BEFORE THE FEDERAL ELECTION COMMISSION

In the Matters of American Target Advertising,
Inc. and Mail Fund, Inc. MUR 5635

BRIEF OF AMERICAN TARGET ADVERTISING, INC. ON MATTERS AFFECTING ITS RIGHTS AND INTERESTS

On or about July 25, 2005, the General Counsel issued its brief against Mail Fund, Inc. in this matter in which American Target Advertising, Inc. (ATA) is a respondent.

It is appropriate for the Commission to consider this filing because (1) Mr. James Flemma, the sole principal of Mail Fund, Inc. (MFI) passed away the day that the General Counsel issued its brief against MFI, (2) the allegations raised against MFI impact directly on, and would harm, ATA's ordinary course of business,[1] and (3) ATA has unique data and information that only it can provide to the Commission, which will impact on the Commission's decision as affecting MFI and ATA.[2]

I. MFI's Principal Died and Cannot Provide Data or Guidance in Response to the GC's Brief.

In a January 2005 meeting at the Commission, counsel for ATA informed Counsel Beth Mizuno that Mr. Flemma was gravely, even terminally ill.

As briefed by ATA, the financing relationship between Mr. Flemma and ATA went back 15 years. Mr. Flemma initially started lending to ATA under his name, but later incorporated as Mail Fund, Inc. In ATA's prior submissions, ATA provided many examples of MFI's lending to ATA for its nonpolitical clients' mailings, proving that the

[1] 2 U.S.C. 437g(a)(4)(B)(ii) provides that "[t]he Commission may not make any determination adverse to a person under clause (i) [finding probable cause that a person violated the Act] until the person has been given written notice and an opportunity to be heard."

[2] Section II, "Analysis" of the General Counsel's brief establishes the link between ATA and MFI for purposes of that brief against MFI, and the GC's Brief is targeted as much against the ordinary business practice of ATA's using postage lenders as against MFI. Since the GC's brief against MFI targets an ordinary business practice of ATA, and ATA is uncertain of whether MFI will respond to the allegations, ATA presents information and arguments in this brief that the Commission should consider in resolving these critical claims affecting ATA's ordinary course of business.

CLPAC program was conducted in the ordinary course of business for nonpolitical clients of ATA. The relationship was between ATA and MFI, not CLPAC and MFI, MFI having advanced tens of millions of dollars for ATA's nonpolitical client mailings over 15 years.

Sadly, Mr. Flemma passed away on July 25, 2005. ATA is unaware of the status of MFI as an ongoing entity, and ATA finds no provisions in the regulations for a respondent's counsel to file a notice (or "suggestion") of death.

II. The Commission Has Already Approved the Use of Non-Banks to Advance Direct Mail Fundraising Costs.

The GC relies on 2 U.S.C. 441b(a) as authority that only banking institutions may lend money to political committees for their direct mail fundraising appeals. The Commission, however, has already expressly authorized non-banks to advance direct mail fundraising costs.

The Commission has spoken to this issue already, acknowledging the standard direct mail industry practice – indeed the necessity in many instances – of non-banks advancing postage and other direct mail fundraising costs. Both 11 CFR 100.55 and 116.3(b) allow for such extensions of credit by non-bank vendors. AO 1979-36 expressly approved that non-bank corporations may advance funds for direct mail fundraising programs.

Thus, while the GC now insists that 2 U.S.C. 441b(a) is an absolute prohibition on non-banks advancing funds, the Commission has already authorized a number of exceptions, and the ATA/MFI arrangement falls within those exceptions.[3]

ATA and MFI had a 15-year history, and like most small businesses, ATA has many financing needs unrelated to political committees. ATA did not "hide" MFI, which evidences an openness that ATA thought that it was operating lawfully, and not even utilizing a "loophole." Had MFI lent its financing for all of ATA's postage through ATA's general operating accounts, there would be no issue for the Commission to pursue, since AO 1979-36 expressly allowed the agency to finance the mailings of political committees.

[3] ATA has previously briefed the Commission that the GC's *ultra vires* agenda is to modify these regulations and rulings in an *ex post facto* manner.

III. The GC Would Punish MFI for Making a Profit.

The GC's brief omits a very material fact: the amounts on which it bases its claims for corporate contributions by MFI include MFI's ***profit.***[4]

MFI charged interest at its then-standard rate of 24 percent per annum. Thus, the General Counsel would mislead the Commission into assessing penalties based not on the amounts advanced, but on MFI's substantial profit as well. Under any event, the Commission has no authority to penalize profits, because profits cannot be considered contributions.

It should be evident to the Commission just from the fact that ATA and others who use postage lenders pay high interest rates to specialized postage lenders that ***banks generally do not lend postage money*** to smaller direct mail agencies or political committees for many reasons including the type or lack of collateral that banks typically require to secure their loans. Thus, as is one standard direct mail fundraising industry practice, agencies and organizations rely on postage lenders.

The inability to pay postage creates, of course, the inability to mail. The exercise of the First Amendment right to mail is therefore inherently based in the ability to pay postage. In *American Target Advertising v. Giani*, 199 F. 3d 1241 (10th Cir. 00), the United States Court of Appeals recognized that credit ratings of direct mail agencies and their clients should not be a bar to the constitutional right to mail fundraising letters.

The GC raises the issue that "there is no evidence that CLPAC repaid Mail Fund . . . $68,254." The General Counsel, however, feigns ignorance of what it was told in meetings and information it received in ATA's many submissions prior to this stage. MFI was not only paid for all of its invoices, but ***every penny*** that MFI was paid came from income covered by the CLPAC fundraising mailings.

There were direct disbursements from the escrow account to pay MFI, of course. For amounts not paid out of the escrow account, MFI had not only a security interest in the names generated by the ATA fundraising program for CLPAC, but was paid out of

[4] ATA's brief of May 13, 2005 objected to the GC's attempt to base its alleged penalties not on what postage lenders advanced, but on what they were ***paid***, which includes their substantial interest (profit). The GC's brief against MFI nevertheless fails to disclose this legally and factually important distinction. ATA is obviously disappointed, but not surprised at this juncture, that the GC continues this path of distorting and omitting facts to mislead the Commission.

the net list rental proceeds. The briefs of ATA, The Viguerie Company and ConservativeHQ.com, Inc. explain that the "lifetime value" of the CLPAC names was sufficient to cover any upfront losses of the fundraising program. Thus, MFI was also paid out of the proceeds of the list rentals made possible from ATA's exclusive marketing rights to the CLPAC housefile, which was and still is part of ATA's compensation from CLPAC.[5]

Therefore, MFI made a substantial profit at higher-than-bank-loan charges, evidencing its clear profit motive, as opposed to any motive of making a political contribution. ***Direct mail fundraising postage lending was MFI's business.*** It is one standard form of business in the direct mail fundraising industry, and it was and has been ATA's ordinary course of business for many years to rely on postage lenders to advance postage funds since the United States Postal Service does not extend credit.

The failed logic of the General Counsel's position is demonstrated by the following examples:

> Direct Mail Agency A has $1 million in its general operating bank account. These are profits from its nonpolitical business. In its ordinary course of business, it advances postage at no interest for its clients' direct mail fundraising programs.
>
> DM Agency B borrows $1 million from a small bank whose board consists of partisan political activists of one party. Agency B puts the loan proceeds into its general operating bank account. The bank charges interest at Prime plus 2 percent per annum. Agency B advances postage for its nonpolitical and political clients at Prime, but uses $1 million to pay postage on its political direct mail.
>
> DM Agency C relies on multiple lenders for its general financing, and obtains $1 million at below-market interest from a partisan billionaire and deposits that loan into its own operating account. Agency C advances postage to its nonpolitical clients at 10 percent per annum, and uses $1 million from its own account to advance postage for a political committee.
>
> Agency D uses postage lenders in its normal course of business. Agency D obtains $100,000 from its postage lender at 24 percent per annum (two percent per month). Agency D does not deposit that money into its own

[5] ATA could, perhaps, understand that these concepts may not have been understood or grasped by General Counsel before this matter. However, after repeated explanations of not only the facts, but of this process itself, it appears to ATA, at least, that the General Counsel may be choosing to ignore the facts to further advance its agenda, described in previous submissions.

> operating account, but purchases $100,000 of postage, returns that $100,000 plus $2,000 interest to its lender from the proceeds of the direct mail fundraising program, borrows that same $100,000 of principal for the next mailing, repays it and $2,000 interest. This happens for 10 mailings, so that the lender has advanced only $100,000 of his money, but has done so 10 times and has made a profit of $20,000.

Under the Act and the regulations, the first three arrangements are legal. Under the General Counsel's flawed theories, only Agency D and its lender have violated the Act, even though (1) in all four examples the same amount of postage was paid, (2) the lender to Agency D made a profit in excess of bank rates of interest, and (3) Agency D operated openly under this arrangement.

IV. The Use of MURs and Conciliation Agreements as Authority by the General Counsel Against Non-Parties to Those MURs Should be Rejected.

The GC's brief relies on citations to MURs and conciliation agreements as authority for the Commission to make findings of probable cause. ATA has previously objected to the GC's use of MURs and conciliation agreements as "legal" or even "persuasive" authority. These purely investigative matters lack the integrity of dispositive findings of fact and/or law, and the Commission should not allow this strange practice by the GC to be used against non-parties to those MURs and agreements, especially in making determinations of finding probable cause in this or any adjudication.

A. MURs May Not Be Cited Against These Respondents.

As legal authority, the governing statute makes clear that conciliation agreements are to be used by the Commission in subsequent matters only for violations of those respective conciliation agreements by the parties to the agreements themselves. See, 2 U.S.C. 437g(5)(D). Conciliation agreements, therefore, are meaningless as legal authority except as applied the respective parties of those agreements, and may not, as a matter of law, be used *by the Commission itself* against respondents in other matters.

The governing statute authorizing advisory opinions, on the other hand, expressly provides:

> any person who relies upon any provision or finding of an advisory opinion in accordance with paragraph 1 and ***who acts in good faith in accordance with the provisions of such advisory opinion shall not, as a result of any such act, be subject to any sanction provided by this Act*** . . .

2 U.S.C. 437f (emphasis added). The Congress, therefore, has expressly authorized reliance on advisory opinions by parties other than those in the respective advisory opinions.

Unlike advisory opinions, which the Commission publishes on the Internet, are reported in sources available "outside the Beltway," and are generally accepted as part of the rulemaking authority of the Commission, there are no provisions for reliance on investigative matters and conciliation agreements as authority ***against*** parties other than those who signed onto such conciliation agreements. Such investigative matters lack the dispositive nature of formal rulemakings or adjudications resolved on the merits.

Respondents, of course, may have many reasons unrelated to the merits of the matter, including the avoidance of the high costs of litigation, to enter into conciliation agreements. The use of MURs and conciliation agreements as legal authority by the General Counsel against third parties is more akin to the man behind the curtain in the Wizard of Oz than adjudicative findings consistent with due process – only the Commission itself knows which levers to pull.

ATA objected under due process grounds to the citation of MURs by the GC as authority. As expressed herein, their use by the GC in this manner is unauthorized by law, and therefore appears to be *ultra vires* as well. The Commission should not be persuaded by, nor reward, the attempt to use such citations in reaching findings of probable cause.

B. <u>MURs 3027 and 5173 Did Not Address the Ordinary Course of Business of the Direct Mail Agency</u>.

ATA's Response Brief of May 13, 2005 includes a supplement that addresses why, on the facts and the law, MURs 3027 and 5173 do not apply (even without regard to the objections therein and herein). ATA urges the Commission to re-read that supplement and consider it in its deliberations against MFI.

One of the many dangers of using MURs and conciliation agreements as legal authority, as stated above, is that they do not resolve the merits of the respective matter, and are therefore not dispositive guides for future conduct of those other than the respondents to the respective MUR. MURs 3027 and 5173 are examples of why.

Although MUR 3027 involved DMFE, a postage lender to ATA's predecessor, The Viguerie Company (TVC), TVC was not made a respondent in that matter, and was not even familiar with that investigative matter's files and conclusions until the GC cited MUR 3027 in this present matter.

The issue of whether the use of postage lenders ***by the direct mail agency in the agency's ordinary course of business*** was not addressed in, and thus not resolved by, MUR 3027. Because it was not a respondent in that matter, TVC had not even been afforded the opportunity to brief the Commission on its ordinary course of using postage lenders, nor the industry standard use of postage lenders.[6]

This matter is distinctly different than both MURs 3027 and 5173, as explained in the supplement to ATA's May 13, 2005 brief. MUR 3027 did not result in any dispositive conclusion, and MUR 5173 was settled through a conciliation agreement. MURs 3027 and 5173 are not law. As a matter of law they have no bearing on MFI or ATA, and may not be considered in this matter.

V. <u>Conclusion</u>.

Inherent in the General Counsel's policy arguments is that only large, wealthy political committees should be able to exercise their constitutional rights to engage in national direct mail fundraising. Of course direct mail costs money upfront, as the Commission has previously recognized in AO 1979-36.

If the Commission were to choose a policy, as ATA was told by Counsel Mizuno, that only political committees that can afford to do direct mail fundraising should be allowed to conduct direct mail fundraising, then that is a policy decision that the Commission should pronounce in advance and under the bright light of public comment.

The ordinary course of business of ATA, the standard industry practices and AO 1979-36 all prove that non-banks may -- indeed sometimes must -- advance the costs necessary to conduct direct mail fundraising.

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[6] Based on hearsay, but nevertheless very reliable sources, ATA knows that other agencies and even major political committees use postage lenders to advance postage costs of direct mail fundraising letters. As previously noted in an ATA brief, Beth Mizuno of the General Counsel's office was apprised of this in a meeting with ATA's counsel. Her response was that ATA should "turn in" the agencies and committees that have used non-committee postage financing so that the Commission may open investigations and ultimate prosecutions, which ATA duly noted chills its ability to bring in witnesses verifying this standard practice.

Mr. Flemma had a direct mail professional background, not a political one. He understood the business need to pay postage, and he made a profitable commercial enterprise out of that. MFI was a direct mail vendor that extended credit to cover an essential element of any direct mail fundraising program, and did so in its normal course of business and ATA's normal course of business. The United States Postal Service does not extend credit as defined in 11 CFR 116.1(e), yet the General Counsel somehow and curiously suggests that postage is not an essential good or service for direct mail fundraising.

The standards under 11 CFR 116.3(b) require the Commission to give credence to the ordinary course of business of ATA regardless of whether the GC understands or likes the commercial and legal elements of those business arrangements. The Commission should not reward the GC's efforts to distort the facts and the law to achieve its *ultra vires* agenda to harm ATA.

Respectfully submitted,

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Date: August 1, 2005

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ERRATA SHEET FOR THE BRIEF OF AMERICAN TARGET ADVERTISING, INC. ON MATTERS AFFECTING ITS RIGHTS AND INTERESTS

American Target Advertising, Inc. (ATA) submits this errata sheet for its brief submitted on or about August 1, 2005 in this matter.

The citation under Section IV.A., at page five, to 2 U.S.C. 437g(5)(D) should be to 2 U.S.C. 437g(a)(5)(D) instead.

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