

## **PUBLIC COMMENTS ON DRAFT ADVISORY OPINIONS**

Members of the public may submit written comments on draft advisory opinions.

DRAFTS A and B of ADVISORY OPINION 2012-24 are now available for comment. Advisory Opinion 2012-24 was requested by Tony P. Trimble, Esq., and Matthew W. Haapoja, Esq., on behalf of Dean Peterson, and the drafts are scheduled to be considered by the Commission at its public meeting on August 2, 2012. The meeting will begin at 10:00 a.m. and will be held in the 9<sup>th</sup> Floor Hearing Room at the Federal Election Commission, 999 E Street, NW, Washington, DC. Individuals who plan to attend the public meeting and who require special assistance, such as sign language interpretation or other reasonable accommodations, should contact the Commission Secretary, at (202) 694-1040, at least 72 hours prior to the meeting date.

If you wish to comment on DRAFTS A and B of ADVISORY OPINION 2012-24, please note the following requirements:

- 1) Comments must be in writing, and they must be both legible and complete.
- 2) Comments must be submitted to the Office of the Commission Secretary by hand delivery or fax ((202) 208-3333), with a duplicate copy submitted to the Office of General Counsel by hand delivery or fax ((202) 219-3923).
- 3) Comments must be received by noon (Eastern Time) on August 1, 2012.
- 4) The Commission will generally not accept comments received after the deadline. Requests to extend the comment period are discouraged and unwelcome. An extension request will be considered only if received before the comment deadline and then only on a case-by-case basis in special circumstances.
- 5) All timely received comments will be made available to the public at the Commission's Public Records Office and will be posted on the Commission's website at <http://saos.nictusa.com/saos/searchao>.

## **REQUESTOR APPEARANCES BEFORE THE COMMISSION**

The Commission has implemented a pilot program to allow advisory opinion requestors, or their counsel, to appear before the Commission to answer questions at the open meeting at which the Commission considers the draft advisory opinion. This program took effect on July 7, 2009.

Under the program:

- 1) A requestor has an automatic right to appear before the Commission if any public draft of the advisory opinion is made available to the requestor or requestor's counsel less than one week before the public meeting at which the advisory opinion request will be considered. Under these circumstances, no advance written notice of intent to appear is required. This one-week period is shortened to three days for advisory opinions under the expedited twenty-day procedure in 2 U.S.C. 437f(a)(2).
- 2) A requestor must provide written notice of intent to appear before the Commission if all public drafts of the advisory opinion are made available to requestor or requestor's counsel at least one week before the public meeting at which the Commission will consider the advisory opinion request. This one-week period is shortened to three days for advisory opinions under the expedited twenty-day procedure in 2 U.S.C. 437f(a)(2). The notice of intent to appear must be received by the Office of the Commission Secretary by hand delivery, email ([Secretary@fec.gov](mailto:Secretary@fec.gov)), or fax ((202) 208-3333), no later than 48 hours before the scheduled public meeting. Requestors are responsible for ensuring that the Office of the Commission Secretary receives timely notice.
- 3) Requestors or their counsel unable to appear physically at a public meeting may participate by telephone, subject to the Commission's technical capabilities.
- 4) Requestors or their counsel who appear before the Commission may do so only for the limited purpose of addressing questions raised by the Commission at the public meeting. Their appearance does not guarantee that any questions will be asked.

**FOR FURTHER INFORMATION**

Press inquiries: Judith Ingram  
Press Officer  
(202) 694-1220

Commission Secretary: Shawn Woodhead Werth  
(202) 694-1040

Comment Submission Procedure: Kevin Deeley  
Acting Associate General Counsel  
(202) 694-1650

Other inquiries:

To obtain copies of documents related to Advisory Opinion 2012-24, contact the Public Records Office at (202) 694-1120 or (800) 424-9530, or visit the Commission's website at <http://saos.nictusa.com/saos/searchao>.

**ADDRESSES**

Office of the Commission Secretary  
Federal Election Commission  
999 E Street, NW  
Washington, DC 20463

Office of General Counsel  
ATTN: Kevin Deeley, Esq.  
Federal Election Commission  
999 E Street, NW  
Washington, DC 20463

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FEDERAL ELECTION COMMISSION  
Washington, DC 20463

July 31, 2012

**AGENDA ITEM**

**MEMORANDUM**

TO: The Commission

FROM: Anthony Herman *AH by BF*  
General Counsel

Kevin Deeley *KD by BF*  
Acting Associate General Counsel

Amy Rothstein *AR*  
Assistant General Counsel

Esther Heiden *AH for EH*  
Attorney

Subject: AO 2012-24 (Peterson) (Drafts A and B)

For Meeting of 8-2-12

**SUBMITTED LATE**

Attached are proposed drafts of the subject advisory opinion. We have been asked to have these drafts placed on the Open Session agenda for August 2, 2012.

Attachment

1 ADVISORY OPINION 2012-24

2

3 Tony P. Trimble, Esq.  
4 Matthew W. Haapoja, Esq.  
5 Trimble & Associates, Ltd.  
6 10201 Wayzata Boulevard  
7 Suite 130  
8 Minneapolis, MN 55305  
9

**DRAFT A**

10 Dear Messrs. Trimble and Haapoja:

11 We are responding to your advisory opinion request on behalf of Mr. Dean  
12 Peterson concerning the application of the Federal Election Campaign Act of 1971, as  
13 amended (the "Act"), and Commission regulations to Mr. Peterson's proposed  
14 publication and marketing of Mr. Lee Byberg's autobiography. The Commission  
15 concludes that the proposed activities will not constitute an in-kind contribution to Mr.  
16 Byberg or his authorized campaign committee.

17 ***Background***

18 The facts presented in this advisory opinion are based on your letter received on  
19 July 11, 2012.

20 Mr. Byberg is a candidate for the U.S. House of Representatives from the 7th  
21 Congressional District of the State of Minnesota. Byberg for Congress (the  
22 "Committee") is Mr. Byberg's authorized campaign committee. Mr. Peterson is a  
23 businessman in Willmar, Minnesota, who plans to form a limited liability company (the  
24 "Publishing Company"), which will publish, market, and distribute Mr. Byberg's  
25 autobiography.

26 Mr. Byberg and Mr. Peterson are acquainted through their involvement in the  
27 Willmar business and civic communities, as well as local charitable ministry  
28 organizations. Mr. Peterson has made contributions and volunteered his services to Mr.

1 Byberg's congressional campaign. Mr. Peterson is not a paid employee or consultant for  
2 the Committee and plays no official role with the Committee.

3 Mr. Byberg is currently writing an autobiography, the primary subjects of which  
4 are his life and faith story, and various public policy issues. Mr. Peterson expects the  
5 book will also address potential legislative approaches to those issues. Mr. Byberg's  
6 previous involvement in political campaigns, including his 2010 candidacy for U.S.  
7 House of Representatives, may also be covered. The book will not, however, expressly  
8 advocate the election or defeat of any clearly identified candidate for Federal office.

9 Because Mr. Peterson believes Mr. Byberg's life story to be compelling and likely  
10 both educational and profitable, he plans to form the Publishing Company to publish the  
11 autobiography. Mr. Peterson previously helped another individual self-publish a book  
12 and is generally interested in entering the "self-publishing" industry by offering  
13 publication and distribution services to authors not signed with a more traditional  
14 publishing company. Mr. Peterson will own the Publishing Company either by himself  
15 or with other individuals, none of whom will be employees, officers, agents, or other  
16 representatives of the Committee.

17 Mr. Peterson plans for the Publishing Company to enter into a publishing and  
18 distribution agreement with Mr. Byberg, which will be negotiated on an arm's-length  
19 basis. The agreement is expected to contain the following terms:

- 20 i. The Publishing Company will receive exclusive worldwide publishing,  
21 distribution and marketing/promotional rights for the book for a two-year  
22 term, renewable at Mr. Byberg's option.  
23  
24 ii. The Publishing Company will not be able to change the book without Mr.  
25 Byberg's prior written approval.  
26

- 1           iii.    Mr. Byberg will have reasonable approval rights relative to  
2                    marketing/promotional content but cannot otherwise control or direct any  
3                    activities of the Publishing Company.  
4
- 5           iv.    The Publishing Company will exercise commercially reasonable efforts to  
6                    market, promote, sell, and distribute the book in hard copy and electronic  
7                    format through local bookstores in Minnesota and on-line through  
8                    commercial sellers, such as Amazon.com. Hard copy publication will  
9                    consist of the Publishing Company purchasing a “run” of printed books  
10                   from a printing company (likely several hundred or thousand copies),  
11                   storing the books at the Publishing Company’s offices, and selling the  
12                   books through brick and mortar bookstores or on the Publishing  
13                   Company’s own website.<sup>1</sup> Electronic publication will involve an on-line  
14                   “e-book” for which compensation is paid to the on-line retailer for each  
15                   book sold.  
16
- 17                    The Publishing Company may also market, promote, sell and distribute the  
18                    book through civic organizations and churches in Minnesota, such as  
19                    through book-signing events and parties. The content and subject matter  
20                    of the Publishing Company’s book promotional events will be limited to  
21                    promoting the book and will not expressly advocate the election or defeat  
22                    of any Federal candidate, regardless of whether Mr. Byberg is in  
23                    attendance. The Publishing Company will pay all costs of the book  
24                    promotional events, including Mr. Byberg’s travel costs to attend.  
25
- 26           v.    Mr. Byberg will be entitled to royalties in the amount of ten percent of  
27                    gross sales of the book. The book will be sold at a 50 percent discount for  
28                    “bulk purchases” of 50 copies or more.<sup>2</sup> While Mr. Byberg is a candidate  
29                    for Federal office, the Publishing Company will donate his royalties  
30                    directly to charitable organizations recognized by the Internal Revenue  
31                    Service as exempt from taxation under 26 U.S.C. 501(c)(3), as selected by  
32                    Mr. Byberg. Mr. Byberg will report the royalties as having been received  
33                    and donated to these charitable organizations on his Federal and State  
34                    income tax returns. The Publishing Company will not transmit any  
35                    royalty monies directly to him during his candidacy.  
36
- 37           vi.    Mr. Byberg will not receive any other compensation or remuneration from  
38                    the Publishing Company relative to the book, other than for actual and  
39                    necessary travel expenses in connection with marketing or promotional  
40                    appearances, as described above. Mr. Byberg will undertake all marketing

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<sup>1</sup> The requestor represents that this up front payment for “runs” of the book is consistent with normal industry practice.

<sup>2</sup> The requestor represents that these terms are commercially reasonable and consistent with industry practice.

1 and promotional appearances on his own time and will not use Committee  
2 resources. The appearances will not be in conjunction with Committee  
3 activities or events.  
4

- 5 vii. None of the Publishing Company's officers, directors, or employees will  
6 be officers, employees, or contractors of the Committee, and the  
7 Publishing Company's efforts will not be controlled or directed by any  
8 officers, employees, or contractors of the Committee. Committee funds  
9 will not be used to fund any of the Publishing Company's publication,  
10 marketing/promotional, or distribution efforts relative to the book  
11 (including the payment of costs of any book promotional events).  
12  
13

14 ***Questions Presented***

15 1. *May the Publishing Company be wholly owned and operated by Mr. Peterson*  
16 *without the activities of the Publishing Company in printing, marketing/promoting, and*  
17 *selling the book being deemed an in-kind contribution to the Committee by virtue of Mr.*  
18 *Byberg's status as a candidate for Federal office and Mr. Peterson's status of having*  
19 *contributed the maximum amount permitted to the Committee in 2012?*

20 2a. *If the Commission determines that the Publishing Company's activities would be*  
21 *deemed an in-kind contribution to the Committee, would the Commission's opinion differ*  
22 *if Mr. Peterson was not the majority owner of the Publishing Company, and the majority*  
23 *owners of the Publishing Company were not contributors to the Committee, even if such*  
24 *persons were related to and/or acquainted with Mr. Peterson?*

25 2b. *If the Commission determines that the Publishing Company's activities would be*  
26 *deemed an in-kind contribution to the Committee, would the Commission's opinion differ*  
27 *if Mr. Peterson were not an officer and/or was not the sole governor/director of the*  
28 *Publishing Company?*



1 3. *Would payment by the Publishing Company of Mr. Byberg's book promotional*  
2 *travel expenses constitute an in-kind contribution to the Committee?*

3 ***Legal Analysis and Conclusions***

4 1. *May the Publishing Company be wholly owned and operated by Mr. Peterson*  
5 *without the activities of the Publishing Company in printing, marketing/promoting, and*  
6 *selling the book being deemed an in-kind contribution to the Committee by virtue of Mr.*  
7 *Byberg's status as a candidate for Federal office and Mr. Peterson's status of having*  
8 *contributed the maximum amount permitted to the Committee in 2012?*

9 Yes, the Publishing Company may be wholly owned and operated by Mr.  
10 Peterson without the activities of the Publishing Company in printing,  
11 marketing/promoting, and selling the book being deemed an in-kind contribution to the  
12 Committee.

13 The Act and Commission regulations define "contribution" to include "any gift,  
14 subscription, loan, advance, or deposit of money or anything of value made by any  
15 person for the purpose of influencing any election for Federal office." 2 U.S.C.  
16 431(8)(A)(i); 11 CFR 100.52(a); *see also* 2 U.S.C. 441b(b)(2); 11 CFR 114.2(b)(1).  
17 "Anything of value" includes all in-kind contributions, including the provision of goods  
18 or services without charge or at a charge that is less than the usual and normal charge.  
19 *See* 11 CFR 100.52(d)(1). The term "usual and normal charge" means the price of goods  
20 in the market from which they ordinarily would have been purchased at the time of the  
21 contribution, or the commercially reasonable rate prevailing at the time the services were  
22 rendered. *See* 11 CFR 100.52(d)(2).

1           The Commission has previously been asked to analyze commercial transactions  
2 that involve a Federal candidate to determine whether the transaction would result in a  
3 contribution. *See, e.g.*, Advisory Opinions 1988-17 (Election Concepts) (sale of  
4 medallions to candidate committees) and 1994-08 (Parker) (sublease of office space by a  
5 candidate-owned corporation to her campaign). In conducting these analyses, the  
6 Commission has generally focused on whether the transaction involves the sale of goods  
7 or provisions of services at the usual and normal charge or at a commercially reasonable  
8 rate. Transactions conducted in this manner will not result in a contribution to the  
9 candidate.

10           Here, the terms of the proposed agreement between the Publishing Company and  
11 Mr. Byberg indicate that the Publishing Company's activities in publishing, marketing,  
12 and selling Mr. Byberg's autobiography are commercially reasonable and will not result  
13 in a contribution or expenditure. The request indicates that the agreement between the  
14 Publishing Company and Mr. Byberg is consistent with the practices of the self-  
15 publishing industry. The requestor asserts that the Publishing Company's payment for  
16 the initial run of hard copy books and the royalty rate are both consistent with industry  
17 practice. Moreover, the requestor indicates that the services provided by the Publishing  
18 Company to Mr. Byberg for the publication, marketing, and promotion of his book will  
19 be offered at the usual and normal charge for such services (as will be the planned  
20 discount rate for bulk sales of the book).

21           In light of the foregoing, the Commission concludes that the proposed activities  
22 would not constitute an in-kind contribution to the Committee. The fact that Mr. Peterson

1 has contributed to Mr. Byberg and previously volunteered for his campaign does not alter  
2 this conclusion.

3 *2a. If the Commission determines that the Publishing Company's activities would be*  
4 *deemed an in-kind contribution to the Committee, would the Commission's opinion differ*  
5 *if Mr. Peterson was not the majority owner of the Publishing Company, and the majority*  
6 *owners of the Publishing Company were not contributors to the Committee, even if such*  
7 *persons were related to and/or acquainted with Mr. Peterson?*

8 *2b. If the Commission determines that the Publishing Company's activities would be*  
9 *deemed an in-kind contribution to the Committee, would the Commission's opinion differ*  
10 *if Mr. Peterson were not an officer and/or was not the sole governor/director of the*  
11 *Publishing Company?*

12 Because the Commission has determined that the activities proposed in the  
13 request would not constitute an in-kind contribution by Mr. Peterson or the Publishing  
14 Company to the Committee, Question 2 is moot.

15 *3. Would payment by Publishing Company of Mr. Byberg's book promotional travel*  
16 *expenses constitute an in-kind contribution to the Committee?*

17 No, payment by the Publishing Company of Mr. Byberg's book promotional  
18 travel expenses would not constitute an in-kind contribution from the Publishing  
19 Company to the Committee.

20 As discussed above, the Act and Commission regulations define "contribution" to  
21 include "any gift, subscription, loan, advance, or deposit of money or anything of value  
22 made by any person for the purpose of influencing any election for Federal office."

23 2 U.S.C. 431(8)(A)(i); 11 CFR 100.52(a); *see also* 2 U.S.C. 441b(b)(2); 11 CFR

1 114.2(b)(1). The requestor states that all marketing and promotional appearances by Mr.  
2 Byberg will be conducted on Mr. Byberg's personal time and will be limited to  
3 promotion of the book, and that the Publishing Company's promotional events for the  
4 book will not advocate the election or defeat of any candidate for Federal elective office,  
5 including Mr. Byberg, either expressly or by implication, regardless of whether Mr.  
6 Byberg is in attendance. The proposed agreement also stipulates that no marketing or  
7 book promotional appearances by Mr. Byberg will occur in conjunction with Committee  
8 activities or events. Under these facts, the Commission concludes that the Publishing  
9 Company's payments of Mr. Byberg's book promotional travel expenses will not  
10 constitute an in-kind contribution to the Committee.

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

22

23

1 The cited advisory opinions are available on the Commission's website, or directly from  
2 the Commission's Advisory Opinion searchable database at <http://www.fec.gov/searchao>.

3

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On behalf of the Commission,

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Caroline C. Hunter

9

Chair

10

1     **ADVISORY OPINION 2012-24**

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9

Tony P. Trimble, Esq.  
Matthew W. Haapoja, Esq  
Trimble & Associates, Ltd.  
10201 Wayzata Boulevard  
Suite 130  
Minneapolis, MN 55305

**DRAFT B**

10    Dear Messrs. Trimble and Haapoja:

11           We are responding to your advisory opinion request on behalf of Mr. Dean  
12    Peterson concerning the application of the Federal Election Campaign Act of 1971, as  
13    amended (the "Act"), and Commission regulations to Mr. Peterson's proposed  
14    publication and marketing of Mr. Lee Byberg's autobiography. The Commission  
15    concludes that the proposed activities will not constitute an in-kind contribution to Mr.  
16    Byberg or his authorized campaign committee.

17    ***Background***

18           The facts presented in this advisory opinion are based on your letter received on  
19    July 11, 2012.

20           Mr. Byberg is a candidate for the U.S. House of Representatives from the 7th  
21    Congressional District of the State of Minnesota. Byberg for Congress (the  
22    "Committee") is Mr. Byberg's authorized campaign committee. Mr. Peterson is a  
23    businessman in Willmar, Minnesota, who plans to form a limited liability company (the  
24    "Publishing Company"), which will publish, market, and distribute Mr. Byberg's  
25    autobiography.

26           Mr. Byberg and Mr. Peterson are acquainted through their involvement in the  
27    Willmar business and civic communities, as well as local charitable ministry  
28    organizations. Mr. Peterson has made contributions and volunteered his services to Mr.

1 Byberg's congressional campaign. Mr. Peterson is not a paid employee or consultant for  
2 the Committee and plays no official role with the Committee.

3 Mr. Byberg is currently writing an autobiography, the primary subjects of which  
4 are his life and faith story, and various public policy issues. Mr. Peterson expects the  
5 book will also address potential legislative approaches to those issues. Mr. Byberg's  
6 previous involvement in political campaigns, including his 2010 candidacy for U.S.  
7 House of Representatives, may also be covered. The book will not, however, expressly  
8 or by implication, advocate the election or defeat of any candidate for Federal office.

9 Mr. Peterson previously helped another individual self-publish a book and is  
10 generally interested in entering the "self-publishing" industry by offering publication and  
11 distribution services to authors not signed with a more traditional publishing company.  
12 Because Mr. Peterson believes Mr. Byberg's life story to be compelling and likely both  
13 educational and profitable, he plans to form the Publishing Company and publish the  
14 autobiography. Mr. Peterson will own the Publishing Company either by himself or with  
15 other individuals, none of whom will be employees, officers, agents, or other  
16 representatives of the Committee.

17 Mr. Peterson plans for the Publishing Company to enter into a publishing and  
18 distribution agreement with Mr. Byberg, which will be negotiated on an arm's-length  
19 basis. The agreement is expected to contain the following terms:

- 20 i. The Publishing Company will receive exclusive worldwide publishing,  
21 distribution and marketing/promotional rights for the book for a two-year  
22 term, renewable at Mr. Byberg's option.  
23  
24 ii. The Publishing Company will not be able to change the book without Mr.  
25 Byberg's prior written approval.  
26

- 1           iii.    Mr. Byberg will be entitled to reasonable approval rights relative to
- 2                   marketing/promotional content but cannot otherwise control or direct,
- 3                   whethor expressly or by inplication, any activitlea of the Publishing
- 4                   Company.
- 5
- 6           iv.    The Publishing Company will exercise commercially reasonable efforts to
- 7                   market, promote, sell, and distribute the book in hard copy and electronic
- 8                   format through local bookstores in Minnesota and on-line through
- 9                   commercial sellers, such as Amazon.com. Hard copy publication will
- 10                  consist of the Publishing Company purchasing a "run" of printed books
- 11                  from a printing company (likely several hundred or thousand copies),
- 12                  storing the books at the Publishing Company's offices, and selling the
- 13                  books though brick and mortar bookstores or on the Publishing
- 14                  Company's own wabsito.<sup>1</sup> Electronic publication will involve an on-line
- 15                  "e-book" for which compensation is paid to the on-line retailer for each
- 16                  book sold.
- 17
- 18                  The Publishing Company may also market, promote, sell and distribute the
- 19                  book through civic organizations and churches in Minnesota, such as
- 20                  through book-signing events and parties. The content and subject matter
- 21                  of the Publishing Company's book promotional events will be limited to
- 22                  promoting the book and will not, expressly or by imphcation, advocate the
- 23                  election or defeat of any Federal candilute, regardless of whether Mr.
- 24                  Byberg is in attendatee. The Publishing Company will pay all eosts of the
- 25                  book promotional events, including Mr. Byberg's travel costs to attend.
- 26                  None of those costs will be spent at the request or suggestion of Mr.
- 27                  Byberg, the Committee, or any officers directors, agents or other
- 28                  representatives of the Committee.<sup>2</sup>
- 29
- 30                  No Committee funds will be used to pay any costs of the Book
- 31                  promotional events or the travel costs of Mr. Byberg's attendance at such
- 32                  events. No Book promotional activity will occur at any event or during
- 33                  any trip for which travel expenses have been paid by the Committee, and
- 34                  no Coanmittee oc election-related activity will occur at any event or during
- 35                  any trip for which travel expenses have been paid by the Publishing
- 36                  Company.
- 37

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<sup>1</sup> The requestor represents that this up front payment for "runs" of the book is consistent with normal industry practice.

<sup>2</sup> You also represent that no part of the advertising or promotional materials will constitute a coordinated communication pursuant to 11 CFR 109.21 or an electioneering communication pursuant to 100.29. While these representations are legal conclusions rather than factual statements, the Commission understands the intent of these representations is to obtain an answer premised on these assumptions.



- 1 v. Mr. Byberg will be entitled to royalties in the amount of ten percent of  
2 gross sales of the book. The book will be sold at a 50 percent discount for  
3 "bulk purchases" of 50 copies or more.<sup>3</sup> While Mr. Byberg is a candidate  
4 for Federal office, the Publishing Company will donate his royalties  
5 directly to charitable organizations recognized by the Internal Revenue  
6 Service as exempt from taxation under 26 U.S.C. 501(c)(3), as selected by  
7 Mr. Byberg. Mr. Byberg will report the royalties as having been received  
8 and donated to these charitable organizations on his Federal and State  
9 income tax returns. The Publishing Company will not transmit any  
10 royalty monies directly to him during his candidacy.
- 11
- 12 vi. Mr. Byberg will not receive any other compensation or remuneration from  
13 the Publishing Company relative to the book, other than for actual and  
14 necessary travel expenses in connection with marketing or promotional  
15 appearances, as described above. Mr. Byberg will undertake all marketing  
16 and promotional appearances on his own time and will not use Committee  
17 resources. The appearances will not be in conjunction with Committee  
18 activities or events.
- 19
- 20 vii. None of the Publishing Company's officers, directors, or employees will  
21 be officers, employees, or contractors of the Committee, and the  
22 Publishing Company's efforts will not be controlled or directed by any  
23 officers, employees, or contractors of the Committee. Committee funds  
24 will not be used to fund any of the Publishing Company's publication,  
25 marketing/promotional, or distribution efforts relative to the book  
26 (including the payment of costs of any book promotional events).
- 27

28

29 ***Questions Presented***

- 30 1. *May the Publishing Company be wholly owned and operated by Mr. Peterson*  
31 *without the activities of the Publishing Company in printing, marketing/promoting, and*  
32 *selling the book being deemed an in-kind contribution to the Committee by virtue of Mr.*  
33 *Byberg's status as a candidate for Federal office and Mr. Peterson's status of having*  
34 *contributed the maximum amount permitted to the Committee in 2012?*

---

<sup>3</sup> The requestor represents that these terms are commercially reasonable and consistent with industry practice.

1 *2a. If the Commission determines that the Publishing Company's activities would be*  
2 *deemed an in-kind contribution to the Committee, would the Commission's opinion differ*  
3 *if Mr. Peterson was not the majority owner of the Publishing Company, and the majority*  
4 *owners of the Publishing Company were not contributors to the Committee, even if such*  
5 *persons were related to and/or acquainted with Mr. Peterson?*

6 *2b. If the Commission determines that the Publishing Company's activities would be*  
7 *deemed an in-kind contribution to the Committee, would the Commission's opinion differ*  
8 *if Mr. Peterson were not an officer and/or was not the sole governor/director of the*  
9 *Publishing Company?*

10 *3. Would payment by the Publishing Company of Mr. Byberg's book promotional*  
11 *travel expenses constitute an in-kind contribution to the Committee?*

12 ***Legal Analysis and Conclusions***

13 *1. May the Publishing Company be wholly owned and operated by Mr. Peterson*  
14 *without the activities of the Publishing Company in printing, marketing/promoting, and*  
15 *selling the book being deemed an in-kind contribution to the Committee by virtue of Mr.*  
16 *Byberg's status as a candidate for Federal office and Mr. Peterson's status of having*  
17 *contributed the maximum amount permitted to the Committee in 2012?*

18 Yes, the Publishing Company may be wholly owned and operated by Mr.  
19 Peterson without the activities of the Publishing Company in printing,  
20 marketing/promoting, and selling the book being deemed an in-kind contribution to the  
21 Committee.

22 The Act and Commission regulations define "contribution" to include "any gift,  
23 subscription, loan, advance, or deposit of money or anything of value made by any

1 person for the purpose of influencing any election for Federal office.” 2 U.S.C.  
2 431(8)(A)(i); 11 CFR 100.52(a); *see also* 2 U.S.C. 441b(b)(2); 11 CFR 114.2(b)(1).  
3 “Anything of value” includes all in-kind contributions, including the provision of goods  
4 or services without charge or at a charge that is less than the usual and normal charge.  
5 *See* 11 CFR 100.52(d)(1). The term “usual and normal charge” means the price of goods  
6 in the market from which they ordinarily would have been purchased at the time of the  
7 contribution, or the commercially reasonable rate prevailing at the time the services were  
8 rendered. *See* 11 CFR 100.52(d)(2).

9       The Commission has previously considered questions concerning business ventures  
10 by corporations and other entities that involve candidate or party-related merchandise.<sup>4</sup> “If  
11 outlays of funds, goods, or services are made by a business entity selling items and these  
12 outlays are not paid for by the candidates benefiting, referred to, or affected, the question  
13 arises as to whether such outlays are contributions or expenditures subject to the Act’s limits  
14 under 2 U.S.C. 441a or prohibited by 2 U.S.C. 441b(a), or whether they are merely  
15 entrepreneurial or commercial activity unlimited by the Act.” Advisory Opinion 1994-30  
16 (Conservative Concepts/Pence).

17       The Commission has recognized that “entrepreneurial activity involving candidate-  
18 related merchandise is commonplace” and has identified factors to consider in determining  
19 whether the activity is a contribution or expenditure. Advisory Opinion 1989-21 (Create-a-  
20 Craft). These include whether: (1) the sales involve fundraising efforts or solicitations for  
21 political contributions; (2) the vendor is engaged in the activity for genuinely commercial

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<sup>4</sup> The Commission has also previously considered questions involving candidate autobiographies. *See, e.g.*, Advisory Opinion 1995-46 (D’Amato); Advisory Opinion 2001-08 (Specter). Unlike here, though, those advisory opinions involved whether the candidates’ principal campaign committees could purchase copies of candidate autobiographies at bulk rates, rather than whether the publications themselves were in-kind contributions to the candidates.

1 purposes; (3) the items are sold at the vendor's usual and normal charge; and (4) the  
2 purchases are made by individuals for their personal use. *See id.*; Advisory Opinion  
3 1994-30 (Conservative Concepts/Pence). The Commission has also considered whether the  
4 entity engaging in the activity: (1) was owned, controlled, or affiliated with a candidate or  
5 political committee; (2) was in the business of conducting the type of activity involved;  
6 and (3) followed usual and normal business practices and industry standards. *See* MURs  
7 5474 and 5539 (Dog Eat Dog Films/Michael Moore), First General Counsel's Report, at  
8 13-17, May 25, 2008; MUR 5485 (Conversagent), First General Counsel's Report,  
9 at 7-10, Oct. 25, 2005.

10 With respect to promotional activities, in prior advisory opinions, the Commission  
11 has determined that the financing of activities in which a Federal candidate participates  
12 will result in a contribution to that candidate if the activities involve (1) the solicitation,  
13 making or acceptance of contributions to the candidate's campaign, (2) communications,  
14 including communications by a candidate, expressly advocating the nomination, election  
15 or defeat of the candidate or that candidate's opponent, or (3) the identification of the  
16 candidate as such. *See* Advisory Opinions 1999-11 (Byrum), 1994-15 (Byrne), 1992-37  
17 (Terry), 1992-06 (Duke), 1986-37 (National Conservative Foundation); *see also*  
18 Advisory Opinion 2009-26 (Coulson).<sup>5</sup>

19 Here, the terms of the proposed agreement between the Publishing Company and  
20 Mr. Byberg indicate that the Publishing Company's activities in publishing, marketing,

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<sup>5</sup> "The Commission has also indicated that the absence of solicitations for contributions or express advocacy regarding candidates will not preclude a determination that an activity is "campaign-related." Advisory Opinion 1994-15 (Byrne). *Cf.* Advisory Opinions 1999-02 (Premere) (concluding that forums were "in connection with an election" when invitations were based on individuals' status as federal candidates).

1 and selling Mr. Byberg's autobiography will not result in a contribution or expenditure.  
2 First, sales of the book will not involve fundraising activity or solicitations for political  
3 contributions. Although Mr. Byberg will be entitled to royalties, the Publishing Company  
4 will not transmit any royalty funds to him during his candidacy; instead, the Publishing  
5 Company will donate his royalties directly to charitable organizations.<sup>6</sup> Nor will Mr.  
6 Byberg receive any other compensation or remuneration from the Publishing Company  
7 regarding the book, other than for actual and necessary travel expenses in connection  
8 with his marketing and promotional appearances. Mr. Byberg will undertake such travel  
9 entirely on his own time and without using Committee resources or in conjunction with  
10 Committee activities or events.

11 Second, Mr. Peterson has represented that he has previously helped another  
12 individual self-publish a book and is generally interested in entering the "self-publishing"  
13 industry by offering publication and distribution services to authors not signed with a  
14 more traditional publishing company. Mr. Peterson has decided to publish the  
15 autobiography because he believes Mr. Byberg's life story to be compelling and likely  
16 both educational and profitable.<sup>7</sup> While the request contains no representations with  
17 respect to price, for the purpose of the request the Commission assures that copies of the

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<sup>6</sup> A contribution will not result merely from Mr. Byberg's reporting the royalties as having been received and donated to charitable organizations on his Federal and State income tax returns. See Advisory Opinion 1995-46 (D'Amato).

<sup>7</sup> Although this would be the first publishing project for the Publishing Company and therefore we have no track record with which to compare this project, we are inclined to credit the requester's representations with respect to his motivations for deciding to publish Mr. Byberg's autobiography. While the Commission acknowledges that providing the opportunity for Mr. Byberg to tell his story and introduce himself to voters of Minnesota's Seventh Congressional District will likely confer some benefit on Mr. Byberg's campaign, we are cognizant of the extensive efforts set forth in the request to keep book-related activities separate from Mr. Byberg's campaign activities. If, however, the Commission becomes aware that the decision to publish Mr. Byberg's autobiography was motivated by the desire to see Mr. Byberg prevail in his campaign for Federal office, the answer would likely be different.

1 books will be sold at a charge that would qualify as usual and normal within the  
2 publishing industry and consistent with future publishing endeavors by the Publishing  
3 Company.

4       Additionally, the Publishing Company will not be owned or controlled by, or  
5 affiliated with, Mr. Byberg or any other Federal candidate or political committee. The  
6 Publishing Company will be owned solely by the requestor or by the requestor and other  
7 individuals, none of whom will be employees, officers, agents, or other representatives of  
8 the Committee. Although Mr. Byberg will have reasonable approval rights over the  
9 content of marketing and promotional efforts of the Publishing Company,<sup>8</sup> he will not  
10 otherwise control or direct, expressly or by implication, any activities of the Publishing  
11 Company. According to the request, no Committee or campaign funds will be used to  
12 pay costs relating to the publication and marketing of Mr. Byberg's book, including  
13 travel for promotional events.

14       Finally, the request indicates that the agreement between the Publishing Company  
15 and Mr. Byberg is commercially reasonable and consistent with the practices of the  
16 industry. The requestor asserts that the Publishing Company's payment for the initial run  
17 of hard copy books and the royalty rate are both consistent with industry practice.  
18 Moreover, the requestor indicates that the services provided by the Publishing Company  
19 to Mr. Byberg for the publication, marketing, and promotion of his book will be offered  
20 at the usual and normal charge for such services (as will be the planned discount rate for  
21 bulk sales of the book).

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<sup>8</sup> The requestor represents that these reasonable approval rights will not result in the Publishing Company's advertising constituting a coordinated communication under 11 CFR 109.21.

1           The requestor further states that none of the Publishing Company's advertising of  
2 the book will constitute either a coordinated communication under 11 CFR 109.21 or an  
3 electioneering communication under 11 CFR 100.29. As noted above, the agreement  
4 between the Publishing Company and Mr. Byberg will require that all promotional events  
5 at which Mr. Byberg appears will be performed on Mr. Byberg's own time, will be  
6 limited to promotion of the book only, will not be in conjunction with Committee  
7 activities or events, and will not involve any election-related activity. Accordingly, the  
8 Commission does not anticipate that Mr. Byberg will be identified as a candidate for  
9 Federal office at any such events.

10           For the foregoing reasons, based upon the representations set forth in the request  
11 as well as the necessary enumerated conditions, the Commission concludes that the  
12 proposed activities would not constitute an in-kind contribution to the Committee.

13    *2a. If the Commission determines that the Publishing Company's activities would be*  
14 *deemed an in-kind contribution to the Committee, would the Commission's opinion differ*  
15 *if Mr. Peterson was not the majority owner of the Publishing Company, and the majority*  
16 *owners of the Publishing Company were not contributors to the Committee, even if such*  
17 *persons were related to and/or acquainted with Mr. Peterson?*

18    *2b. If the Commission determines that the Publishing Company's activities would be*  
19 *deemed an in-kind contribution to the Committee, would the Commission's opinion differ*  
20 *if Mr. Peterson were not an officer and/or was not the sole governor/director of the*  
21 *Publishing Company?*

22           Because the Commission has determined that the activities proposed in the  
23 request would not constitute an in-kind contribution by Mr. Peterson or the Publishing

1 Company to the Committee, Question 2 is moot.

2 3. *Would payment by Publishing Company of Mr. Byberg's book promotional travel*  
3 *expenses constitute an in-kind contribution to the Committee?*

4 No, payment by the Publishing Company of Mr. Byberg's book promotional  
5 travel expenses would not constitute an in-kind contribution from the Publishing  
6 Company to the Committee.

7 As discussed above, the Act and Commission regulations define "contribution" to  
8 include "any gift, subscription, loan, advance, or deposit of money or anything of value  
9 made by any person for the purpose of influencing any election for Federal office."  
10 2 U.S.C. 431(8)(A)(i); 11 CFR 100.52(a); *see also* 2 U.S.C. 441b(b)(2); 11 CFR  
11 114.2(b)(1). The requestor states that all marketing and promotional appearances by Mr.  
12 Byberg will be conducted on Mr. Byberg's personal time and will be limited to  
13 promotion of the book, and that the Publishing Company's promotional events for the  
14 book will not advocate the election or defeat of any candidate for Federal elective office,  
15 including Mr. Byberg, either expressly or by implication, regardless of whether Mr.  
16 Byberg is in attendance. The proposed agreement also stipulates that no marketing or  
17 book promotional appearances by Mr. Byberg will occur in conjunction with Committee  
18 activities or events.<sup>9</sup> Under these facts, the Commission concludes that the Publishing  
19 Company's payments of Mr. Byberg's book promotional travel expenses will not  
20 constitute an in-kind contribution to the Committee.

21 This response constitutes an advisory opinion concerning the application of the

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<sup>9</sup> The Commission notes that, in general, candidates seeking election to the House of Representatives are prohibited from ~~involving~~ using private, non-commercial aircraft in connection with their campaign. 11 CFR 100.93(c)(2). Accordingly, Mr. Byberg would be prohibited from engaging in any campaign-related activity if non-commercial travel is used to reach a location in connection with a book promotion event. *Id.*



1 Act and Commission regulations to the specific transaction or activity set forth in your  
2 request. *See* 2 U.S.C. 437f. The Commission emphasizes that, if there is a change in any  
3 of the facts or assumptions presented, and such facts or assumptions are material to a  
4 conclusion presented in this advisory opinion, then the requestor may not rely on that  
5 conclusion as support for its proposed activity. Any person involved in any specific  
6 transaction or activity which is indistinguishable in all its material aspects from the  
7 transaction or activity with respect to which this advisory opinion is rendered may rely on  
8 this advisory opinion. *See* 2 U.S.C. 437f(c)(1)(B). Please note that the analysis or  
9 conclusions in this advisory opinion may be affected by subsequent developments in the  
10 law including, but not limited to, statutes, regulations, advisory opinions, and case law.  
11 The cited advisory opinions are available on the Commission's website, or directly from  
12 the Commission's Advisory Opinion searchable database at <http://www.fec.gov/searchao>.

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On behalf of the Commission,

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Caroline C. Hunter

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Chair

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