American Target Advertising, Inc.

Pioneers in direct response fundraising since 1965

January 26, 2005

VIA UPS OVERNIGHT

Office of the General Counsel
999 E Street, N.W.
Federal Election Commission
Washington, D.C. 20463

Re: MUR 5635

RECEIVED
FEDERAL ELECTION
COMMISSION
OFFICE OF GENERAL
COUNSEL

2005 JAN 27 P 12: 06

Dear Sir/Madam:

This is a summary of the attached detailed submission of American Target Advertising, Inc. *et al.* (ATA) in response to the Report of the Audit Division in the above-referenced matter.

ATA is a direct marketing agency that specializes in direct mail fundraising for nonprofit clients. The Report finds reason to believe that ATA's contract and program for Conservative Leadership PAC (CLPAC) resulted in various impermissible contributions.

The contract between ATA and CLPAC is known as a no-risk contract because CLPAC's liability for expenses of the direct marketing fundraising program are capped at a percentage of the amounts raised.

ATA's Chairman pioneered ideological and political direct mail 40 years ago, and his companies have used substantially the same type of no-risk contract in all that time.

As a matter of law, therefore, there were no impermissible contributions because ATA extended credit to CLPAC consistent with 11 CFR 116.3. The contract and the program were extensions of credit in the ordinary course of ATA's business, and the terms were substantially similar to extensions of credit to nonpolitical organizations that are of similar risk and size of obligation.

The length of ATA's submission is due in part to the complexity of direct mail in general and the facts of the CLPAC program more specifically.

However, the length is also due largely to ATA's observation that the Report disregards, even mischaracterizes material facts found in ATA's previous submissions in response to the Interim Report of the Audit Division.

ATA respectfully suggests that these mischaracterizations and omissions of material facts should cause a troubling concern that the Report seems bent on reaching

9625 Surveyor Court, Suite 400 • Manassas, VA 20110 • (703) 392-7676 • Fax (703) 392-7654

conclusions in spite of the facts, if not the law. Therefore, ATA's submission includes relatively detailed exceptions to findings in the Report, to-wit:

1. the Report fails to acknowledge in any real sense the forms of valuable consideration ATA received under its no-risk contract including (a) exclusive marketing rights to the housefile, and (B) higher than standard fees;

2. the Report fails to acknowledge the contractual obligation to disburse money to CLPAC from a percentage of housefile net income;

3. the Report fails to acknowledge facts from ATA's prior submissions showing that the losses incurred were caused by extraordinary, unpredictable circumstances not within ATA's control; and

4. the Report fails to acknowledge that the postage lenders to ATA had previously established financing relationships with ATA, and that it was and is ATA's ordinary course of business to rely on such lenders to help finance ATA's mail programs for its nonpolitical clients. One of the lenders goes back 15 years in its financing relationship with ATA.

Thus, the Report omits serious and material facts in making its findings. Additionally, the Report disregards the Commission's own regulations and rulings.

I would welcome questions from your office about the matters addressed in ATA's submission.

Respectfully submitted,

Mark J. Fitzgibbons
President of Corporate and Legal Affairs

Enclosures

SUBMISSION OF AMERICAN TARGET ADVERTISING, INC.
in response to the
REPORT OF THE AUDIT DIVISION ON THE CONSERVATIVE LEADERSHIP PAC

MUR 5635

This submission is in response to the Report of the Audit Division on the Conservative Leadership Political Action Committee (CLPAC), and the accompanying January 11, 2005 letter from the Federal Election Commission stating that the Commission found reason to believe that there have been violations of the Federal Election Campaign Act, as amended.

This submission is made on behalf of American Target Advertising, Inc. (ATA), The Viguerie Company (TVC) and ConservativeHQ.com, Inc. (CHQ).

This submission further addresses the findings as they pertain to other vendors identified in the Report.

25049134959

I. Background.

ATA entered into an agreement with CLPAC on or about July 6, 2000, which agreement was subsequently amended (the "Contract"). ATA is a direct marketing agency owned by TVC. The Contract expressed the terms of ATA's direct marketing and fundraising services for CLPAC's independent expenditure program. CHQ is a corporation affiliated with TVC that provided Internet services.

To address certain facts and conclusions in the Interim Report of the Audit Division, ATA made written submissions to the Audit Division. Those submissions were made under cover of letters dated March 4, 2004, March 25, 2004, March 29, 2004 (two separate letters of that date), March 31, 2004, and April 1, 2004.

This submission fully incorporates by reference the entirety of those 2004 submissions, including their requests for confidentiality based on the proprietary information discussed and provided therein.

The Report acknowledges that the Contract was a "no-risk" arrangement, which appears to be the crux of finding reason to believe that impermissible contributions were made to CLPAC when ATA and vendors either advanced funds to cover the costs of the direct mail program, or failed to recover amounts billed for goods and services.

II. Legal Basis of ATA's Arguments that the Report Errs in Finding Reason to Believe that Impermissible Contributions Were Made.

ATA extended credit under its no-risk contract with CLPAC consistent with 11 CFR 116.3. The Contract itself, the use of third-party financing, the assumption and payment of debt by ATA to third-party vendors, and the disbursements to CLPAC were entirely consistent with ATA's extension of credit in its ordinary course of business on terms that were substantially similar to extensions of credit to nonpolitical debtors of similar risk and size of obligation.

Therefore, under the Commission's own regulation, 11 CFR 116.3, neither ATA nor any vendor made an impermissible contribution to CLPAC.

III. ATA's Exceptions to The Report's Factual Findings and Conclusions.

Finding 3.

1. The Report fails to credit a major form of consideration under the Contract; to-wit: that ATA received a copy of the CLPAC housefile, and ATA was granted the exclusive marketing rights to those names. Such exclusive marketing rights are valuable financial consideration for the potential for loss under the marketing/fundraising Contract. This form of consideration is consistent with ATA's contracts for nonpolitical clients.

2. The Report fails to acknowledge the Contract's requirements to disburse housefile net income. The Report concludes that CLPAC received disbursements of $465,000 from the escrow account, and such receipts exceed those provided in the Contract. The Report fails to mention or even acknowledge that the initial Contract provided that CLPAC was to receive **70 percent of the net housefile income**, and was amended to provide that CLPAC was to receive only 50 percent of the net housefile income in consideration of receiving net income from the prospect mailing before the $1,000,000 prospect income reserve was met.

3. The Report fails to credit ATA's higher fees against the losses. ATA's prior submissions explained that ATA not only charged CLPAC 25 percent more than its customary fees at the time of the Contract, but 100 percent more than the industry standard fee. Therefore, a portion of what the Report would find as prohibited contributions results from ATA's charging higher fees, which is the opposite of the standard set forth in former section 100.7, current section 100.52(d) of 11 CFR.

4. The report fails to acknowledge the impact of the post-2000 election litigation, which delayed the determination of the presidency, and its concomitant affect on the ability of ATA to do debt reduction mailings under commercially reasonable standards.

5. While the Report does acknowledge in part ATA's explanation in its prior submissions of major losses resulting from botched mailings late in the direct mail cycle, the Report fails to acknowledge the impact of those financial failures on the program. These failures resulted not only in the loss of perhaps millions of dollars in revenues, but diverted use of what monies were raised, and even increased the costs of the direct mail program. The Report fails to acknowledge that ATA made commercially sound decisions that may have resulted in higher costs, **but ultimately prevented larger losses than what these failed mailings could have cost.**

The Report reached conclusions that the no-risk arrangement for the CLPAC program and the resulting losses were impermissible contributions. However, AO 1979-36 expresses the policy that, consistent with 11 CFR 116.3, such no-risk contracts do not result in impermissible contributions if such contracts are used in the ordinary course of business.

Finding 1.

Additionally, ATA takes exception to the conclusions of Finding 1, specifically:

6. The amount of impermissible contributions that the Report would find as applied to the postage lenders is based on billings, not advances. ("Three individuals and a corporation *billed* CLPAC $1,835,335 for postage, list rental, and *interest*.") Interest is profit for any lender, and is not part of the money advanced. Therefore, ATA takes exception to the Report's conclusions that billings are an acceptable basis on which the FEC may assess impermissible contributions.

7. The Report also concludes that "[the lenders] did not provide any services that required the use of postage and/or list rental." The lenders who provided extensions of credit and financing not only did so in the normal course of ATA's direct mail programs for its non-political clients, but all had existing relationships with ATA.

8. The Report concludes that the postage loans addressed in Finding 1 were impermissible contributions, citing MURs 3027 and 5173. MUR 3027, however, seems to support ATA's position that the advances to the direct mail agency from third parties other than banks to pay for certain costs of direct mail fundraising program in the normal course of business of the direct mail agency do not constitute impermissible contributions.

ATA in its prior submissions expressed that while certain vendors may be willing and able to provide goods and services on credit, some do not. The single largest cost of most direct mail pieces is postage, which must be paid in advance. AO 1979-36 expressly provides that the costs of the direct mail fundraising program may be advanced by non-banks. AO 1979-36 further approves the contractual process limiting the liability of committees to only a portion of the fundraising proceeds, thereby making the direct marketing agency liable to cover the extensions of credit and other advances of the direct mail program.

It is worth noting in advance that ATA is in the *business* of direct mail marketing and fundraising. Its clients are mostly non-political nonprofits.[1] ATA and the vendors that provided goods and services have a profit motive. The likelihood of greater profit for all vendors in this process is inextricably linked to the volume of mail. The flipside is that the risk of losses may increase when mail volumes increase.

ATA understands that when it serves different forms of clientele, ATA may be subject to different – even diametrically opposed[2] -- laws. However, ATA believed that its prior submissions proved that the CLPAC Contract and operations were consistent with extensions of credit in its ordinary course of business, and therefore consistent with the Commission's regulations and rulings.

IV. ATA's Ownership of, and Exclusive Rights to Market the CLPAC Housefile, Constitute Financial Consideration that Offsets the Proposed Impermissible Contributions under the Report.

Paragraph 8 of the Contract reads in relevant part:

> ATA and CLPAC shall each own a copy of the [CLPAC] housefile. As and for part of its consideration, ATA may use the housefile for any purpose. CLPAC shall be entitled to use its copy of the housefile for its own housefile communications only, and for no other purpose. CLPAC may not rent, sell, exchange, give away or otherwise transfer its copy of the housefile or any portion thereof.

See Exhibit A, copy of the ATA/CLPAC Contract. Under this provision, ATA owned a copy of the housefile, and was given the exclusive rights to market the file as part of its own file, called The Viguerie Company Masterfile (TVCMF). These exclusive rights, and the income to be generated from the list rentals and uses of such names and addresses is valuable consideration.

---

[1] Footnote 8 of the Report asserts that ATA's "non-political clients appear to include political organizations that are not political committees." Most of ATA's clients are 501(c)(4) and 501(c)(3) organizations, not 527 organizations.

[2] Contrary to the Report's conclusions that ATA's client received too much money, under the status of state fraud laws, the relatively low percentage of money that CLPAC received out of the total funds raised could have subjected both CLPAC and ATA to causes of action for fraud. The United States Supreme Court decided a case on this issue, but not until 2003. See, *Illinois ex rel. Madigan v. Telemarketing Associates, Inc.* 538 U.S. 600 (2003). Under the theory of fraud brought by the Illinois Attorney General, and supported by *amicus* briefs of 53 attorneys general and other state officials, the U.S. Justice Department and others, the costs of fundraising by professional agencies were irrelevant to whether fraud had been committed when fundraising solicitations resulted in only 15 percent being sent to the nonprofit. Such a theory of fraud could very well apply to political committees.

Paragraph 7 of the Contract also gave ATA the exclusive rights to do prospect mailings that refer to Hillary Rodham Clinton (later amended to include Al Gore) through the date of the election.

Importantly as well, paragraph 7 also gave ATA exclusivity in mailing the housefile fundraising letters, which is significant because CLPAC could not take the names that ATA developed in its prospect mailings and separately mail those and keep the income from names developed by ATA. This limited and controlled use of the housefile for CLPAC added value to the names for ATA's marketing and other rental purposes.

The Report fails to credit any of this valuable consideration against the direct mail losses against which the Report assesses claims of impermissible contributions.

The no-risk contract in AO 1979-36 provided that Working Names (the direct mail agency, or "Agency") was to conduct direct mail fundraising for Committee for Fauntroy ("Committee"). The direct mail program was to use a portion of the direct mail fundraising proceeds to meet its operating expenses. Three quarters of the proceeds were to be applied to the Agency's direct mail expenses, and one quarter were to be used by the Committee.

Thus, like the ATA/CLPAC program, the Committee's responsibility to pay fundraising expenses was capped by a percentage of what was raised.[3]

The Agency in AO 1979-36 incurred initial expenses in preparing and mailing fundraising letters. The Agency charged a fee of one-fifth the other costs of the direct mail program expenses, but capped the payment by the Committee at three-fourths of the direct mail receipts.

AO 1979-36 does not state whether the Agency had an exclusive arrangement with the Committee, nor does it state that the Agency had exclusive rights to market the names and receive the rental and list management income therefrom.

A. ATA Received More Consideration for the No-Risk Contract than the Agency in AO 1979-36.

[3] As explained in more detail below, the Report cites the sentence in paragraph 1 of the Contract ("CLPAC will be responsible for payment of costs incurred hereunder only to the extent of the amount of moneys raised under this Agreement") as mandating payment of costs up to 100 percent of monies raised. The Report misconstrues both the language and intent of that sentence. The phrase is one of limitation, not obligation, for CLPAC's liability to pay program expenses. This same type of limiting language is found in AO 1979-36 limiting the Committee's financial exposure with regard to the fundraising expenses.

The exclusive marketing rights to the CLPAC housefile, and the concomitant (1) easier access to those names for ATA's other clients at ATA's time of choosing and (2) the list management and list rental income derived from marketing the names to outside users is valuable consideration that the Report entirely neglects.

ATA respectfully suggests that the Report's omission of this consideration is both serious and material on its face.

Additionally, these exclusive marketing rights provide, in part, an explanation of why ATA believed that it should mail the quantity of prospect letters that it did. To understand this, it is necessary to understand some of the math behind direct mail for fundraising.

Prospect mail is otherwise known as acquisition mail. It is mail to people who have previously not responded with a contribution. The purposes of prospect mail are multiple, but the two most important purposes are (1) to obtain a contribution, and (2) add the name of the donor to the housefile for future housefile mailings.

A prospect fundraising program involves the selection of many lists, and mailing untested or tested copy and techniques. A prospect fundraising program is generally considered successful if two percent of the letters mailed result in contributions. In terms of covering costs of the mailings, a prospect mailing is considered successful if it raises 80 percent of the costs.

Subsequent mailings to the housefile are theoretically the mailings that generate a "profit" both for the organization itself and the agency.[4] The percentage of donors who contribute in response to housefile mailings is usually considerably higher than the percentage of donors who respond to prospect mailings since the housefile donors somehow have shown an interest in the program or issues and a propensity or ability to contribute.

So while the prospect mailings may generate losses under most direct mail programs, those initial losses are actually an investment in what is called the "lifetime value" of a donor.[5]

---

[4] This helps explain, in part, the distinctions between prospect and housefile income distributions found in the Contract under which CLPAC was initially to receive 70 percent of the net housefile income.

[5] As explained in ATA's prior submissions, anyone familiar with the rise of AOL or Amazon.com saw examples of how this works in the commercial world. Both entities spent great amounts of money on advertising designed to acquire customers. For some time, those companies generated operating losses, but were eventually profitable from sales, and wealthy from the asset of having databases of customers, which provide another stream of revenue from other Internet marketers who want access to those names.

ATA's prior submissions include contracts and data proving that its usual and normal course of business for nonpolitical clients relies on these same elements:

> the contracts are no-risk; i.e., the clients' liability for the direct mail expenses is limited to paying no more than what is raised;
>
> ATA obtains the exclusive marketing rights to the housefile, and the concomitant income, during and following the contract;[6]
>
> the contracts provide that a portion of the housefile net income is used to pay prospecting losses, as explained in more detail below.

As stated in ATA's prior submissions, ATA mailed over 10 million prospect letters for CLPAC. Even had those letters generated a contributor response rate of only one percent, and had the average contribution been $100 (including contributions to the prospect mailings and the subsequent housefile mailings), that would have resulted in $10,000,000 (10 million letters mailed times one percent response (100,000 contributors) rate times $100 average contribution). That would have covered all costs of the direct mail fundraising expenses and netted a considerable profit to CLPAC.

But even had the average contribution been less, and the costs of the direct mail program were not covered, a file of 100,000 names would result in considerable rental income. That many names would have easily resulted in more rental income in one year than the existing losses under the program.[7]

Therefore, the Contract itself was structured on sound direct mail principles with safeguards that were designed and *intended* to maximize not only the amount of net income disbursed to CLPAC (which is a significant reason why any nonprofit entity hires ATA or any other agency) but to maximize profits for the commercial vendors, ATA included, as well.

In AO 1985-28, the FEC gave its approval to a fundraising process of offering rebates that was consistent with the usual and normal business practices for a racetrack that proposed to host a political fundraising event. Like AO 1979-36, the FEC's approval

---

[6] Under the CLPAC Contract, ATA has the exclusive marketing rights forever, whereas for its nonpolitical clients, ATA typically receives the exclusive marketing rights for a limited number of years, either two, three or four, thus the value to ATA of its rights under the CLPAC Contract are even greater.

[7] The Report does acknowledge the names that ATA had acquired from two previous direct mail programs, which ATA believed were to be a sound basis for the expected success of the CLPAC program. As noted in ATA's prior submissions, it is estimated that ATA mailed eight million more names of outside lists. And the open-market value of the 300,000 names already in ATA's file from the recent contracts would have been increased by more recent and frequent contributions because recency and frequency are two important factors in selection of list rentals.

was given the *processes* of particular fundraising methods that were used by the commercial vendors in their normal business practices.

ATA's process for the CLPAC of using no-risk contracts was and is its usual business practice. Its process of acquiring the exclusive marketing rights to the names as consideration of the no-risk arrangement was and is its normal business practice.

B. AO 1991-18 Was Decided Based on the No-Risk Contract Not Being the Agency's Ordinary Course of Business.

FEC staff points to AO 1991-18 as holding that the elements of ATA's contract have been rejected since AO 1979-36 was issued. AO 1991-18 deals with a committee that asked if its telemarketing agency could operate a version of a no-risk contract. This Advisory Opinion expressly acknowledges that the telemarketing agency did not use no-risk contracts in its usual and normal course of business.

AO 1991-18 addresses the fact that start-up fundraising programs are "inherently speculative." The agency was to obtain a copy of the committee's housefile as and for partial consideration under the contract. This AO states that "the value of ownership of the list for clients other than the committee and its adequacy as compensation may be speculative." The contract provided different formulas of payment for prospect fundraising versus the "Current Donor Program."

AO 1991-18 is distinctly different from the CLPAC program, however, because it was not the ordinary course of business of the agency to extend credit in this manner. AO 1991-18 states that "[b]ecause of the speculative nature of the [prospecting] program as distinguished from the Current Donor Program, and the consequent possibilities of shortfall, the Commission cannot give its approval to the Prospecting Program ***in the absence of a record by [the agency] of the implementation of a program of similar structure and size in the ordinary course of business***." (Emphasis added).

It is well established that ATA's usual and normal course of business involves the use of no-risk contracts for its nonpolitical clients. It is also well recognized that ATA's Chairman pioneered political and ideological direct mail fundraising 40 years ago,[8] as explained more below.

The Report would therefore make findings of impermissible contributions not based on processes, but based on failed results and losses of a direct mail fundraising program. No fundraising or direct mail agency can predict or certify results in advance. However, ATA did establish reasonable commercial safeguards to compensate it in the event of losses. These are entirely consistent with over 95 percent of its contracts with

[8] In fact John F. Kennedy, Jr.'s political magazine *George* recognized as number 63 of the 20th Century's 100 most important political moments the creation of mass political direct mail by ATA's Chairman.

nonpolitical clients that include 501(c)(3) and 501(c)(4) organizations that are distinctly not political committees under IRC 527.

The inclusion of the exclusive marketing rights as partial consideration to ATA accommodated the potential risk of losses in building the housefile was and is consistent with ATA's ordinary course of business.

V. The Report Errs by Failing to Acknowledge the Contractual Obligation of ATA to Disburse a Percentage of Housefile Net Income to CLPAC.

The Report also finds that "based on the amount deposited into the escrow account and the apparent losses by ATA, the distribution of $465,000 to CLPAC represents a contribution from ATA."

ATA respectfully suggests that the Report misreads the Contract. The Report's omission of any reference to the obligation to disburse a percentage of the housefile net income to CLPAC is both serious and material.

2504413495

ATA, as noted above in Footnote 3, points out that the Report misreads the following sentence from Paragraph 1 of the Contract:

> CLPAC will be responsible for payment of costs incurred hereunder only to the extent of the amount of moneys raised under this Agreement.

As described above in discussion of AO 1979-36, this sentence is clearly one of *limiting* CLPAC's obligations, which is the essence of a no-risk contract. This sentence, especially when read in conjunction with the entirety of the Contract, limits CLPAC's liabilities to vendors to only what is raised in the direct mail program, which is exactly like the no-risk contract in AO 1979-36 in this regard.

Paragraph 4 of the Contract creates an affirmative obligation to disburse to CLPAC 70 percent of the net housefile income, later amended to 50 percent of the net housefile income.

Therefore, on its face, the Report omits this very important contractual formula for disbursement of income, and misconstrues the no-risk provision into an obligation to pay 100 percent of the gross income from both prospect and housefile mail towards expenses before CLPAC received money.

A. The Failure to Disburse Funds Could Have Constituted a Basis for an Action at Fraud.

The Report reaches the following conclusion based on its misreading of the Contract and omission of material facts: "[i]f the terms of the Agreement were followed, CLPAC should have been responsible for, at a minimum, expenses totaling $4,666,695."

That conclusion is not only improperly derived, as it is contradicted by the terms of the Contract, but assumes that in operation ATA violated the Contract by disbursing money to CLPAC before all expenses were paid. That, neither, is the case.

Additionally, the overall percentage of the money received by CLPAC is less than 10 percent of what was raised from both prospect and housefile mailings ($465,000 divided by $4,666,695). In the context of ATA's usual course of business and fundraising industry standards, that is low.[9]

In 2003, the United States Supreme Court ruled on a challenge by the Illinois Attorney General against Telemarketing Associates, a professional fundraising agency, that its contract and fundraising activities, under which its nonprofit client received 15 percent of the fundraising proceeds, constituted fraud. The other 85 percent of the fundraising proceeds were applied to fundraising costs. The case began in 1991 when the Illinois Attorney General filed suit in state court. See, *Illinois ex rel. Madigan v. Telemarketing Associates, Inc.*, 538 US 600 (2003).

The gist of the case was that professional fundraising programs that seek money for nonprofit causes, but distribute only 15 percent to the ultimate beneficiary of such fundraising programs, constitute fraud on the donors unless the percentages are disclosed in the solicitation.

The Supreme Court ruled that such solicitations and the concomitant disbursement of 15 percent of funds does not constitute fraud. However, this case evidences the state of the regulatory environment in which ATA operates and operated at the time of the CLPAC program.

The theory of the *Madigan* case, including the claims under state law for fraud, would apply to professional fundraising for political committees, although that case involved a non-political nonprofit fundraising program conducted by a commercial agency. *Amicus* briefs in support of Illinois were filed by the U.S. Department of Justice, and Federal Trade Commission, and *53 state attorneys general or other state officials*.

Thus, it is apparent to ATA that it was subject to at least the potential that both federal and state agencies believed that fundraising agencies have a legal obligation to disburse at least some percentage of funds raised to its clients. While the Report claims that CLPAC's receiving less than 10 percent of the gross fundraising proceeds is too much, state law enforcement officials and federal agencies deemed 15 percent too little.

ATA understands that fundraising programs need to cover at least some costs otherwise the ultimate beneficiaries of the contributed donations (the nonprofit organizations or the political committees) cannot function.

[9] Even under the no-risk arrangement in AO 1979-36, the Committee was to receive 25 percent of the fundraising proceeds regardless of the fact that program expenses could have exceeded the other 75 percent.

At the same time, ATA recognizes that in the solicitation process and the letters soliciting donations are for express purposes other than covering just the fundraising costs themselves. For ATA's nonprofit clients, the solicitations may be raising money to provide hospitalized veterans with therapeutic kits, or providing money for centers that treat drug-troubled teens. In the CLPAC program, the solicitations expressly sought contributions so that the client could make independent expenditures through newspaper ads and other media.[10]

Thus, every fundraising program conducted by ATA does result in disbursements of some percentage of housefile net income to its clients. ATA relies on its process set forth in its contracts to recoup losses, and ultimately pay for these losses, whether through future mailings or through other forms of consideration.

B. Losses Are a Part of the Fundraising Business.

The Report, on page 17, states that "[i]t was also observed that it is unlikely that in the normal course of ATA's business it enters into contracts that result in multimillion dollar losses and continues to operate."

In its March 4, 2004 submission, ATA did provide examples of large and sustained fundraising program losses, to which the Report gives faint and even incorrect recognition. On page 17, the Report reads:

> Information was provided on three other clients, all nonprofit organizations that, like CLPAC, have received proceeds from their fundraising programs while the costs of the programs *exceeded revenue*. The third was terminated early with ATA assuming a portion of the unpaid balance. The others eventually made a profit. Unlike CLPAC, each of the three examples appeared to be multi-year contracts. (Emphasis added.)

Referencing page 5 of ATA's March 4, 2004 submission to which the Report apparently refers (see Exhibit C, page 5 of the March 4, 2004 letter), the Report not only manages to draw the most adverse conclusions based on its mischaracterization of the facts, but misinterprets or otherwise misrepresents ATA's submission as well.

CLPAC was an independent expenditure program, so by necessity its duration and focus was limited to the 2000 election. ATA nevertheless charged higher fees and added other forms of consideration to reflect this fact.

Secondly, the Report's factual assertion that "[t]he others eventually made a profit" is nowhere stated in ATA's submission, and is in fact *false*.

[10] ATA's clients also need funds to pay staff, rent and other overhead expenses in addition to their other program expenditures.

2504412480

Referencing Exhibit B, Client T had a ledger of over $2 million in 2002, which was larger in 2003, yet the client received disbursements of $267,100 and $350,000 respectively. Client A's ledger was in excess of $1 million in both years, but received $253,532 and $252,956. Neither program was or is now making a "profit."

Thus, ATA has already demonstrated that in ATA's normal course of business, even where significantly large program losses occur, money is disbursed to its clients consistent with the contractual obligations to disburse some percentage of housefile net income or prospect income.

That CLPAC received income was not, as the Report represents, a violation of the terms of the Contract itself, but was required by the terms of the Contract. That is consistent with the process approved in AO 1979-36 that the committee receive income regardless of program expenses.

C. All Direct Mail Fundraising Is Inherently Speculative.

The Contract provided that as and for partial consideration of the no-risk process, ATA received exclusive marketing rights of the CLPAC housefile, consistent with ATA's usual and normal business processes for nonpolitical clients.

Paragraph 4 of the Contract not only required ATA to disburse a set percentage of housefile net income to CLPAC, but the Contract also provided that the percentage of housefile net income not paid to CLPAC was to be applied to prospect losses. This also is consistent with ATA's contracts for nonpolitical clients.

All direct mail must be financed. All existing large files were once small files, and these larger files were built by mailing prospect letters either at no profit or at losses. The names added to these housefiles, and subsequent mailings generating subsequent profits, paid for these start-up costs.[11]

Larger files of the older, established committees such as the Republican National Committee or the Democratic National Committee have millions of dollars on hand and files of hundreds of thousand of existing donors. These larger, older committees can more easily finance their massive prospecting programs. These committees also until recently could rely on large soft-money donations.

Forty years ago, however, Mr. Viguerie revolutionized direct mail fundraising by applying commercial direct mail concepts and techniques. He was the first to use the concept of the lifetime value of a donor to mail prospect letters for the purpose of building larger housefiles, then using those housefiles to finance the initial losses incurred in building those files. Thus, these fundraising programs actually paid for themselves.

[11] The exception to this formula is when organizations already have their own large cash reserves on hand to finance the direct mail fundraising. This, of course presumes that organizations have wealth before they conduct fundraising.

The process that ATA uses now was pioneered 40 years ago, and nearly, if not virtually, every political committee, every nonprofit advocacy organization, and every charity that now uses direct mail for fundraising has copied those methods and concepts to one degree or another.

Direct mail now reaches millions of small donors. Political fundraising in the 1960s was limited to reaching just thousands of high-dollar contributors through other means.

Although under ATA's contracts money is disbursed to clients, even those that are incurring overall program losses, the formulae in ATA's contracts provide for multiple means by which ATA's risk of losses are compensated by the mail programs themselves.

ATA was contractually bound to make disbursements to CLPAC. The Report omits material facts about this. Such disbursements are not only sanctioned by prior FEC law, but are responsible given the business and regulatory environment in which ATA operates. ATA's usual and ordinary business practice is to disburse funds to its client even while multi-million dollar losses are being incurred.

2504913498

VI. ATA Charged Higher Fees to CLPAC Evidencing an Intent to Make a Profit, Not a Contribution.

In ATA's prior submissions, it showed that its own fees for the CLPAC program were at least 25 percent higher than its fees for non-political clients under no-risk contracts at that time, 33 percent higher than its fees for non-political clients not under no-risk contracts at the time, and 100 percent higher than the average industry fees at the time.

ATA charged CLPAC 10 cents per letter mailed, when the standard industry charge was approximately five cents. ATA charged $5,000 per package, but charged its nonpolitical clients either no package fee or fees ranging only as high as $4,000. ATA charged CLPAC 13.5 cents per name rented, and charged twenty cents for Giuliani names, when its average list rental fees on the market were merely 10 cents at the time. See Contract, paragraphs 5 and 6.

At the very least, this evidences ATA's intent to make a profit rather than a contribution. ATA did not charge less than the usual and normal fees; it charged *more*. This has several consequences.

Had ATA charged half its fees, which still would have been within industry standards, the overall debt of the program on which the Report makes findings of impermissible contributions would have been less. Some significant portion of money

paid to ATA could therefore have been paid to other vendors had ATA charged the industry standard.

It would take more than the 15 days allotted to respond to the Report for ATA to go back and calculate what portion of the debt results from ATA's having charged these higher than normal fees, so ATA respectfully reserves the right to supplement its submissions should the Commission still believe that ATA made an impermissible contribution.

ATA respectfully suggests that the result, again, is that the Report omits material facts and draws the most adverse conclusions possible that are in contravention of the facts. The portion of the ledger increased by ATA's higher fees is still counted towards the impermissible contribution. That not only flies in the face of logic, but also seems contrary to the Act's language and intent.

Secondly, the fees that ATA charged CLPAC were higher than even ATA's normal charges for non-political no-risk contracts. Thus, ATA factored into its fees the higher risk associated with an independent expenditure fundraising program that inherently was of shorter duration than most of ATA's contracts. This added "buffer" of fees was intended as partial protection in the event that the program lost money, and the vendors looked to ATA to be paid.[12]

Again, referencing AO 1979-36, the contract provided that all costs of the direct mail fundraising program were to be paid out of 75 percent of that program's fundraising returns – regardless of the actual costs. AO 1979-36 states in relevant part:

> The Commission concludes that if, in fact, (1) the proposed financial agreement with its provisions for expenses to be initially *incurred* by Working Names, and for the limited liability on behalf of the Committee if the direct mail is "unsuccessful," is of a type which is normal industry practice and contains the type of credit which is extended in the ordinary course of Working Names' business with terms which are substantially similar to those give to nonpolitical, as well as political, debtors of similar risk and size of obligation, and if (2) the costs charged the Committee for services are at least the normal charge for services of that type, the amounts *expended* by Working Names will not be considered to be campaign contributions. (Emphasis added.)

By limiting the Committee for Fauntroy's financial exposure to just 75 percent of the fundraising proceeds, the Agency obviously guaranteed that it would be responsible to pay other vendors for expenses that exceeded 75 percent of the funds raised.

---

[12] The conclusions of Finding 2 of the Report are reached in part based on the facts shown by ATA in its prior submissions. Important among these was the fact that all of the vendors who either threatened litigation or otherwise entered into settlements did so against or with ATA, not CLPAC. Under the no-risk contract, ATA was deemed to be the obligor of the debt to the vendors, and the actions of the vendors in directing their efforts at ATA prove this.

25044124963

AO 1979-36, in the above-referenced quote, expressly authorized the contract under which the Committee had limited liability in the event of an "unsuccessful" direct mail program. Concomitantly, the FEC authorized the "process" of the no-risk contract under which the direct mail agency charged a fee at least equal to its normal fee, and was ultimately responsible – in advance of knowing the actual results of the direct mail program – for not only its own losses, but the entire program's losses, which would include all other vendors.

In AO 1979-36, the Agency does not represent that it charged a higher fee for its services to the political Committee than its fees for nonpolitical committees. In the CLPAC Contract, ATA charged more than its usual fees.

Had ATA not charged higher fees than its usual and normal fees for nonpolitical clients, the resulting debt of the CLPAC program would have been less. Had the CLPAC been successful, and paid the entirety of the debt, it would make no difference, of course, that ATA charged higher fees or its usual fees.

2504212495

VII. The Report Fails to Factor into Its Findings the Unique Circumstances of the 2000 Presidential Election Making Debt-Reduction Mailings Commerically Unreasonable.

Although ATA attempted to make clear in its prior submissions that among the circumstances compounding its losses was the unique and historic post-election litigation, the Report ignored these facts as well.

The Commission should be well familiar with the fact that the most lucrative fundraising period is immediately before an election.

The Commission also should know that the most lucrative debt reduction fundraising period is immediately following any election. The further away from the date of an election, the less donors respond as a general rule. This is especially true for an independent expenditure's fundraising program.

The post-election litigation, and the fact that the presidency was not settled until after the U.S. Supreme Court's decision in *Bush v. Gore*, decided on December 12, 2004, contributed to ATA's decision that it could not mail with regard to the debt associated with its Gore mailings until later than it would have absent the litigation.

That effectively preempted the opportunity to do at least two debt reduction mailings. The Contract provided that after the date of the election (November 7), ATA lost the exclusive right to mail housefile letters for CLPAC.

The Report fails to honor ATA's prior submissions explaining that this post-election situation made debt reduction mailings far less commercially reasonable. Had

this unprecedented post-election litigation not occurred, ATA could have mailed to reduce at least some amount of the debt on which the Report would assess an impermissible contribution.

VIII. The Report Does Not Adequately Describe the Reasons for the Losses of the Direct Mail Program.

In its prior submissions, ATA described and provided supporting documents showing that unexpected losses were caused by late and botched mailings closer to the date of the election than early in the program.

Page 17 of the Report references ATA's explanation, noting that documents were provided for what was referred to as the "Chicago vendors." The Report, however, gives slight regard to the facts, declaring only the following conclusion:

> However, our review of these documents cast doubt on who was at fault for the failed mailings. Further, ATA and TVC (the parent company of ATA) entered into agreements recognizing, and paying, the full amount as being owed to these vendors.

The facts, however, demonstrate that the problems were more extensive than this relatively cavalier assessment.

ATA provided documentation and explained that late in the program, at a time when both prospect mailings and housefile mailings were occurring in a critical several week period, three vendors were to handle approximately three million letters to be mailed. These mailings cost over one dollar per letter mailed.

It was explained that the timing of delivery of these letters was critical, given that response rates are highly sensitive to timing.

One of the vendors experienced a fire at their mail plant, delaying the mailing and delivery of the letters. ATA noted that there were disputes with the other vendors about when mail was scheduled by ATA, and when mail was supposed to be sent by these vendors.

ATA took emergency steps that ended up costing more money, and making the packages less effective, but that ultimately got these letters into the mail stream since a substantial portion of the "hard" costs of printing, lists, etc. had already been incurred. Among those emergency measures included (1) reducing the number of inserts, while although printed, would have taken more time to complete the insertion process of the letters, and (2) mailing at First Class postage, rather than the less expensive standard bulk rate postage.

2594124965

In ATA's fast-paced environment, the employee who handled these mailings did not maintain adequate contemporaneous records showing when the vendors may have been at fault for these delays, added costs, and other harmful affects.

Following the program, litigation almost ensued between ATA and these vendors, but it was settled with ATA's paying the vendors on their entire invoice amounts. The reasons that ATA settled by paying the full amounts, which were stated in ATA's prior submission, is that ATA lacked good documentation that would have affirmatively proven in a court of law the bases to claim offsets against these vendors. The ATA employee who handled these mailings was terminated from employment.

Thus, ATA did not wish to incur the legal expenses of litigation in lawsuits that, in its judgment, it could not win based on a lack of supporting documents, not based on a lack of merit. In other words, under good legal standards, and commercially reasonable conclusions, ATA had no choice but to pay the entire balances.

These losses happened late in the program, at a very critical time not only in terms of its being a usually lucrative pre-election period, but at a time when ATA had already committed to making those mailings. Had these extraordinary losses occurred earlier in the program, ATA may have been able to make other adjustments that would have ultimately limited the losses.

ATA was ultimately responsible for the success or failure of the direct mail program, regardless of who was at fault. CLPAC contracted with ATA to raise money. The program did not raise as much money as ATA, through advance projections, thought it would. Whether it be CLPAC or any of ATA's nonpolitical clients, it matters little if at all who was at fault for failed mailings. The fact is, they occurred.

The ATA Contract, however, was front-loaded with higher fees and consideration in the form of the exclusive marketing rights to the mailing list. ATA also had, by the arm's-length contract, other exclusive rights to act as the sole agency on behalf of CLPAC.

These other forms of consideration are all-the-more reason why it was commercially reasonable for ATA to pay the vendors even though they were partly responsible for the losses of the program. The Report seems to indicate its preference for ATA to litigate rather than settle with these vendors. But that replaces ATA's better judgment made at the time knowing the facts available to it with the Commission's hindsight without even honoring the facts that ATA has presented.

A. ATA Has Demonstrated That It, From Time to Time, Assumes the Obligation to Pay Large Sums to Vendors in Its Normal Course of Business.

In its prior submissions, ATA set forth examples of its having waived its fees and assumed the obligations to pay vendors for its nonpolitical client mailings. See letter dated April 1, 2004 generally, and page 1 of letter dated March 31, 2004 referencing

2504412496

waivers of $978,029 of ATA's fees out of an assumption of debt in the amount of $1,243,849.

Over the many years, ATA has paid or written off millions of dollars of its nonpolitical client debt consistent with its no-risk contracts. The Report makes no mention of the submissions, along with the examples of these payments by ATA in six figures just to individual vendors.

The Report indicates doubt of the facts presented by ATA, and diminishes the resulting adverse consequences to ATA. But such doubt appears to result from the Report's substantially disregarding the explanation and documents that ATA presented already, and the impact these losses had on the program.

B. The Report Would Punish ATA for Business Losses Even Though ATA Followed Processes that Were Approved by the Commission.

That the Commission would punish ATA for losing money would add penalty to harm already done to ATA. Given the facts, all that has been addressed in this and previous submissions, and the law as ATA understands it to have been, ATA respectfully suggests that the Commission must conclude that these business losses do not amount to an impermissible contribution.

The conditions existing at the time of the Contract, as described in prior submissions, led ATA to believe that it was poised to make the most amount of money for a short-term independent expenditure than any in history. It was the motive of profit, not the motive of making a contribution, that led ATA to mail in the quantities that mailed.

The business decision to mail in large quantities was based on sound data, not merely pipe dreams. ATA had concluded two very successful programs, as described in ATA's prior submissions, on issues that in terms of direct mail were hugely indicative that the CLPAC program would succeed.

When the facts are considered as a whole, and not reviewed in the most adverse, piecemeal approach as the Report does, the losses were indicative of the intent to make money, and events caused losses instead.

C. The Assumption of Losses Under the No-Risk Contract Did Not Amount to an Impermissible Contribution.

ATA recognized that these losses posed questions. ATA sought the legal counsel of an independent lawyer specializing in federal election law to address whether such losses, and ATA's post-program actions to deal with those losses were acceptable practices.

2594123967

I attached a copy of a letter dated April 30, 2001 from election lawyer Mark Braden to ATA. See Exhibit C. Mr. Braden addresses the losses of the no-risk program, noting that ATA received consideration in multiple forms for the guarantees of covering potential losses of the program.

The letter states, "[b]ased upon this contractual agreement, it appears that CLPAC has no present debt arising from the fundraising services provided in the contract to it by ATA." It goes on to further state,

> [a]ny decision of ATA and its vendors to reach a compromise on outstanding debts arising from service and goods provided to ATA to fulfill its contract obligations to CLPAC are commercial decisions. ATA is not a political committee, so any arrangements with vendors to resolve the outstanding debts for less than full invoice payments are not subject to any need to negotiate a debt settlement agreement under the Commission regulations.

Thus, it is a fact that ATA at least thought that it was operating under the law. Even after reviewing the Report, which contains various errors of fact and adverse conclusions based on erroneous facts, ATA respectfully suggests that the Commission has erred in finding reason to believe that ATA made impermissible contributions.

If ATA can be blamed for anything it is an excess of the desire to make money fast, but there have been "golden" windows of opportunity before that ATA knows happen from time to time. Such successes are not penalized by the Commission, although the processes are the same.

In essence, the Commission wants to penalize ATA for a direct mail failure. Even under the rigid requirements of the Act, that cannot be correct because it is inherent in any business's extension of credit that the risk of losses is present. Therefore, ATA respectfully suggests that the CLPAC program was consistent with 11 CFR 116.3, and does not result in a contribution from ATA, TVC and CHQ to CLPAC.

CONTINUED AT NEXT PAGE

IX. In Finding 1, the Report Would Find Impermissible Contributions Based on Incorrect Standards.

Finding 1 concludes that four of ATA's lenders made impermissible contributions totaling $1,835,335. The Report, at page 6, states that the loans were made for "postage, list rental and interest." The loans were made by one corporate entity, Mail Fund, Inc. (MFI), and three individuals, Edward Adams (Adams), Marc Roffman (Roffman) and Ben Hart (Hart).

As a preliminary matter, the Report would assess impermissible contributions based on "billings," rather than the amounts advanced to ATA and the mail program. This appears to be the wrong standard regardless of the other policy and legal matters addressed below, since billings include interest, which is profit.

If the Commission were to find that the postage advances constitute impermissible contributions, then only the amounts advanced, and not interest, should form the basis of the Commission's assessment.

ATA addressed in its prior submissions that these loans to ATA were at rates of either 24 percent per annum, or even 36 percent per annum. The interest was charged monthly, and was paid out of proceeds of the direct mail program.

Thus, amounts used for mailings that were returned before 30 days, which occurred especially for mailings sent at First Class postage (which deliver faster) resulted in effective interest rates higher than either 24 or 36 percent. This is so because these advances incurred upfront charges at the time the postage money was paid. Additional interest is charged after thirty days, but when advances are paid in twenty days, for example, the effective interest rate is higher than if the entire interest were spread over the entire month.

Given the fact that ATA had only 15 days to respond to the Commission's findings in the Report, and given the fact that ATA has had to spend an extraordinary amount of that time addressing the disputed factual and legal findings, ATA respectfully asks that the Commission reserves ATA's right to supplement this response to show what were the loan amounts advanced versus what was profit.

X. The Report Incorrectly Asserts that ATA's Postage Lenders Did Not Provide Services that Required Use of Postage and/or List Rental.

Page 6 of the Report states that "[the lenders] did not provide services that required the use of postage and/or list rental." ATA is not clear what the purpose of the sentence is, because from ATA's perspective it is unequivocal that ATA's lenders provided their services that are required for postage and list rental.

Postage and list rental are, of course, essential to direct mail. When direct mail goods and services cannot be acquired through credit terms, these costs must be paid in advance.

Other essential elements of any direct mail program, such as the paper and envelopes, also must be prepaid by the vendors that provide those goods and other hard costs essential to direct mail.

In fact, all direct mail for every political, nonprofit or commercial program involve, even require, prepayments of certain expenses.

All prepayments, of course, mean that all direct mail is financed in advance to some extent. Even political committees large enough, wealthy enough and creditworthy enough rely on vendors who are prepaying certain aspects of their direct mail goods. If the vendors are corporate entities, then corporations are financing the direct mail; if the vendor is a sole proprietor, than an individual is financing the mail.

Therefore, all political mail is financed to one extent or another by corporations and individuals in excess of the contribution limits. To avoid this conclusion is to avoid the reality of direct mail.[1]

Therefore, as a preliminary observation, ATA respectfully suggests that for the Commission to insist that the proper standard of financing direct mail is that all financing must be provide by federal banks under former 11 CFR 100.7(a)(1) without regard to the normal and usual business practices for the vendors nonpolitical clients would effectively, if enforced consistently, prohibit the use of all direct mail by all political committees.

A. Postage Always Must Be Paid in Advance Because the Post Office Does Not Provide Credit Terms.

As explained in ATA's prior submissions, of all the goods and services that may be provided on credit in any direct mail program (depending on, of course, the creditworthiness of the program), postage is absolutely never provided by the United States Postal Service on credit terms, and lists often are distinctly less available on credit terms.

Therefore, in ATA's normal and usual course of business for nonpolitical clients, ATA uses the services of postage/program lenders. ATA explained in its prior

[1] ATA tried to explain this fact to Commission staff in an effort to elucidate that direct mail programs are based on the fact that certain nonprofit organizations and political committees are just unable to mail without some form of prepayments or credit, because even the vendors who provide services to the larger committees rely on the creditworthiness of those committees in the vendors' paying for goods in advance. Staff suggested that ATA file complaints against these committees, which was not the point of ATA's explaining this basic direct mail concept.

submissions that ATA is a relatively small business, as are most creative direct mail agencies.

As noted above and in ATA's prior submissions, nonprofit direct mail fundraising is inherently speculative. ATA does not have the capital reserves to finance all of its direct mail, so it relies on established relationships with its lenders to advance funds to the programs to cover expenses that may not be provided on credit terms.

Due to the lack of ATA's own capital, the inherently speculative nature of direct mail fundraising, and the nature of ATA's collateral, financing from banks is impossible to obtain.[2] Thus, ATA relies for its financing on non-institutional lenders who are typically involved with ATA and who understand direct mail.

The exceptionally high interest charged by ATA's lenders reflects the inherent assessment of "risk" and the marketplace fact that institutional lenders will not finance ATA and the mail.

That ATA has used this similar business model for 40 years indicates that such financing is part of ATA's usual course of business for its nonpolitical clients.[3]

Thus, the premise stated in the Report that ATA's lenders did not provide "services that required the use of postage and/list rental" may have some meaning that ATA cannot discern, but ATA respectfully suggests that such premise fundamentally ignores the realities of direct mail, and is therefore wrong. Postage is required in any direct mail program, of course.

B. The Postage Lenders Had Established Relationships with ATA, Not CLPAC.

As to the specific lenders noted in the Report, ATA explains as follows.

Adams was an ATA employee who financed ATA's nonpolitical mail, as demonstrated by ATA's prior submissions.[4] ATA respectfully suggests that the Report

[2] The "collateral" is the mailing lists. Banks have informed ATA that this is not the type of collateral that banks use to extend credit.

[3] It is one of ATA's specialties to build files for start-up or other under-funded nonprofits. Thus, ATA's nonprofit clients typically are not bankable themselves. Of course, the Commission certainly recognizes that this is not a reflection on the worthiness or merits of these nonprofit clients themselves. From many small acorns have grown large oak trees, and ATA has been involved in the start-up phases of many of the now-largest, most successful nonprofit organizations in the country. Not only that, ATA's model of building files has been copied by other agencies and organizations of every type of ideology including non-ideological charities.

[4] To finance more of ATA's mail at more profit, Adams eventually collected partners, which partnership is named "Braintree." It does not appear that Braintree partnership lent to ATA at the time of the CLPAC program, but this partnership in which Adams was a principal, is a logical

makes several incorrect observations, which demonstrate further that the Report draws the most adverse conclusions based on a misunderstanding of the direct mail process and the Contract.

The Report, at page 7, incorrectly asserts that "Adams is apparently associated with CLPAC, as he approved the payment of several telemarketing invoices received by CLPAC from [ATA]."

ATA, not CLPAC, approved all direct mail invoices. Acting in his capacity as an ATA employee, Adams (and other employees) reviewed and rejected, suggested changes to the vendors in the event of incorrect charges, or approved vendor invoices.

Secondly, the Report, same page, also asserts "Adams advanced funds to other business entities that provided direct mail or telemarketing services to CLPAC. It is not clear, from the records made available, to which entities postage advances were made."

It is necessary to understand how direct mail operations work for the Commission to understand why postage lenders make payments to vendors.

Vendors that are known as "mailshops" handle the processing of direct mail in the stages between printing and being mailed by the United States Postal Service. Mailshops insert the printed materials into the envelopes and affix mailing labels (when labels are used) and postage to the envelopes. They sort the mail by zip codes, and deliver the mail to the respective Post Offices. Some mailshops handle enough volume that they actually have a U.S. Post Office facility on the premises of the mailshop.

Some mailshops have postage accounts of their own, from which they draw their own funds or the collective funds of their clientele. These postage accounts are somewhat like the postage meters found in most small offices, except in much larger dollar amounts, and able to affix more types of postage.

Some large mailshops with these postage accounts and enough capital will front the postage costs and bill that back in their invoice as part of their mailshop services. Postage is the single largest expense of many if not most mailings. Therefore, other mailshops with less capital, or who deem the mail program as not being creditworthy enough, will insist on payment of the postage by ATA in advance of actually affixing postage. This latter arrangement is more common.

Another fact that the Commission needs to know is that some mailshops use their own postage accounts, and therefore ATA must make the postage prepayment checks payable to the vendors themselves.[5] These mailshops then deposit ATA's checks (or

---

business extension of Adams. Adams did lend to ATA for nonpolitical mailings, as explained in ATA's prior submissions.

[5] Mailshops understand that checks need to clear, thus to get the mail out on time, they use these accounts in their own names. Having such a "pool" of funds ensures that their volumes of mail for their customers is sent on time.

their postage lenders') into their own postage accounts, and subsequently affix the same amount of postage "value' to the letters.

Other mailshops use yet another method, whereby they do not use their own accounts. ATA (or the lenders) therefore must make postage checks payable to the U.S. Postmaster. This method has become less frequently used by mailshops as both mailshops and the U.S. Postal Service have become more sophisticated.

Whatever the method used by the respective mailshops, the "ultimate" vendor to which all postage prepayments are made is the United States Postal Service regardless of how or to whom the checks are cut. And no matter what particular method is used by the mailshop, such postage is necessary for mail to get out. Mailshops understand this, which advances their business interests of getting paid.

Understandably, the Commission may not understand these intricacies that, as stated above, are rudimentary and even second-nature in direct mail. But the core concept is this basic: *no postage, no mail; no mail, no money; no money, nobody gets paid.*

C. The Lenders Lent to ATA's Direct Mail Program

Adams, being smart and enterprising, and having access to capital, understood that he could help ATA's profit-seeking goals by paying postage. Adams' postage funds were used by ATA for CLPAC and its other clients that are nonpolitical. Adams also made a nice profit on his advances to ATA's nonpolitical mailings under the same terms and arrangements.

Roffman is the principal of Premier Printing and Premier Services (Premier). Premier had been a major vendor providing print and mailshop services to ATA.

As explained in ATA's prior submissions, the direct mail business is competitive. ATA as an agency mails large quantities every year, and vendors are obviously eager to work for large-volume mailers. ATA solicits bids before mailings, and awards mailings to vendors based on many factors including price, quality of service, availability, etc. Vendors that can best guarantee that mail will be sent on time are especially valued, because the timing of mail is often essential to its financial success.[6]

Here again, Roffman paid postage as an essential element of getting mail out, and the postage he advanced was for mail at his shop.[7]

---

[6] As explained above, failing to meet mailing deadlines can also cripple the financial success of mailings. So a premium is placed on vendors who can ensure that the mail goes out on time.

[7] The Report at page 7 expresses some doubt that Roffman's postage was paid for mail at his own shop based on the fact that postage for one mailing (Job 014P) sent from Premier was not the result of Roffman's postage advance. The Report in this case fails to recognize that ATA's

Hart was another ATA employee. There is essentially no distinction between the circumstances for Hart than those described above for Adams. Given the length of this submission, therefore, ATA only states that Hart helped finance ATA and made a profit for himself. ATA's previous submissions also demonstrate that Hart lent substantially on ATA's mail for its nonpolitical clients.

MFI is in the business of lending for nonprofit direct mail. ATA and MFI have had an extensive relationship on most if not all of ATA's nonpolitical direct mail for many years preceding the CLPAC program and since. As stated above in the more general description of the need to finance postage, MFI did provide services for which postage and list payments were essential to ATA's direct mail program.

MFI also has a security interest in the TVCMF as collateral for his financing since he has financed more of ATA's programs and needs. As noted above, the TVCMF is the file containing the names of all of ATA's clients, which are added to the TVCMF as partial consideration of the contracts into which ATA enters. The TVCMF produces revenues from list rentals to third parties, and those revenues also provide a source of repayment to MFI for its financing of ATA.

2504412497

XI. ATA Relies on Postage Lenders in Its Usual and Normal Course of Business for Its Nonpolitical Clients.

The Report does not express any disagreement with ATA's previous submissions that ATA relies on its postage lenders as part of ATA's normal and usual course of business. As expressed in those submissions and in this submission, ATA believes that it has demonstrated that these lenders advanced postage in their own normal and usual course of business.

If the Commission does not find ATA's prior submissions conclusive to demonstrate this fact, ATA respectfully reserves the right to supplement its submissions. However, the Report seems to have accepted this foundation by its not addressing the "usual and normal course of business" in its findings about the lenders.

Therefore, it seems that the finding of impermissible contributions by these direct mail lenders rests solely on the fact that these lenders are not banks under former 11 CFR 100.7(a)(1).

The Commission, however, has already expressed its policy that former section 107(a)(1) is not an "absolute" standard. In AO 1979-36, the Commission expressly sanctioned an arrangement where a non-bank could advance money for the purpose of

---

postage sources were multiple and essentially fungible, and that ATA did not need Roffman to advance all postage for all mailings done at Premier.

funding elements of a direct mail program if such financing was part of the agency's normal and usual course of business for its nonpolitical clients.

Given that the Commission had already recognized that, at least in direct mail, costs are paid for in advance, which means that someone or some entity loaned money to the direct mail program, and given ATA's 40-year track record of financing its clients' mail often through use of non-bank lenders, certainly the Commission can understand that ATA thought, at a minimum, it was compliant.

For the Commission to exact a policy other than what was expressed in AO 1979-36 would require that small direct marketing agencies, like ATA, have either cash reserves of millions of dollars, or that only bank-creditworthy agencies can participate in this process.

It is a fact in the business world that commercial operations obtain their own financing from any number of sources. Some rely on banks, some on venture capital from non-banks. The Commission certainly recognizes the fact that small businesses lacking the type of collateral on which banks rely to make their loans, must obtain capital from sources other than banks.

Thus not only does ATA believe that it was compliant, but the consequences of the FEC's eliminating smaller, less creditworthy agencies from this process by prohibiting them from using alternative means of financing their businesses should merit substantially more consideration, if not advance public notice and debate.[8] [9]

ATA recognizes that AO 1979-36 has limitations. ATA believes that it was not exposing a "loophole." In fact, ATA believes that should the Commission conclude that these disclosed forms of ATA's financing be held as impermissible contributions, the Report itself would be fostering if not creating a loophole itself.

---

[8] Such an outcome would have further reaching consequences than may be evident. Large, established committees and incumbents with substantial bankrolls would be given a huge advantage since they typically can afford their own internal direct mail professionals with both the expertise and access to capital from the committees' reserves. Small, new and under-funded committees would be disadvantaged. These smaller committees must rely on outside professionals for their fundraising, otherwise they cannot compete. Restricting access to these agencies would obviously tilt the political balance, and would harm the political process.

[9] ATA does not believe this to be the official policy of the Commission, but in a meeting Commission staff expressed the belief that "[i]f a committee cannot afford to do direct mail, it should not do direct mail." ATA deals with many regulatory agencies that oversee and regulate the various forms of direct mail fundraising. While ATA has always tried to respect, follow and remain cognizant of the law, we have never been confronted with such a statement that so brazenly disrespects not only the business that we are in, but the First Amendment and certain other limitations on the authority of government.

Given that AO 1979-36 expresses the position that direct mail agencies may operate their programs while advancing certain necessary costs of the direct mail program under their usual and normal business practices, it is conceivable that billionaire financiers could evade disclosure by, instead of funding committees, funding direct mail agencies.[10]

ATA, therefore, not only believed that it was operating in compliance, but that it was complying within the larger disclosure policy purposes of the Act.

A. MURs 3027 and 5173.

For part of its legal authority, the Report cites MURs 3027 and 5173.[11] MUR 3027 involved a former TVC client, Public Affairs PAC (PAPAC), and a former TVC lender, Direct Marketing Financing and Escrow (DMFE). TVC was not a respondent in that matter.

MUR 5173 involved other programs entirely unrelated to TVC, but involving DMFE.

In MUR 3027, the Commission ultimately concluded that DMFE did not make an impermissible contribution. DMFE argued that it had an ongoing lending relationship with the agency, TVC, and thus the loans were made to TVC. Like the current matter, the lender was paid back first from the direct mail fundraising proceeds itself, and TVC guaranteed payment in the event that the fundraising proceeds were insufficient to cover the loans. DMFE also argued that it was unaware that the direct mail program involved a political committee.

The October 18, 1991 General Counsel's Report in MUR 3027 at page 5 states as follows:

> In this particular case, however, the facts presented suggest that certain mitigation is warranted in the resolution of this issue. Specifically, the facts noted above indicate that TVC, ***a large direct mail company serving political and non-political clients, had an established lending relationship with DMF&E***, a finance company organized to engage in the business of securing financing and escrow services for the need of the

[10] We trust that the Commission recognizes *ipso facto* that ATA's reliance on smaller, disclosed lenders is proof that just because we suggest this loophole would be a result of the Report's conclusions, ATA is not suggesting that this loophole would be appropriate for billionaires to finance committees.

[11] ATA is not familiar with the Commission's practice of citing matters under review, which while framed based on the Commission's interpretation of the law as part of its adjudicative authority, are nevertheless investigative conclusions. ATA is also troubled by the fact that the MURs are heavily redacted, affording the Commission, but not respondents, access to the entirety of these authorities used, and thereby putting respondents at a disadvantage.

> direct marketing industry. ***As part of its normal business practice,*** TVC obtained a line of credit from DMF&E to do its mailing for its client PAPAC. Apparently according to an agreement with DMF&E, TVC was legally liable for repayment of the credit expended. There is no evidence that DMF&E knew the PAPAC client to be a federal political committee. (Emphasis added.)

Thus, like the lenders to ATA for the CLPAC program, MUR 3027 accepted this "credit" arrangement to the direct mail agency based in large part on the established relationship. The other important consideration is that MUR 3027 dismissed its claim against DMFE based on its lending ***being the normal business practice of TVC, the direct mail agency.***

Therefore, MUR 3027 seems to actually support the arrangements used by ATA in the present matter.

ATA's normal business practice is to use the financing services of the lenders for its nonpolitical clients. ATA had established lending relationships with these lenders. Therefore, MUR 3027, while questioning the DMFE financing, ultimately concludes that these same factors did not result in an impermissible contribution by the lender who extended such credit.

B. MUR 5173 Is Distinguishable on the Facts.

MUR 5173 came approximately 10 years after MUR 3027. In that matter, the treasurer and founder of the committee, Ann Stone, was also the principal in the direct mail fundraising firm, Ann Stone Associates (ASA). The public record of MUR 5173 has been redacted, but it appears that the contract between the agency and the PAC was not a no-risk contract.

The General Counsel's Brief at page 32 in MUR 5173 states as follows:

> The apparent connection of the Committee's treasurer, Ann E. W. Stone, to ASA and the lack of information concerning the Committee's debt to this vendor raises questions about whether the extension of credit by ASA was in the ordinary course of business and whether ASA forgave any amount of the Committee's debt.

This "connection" of agency to committee through one common principal obviously presented the issue of whether the direct mail contract was at arm's length.

In the present matter, there is no such "connection" between the agency, ATA, and the committee, CLPAC, and therefore there is no such issue as to whether the extensions of credit were not at arm's length.

Also, it appears that the vendors at issue, including DMFE and the agency, waived some of their fees and costs, and otherwise forgave debt to the committee itself.

As ATA observed above, it is not apparent from the redacted record of MUR 5173, but there was no statement that ASA and the committee entered into a no-risk contract.

DMFE, which lent to the committee, substantially reduced its interest from 6.75 percent interest per month to 10 percent annually as part of the program. In the present matter, the lenders were paid all of their charges as agreed to upfront.

It does not appear from the record in MUR 5173 that DMFE had any prior relationship with the agency, ASA, so it does not appear that the normal and usual course of the agency was to rely on DMFE for its nonpolitical mail.

In the present matter, all of the lenders had ongoing and existing relationships with ATA, and it is settled that ATA relied on such lenders in its usual and normal business for nonpolitical clients.

The DMFE loan agreement in MUR 5173 was signed by the committee in addition to the agency. Thus, it was apparent that the committee was at least partially responsible to repay the loan, and thus the loan was to the committee.

Lastly, MUR 5173 notes that DMFE was previously aware, based on its involvement in MUR 3027, of the precise parameters of what was acceptable lending. In MUR 3027, DMFE had an established financing relationship with an agency whose ordinary course of business was to enter into no-risk contracts with nonpolitical clients.

DMFE's activities in MUR 5173 went beyond what the Commission had deemed acceptable in MUR 3027. DMFE did not establish an existing lending relationship with an agency whose usual course of business supported these arrangements. The Conciliation Agreement signed by DMFE in MUR 5173 states that DMFE "deliberately ignored the Commission's admonishment in MUR 3027."

Therefore, ATA respectfully suggests that the Report's reliance on MUR 5173 is misplaced, and that the Report's Finding 1 as to impermissible contributions is wrong both factually and as a matter of law.

XII. ATA Provided Detailed Explanations and Supporting Documentation in Its Prior Submissions That Were Either Misunderstood, Omitted or Ignored by the Report.

ATA respectfully suggests that it provided proof that the CLPAC program was entirely consistent in nearly every contractual element in ATA's usual and normal course of business.

ATA of course does not have records going back all 40 years of its existence, but ATA did provide relatively recent examples from what records it has and could locate in a brief amount of time to address the findings in the Interim Report.

ATA mentioned above that it incorporates its prior submissions into this submission, since it is apparent to ATA that the Report does not adequately recognize those prior submissions either in the quantity or quality of their content.

Nevertheless, ATA makes the following bullet-like references to various exhibits, which while indicative of ATA's usual business practices, cannot due to time and other limitations, do justice to explain 40 years.

A. Contracts.

Exhibit D. March 1993 contract with .01(c)(3) organization. No-risk provision in Section 2 limiting client's liability to no more than what is raised. Disburse 50 percent of housefile net income, then 70 percent under Section 3.B. Escrow reserve of $150,000. Section 3.B. TVC's fee six cents per letter. TVC has exclusive rights to market the housefile and keep income. Section 5.B.

Exhibit E. April 1994 contract with , a 501(c)(3) organization. No-risk provision in Section 2. Client receives 50 percent of the net housefile income, then 60 percent. Section 3.B. TVC advances postage. Section 5.C. TVC's fees are 7.5 cents per letter, and 10 cents for list rentals. TVC gets exclusive license to market the file and keep income. Section 5.A.

Exhibit F. January 1996 contract with .
No-risk provision in Section 2. ATA arranges for advance of funds to Client's direct mail program for postage and other costs. Section 3.C. ATA's fee is 6.5 cents per letter, and $2,000 per package. Section 4. ATA gets exclusive license to market names and keep income. Section 4.A.(i). ATA charges list rental of 10 cents per name. Section 5.C.

Exhibit G. November 1996 contract with No-risk provision in Section 2 ("Client shall be invoiced by vendors and suppliers including ATA for fees and/or the actual costs of goods and services, however, Client's responsibility for payment of goods and services for communications and/or solicitations under this Agreement shall not exceed the total amount of funds raised under this Agreement as provided for and described in Section 3. Except as otherwise provided in Sections 3, 5 and 9, ATA shall indemnify and hold Client harmless from any liability for any remaining unpaid balance of expenses resulting from any goods or services provided by any vendors or suppliers under this Agreement."). ATA may arrange advances of funds to Client's direct mail program for postage and other costs. Section 3.D. Prospect reserve of $300,000, later amended to $100,000. Section 3.B.(i). Client paid 70 percent of housefile net income, but amended September 1997 to 50 percent. Section 3.B.(ii). ATA's fees eight cents and seven cents per letter mailed, and $3,500 per package. Section 4. ATA gets exclusive rights to market the file and keep income. Section 5.A.

Exhibit H. December 1999 contract with No-risk provision in Section 3. ATA may arrange for postage and prepayment from funds borrowed from third parties. Section 4.B. Prospect reserve of $200,000. Section 4.C.i. Client disbursed $15,000 per month from housefile net income. Section 4.C.ii. ATA's fees are eight cents per letter, and $4,000 per package. Section 5. ATA gets exclusive marketing rights to the file. Section 7.

B. Disbursement to Clients Despite Large Ledger Balances.

Exhibit B, which is a previous submission in response to the Interim Report, demonstrates that ATA's client routinely receive disbursements of large quantities despite the fact that those program have large ledgers on their direct mail programs.

Referencing page 5 and the accompanying exhibits thereto, Client T had year-end ledger balances of $2,323,441 and $2,501,151 in 2002 and 2003, yet Client T was disbursed $267,100 and $350,000 in those years respectively.

Client A's ledgers were $1,377,627 and $1,244,640, yet received disbursements of $253,532 and $252,956 in 2002 and 2003.

C. Assumption of Nonpolitical Debt.

Exhibit I is a Promissory Note to one vendor, n the amount of $640,852,89, and dated August 1995. It covers ATA's debt on behalf of its nonpolitical clients $191,191.03), ($184,865.18) and ($315,486.20).

Exhibit J is a Promissory Note to vendor in the amount of $370,000. It covers ATA's debt on behalf of nonpolitical clients ($189,896.26), ($129,250.62) and ($50,945.39).

Exhibit K is a Promissory Note to in the amount of $105,868.78 for undisclosed nonpolitical clients.

Exhibit L is a June 2003 Agreement to pay vendor $349,573.91 on the program, and $335,169.37 on the program, plus interest.

D. Financing.

ATA presumes that the lenders identified in the Report will submit documentation showing that they provided financing to ATA in the ordinary course of business for nonpolitical clients.

In ATA's April 1, 2004 submission, ATA provided examples of advances made by its lenders identified in the Report. Exhibit M is a copy of those invoices and other

documents showing that these lenders advanced postage and other vendor payments on behalf of ATA for its nonpolitical clients.

ATA does not maintain records going back all 40 years, but reserves its right to supplement these examples with others. However, ATA trusts that these submissions amply demonstrate that the CLPAC program was ATA's ordinary course of business for nonpolitical clients.

XIII. Request to Appear Before the Full Commission.

ATA respectfully requests that Mark Fitzgibbons appear in person before the Commissioners to testify and answer questions that the Commissioners might have.

At the Commission hearing in which it accepted the Interim Report of the Audit Division, then-Chairman Smith noted that, as a policy matter, the Commission may wish to change to regulations prospectively as to the Commission's existing policy of allowing no-risk contracts, presumably as stated in AO 1979-36.

The purpose of ATA's request to testify would not be to address such rulemaking concerns, but to explain and answer questions in this adjudication setting the admittedly complex but purposeful elements of the direct mail program at issue.

It is apparent from ATA's reading of the Report that the Report either does not understand at least some of the important facts and concepts explained in ATA's prior submissions at the Interim phases, or that the Report does not give credence to those submissions.

ATA understands that direct mail and the facts of the CLPAC program are complex. However, ATA also respectfully suggests that ATA should, more than most respondents, be given credence when it comes to explaining the complexities of direct mail.

ATA's Chairman is generally credited with having pioneered political direct mail 40 years ago. That, however, is only partially correct. He actually pioneered *ideological movement* direct mail. His agency's methods, techniques and strategies have been copied and used for political and other nonprofit direct mail.

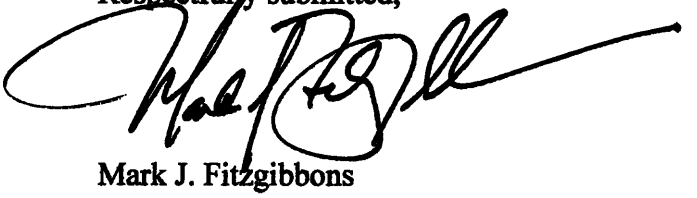
In fact, hundreds of his former employees have gone on to work in political and nonprofit direct mail. The large direct mail operations in ideological, political and nonprofit fundraising are the direct descendants of what was pioneered 40 years ago.

This agency and its founder have literally spawned industries, and the pioneering done by this agency has resulted in millions of Americans participating in the political contribution process with small-dollar donations rather than politics being funded with significantly fewer, wealthier donors.

ATA was informed that no extensions would be granted, and ATA had merely 15 days to prepare this submission. Not only were the facts of the program detailed and complex, but literally years of study and experience are required to become a good direct marketer or fundraiser by understanding the complexities and nuances.

Therefore, I take what may be perhaps an unusual step of offering if not directly requesting to testify before the Commissioners themselves in the hope of clarifying the facts if needed, certainly if not persuading the Commission that what was done was done with the best intentions of complying with the law given the industry in which ATA operates.

Respectfully submitted,



Mark J. Fitzgibbons
President of Corporate and Legal Affairs
American Target Advertising, Inc.
9625 Surveyor Court
Suite 400
Manassas, Virginia 20110
(703) 392-7676

Exhibits A – M Attached

25044124993