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By Office of General Counsel at 5:31 pm, Oct 06, 2021

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By Office of the Commission Secretary at 11:07 am, Oct 07, 2021

October 6, 2021

Direct: (213) 452-6550

VIA E-MAIL

Lisa Stevenson
Federal Election Commission
Office of the General Counsel
1050 First Street, NE
Washington, D.C. 20463
E-Mail: ao@fec.gov

Re: Request for Advisory Opinion on behalf of Rep. Adam Schiff and Adam Schiff for Congress

Dear Ms. Stevenson:

I write on behalf of Congressman Adam Schiff and Schiff for Congress (“Requestors”) to request an advisory opinion from the Federal Election Commission (“Commission”), pursuant to 52 U.S.C. § 30108, regarding the application of the Federal Election Campaign Act of 1971, as amended (the “Act”), to the promotion of a book authored by Congressman Schiff and published by Random House. The book is set to be released on October 12, 2021. As such, the Requestors respectfully request that the Commission expedite this request and provide guidance as soon as practical.

1. Factual Background

Congressman Adam Schiff is a member of the United States House of Representatives, representing California’s 28th congressional district, and he is a candidate for re-election to the House of Representatives in 2022. Schiff for Congress (FEC# C00343871) is his principal campaign committee.

Random House, a division of Penguin House Publishing, LLC (“Publisher”) is a long established and prominent publisher that publishes a wide variety of books and other print and digital publications, both political and non-political. According to its website, Publisher “publishes 70,000 digital and 15,000 print titles annually, with more than 100,000 eBooks available worldwide.”

On October 12, 2021, Publisher will publish a non-fiction book written by Congressman Schiff entitled “Midnight in Washington.” The book will chronicle the high-stakes drama of defending the Constitution in the face of former President Donald Trump. In the book, Congressman Schiff details “step by step just how our democracy was put at risk, and traces his own path to meeting the crisis—from serious prosecutor, to congressman with an expertise in national security and a

reputation for bipartisanship, to liberal lightning rod, scourge of the right, and archenemy of a president.” (<https://www.penguinrandomhouse.com/books/669172/midnight-in-washington-by-adam-schiff/>.) “Midnight in Washington” will be sold at the usual and customary sale prices for the industry, including standard bulk discounts, where applicable.

The publishing agreement between Congressman Schiff and Publisher (the “Agreement”) has been reviewed and approved by the House of Representatives Committee on Ethics, which determined that Publisher is an established publisher, and that Congressman Schiff will be paid under the Agreement in accordance with usual and customary contractual terms for the industry.

Under the Agreement, Publisher and Congressman Schiff will share the net proceeds from sales and licensing of the book (referred to in the Agreement as the “Work”) evenly: 50% paid to the Publisher and 50% paid to Congressman Schiff. “Net proceeds” is defined in the Agreement as “the net of: (1) gross billings, after discounts, incentives and allowances, from sales of the Work by Publisher (exclusive of any separately stated prepaid taxes, insurance and freight included in gross billing), less credits for actual returns and a reasonable reserve for returns for physical copies, equals net adjusted sales, plus (ii) amounts received from licensing subsidiary rights in the Work in accordance with paragraph 11 of the Agreement after deduction of any foreign taxes withheld and of any of Publisher’s third party agents’ commissions, less the following expense items incurred by Publisher relating solely to the Work . . . [a]ctual direct out-of-pocket advertising, publicity and promotional costs (including co-op advertising allowances relating to the Work).”¹ In short, the Publisher will incur all costs associated with publication and promotion of the book, then subtract those costs from the gross sale proceeds to calculate the net proceeds payable both to Congressman Schiff and the Publisher for their equal shares of the profits.

Finally, the Agreement states that “[a]ll details of the advertising and promotion of the Work shall be determined by Publisher.” The Publisher’s activity will involve only the publication, promotion and sale of the book and will not include any fundraising activity or solicitations for Congressman Schiff or Schiff for Congress.

Congressman Schiff and Publisher wish to use the e-mail list maintained by Schiff for Congress to promote the book, such as notifying recipients of the book’s release. This e-mail list was developed over time by the Committee for its own use, and is not merely a compilation of lists purchased from other sources. The list has been primarily used for the Committee’s own purposes, and was not developed for sale or lease to others.

The Publisher and Congressman Schiff agree that the cost of promoting the book to the Committee’s e-mail list would be an advertising, publicity, and promotional cost under the Agreement. In furtherance of these activities, Publisher wishes to enter into a list rental agreement with Schiff for Congress. That agreement will specify the fair market value of the list rental, to be determined by an independent list appraisal consistent with long-standing advice issued by the Commission. (*See* Advisory Opinion 2002-14 (Libertarian National Committee).) Consistent with the process for payment of advertising and publishing expenses for the book

¹ There are a number of other publishing and promotional expense items listed in the Agreement that are not relevant to this analysis.

generally, Publisher would pay Schiff for Congress for the price of the list rental, and deduct that cost from the gross sales and licensing proceeds to determine the “net proceeds” payable to Congressman Schiff and Publisher. Alternatively, Congressman Schiff will enter into an agreement to personally rent the Committee’s e-mail list based on the current fair market value determined by an independent list broker, then receive subsequent payment from the Publisher for the cost paid to rent the e-mail list.² Under either proposal, no Committee resources or personnel will be used in promoting the book.

While the book is set to be released on October 12, 2021, Publisher will not enter into a list rental agreement with the Committee, make a payment to the Committee, or in the alternative, make a payment to Congressman Schiff, until the Commission has provided its guidance.

2. Question Presented

May Congressman Schiff and Publisher use the Schiff for Congress e-mail list to promote the sale of his book where, pursuant to the Agreement between the Publisher and Congressman Schiff to split the net proceeds of the sale of the book 50/50, Publisher pays the Committee for the fair market value to rent the Committee’s e-mail list, and deducts the amount paid from gross sales to determine the net proceeds payable to Congressman Schiff, consistent with all other publishing and advertising costs under the Agreement?

Alternatively, may Congressman Schiff personally pay to rent the Committee’s e-mail list based on the current fair market value, then receive subsequent payment from the Publisher for the cost paid to rent the e-mail list?

3. Legal Discussion

The Commission has “long recognized that a political committee’s mailing lists are assets that are frequently sold, rented or exchanged in the market.” (*See* Advisory Opinion 2014-06 (Ryan); *see also e.g.*, Advisory Opinion 2011-02 (Brown); Advisory Opinion 2002-14 (Libertarian National Committee).) The relevant questions under the current circumstances are: (1) whether Congressman Schiff and his Publisher’s use of the Committee’s e-mail lists to promote the book constitutes personal use of the Committee’s asset; and (2) whether the payment from Publisher to the Committee (or, alternatively, the Publisher’s reimbursement of Congressman Schiff) constitutes a contribution from the Publisher to Congressman Schiff and Schiff for Congress.

A. The Publisher and Congressman Schiff’s Use of the Committee’s E-mail List is not Personal Use by Congressman Schiff Because the Transfer is for Fair Market Value.

Commission regulations at 11 C.F.R. 113.1(g)(3) state that “the transfer of a campaign committee asset is not personal use so long as the transfer is for fair market value.” Here, the

² Again, pursuant to the Agreement between the Publisher and Congressman Schiff to split the net proceeds of the sale of the book 50/50, payment by Publisher to Congressman Schiff for the fair market value to rent the Committee’s e-mail list would be deducted from gross sales to determine the net proceeds payable to Congressman Schiff, consistent with all other publishing and advertising costs under the Agreement.

proposal is for the Publisher to enter into a list rental agreement with the Committee so that Congressman Schiff and Publisher may promote the book. The Publisher, in accordance with the publishing Agreement, will rent the Committee's e-mail list at fair market value, as determined by an independent list broker. The list rental agreement between the Publisher and the Committee will also comply with the requirements of Advisory Opinion 2002-14 (Libertarian National Committee). Thus, the Publisher's and Congressman Schiff's proposal to use the Committee's e-mail list to promote his book is permissible and does not constitute personal use. (See Advisory Opinion 2014-04 (Ryan) at 8.)

In the alternative scenario, if Congressman Schiff were to personally pay to rent the Committee's e-mail list and Publisher were to reimburse Congressman Schiff for the cost of renting the list, Congressman Schiff will pay fair market value of the list as determined by an independent list broker, and the rental agreement between Congressman Schiff and the Committee will similarly comply with the requirements of Advisory Opinion 2002-14 (Libertarian National Committee). Moreover, Publisher will reimburse Congressman Schiff for the fair market value amount actually paid by Congressman Schiff to the Committee. Consequently, the Publisher's and Congressman Schiff's proposal to use the Committee's e-mail list to promote the book under this scenario is similarly permissible, and would not constitute personal use. (See Advisory Opinion 2014-04 (Ryan) at 8.)

B. A Payment by the Publisher for Rental of the Committee's E-Mail List does not Result in a Contribution from the Publisher to Congressman Schiff and Schiff for Congress.

The facts here potentially implicate Commission regulation 11 C.F.R. 113.1(g)(6). That section states:

Notwithstanding that the use of funds for a particular expense would be a personal use under this section, payment of that expense by any person other than the candidate or the campaign committee shall be a contribution under subpart B of part 100 to the candidate unless the payment would have been made irrespective of the candidacy.

In this case, the payment from the Publisher – whether it is made directly to the Committee or as a reimbursement from the Publisher to Congressman Schiff – is being made purely for commercial purposes relating to the promotion of the book, not for any reason having to do with Congressman Schiff's candidacy for re-election in 2022.

Regardless, the Commission has previously determined that no contribution results when a political committee leases its mailing list as long as: "(1) the mailing list has an ascertainable fair market value; (2) the political committee leases the mailing list at the usual and normal charge in a *bona fide*, arm's-length transaction; and (3) the list is used in a commercially reasonable manner consistent with such arm's-length agreement." (See Advisory Opinion 2002-14 (Libertarian National Committee; see also Advisory Opinion 2014-06 (Ryan).)

In Advisory Opinion 2014-06 (Ryan), the Commission determined that Congressman Paul Ryan's rental of his leadership PAC's mailing list to promote his book using personal funds was not a contribution from his leadership PAC to Congressman Ryan. The present scenario differs slightly from that considered by the Commission in Advisory Opinion 2014-06, in that

Congressman Ryan proposed to personally reimburse his principal campaign committee and leadership committee, whereas here, the Requestors contemplate that the Publisher will pay to rent the e-mail list from the Committee – either directly or as a reimbursement to Congressman Schiff – consistent with the manner in which all other “[a]ctual and direct out-of-pocket advertising, publicity and promotional costs” for the book are to be handled under the Agreement. Ultimately, however, those costs will be deducted from the gross sale proceeds in determining the “net proceeds” distributed to each of the parties. Thus, the cost of the list rental will be borne equally by the parties pursuant to the terms of the publishing Agreement.

Following the criteria set forth by the Commission, the Committee’s list has an ascertainable fair market value that will be determined based on an independent list broker, and the Publisher (or, alternatively, Congressman Schiff) will enter into an arm’s length rental agreement with Schiff for Congress that will comply with the requirements set forth in the Commission’s Advisory Opinion 2002-14 (Libertarian National Committee). Moreover, the list will be used by the Publisher and Congressman Schiff consistent with the rental agreement solely to promote the book. Thus, consistent with the Commission’s prior advice, the rental of the Committee’s e-mail list by the Publisher – either directly or by reimbursing Congressman Schiff – will not result in a contribution by the Publisher to Congressman Schiff.

4. Conclusion

We appreciate the Commission’s consideration of this request and urge the Commission to issue an Opinion finding that the proposed transaction does not result in a personal use of campaign funds or result in a campaign contribution to Congressman Schiff or the Committee. Further, given the short timeframe remaining before the publication of Congressman Schiff’s book, we respectfully request that the Commission expedite this request for advice.

Very truly yours,



Stephen J. Kaufman

SJK:VCC