14 *of persons" if there is no communication or prearrangement between the purchaser and*
15 *the creator?*

16 Where there is no communication or prearrangement between the creator and the
17 purchaser of the ad, and the Corporation has not conveyed any information about the
18 creator to the purchaser or *vice versa* (other than to inform the purchaser of the content of
19 a disclaimer mentioned in response to question 2), the purchaser may run an ad without
20 the Corporation and the ad's creator and purchaser becoming a "group" for purposes of
21 the definition of "political committee."

1 The Act and Commission regulations define a “political committee” as “any
2 committee, club, association, or other group of persons which receives contributions
3 aggregating in excess of \$1,000 during a calendar year or which makes expenditures
4 aggregating in excess of \$1,000 during a calendar year.” 2 U.S.C. 431(4)(A); 11 CFR
5 100.5(a). The Supreme Court construed the term “political committee” to encompass
6 only organizations that are under the control of a candidate or whose major purpose is the
7 nomination or election of a candidate. *Buckley v. Valeo*, 424 U.S. 1, 79 (1976).

8 Under the facts presented here, it appears that the creator and the purchaser will
9 not constitute a “group of persons” and, hence, no “political committee” will be created
10 through the Corporation’s activities. The Corporation will not facilitate communications
11 or arrangements between the creator and the purchaser. In addition, the Corporation will
12 not convey (with the exception of the limited information noted above): (i) any
13 information to actual or prospective purchasers about the creator, or other actual or
14 prospective purchasers, or previous placements of the ad; or (ii) any information to the
15 creator about the purchasers of an ad, or the scheduling or airing of such ads.

16 The Commission does not address whether any agreements or collaboration
17 between a creator and a purchaser not involving the Corporation would result in the
18 formation of a “group of persons” that would be considered a political committee.

19 4. *If purchasers using VoterVoter.com obtain airtime for an ad that was already*
20 *purchased by other purchasers using VoterVoter.com after reviewing FEC Form 5s filed*
21 *by those other purchasers, are all these purchasers a “group of persons” for purposes of*
22 *the definition of “political committee,” even if there is no direct communication or*

1 *prearrangement between the purchasers themselves, and the Corporation has not*
2 *communicated with any purchaser about airtime orders or purchases by others?*

3 Subsequent purchasers of ads may choose to review the FEC Form 5s filed by
4 previous purchasers. However, if there is no communication between or among the
5 purchasers themselves, and the Corporation has not communicated with purchasers about
6 other purchasers, the mere review of FEC Form 5s would not be sufficient to cause
7 previous and new purchasers of the same ad to be considered a “group of persons” and
8 hence a political committee. The Commission does not address whether any
9 communications or collaboration between purchasers would result in the formation of a
10 "group of persons" that could be considered a political committee.

11 5. *If a nonconnected political committee posts an ad on VoterVoter.com that omits*
12 *any mention of the political committee's name, logo, or any other identification, does an*
13 *individual purchaser who pays to broadcast that ad make an in-kind contribution to the*
14 *nonconnected political committee?*

15 No, a purchaser does not make an in-kind contribution to a nonconnected political
16 committee merely by purchasing airtime to run an ad posted on VoterVoter.com by that
17 nonconnected political committee.

18 A “contribution” includes “any gift, subscription, loan, advance, or deposit of money
19 or anything of value made by any person for the purpose of influencing any election for
20 Federal office.” 2 U.S.C. 431(8)(A)(i) and 11 CFR 100.52(a); *see also* 2 U.S.C. 441b(b)(2)
21 and 11 CFR 114.2(b)(1). “Anything of value” includes all in-kind contributions, including
22 the provision of goods or services without charge or at a charge that is less than the usual and
23 normal charge. *See* 11 CFR 100.52(d)(1). Here, given the absence of any collaboration

1 between the purchaser and the creator, the Commission concludes that purchasing airtime to
2 run an ad created and posted on VoterVoter.com by a nonconnected political committee
3 does not result in an in-kind contribution to that committee.¹³

4 6a. *Does the use of footage of a candidate at a public appearance, in an ad posted on*
5 *VoterVoter.com, constitute republication of campaign materials?*

6 No, if an individual independently creates and uses his or her own footage of a
7 candidate at a public appearance in an ad he or she posts on VoterVoter.com, the footage
8 would not constitute candidate campaign materials. Hence its use would not constitute
9 republication of campaign materials by either the creator or a subsequent purchaser of
10 airtime for the ad.

11 The Act and Commission regulations provide that, with limited exceptions not
12 implicated here, the dissemination, distribution, or republication, in whole or in part, of
13 campaign materials prepared by a candidate or the candidate's authorized committee, is a
14 contribution by the person republishing the campaign materials for the purposes of the
15 Act's limitations and his or her reporting responsibilities, regardless of whether such
16 republication is a "coordinated communication." 2 U.S.C. 441a(a)(7)(B)(iii); 11 CFR
17 109.23.¹⁴ Here, as long as the creator is acting on his or her own behalf in creating the
18 footage and neither the candidate nor his or her authorized committee, or any agent acting

¹³ Under Commission regulations and the Act, republication of a candidate's campaign materials results in a contribution. 2 U.S.C. 441a(7)(B); 11 C.F.R. 109.20, 109.21, 109.23. Accordingly, the cost of airing ads produced by a candidate or the candidate's authorized committee will result in an in-kind contribution. *Id.*

¹⁴ When a creator posts an ad on the website, the Corporation should ask the creator whether the ad posted constitutes a republication. If it does, the Corporation should inform: (1) political committee creators that the production costs will be a contribution to the candidate subject to the Act's limits; and (2) persons deciding to purchase airtime for the ad that their purchase would be a contribution subject to the Act's limits. In addition, if the republication is both a public communication and a coordinated communication, it may need to be reported by the candidate as well. See 11 CFR 109.21(a), (c)(2), and (d)(6) and 109.23.

1 on behalf of either, would have any ownership or other rights to the footage, the ad would
2 not constitute the dissemination, distribution or republishing of campaign materials.

3 *6b. Would this analysis change if the footage includes images of campaign materials,*
4 *such as banners, signs, buttons, or t-shirts, either in the background or worn by the*
5 *candidate at the event?*

6 No. If the footage includes images of campaign materials, such as campaign
7 signs, buttons, or t-shirts with slogans, at the public appearance, the use of the footage
8 would not thereby become a republication of campaign materials.

9 At campaign rallies or other candidate events, it is customary for banners and
10 signs to be displayed and for attendees to wear campaign buttons, t-shirts, and other
11 campaign apparel. Film footage of such a candidate appearance would not constitute a
12 republication of campaign materials by the creator or the purchaser unless the creator
13 arranged for such materials to be displayed, held up, or worn at the event for the purpose
14 of being shown in the ad.

15 This response constitutes an advisory opinion concerning the application of the
16 Act and Commission regulations to the specific transaction or activity set forth in your
17 request. *See* 2 U.S.C. 437f. The Commission emphasizes that, if there is a change in any
18 of the facts or assumptions presented, and such facts or assumptions are material to a
19 conclusion presented in this advisory opinion, then the requestor may not rely on that
20 conclusion as support for its proposed activity. Any person involved in any specific
21 transaction or activity which is indistinguishable in all its material aspects from the
22 transaction or activity with respect to which this advisory opinion is rendered may rely on

1 this advisory opinion. *See* 2 U.S.C. 437f(c)(1)(B). Please note that the analysis or
2 conclusions in this advisory opinion may be affected by subsequent developments in the
3 law including, but not limited to, statutes, regulations, advisory opinions and case law.
4 All cited advisory opinions are available on the Commission's website at
5 <http://saos.nictusa.com/saos/searchao>.

6

On behalf of the Commission,

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Donald F. McGahn II
Chairman