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**AGENDA DOCUMENT NO.13-49**  
**AGENDA ITEM**  
**For meeting of November 21, 2013**  
**SUBMITTED LATE**

November 20, 2013

**MEMORANDUM**

TO: The Commission

FROM: Lisa J. Stevenson *LJS*  
Deputy General Counsel

Adav Noti *AN*  
Acting Associate General Counsel

Amy Rothstein *AR*  
Assistant General Counsel

Joanna Waldstreicher *J&W*  
Attorney

Subject: Draft AO 2013-16 (PoliticalRefund.org)

Attached is a proposed draft of the subject advisory opinion.

Members of the public may submit written comments on the draft advisory opinion. We are making this draft available for comment until 9:00 am (Eastern Time) on November 21, 2013.

Members of the public may also attend the Commission meeting at which the draft will be considered. The advisory opinion requestor may appear before the Commission at this meeting to answer questions.

For more information about how to submit comments or attend the Commission meeting, go to <http://www.fec.gov/law/draftaos.shtml>.

Attachment

1 ADVISORY OPINION 2013-16

2

3 Dan Backer, Esq.

**DRAFT**

4 DB Capitol Strategies PLLC

5 717 King Street

6 Suite 300

7 Alexandria, VA 22314

8

9 Mr. Paul D. Kamenar

10 Coolidge Reagan Foundation

11 1629 K Street, N.W.

12 Suite 300

13 Washington, D.C. 20006

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15 Dear Messrs. Backer and Kamenar:

16 We are responding to your advisory opinion request on behalf of

17 PoliticalRefund.org. PoliticalRefund.org asks about the application of the Federal

18 Election Campaign Act of 1971, as amended (the “Act”), and Commission regulations to

19 its proposal to use data obtained from filings with the Commission to contact persons

20 who have made contributions to candidates, to inform those contributors of their right to

21 seek a refund of their contributions, and to facilitate requests for refunds.

22 PoliticalRefund.org also asks whether it may display on its website the aggregate number

23 of contributors who have requested refunds, and whether it may accept advertising on its

24 website and sponsorship of its communications with contributors. The Commission

25 concludes that the proposed use of contributor data, display of the aggregate number of

26 contributors who have requested refunds, and acceptance of advertising and sponsorship

27 are consistent with the Act and Commission regulations.

1 ***Background***

2 The facts presented in this advisory opinion are based on your letter received on  
3 September 10 and your email dated September 20, 2013 (collectively, “Advisory Opinion  
4 Request”).

5 PoliticalRefund.org is a non-profit organization<sup>1</sup> whose stated mission is “to  
6 provide political campaign contributors a simple, user-friendly means to request a refund  
7 of their contributions.” Advisory Opinion Request at 2. PoliticalRefund.org plans to  
8 focus its efforts on contributions made to federal officeholders “whose dramatically  
9 shifting issue positions or scandals” might cause contributors to seek refunds of their  
10 campaign contributions. *Id.* PoliticalRefund.org’s directors will decide whether to target  
11 a particular officeholder’s contributors, although in some cases the officeholder might be  
12 suggested by third parties, including paying sponsors (as described below).

13 PoliticalRefund.org plans to use data obtained from reports filed with the  
14 Commission and posted on the Commission’s website to identify persons who have  
15 contributed to a given officeholder. PoliticalRefund.org will contract with a vendor to  
16 match that information with data from other sources to fill in missing address information  
17 and obtain contributors’ email addresses, when available. PoliticalRefund.org states that,  
18 once the vendor provides the information to PoliticalRefund.org, the vendor will destroy  
19 its records of the data to prevent any further use of the contributor information.

20 PoliticalRefund.org plans to communicate with contributors either by  
21 conventional mail (letter or postcard) or, to reduce costs, by email when email addresses

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<sup>1</sup> PoliticalRefund.org states that its application for federal tax-exempt status under section 501(c)(4) of the Internal Revenue Code is currently pending. Advisory Opinion Request at 2.

1 are available. Recipients of letters and postcards will decide whether to visit  
2 PoliticalRefund.org's website and use its platform to request a contribution refund,  
3 whereas recipients of email communications will be able to click on a link to access  
4 PoliticalRefund.org's website. Whether by traditional mail or email, each  
5 communication will inform contributors about their right to request a refund of their  
6 contributions and about PoliticalRefund.org's website and services, although these  
7 communications also will state that no candidate or political committee is under any  
8 obligation to refund contributions. Each communication will be personalized with the  
9 contributor's name and address, the name of the officeholder to whom the contribution  
10 was made, and the amount of the contribution. PoliticalRefund.org represents that once it  
11 sends the communication, it will destroy its records of the data to prevent further use of  
12 contributor information.

13 A contributor who visits PoliticalRefund.org's website will be able to complete a  
14 form with the information necessary to request a refund; data entered into the form will  
15 automatically populate a refund request letter, which the contributor will send to the  
16 appropriate authorized committee. PoliticalRefund.org also wishes to give contributors  
17 who generate refund request letters the option of having PoliticalRefund.org follow up  
18 with the committees from which the contributors request refunds. Except for contributors  
19 who affirmatively consent to be contacted again by PoliticalRefund.org,  
20 PoliticalRefund.org will contact each contributor only once per election cycle concerning  
21 contributions made to a given candidate. PoliticalRefund.org may contact a person who  
22 has made contributions to multiple candidates multiple times, but only once for each  
23 candidate per election cycle. PoliticalRefund.org will not retain, sell, or otherwise use

1 the information provided by contributors, other than to populate the refund request letter  
2 and for any follow-up communications requested by the contributor.

3 PoliticalRefund.org also proposes to publish on its website the aggregate number  
4 of contributors who have requested refunds from specific authorized committees. The  
5 data will be collected to measure the efficacy of PoliticalRefund.org's efforts and will  
6 provide the public with information about trends in refund requests, including trends  
7 regarding particular authorized committees. The data will be solely numerical and will  
8 not disclose any contributor's identifying information.

9 PoliticalRefund.org will not solicit donations from visitors to its website to help  
10 fund its activities, nor will it charge a fee for its services. To cover the costs of its  
11 website and activities, PoliticalRefund.org wishes to accept banner advertising on its  
12 website and sponsorship for its communications. PoliticalRefund.org will not accept  
13 such advertising or sponsorship from candidates, political committees, or any other  
14 entities engaging primarily in political activities. Sponsors will be identified as such in  
15 the communications that they sponsor. Because PoliticalRefund.org does not seek to  
16 make a profit on its activities, it will charge sponsorship fees only to cover the costs of  
17 the sponsored communication, and it will charge advertising fees only to cover the  
18 administrative costs of operating the website. PoliticalRefund.org will not enable or  
19 encourage anyone to make a contribution to any candidate or political committee.

20 ***Questions Presented***

21 1. *May PoliticalRefund.org send a personalized letter with its website URL*  
22 *to contributors whose names and contact information were obtained in part from the*  
23 *Commission and securely matched to provide necessary additional mailing information?*

1           2.       *May PoliticalRefund.org instead send a postcard with its website URL to*  
2 *contributors whose names and contact information were similarly obtained from the*  
3 *Commission and matched for full addresses?*

4           3.       *May PoliticalRefund.org instead send an email containing a link to its*  
5 *website to contributors whose names and contact information were similarly obtained*  
6 *from the Commission and matched for email addresses?*

7           4.       *May PoliticalRefund.org send a personalized email containing computer*  
8 *code embedded in the individual contributor's link to the website, which would then pre-*  
9 *populate the form letter at the website with the contributor's name and address*  
10 *information?*

11          5.       *May PoliticalRefund.org offer contributors who respond to its*  
12 *communications the option of having PoliticalRefund.org follow up with their refund*  
13 *requests and communicate that information back to the contributors?*

14          6.       *Without disclosing the identifying information of any contributor, may the*  
15 *PoliticalRefund.org website display on its home page the aggregate number of persons*  
16 *who have requested a refund and the total dollar amount requested from any individual*  
17 *authorized committee and from all authorized committees through the*  
18 *PoliticalRefund.org system?*

19          7.       *May the PoliticalRefund.org website sell banner advertising and other*  
20 *sponsorship opportunities on its website in order to pay the costs of maintaining the*  
21 *website?*

1 ***Legal Analysis and Conclusion***

2 1. *May PoliticalRefund.org send a personalized letter with its website URL*  
3 *to contributors whose names and contact information were obtained in part from the*  
4 *Commission and securely matched to provide necessary additional mailing information?*

5 2. *May PoliticalRefund.org instead send a postcard with its website URL to*  
6 *contributors whose names and contact information were similarly obtained from the*  
7 *Commission and matched for full addresses?*

8 3. *May PoliticalRefund.org instead send an email containing a link to its*  
9 *website to contributors whose names and contact information were similarly obtained*  
10 *from the Commission and matched for email addresses?*

11 4. *May PoliticalRefund.org send a personalized email containing computer*  
12 *code embedded in the individual contributor's link to the website, which would then pre-*  
13 *populate the form letter at the website with the contributor's name and address*  
14 *information?*

15 Yes, PoliticalRefund.org may use publicly available contributor information  
16 obtained from the Commission to contact contributors as proposed via letter, postcard, or  
17 email, and may embed computer code in its emails to pre-populate a web form with a  
18 contributor's name and address, because the contributor information would not be used  
19 for the purpose of soliciting contributions or for any commercial purpose.<sup>2</sup>

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<sup>2</sup> PoliticalRefund.org intends to contact contributors to federal candidates with regard to the candidates' "dramatically shifting issue positions," "scandals," "controversial actions or other occurrences of potential concern." Advisory Opinion Request at 2. PoliticalRefund.org has not expressed any intention to make contributions or expenditures in connection with a federal election. However, if PoliticalRefund.org makes contributions or expenditures, PoliticalRefund.org may be required to register and file reports as a political committee under the Act. The Act and Commission regulations define a "political committee" as "any committee, club, association or other group of persons which receives

1           The Act requires each political committee to report the “identification” of each  
2 person who makes aggregate contributions to the committee exceeding \$200 for the  
3 calendar year (or election cycle in the case of an authorized committee). 2 U.S.C.  
4 § 434(b)(3)(A); *see also* 11 C.F.R. § 104.8(a). For contributions by individuals,  
5 “identification” consists of reporting the individual’s name, mailing address, occupation,  
6 and employer’s name. 2 U.S.C. § 431(13)(A); 11 C.F.R. § 100.12. The Act requires the  
7 Commission to make these reports available for public inspection and copying, 2 U.S.C.  
8 § 438(a)(4); *see also* 2 U.S.C. § 438a (requiring Commission to make all reports publicly  
9 available online), but Congress was concerned about “protect[ing] the privacy of the  
10 generally very public-spirited citizens who may make a contribution to a political  
11 campaign or a political party.” 117 Cong. Rec. S30057 (daily ed. Aug. 5, 1971)  
12 (statement of Sen. Bellmon). Congress therefore provided a limitation to ensure that  
13 public contributor information was not misused: “[A]ny information copied from such  
14 reports or statements may not be sold or used by any person for the purpose of soliciting  
15 contributions or for commercial purposes, other than using the name and address of any  
16 political committee to solicit contributions from such committee.” 2 U.S.C. § 438(a)(4);  
17 *see also* 11 C.F.R. § 104.15(a). The prohibition on using contributor information to  
18 solicit contributions applies to soliciting any kind of contribution or donation, including  
19 charitable donations. 11 C.F.R. § 104.15(b). The Commission has characterized this

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contributions aggregating in excess of \$1,000 during a calendar year or which makes expenditures aggregating in excess of \$1,000 during a calendar year.” 2 U.S.C. § 431(4)(A); *see also* 11 C.F.R. § 100.5. However, an organization that has made contributions or expenditures in excess of \$1,000 will not be considered a “political committee” unless, in addition, its “major purpose is Federal campaign activity (*i.e.*, the nomination or election of a Federal candidate).” Political Committee Status: Supplemental Explanation and Justification, 72 Fed. Reg. 5595, 5597 (Feb. 7, 2007); *see Buckley v. Valeo*, 424 U.S. 1, 79 (1976).

1 limitation as “a broad prophylactic measure intended to protect the privacy of the  
2 contributors about whom information is disclosed” in reports and statements filed with  
3 the Commission. Advisory Opinion 2003-24 (NCTFK) at 4; *see generally FEC v. Legi-*  
4 *Tech, Inc.*, 967 F. Supp. 523 (D.D.C. 1997) (discussing scope and purpose of provision).

5         The Commission has determined that the Act and Commission regulations do not  
6 prohibit the use of contributor information in circumstances similar to those presented  
7 here. In Advisory Opinion 2009-19 (Club for Growth), the Commission concluded that a  
8 nonprofit membership organization and its separate segregated fund (“SSF”) could use  
9 information obtained from a candidate’s disclosure reports to compile a list of the  
10 candidate’s contributors and to inform each contributor by letter or telephonically that the  
11 candidate had changed his party affiliation and had offered to refund contributions upon  
12 request. In concluding that the proposed use of contributor information was permissible,  
13 the Commission emphasized that the organization and its SSF would neither solicit  
14 contributions nor use contributor information for any commercial purpose; the  
15 communications would be made only once to each contributor and would not require any  
16 follow-up contact; and the organization and its SSF would safeguard the contributor  
17 information against misuse by themselves or third parties. *Id.* at 4-5; *see also* Advisory  
18 Opinion 1984-02 (Gramm) (concluding that Representative Gramm’s authorized  
19 committee could use information obtained from disclosure reports to inform contributors  
20 to a nonconnected committee calling itself “Americans for Phil Gramm in ’84” that the  
21 nonconnected committee was not an authorized committee); Advisory Opinion 1981-05  
22 (Findley) (concluding that a candidate could use information obtained from disclosure  
23 reports to mail letters to his opponent’s contributors to correct allegedly defamatory

1 statements made by his opponent). In each of these advisory opinions, the Commission  
2 noted that the purpose of the prohibition is to prevent contributor information from being  
3 used for commercial purposes or for making solicitations. The prohibition does not  
4 “foreclose the use of this information for other, albeit political, purposes, such as  
5 correcting contributor misperceptions.” Advisory Opinion 1984-02 (Gramm).

6 Like Club for Growth, PoliticalRefund.org will use contributor information for  
7 the limited purpose of identifying and informing contributors about a candidate’s change  
8 in position and about their right to request a refund of their contributions, rather than for  
9 commercial purposes or to solicit contributions or donations. Moreover,  
10 PoliticalRefund.org has stated that it will safeguard contributor information to ensure that  
11 it is not misused by its vendors or by PoliticalRefund.org itself. Finally, as explained  
12 further in response to Question 5 below, PoliticalRefund.org will contact each contributor  
13 only once per candidate per election cycle (unless the contributor affirmatively consents  
14 to be contacted again), which is consistent with the limited activity the Commission  
15 found permissible in Advisory Opinion 2009-19 (Club for Growth).

16 Accordingly, PoliticalRefund.org’s proposed use of contributor information  
17 obtained from the Commission to contact contributors via letter, postcard, or email is  
18 consistent with the Act and Commission regulations.

19 5. *May PoliticalRefund.org offer contributors who respond to its*  
20 *communications the option of having PoliticalRefund.org follow up with their refund*  
21 *requests and communicate that information back to the contributors?*

22 Yes, PoliticalRefund.org may offer contributors who respond to its  
23 communications the option of having PoliticalRefund.org follow up with their refund

1 requests and communicate that information back to the contributors because any such  
2 follow-up communications would not be to solicit donations or for commercial purposes,  
3 would occur solely at the request of the contributors, and would be limited in quantity.

4 PoliticalRefund.org generally proposes to contact contributors only once per  
5 election cycle for each targeted candidate. The only exception PoliticalRefund.org  
6 identifies to this one-contact rule is that the organization would follow up with  
7 contributors regarding the status of their refund requests if the contributors authorize  
8 PoliticalRefund.org to do so.

9 PoliticalRefund.org's proposal is consistent with that approved by the  
10 Commission in Advisory Opinion 2009-19 (Club for Growth), for three reasons. First, as  
11 discussed above, the substance of PoliticalRefund.org's communications regarding  
12 contribution refunds would not constitute solicitations or commercial communications  
13 within the meaning of the Act or Commission regulations.

14 Second, in Advisory Opinion 2009-19 (Club for Growth), the Club for Growth  
15 stated that it would not contact a contributor more than once unless the contributor  
16 affirmatively requested additional communications. The Commission incorporated this  
17 limitation into its conclusion that the Club for Growth's proposal was permissible  
18 because its communications would be "made only once to each donor" and would not  
19 necessarily entail "any further contact." PoliticalRefund.org similarly states that it would  
20 require affirmative authorization from a contributor before contacting that contributor  
21 more than once per candidate.

22 Third, in both Advisory Opinion 2009-19 (Club for Growth) and in the current  
23 request, any authorized follow-up communications would necessarily be limited in

1 quantity. In Advisory Opinion 2009-19 (Club for Growth), the only additional  
2 information that would be provided in a subsequent contact would be “further  
3 information . . . on how to request a refund.” This is equivalent to the scope of  
4 PoliticalRefund.org’s proposal, which would provide a status update on the contributor’s  
5 refund request. In both cases, once the requested information is provided, there would be  
6 no further communications. This limitation distinguishes the instant request from the  
7 broad and open-ended interaction with contributors that the Commission found to be  
8 impermissible in Advisory Opinion 2003-24 (NCTFK). In that advisory opinion, the  
9 National Center for Tobacco Free Kids proposed to use contributor information obtained  
10 from reports filed with the Commission to send direct mail communications regarding  
11 tobacco use to certain contributors and to share the contributor information with allied  
12 organizations to enable them to contact the contributors for similar purposes. The  
13 Commission concluded that the proposed use of contributor information was not  
14 permissible under the Act and Commission regulations because it “present[s] the  
15 possibility of repetitive and intrusive communications to contributors,” which “would fall  
16 within the realm of ‘harassment’ that Congress wanted to prevent.” Advisory Opinion  
17 2003-24 (NCTFK) at 4. The instant request presents no potential for such “open-ended”  
18 communications.

19 In sum, because PoliticalRefund.org proposes to contact each contributor only  
20 once per election cycle per candidate and will limit any further contacts to refund-status  
21 updates that the contributor affirmatively requests, the Commission concludes that this  
22 aspect of the proposal is consistent with the Act and Commission regulations.

1           6.        *Without disclosing the identifying information of any contributor, may the*  
2 *PoliticalRefund.org website display on its home page the aggregate number of persons*  
3 *who have requested a refund and the total dollar amount requested from any individual*  
4 *authorized committee and from all authorized committees through the*  
5 *PoliticalRefund.org system?*

6           Yes, PoliticalRefund.org may display the aggregate number of persons who have  
7 requested a refund and the total dollar amount requested from specified committees and  
8 from all committees through the PoliticalRefund.org system because the display would  
9 not include any identifiable contributor information.

10           The principal purpose of restricting the use of information from Commission  
11 reports is to protect individual contributors from having their information used for  
12 solicitation or commercial purposes or sold to others who use the information for such  
13 purposes. *See Legi-Tech*, 967 F. Supp. at 530; *see also, e.g.*, Advisory Opinion 2009-19  
14 (Club for Growth); Advisory Opinion 1998-04 (White Oak Technologies); Advisory  
15 Opinion 1995-09 (NewtWatch); Advisory Opinion 1986-25 (Public Data); Advisory  
16 Opinion 1984-02 (Gramm). The Commission has previously considered whether  
17 promotional displays based on aggregate contributor data constitute such a use. In  
18 Advisory Opinion 1998-04 (White Oak Technologies), the requestor had developed  
19 software that could analyze large datasets, such the Commission's public databases, for  
20 "fraud detection" and other purposes. The requestor proposed to create marketing  
21 materials that would not contain any identifiable information filed with the Commission  
22 but would include sample analyses of aggregate contributor data to illustrate the efficacy  
23 of the requestor's data-mining product. The Commission concluded that the requestor's

1 proposed use of contributor data was not prohibited by the Act or Commission  
2 regulations because neither the marketing materials nor the underlying software being  
3 marketed would include contributors' identifying information.

4 Here, PoliticalRefund.org proposes to display aggregate numbers of persons who  
5 have used its platform to request refunds. This information will neither identify any  
6 contributor nor include contributor information that could be used for solicitations or  
7 commercial purposes. Accordingly, PoliticalRefund.org's proposal to display aggregate  
8 information about refund requests is not a prohibited use of contributor data.

9 7. *May the PoliticalRefund.org website sell banner advertising and other*  
10 *sponsorship opportunities on its website in order to pay the costs of maintaining the*  
11 *website?*

12 Yes, PoliticalRefund.org may sell advertising on its website and other sponsorship  
13 opportunities. As explained above, none of PoliticalRefund.org's proposed uses of  
14 contributor information violates the prohibition on using contributor data to solicit  
15 contributions or for commercial purposes. Because these activities are consistent with  
16 the Act, and because, based on the representations made in the request,  
17 PoliticalRefund.org is not a political committee<sup>3</sup> or otherwise subject to the Act's  
18 financing restrictions, PoliticalRefund.org's sources of income are not governed by the  
19 Act. Therefore, as long as PoliticalRefund.org continues to comply with 2 U.S.C.  
20 § 438(a)(4) by using contributor data only to contact contributors regarding refunds in the  
21 manner approved above in the responses to Questions 1-5 — and by publicizing only  
22 aggregate data in the manner approved in the response to Question 6 —

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<sup>3</sup> See *supra* note 2.

1 PoliticalRefund.org may sell advertising and other sponsorship opportunities to defray  
2 the costs of maintaining its website.

3         This response constitutes an advisory opinion concerning the application of the  
4 Act and Commission regulations to the specific transaction or activity set forth in your  
5 request. *See* 2 U.S.C. § 437f. The Commission emphasizes that, if there is a change in  
6 any of the facts or assumptions presented, and such facts or assumptions are material to a  
7 conclusion presented in this advisory opinion, then the requestor may not rely on that  
8 conclusion as support for its proposed activity. Any person involved in any specific  
9 transaction or activity that is indistinguishable in all its material aspects from the  
10 transaction or activity with respect to which this advisory opinion is rendered may rely on  
11 this advisory opinion. *See* 2 U.S.C. § 437f(c)(1)(B). Please note that the analysis or  
12 conclusions in this advisory opinion may be affected by subsequent developments in the  
13 law including, but not limited to, statutes, regulations, advisory opinions, and case law.  
14 All advisory opinions cited herein are available on the Commission's website.

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On behalf of the Commission,

Ellen L. Weintraub  
Chair