



FEDERAL ELECTION COMMISSION

Washington, DC

**MEMORANDUM**

**TO: The Commission**

**FROM: Office of the Commission Secretary <sup>VFV</sup>**

**DATE: August 13, 2024**

**SUBJECT: AO 2024-06 (American Target Advertising and The Conservative  
Caucus) Draft A (Comment)**

**Attached is a comment received on AO 2024-06. This matter is on the August 15, 2024 Open Meeting Agenda.**

**Attachment**

**RECEIVED**

By Office of the Commission Secretary at 4:17 pm, Aug 12, 2024

9625 Surveyor Court  
Suite 400  
Manassas, VA 20110  
PHONE 703-392-7676  
FAX 703-392-7654  
info@americantarget.com

August 12, 2024

**RECEIVED**

By Office of General Counsel at 3:30 pm, Aug 12, 2024

Ms. Lisa J. Stevenson  
Acting General Counsel  
Federal Election Commission  
1050 First Street, NE  
Washington, DC 20463

Via ao@fec.gov

Re: AO 2024-06 (American Target Advertising  
and The Conservative Caucus) --  
Draft A

Dear Ms. Stevenson:

I submit these comments for consideration by your office and the Commissioners at the upcoming August 15 open meeting that will consider Draft A of AO 2024-06, American Target Advertising and The Conservative Caucus,<sup>1</sup> and ask that these comments be distributed to the Commissioners and the staffs.

First of all, I wish to thank you and your staff, including Associate General Counsel Neven Stipanovic, Assistant General Counsel Amy Rothstein, and Attorney Joseph Wenzinger, for your thoughtful work on this request about reporting the value of checks in check package fundraising appeals to be mailed by our agency's 501(c)(4) nonprofit client, The Conservative Caucus (TCC), in the context of Independent Expenditures.

I respectfully ask the Commission to conclude differently from Draft A in two key regards, and I do so by emphasizing the fundraising purpose of the check package technique to be used in the TCC Independent Expenditure letters.<sup>2</sup>

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<sup>1</sup> Agenda Document No. 24-30-A.

<sup>2</sup> I distinguish the TCC check package fundraising letters subject to this AO Request from the facts in LRA 1163 (Madison Project, Inc.), Feb. 28, 2023, referenced in footnote 16 of Draft A. The facts there were that the Madison Project was raising money to later *engage in* Independent Expenditures, but that the letters themselves did

**I. The “purpose” of the checks is not express advocacy.**

Although the check package technique at the heart of this AO Request is used in the context of direct mail letters that include express advocacy in this particular instance, this is a fundraising technique originally and somewhat commonly employed for letters that are not Independent Expenditures. That TCC engages in Independent Expenditures does not ignore the reality that it must raise money to pay salaries, pay the licenses, registration fees, and audit costs necessary to comply with state charitable solicitation laws, and cover other costs of its tax-exempt mission unrelated to the Independent Expenditure. In fact, all TCC fundraising mailings include the following language:

Your generous donation is used for the tax-exempt mission of The Conservative Caucus and its projects, which may include educating the public, administrative, compliance and fundraising costs.

Therefore, in the first regard, is the face value of the checks in the check packages in any way reportable as a cost of the Independent Expenditure? Secondly, if the answer to that question is yes, is it actually possible for “best efforts” to accurately or even actually report the value of checks received and/or deposited by the recipients?<sup>3</sup> I respectfully urge the Commission to conclude the answer to these two questions is no.

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not include express advocacy. In our AO Request we state unequivocally that the direct mail letters engage in express advocacy, and therefore meet the criteria of Independent Expenditures. But that is not to confuse *the purpose* of the checks themselves as not constituting a form of express advocacy. The purpose of the checks, **as evidenced by the fact that they are used in TCC letters that are not Independent Expenditures**, is for TCC’s fundraising as a 501(c)(4) nonprofit organization.

<sup>3</sup> In support of the fact that the “purpose” of the checks is not to urge recipients to vote for or against a federal candidate, the AO Request states:

The recipients may deposit these checks in their own bank accounts, and some do. It is ATA’s experience that on average fewer than three percent of the checks are deposited by recipients. Funds to pay the checks are drawn on a bank account of the ATA nonprofit client. The recipients are urged to not deposit the checks, but instead return those mailed checks

As stated in the Advisory Opinion Request – IE Direct Mail Check Packages, in the course of our services for TCC for fundraising mailings [that are not Independent Expenditures]:

One of the techniques ATA employs to encourage recipients of its clients' mail to open the letters is to show a real check through a window of the carrier envelope. Those are called "check packages." The checks are made payable to the "bearer" and the individual to whom the letter is mailed.

The checks themselves, therefore, are not communications "expressly advocating the election or defeat of a clearly identified candidate."<sup>4</sup> It is important for the Commission to keep in mind that while these fundraising letters include express advocacy, *there is no way the TCC letters would include checks if their purpose were to expressly advocate without soliciting donations.*<sup>5</sup>

## **II. The "purpose" of the checks neither is to influence elections.**

For these same reasons, the checks are not "any . . . payment, distribution, . . . or gift of money or anything of value, made by any person for the purpose of influencing any election for Federal office,"<sup>6</sup> I respectfully suggest, contrary to the conclusions in Draft A at pages 4 – 5. This is, again, evident from the fact that check packages are used for fundraising mailings that are not Independent Expenditures. Here again I stress that if the mailings were simply Independent Expenditures, **check packages would not be used.**

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along with a contribution written on a personal check of the recipient of the letter.

<sup>4</sup> 52 U.S.C. § 30101(17); 11 C.F.R. § 100.16(a).

<sup>5</sup> This AO Request of course does not address the unlikely fact pattern perhaps never presented to the Commission as to whether mass-mailed letters engaging in express advocacy *but not soliciting donations*, but that include checks, would result in those checks being reportable portions of the Independent Expenditure.

<sup>6</sup> 52 U.S.C. § 30101(9)(A).

Check packages are used for the “*purpose of*” fundraising -- which is not an Independent Expenditure purpose -- even if they happen to be in a letter which also expressly advocates election or defeat of a clearly identified candidate. Therefore, they are not payments “*for the purpose of* influencing any election for Federal office.” By our experience, over 97 percent of the checks are not deposited anyway.

### **III. Reporting the face value of checks is inconsistent with the reporting purposes of Independent Expenditures.**

This is admittedly a unique AO Request involving separate purposes of components of a direct mail letter. I also respectfully suggest to the Commission that the formula for “best efforts” proposed in Draft A is at best unduly burdensome, and at worst unworkable.<sup>7</sup> As already stated, TCC utilizes check package mailings for their programs that are not Independent Expenditures. A “reliable tracking method” mentioned in Footnote 23 unfortunately does not exist. As a 501(c)(4) organization, TCC’s checks from check packages would be (1) returned to the cager undeposited, (2) discarded by the recipients, or (3) deposited into recipients’ bank account. This pattern is discerned from mailings that are not Independent Expenditures.

TCC’s bank statements from the account from which funds are drawn to pay the deposited checks do not distinguish which checks are or would be for Independent Expenditures, and which are not. Nor would the bank statements distinguish checks from one Independent Expenditure versus another should TCC simultaneously engage in more than one Independent Expenditure.<sup>8</sup>

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<sup>7</sup> ATA and TCC fully expect that the costs associated with preparing, printing, and inserting the checks into carrier envelopes would be reported.

<sup>8</sup> Even the process for estimating the value of the checks suggested at page 6 of Draft A, which is:

Client could estimate the cost of an independent expenditure as the face value of all checks in a mass mailing, or as a percentage of the face value

Even if someone were to spend the tedious and laborious time examining each check deposited, that method would assume the checks for Independent Expenditure mailings differ from the checks for mailings that are not Independent Expenditures and could be distinguished for reporting purposes. Nonprofit organizations with limited direct mail budgets, however, may “gang” the printing of components of mailings, which would make checks indistinguishable.

Complying with the Independent Expenditure reporting requirements for direct mail is already burdensome and expensive enough because of how direct mail invoices are received by the reporting entity after the mail is sent.

Should the Commission decide that the face value of checks in the check package fundraising letters subject to this AO Request are reportable expenditures, I therefore urge the Commission to question whether the “best efforts” tracking of the value of checks deposited recommended in Draft A is consistent with the purposes of disclosure articulated in *Buckley v. Valeo*<sup>9</sup> of providing the electorate with information about where political campaign money comes from, and deterring corruption through narrowly drawn regulation. From my perspective, it does not, and I urge the Commission to conclude likewise should it need to reach that question.

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of all checks in a mass mailing. Client should clearly designate where a reported cost is an estimate.

could result in wildly differing numbers of no real informative value. Reporting 100 percent of \$2.24 checks in a mailing of 100,000 letters would increase the reported value of the Independent Expenditure by \$224,000, whereas reporting only three percent -- which is a better estimate based on ATA’s experience -- would be only \$6,720, resulting in a **difference of \$217,280 reported for the same Independent Expenditure mailing** depending on which method of estimating is used. Compare that to the certainty and ease of the method suggested in Footnote 7 above,

<sup>9</sup> 424 U.S. 1 (1976).

Especially given the dual nature of check packages in the context of Independent Expenditures by TCC, i.e., their “purpose” of nonprofit fundraising versus express advocacy, and the obligation to narrowly draw the regulation of their disclosure, I urge this Advisory Opinion to obligate TCC to report only the costs associated with preparing, printing, and inserting the checks into carrier envelopes, and not their face value.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Mark J. Fitzgibbons', with a long horizontal flourish extending to the right.

Mark J. Fitzgibbons  
President of Corporate Affairs

cc: The Conservative Caucus