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FEDERAL ELECTION COMMISSION
Washington, DC

AGENDA DOCUMENT NO. 24-30-B
AGENDA ITEM
For meeting of August 29, 2024

August 22, 2024

MEMORANDUM

TO: The Commission

FROM: Lisa J. Stevenson *NFS for LJS*
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Attorney

Subject: AO 2024-06 (American Target Advertising and The Conservative
Caucus) – Draft B

Attached is a proposed draft of the subject advisory opinion. We have been asked to place this draft on the Agenda by one or more Commissioners.

Members of the public may submit written comments on the draft advisory opinion. We are making this draft available for comment until 12:00 pm (Eastern Time) on Wednesday, August 28, 2024.

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 <https://www.fec.gov/legal-resources/advisory-opinions-process/>.

Attachment

1 ADVISORY OPINION 2024-06

2

3 Mark J. Fitzgibbons
4 President of Corporate Affairs
5 American Target Advertising, Inc.
6 9625 Surveyor Court, Suite 400
7 Manassas, VA 20110

DRAFT B

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9 Dear Mr. Fitzgibbons:

10 We are responding to your advisory opinion request on behalf of American Target
11 Advertising, Inc. and The Conservative Caucus (collectively, “Requestors”) concerning the
12 application of the Federal Election Campaign Act, 52 U.S.C. §§ 30101-45 (the “Act”), and
13 Commission regulations to the reporting of independent expenditures. Specifically, Requestors
14 ask whether and how to report as an independent expenditure a package of materials distributed
15 via mass mailings that contain letters of express advocacy and a check of nominal value payable
16 to the individual recipient of the mailing. The Commission concludes that The Conservative
17 Caucus must include in the cost of the independent expenditure the face value of checks that The
18 Conservative Caucus reasonably expects to be deposited or cashed after receipt and must make
19 any necessary corrections to that estimate if the face value of checks actually cashed or deposited
20 differs from the reported estimate, as explained further below.

21 ***Background***

22 The facts presented in this advisory opinion are based on your letter received on June 21,
23 2024, and American Target Advertising’s comment submitted on August 12, 2024.

24 American Target Advertising, Inc. (“Vendor”) is a Virginia for-profit corporation, in the
25 business of preparing and coordinating direct mail programs.¹ In providing these services,

¹ Advisory Opinion Request (“AOR”) at AOR001 (describing further that Vendor “is a direct marketing agency”); *see also* AOR001-2 (describing Vendor’s services).

1 Vendor relies on its marketing and similar expertise to prepare and distribute letters on behalf of
2 its customers. Vendor drafts the mailings on behalf of its customers, oversees their printing and
3 production by other vendors, and coordinates invoicing and bill payment on behalf of its
4 customers. The types of mailings prepared by Vendor on behalf of its clients may include
5 donation forms, reply envelopes, and other inserts. Recipients of these types of mailings may be
6 asked to reply by sending back surveys, petitions, or donations to the sponsoring customer.²

7 Vendor also assists its customers in complying with their disclosure requirements under
8 the Act and Commission regulations by providing its customers with the information they need
9 to file reports with the Commission. This information includes Vendor’s fees, postage costs,
10 payments to other vendors, and other costs associated with the mailings. The number of
11 packages in each mailing “can range from thousands to tens of thousands to hundreds of
12 thousands. A very successful package can be millions mailed.”³

13 The Conservative Caucus (“Client”) is a customer of Vendor’s.⁴ Client is a Virginia
14 nonprofit corporation exempt from taxation under section 501(c)(4) of the Internal Revenue
15 Code. Client contracts with Vendor to prepare direct mail letters that, among other things,
16 market Client’s mission, solicit donations to Client, and “unambiguously express advocacy
17 exhorting recipients to ‘Vote for Trump’ or ‘Elect Trump.’”⁵

² Although Vendor often prepares letters that include its customers’ solicitations for donations, Vendor itself does not solicit donations.

³ AOR002.

⁴ AOR001.

⁵ *Id.*

1 One type of direct mail program in the Vendor-Client arrangement, which is the subject
2 of this advisory opinion, is a “check package” program.⁶ This program “encourage[s]
3 recipients” of the mail “to open the letters” by including in each check package a check payable
4 to the “bearer” and the individual recipient, and displaying the check through the window of
5 each envelope.⁷ The checks are of nominal value, typically ranging from \$1 to \$3, and follow a
6 marketing theme such as, for example, \$2.24 for the 2024 election. Although a letter in each
7 check package encourages recipients not to cash or deposit the checks and, instead, to return the
8 checks along with a donation to Client, some recipients do cash or deposit the checks — less
9 than three percent, on average, in Vendor’s experience.⁸ Each cashed or deposited check is
10 drawn on Client’s bank account. Recipients have “up to 45 (or more) days from the date of the
11 check” to cash the checks before they become void.⁹

12 Because of the lag time between Vendor’s dissemination of the check packages and
13 recipients’ cashing or depositing the checks, Requestors state that they may not know the actual
14 cost of a check-package mass mailing until after the deadline for filing an independent
15 expenditure report with the Commission has passed.¹⁰ Moreover, in some cases, the lack of
16 timely information about the total cost of a mass mailing could affect Requestors’ ability to
17 determine whether a reporting requirement has been triggered. Further, because there may be
18 “multiple mailings of the check package on different mail dates,” Requestors state, “it would be

⁶ AOR002.

⁷ *Id.*

⁸ AOR003.

⁹ AOR004.

¹⁰ *See id.*

1 difficult if not impossible to determine the specific [independent expenditure] to which to
2 attribute many checks.”¹¹

3 ***Questions Presented***

4 1. *Should the face amount of the checks in a check package mailed as an independent*
5 *expenditure be included in the costs of the independent expenditure reported by Client to*
6 *the Commission?*

7 2. *Is there any other formula required under the Act to report the value of these checks*
8 *included in an independent expenditure mailing?*

9 ***Legal Analysis***

10 Client must include the face amount of the checks in a check package mailed as an
11 independent expenditure that Client reasonably expects to be deposited or cashed in the costs of
12 the independent expenditure reported by Client to the Commission, and must make any
13 necessary corrections to that estimate if the face value of checks that are actually cashed or
14 deposited differs from the reported estimate, as explained further below.

15 The Act and Commission regulations require persons making independent expenditures
16 to disclose information about the independent expenditures to the Commission.¹² An
17 “independent expenditure” is an “expenditure” for a communication “expressly advocating the
18 election or defeat of a clearly identified candidate . . . that is not made in concert or cooperation
19 with[,] or at the request or suggestion of such candidate, the candidate’s authorized political

¹¹ *Id.*

¹² See 52 U.S.C. § 30104(g) (addressing the reporting of independent expenditures); 11 C.F.R. § 109.10 (addressing the reporting of independent expenditures by political committees and other persons).

1 committee, . . . a political party committee, or [their] agents.”¹³ The term “expenditure” includes
2 “any . . . payment, distribution, . . . or gift of money or anything of value, made by any person for
3 the purpose of influencing any election for Federal office.”¹⁴ The term “money” includes
4 “checks, money orders, or any other negotiable instrument payable on demand.”¹⁵

5 Here, Requestors propose to disseminate checks along with letters containing “language
6 that is unambiguously express advocacy” via mass mailings.¹⁶ Each check will be drawn on
7 Client’s account and will be payable to “bearer” and the intended recipient of the mailing.
8 Requestors’ stated purpose for including the checks is to “encourage recipients . . . to open the
9 letters” because, “[f]or the mass-mailed letters to be effective, recipients . . . must first open the
10 letters rather than discard them in the trash.”¹⁷ Because the checks will be part of an independent
11 expenditure mass mailing packet, the cost of the entire package(which includes the checks) will
12 be subject to the independent expenditure reporting requirements of the Act and Commission
13 regulations.

14 The independent expenditure reporting requirements differ, depending on an independent
15 expenditure’s amount, and when the communication is “distributed or otherwise publicly
16 disseminated.”¹⁸ Here, Requestors may not be able to determine the actual cost of an

¹³ 52 U.S.C. § 30101(17); 11 C.F.R. § 100.16(a).

¹⁴ 52 U.S.C. § 30101(9)(A); *see also* 11 C.F.R. §§ 100.110-100.114 (defining “expenditure”).

¹⁵ 11 C.F.R. § 100.111(d).

¹⁶ *Contra* Cert. at 1, LRA 1163 (Madison Project, Inc.), Feb. 28, 2023 (Commission determination that certain fundraising solicitations did not constitute misreported independent expenditures); *see also* Statement of Reasons of Comm’rs Dickerson, Lindenbaum, and Trainor, LRA 1163 (Madison Project, Inc.), May 1, 2024.

¹⁷ AOR002.

¹⁸ Persons who are not political committees and who make or contract to make independent expenditures may

1 independent expenditure until well after its dissemination.¹⁹ This may affect Requestor’s ability
2 to determine whether the mass mailing has triggered a reporting requirement and, if it has, the
3 amount to report.

4 In these circumstances, Client should use its “best efforts” to estimate the cost of an
5 independent expenditure prior to the reporting deadline and if, based on that estimate, a report is
6 required, Client should report a reasonable estimate of the cost of the independent expenditure to
7 the Commission.²⁰ For example, Client could estimate the cost of an independent expenditure as
8 the face value of all checks in a check packet mass mailing, or as a percentage of the face value
9 of all checks in a check packet mass mailing. Client should clearly designate where a reported
10 cost is an estimate.²¹

be required to file 48-hour, 24-hour, or quarterly reports with the Commission. *See, e.g.*, 52 U.S.C. § 30104(g)(2); 11 C.F.R. § 109.10(c) (requiring “48-hour report” of independent expenditures aggregating \$10,000 or more with respect to given election to be filed within 48 hours after communication is publicly distributed or otherwise publicly disseminated, if distribution or dissemination occurs up to and including 20th day before election); 52 U.S.C. § 30104(g)(1); 11 C.F.R. § 109.10(d) (requiring “24-hour report” of independent expenditures aggregating \$1,000 or more with respect to given election to be filed within 24 hours after communication is publicly distributed or publicly disseminated, if distribution or dissemination occurs after 20th day, but more than 24 hours, before election); 52 U.S.C. § 30104(c); 11 C.F.R. § 109.10 (requiring quarterly report to be filed for independent expenditures aggregating more than \$250 with respect to given election in calendar year and in any subsequent quarter in which additional independent expenditures are made). 48-hour, 24-hour, and quarterly reports may be filed on FEC Form 5 or via verified and signed statements and reports. *See* 11 C.F.R. § 109.10; FEC, Instructions for Preparing FEC Form 5 (“Form 5 Instructions”), (rev. Sept. 2013), <https://www.fec.gov/resources/cms-content/documents/policy-guidance/fecfrm5i.pdf> (providing instructions for reporting independent expenditures made and contributions received to be used by persons other than political committees).

¹⁹ A communication that is mailed to its intended audience, such as the check packages here, is “publicly disseminated” when it is relinquished to the U.S. Postal Service. 11 C.F.R. § 104.5(g)(4).

²⁰ For further guidance, *see* FEC, Estimating Independent Expenditures, <https://www.fec.gov/help-candidates-and-committees/making-independent-expenditures/estimating-independent-expenditures/> (last visited July 23, 2024).

²¹ If Client reports on FEC Form 5, this designation should be included as a notation or memo text in the report.

1 If Client later receives information that the actual cost of the independent expenditure
2 differs from the estimate, Client should report the correct amount and reference the earlier
3 estimate.²² If, based on the actual cost of an independent expenditure, Client discovers that it
4 triggered the reporting requirement, Client should promptly report the actual cost and timeframe
5 of the independent expenditure. Provided that Client makes a reasonable, good faith effort to
6 estimate accurately the costs of an independent expenditure and reports the actual amount if it
7 determines that the actual amount differs from the reported estimate, Client will be considered to
8 have used its “best efforts” to meet its independent expenditure reporting obligations.²³

9 This response constitutes an advisory opinion concerning the application of the Act and
10 Commission regulations to the specific transactions or activities set forth in Vendor and Client’s
11 request.²⁴ The Commission emphasizes that, if there is a change in any of the facts or
12 assumptions presented, and such facts or assumptions are material to a conclusion presented in
13 this advisory opinion, then the requestors may not rely on that conclusion as support for its
14 proposed transactions or activity. Any person involved in any specific transaction or activity

²² Client may do this, for example, by reporting the correct amount on a quarterly report filed on FEC Form 5, referencing the earlier estimate with a notation or memo text, and amending the previous report. Specifically, if Client receives information about the actual cost of the independent expenditure after filing the 48- or 24-hour report but before filing the quarterly report, Client should reflect the actual cost of the independent expenditure on the quarterly report and reference the earlier estimate disclosed in the 48- or 24-hour report using a notation or memo text. If Client receives information about the actual cost of the independent expenditure after filing the quarterly report covering the period when the distribution or public dissemination occurred, Client should amend the quarterly report to reflect the actual cost and reference the earlier estimate. In addition, Client should amend or file any required 48- or 24-hour reports based on the actual cost and timeframe of the independent expenditure, referencing the earlier estimate using a notation or memo text.

²³ Client should also use its “best efforts” to match a cashed or deposited check to the correct independent expenditure check mail package mass mailing. *See, e.g.*, 52 U.S.C. § 30102(i); 11 C.F.R. § 102.9(d) (requiring treasurers of political committees to use “best efforts” to obtain, maintain, and submit information required to be reported to Commission).

²⁴ *See* 52 U.S.C. § 30108.

1 which is indistinguishable in all its material aspects from the transaction or activity with respect
2 to which this advisory opinion is rendered may rely on this advisory opinion.²⁵ Please note that
3 the analysis or conclusions in this advisory opinion may be affected by subsequent developments
4 in the law including, but not limited to, statutes, regulations, advisory opinions, and case law.

5 Any advisory opinions cited herein are available on the Commission's website.

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On behalf of the Commission,

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Sean J. Cooksey
Chairman

²⁵ *See id.* § 30108(c)(1)(B).