



**FEDERAL ELECTION COMMISSION**  
Washington, DC 20463

**MEMORANDUM**

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

**FROM:** DEPUTY COMMISSION SECRETARY *D. H.*

**DATE:** January 11, 2010

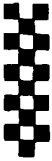
**SUBJECT:** COMMENT ON DRAFT AO 2009-27  
American Future Fund Political Action

Transmitted herewith is a timely submitted comment from Ronald M. Jacobs, Esq., on behalf of ccAdvertising, regarding the above-captioned matter.

Proposed Advisory Opinion 2009-27 is on the agenda for Thursday, January 14, 2010.

**Attachment**

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FEDERAL ELECTION  
COMMISSION  
SECRETARIAT  
675 SEVENTH STREET NW WASHINGTON, DC 20004  
T 202.344.4000 F 202.344.8300 www.Venable.com

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January 11, 2010

Ronald M. Jacobs

T 202.344.8216  
F 202.344.8300  
rmjacobs@venable.com

*Via Electronic Mail & Facsimile*

Thomasenia Duncan, General Counsel  
The Honorable Mary Dove, Secretary  
Federal Election Commission  
999 E Street, NW  
Washington, DC 20463

**Re: Comments by ccAdvertising in response to AOR 2009-27**

Dear Ms. Duncan & Ms. Dove:

Our client, ccAdvertising, submits these comments in response to Advisory Opinion 2009-27 Drafts A, B (issued on December 18, 2009), and C (issued January 8, 2010). As set forth in its earlier comments and below, ccAdvertising supports the request by America Future Fund Political Action ("AFFPA") to have the Commission preempt state laws that ban or otherwise restrict the use of prerecorded messages. As such, ccAdvertising believes that neither draft A nor B is a reasonable interpretation of the Federal Election Campaign Act ("FECA") or Commission regulations. Draft C, however, accurately explains the proper scope of FECA preemption and should be adopted.

#### DISCUSSION

##### **I. Comments on Draft A.**

AFFPA and the American Association of Political Consultants have addressed many of the problems with Draft A, which would conclude that the state laws at issue are not preempted. ccAdvertising makes three additional points with respect to Draft A.

**A. ccAdvertising did not suggest that the Commission preempt the state laws because they are unconstitutional.**

Note 7 to Draft A appears to misunderstand ccAdvertising's point about the increase in cost imposed by these state laws and the comparison to First Amendment jurisprudence on blocking an entire channel of communication. ccAdvertising was not suggesting that the state laws should be preempted because they violate the First Amendment. Rather, ccAdvertising suggested

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using the well-established doctrines in that area to assist the Commission determine when a law prohibits the making of an expenditure.

ccAdvertising thought such a framework would be useful to the Commission because the states have suggested in their comments that preemption here would lead to widespread preemption of other laws that tangentially impact how a political committee makes expenditures. ccAdvertising's comments were a suggestion for how the Commission could distinguish between laws that are mere time, manner, place restrictions (and thus not preempted) and laws that directly prohibit the making of an expenditure—which is squarely within the statutory and regulatory scope of the FECA's preemption.

**B. *FreeEats.com v. Indiana* does not suggest this is an issue left to the states to decide.**

Draft A relies on the Seventh Circuit's decision in *FreeEats.com v. Indiana*, 502 F.3d 590 (7th Cir. 2007), to suggest that the question of preemption should be dealt with in a state forum. See Draft A at 10, n.7. The *FreeEats* case cannot be "informative" to the Commission because it dealt with *Younger* abstention.

In that case, *FreeEats.com* (the parent company of ccAdvertising) had placed prerecorded message calls into Indiana. It then sought a declaratory judgment from the United States District Court for the Southern District of Indiana holding the Indiana statute preempted under the Telephone Consumer Protection Act and unconstitutional under the First Amendment. Shortly after that suit was filed, the State of Indiana initiated an enforcement action in state court against *FreeEats.com*. The Seventh Circuit applied the *Younger* principles to vacate the district court's decision. *FreeEats.com, Inc. v. Indiana*, 502 F.3d 590 (7th Cir. 2007).

*Younger* applies only to cases in which there is a state enforcement case and a federal challenge to a state law. *Id.* at 595. It is not a doctrine of broad applicability that should in any way inform the Commission's decision of whether or not it should issue an advisory opinion. Indeed, *Younger* applies only to federal courts, not agencies. *Id.* ("*Younger* and its progeny 'require

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federal courts to abstain from enjoining ongoing state proceedings..." (quoting *Majors v. Engelbrecht*, 149 F.3d 709, 711 (7th Cir. 1998)).

## **C. ccAdvertising's calls demonstrate the importance of this channel.**

ccAdvertising's Artificial Intelligence Call ("AIC") process emulates a live caller. That is, the AIC technology asks a series of questions, listens for a response, and asks additional questions based on that response. The very first question can be programmed to ask whether the person wishes to continue with the call. The entire call, and the request for permission to conduct the call, are virtually indistinguishable from the same call conducted using a live operator. In short, technology can emulate a human being and the interaction it has with respondents, only faster. Thus, it becomes clear that these state laws—as explained in our prior comments—are designed not to protect privacy, but to drive up the cost of the calls and prohibit them.

Second, it is ccAdvertising's experience that the AIC process, when coupled with an accurate database, are the most effective form of political speech available in many circumstances. It is typical for a ccAdvertising AIC survey to obtain more responses than there are homes that watch the most popular television station in the service area, listen to the most popular radio station in a market, or read the most popular newspaper in the market *combined*. As such, these calls are an incredibly important channel of communication.<sup>1</sup>

## **II. Comments on Draft B.**

Again, ccAdvertising supports the comments submitted by AFFPA and the American Association of Political Consultants with respect to Draft B, which would decline to issue an advisory opinion. ccAdvertising offers one further reason why such an approach does not make sense from an administrative law standpoint: even if the state is not compelled to follow an Advisory Opinion, a reviewing court would grant a high degree of deference to a decision by the FEC interpreting its statute and regulations to preempt the state law.

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<sup>1</sup> Indeed, over 40 Members of Congress have used ccAdvertising to conduct survey calls using the Congressional Franking privilege.

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Advisory Opinions are compelled by statute and issued subject to a robust notice and comment procedure. 2 U.S.C. § 437f(d). As such, if a state were to enforce its prerecorded message rule against AFFPA, the court should grant a high degree of deference to the FEC's Advisory Opinion under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). See *FEC v. National Rifle Ass'n*, 254 F.3d 173, 184-86 (D.C. Cir. 2001) (granting *Chevron* deference to FEC Advisory Opinions, even when the party receiving the opinion was not a party to the litigation).

Simply put, although the state agency may not statutorily be precluded from enforcing the state laws under 2 U.S.C. § 437f(c)(2), the court would be required to defer to the FEC's advisory opinion. Thus, although an Advisory Opinion holding such laws to be preempted may not be a perfect shield from the enforcement of those preempted state laws, such an opinion would be a very good shield from liability given the deference due to that opinion.<sup>2</sup>

### III. Comments on Draft C.

Draft C, which would preempt the state laws at issue in AFFPA's request, is well-reasoned and should be adopted by the Commission. It properly recognizes that the state laws at issue impermissibly limit how political committees may make expenditures and accurately follows the state of the law on the scope of FECA preemption.

### CONCLUSION

In sum, neither Draft A nor Draft B are consistent with the FECA or the Commission's regulations. Draft A's determination that the laws are not preempted is inconsistent with the impact of the state laws, which either literally or effectively prohibit expenditures for prerecorded messages. Draft B's avoidance of the issue is untenable because the Commission is compelled to issue Advisory Opinions and an Advisory Opinion would offer protection to AFFPA.

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<sup>2</sup> This logic also applies to the statement in Draft A that "the Commission cannot provide the requestor with any protection from any state law enforcement body."

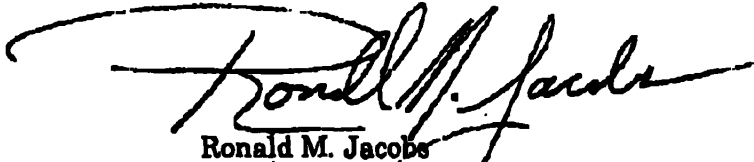
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**Draft C correctly identifies the state laws that the FECA preempts and provides a rational explanation for why such laws directly regulate expenditures by political committees. As such, the Commission should adopt Draft C at its meeting on January 14, 2010.**

**Respectfully submitted,**

A handwritten signature in black ink, appearing to read "Ronald M. Jacobs", with a large, sweeping flourish extending from the end of the signature.

**Ronald M. Jacobs**

**cc: Gabriel S. Joseph, III  
President ccAdvertising**