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Washington, DC 20463

AGENDA DOCUMENT NO. 21-37-A
AGENDA ITEM
For meeting of November 10, 2021

November 1, 2021

MEMORANDUM

TO: The Commission

FROM: Lisa J. Stevenson *NFS for LJS*
Acting General Counsel

Neven F. Stipanovic *NFS*
Associate General Counsel

Robert M. Knop *RMK*
Assistant General Counsel

Heather Filemyr *HF*
Attorney

Theodore Lutz *TML*
Attorney

Subject: AO 2021-12 (Rep. Adam Schiff and Schiff for Congress) Draft A

Attached is a proposed draft of the subject advisory opinion.

Members of the public may submit written comments on the draft advisory opinion. We are making this draft available for comment until 12:00pm (Eastern Time) on November 9, 2021.

Members of the public may also attend the Commission meeting at which the draft will be considered. The advisory opinion requestor may appear before the Commission at this meeting to answer questions.

For more information about how to submit comments or attend the Commission meeting, go to <https://www.fec.gov/legal-resources/advisory-opinions-process/>.

Attachment

1 ADVISORY OPINION 2021-12
2
3 Stephen J. Kaufman, Esq.
4 Kaufman Legal Group
5 777 S. Figueroa Street
6 Suite 4050
7 Los Angeles, CA 90017

DRAFT A

8 Dear Mr. Kaufman:

9 We are responding to your advisory opinion request on behalf of Congressman
10 Adam Schiff and his principal campaign committee, Schiff for Congress (“the
11 Committee”),¹ concerning the application of the Federal Election Campaign Act,
12 52 U.S.C. §§ 30101-45 (the “Act”), and Commission regulations to two alternative
13 proposals to rent the Committee’s email list to a book publisher to promote a book
14 written by Congressman Schiff and published by Random House. The Committee
15 proposes either to rent its list directly to the book’s publisher or to rent the list to
16 Congressman Schiff, who would later be reimbursed by the book publisher. The
17 Commission concludes that both proposals are permissible because: 1) the rental of the
18 Committee’s email list for fair market value is not a personal use of a committee asset,
19 and 2) the payment to rent the list is not a contribution where the Committee would
20 receive the fair market value of the list rental, as determined by an independent list
21 broker, in a *bona fide* arm’s length transaction to promote the book.

22 ***Background***

23 The facts presented in this advisory opinion are based on your letter dated
24 October 6, 2021 and disclosure reports filed with the Commission.

¹ See <https://www.fec.gov/data/committee/C00343871/> (last visited Oct. 19, 2021).

1 Congressman Schiff is a member of the U.S. House of Representatives and a
2 candidate for re-election in 2022; Schiff for Congress is his principal campaign
3 committee. Advisory Opinion Request (“AOR”) at AOR001. On October 12, 2021,
4 Random House, a division of Penguin House Publishing, LLC, published a non-fiction
5 book written by Congressman Schiff. *Id.* Random House is a “long established and
6 prominent publisher that publishes a wide variety of books and other print and digital
7 publications, both political and non-political.” *Id.* According to the publisher’s website,
8 it publishes more than 15,000 print titles annually. *Id.*

9 Congressman Schiff and Random House entered into an agreement (the
10 “publishing agreement”) that established the terms for the publication of the book written
11 by Congressman Schiff. AOR002. The House of Representatives Committee on Ethics
12 approved the publishing agreement and determined that Random House is an established
13 publisher and that Congressman Schiff would be paid under the publishing agreement “in
14 accordance with usual and customary contractual terms for the industry.” *Id.* Random
15 House “will incur all costs associated with publication and promotion of the book” and
16 determine “[a]ll details” of its advertising and promotion. *Id.* After Random House
17 recoups its publication and promotion costs, Congressman Schiff and Random House will
18 each receive 50 percent of the net profits from sale of the book. *Id.* Congressman
19 Schiff’s book “will be sold at the usual and customary sale prices for the industry,
20 including standard bulk discounts, where applicable.” *Id.* Random House’s activities
21 under the publishing agreement “will involve only the publication, promotion and sale of
22 the book and will not include any fundraising activity or solicitations for Congressman
23 Schiff or Schiff for Congress.” *Id.*

1 The Committee maintains an email list that was compiled over time by the
2 Committee for its own use, and the list has been primarily used for the Committee’s own
3 purposes. AOR002. Random House would like to rent the Committee’s email list for
4 use by Random House and Congressman Schiff, “solely to promote the book.” AOR002,
5 5. “The Publisher and Congressman Schiff agree that the cost of promoting the book to
6 the Committee’s e-mail list would be an advertising, publicity, and promotional cost”
7 under the publishing agreement. AOR002.

8 Requestors propose to structure the list rental in one of two ways. AOR002-3.
9 Under the first alternative, Random House would pay the Committee directly for the fair
10 market value of the list rental. *Id.* Under the second alternative, Congressman Schiff
11 would enter into an agreement with the Committee to pay fair market value for the list
12 rental using his personal funds, and Random House would reimburse him for that
13 payment. AOR003. Under both proposals, the Committee would be paid for the fair
14 market for the rental “determined by an independent list broker” and no Committee
15 resources or personnel would be used to promote the book. AOR002-3. Random House
16 “will not enter into a list rental agreement with the Committee, make a payment to the
17 Committee, or in the alternative, make a payment to Congressman Schiff, until the
18 Commission has provided its guidance” to requestors. AOR003.

19 ***Questions Presented***

20 1. *Under the conditions proposed, may the Committee enter into an*
21 *agreement to rent its email list to Random House for fair market value to be used to*
22 *promote a book published by Random House and written by Congressman Schiff?*

1 2. *In the alternative, may Congressman Schiff be reimbursed by Random*
2 *House if he pays for the list rental using his personal funds?*

3 ***Legal Analysis***

4 1. *Under the conditions proposed, may the Committee enter into an*
5 *agreement to rent its email list to Random House for fair market value to be used to*
6 *promote a book published by Random House and written by Congressman Schiff?*

7 2. *In the alternative, may Congressman Schiff be reimbursed by Random*
8 *House if he pays for the list rental using his personal funds?*

9 Yes, requestors may engage in either of the proposed list rental arrangements.

10 The proposal to rent the list to Random House, either directly or indirectly, is permissible
11 under the conditions proposed because: 1) the rental of the Committee’s email list for its
12 fair market value is not a personal use of a committee asset, and 2) the payment to rent
13 the list is not a contribution where the Committee would receive the fair market value of
14 the list rental, as determined by an independent list broker, in a *bona fide* arm’s length
15 transaction to promote the book.

16 **A. The Committee’s rental of the list to Random House for its fair market value**
17 **would not result in personal use of a committee asset.**

18 The Act provides that a “contribution accepted by a candidate, and any other
19 donation received by an individual as support for activities of the individual as a holder
20 of Federal office . . . shall not be converted by any person to personal use.” 52 U.S.C.
21 § 30114(a-b); *see also* 11 C.F.R. § 113.2(e). Personal use occurs if a “contribution or
22 amount is used to fulfill any commitment, obligation, or expense of a person that would
23 exist irrespective of the candidate’s election campaign or individual’s duties as a holder

1 of Federal office, including,” but not limited to, any of the enumerated *per se* personal
2 uses. 52 U.S.C. § 30114(b)(2); *see also* 11 C.F.R. § 113.1(g)(1).

3 Commission regulations provide that the “transfer of a campaign committee asset
4 is not personal use so long as the transfer is for fair market value.” 11 C.F.R.
5 § 113.1(g)(3). “The Commission has long recognized that a political committee’s
6 mailing lists are assets that have value and that are frequently sold, rented, or exchanged
7 in a market.” Advisory Opinion 2014-06 (Ryan *et al.*) (“Ryan”) at 8 (citing prior
8 advisory opinions); Advisory Opinion 2011-02 (Scott Brown for U.S. Senate Committee)
9 (“Brown”) at 7 (same). In previous advisory opinions, the Commission has determined
10 that, where candidates received royalty payments for their book sales, no personal use
11 results if a candidate uses personal funds to pay his authorized committee to rent the
12 committee’s mailing list for the list’s fair market value as determined by an independent
13 list broker. Advisory Opinion 2014-06 (Ryan) at 8; Advisory Opinion 2011-02 (Brown)
14 at 8. The Commission has not previously considered a proposal for a committee to rent
15 its list directly to the publisher of a book written by a candidate, rather than renting the
16 list to the candidate.

17 Here, Random House would pay the fair market value, as determined by an
18 independent list broker, to rent the Committee’s email list either by making a direct
19 payment to the Committee or by reimbursing Congressman Schiff for his payment of fair
20 market value to the Committee to rent the list. AOR002-3. Further, no Committee
21 resources or personnel would be used to promote the book, and any royalties paid to
22 Congressman Schiff would reflect net profits under the publishing agreement after
23 Random House recoups its costs in promoting the book. *Id.* Thus, because Random

1 House would pay fair market value to rent the list, the transfer would not result in a
2 prohibited personal use of a committee asset under 11 C.F.R. § 113.1(g)(3).^{2, 3}

3 **B. The Committee’s rental of its email list to Random House would not result in**
4 **the receipt of a corporate contribution by the Committee or Congressman**
5 **Schiff.**

6 Random House’s payment to rent the Committee’s email list, either directly or
7 indirectly, would not result in the receipt of a corporate contribution by the Committee or
8 Congressman Schiff because the Committee would receive payment for the fair market
9 value of the list rental, as determined by an independent list broker, in a *bona fide* arm’s
10 length transaction to promote the book.

11 The Act and Commission regulations define “contribution” to include “any gift,
12 subscription, loan, advance, or deposit of money or anything of value made by any
13 person for the purpose of influencing any election for Federal office.” 52 U.S.C.
14 § 30101(8)(A)(i); *see also* 11 C.F.R. § 100.52. For corporations, the term “contribution”
15 . . . also includes any direct or indirect payment, distribution, loan, advance, deposit, or

² As the Commission has explained, “[i]t makes no difference whether the [person paying fair market value for a committee asset] is the candidate or an unrelated third party.” *See* Expenditures; Reports by Political Committees; Personal Use of Campaign Funds, 60 Fed. Reg. 7862, 7870 (Feb. 9, 1995). Regardless of who pays to rent the list, the Committee will receive the list’s fair market value, ensuring that no “indirect conversion” of campaign funds occurs. *Id.* at 7869.

³ Section 113.1(g)(6) of Commission regulations does not apply to this transaction. That regulation provides: “Notwithstanding that the use of funds for a particular expense would be a personal use under this section, payment of that expense by any person other than the candidate or the campaign committee shall be a contribution . . . to the candidate unless the payment would have been made irrespective of the candidacy. . . .” Here, the publishing agreement between Random House and Congressman Schiff provides that Random House “will incur all costs associated with publication and promotion of the book,” including the cost to rent the Committee’s email list. AOR002. Thus, the cost to rent the email list is Random House’s commitment, obligation, or expenses under the publishing agreement, not Congressman Schiff’s, and one that Random House would pay irrespective of Schiff’s candidacy. *See* Advisory Opinion 2014-06 (Ryan) at 7 (“[E]xpenses associated with marketing a book that a commercial publisher publishes and for which it pays royalties to the candidate are expenses that would exist irrespective of the candidate’s election campaign or duties as a federal officeholder”).

1 gift of money, or any services, or anything of value . . . to any candidate [or] campaign
2 committee . . . in connection with” a federal election. 52 U.S.C. § 30118(b)(2); *see also*
3 11 C.F.R. § 114.1(a)(1). “[A]nything of value” includes goods or services provided at
4 less than the usual and normal charge. 11 C.F.R. § 100.111(e)(1).

5 The Commission has previously determined that under similar circumstances a
6 federal political committee may lease its mailing list to a corporation without receiving a
7 prohibited corporate contribution. In Advisory Opinion 2002-14 (Libertarian National
8 Committee) (“LNC”) at 4-5, the Commission concluded that a national party committee
9 could lease its list to “any person, including . . . for profit corporations, . . . without a
10 contribution resulting” provided that 1) the committee itself developed the list over a
11 period of time primarily for its own political or campaign purposes (rather than for sale or
12 lease to others); 2) the leasing of the list constituted only a small percentage of the
13 committee’s use of the list; 3) the list had an ascertainable fair market value; and 4) the
14 list was “leased at the usual and normal charge in a bona fide, arm’s length transaction”
15 (which could include using a commercial list broker) and would “be used in a
16 commercially reasonable manner consistent with such an arm’s length agreement.” *See*
17 *also* Advisory Opinion 2003-19 (DCCC) at 2-3 (summarizing LNC advisory opinion and
18 applying its analysis to sale of office equipment and furniture by national party
19 committee).⁴ Subsequently, in Advisory Opinion 2014-06 (Ryan) at 8-9 and n.3, the
20 Commission concluded that, under facts analogous to those in Advisory Opinion 2002-14
21 (LNC), a candidate would neither make a contribution to nor receive a contribution from

⁴ The Commission has explained that list rental payments received by a political committee are reported as “[o]ther [r]eceipts.” *See, e.g.*, Advisory Opinion 2002-14 (LNC) at 5.

1 his leadership PAC when renting the leadership PAC's mailing list in order to promote
2 his book.

3 Neither of the list rental arrangements proposed by requestors would result in the
4 receipt of a corporate contribution by the Committee or Congressman Schiff. As in
5 Advisory Opinion 2002-14 (LNC), the Committee's email list was compiled over time
6 for the Committee's own use, and the rental for purposes of promoting a single book
7 would be a small percentage of the list's overall use given the list's continued use by the
8 Committee for campaign purposes. AOR002. The Committee would be paid for the fair
9 market value of the list, as determined by an independent list broker, pursuant to a *bona*
10 *fide* arm's length transaction, and Random House and Congressman Schiff would use the
11 list rental "solely to promote the book," a commercial purpose. AOR002-3, 5.
12 Accordingly, as in Advisory Opinion 2002-14 (LNC), Random House's proposed
13 payment (either directly to the Committee or to reimburse Congressman Schiff for his
14 payment to the Committee to rent the Committee's email list) would not result in the
15 receipt of a corporate contribution by the Committee or Congressman Schiff.

16 The Commission's analysis of whether the proposed transaction constitutes a
17 personal use of a committee asset or a corporate contribution is the same regardless of
18 whether Random House pays for the list directly or indirectly. However, if Congressman
19 Schiff pays to rent the Committee's email list using personal funds and is reimbursed by
20 Random House, the Committee may wish to consult with its assigned analyst in the
21 Commission's Reports Analysis Division regarding any reporting implications.

