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April 25, 2012

**FEC - RAD**  
Reports Analysis Div.

26 APR '12 RCUD

VIA HAND DELIVERY

Ms. Deborah Chacona  
Reports Analysis Division  
Federal Election Commission  
999 E Street NW  
Washington, D.C. 20463

Re: Restore Our Future, Inc. Request for Determination Regarding Reporting  
Expenditures for National Ad Buys

Dear Ms. Chacona:

I am writing to you in response to the Federal Election Commission's ("FEC") two Requests For Additional Information ("RFAI") sent to Restore Our Future, Inc. ("ROF") on March 13, 2012, as well as conversations with the FEC's Reports Analysis Division ("RAD") senior staff over the past month. In these letters, RAD requested additional information regarding three Form 3-X, Schedule E, 24 and 48 hour expenditure reports ("24/48 hour reports") filed by ROF: namely reports for February 15, 2012 in the amount of \$7,706.52, and \$417,527.50, and for February 21, 2012 in the amount of \$416,973.75.

Specifically, RAD is asking us to retroactively itemize these expenditures on a per-state basis, and continue to report this way in the future. This arbitrary and burdensome request and interpretation of the regulations is not supported by any reasonable reading of either the statute or the regulations, and will generate inaccurate and meaningless statistics.

The expenditures in question were national cable media buys from the FoxNews network. Unlike broadcast media buys, made on a local-affiliate basis, this buy was aired to every FoxNews cable subscriber nation-wide. A combination of differing pricing models and the fact of national airing makes it impossible to itemize such a buy on a per-state basis. Moreover, because RAD has specifically stated it intends to require per-state itemization for every future 24/48 hour report, it creates a difficult and burdensome request with which to comply. Taking into account the unique nature of Presidential primaries, with multiple elections in short periods

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of time, it would be extraordinarily and unnecessarily burdensome to attempt to take into account every state's 24/48 hour deadline when dealing with a national buy.

Therefore, we respectfully request that RAD issue a determination of corrective action so we may seek full review of the scope of this regulation from the Office of General Counsel, and the Commission as a whole if necessary.

### **Request for a Determination of Corrective Action**

Effective August 1, 2011, the FEC adopted a program by which an entity with a legal question may have its question considered by the full Commission. *Notice 2011-11*, 76 F.R. 45798 (2011). Under this program, if a unit of the Office of Compliance, such as the RAD, issues a request for corrective action during a report review, and the entity disagrees with the request based on a question of law, the entity may seek review of the question by the full Commission.

In order to seek full Commission review, a "determination" must be issued by a unit of the Office of Compliance stating an entity remains obligated to take corrective legal action. In this case, such a determination must come in the form of notification to the entity of legal guidance prepared by the FEC's Office of General Counsel, at the request of RAD recommending the corrective action.

Having received two RFAI's, ROF meets the standard for having received such a request for corrective action during a report review. The RAD has specifically asked for a retroactive itemization on a per-state basis of expenditures of national cable media buys in the context of 24/48 hour reports. ROF materially disputes the legal basis for these requests.

### **Legal Basis for Request**

Title 2 U.S.C. §434(g), governing expenditure reporting, authorizes the collection of 24/48 hour reports. That section also requires certain information be collected with each report. The requirements, found in 2 U.S.C. §434(b)(6)(B)(iii), read:

(B) for any other political committee, the name and address of each--

(iii) person who receives any disbursement . . . in connection with an independent expenditure by the reporting committee, together with the date, amount, and purpose of any such independent expenditure and a statement which indicates whether such independent expenditure is in support of, or in opposition to, a candidate, as well as the name and office sought by such candidate. . .

Expanding on this disclosure provision, Title 11 C.F.R. §104.3(b)(3), governing reporting of expenditures by non-authorized committees, states:

(vii)(B) For each independent expenditure reported, the committee must also provide a statement which indicates whether such independent expenditure is in support of, or in opposition to a particular candidate, as well as the name of the candidate and office sought by such candidate (including State and Congressional district, *when applicable*), . . . (italics added)

As a threshold matter, it is perhaps obvious to state that reporting the State and Congressional district is not required in every report. A plain reading of the regulation simply states the information is required "when applicable." The information thus cannot be mandatorily required for every report. Thus, if the candidate to be identified does not require identification of the State or Congressional district, it is simply not applicable. As an obvious example, an election for a U.S. Senate seat need not include Congressional district.

The original Explanations and Justifications for this rule support this analysis. Explaining the addition of §104.3(b)(3)(vii), the comments note the new regulations simply require each person "be identified by name and office sought, including the state and congressional district where applicable." 45 F.R. 15086 (1980). No mention is made of a reading *requiring* state and congressional district to be made in all cases.

To determine whether the requirement is applicable in this case, the requirement should be read in the context of the entire regulation and statute. The overall subsection, §104.3(b), asks for a statement of whether the independent expenditure is in support of, or opposition to, a particular candidate. The request for "State and Congressional district, when applicable," only comes subordinate to this initial requirement. Likewise, the governing statute, §434(b)(6)(B)(iii), seeks the name and office sought by the candidate against or for whom the advertising is aired. A fair reading of these two sentences indicates the goal is candidate identification, rather than strictly, identification of where the money is being spent.

By this reasoning, State need not be identified in the context of a Presidential primary, as a Presidential candidate is, of course, running for a national office. Although the FEC's practice is to treat each state's primary as a separate election, *see* AO 2003-40, the reporting requirements for identification of a state do not logically follow in this instance. Of course, each primary election is a separately administered election with potentially different candidates on the ballot and with different division of delegates or counts at stake. However, if the purpose of the expenditure requirement is to identify the office sought by the candidate, the listing of state should not be compelled in this instance when the actual office sought is not a state or congressional district, but national.

Of course, there are sound public policy reasons to enumerate the state in which expenditures are made, if known. However, in the instance of reporting national cable media buy expenditures, as explained below, listing of state for expenditure reports makes no sense, generates inaccurate and meaningless statistics, and is not "applicable" for the purposes of reporting either.

**Facts Underlying a Finding of “Inapplicable”**

As part of its independent expenditure activity, ROF made several national cable media ad buys for the purpose of airing commercials referring to a federal candidate. All the applicable information required by the 24/48 hour reports was reported to the FEC in the appropriate timeline.

National cable media ad buys consist of the purchase of national viewing time directly from a cable network, such as FoxNews or the Discovery Channel. Cable networks run television programming and advertisements via subscription on a national basis via co-axial or fiber-optic cable that must be installed and paid for in each viewing household. Any airtime purchased from a national cable network will be available to every subscriber to that network in the nation.

This is in contrast to traditional broadcast network programming, which is broadcast and aired wirelessly directly to televisions’ internal receivers or antennas. That said, a broadcast company does not air its programming directly, or on a national basis. Rather, programming is actually broadcast through locally owned and operated affiliate stations, which then broadcast to major media markets. Thus, it is possible under this decentralized system to purchase airtime from one or several local affiliates simultaneously and target specific states or media markets. Note that a “media market” is often not contiguous with a state, and a single state may include multiple media markets. It is, though, possible to purchase national airtime from a broadcast network that is aired to all affiliates simultaneously.

Like purchasing anything in bulk, the cost of national cable airtime differs significantly from purchasing airtime on a national broadcast network level, or local affiliate level, or even via satellite television. For any purchase of viewing time, cable or broadcast, local or national, there is no “set rate” of airtime costs, but rates that often change daily based on demand for the station, time of airing, and competition from other potential purchasers.

Thus, there is no way to accurately calculate the cost per-state of a national cable expenditure by either simple division, as the rates per market vary considerably, or by attempting to compare it to the costs of prices on a per market basis, as the cost for cable and broadcast airtime also differs with the medium. Moreover, although local stations may retain on file the general baseline price for different shows and stations, it remains effectively impossible to calculate the equivalent costs of purchasing such airtime after the fact.

**Non-Application to the Reporting Requirements**

Based on these facts, ROF contends that when purchasing airtime for a national cable media buy, itemizing the expenditure on a per-state basis is not applicable for the purposes of the regulation. First, of course, the purchase was not made to air in any specific state, nor target a specific state, but to air nationally with respect to a national candidate.

More importantly, the purpose of the laws and regulations is in part to provide accurate disclosure. As discussed above, it is impossible to provide any meaningfully accurate per-state

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expenditure number. To compare a national cable media buy with a more traditional per-market broadcast affiliate buy is meaningless. Especially because local costs differ, it is certain any per-state calculation based on simple division would be grossly inaccurate. For example, the cost for many states with small media markets would likely be over-estimated. On the flip side, comparing a divided cost to the expensive New York media market would undoubtedly grossly under-estimate actual price. Intra-state differences, such as differences between the Philadelphia and Scranton media market in Pennsylvania, further makes simple division a bad way to attempt to estimate true per-state costs.

The RAD's proposed solution, modeled on AO 2011-28, to merely divide the amount of the expenditure by the number of states with competitive primaries, would also create a meaningless and dishonest estimate. Wholly setting apart the factual impossibility of using division to estimate expenditures, the RAD's solution introduces a further complication by dividing the expenditure by too few units. As cable commercials air nationally, simply dividing the expenditure by the number of upcoming competitive primary states ignores the fact the ad is also airing in states where the primary has finished. This likewise underestimates and overestimates the expenditure per-state.

The goal of both the statute and regulations is to provide accurate reporting of spending amounts, and consequently, an interpretation of the regulation requiring mathematics producing such an arbitrary figure cannot be required or applicable.

Additionally, because RAD has requested this information on all future 24/48 hour reports, producing such a number, even if possible, would be difficult and unduly burdensome. First, the mathematics of attempting to produce even estimated per-state costs is daunting, and certainly burdensome when required within a 24 hour deadline. Second, because each primary election in a Presidential race is treated as a separate election, this could potentially expose an entity to an absurd number of shifting reporting deadlines. For a single day buy, this could, for example, encompass ten primary states within the 24 hour deadline, and another fifteen within the 48 hour deadline. If the buy is for a week instead—the usual length of time—several of those states could shift from a 48 hour to 24 hour reporting deadline.

In Advisory Opinion 1995-44, (Forbes for President), the FEC concluded that interpreting contribution reporting requirements in the context of a multi-primary Presidential election cycle to require nationally applied 24/48 hour reports would force a campaign to endure multiple, overlapping deadlines for reporting that would be "difficult or arbitrary." AO 1995-44, 2. The FEC instead concluded the entity did not have to file such reports on a 24/48 hour cycle. The conclusion that a national application of a 24/48 hour reporting regulation when applied across a national primary election with multiple elections and deadlines is "difficult [and] arbitrary" is sound, and demonstrates the RAD's interpretation of the regulations is likewise arbitrary and an unsupported reading of the regulations.

### AO 2011-28

In justifying its request for corrective action, RAD relies on Advisory Opinion 2011-28 (Western Representation PAC), as justification for requiring itemized per-state expenditure in

national media buys. Reliance on this Advisory Opinion is misplaced and an incorrect application of the regulations, as the facts underlying AO 2011-28 differ significantly enough to render the reasoning inapplicable to the current case.

In AO 2011-28, the Western Representation PAC asked the FEC whether it could exclude the cost of national internet advertising buys from the 24/48 hour reports, and whether it could report these costs without itemizing them on a per-state basis. The FEC answered no to both questions. However, based on the way costs were calculated for national internet advertising, the FEC permitted Western Representation PAC to estimate the costs through simple division for the purposes of the 24/48 hour reports, and then report the actual per-state costs in monthly or quarterly reports.

Two critical differences exist making application of AO 2011-28 improper here. First, as discussed above, unlike a national internet buy, the actual per-state expenditures of a cable buy can never be calculated. The requirement of equal division per-primary state in AO 2011-28, in contrast, was not designed to reveal the actual cost of expenditure, but to serve as a “placeholder” figure until the actual per-state costs could be calculated and reported. Such an approach makes no sense in this case where the upfront costs are definitively known, but cannot be itemized into a per-state approach.

Second, the FEC concluded Western Representation PAC was permitted to list estimates until the monthly report to accommodate the fact the per-state calculations could take several days to create and calculate. In contrast, the RAD is requesting the per-state itemization be included on all future 24/48 hour reports. The FEC specifically stated it was unconcerned about requiring such detailed expenditure reporting, with respect to the shifting deadlines in a primary election, because reporting the expenditures could be “neither difficult nor especially burdensome” with a monthly deadline. AO 2011-28, 5. Here, of course, a calculation will be required within the 24/48 hour timeline, a short enough time period to render reporting difficult and burdensome.

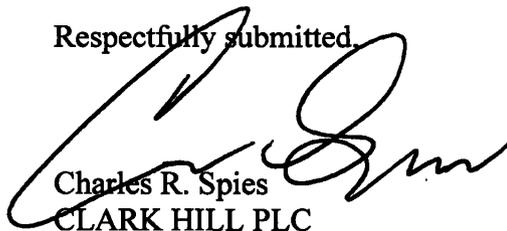
### **Conclusion and Request**

The laws and regulations promulgated to require 24/48 hour reports is based on principles of meaningful candidate identification and accurate expenditure reporting. Neither are applicable here based on the facts. In a Presidential contest, the office sought is national, and not amenable to identification by state or congressional district. Listing the states in which an ad buy airs is a poor fit for the underlying goal of ensuring a candidate targeted or supported by media buys is properly identified. Likewise, as the cost structure and basic facts underlying a national cable media buy differ significantly from traditional per-market broadcast buys, there is no way to calculate a meaningful—or even close to—expenditure figure. Simply “guesstimating” by dividing the expenditure into parts does not serve at all the goal of accurate reporting.

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Having received a notice of corrective action, ROF has a material dispute with the basis for the corrective action, and submits that interpreting 11 C.F.R. §104.3(b) to require per-state itemization of a national cable media ad buy in a Presidential primary is an arbitrary interpretation and application of the regulation unsupported by the regulation itself. Therefore, we respectfully petition the RAD to request legal guidance from the Office of General Counsel to assess whether ROF remains obligated to take the corrective action.

Respectfully submitted,



Charles R. Spies  
CLARK HILL PLC

CRS:mdw

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**Federal Election Commission**  
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