American Target Advertising, Inc.

Pioneers in direct response fundraising since 1965

May 13, 2005

VIA UPS OVERNIGHT

Secretary of the Commission
Federal Election Commission
999 E Street, N.W.
Washington, DC 20463

Re: MUR 5635

To the Honorable Commissioners:

This is the response of American Target Advertising, Inc. (ATA) to the General Counsel's Brief, dated April 28, 2005, in the above-referenced matter.

This matter is about a no-recourse direct mail fundraising program conducted by ATA, whose principal, Richard A. Viguerie, pioneered cause-related direct mail fundraising over 40 years ago using substantially the same no-recourse contracts.

The General Counsel's Brief recommends that the Commission find probable cause that ATA violated provisions of the Federal Election Campaign Act (Act) based on substantial losses of the direct mail fundraising program conducted for Conservative Leadership PAC, and ATA's contract and operations not being in its ordinary course of business.

The General Counsel would have the Commission believe that the large numbers and the size of the losses evidence that violations of the Act had to have occurred. ATA, however, has demonstrated already that it did not violate the Act because:

1. its no-recourse contract with CLPAC is substantially similar in all respects, and consistent with, its ordinary course of business for over 40 years;

2. in its ordinary course of its direct mail fundraising business, ATA extends credit to its clients, obtains credit from third-party direct mail vendors, incurs third-party vendor debt, pays third-party vendor debt, mails in substantial volumes in relatively short periods of time, disburses substantial sums to its clients, and in all aspects operates consistently with what happened in the CLPAC fundraising program;

3. ATA operated within the regulations (specifically, 11 CFR 116.3), and in fact exceeded meeting rulings (AO 1979-36 and others) of the Commission.

The facts in this matter are many and some are detailed. However, ATA's lengthy brief attached to this summary letter is made lengthier by the need to address gross mischaracterizations of fact and law in the General Counsel's Brief.

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That Brief (1) distorts and omits material facts, (2) mischaracterizes material aspects of the law, and (3) demonstrates what can be best described as a disturbing ignorance of, or disregard for, the commercial realities of direct mail fundraising. These mischaracterizations are extensive, repeated, and seem intentional given the facts in the record and ATA's voluminous submissions to date.

In fact, the General Counsel has modified its own earlier assessments of the facts and law in this matter. The General Counsel's Brief fails to explain this significant change, and therefore lacks candor. Worse yet, the shifting theories, omissions of fact and mischaracterizations of law appear designed to mislead the Commission into finding an adverse result for ATA regardless of the actual merits.

The General Counsel's Brief clearly is written to leave the Commission with a visceral reaction to the numbers. However, as ATA demonstrates in its brief attached hereto, ATA operated entirely consistent with the Commission's regulations, and even exceeded meeting what the Commission approved in various advisory opinions.

This direct mail fundraising loss was not in violation of the Act. ATA's attached brief demonstrates in strong detail that the facts in the record and proper characterization of the law refute the General Counsel's case, and show it to be without merit.

The RNC, the DNC and all major political committees using direct mail have copied and benefited from the business model and techniques pioneered by Mr. Viguerie and his companies. Before, only tens of thousands of individuals contributed to national campaigns. Now millions of Americans of more ordinary means do. The Commission should applaud this, not punish it.

ATA's brief is admittedly detailed and lengthy, but each commissioner should read it not just for the merits of this matter, but as an informative brief about direct mail. I offer to answer questions that the commissioners may have.

Respectfully submitted,

Mark J. Fitzgibbons
President of Corporate and Legal Affairs

Attachment: Response Brief of ATA

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of American Target Advertising, Inc. MUR 5635

RESPONSE BRIEF OF
AMERICAN TARGET ADVERTISING, INC.

American Target Advertising, Inc. (ATA) hereby responds to the General Counsel's Brief (GC Brief) dated April 28, 2005 and issued by the Commission under cover of April 29, 2005 correspondence. ATA respectfully urges the Commission to reject all of the recommendations in the GC's Brief, and to dismiss this matter in its entirety because ATA's no-risk fundraising contract with the Conservative Leadership Political Action Committee (CLPAC) in both its arrangement and operation did not violate the provisions of the Federal Election Campaign Act (the "Act").

I. Procedural Background of this Matter

Although not a respondent at the time, ATA's involvement in this matter began in March 2004. Counsel for CLPAC informed ATA that the Audit Division requested an explanation and documentation showing, consistent with ATA's ordinary course of business, (1) that ATA's nonpolitical clients receive proceeds from fundraising programs even though there may have been large outstanding balances owed to vendors, (2) that ATA accepts the risk of financial loss including payment of program costs to outside vendors, and (3) that ATA's ordinary course of business provides that program costs, including ATA's fees, are payable only to the extent of a percentage of monies raised.

On March 4, 2004, ATA made a 23-page submission (exhibits included) with a sampling of contracts, program accounts payable, and disbursements to clients demonstrating ATA's ordinary course of business. The data presented then and in subsequent submissions by ATA proved that ATA carried multi-million dollar client ledger balances for prolonged periods, paid vendors, used postage lenders, wrote off its own fees and met every one of the aspects for its non-political clients that the GC's Brief now claims in the CLPAC matter were inconsistent with ATA's ordinary course of business.

On March 24, 2004, ATA met with representatives of the Audit Division to field and answer questions. At that meeting, ATA explained general direct mail principles, as well as explained its history of using no-risk contracts for its nonprofit clients. ATA also explained many of the circumstances of the CLPAC program (as it did in later written submissions).

In response to requests made at that meeting, ATA made subsequent detailed written submissions on March 25 (17 pages), March 29 (48 pages), two on March 31 (64 and eight pages), and April 1, 2004 (61 pages). These submissions are broken out by topic to address the various questions about ATA's ordinary course of business over 40 years and the facts specific to the CLPAC program. Therefore, ATA was more than forthcoming with vast amounts of information on a voluntary basis.

On October 18, 2004, the Report of the Audit Division was issued. Of the seven Findings and Recommendations, three pertained to ATA: Finding 1, that four of ATA's postage lenders made impermissible contributions of $1,835,335; Finding 2, that ten of ATA's vendors extended credit to CLPAC in the amount of $3,766,914 outside their ordinary course of business; and Finding 3, that CLPAC received impermissible contributions from ATA for $465,000 in direct disbursements, and vendor credits and/or payments against invoices in the amount of $3,677,709.

Concomitantly with the Auditor's Report, the General Counsel filed a memorandum dated October 15, 2004. That memorandum expressly acknowledged that the ATA limited risk contract, as written, "may not" result in contributions. That memorandum would have limited the impermissible contribution to $981,121 as a result of the "parties execution under the agreement" only, namely the disbursement of funds to the client.[1]

On January 11, 2005, the Commission issued its letter notifying ATA that it had reason to believe ATA may have violated the Act, accompanied by a report of the Audit Division. The Office of General Counsel informed ATA that no extensions to the 15-day response deadline would be granted.

[1] It has been since pointed out by ATA in its submissions that the General Counsel's Office misread the contract. The contract required a disbursement of a percentage of housefile net income regardless of whether any or all prospect mailings lost money.

On January 19, 2005, counsel for ATA met with a member of the General Counsel's office and two members of the Audit Division to informally discuss issues for potential "conciliation."

On January 26, 2005, ATA filed its 33-page (exclusive of exhibits) response to the Report of the Audit Division.

On April 29, 2005, the Commission issued its letter stating it may consider a finding of probable cause based on the General Counsel's Brief (the "GC Brief"). accompanying that letter. The GC's Brief raises legal theories not previously raised in this matter, modifies some of the theories raised by the Audit Division, and even contradicts directly its own previous major assessments. The GC's Brief also raises for the first time in this matter the claim that ATA knowingly and willfully violated the Act, despite previous verbal representations and assurances by the GC's office to the contrary. After the General Counsel took yet another three months to substantially revise its theories of this case, ATA was notified that it had 15 days to respond.

II. Summary

The major allegations of violations of the Act contained in the GC's Brief are as follows: (1) ATA made prohibited corporate contributions to CLPAC based on (a) ATA's not being paid in full and for writing off resulting debt, (b) disbursing $465,000 to CLPAC, and (c) ATA's payments to third-party vendors of ATA's direct mail program for CLPAC; (2) ATA's accepting contributions on CLPAC's behalf from other corporations in the form of extensions of credit to ATA for the CLPAC program; and (3) ATA's violations were knowing and willful based on the involvement of its "principals" in MUR 3841.

A. The GC's Brief Mistakenly Tries to Label Fundraising Losses as Corporate Contributions.

ATA presumes that the Commission will at least acknowledge that none of the allegations raised in the GC's Brief could be brought, for none would be colorable under law, had the ATA direct marketing fundraising program for CLPAC brought in enough money to cover the expenses of that program, whether such funds were raised before the 2000 election or after the election.

It was not, nor could it be credibly, alleged by the General Counsel that the extensions of credit by ATA, the payments to vendors, the acceptance of credit from print and other vendors by ATA, be deemed violations of the Act had the direct mail fundraising program raised the same amount as the costs of the program.

Therefore, independent of the results, i.e., that ATA's direct mail program lost money, there would be no claims against ATA that it made corporate contributions, nor accepted corporate contributions through the extension of credit from its vendors. For the Commission to do otherwise would mean that no political committee could engage in direct mail fundraising because (1) no direct mail fundraising program can achieve net income without incurring some losses, and (2) the entire direct mail industry works on credit terms, i.e., vendors provide goods and services in advance of being paid, with few exceptions.

Boiled down to its essence, therefore, the GC's Brief is based entirely on the fact that ATA's fundraising program failed to raise enough money and could not (or did not, as the GC's Brief believes was possible) collect those losses from its client after the 2000 election.

The Commission also needs to put this matter in proper context. ATA is a direct marketing agency, which raises funds primarily for charitable and ideological causes. Unlike other corporate entities that may be faced with accusations of having made corporate contributions, direct mail fundraising is ATA's business. Even the Commission must recognize the fact that companies, even the best ones, do not always succeed at what they do. The Commission must also recognize the fact that not all fundraising programs raise more than their costs.

ATA's founder, Richard A. Viguerie, is generally credited as the pioneer of political direct mail,[2] although political direct mail has been less than 10 percent of its business, the rest being mostly charitable and ideological.[3]

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[2] The late John F. Kennedy, Jr.'s "pop" political magazine, *George*, named Mr. Viguerie's pioneering of political direct mail number 63 on the 20th Century's 100 most important political moments.

[3] This was all explained and demonstrated in great detail in ATA's prior submissions in this matter. ATA also explained that it does not have business records going back 40 years, which

The GC's Brief rests squarely on the premise that the CLPAC program was not consistent with ATA's ordinary course of business. That, however, is not only wrong, it is frivolous. Mr. Viguerie's company developed its business model even before the Commission was even created by the Federal Election Campaign Act.

The major political committees, large national campaigns, many other political committees and non-political entities copied Mr. Viguerie's business model and the techniques that he first brought to bear in cause-related marketing and fundraising. Instead of fundraising from a small number of wealthy donors and corporations, it is now commonplace that these large committees rely in significant part on the processes and techniques they copied from Mr. Viguerie's company to reach millions of Americans with appeals for smaller donations.

The major distinction now between committees such as the Republican National Committee and most of the clients of ATA is that those committees now have (1) lists of donors that were developed over time, and (2) significant cash on hand. But those large committees built their files, and generated substantial sums (even when they could raise soft money) from the mass direct mail marketing that Mr. Viguerie pioneered in 1965, and continues to pioneer.

This case is, therefore, not about inappropriate actions that by themselves violate the Act, but simply failed fundraising results. In the context of direct mail fundraising, results are matters of probabilities combined with highly refined creative copy, techniques (some very sophisticated) and thousands of other factors that take years of work, training and even professional study to understand well.

Even with the best-laid plans, however, many direct mail programs fail. Then, again, many long-term and even previously successful businesses fail. That is a fact in the commercial world. The CLPAC fundraising program failed. Other nonpolitical direct mail programs conducted by ATA have failed. Fortunately, enough have succeeded so that ATA has remained in business 40 years.

B. The GC's Brief is an Attempt to Mislead the Commission Through Distortions and Omissions of Material Facts.

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would demonstrate even more examples that would refute the claims against ATA raised in this matter pertaining to extensions of credit, writing off fees, paying vendors, etc.

Only in the context of the Act would anyone ever think to punish a fundraising failure of this sort with potential fines. The GC's Brief, however, falls far short of making a sustainable case that ATA violated the Act, and even then it appears the GC's Brief resorts to distorting and omitting material facts to support its newly revised and weak theories of its case.[4]

To reach its most recent recommendations that this fundraising failure was a knowing an willful violation of the Act, the General Counsel's Office and the Audit Division have, through the combined total of over 12 months, proffered multiple legal theories, revised legal theories, withdrew legal theories, and in the case of the General Counsel, has even proffered conflicting legal theories of this case. In each instance of importance, ATA was given 15 days to respond to those shifting sands.

The GC's Brief takes more than simply the most adverse view of material facts; it outright neglects, even to the point of mischaracterizing, certain material facts. For to reach its most recent (based on both new and revised old theories) allegations and conclusions, the GC's Brief had to omit, ignore or mischaracterize material facts describing (1) direct mail in general, (2) the facts leading up to the CLPAC program, and (3) the reasons why the CLPAC program failed.

There are so many mischaracterizations of fact, that ATA is at a loss to determine which are important enough to point out to the Committee. One serious one, that is telling of the GC Brief's less-than-accurate approach to this case is the fact that the GC's Brief fails to adequately describe the precautions and consideration ATA has for the risk in its no-risk contract by securing upfront larger-than-usual compensation and by securing ownership rights to the mailing list. These omissions of material facts are exemplary of the misleading nature of the GC's Brief. Equally misleading, perhaps, is that the GC's Brief would assess a portion of its penalties measured by the higher fees that ATA charged as a precaution against losses. That is not only penurious, but ATA suggests that is disingenuous as a matter of law.

[4] ATA is well aware of then-Chairman Smith's statement at the open Commission hearing on whether to accept the Audit Division's Report to open an MUR that the Commission was rethinking its existing regulations and policies about whether to continue to allow no-risk fundraising contracts for committees. But that is a matter that should be resolved through the rulemaking process, and not done through an adjudication for which the General Counsel's brief so thoroughly misrepresents the facts of the case.

Because of the complexity of the facts and the extent to which the GC's Brief fails to honor the facts, the length of this brief is made longer by virtue of ATA's having to rebut misstatements found in the GC's brief and explain what really transpired. ATA incorporates its prior submissions in this matter, which disprove many of the claims and allegations in the GC's Brief. ATA also reserves the right to supplement this brief because many of the references to numbers and data in the GC's Brief are either without citation, or without supporting reference to source materials.

(Brief continued at page 8.)

III. Standing Objection.

ATA objects generally to the cavalier use of references to dollar amounts in the GC's Brief without citations, references or supporting documentation.

ATA is already at a procedural disadvantage in that, at each instance when ATA has been asked to respond, or as set by law must respond within 15 days, the Audit Division and the General Counsel then was under no time limits and took months to prepare their submissions. The Procedural Background section of this brief sets forth the immense time disadvantage to ATA, and the prolonged time that the General Counsel has had to craft and revise its theories of the case in response to ATA's factual and legal bases.

The GC's Brief cites numbers on which it asks the Commission to assess penalties even though the GC's Brief fails to provide satisfactory foundations for proffering those numbers. The following is just a partial list of material numbers used in the GC's Brief without proper foundation or citation to sources:

1. the fundraising efforts cost approximately $8 million and raised approximately $4 million;

2. ATA wrote off $1,157,832 of the amount CLPAC owed;

3. ATA paid third-party vendors a total of $1,195,024;

4. ATA arranged for other entities and individuals to provide more than $6 million in goods and services in advance of payment; and

5. ATA accepted a total of $2,473,517 from six corporations.

ATA objects to the inclusion of these numbers that do not adequately provide information of their sources. Without specific foundations, ATA is disadvantaged even further in its ability to either agree with, or dispute, the credibility of these numbers. Therefore, ATA makes its standing objection to the use of those numbers and others as a basis on which the GC's Brief would allege violations of the Act.

A. Without Specific Substantiation by the GC's Brief, ATA Cannot Refute with Specificity; However, General Observations Prove that the Numbers in the GC's Brief are Either Wrong Facially, or Wrong Legally.

Of course without specific references, foundations or supporting documentation, ATA is at a disadvantage in being able to refute the accuracy of the numbers used in the

GC's Brief. However, ATA can make the following general observations disputing the accuracy or veracity of those numbers.

The GC's Brief in several parts states that the costs of the fundraising program were approximately $8 million and the program raised approximately $4 million, therefore alleging a $4 million difference. However, Attachment A to the GC's Brief, which represents that it is based on ATA's management reports, shows total costs at $6,511,646 and total income at $3,763,116, which is a difference of only $2,748,530.

ATA's management reports are not accounting reports, and are used for internal purposes to generally track certain information about mail results. Attachment A to the GC Brief does not represent which of ATA's management reports was used or the date of the report. Therefore, it is impossible to verify the accuracy of Attachment A to the GC's Brief.

One source of information about income for the CLPAC mail program are the bank statements of the deposit account for the fundraising program. Those bank statements show that for the month ending August 31, 2000 through the month ending August 31, 2001, the fundraising proceeds for the CLPAC program were $5,141,307. See Exhibit 1, attached hereto, showing the monthly fundraising deposit amounts. That is considerably more than the amount of $4 million which the GC's Brief represents as the total amount raised. This discrepancy of over $1 million between what the GC's Brief represents to the Commission versus the actual amount of income to the program is material, of course. A mistake that large on such an important and material fact indicates that the numbers used in the GC's Brief are entirely unreliable.

The GC's Brief also claims that ATA wrote off $1,157,832 of debt. As a primary issue, the GC's Brief fails to credit the fact that ATA's fees were 100 percent higher than standard industry fees, 80 percent higher than its fees for its contracts that were not no-risk, and 25 percent higher than its fees for no-risk clients. Thus, part of the alleged corporate contribution that the GC's Brief would have the Commission assess is based on some percentage of ATA's fees that ATA expressly increased for the CLPAC program.

Also, without seeing the bases for the numbers alleged in the GC's Brief that ATA wrote off, ATA cannot assess whether those amounts include payments by ATA to vendors, which were billed back by ATA to the CLPAC program.

The GC's Brief also tries to allege penalties based on ATA's payments to third-party vendors. If the GC Brief "double-dips" by attempting to assess penalties on the same numbers twice, that would be akin to "double-billing" in the commercial world, which of course is dishonest. But ATA cannot make that assessment because the GC's Brief fails to provide adequate support, reference or foundation for its numbers.

It does appear, though, that the CG's Brief in fact does "double-dip" in trying to assess penalties on the same dollars, but under misleading presentation of those numbers.

B. The Commission Cannot Assess Penalties on Unsupported Numbers; Even the Commission is Subject to Rules of Due Process.

Should this matter proceed, ATA would of course challenge more formally the fact that due process requires a more clear establishment of the grounds for penalties. ATA has not been provided adequate notice or information on which it could challenge (or agree) with the numbers in the GC's Brief. However, given the other problems with the factual misrepresentations in the GC's Brief, as addressed in the other portions of ATA's brief, ATA has grounds to assume that the numbers are incorrect, and reserves the right to challenge them and the record in its entirety.

Especially given the legal and evidentiary standards for alleging knowing and willful violations of the Act (clear and convincing proof, described herein below), ATA moves to strike those numbers from the record since the GC's Brief fails to provide foundation or substantiation. Especially given the serious nature of the allegations, the use of numbers in the GC's brief without proper foundation is not only irresponsible, it is fatal to the Brief as a matter of law.

(Brief continued at page 11.)

IV. Factual Background.

ATA has already provided voluminous submissions in this matter. Unfortunately, the GC's Brief distorts or omits many material facts in this matter already addressed in ATA's submissions. Therefore, ATA fully incorporates herein those prior submissions. The Commission must take into consideration all of the information previously submitted by ATA. *See, In re: Federal Election Campaign Act Litigation*, 474 F.Supp 1044 (D. D.C. 1979) and *Orloski v. FEC*, 795 F.2d 156 (D.C. Cir. 1986).

ATA and CLPAC entered into a contract for ATA to raise money for an independent expenditure in the 2000 U.S. Senate race in New York. The contract was subsequently amended to include raising money for an independent expenditure in the 2000 presidential election.

In obviously attempting to denigrate the motives, if not the judgment, of ATA, the GC's Brief, at page 15, concludes that even though ATA's direct mail efforts lost money, "[p]olitically, though, it was a success." Of course, the GC's claims are both unsupported and wrong since Mrs. Clinton was elected to the U.S. Senate and Vice President Gore won the popular vote.

A. Programs Conducted Before CLPAC Boded Well for CLPAC's Success.

Since the GC's Brief is clearly based in part on its assessment of both ATA's motives and judgment, it is necessary for the Commission to not only know ATA's bases for its actions, but also for ATA to point out that these facts have already been addressed both in writing and in meetings. The GC's Brief neglects to even mention this background, probably because it detracts from the theories in the GC's Brief, but it is nevertheless important to the Commission's consideration of this matter.

Preceding ATA's entering into a contract to raise money for CLPAC's independent expenditures, ATA had two clients with appeals that demonstrated a strong "anti-Clinton Administration" sentiment, and which were highly lucrative for ATA and its clients. The first was a 501(c)(3) public interest law firm, Judicial Watch (JW). The second was the Rudolph Giuliani (RG) campaign for U.S. Senate.

ATA started its services under a no-risk contract for JW in 1996, but that program was not lucrative until later in the program when more of its lawsuits were filed against Clinton Administration officials for alleged and perceived abuses. In year 2000 alone,

the program was so successful that just ATA's direct mail program alone raised $20,848,045, of which $7,163,510 went to JW, $11,215,581 was paid to vendors, and $2,468,954 was paid to ATA in fees. See March 4, 2004 letter of Mark Fitzgibbons to Heidi Abegg.

ATA entered into a contract with RG in the latter part of 1999, which was not no-risk at the client's choice, for his candidacy for U.S. Senate.[5] His opponent was Mrs. Clinton. The campaign was pre-9/11, so Mayor Giuliani had not achieved the widespread national recognition that he had after that tragedy. This was a direct mail appeal of national interest, and the direct mail appeal was crafted as anti-Mrs. Clinton (much as many 2004 election appeals were crafted as anti-President Bush).

The RG program was nearly all prospect mail, and it netted considerable money. In fact, the RG direct mail program was on target to set a record for the most money ever raised via direct mail for a U.S. Senate race before Mayor Giuliani withdrew from the race for health reasons.[6] [7] ATA and vendors did work in advance of being paid, and were paid only after returns and money were in, as is standard in the direct mail fundraising business.

Thus, in terms of cause-related marketing, ATA had tapped into a very lucrative anti-Clinton administration sentiment in 2000. Through the JW and RG programs, ATA was able to discern that there was especially strong national sentiment among conservatives against Mrs. Clinton and Vice President Gore. These other programs preceding the CLPAC program actually provided informal marketing "tests" that, in direct mail fundraising, it was "time to make hay while the sun was shining."

The GC's Brief, despite ATA's repeated explanations of these facts, questions why ATA would enter into a contract with CLPAC, which the GC's Brief reports as being founded in 1972 but having only $464 cash on hand at the time that the contract was signed. It didn't take a direct mail genius, however, to understand that the anti-

[5] ATA has previously noted that approximately 95 percent of its contracts are no-risk, and less than 10 percent of its contracts are for political committees.

[6] ATA was not hired by Mayor Giuliani's successor in the race.

[7] ATA had done work previously for the U.S. Senate campaign that had set the record for most money raised through direct mail. It is to be noted that even in that direct mail campaign that set the record for most money raised, there were losses in prospect mailings.

Clinton and anti-Gore sentiments would be lucrative for somebody's direct mail campaign.

ATA already had access to anti-Clinton names and supporters, had a good idea of which types of appeals would work, and knew that in the past it was able to generate large volumes of mail and raise large sums of money in short periods of time, under the right circumstances. It also had an individual, Morton Blackwell as head of CLPAC and the letter signer, who had instant name-recognition and credibility.

Mr. Blackwell was already known nationally as an honorable conservative leader with a proven track record of success. He heads a 501(c)(3) school attended by eventual Members of both houses of Congress and two Miss Americas. Thus, Mr. Blackwell and CLPAC needed little, if any, introduction and "branding" through the direct mail appeals.

It is also not uncommon for committees to lay somewhat dormant for periods of time, and given the no-risk nature of ATA's normal contracts for its nonpolitical clients, it is irrelevant what the organization had in its bank account before the contract began.[8]

Despite the GC Brief's purposeful avoidance of these facts, which contradict the GC Brief's attack on ATA's motives and thus damage the GC's theories of the case, ATA had very strong commercial motives to enter into the CLPAC contract even on such short notice and for such a limited period. The fact is, ATA had every reason to believe, based on its superior knowledge of direct mail and its very recent experience, that the CLPAC program would be a commercial success.

The GC's Brief would substitute its inferior understanding (or its knowing misrepresentations) of both direct mail and the circumstances for ATA's. That would, of course, be a modification of the Commission's own regulation allowing extensions of credit in the ordinary course of business.

B. The GC's Brief Contains Serious and Material Omissions and Distortions of Fact about the Contract.

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[8] ATA finds curious that the GC's Brief would somehow find it more appealing under the law if independent expenditures were left only to committees with sizeable pre-existing bank account balances. As a policy consideration, certainly the Commission understands that this would be deemed protective of the larger committees creating monopolistic-like protections in American politics.

Unfortunately, it is not within the parameters of this brief to explain direct mail in any detail. Direct mail is a highly specialized profession taking years to learn and understand. It is not as simple as it may appear, and it is clearly more professionally specialized than the GC's Brief would lead the Commission to believe.

However, that does not justify the serious and material omissions and distortions about the ATA/CLPAC contract found in the GC's Brief, especially considering that in ATA's prior submissions and meetings with Commission staff ATA has already explained much of what the GC's Brief mischaracterizes.

The contract was no-risk, which the General Counsel's office in its October 15, 2004 memorandum already acknowledged legal and factual limitations on the consideration of potential penalties against ATA and CLPAC.

The basic and fundamental premise of no-risk contracts is that the direct mail advances or guarantees payment to third-party vendors and the fundraiser has no recourse against its client for program losses. AO 1979-36 approved no recourse contracts for use with a political committee if the fundraiser had used such no recourse contracts (and thus extensions of credit) in its ordinary course of business for nonpolitical clients.

ATA has used no-risk contracts for substantially most of its clients for over 40 years. By design, these contracts enable entities with little or no money to get into the mail to raise money.[9]

Entities with no or few supporters need to reach new supporters. Good direct mail is based in sound techniques, principles and expertise, and small or new cause-driven entities often lack such expertise.[10] Even good direct mail often loses money, however, if not on prospect mail generally then on some programs overall.

Prospect mail is mail to potential donors who have not previously responded or contributed to the organization. The donor files of other organizations, entities,

[9] Both the Internal Revenue Service and the United States Postal Service had on two separate occasions challenged use of no-risk fundraising contracts. The IRS was chastised by the U.S. Court of Appeals for the 7th Circuit for failing to understand basic contract law, and the USPS later revised its unclear regulation for the purpose of acknowledging the beneficial use of no-risk fundraising contracts.

[10] The large national committees and parties have their own experts on staff, but even outsource some of their creative work to agencies.

publications and the like are rented for one-time uses, and letters are sent to those names on the rented lists.

There are multiple purposes to prospect mailings. One purpose is to identify adherents who respond with contributions and/or various forms of response devices that may be included in the package, such as surveys, petitions, etc. Those respondents are added to the mailing entities' "housefile."

A second purpose of prospect mailings is to raise money. It is considered a benchmark of prospect mail if it generates about a two percent response rate and raises 80 cents for every dollar spent. More than 80 cents is considered successful; less than 80 cents may be considered successful, but that depends on the nature of the appeal. It is not common for prospect mailings to break even, and it is even rarer that they generate net income in excess of the costs.

To pay these prospect losses, organizations have some options. They either have a pre-existing or other large source of funds, or they use a portion of the income from housefile mailings to pay for those losses.

C. Direct Mail Fundraising Now Uses the Lifetime Value of Donors to Finance Prospect Losses.

Mr. Viguerie pioneered cause-related direct mail by using commercial techniques such as the "lifetime value" of a housefile for fundraising for new, small and under-funded organizations. Under the right circumstances, housefile mailings generate enough income to pay the prospect losses – some programs work faster than others. Also, the names on the housefile may be rented to other organizations that are prospecting, thereby generating another source of revenue. The housefile is therefore an income-producing asset with a value that extends some years after the fundraising appeals end.

The Commission should applaud this, not punish this. Mr. Viguerie's pioneering of this concept has brought great changes to political fundraising. Instead of being a function of a relatively few wealthy donors, millions of Americans now participate in the political process, not just at the ballot boxes, but by writing $10, $25 and other small contributions.

Both major political parties have copied these methods (and still copy newer techniques developed by this company). Former Viguerie company employees and

others who have learned from Mr. Viguerie's companies have established the databases, written copy and done numerous other tasks in building the files for RNC, the DNC and other major committees.

The entire contributor files to the 1960 presidential campaigns of Kennedy-Nixon were approximately 60,000 donors. Compare that to the 2000 and 2004 campaigns of George Bush and his Democrat opponents, whose donor files consisted of millions of donors, or the just Republican Party's approximately 2 million contributors in 2000. None of these larger files were built without experiencing losses on many if not most prospect mailings to contributors of smaller amounts. Such losses were supplemented either by subsequent housefile mailings, or by access to larger contributions (and for the DNC and RNC, soft money before the Bipartisan Campaign Reform Act).

D. ATA's Contract with CLPAC Was the Entirely Consistent with ATA's Ordinary Course of Business.

ATA entered into its contract with CLPAC on or about July 6, 2000. It was initially drafted for an independent expenditure against Mrs. Clinton. See Exhibit 2 attached hereto. An amendment was signed on September 28, 2000 that incorporated changes that the principals of ATA and CLPAC had previously agreed upon verbally.[11]

The ATA/CLPAC contract was similar to most of ATA's no-risk contracts in that it provided that 30 percent of the housefile net income would be applied to prospect losses, and 70 percent of the net housefile income would be disbursed to CLPAC.[12] The amendment changed that to 50-50 percentage split of housefile net income.

The contract also provided that ATA was to own a copy of the housefile, and to have exclusive marketing rights thereto. See paragraph 8 of the Contract, and ATA's January 26, 2005 submission, pages 4 – 7. The GC's Brief omitted this fact, which is serious and material. The ownership and exclusive marketing rights to the housefile

[11] The principals had agreed in principle to make certain changes to the scope and operations of the program before the lawyers completed memorializing a written amendment incorporating those changes. Honorable people, of course, understand, and the law allows for, such changes in operations to contracts before formalizing them in writing, especially in many fast-paced business environments.

[12] In ATA's previous submissions, it provided multiple examples of contracts with non-political entities showing that the percentage of housefile net income may vary from time-to-time, and from client-to-client, but the percentage formula used in the CLPAC contract was rather typical.

constitutes very valuable consideration for the no-risk arrangement. Even the General Counsel acknowledged this previously in its October 15, 2004 memorandum.

Additional material omissions in the GC's Brief include the fact that ATA charged 10 cents per letter mailed, was the exclusive fundraiser for the independent expenditure, and otherwise charged higher fees than its fees at that time. See ATA's January 26, 2005 submission, pages 13 – 14. ATA explained repeatedly in prior submissions and meetings that the standard industry fee at that time was four to six cents, and that ATA's fee for its other no-risk contracts was from seven to eight cents.

ATA has also already explained that its package fee, its list rental fees and all of its fees in the CLPAC contract were approximately 25 percent to 100 percent higher than standard fees. See March 25, 2004 submission pages 1 - 3, and January 26, 2005 submission, at page 13.

E. Prospect Reserves Are Not Required by Commission Regulations, and the GC's Brief Misrepresents the Purpose of the $1 Million Reserve Written into the Contract.

The initial contract provided that no prospect net income would be disbursed until after a $1,000,000 "reserve" from net prospect income had been developed.[13] The amendment to the agreement explains why that prospect reserve was withdrawn, which was so that CLPAC could receive net prospect income to fulfill the reasons why it was soliciting donors in the first place, i.e., to pay for ads. See Paragraph 1 of Amendment to Agreement, Exhibit 2.

The GC's Brief attempts to make much of this reserve even though there is nothing in the Commission's regulations or advisory opinions about such reserves. Additionally, the GC's Brief facially misrepresents the purposes of that reserve. Paragraph 3 of the contract describes the purposes of that reserve:

> to pay future prospect or other program costs (including prepayment of program costs for postage, lists and third-party vendors ***as directed by ATA***)

[13] The General Counsel's first memorandum, dated October 15, 2004 entirely misread the contractual obligation to disburse housefile income to CLPAC, and the GC's Brief fails to acknowledge properly this contractual obligation.

Therefore, the prospect reserve was not required by Commission law, and on the face of the contract it describes that its use was to be at ATA's discretion. Therefore, the GC's Brief's overblown hype about this reserve and its being amended out of the contract is just that – overblown hype.

There is no Commission ruling on such reserves because they are entirely a creation of ATA. ATA began adding prospect "reserves" to some, but not all, of its nonpolitical contracts for the first time in the mid-1990s. Such reserves, when written into ATA's contracts, ranged from $150,000 to the largest reserve ever used before the CLPAC contract, $400,000, and ATA had amended some of its contracts to reduce or eliminate those reserves. See ATA's January 26, 2005 submission, pages 30 –31, and Exhibits D – H of that submission.

The GC's Brief would have the Commission believe that this reserve was an essential element of no-risk arrangements, but that is not the case. Since reserves (1) are an ATA creation in the first place, and (2) they are nowhere referenced in Commission rulings, it was entirely appropriate for ATA and CLPAC to amend this reserve out of the contract.

The GC's Brief further mischaracterizes the reserve as the only "safeguard" against losses written into the contract. But the contract clearly shows ***on its face*** that the reserve was to be used at ATA's discretion ***to help finance more mail.*** That the GC's Brief would try to mislead the Commission in this regard is further proof that it either does not understand the contract, or purposefully misrepresents it to the Commission.

Thus, the allegation in the GC's Brief, at page 10, that ATA contained "one safeguard only" (i.e., the $1 million prospect reserve) is out-and-out false, and knowingly so since ATA has already addressed these issues in some detail. Besides, the General Counsel's office has previously acknowledged one of the other safeguards written into the contract as entirely satisfactory for extensions of credit under no-risk contracts as a matter of law in its formal memorandum to the Commission in October 2004. See, also, ATA's January 26, 2005 submission, pages 4 – 8, 13 – 15; and March 25, 2004 letter from Mark Fitzgibbons to Joseph Stoltz.

As explained below, the ATA/CLPAC contract also provided for higher-than-standard fees, ownership of and exclusive marketing rights to the housefile, and an

amended housefile percentage split in consideration of eliminating the $1 million prospect reserve. The parties also agreed to extend the date of the original contract past October 20 for prospect and November 6 for housefile mailings 2000 (the original terms) so that ATA could do debt-reduction mailings.

The GC's Brief fails to admit what it has previously admitted, i.e., that the ownership and exclusive marketing rights to the CLPAC housefile constituted adequate consideration of the no-risk arrangement. The GC's Brief fails to even attempt to explain why it now runs away from its earlier assessment.

Lastly, even if the GC's Brief were to explain its change of position, it fails to credit the numerical facts that ATA's higher fees would necessarily need to be credited against whatever corporate contributions the Commission would assess. It is the Commission's own regulation that extensions of credit need only be what is charge for nonpolitical clients. ATA actually charged more. ATA already explained the logical results of this at page 2 of its March 25, 2004 submission:

> Had ATA charged only the "standard" fee within the industry for no-risk arrangements, at least two limiting factors would have occurred: (1) the amount owed to ATA at the end of the contract would have been less, and/or (2) the third-party debt would have been reduced by some amount because more money would have been available to pay the vendors rather than ATA. Unlike situations under former 11 CFR 100.7(a)(iii), and current 11 CFR 100.52(d), ATA did not charge *less* than its usual and normal charge; it charged *more*.

In its fact- and law-blind zeal, the GC's Brief neglects that the Commission cannot make findings of impermissible contributions when service providers charge more than their ordinary fees. These higher fees prove ATA's intent of making a profit, and provided additional safeguards against losses.

F. Early Mailings Indicated that CLPAC Would Succeed.

The GC's Brief, at page 10, is critical of the ATA contract for its lack of requiring a testing period. Such contractually written testing periods were given approval in an advisory opinion.

The GC's Brief, at page 4, states that, "[t]he first few mailings, which consisted of prospect mailings, were relatively modest in size and resulted in mixed gains and losses."

As explained above, the JW and RG programs in 2000 had already provided an informal test of the issues and the mailing of large quantities resulting in profits. Even with a "hot-button" issue and a well-known (in conservative circles) letter signer, ATA needed to develop good copy and techniques for its first packages, and experienced some production delays in getting out the first mailings.

ATA, however, did conduct initial test mailings. The first of these test mailings did not "drop" until July 28, 2000. The first five mailings had phenomenal results.

Using the results in GC Brief Attachment A, the first five mailings consisted of 502,571 letters, at a total cost of $323,909, and generated $474,174 in gross income (a net income amount of $150,265). As mentioned above, the benchmark for prospect income is 80 percent of the costs. These mailings raised 145 percent of their costs. In terms of direct mail, that is a *monster* success for the first five mailings of any program.

As explained in ATA's March 4, 2004 submission, it is standard in the direct mail fundraising industry to understand that any initial prospect mailings that generate net income means that not enough letters were mailed. Again, the benchmark return should be about 80 percent. Prospect mailings that generate net income are in one sense not succeeding because that is an indication that not enough were mailed.[14]

The GC's Brief, at page 4, then goes on to state, "[o]n August 21, 2000, ATA cast a substantial net in a prospect mailing of 2.7 million pieces, at a total cost of over $1.4 million. This mailing resulted in a net loss of approximately $675,000. Four days after that, on August 25, 2000, ATA disbursed $20,000 to CLPAC."

First, the Commission should not fall for that trap of how the GC's Brief juxtaposes the dates, which implies that all of the letters mailed on August 21 and that the disbursement was made four days later. The August 21 date is the date that the first portions of that mailing dropped. Mailshops used by ATA typically do not have the

[14] In one meeting with a member of the General Counsel's office, the lawyer did not seem to either grasp or respect this direct mail concept, suggesting instead that all prospect mailings should generate net income rather that focus on building the housefile faster. This leads to two comments: (1) this ignores the concept of the long-term value of the housefile as partial consideration of the no-risk arrangement, and (2) while ATA does understand and respect the fact that fundraising for political committees is subject to many laws and regulations that do not apply to nonpolitical fundraising, ATA in turn suggests that the GC's Brief indicates either an inability or unwillingness to understand the ordinary course of ATA's direct mail business and experience.

capacity to affix postage and deliver that many letters to the Post Office at one time, so the total quantity probably mailed over four to seven days, and not all on August 21.

Also, mail returns come in over a period of time. First, the letters need to be delivered. Then, as any direct mail person would know, returns come back over time which if charted would look like a bell curve. Thus, the few earliest results of that mailing would not have come in for approximately six days (if mailed at First-Class U.S. Mail, as opposed to the slower bulk-rate) and returns would have continued arriving for approximately 45 or more days. The middle of the bell curve is the "doubling date," which is the date by which direct mailers can predict by probabilities the total income for mailings. The doubling date for that August 21 mailing occurred long after August 25.

Secondly, with regard to the prospect mailings mailed in larger volumes after the initial five mailings that were successful, that is good direct mail practice. The prospect mailings generate some income, but they are also intended to build the housefile, as explained above. There are two positive aspects of larger housefiles. First, they generate more income from fundraising solicitations. Secondly, they generate list rental income.

Here, the GC Brief's neglect of the CLPAC housefile as partial consideration to ATA is fatal to its case. As part of the contract, ATA owned a copy of housefile and had exclusive marketing rights to the file. That means that ATA got to keep all of the income from list rentals even after the contract ended. That fact alone contradicts the GC Brief's failure to acknowledge these contractual rights, after having acknowledged them in its October 15, 2005 memorandum.

Given (1) that the General Counsel had previously acknowledged the housefile-as-consideration fact; and (2) that this valuable form of long-term consideration contradicts many of the major theories of its case, it would appear that the GC's Brief omission of this fact is designed to mislead the Commission.[15]

G. The GC's Brief Also Fails to Accurately Represent the Contract in Operation.

[15] Not to address this material issue before the Commission, even with some form of explanation, appears, as well, to be of questionable legal ethics.

As discussed above, the principals of the parties to the contract had agreed to amend the contract before the amendment document was prepared and signed. The GC's Brief, at page 4, represents the contract amendment date as September 20, 2000. The GC's Brief does not object to the effects of the amendment to the contract, nor does the GC's Brief even adequately explain what the amendment did except for the elimination of the $1 million dollar prospect reserve.

The contract amendment changed the split of the housefile net income in consideration of the termination of the prospect reserve. The amendment also explains that this was done so that CLPAC could receive money to fulfill the purposes for which it was soliciting funds (expenditures on ads, and see below for an explanation of the potential legal consequences of soliciting funds and not fulfilling the purposes for which the funds were solicited). The amendment also expanded the scope of the independent expenditure to include the presidential race.

As evidenced by the date that the first Gore mailings dropped, September 5, 2000 (see Attachment A to GC's Brief), ATA and CLPAC had already agreed to amend the contract even before the date of that mailing. Since it takes time to write and physically produce a package, the contract amendment was agreed upon long before September 5.

These facts refute certain allegations presented in GC's Brief tied to, and dependent on, the date of the contract amendment.[16] The disbursement of $30,000 of net prospecting income before the actual amendment was signed was appropriate, especially given the fact that the first five mailings netted over $150,000. That the written amendment itself was not signed until afterwards is no violation of the Act, of course. Thus, the GC's Brief again is wrong both factually and legally about the $30,000 in prospect net income disbursements by September 8.

H. The GC's Brief Also Incorrectly Represents the Nature of Payments by Individuals.

In its January 26, 2005 submission, ATA went to great lengths to rebut the Audit Division's claims that certain individuals and one corporate entity made contributions in the form of postage advances. See pages 20 – 30 thereof. As explained in that

[16] There is, of course, nothing improper, untoward or unlawful about parties making verbal agreements that their lawyers later memorializing in writing, even though this may not fit the persnickety, yet incorrect, description of the contract amendment found in GC's Brief.

submission, postage is one element of direct mail programs that cannot be paid on credit terms, and, of course, postage is an essential element of direct mail.

ATA is of limited capital, and banks will not lend postage funds for nonprofit direct mail. As part of its ordinary business, ATA relies on any number of postage lenders to fund the postage for its nonpolitical clients.

The GC's Brief, at page 5 - 6, identifies two former ATA employees, Ben Hart and Edward Adams, and one entity, Mail Fund, Inc. as having paid third-party vendors. But as explained in detail in ATA's January 26, 2005 submission, those payments were indeed for postage. That the checks may have been payable to certain vendors was also explained. At pages 23 – 24, ATA's submission explains that some mailshops have accounts used to pay the U.S. Postmaster, so some postage checks from ATA and its lenders must be made payable to the mailshops; others may be made payable to the US Postmaster.

Therefore, the GC's Brief inaccurately portrays some of the payments by these postage lenders as payments to third-party subcontractors.

I. Not Just ATA, But the Entire Direct Mail Industry Operates on Credit Terms.

The GC's Brief, at page 6, states, "[i]n sum, ATA provided access to individuals and corporations that were willing to loan money and *direct mail companies willing to work in advance of payment.*" (Emphasis added.)

ATA trusts that the Commission itself, after regulating political direct mail fundraising since 1971, will immediately recognize that the reference by the General Counsel to *direct mail companies willing to work in advance of payment* is no violation of the law.

Virtually all direct mail is done *in advance of payment*. All committees using direct mail fundraising, from the largest to the smallest, get goods and services from direct mail companies *in advance of payment*. The direct mail industry operates generally on credit terms.

Only the United States Postal Service requires payment in advance all of the time. Otherwise, every element of direct mail operates on credit terms.

The United States Government Printing Office (GPO), which prints the books and forms of government agencies, including the Federal Election Commission, subcontracts out much of its work to vendors *who do work in advance of payment.*

If it were not bad enough that the GC's Brief demonstrates it does not know such a major aspect of political fundraising, then the Commissioners should also know the following. In meetings, ATA explained this concept that all political committees using direct mail benefit from credit terms. Instead of receiving a reaction of retreat from this issue, ATA was asked to provide the names of the people or entities who operate this way so that the Commission could open investigations and prosecute those committees and parties.[17]

J. Unanticipated Events Not Within ATA's Control Led to Extraordinary Losses Late in the Fundraising Program.

In prior submissions already in the record in this matter, ATA explained the multiple problems it faced late in the fundraising program on several large mailings. See, ATA's March 29, 2004 submission generally and its January 26, 2005 submission, pages 16 - 17.

Some 3.5 million letters (approximately one third of the mailings for the entire program) mailed late as a result of various unanticipated events and factors, including a fire at one of the mailshops. These late mailings mailed into other mailings, depressing the results at a very critical time in the 30 days immediately preceding the 2000 election.

It was ATA's general experience and knowledge based on its own prior work and the thought of other leading election fundraisers that the month prior to any election is the most lucrative fundraising period. That is when donors are most focused on the elections, and most willing to make their largest contributions.

The consequence of the late mailings is that they mailed into other mailings previously scheduled. It doesn't take a direct mail expert to understand the statistical

[17] ATA said this in the meeting to elucidate about what it presumed was commonly known. Not only was ATA surprised by this basic lack of understanding about how direct mail works, ATA was also surprised by the chilling effect of the threat of prosecution on the thousands of vendors and committees that could step forward and verify this fact, if that were needed. Quite frankly, the Commission needs to take steps to ensure that its people are better informed because this level of ignorance is dangerous, not to those who operate under election law, but to the public and the taxpayers.

probabilities here, but the Commission should know that the timing of letters is critical to whether a potential donor will make one or more multiple contributions. Receiving multiple donation requests within too short a period of time from the same soliciting entity will deplete the number of contributions. Donors are, after all, usually of limited financial resources and essentially "budget" their contributions.

The costs of the program also increased as a result of ATA's taking emergency measures to get these mailings out once it was informed of the problems at the mailshops. It had already ordered lists, printing and other components of these mailings, so ATA was obligated to pay for them. For the insertion process to be sped up, ATA instructed the mailshops to omit some of the inserts, which negatively affected the effectiveness of the solicitations.[18] Also, ATA had to pay increased postage costs and overtime at the mailshops to ensure packages at least got into the hands of potential donors in time for those contributors to send money for the purposes asked in the letters (since they were clearly written as pre-election contribution solicitations as opposed to debt-reduction solicitations).[19]

There is also one phenomenon that ATA has not previously addressed, but came to understand after the 2004 presidential election cycle. The volume of direct mail used by the Bush-Cheney campaign was unprecedented, both in 2000 and 2004. Karl Rove, of course, was a direct mail fundraiser before he joined Bush-Cheney.

The unprecedented volume of direct mail solicitations by the Bush-Cheney campaign and the major committees beginning in the 2000 election, and continuing in the

[18] It is generally known in the direct mail industry that longer letters with more content, while more costly, generate more net revenue as a general result. This may seem counter-intuitive to those who are not direct mail professionals, but test results over decades and for all sorts of different types of program prove this generalization to be true.

[19] This is common to various types of nonpolitical fundraising for an event with a set date. If any of the Commissioners have hosted nonpolitical fundraising events, you'll know that some contributions come in early, but the bulk of contributions come in immediately preceding the event itself, with many people bringing checks to the event. While the GC's Brief attempts to distinguish the "advertising" value of direct mail from its solicitation value to denigrate the financial value of the volume of late mailings, even the General Counsel could not credibly argue that a direct mail solicitation for money to pay for pre-election advertising does not lose the likelihood of obtaining a contribution if it were to be received after the election, or even within too close a period of time before the election when the donor realizes that his or her contribution won't have any effect.

2004 election suppressed the results of not only competing political direct mail, but even non-competing non-political direct mail. The volume of mail by the larger committees "sucked" much of the money out of fundraising in general through the date of the election.

K. The Post-Election Litigation Prohibited Successful Debt-Reduction Mailings.

It was, of course, impossible to know in advance that the results of the 2000 election would be settled by litigation up to the United States Supreme Court. Given that most committees may rely to some extent on post-election debt-reduction mailings, it was reasonable for ATA to assume that it could recoup some of its losses. It is also a rule of thumb that the closer to the election, the more successful the debt reduction mailing.

However, the post-election litigation postponed the ability to do debt reduction mailings, since the presidency was not settled immediately. And, of course, the Bush-Cheney campaign continued raising money for the post-election litigation, which further hurt competing fundraising. The debt-reduction mailings that ATA did lost money, proving that ATA would only go into further debt if it were to mail more debt-reduction letters. Thus, it was commercially reasonable to stop the debt-reduction program after a few mailings showed that they were losing money.

L. Based on the Correct Factual Background, the GC's Brief Fails as a Matter of Law to Allege Violations of the Act.

The mischaracterizations and omissions of material facts contained in Section II.A. (Background) are fatal to the General Counsel's positions as a matter of law. It is evident to ATA that, based on the prior submissions of ATA in this matter, the many and egregious mischaracterizations and omissions of fact in the GC's Brief, and the failures to at least address them, even in the light most favorable to the General Counsel's theories, are designed to mislead the Commission.

Based on the serious flaws in the Background section of the GC's Brief alone, the recommendations lack merit and are frivolous. Therefore, the Commission should not approve any of the General Counsel's recommendations, and dismiss this matter in its entirety. Certainly, based on the record and the material mischaracterizations of fact, the Commission cannot find probable cause that any of the violations alleged in the GC's Brief have merit.

V. ATA's No-Risk Contract with CLPAC Was In Its Ordinary Course of Business

The GC's Brief, at page 7, states that "ATA did not extend credit to CLPAC in the ordinary course of business" as that Brief's primary basis for alleging corporate contributions by ATA, receipt of corporate contributions by ATA from third-party vendors and its other allegations of violating the Act.

ATA, however, has met its obligation of showing that it complied with the Commission's own regulation, 11 CFR 116.3(c) which defines "ordinary course of business" as:

> whether the commercial vendor followed its established procedures and its past practice in approving the extension of credit;
>
> whether the commercial vendor received prompt payment in full if it previously extended credit to the same candidate or political committee; and
>
> whether the extension of credit conformed to the usual and normal practice in the commercial vendor's trade or industry.

A. ATA Properly Relies on AO 1979-36.

In AO 1979-36, the Commission approved a "no-risk" contract with substantially fewer protections for the fundraising agency than those contained in the ATA/CLPAC contract. The contract in that AO provided that the fundraising agency would have no recourse against the committee, that the committee's obligation to pay the fees and expenses of the fundraising program (including advances made by the fundraising agency) were limited to no more than 75 percent of the total funds raised.

The committee, in other words, was entitled under the contract to receive 25 percent of the gross funds raised from both prospect and housefile mailing regardless of whether the program lost money.

In that AO, the agency did not receive a copy of the housefile as consideration of its no-risk arrangement. The agency did not represent that it charged higher than its normal fees, had an exclusive fundraising arrangement with the committee, or any of the additional items of consideration found in the ATA/CLPAC contract.

The key, however, is the fact that the Commission approved the contract in AO 1979-36 where the fundraising agency had no recourse against the committee even if the

fundraising program were "unsuccessful." In other words, the Committee approved this arrangement without regard to the results of the direct mail fundraising program. AO 1976-36 reads in relevant part:

> The Commission concludes that if, (1) the proposed financial agreement with its provisions for expenses to be initially incurred by [the direct mail agency], and for 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 to the ordinary course of [the direct mail agency's] business with terms which are substantially similar to those given to nonpolitical, as well as political, debtors of similar risk and size of obligation, and (2) the costs charged the Committee for services are at least the normal charge for services of that type, then the amounts ***expended*** by [the direct mail agency] will not be considered campaign contributions.

(Emphasis added.) This language is important because it justifies many of the arguments made previously by ATA, and defeats those found in the GC's Brief.

First, AO 1979-36 expressly approved the arrangement of a direct mail agency to incur expenses for the fundraising program. The agency in AO 1979-36 was a direct mail and marketing agency, thus the postage, printing and other components of the direct mail program provided by third-party vendors were incurred by the direct mail agency for the fundraising program of the committee.

AO 1979-36 also expressly approved the arrangement under which the fundraising agency had ***no recourse against the political committee***, and approved the arrangement of disbursing money to the committee even if all costs were not paid by the fundraising program.

The GC's Brief is based entirely on attacking the results of the CLPAC fundraising program by cleverly trying to show that the arrangement between ATA and CLPAC was impermissible. But that argument fails, both in its legal premise and based on the facts.

Compared to the arrangement approved in 1979-36, ATA had more forms of alternative consideration in the form of (1) ownership and exclusive marketing rights to the CLPAC housefile, (2) higher-than-usual fees, and (3) exclusivity. This means that ATA's contractual arrangement exceeded the arrangement approved in AO 1979-36.

Both as a matter of law, and under the facts, the arrangement between ATA and CLPAC was even more secure than the arrangement approved in AO 1979-36. And as in AO 1979-36, the arrangement between ATA and CLPAC was entirely within ATA's ordinary course of business. Neither the regulations nor the advisory opinions cited in the GC's Brief ***require anything more.*** However, ATA can demonstrate that the other advisory opinions are either completely inapplicable to this present matter, or otherwise support ATA's position.

B. AO 1991-18 Expressly Acknowledges, and Is Therefore Inapplicable to this Matter, that the Fundraising Agency Did Not Use the Arrangement in Its Ordinary Course of Business.

The GC's Brief relies heavily on AO 1991-18 for the proposition that, after AO 1979-36 had been issued, the Commission modified its position to ensure that fundraising arrangements are "more explicit as to the need . . . for the committee to pay all of the costs or the program." GC Brief, at 9. In other words, the GC's Brief would require any fundraising arrangement to ensure results, which is a significant departure from when the Commission approved, in advance, simply the arrangement in AO 1979-36.

In describing AO 1991-18, the GC's Brief, however, omits the most critical part of that advisory opinion. AO 1991-18 expressly states:

> you characterize the programs at issue as novel or innovative and, other than the fact that these programs for the Committee have begun, ***there is no indication that the extensions of credit in these programs are in [the fundraiser's] ordinary course of business and on terms substantially similar to extensions of credit to nonpolitical debtors that are of similar risk and size of obligation.***
>
> **********
>
> [T]he Commission cannot give its approval to the Prospecting Program in the absence of a record by [the fundraiser] or similar companies of the implementation of a program of similar structure and size in the ordinary course of business.

(Emphasis added.) Therefore, the GC's Brief reliance on AO 1991-18 is entirely misplaced. Indeed, the arrangement in AO 1991-18 was not approved because it was not in the ordinary course of business for that fundraiser.

AO 1991-18 does not revise the ruling in AO 1979-36 as the GC's Brief, through its cryptic use of random words from that opinion, would mislead the Commission into

believing. If anything, AO 1991-18 ***reinforces*** AO 1979-36 since, once again, the Commission focused on whether the arrangement (as opposed to the results, which AO 1991-18 admits are inherently "speculative") was in the ordinary course of business.

Rather than being "far more analogous," as the GC's Brief represents, AO 1991-18 is not applicable at all to the ATA/CLPAC contract since it is expressly based on the fact that the arrangement at issue in that opinion was not in the commercial vendor's ordinary course of business.

C. The GC's Brief is Frivolous in Suggesting that ATA Should Have Sued CLPAC or Pursued Other Forms of Recourse under a No-Recourse Contract.

The GC's Brief misrepresents AO 1991-18 and the other advisory opinions referenced at pages 9 and 10 of that brief, claiming that these advisory opinions modified AO 1979-36 to the point that it was commercially unreasonable for ATA not to (1) demand payment, (2) impose additional late fees, (3) refer the debt to a collection service, or (4) initiate litigation. GC's Brief, at 9.

Of course, even a simple law-school reading of the contract between ATA and CLPAC shows that none of these actions for legal recourse were available to ATA, and litigation by ATA against CLPAC would not only fail to survive a motion to dismiss, it would have likely faced Rule 11-like sanctions.[20]

The GC's Brief asserts these meritless claims against the backdrop of its failure to adequately describe AO 1991-18 and the other advisory opinions cited in that brief. None of the advisory opinions disturbs the principles of AO 1979-36, and a closer examination finds these opinions (1) were not based on the ordinary course of business of the fundraising vendor, and (2) have substantially different facts from the present matter.

AO 1990-1, for example, did not involve a no-risk arrangement. It involved a question about an inbound "900" call program in which callers would be charged for their inbound calls to register in response to a prerecorded voice message. Its principal issue

[20] ATA understands, of course, that the Commission's responsibility is to enforce election law. However, since part of those responsibilities involve an interpretation of what is commercially reasonable, the Commission and its lawyers cannot ignore basic contract law or other matters influencing the commercial relationships between parties subject to its jurisdiction. ATA does not mean to impugn, but for the GC's Brief to suggest that ATA sue CLPAC seems to demonstrate a naivete or some intentional disregard of the law to the point that may demonstrate a lack of understanding what constitutes "commercially reasonable."

revolved around whether the inbound call service could be compensated by payments from third parties. The inbound call service was obligated to pay certain charges by other telephone wire carriers.

AO 1990-1, however, cites favorably AO 1979-36 for the proposition that a vendor providing goods and services need not be paid directly by the political committee, but instead is compensated in whole or in part by third parties.

The GC's Brief apparently cites AO 1990-1 for the issue of whether it was inappropriate for ATA not to require an advance deposit from CLPAC as a "safeguard" against losses. The arrangement approved in AO 1990-1 did include a deposit of $2,000, but that was unrelated to the issues approved, namely, that third parties may pay vendors in committee fundraising programs. AO 1990-1 was not about the extension of credit in the normal course of business of a fundraising agency, and does not stand for what the GC's Brief claims.

AO 1990-14, also cited in the GC's Brief, likewise does not stand for the principles represented in that brief either. It, too, involved the services of a "900" number. There was no representation in this AO that the issue was about extensions of credit under a no-recourse arrangement in the ordinary course of a fundraiser's business. In fact, AO 1990-14 expressly describes that the 900 service provider's recourse for non-collection of its fees was against the pledging callers who failed to fulfill their pledges, and not against the political committee. ("The contract requires AT&T to 'undertake good faith efforts' to collect the charges from the callers. AT&T has the right, however, to remove from a caller's bill any charge which the caller disputes or refuses to pay.") Therefore, AO 1990-14 is likewise inapplicable to the present matter, both at law and under the facts.

AO 1989-21, also relied upon in the GC's Brief, involved a proposal by a t-shirt and merchandise artist to sell items at reduced prices as part of a new venture for political fundraising. That AO expressly turned on the fact that the artist had "given no indication that such a discount is a usual and normal charge offered to [her] non-political clients in the ordinary course of business." AO 1989-21 distinguished the commercial artist's proposal from AO 1979-36 by stating:

> the ***ordinary course of business of a direct mail firm is fundraising***, and in Advisory Opinion 1979-36, ***advances were being made as part of a standard fundraising program with safeguards for the company***. You are not ordinarily in the business of fundraising, and advances by you for a committee that would forego almost nothing, regardless of the degree of success of your fundraising efforts, would constitute contributions.

(Emphasis added.)

AO 1989-21 is therefore significant, but not for the misleading reasons described in the GC's Brief. AO 1989-21 is significant because it confirms the arrangement in 1979-36 (as opposed to modifying AO 1979-36, as the GC's Brief is written).

More importantly, however, is the fact that AO 1989-21 confirms that ***direct mail fundraising is treated differently*** than other forms of entities that are alleged to have made contributions. This express acknowledgement of Advisory Opinion 1979-36 is damaging to all of the underlying premises of the GC's Brief, for it approves the fundamental distinctions that direct mail involves advances and extensions of credit by direct mail agencies and vendors ***because that is the nature of the direct mail fundraising business.***

AO 1989-21 clearly shows that the Commission has expressly acknowledged that (1) what it may consider impermissible for non-fundraising entities is permissible for fundraising agencies, (2) especially if the arrangement of the fundraising agency is consistent with its ordinary course of business. Thus, AO 1989-21 actually contradicts the entire premise of the GC's Brief, and certainly shows that its description of these various advisory opinions is a misleading representation of what the GC's Brief represents.

Contrast the outcome in AO 1989-21 with that in AO 1985-28. In AO 1985-26, a racetrack sought approval of offering a $3 rebate for attendees of a fundraising event. The Commission approved this rebate because it was the ordinary course of business for he racetrack's non-political clientele. Although virtually identical to the discount offered in AO 1985-26, the racetrack in AO 1989-21 was able to proceed because the arrangement (again, not the results) was consistent with its ordinary course of business.

D. The Record in This Matter Amply Demonstrates that the Arrangement Between ATA and CLPAC Was Consistent with ATA's Ordinary Course of Business.

Under the regulations and all of the advisory opinions, even those cited by the GC's Brief, it is clear that the Commission, up until now, has focused on whether the arrangements between a fundraiser and a committee were acceptable. Fundraising results are unpredictable, of course. The results of fundraising programs depend on literally thousands of factors, many of which are outside the control of the fundraising agency.

The Commission's own regulations heretofore have focused on the arrangements, not the results, to determine whether a no-risk fundraising program was consistent with the fundraising agency's ordinary course of business. If the Commission were to attribute contributions based on failed results under arrangements that it has approved, then that would appear to be a change in the Commission's own regulations.

When an arrangement is consistent with the fundraiser's ordinary course of business, that arrangement has been deemed acceptable by the Commission – *even if such arrangement would not otherwise be considered acceptable* for a non-fundraising entity and if the arrangement was not in the ordinary course of that entity's business.

No fundraising person or agency can guarantee positive results. That is the nature of fundraising, which appears to be the reason why the Commission's regulations and opinions have heretofore only tried to ensure that the arrangements were in the ordinary course of business. Indeed, there is no "ordinary course" of results of fundraising programs.

The CLPAC contract and program was entirely consistent with ATA's ordinary course of business for its 35 years preceding that contract and the 40 years to date. After the extensive submissions made by ATA and found in the record of this matter, the GC's Brief does not once, and indeed cannot, allege violations of the Act based on the arrangements. The GC's Brief is based entirely on attacking the results of the program and ATA's motives.

However, the regulations and advisory opinions on which ATA relied, and on which ATA suggests the Commission must likewise rely, show that it is the arrangement, not the results or the unsubstantiated and cynical motives alleged by the GC's Brief, that must govern as a matter of law. Under those standards, there cannot be findings that ATA violated the Act in any way, shape or form.

E. Factually, the Record Proves that ATA's Operations Were Consistent with Its Ordinary Course of Business.

ATA does not ever enter into any contract with the intent of losing money, but sizeable losses have occurred with its non-political clients, as demonstrated by ATA's prior submissions. The losses in the CLPAC fundraising program were certainly sizeable, but not unprecedented. The quantities mailed in the months preceding and following the election were sizeable, but not only are such volumes over such periods common, but justified given the events preceding the program, as explained herein above.

The record demonstrates that ATA has proven before the Commission in this matter that

(1) it incurs third-party vendor debt larger than amounts incurred for CLPAC on behalf of its non-political client mailings,

(2) it pays individual vendors six- and seven-figure sums of money out of ATA's own funds,

(3) it carries seven-figure debt of its clients of as much as $3+ million,

(4) its continues to disburse to its clients six-figure sums equal to, and more than, what CLPAC received even while those programs are incurring debt and "losing" money in excess of seven figures,

(5) it does not seek recourse against its clients for this debt when the clients abide by the terms of the contract,

(6) it continues to mail for clients even when such sizeable debts mount, and

(7) it relies on non-bank private lenders to help finance postage for its non-political clients.

ATA's prior submissions in this matter proving these facts total *358 pages*.[21] ATA has already noted that these are just some of the more recent examples because it does not have records going back the full 35 years preceding the CLPAC fundraising program.

[21] And as explained below, ATA had already demonstrated to the Commission in MUR 3841 many of these elements in its ordinary course of business, to-wit, that ATA incurred sizeable third-party debt on behalf of non-political clients, that ATA assumed that debt, and that ATA wrote off sizeable portions of the balances owed by its non-political clients.

F. The GC's Brief Demonstrates that It Does Not Understand What is Commercially Reasonable in Direct Mail.

To support its case that the CLPAC program was not in ATA's ordinary course of business, the GC's Brief claims that ATA did not treat the debt in a commercially reasonable manner. GC's Brief, at 7. But as explained above, not only was this a no-recourse contract, but such no-recourse contracts have been approved by the Commission.

It is apparent, however, that the size of the loss is being used by the GC's Brief in an attempt to lead the Commission to conclude that for ATA to incur such sizeable fundraising losses is not commercially reasonable.

ATA has sustained itself for over 40 years obviously because more programs succeeded than failed, but even that does not explain the entirety of how ATA's business model keeps it a viable entity. One of the keys to ATA's ability to survive these program losses also points to one of the material failings of the GC's Brief. The GC's Brief fails (or, given General Counsel's previously stated position in its October 15, 2004 memorandum, appears to refuse) to acknowledge the substantial consideration from the exclusive marketing rights to the names developed by ATA for its clients.

As ATA noted above, there are a number of incentives to heavily mail prospect letters. One is that they generate income, although in most programs prospect mailings do not even cover their costs. The second incentive is to find new donors.

Adding names to a housefile has two financial benefits. Subsequent housefile mailings usually generate net income, and a percentage of that is used to pay for prospecting losses. The second benefit is the long-term income generated from renting those names.

Therefore, ATA is generally able to recoup its outlays through housefile net income and the list rental income. Thus, the commercial reasonableness of mailing prospect letters at a loss is that the names generated by those mailings result in long-term income.

The failure of the GC's Brief to acknowledge this direct mail principle is therefore fatal to even its theory that, in operation, the ATA/CLPAC program was not consistent with ATA's ordinary course of business.

Of the seven items numerated above describing how the record in this matter already shows that the ATA/CLPAC contract was consistent with its ordinary course of business, the exclusive marketing rights to ATA's clients' files explain the first six of them.

G. Other Federal Agencies Regulating Fundraising Have Failed to Understand No-Risk Contracts, But Either Amended Their Regulations or Lost in Litigation.

Both the Internal Revenue Service (IRS) and the United States Postal Service (USPS) regulate important aspects of direct mail fundraising, and both tried, under interpretations of their own regulations, to prosecute direct mail agencies using no-risk contracts. The IRS lost in litigation, and the USPS issued a clarifying regulation upholding ATA's position.

The case of *United Cancer Council v. Internal Revenue Service*, 165 F.3d 1173 (7th Cir. 1999) is illustrative of how the IRS failed to understand no-risk contracts, much akin to how the GC's Brief fails. In 1984, United Cancer Council (UCC) had an annual operating budget of only $35,000 and was on the verge of bankruptcy. It entered into a no-risk direct mail contract with W&H under which W&H agreed to front costs. As consideration, W&H insisted on an exclusive contract, co-ownership of the housfile, and exclusive marketing rights to that file.

In five years, W&H raised $28.8 million, and the program costs were $26.5 million. Although UCC admitted that the program was a success, UCC did not further retain W&H, instead opting for another agency, and shortly thereafter filed for bankruptcy.

The IRS attempted to retroactively revoke the tax-exempt status of UCC to the date it entered into the W&H contract based on UCC's entering the no-risk contract with W&H, alleging that because of the above-referenced terms, W&H was an "insider" that improperly benefited financially from the UCC fundraising program.

Chief Judge Posner's written decision notes that the IRS's classification of W&H as an insider was based on the fundraising contract. Judge Posner, however, noted that "[s]uch contracts are common. Fundraising has become a specialized professional activity and many charities hire specialists in it." As to the exclusivity provision, the decision chastised the IRS:

> The other point that the [IRS] makes about the exclusivity provision in the contract—that it put the charity at the mercy of the fundraiser until the contract with W&H expired—***merely demonstrates the [IRS's] ignorance of contract law.***

Id (emphasis added). The decision went on to further note the value of the housefile as additional consideration:

> ***The [IRS] also misses the significance of the contract's asymmetrical treatment of the parties rights in the donor list.*** The charitable-fundraising community distinguishes between "prospect files" and "housefiles." A prospect file is a list of people who have not given to the charity in question but are thought sufficiently likely to do so to be placed in the list of addresses of a direct-mail fundraising campaign. If the prospect responds, his or her name is transferred to the housefile, that is the list of people who have already made a donation to the charity. ***A housefile is very valuable,*** because people who have already donated to a particular charity are more likely to donate to it again than mere prospects who are likely to donate to it for the first time. . . Its value to the fundraiser is quite different . . . The value to it of a housefile that it has created is the possibility of marketing it (as a prospect file—but to a prospect file in which all the prospects are charitable donors rather than a mere cross-section of potential donors) to another charity that hires it.

Id (emphases added).

Much like the *UCC* case, ATA respectfully suggests that the GC's Brief demonstrates that it does not understand general direct mail principles, the value of the donor file as consideration and even contract law as it applies to fundraising. In the context of federal law, there must be some overriding respect for these issues. In the context of the Act, regulations demand it in recognition of the ordinary course of business of the fundraising agency, and not what the General Counsel, with its demonstrated lack of understanding of direct mail, prefers.

The USPS matter involved an interpretation of a postal regulation called the "cooperative mail rule" (CMR) affecting the availability of the reduced nonprofit postage rates. The CMR was written to prevent commercial entities from cooperating with nonprofits to mail solicitations for the commercial entities' goods and service (as opposed to fundraising letters of the nonprofit organization) at the reduced nonprofit rates.

The CMR is described in USPS Publication 417, and states that eligibility factors would be decided based on

1. who devised, designed and paid for the letter
2. who paid postage, either directly or indirectly
3. how the revenues are divided
4. what risks are entailed in the mailing, and who bears the risk

Section 5-2, USPS Pub. 417.

The USPS began an administrative action and attempted to assess a large postage penalty against ATA on the basis that the CMR was intended not only to apply these four above-referenced factors to the mailing of commercial solicitations, but to the mailing of fundraising letters under no-risk arrangements between nonprofit organizations and their direct mail agencies. ATA responded by stating that the USPS had misconstrued its own regulation, which could not be applied to direct mail agencies contracted by nonprofits to mail fundraising letters that contained no commercial solicitations. One of the major issues of contention was ATA's contractual rights to market the names of its clients that were developed from the prospect mailings.

After meetings with nonprofit groups and litigation threatened by ATA, the USPS realized that it had indeed misconstrued its own regulation, and issued a clarifying regulation acknowledging that fundraising letters mailed under no-risk contracts were eligible for the reduced nonprofit rates.

In both cases, federal agencies that regulated direct mail fundraising initially failed to understand the commercial soundness of no-risk contracts wherein the direct mail agency that built the housefiles had exclusive marketing rights as consideration for the risk of loss. ATA respectfully suggests that the GC's Brief contains the same or similar failures. The Commission should not make the same mistake as these other agencies in misunderstanding the nature and sound commercial bases of no-risk contracts and the valuable consideration provided by marketing rights to these housefiles. One federal agency was admonished by the court. The other agency went to great lengths to administratively cure of its flawed interpretation under threat of litigation, but also after it came to better understand these arrangements.

H. ATA's Use of Postage Lenders was Consistent with Its Ordinary Course of Business.

The seventh enumerated item deals with ATA's ordinary course of using postage lenders. ATA has already addressed those issues repeatedly and extensively. Therefore, ATA reprints from its January 26, 2005 submission its explanation, and attaches that hereto as a Supplement. ATA incorporates that Supplement herein as if part of this brief.

Besides the substantive arguments presented in the Supplement, ATA makes the procedural objection of the use of MURs in the GC's Brief. MURs, of course, are not binding or controlling legal authority. They are neither conclusive adjudicative decisions, nor are they rulemaking. They are, of course, investigative matters until the Commission or a court makes a final determination on the full merits.

The GC's Brief cites MURs 3027 and 5173 as if they were controlling legal authority. Such MURs are made available to the public, but only at the Commission's offices themselves. They are not otherwise published, even online, to ATA's knowledge. Thus, while the General Counsel has access to these investigative documents, parties outside the "Beltway" do not. ATA respectfully questions whether the Commission should allow this practice used by the General Counsel.

And of course, MURs resolved by conciliation agreements are not resolved on the merits. Whether the Commission's policy is to allow MURs to be considered for parties other than those directly involved certainly raises due process questions, and ATA respectfully suggests that the Commission, courts or other final arbiters may not consider these MURs in their deliberations.

Therefore, in addition to the substantive reasons why the GC's Brief is both wrong and inherently weak by reason of its need to cite these MURs as law, ATA objects to the inclusion of MURs 3027 and 5173, and would move to strike those references if the Commission's procedures allowed.

VI. Disbursing Less than 10 Percent of the Gross Income Was Proper and Authorized under Commission's Own Ruling

The GC's Brief, at 11, alleges that the disbursement of $465,000 to CLPAC constituted a corporate contribution by ATA.

A. Disbursements under the Commission's Own Ruling Could Have Been Higher.

Assuming that figure of $465,000 is correct, that still represents only nine percent ($465,000 divided by $5,141,307) of the gross proceeds of the fundraising program. As noted herein above, the Commission had already approved disbursements of 25 percent of the gross fundraising proceeds regardless of whether the program was "unsuccessful" or not, under a no-recourse direct mail fundraising contract. See, AO 1979-36.

The nine percent disbursed to CLPAC falls within that percentage by a full 16 percentage points. The percentage approved in AO 1979-36 was a full 2.8 times the percentage of money disbursed versus gross income.

Had ATA used the contract that the Commission itself approved in AO 1979-39, the disbursements to CLPAC would have been $1,285,327 (25 percent of the total income). That's $800,000 more than CLPAC received. ATA has already noted that although not required by the terms of the contract, ATA nevertheless did five "test" mailings that netted over $150,000. That was not only reason to mail heavy, but to begin disbursing money to CLPAC.

As a matter of law, therefore, the amounts disbursed to CLPAC under (1) a no-risk contract that was (2) consistent with ATA's ordinary course of business, was proper and even appeared to be authorized by the Commission's own rulings.

ATA was contractually obligated to disburse money to its client.[22] That was the purpose for which CLPAC retained ATA. Even the Commission's own regulations and advisory opinions, referenced herein above, recognize this basic distinction between fundraising agencies and other entities. See, for example, AO 1989-21, which reads in relevant part, "the ordinary course of business of a direct mail firm is fundraising."

B. Disbursing Less Could Have Subject the Parties to Charges of Fraud.

[22] ATA will note that the General Counsel's October 15, 2004 memorandum failed to read this contractual obligation correctly, which ATA pointed out in its January 26, 2005 submission. The GC's Brief is modified somewhat from that October 2004 misreading of the contract.

The purpose of the direct mail fundraising program was to raise money for CLPAC to pay for newspaper or television ads on its independent expenditure. That is the reason why people made their contributions in response to the fundraising letters prepared by ATA.[23]

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 *Madigan* case, initially brought in state court, 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 GC's Brief 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

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

little. Had ATA not made disbursements, it could have been sued by any of the many states that were *amici* in *Madigan*, and perhaps even the United States Justice Department.

C. The Record in this Matter Shows that the Disbursements to CLPAC Were Consistent with Its Ordinary Course of Business.

Every fundraising program conducted by ATA results in disbursements of some percentage of income to its clients. That is what ATA is retained to do.

Direct mail fundraising is, of course, different from other types of fundraising in that it continuously involves the incursion of debt and the expenditure of money for the next mailings until the mailings stop. Thus, there is a constant ledger of debt to vendors, unlike, for example, a dinner fundraiser where the expenses for the dinner are final on the date of the dinner. Therefore, ATA's normal course of business is to disburse money to its clients on an ongoing basis, even though the programs have debt. The record shows that ATA has provided examples of this normal course of disbursing funds to its nonpolitical clients even when there are program balances owed. Those disbursements are not contributions to its nonpolitical clients.

VII. The Extensions of Credit by Direct Mail Vendors Does Not Constitute A Receipt of Contributions by ATA

The GC's Brief alleges that ATA accepted contributions on behalf of CLPAC by the extensions of credit from its vendors, and by certain vendors' writing off portions of their invoices owed by ATA.[24] That, however, is just another spin on the failed arguments made elsewhere in the GC's Brief.

As noted above, the whole direct mail industry functions on credit terms. To allege this as a violation against ATA, the Commission would need to allege the same

[24] Besides ATA's standing objection noted in Section III of this brief, the GC's Brief fails to represent how much of the vendors' total invoices were written off; in other words, these vendors may have charged higher-than-usual fees and been paid large sums of money from the program, which could have resulted in their breaking even. Vendors often charge higher fees for political direct mail because of the risk. Therefore, it is not a given, and should not be assumed by the GC's Brief, that the vendors lost money by writing off any portion of their invoices, especially if such invoices included interest.

against every major political committee and every direct mail agency involved in political fundraising. Clearly, such allegations would be absurd.[25]

GC's Brief at page 11 manages on the same page to accuse ATA of making prohibited contributions by *paying* vendors, and of *accepting* contributions by negotiating settlements with its vendors. These are not only contradictory positions, but to suggest that ATA cannot pay vendors or negotiate down vendor debt when a program loses money means that the GC's Brief would leave ATA only one option on fundraising programs that lose money – file bankruptcy.

ATA doubts seriously that the Commission believes that its regulations are so impervious to common sense that such a result would even be suggested, but that appears to be the only avenue out under the GC's Brief, given, of course, the no-recourse contract at issue.

A. As Explained, the Extension of Credit by Vendors Is Consistent with ATA's and the Entire Industry's Ordinary Business.

That vendors solicit ATA's business is to be expected. ATA, of course, attempts to negotiate the most reasonably advantageous terms for its direct mail programs. Vendors understand that their potential for income and profit is based on the success of the direct mail because it is the direct mail that is the source of all revenue.

Therefore, vendors extend credit to sell their goods and services, postage lenders lend money at interest to make a profit (the USPS does not extend credit terms), and that is how the direct mail fundraising world turns.

As described at page 24 above, the General Counsel's office indicated its intent to open investigations should ATA provide the names of these committees and agencies. That may be a masterfully strategic way to chill ATA's ability to call witnesses, should the need arise, but it is nonetheless a good example of how the GC's Brief fails to comprehend the ordinary course of direct mail fundraising business.

B. Under the No Recourse Contract, ATA Had to Either Pay Vendors or Negotiate Settlements.

[25] ATA is relatively confident that an independent tribunal would find it not only absurd, but inappropriately ironic since the Commission's own regulations are printed on credit terms.

ATA tried to make money on the CLPAC program. It raised a substantial sum, but did not succeed in raising enough to cover the costs, although it had longer-term consideration in the form of the CLPAC housefile. As described in detail above, the contract prohibited ATA from seeking recourse against CLPAC.

The only way to pay down the debt before ATA was able to recoup losses (through marketing the housefile) was through debt-reduction mailings. The debt-reduction mailings ATA tried showed that it would have only gone into further debt, so it was commercially reasonable to stop.

Faced with collection efforts and threatened litigation from some of its vendors, ATA sought the advice of respected election law expert, Mark Braden. Mr. Braden's advice is contained in his April 30, 2001 letter, attached hereto as Exhibit 4. In that letter he states

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

Besides Mr. Braden's letter, which ATA has already provided for the record, ATA has provided substantial documentation to the Commission showing that it has settled debt with its vendors in substantially similar fashion for its non-political client mailings.

ATA's supplement to this brief explains its position as to postage lenders.

Thus, the GC's Brief's allegation that ATA received contributions is no more legitimate than its previous theories, but is merely designed to lead the Commission to believing that the penalties may be greater.

VIII. ATA In Any Event Did Not Knowingly and Willingly Violate the Act.

GC's Brief departs from prior findings and allegations by, for the first time in this matter, alleging that ATA violated the Act knowingly and willfully (GC's Brief, section II.D, pages 14 – 15). In support of this new and more highly charged allegation, the GC's Brief relies on MUR 3841 for the proposition that the Commission "previously admonished ATA's principals for engaging in conduct similar to conduct [in this matter]."

The allegation, however, is a canard.

A. There Were No Final "Findings" of Violation of the Act in MUR 3841.

The GC's Brief cites as grounds for alleging knowing and willful violations in the present matter the "involvement" of ATA's principals in MUR 3841. As a preliminary observation, ATA points out that the GC's Brief mischaracterizes MUR 3841 as the Commission's having "found" that extensions of credit were not in the ordinary course of business.

In MUR 3841 the Commission proceeded no further than finding "reason to believe" investigate stage that potential violations of the Act may have occurred. That, of course, was before the parties were given an opportunity to file responsive submissions disproving the bases of that investigation.

MUR 3841 never proceeded beyond its preliminary investigative stage under current 11 CFR 111.10. Therefore, the GC's Brief at page 14, is wrong as a matter of law and fact when it says that the Commission "found that the extension of credit [in that matter] was not in the ordinary course of business and not commercially reasonable" (emphasis added).

No action was taken in that matter against TVC, AML or its principals. Both legally and factually, such "reasons to believe" in the investigative stage MUR 3841 were refuted. That matter was terminated, and never reached the stage of finding probable cause.

B. The Facts of MUR 3841 Show that There Was No Violation of the Act.

MUR 3841 began as an investigation of the committee United Conservatives of America (UCA). UCA was a committee whose chairman was Richard A. Viguerie until 1991, and was subsequently run by Robert Mills. The original matter was opened naming only UCA as respondent, but later came to include as respondents two entities affiliated by common ownership by Mr. Viguerie, The Viguerie Company (TVC) and American Mailing Lists Corporation (AML).

TVC was the direct mail agency that provided services to UCA, and AML provided list brokerage (list acquisition) services.

The central bases of the investigative allegations raised against TCV and AML in MUR 3841 were

> TVC also appears to have made prohibited contributions to the Committee by making long-term extensions of credit ***outside the ordinary course of business***. See AO 1979-36; A0 1991-18, MUR 3485. TVC has permitted the Committee to carry a debt of $43,658.70 since December 1990, and has not received a payment in the last two years. Further, there is no evidence that TVC has made efforts to collect the debt. ***Absent such evidence, it appears that TVC is acting in a commercially unreasonable manner***. Further, because the Committee and TVC share a building and a corporate officer, the transactions between the two may not have been at arm's length.

(Emphasis added.) Page 6, Factual and Legal Analysis, MUR 3841, December 22, 1993.

The letter opening the formal investigation in MUR 3841 also alleged that TVC collected only $70,649.70 of the $114,307.86 the Commission alleged that UCA owed TVC for rent and telephone usage.[27]

[27] The Commission alleged that TVC had not charged UCA for office and phone usage based on its not finding invoices. TVC informed the Commission that such charges were added into, and thus incorporated into, its invoices for other charges, so in fact TVC had billed UCA fully and properly, just not separately.

There are, of course, no allegations in this present MUR 5635 of interrelationships of one principal, nor of unpaid rent and phone usage.

Therefore, it is apparent that the GC Brief cites MUR 3841 as grounds for alleging knowing and willful violations of the Act based on extensions of credit outside the normal course of business.

No action was taken against TVC or AML in MUR 3841 because, as explained in more detail below, TVC submitted evidence refuting all of the allegations forming the basis for the Commission's investigation. The GC's Brief in MUR 5635 fails full disclosure by failing to inform the Commission that the allegations in MUR 3841 were explained away or refuted factually and legally.

In closing comments for the records, and in direct response to the Blumberg letters cited in the GC's Brief at pages 14 – 15, yours truly wrote to Peter Blumberg of the Office of General Counsel on April 23, 1997:

> TVC, AMLC and Mr. Viguerie reiterate the assertions made in their previous submissions to the Commission that the entities, and Mr. Viguerie, as President of both, did not make prohibited corporate contributions to UCA, nor did they violate any of the reporting statutes and/or regulations. TVC, AMLC and Mr. Viguerie have consistently and strongly disagreed with the Commission's initial assertions, which formed the basis for its investigation, that the companies' business practices and the circumstances relating to UCA in particular may have been unlawful or inappropriate in any way. Had the Commission continued to pursue the matters, regardless of its reasons for finding no liability as stated in its April 2, 1997 letter, we have no doubt that TVC, AMLC and Mr. Viguerie would have been found not liable for any of the alleged violations.

See Exhibit 5.

In September 28, 1994 correspondence from yours truly to Mr. Blumberg, TVC explained that the UCA matter was entirely consistent with TVC's normal extensions of credit for then over 30 years. See Exhibit 6, attached hereto. TVC noted for the record that it was impossible to provide records then of the 30-year history showing extensions of credit, large fundraising program losses, carrying balances owed by clients, paying vendors despite such program losses, and otherwise refuting all of the factual allegations raised in MUR 3841 that the UCA matter was inconsistent with TVC's normal course of business. However, that letter described 15 different, then-more-recent fundraising

programs refuting the Commission's claims that the UCA matter was not consistent with TVC's extensions of credit in its normal course of business.

Another important fact neglected by the GC's Brief in MUR 5635 was that the UCA contract was not a no-risk arrangement. See Exhibit 6, page 2, footnote 1 ("The ALCT contract differed from the [UCA] contract in that the ALCT contract was a "no-risk" contract."). Thus, MUR 3841 applied to both different legal and factual issues about extensions of credit and commercially reasonable efforts to collect a debt.

C. The GC's Brief Is Not Only Factually Misleading, It Fails the Level of Proof for Even Alleging a Knowing and Willful Violation of the Act.

The knowing and willful violation standard was added to the Act by the 1976 amendments under Public Law 94-283 (which was made necessary by, and was enacted after, *Buckley v. Valeo*). Section 109 of PL 94-283 amended section 313 of the Act. The legislation created a standard of requiring "clear and convincing proof" that a person accused knowingly and willingly violated the Act (Act section 313(a)(6)(a)). See, also, House Conference Report 94-1057, April 28, 1976, *U.S. Code Congressional and Administrative News* 1, 1-1933. Clear and convincing proof, of course, is a much higher standard that merely having reason to believe that *evidence* indicates a knowing and willful violation.

Citing as the only basis of a knowing and willful violation an investigative matter that (1) was opened on different facts, (2) was refuted by the factual submissions, and (3) was closed with no action taken does not even rise to the level of a preponderance of evidence. It certainly does not reach the much higher standard of clear and convincing *proof.*

D. The GC's Brief Fails to Accurately Describe the Legal Standard of What Constitutes a "Knowing and Willful Violation of the Act.

The cases cited at page 15 of the GC's Brief do not support a finding of a knowing and willful violation of the Act by ATA.

United States v. Hopkins, 916 F.2d 207 (5th Cir. 1990) dealt with whether statements by the accused were knowingly false under 18 U.S.C 1001, and is therefore not relevant to the issues or the "knowing and willful" statute at issue in the present matter.

The decision in *AFL-CIO v. FEC*, 628 F.2d 97 (D.C. Cir. 1980), however, contradicts the representation of that case in GC's Brief. While citing that case for the proposition that ATA's actions were in "defiance" of the Act, a more thorough and thoughtful reading of that case indicates that ATA could not be found to have knowingly and willfully violated the Act. That case states that a

> "willful" violation must necessarily connote "defiance or such reckless disregard of the consequence as to be equivalent to a knowing, conscious, and deliberate flaunting of the Act." To hold otherwise would fail to distinguish between a "serious" offense and a "willful" one and would "disrupt the graduation of penalties established by Congress."

Id, at 101, citing *Frank Irey, Jr. Inc. v. OSHA*, 519 F.2d 1200, 1207 (1975).

The court in *AFL-CIO* noted that "every indication is that the AFL-CIO considered itself to be in compliance with the Act." *Id.* The present matter is no different in that regard. The record in MUR 3841 concludes with a letter from Mark Fitzgibbons expressing just that, which was that TVC and all of the principals were in compliance with the Act. Therefore, TVC clearly believed, if not proved, that it was operating consistent with the Act in MUR 3841.

ATA in the present matter likewise believed that it was operating within the Act. This brief, ATA suggests, amply demonstrates that it not only believed that it was operating under its ordinary course of business and reasonable interpretation of the law, but the ***correct*** interpretation of the law. In fact, ATA believes that it has amply demonstrated that the GC's Brief has resorted to distorting the facts and the law simply to present its case.

In *AFL-CIO,* the court also notes that subsequent approval of the AFL-CIO's actions is "persuasive evidence of a lack of intent to violate the Act's prohibitions." *Id.* Not only has ATA engaged in no-risk contracts, but the October 15, 2004 memorandum by the General Counsel acknowledges that no-risk contracts are, as a matter of law, consistent with the Commission's regulations. The contract's provision for ATA to own the housefile was deemed adequate consideration of its losses and its payments to third-party vendors.

ATA has participated in some, but few, fundraising exercises for political committees since MUR 3841. It was a vendor in the North for Senate campaign, which

at that time set a record for the most money raised in direct mail for a U.S. Senate candidate. The contract used there was virtually identical to the contract in this matter, thus the Commission had subsequently "approved" ATA's no-risk contract.

The court in *AFL-CIO* further states that "no one should be convicted on the basis of an interpretation of law that is written as to be of uncertain meaning to the mind of the accused." *Id* (emphasis added). Clearly, in the present matter, ATA thought that it was acting in consonance with the Commission's regulations, for it was acting in consonance with its ordinary course of business, as it has repeatedly demonstrated.

Not only that, the Commission itself has indicated that its previous authorization of no-risk contracts may need to be revisited. That, of course, implies if not means that while the Commission may not prefer no-risk contracts, they are lawful under current law.

While the GC's Brief in MUR 5635 cites the closing letters from the Office of General Counsel in MUR 3841 for the proposition that ATA and its principals acted in "defiance" of the Commission's laws and authority, ATA respectfully submits to the Commission that such proposition is not only wrong, but constitutes a dangerously overzealous misrepresentation of the true picture.

Although the GC's Brief in MUR 5635 also cites the closing letters in MUR 3841 as "admonitions" against future activities, it is apparent from the record in MUR 3841 that the Commission's pre-investigative allegations were either unfounded or were refuted by the facts. The activities of TVC were not deemed to be violations of Commission regulations then, as evidenced by its decision to take no action, and cannot be construed now as a basis for a claim that ATA has knowingly and willingly violated the Act.

The Commission should not confuse "defiance" with "determined resistance."[28] Clearly, the Commission has opened investigations that were proven through discovery to have been based on flawed information. MUR 3841 was premised on the belief by the Commission that ATA's extensions of credit were not its ordinary course of business. ATA refuted those investigative contentions by its submissions.

[28] Nor would it be appropriate for General Counsel to raise the bar against good faith challenges by raising 11th hour allegations of potentially criminal sanctions simply because a party makes a good faith challenge to the General Counsel's recent and flawed interpretations of the regulations.

"Determined resistance" does not constitute grounds for the Commission to assess penalties. See, *FEC v. Friends of* Harman, 59 F.Supp.2d 1046, 1059 (C.D. Cal 1999). Certainly, the Commission may be wrong in at least some of its investigative stages, and it cannot expect parties subject to investigations to roll over and play dead if they believe they are acting lawfully.

MUR 3841 rose to no higher level than an investigation, thus the characterization in GC's Brief that the Commission "found" extensions of credit not in the ordinary course of business is a misleading characterization of MUR 3841.

The General Counsel itself has admitted in its October 15, 2004 memorandum in this matter that there were no unlawful contributions or receipt of contributions by virtue of the no-risk contract, and is now wrong that ATA operated outside of the contract. Given that the General Counsel's Office itself is in conflict about the facts and the law, there can be no finding of a knowing and willful violation by ATA.

The fact that ATA has disagreed with General Counsel in this matter or in MUR 3841 should not be construed by the Commission as temerity or defiance of the Act or of the Commission's authority in general. Quite to the contrary, ATA and its clients are regulated by many government agencies. ATA goes to great lengths to comply with laws of the many government agencies that oversee its activities. That it has taken exception to an investigative matter before the Commission is no sign of defiance or disrespect for the Commission's authority or the laws that it enforces.

The Commission in this matter, however, should not rely on the mischaracterizations of MUR 3841, especially when such mischaracterizations are about such a serious matter as whether new activities are knowing and willful violations of the Act. As a matter of law, the GC's Brief fails to meet the evidentiary and the substantive legal showings necessary even to raise such an allegation.

IX. Conclusion

The GC's Brief is obviously intended to draw a visceral reaction based on the size of the losses involved. However, those numbers themselves are suspect. Given the other mischaracterizations and omissions of material facts, its less-than-candid description of the controlling legal authorities, and the materially flawed conclusions it asks the

Commission to reach, ATA respectfully suggests that the General Counsel has an ethical obligation to withdraw its recommendations.

For all the reasons stated herein and in the entire record, ATA respectfully suggests that the Commission has no grounds to find probable cause of any violations of the Act by ATA, and should terminate this matter.

ATA also reiterates that should the Commission desire to consider the role of no-risk contracts under the Act, that it proceed under its rulemaking, rather than its adjudication, authority. ATA did not violate the Act, and it has demonstrated clearly enough that even if the Commission were to disagree with ATA's assessments, there are ample, legitimate grounds on which ATA had and has reason to believe that it was operating within the Act.

ATA also believes that it is right as a matter of law to challenge the questionable interpretations presented thus far in this matter. ATA also believes that the presentations by its opposition are sufficiently wrong that they would be subject themselves to legal sanctions by independent tribunals should this matter proceed.

It should be apparent that direct mail is a complex profession, and understandably the matters addressed in this brief are complex. It should also be apparent that ATA believes that what it does and what it has done are not only lawful, but that is has operated openly for 40 years under bright lights of publicity and regulation by many government agencies.

Counsel for ATA therefore reiterates his offer extended in previous submissions to appear before the Commission to answer questions that members of the Commission may have.

Respectfully submitted,

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Date: May 13, 2005

SUPPLEMENT

TO RESPONSE BRIEF OF

AMERICAN TARGET ADVERTISING, INC.

MUR 5635

(10 Pages Total)

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

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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]

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[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.

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

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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.

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[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.