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For meeting of May 10, 2018
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May 8, 2018

MEMORANDUM

TO: The Commission

FROM: Lisa J. Stevenson *LJS*
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Subject: AO 2018-04 (Conservative Primary LLC) Draft A

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 May 10, 2018.

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 2018-04

2

3 Petra A. Mangini, Esq.
4 political.law
5 203 South Union St.
6 Suite 300
7 Alexandria, VA 22314

DRAFT A

8

9 Dear Ms. Mangini:

10 We are responding to your advisory opinion request on behalf of Conservative Primary
11 LLC (“Conservative Primary” or the “Company”) concerning the application of the Federal
12 Election Campaign Act, 52 U.S.C. §§ 30101-45 (the “Act”), and Commission regulations to
13 Conservative Primary’s proposed business plan to create and administer a website to conduct
14 straw polls and advertise the site and the poll results. The Commission concludes that the
15 Company’s activities as set forth in the request, including its proposed website and ads, are
16 permissible under the Act and Commission regulations. The relevant statutory and regulatory
17 requirements are described below.

18 **Background**

19 The facts presented in this advisory opinion are based on your letter received on February
20 20, 2018, and your e-mail received on March 13, 2018 (collectively “advisory opinion request”
21 or “AOR”).

22 Conservative Primary is a for-profit limited liability company.¹ AOR001. Conservative
23 Primary’s primary purpose and proposed business model is to create and administer a website to
24 conduct straw polls in certain congressional elections. *Id.* Specifically, Conservative Primary
25 will conduct straw polls in primary elections where there are at least two Republican candidates,

¹ Although Conservative Primary is an LLC, it asks the Commission to consider it as a corporation for the purposes of this advisory opinion. *See* AOR012; *see also* 11 C.F.R. § 110.1(g)(2), (3) (treating LLCs that elect corporate taxation for purposes of IRS regulations as corporations for purposes of the Act and Commission regulations).

1 not including a Republican incumbent. *Id.* Straw polls will not be conducted in all races; the
2 races will be selected based on criteria such as statistics about the congressional districts.

3 AOR012. Conservative Primary has not yet determined how many races it will select for polls,
4 nor has it determined whether it will conduct straw polls in races where the incumbent is not a
5 Republican. *Id.*

6 Conservative Primary will advertise its website to individuals in congressional districts in
7 which it is conducting straw polls. AOR001. It will target politically conservative individuals
8 through email, social media, television, and conservative talk and radio shows. *Id.* An example
9 of such an ad would read:

10 **Ad #1:** Let's go RINO hunting. Congressman Doe in District 8 does not
11 represent the conservatives in this district. Conservative Primary gives you a tool
12 to help elect someone who better represents conservatives like you. Join
13 Conservative Primary, pool your conservative vote, and help nominate a real
14 conservative to the general election.

15 *Id.*

16 Conservative Primary will be a public website, but it will require users to register and pay
17 a fee, potentially \$10, to cast a vote in each straw poll. *Id.* This fee will cover Conservative
18 Primary's costs associated with developing and maintaining the site, credit card fees, and
19 advertising for the company and the poll results, as well as provide a commercially reasonable
20 profit. AOR002. Website visitors may donate money to support the company itself, if they
21 wish, without having to also register or vote in a poll. AOR001. All funds received from
22 registered users ("Customers") and from non-voting visitors' donations will be placed in
23 Conservative Primary's general corporate account. AOR003.

1 The Conservative Primary website will have a password-protected section for Customers
2 to participate in its straw polls. AOR001. The public part of the site will contain general
3 information about the Company, including information on how visitors may register and
4 participate in the straw polls. *Id.* The public part of the site will also include a notice that the
5 Company intends to spend a portion of the revenue it generates on each poll to advertise the
6 winner of that poll. *Id.* The public section of the site will also provide information about
7 ongoing polls that may be of particular public interest, including the district, slate of candidates,
8 polling period, and current vote breakdown. *Id.*

9 When a given poll closes, Conservative Primary will tally the votes and announce the
10 winner, both to its Customers and to the general public in the relevant congressional district.
11 AOR002. Conservative Primary will communicate the poll results to its Customers by email. *Id.*
12 It will communicate the results to the general public on its website, and also through
13 advertisements it produces and distributes online and through conservative talk and radio shows,
14 and possibly on television and through other media. *Id.* The Company will incur all costs of
15 creating and distributing the emails and advertisements and may provide funding itself, if
16 necessary, in addition to relying on revenue generated from registered users and donors.
17 AOR003. Conservative Primary will maintain full control over the Company's funds used for
18 producing and distributing the emails and advertisements. *Id.*

19 In its emails to its Customers and on its website, Conservative Primary will announce the
20 results of a poll and encourage Customers and viewers of the site to support the winner using the
21 following text, with a link to the winning candidate's campaign website:

1 **Ad #2:** Please join your friends in supporting the winners of the Conservative
2 Primary. Vote for these winners and support their campaign with your time and
3 money.²

4 AOR002.

5 Conservative Primary will use three formats for ads communicating the winner of a straw
6 poll to the general public online and on radio, and possibly also on television:

7 **Ad #3:** Your friends and neighbors have participated in a Conservative Primary in
8 District 8. They have chosen Sally Smith as the best pick to challenge incumbent
9 John Doe. Please join your friends in voting for the winner of the Conservative
10 Primary.

11 **Ad #4:** Your friends and neighbors have participated in a Conservative Primary in
12 District 8. They have chosen Sally Smith as the winner.

13 **Ad #5:** Sally Smith has won the Conservative Primary in District 8. Will you
14 support her in the Primary?

15 *Id.*

16 If any of these ads constitute independent expenditures or electioneering communications
17 due to their content, timing, or geographic distribution, Conservative Primary will submit the
18 required independent expenditure or electioneering communication reports as required by the
19 Act and Commission regulations. *Id.* Conservative Primary will also include any required
20 disclaimers in the ads. *Id.*

21 Conservative Primary is not established, financed, maintained, or controlled by any
22 candidate or political party, and it will not conduct its proposed activities in cooperation,
23 consultation or concert with, or at the request or suggestion of, any candidate or party. AOR001.

² Conservative Primary states that the text of Ad #2 will be “part of the display,” AOR002, but acknowledges that because the website and ads are still in development, it does not yet know the full content of the proposed ads, other than the text indicated, and that Ad #2 will include a link to the winning candidate’s website. AOR012.

1 **Questions Presented**

2 1. *How should funds Conservative Primary spends on advertising the straw poll*
3 *results be characterized and reported?*

4 a. *Do the advertisements constitute “expenditures” by Conservative*
5 *Primary?*

6 b. *If the advertisements constitute “expenditures,” do they qualify as*
7 *“independent expenditures” by Conservative Primary?*

8 c. *Do the advertisements constitute “electioneering communications” by*
9 *Conservative Primary?*

10 2. *May Conservative Primary, in its emails to Customers, and on its webpage,*
11 *include a message calling on the reader to support and donate to the winning candidate? If so,*
12 *may Conservative Primary include a link to the candidate or candidate committee’s webpage in*
13 *its email and on the Conservative Primary website?*

14 3. *Are payments from Customers to Conservative Primary partly or entirely*
15 *“contributions”?*

16 4. *Does Conservative Primary’s planned arrangement require the formation of one*
17 *or more political committees?*

18 a. *Does Conservative Primary qualify as a political committee?*

19 b. *In the alternative, do the Customers who collectively participate in a*
20 *particular straw poll, which funds the purchase of one or more advertisements*
21 *relaying the results of that poll, constitute a political committee?*

1 **Legal Analysis and Conclusions**

2 1. *How should funds Conservative Primary spends on advertising the straw poll*
3 *results be characterized and reported?*

4 a. *Do the advertisements constitute “expenditures” by Conservative*
5 *Primary?*

6 b. *If the advertisements constitute “expenditures,” do they qualify as*
7 *“independent expenditures” by Conservative Primary?*

8 The Act defines an expenditure as “any purchase, payment, distribution, loan, advance,
9 deposit, or gift of money or anything of value, made by any person for the purpose of influencing
10 any election for [f]ederal office.” 52 U.S.C. § 30101(9)(A)(i); *see also* 11 C.F.R. § 100.111(a).

11 An independent expenditure is an expenditure “expressly advocating the election or defeat of a
12 clearly identified candidate” that is “not made in concert or cooperation with or at the request or
13 suggestion of such candidate, the candidate’s authorized committee, or their agents, or a political
14 party committee or its agents.” 52 U.S.C. § 30101(17); *see also* 11 C.F.R. § 100.16.

15 Corporations, while prohibited from making contributions to federal candidates, are permitted to
16 make independent expenditures and electioneering communications. *Citizens United v. FEC*,
17 558 U.S. 310, 365 (2010); Independent Expenditures and Electioneering Communications by
18 Corporations and Labor Organizations, 79 Fed. Reg. 62,797 (Oct. 21, 2014).

19 For a particular advertisement to constitute an expenditure or independent expenditure,
20 the content of the advertisement must expressly advocate the election or defeat of a clearly
21 identified candidate. *Buckley v. Valeo*, 424 U.S. 1, 80; 11 C.F.R. § 100.22. Conservative
22 Primary states that the text of each of proposed Ads ##2, 3, and 5 contains express advocacy, and

1 assuming they do, these ads would constitute independent expenditures.³ The text of proposed
2 Ad #4, by contrast, merely presents factual information and would not constitute an independent
3 expenditure.⁴ Independent expenditures must be reported in accordance with the requirements at
4 11 C.F.R. § 109.10(b)-(d), disclosing the information required under 11 C.F.R. § 109.10(e).

5 As to those proposed ads that constitute independent expenditures, such independent
6 expenditures will be made by Conservative Primary because it, not any Customers or donors,
7 will make all decisions about creating and distributing the ads and will provide all funds for the
8 ads from its corporate account.

9 *c. Do the advertisements constitute “electioneering communications” by*
10 *Conservative Primary?*

11 The Act defines an electioneering communication as any broadcast, cable, or satellite
12 communication that refers to a clearly identified candidate for federal office, is made within 30
13 days before a primary election or 60 days before a general, special, or runoff election, and in the
14 case of a candidate for office other than President or Vice-President, is targeted to the relevant
15 electorate. 52 U.S.C. § 30104(f)(3)(A); *see also* 11 C.F.R. § 100.29(a). A communication that
16 constitutes an expenditure or independent expenditure is exempted from the definition of
17 electioneering communication. 11 C.F.R. § 100.29(c)(3).

³ Although the request also describes an “Ad #1,” Conservative Primary does not ask any questions about that advertisement. *See* AOR002 n.1 (defining “Ads” for purposes of this request as proposed Ads ##2-5). The Commission accordingly does not opine on whether Ad #1 would constitute an expenditure, independent expenditure, or electioneering communication.

⁴ This conclusion is limited to the text proposed in the request. To the extent the final content or form of Conservative Primary’s proposed advertisements is materially different from the proposals described in the request (*see* AOR012 (indicating that Conservative Primary has not yet determined the final content or form of its ads)), the conclusions in this Advisory Opinion may not apply to such advertisements.

1 Conservative Primary’s proposed ads all refer to clearly identified federal candidates, and
2 Conservative Primary states that it will distribute the ads to “the general public within the
3 Congressional district in which the Poll is focused.” AOR002. If the ads are distributed within
4 the 30 days before the relevant election and are distributed via broadcast, cable, or satellite, they
5 will meet all the criteria for electioneering communications. However, proposed Ads ##2, 3, and
6 5 will constitute independent expenditures, so they would not be electioneering communications
7 pursuant to the exemption in 52 U.S.C. § 30104(f)(3)(B)(ii) and 11 C.F.R. § 100.29(c)(3). Ad
8 #4, as proposed, is not an independent expenditure; it would be an electioneering communication
9 if distributed via broadcast, cable, or satellite within the 30 days before the relevant election.
10 Electioneering communications must be reported as set forth at 11 C.F.R. § 104.20(b), disclosing
11 the information required under 11 C.F.R. § 104.20(c).

12 2. *May Conservative Primary, in its emails to Customers, and on its webpage,*
13 *include a message calling on the reader to support and donate to the winning candidate? If so,*
14 *may Conservative Primary include a link to the candidate or candidate committee’s webpage in*
15 *its email and on the Conservative Primary website?*

16 Yes, Conservative Primary may, in its emails to its Customers and on its webpage, call on
17 readers to support and contribute to the candidates who win its straw polls, and it may include a
18 link to the candidate’s or candidate committee’s webpage in those messages.

19 As discussed above, corporations are prohibited from making contributions to candidates.
20 Under the Act, a contribution is “any gift, subscription, loan, advance, or deposit of money or
21 anything of value made by any person for the purpose of influencing any election for [f]ederal
22 office.” 52 U.S.C. § 30101(8)(A); *see also* 11 C.F.R. § 100.52. Further, an expenditure may

1 also be considered a contribution to a candidate, if the expenditure is made in coordination with
2 the candidate. 52 U.S.C. § 30116(a)(7)(B); 11 C.F.R. §§ 109.20, 109.21. Corporations are
3 prohibited from making contributions to candidates, and therefore may not make expenditures
4 that are coordinated with candidates or political parties or for the republication of campaign
5 materials. 52 U.S.C. § 30118(a); 11 C.F.R. § 114.2.

6 The email and website messages proposed here would not be coordinated with a
7 candidate. The Act provides that “expenditures made by any person in cooperation, consultation,
8 or concert with, or at the request or suggestion of, a candidate, his authorized political
9 committees, or their agents, shall be considered to be a contribution to such candidate.” 52
10 U.S.C. § 30116(a)(7)(B)(i); *see also* 11 C.F.R. § 109.20. Commission regulations define a
11 “coordinated communication” in terms of three prongs covering the payment for the
12 communication, the content and means of communication, and the conduct between the payor
13 and the candidate. *See* 11 C.F.R. § 109.21. Analysis of those prongs is unnecessary here,
14 however, because the requestor states categorically that it “will not act in cooperation,
15 consultation, or concert with, or at the request or suggestion of any candidate.” AOR006. In the
16 absence of such conduct, the proposed email and website messages would not constitute
17 prohibited coordinated expenditures even if they satisfy the payment and content prongs of
18 section 109.21.

1 3. *Are payments from Customers to Conservative Primary partly or entirely*
2 *“contributions”?*

3 Customers’ payments to Conservative Primary will not be contributions to Conservative
4 Primary because such payments will be made as consideration for the opportunity to participate
5 in the polls, and not for the purpose of influencing an election.⁵

6 The Commission has previously concluded that a commercial entity may charge users a
7 fee in exchange for providing a service without that fee constituting a contribution, so long as the
8 fee covers the entity’s costs as well as a commercially reasonable profit. *See, e.g.,* Advisory
9 Opinion 2017-06 (Stein and Gottlieb) at 4-5; Advisory Opinion 2012-22 (skimmerhat) at 6;
10 Advisory Opinion 2011-06 (Democracy Engine) at 6. Here, Conservative Primary proposes to
11 provide a service to users — straw polls and the ability to amplify users’ preference by
12 advertising the winners of the polls — in exchange for a fee that will cover Conservative
13 Primary’s costs of maintaining its website and producing and distributing the ads and generate a
14 commercially reasonable profit. Accordingly, the fees paid to Conservative Primary by its users
15 in order to participate in the straw polls will not constitute contributions to Conservative
16 Primary.

17 4. *Does Conservative Primary’s planned arrangement require the formation of one*
18 *or more political committees?*

19 a. *Does Conservative Primary qualify as a political committee?*

⁵ Although the request also suggests that visitors to Conservative Primary’s website may *donate* money to support the company itself, without having to register or vote in a poll, AOR001, the request does not ask whether such donations from persons who are not registered Customers would be contributions, and the Commission accordingly does not address that hypothetical question here.

1 Based on the activities described in the request, Conservative Primary is not currently a
2 political committee; however, it could become one in the future if it meets the statutory threshold
3 for political committee status and has as its major purpose the nomination or election of a
4 candidate. *See Buckley v. Valeo*, 424 U.S. 1, 79 (1976); *FEC v. Mass. Citizens for Life, Inc.*,
5 479 U.S. 238, 262 (1986) (“*MCFL*”); Political Committee Status, 72 Fed. Reg. 5595, 5601 (Feb.
6 7, 2007).

7 The Act and Commission regulations define a political committee as “any committee,
8 club, association, or other group of persons which received contributions aggregating in excess
9 of \$1,000 during a calendar year or which makes expenditures aggregating in excess of \$1,000
10 during a calendar year.” 52 U.S.C. § 30101(4)(A); *see also* 11 C.F.R. § 100.5. The Supreme
11 Court construed the term “political committee” to encompass only organizations that are under
12 the control of a candidate or whose major purpose is the nomination or election of a candidate.
13 *See Buckley v. Valeo*, 424 U.S. 1, 79 (1976); *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238,
14 262 (1986) (“*MCFL*”). The Commission determines whether an entity’s major purpose is the
15 election or nomination of a candidate on a case-by-case basis, using a “fact-intensive analysis of
16 a group’s campaign activities compared to its activities unrelated to campaigns.” Political
17 Committee Status, 72 Fed. Reg. 5595, 5601 (Feb. 7, 2007).

18 To date, Conservative Primary has neither received any contributions nor made any
19 expenditures, and therefore it has not reached the \$1,000 per-year statutory threshold to qualify
20 as a political committee. Assuming that Conservative Primary’s expenditures will at some point
21 exceed \$1,000 per year, the question whether it would be a political committee at that point
22 would depend on whether it meets the major purpose test.

1 Here, the request states that Conservative Primary’s “primary purpose and business
2 model is to create and administer a website platform providing straw poll functionality in
3 congressional races,” AOR001, and that “another purpose is to provide conservative voters, in
4 targeted districts, with a mechanism to engage in political speech by advertising the Poll results
5 that may encourage others to take action.” AOR009. The request also states that Conservative
6 Primary is a for-profit company, operated for commercial purposes and not for the purpose of
7 influencing any federal election, and that it will set its fees to generate a commercially
8 reasonable profit. AOR009, AOR002. Such statements support a conclusion that Conservative
9 Primary does not have the major purpose of nominating or electing federal candidates.

10 Nevertheless, in addition to consideration of an organization’s stated purpose, the
11 Commission’s major purpose analysis has also entailed an examination of an entity’s overall
12 conduct, and evaluating its spending on campaign-related activity relative to its other spending.
13 Political Committee Status, 72 Fed. Reg. at 5601; *see MCFL*, 479 U.S. at 262. Here, the request
14 expressly acknowledges that Conservative Primary may engage in “spending related to campaign
15 activity.” AOR010; *see also* AOR002 (describing proposed advertisements that expressly
16 advocate for candidates). However, Conservative Primary’s “actual costs have yet to be
17 determined,” and, in particular, it has not yet determined the amount it will spend related to
18 campaign activity in any calendar year. AOR010. The request thus does not present sufficient
19 facts to enable a determination by the Commission at this time regarding whether Conservative
20 Primary’s hypothetical, unspecified future activities and spending would require it to register and
21 report as a political committee.

1 **b.** *In the alternative, do the Customers who collectively participate in a*
2 *particular straw poll, which funds the purchase of one or more advertisements*
3 *relaying the results of that poll, constitute a political committee?*

4 No, the Customers who participate in a straw poll do not constitute a political committee
5 by virtue of their participation in a particular poll that will fund advertisements relaying the
6 results of that poll.

7 In Advisory Opinion 2008-10 (VoterVoter.com), the Commission considered a proposed
8 business plan whereby individuals could visit the requestor’s website to view and purchase
9 airtime for ads that the requestor or others had created, which expressly advocated the election or
10 defeat of candidates for federal office. The requestor did not establish or facilitate any
11 communication between purchasers, or between the purchasers and the creators of the ads.

12 Advisory Opinion 2008-10 (VoterVoter.com) at 5. The Commission concluded in that matter
13 that website users who purchased airtime to distribute the same candidate ad did not constitute a
14 “group of persons” for purposes of the definition of a political committee because there was no
15 communication between those purchasers and the requestor did not communicate to the
16 purchasers about other purchasers. *Id.* at 9-10. The mere fact that multiple persons spent money
17 to support the same candidate did not render them a political committee in the absence of a
18 means to collectively manage their activities. *See also* Advisory Opinion 2009-13 (The Black
19 Rock Group) (concluding that a consulting company could provide services to multiple single-
20 member LLCs relating to independent expenditures without triggering political committee status,
21 where the consulting company did not facilitate communications between the LLCs).

1 Here, Conservative Primary Customers who participate in the same poll and thereby fund
2 the same ads supporting the winning candidate do not constitute a “group of persons” for
3 purposes of the statutory definition of “political committee,” 52 U.S.C. § 30101(4)(A). Although
4 the Customers will participate in the straw polls with knowledge that a portion of their fees will
5 be used to finance ads announcing the winner of the poll, they will not know who that winner
6 will be or have any control over the funds, the content of the ads, or their distribution, nor will
7 there be any collaboration among the Customers, or between the Customers and Conservative
8 Primary, regarding any of the “plans, strategies, or activities” Conservative Primary will employ
9 in providing its services. AOR003, AOR010-11. Any collaboration among Customers would be
10 outside of the scope of the activities described in the request and may result in the formation of a
11 political committee. *See* Advisory Opinion 2008-10 (VoterVoter.com) at 9-10 (concluding that
12 purchasers’ interactions with a website did not result in the purchasers forming a political
13 committee, but declining to “address whether any communications or collaboration between
14 purchasers would result in the formation of a ‘group of persons’ that could be considered a political
15 committee”).

16 This response constitutes an advisory opinion concerning the application of the Act and
17 Commission regulations to the specific transaction or activity set forth in your request. *See*
18 52 U.S.C. § 30108. The Commission emphasizes that, if there is a change in any of the facts or
19 assumptions presented, and such facts or assumptions are material to a conclusion presented in
20 this advisory opinion, then the requestor may not rely on that conclusion as support for its
21 proposed activity. Any person involved in any specific transaction or activity which is
22 indistinguishable in all its material aspects from the transaction or activity with respect to which

1 this advisory opinion is rendered may rely on this advisory opinion. *See* 52 U.S.C.
2 § 30108(c)(1)(B). Please note that the analysis or conclusions in this advisory opinion may be
3 affected by subsequent developments in the law including, but not limited to, statutes,
4 regulations, advisory opinions, and case law. Any advisory opinions cited herein are available
5 on the Commission's website.

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7 On behalf of the Commission,
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Caroline C. Hunter,
Chair