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FEDERAL ELECTION COMMISSION
Washington, DC 20463

AGENDA DOCUMENT NO. 21-34-A
AGENDA ITEM
For meeting of September 30, 2021

September 22, 2021

MEMORANDUM

TO: The Commission

FROM: Lisa J. Stevenson LJS by NFS
Acting General Counsel

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Associate General Counsel

Robert Knop RMK
Assistant General Counsel

Kevin M. Paulsen KMP
Attorney

Subject: AO 2021-09 (Certified Voter) Draft A

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 September 29, 2021.

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

ADVISORY OPINION 2021-09

Chris Truax, Esq.
Chief Executive Officer
Certified Voter, LLC
P.O. Box 2127
La Mesa, CA 91943

DRAFT A

Dear Mr. Truax:

We are responding to your request for an advisory opinion on behalf of Certified Voter, LLC ("Certified Voter") concerning the application of the Federal Election Campaign Act, 52 U.S.C. §§ 30101-45 (the "Act"), and Commission regulations to Certified Voter's proposal to sell its sponsored advertisement services to political committees. The Commission concludes that Certified Voter may provide these services for a commercially reasonable fee as proposed because in doing so it would act as a commercial vendor.

Background

The facts presented in this advisory opinion are based on your letter received on August 16, 2021. Advisory Opinion Request ("AOR") at AOR001. Certified Voter is a limited liability company that proposes to offer a commercial service to political committees by creating, storing, and distributing custom sponsored advertisements ("sponsored ads") that identify and can be shared by the committees' contributors. *Id.*

The request describes Certified Voter's services as follows: a political committee that retains Certified Voter's services would send a fundraising solicitation to the committee's donors. This solicitation would notify supporters that if they contribute a certain minimum amount to the committee, they would be offered the option to receive a customized sponsored ad from the campaign. A supporter would then be directed to the

committee's website where they would make the contribution[1] and, if they choose to receive a sponsored ad, select the advertisement they wish to customize from one or more video advertisements that "have already been created [and paid for] by" the committee.[2] AOR001. Next, the committee would transmit to Certified Voter the contributor's information along with the contributor's chosen advertisement. Certified Voter's "system" would use this information to generate a sponsored ad by inserting a "brief message" at either the beginning or end of the committee's video advertisement. AOR001-02. This message would include a "voice-over indicating the [advertisement] has been sponsored" and "a page of text consisting of the name of the 'sponsor,' the sponsor's hometown and, possibly, other identifying information such as [the sponsor's] social media address." AOR001. Finally, Certified Voter would deliver the sponsored ad to the committee. You "anticipate that the sponsored ad [would] then [be] shared" with the contributor, who would be encouraged "to share the sponsored ad with friends and family via social media." AOR002. Distribution and use of the sponsored ad after it is transmitted by Certified Voter to the committee, however, "is strictly within the control of" the committee and, presumably, the recipient contributor. *Id.*

[1] The request clarifies that contributors who choose to receive a sponsored ad "will not be paying directly for [political] advertising." Contributions made by those who wish to receive a sponsored ad will be used by the recipient political committees "as it deems appropriate just as with any other contribution." AOR002.

[2] The request stipulates and the Commission assumes for purposes of this advisory opinion that all political advertisements produced by political committees will comply with all applicable legal requirements (including, without limitation, disclaimer requirements) under the Act and Commission regulations. AOR001.

You further "anticipate that the entire sponsored ad process will, from the [contributor's] point of view, take place entirely within the website of the campaign or PAC." *Id.* Certified Voter will exclusively act behind-the-scenes as a "commercial vendor" that digitally generates sponsored ads for its political committee customers at "a commercially-reasonable fee."[3] AOR001.

Question Presented

Is Certified Voter's proposal to sell sponsored advertisement services to political committees for a commercially reasonable fee permissible under the Act and Commission regulations?

Legal Analysis and Conclusion

Yes, Certified Voter may sell sponsored advertisement services to political committees for a commercially reasonable fee as proposed because in doing so it would act as a commercial vendor.

The Act and Commission regulations prohibit corporations, including limited liability companies that have elected to be treated as corporations for federal tax purposes, from making a "contribution," which includes "any direct or indirect payment, distribution, loan, advance, deposit, or gift of money, or any services, or anything of value . . . to any candidate, campaign committee, or political party or organization, in connection with any [federal] election." 52 U.S.C. § 30118(a), (b)(2); 11 C.F.R. § 114.2(b); 11 C.F.R. § 110.1(g)(3); *see also* 52 U.S.C. § 30101(8)(A)(i); 11 C.F.R. § 100.52(a). "[A]nything of value" includes all in-kind contributions, such as the

[3] *See* AOR001-02 ("During this entire process, [contributors] will be interacting with the campaign or PAC rather than directly with Certified Voter.").

provision of goods and services without charge or at less than the "usual and normal charge." *See* 11 C.F.R. § 100.52(d)(1). Commission regulations define "usual and normal charge" as the price of goods in the market from which they ordinarily would have been purchased at the time of the contribution, or the commercially reasonable rate prevailing at the time the services were rendered. *See* 11 C.F.R. § 100.52(d)(2).

Corporations, including limited liability companies that have elected to be treated as corporations for federal tax purposes, are also prohibited from facilitating the making of contributions to political committees. 11 C.F.R. §§ 110.1(g)(3), 114.2(f). Commission regulations define such "facilitation" as using corporate "resources or facilities to engage in fundraising activities in connection with any federal election," but the regulations provide that "[a] corporation does not facilitate the making of a contribution . . . if it provides goods and services in the ordinary course of its business as a commercial vendor in accordance with 11 CFR part 116 at the usual and normal charge." 11 C.F.R. § 114.2(f)(1). Part 116, in turn, defines a commercial vendor as "any persons providing goods or services to a candidate or political committee whose usual and normal business involves the sale, rental, lease, or provision of those goods or services." 11 C.F.R. § 116.1(c).

In sum, the questions of whether Certified Voter's activities constitute the making or facilitating of contributions under the Act and Commission regulations turn on whether

its political committee customers would pay Certified Voter the usual and normal charge (or other consideration of equal value) for its ordinary services as a commercial vendor.[4]

Certified Voter, a limited liability company,[5] intends to provide a specific service to political committees: attaching custom sponsorship statements identifying certain individual contributors to the committees to political advertisements that have already been produced and paid for by these committees.[6] AOR001-02. In exchange for this service, the request states that political committees will pay Certified Voter a "commercially-reasonable" fee. AOR001. The request further states that Certified Voter

[4] *See* Advisory Opinion 2014-09 (Reed Marketing) at 3 (corporation developing and marketing affinity credit card program between banks and political committees is commercial vendor within the meaning of the Act and Commission regulations if its political committee customers pay "the usual and normal charge (or other consideration of equal value) for [its] ordinary services as a commercial vendor"); Advisory Opinion 2010-06 (Famos) at 6 (same). *See also* Advisory Opinion 2007-04 (Atlatl) at 3-4 (corporation processing credit card contributions for political committees is commercial vendor, in part, because it provides these services in the ordinary course of business and at the usual and normal charge).

[5] Because limited liability companies acting as commercial vendors necessarily do not make or facilitate contributions to political committees, the Commission need not address whether Certified Voter has elected to be treated as a corporation or a partnership for federal tax purposes. *See* Advisory Opinion 2012-09 (Points for Politics) at 5 (although limited liability company treated as partnership for federal tax purposes "may generally make contributions consistent with the Act and Commission regulations, if it is acting as a commercial vendor under its proposal, it would not make any contribution at all"). *See also* 11 C.F.R. § 110.1(g).

[6] As the Commission has noted in prior advisory opinions involving commercial vendors, there is an analytical distinction between providing a service to a political committee and providing a service to a contributor. *See, e.g.*, Advisory Opinion 2012-09 (Points for Politics) at 6. This distinction is legally significant because Commission regulations define a commercial vendor as a person providing goods or services "to a *candidate or political committee*." 11 C.F.R. § 116.1(c) (emphasis added). The Commission has historically treated the recipient of a business's services as the party who entered into a contractual relationship with the business. Advisory Opinion 2012-09 (Points for Politics) at 6. *See also* Advisory Opinion 2011-19 (Giving Sphere) at 7; Advisory Opinion 2011-06 (Democracy Engine) at 5. Here, Certified Voter's services could conceivably be viewed as benefitting both the political committee that retains its services and the contributor who ultimately receives a sponsored ad. According to the request, however, political committees would retain and pay for Certified Voter's services—not the contributors who elect to sponsor advertisements and who will only interact with the political committee. *See* AOR001-02. Therefore, Certified Voter would provide services to the political committees, not contributors, and would not be disqualified from acting as a commercial vendor under 11 C.F.R. § 116.1(c).

will conduct its business "as a commercial vendor" to its customers, and will not "act[] as a campaign or PAC in this process." AOR001. The Commission assumes these statements to mean that Certified Voter will furnish its services for a genuinely commercial purpose and not for the purpose of influencing a federal election. Provided that these representations by Certified Voter are and remain accurate,[7] Certified Voter would indeed qualify as a commercial vendor under 11 C.F.R. § 116.1(c).[8] Accordingly, when providing its services in this capacity, it will not make in-kind contributions, or facilitate the making of contributions, to its political committee customers.

This response constitutes an advisory opinion concerning the application of the Act and Commission regulations to the specific transaction or activity set forth in your request. *See* 52 U.S.C. § 30108. The Commission emphasizes that, if there is a change in any of the facts or assumptions presented, and such facts or assumptions are material to

[7] The Commission notes, however, that the nature of the service(s) that a business furnishes to political committees may necessitate consideration of additional or different factors to determine whether it qualifies as a commercial vendor under 11 C.F.R. § 116.1(c). For example, the Commission has consistently required commercial vendors providing contribution processing services to political committees to demonstrate not only that their services are rendered in the ordinary course of business for the usual and normal charge, but also that they forward earmarked contributions to candidates through separate merchant accounts and adopt adequate screening procedures to ensure that they are not forwarding illegal contributions. *See, e.g.*, Advisory Opinion 2019-04 (Prytany) at 5.

[8] This conclusion is consistent with recent Commission decisions concluding that businesses providing *bona fide* commercial services to political committees meet the regulatory definition of a commercial vendor. *See, e.g.*, Advisory Opinion 2008-10 (VoterVoter.com) at 6-7 (corporation purchasing airtime for political advertisements created by both the corporation and individuals is commercial vendor engaging in *bona fide* commercial activity when operating "for genuinely commercial purposes and not for the purpose of influencing any federal election"); Advisory Opinion 2014-09 (Reed Marketing) at 3-4 (corporation developing affinity credit card program between banks and political committees is commercial vendor because it enters into similar agreements on similar terms with non-political clients); First General Counsel's Report, MURs 5474 and 5539 (Dog Eat Dog Films, Inc./Michael Moore) (May 25, 2005) (concluding production and distribution of film criticizing presidential candidate is *bona fide* commercial activity which Commission has previously declined to regulate in appropriate cases without regard to the content of the film itself).

a conclusion presented in this advisory opinion, then the requestor may not rely on that conclusion as support for its proposed activity. Any person involved in any specific transaction or activity which is indistinguishable in all its material aspects from the transaction or activity with respect to which this advisory opinion is rendered may rely on this advisory opinion. *See* 52 U.S.C. § 30108(c)(1)(B). Please note that the analysis or conclusions in this advisory opinion may be affected by subsequent developments in the law including, but not limited to, statutes, regulations, advisory opinions, and case law. Any advisory opinions cited herein are available on the Commission's website.

On behalf of the Commission,

Shana M. Broussard
Chair