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Washington, DC 20463

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AGENDA ITEM
For Meeting of: 04-16-09

April 9, 2009

MEMORANDUM

TO: The Commission

FROM: Thomasenia P. Duncan *JPD*
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Subject: Draft AO 2009-02 (The True Patriot Network, LLC)

Attached is a proposed draft of the subject advisory opinion. We request that this draft be placed on the agenda for April 16, 2009.

Attachment

1 ADVISORY OPINION 2009-02

2

3 Judith L. Corley, Esq.

4 Perkins Coie LLP

5 607 Fourteenth Street, NW

6 Washington, D.C. 20005-2003

7

DRAFT

8 Dear Ms. Corley:

9 We are responding to your advisory opinion request on behalf of The True Patriot
10 Network, LLC (“TPN”), concerning the application of the Federal Election Campaign
11 Act of 1971, as amended (the “Act”), and Commission regulations to TPN’s plan to make
12 independent expenditures.

13 The Commission concludes that TPN may make independent expenditures,
14 subject to the limitations and disclosure requirements that apply to individuals.

15 ***Background***

16 The facts presented in this advisory opinion are based on your letter received on
17 February 4, 2009, your email received on February 11, 2009, and your telephone
18 conversation with Commission staff on February 17, 2009.

19 TPN is a limited liability company (“LLC”) organized under the laws of the State
20 of Washington. The sole member and manager of TPN is Mr. Nicolas Hanauer.

21 In 2007, before forming the LLC, Mr. Hanauer and Mr. Eric Liu jointly published
22 a book entitled *The True Patriot*, which contained the authors’ views on the fundamental
23 principles of patriotism and a call to action by Americans to embrace these principles in
24 their lives. To promote the principles of the book, Mr. Hanauer and Mr. Liu, using only
25 the personal funds of Mr. Hanauer, formed an unincorporated association called The True
26 Patriot Network. During 2007 and 2008, The True Patriot Network promoted principles

1 espoused in the book through public events, newspaper and magazine advertisements,
2 essay contests, and the creation of a website with a social network to link individuals on
3 the subject of patriotism.

4 In 2009, Mr. Hanauer reorganized The True Patriot Network as an LLC to protect
5 himself from personal liability. *See* TPN LLC Agreement at sec. 14. Mr. Hanauer
6 provided the initial (and, to date, only) capital contribution to TPN. *Id.* at sec. 7. TPN
7 does not accept any donations, solicited or unsolicited, and any additional capital will be
8 provided only from Mr. Hanauer's personal funds.

9 Mr. Hanauer is TPN's only member and manager. TPN's LLC Agreement at sec.
10 5 and 6. As TPN's manager, Mr. Hanauer has "the sole and exclusive right" to manage
11 TPN's affairs. *Id.* at sec. 6.2. As TPN's sole member, Mr. Hanauer receives all
12 distributions and allocations of TPN's net income or loss. *Id.* at sec. 8. As manager, he
13 determines when and how much of TPN's cash or other assets that he, as sole member,
14 may withdraw from the company. *Id.* Any interest in the company can be assigned only
15 by Mr. Hanauer, "without the consent of any other person." *Id.* at sec. 10. While the
16 duration of the LLC is perpetual, the withdrawal of Mr. Hanauer as TPN's member will
17 result in the dissolution of TPN. TPN's Certificate of Formation at Article IV; TPN's
18 LLC Agreement at sec. 11.

19 In the LLC Agreement, Mr. Hanauer explicitly disavows any intent to create a
20 partnership or corporation under State law, and he states his intent for TPN to be treated
21 as a "disregarded entity" for Federal income tax purposes. TPN's LLC Agreement at sec.
22 17. TPN has not elected to be treated as a corporation for Federal income tax purposes.

1 Currently, TPN has two employees, both of whom are paid by TPN. Mr. Liu is
2 not an employee. He will be a paid consultant on an as-billed basis. Mr. Hanauer does
3 not receive a salary from TPN.

4 TPN plans to continue promoting the principles of patriotism as described in *The*
5 *True Patriot*. TPN, however, also plans to expand its activities to include
6 communications that influence Federal elections. TPN does not expect the costs
7 associated with making these communications to exceed five to ten percent of TPN's
8 operating budget. Such communications, which could be made on TPN's website,
9 published in newspapers, or broadcast on television, would endorse and urge support for
10 specific Federal candidates and officeholders who share TPN's principles and ideals. In
11 carrying out these activities, TPN states that it will not coordinate with a Federal
12 candidate or party committee, as that term is defined in 11 CFR 109.21. Mr. Hanauer
13 will be the final decision-maker on all TPN actions, although TPN's employees and
14 consultants might advise TPN in the making of these communications.

15 ***Questions Presented***

16 May TPN make independent expenditures, subject to the limitations and
17 disclosure requirements that apply to individuals?

18 ***Legal Analysis and Conclusions***

19 Yes, TPN may make independent expenditures, subject to the limitations and
20 disclosure requirements that apply to individuals.

21 An LLC is treated as a "person" under the Act. 2 U.S.C. 431(11). As such, LLCs
22 are subject to the Act's provisions regarding contributions and expenditures made by
23 persons. 2 U.S.C. 431(8) and (9).

1 Commission regulations specifically address LLCs only in the context of the
2 Act's contribution limitations and prohibitions. 11 CFR 110.1(g). The Commission
3 generally treats contributions by LLCs consistent with the tax treatment that the entities
4 elect under the Internal Revenue Code. An LLC treated as a partnership by the Internal
5 Revenue Service ("IRS") is subject to the contribution limits that apply to partnerships.
6 11 CFR 110.1(g)(2). Similarly, an LLC that elects to be treated as a corporation by the
7 IRS is subject to the Commission's rules on corporate activity. 11 CFR 110.1(g)(3).

8 For Federal income tax purposes, a single member LLC cannot elect to be
9 classified as a partnership; instead, it may choose to be treated either as a corporation or
10 to be disregarded as an entity separate from its owner. 26 CFR 301.7701-3(a). A single-
11 member LLC that does not affirmatively elect treatment as a corporation is treated by
12 default as a disregarded entity. 26 CFR 301.7701-3(b)(1) and 7701-2(c)(2).

13 Accordingly, Commission regulations provide that contributions by an LLC with
14 a single natural person member that does not elect to be treated as a corporation for
15 Federal income tax purposes "shall be attributable only to that single member."
16 11 CFR 110.1(g)(4). "Because of the unity of the member and the LLC in this situation,
17 it is appropriate for attribution of the contribution to pass through the LLC and attach to
18 the single member under these circumstances." Explanation and Justification for the
19 Treatment of Limited Liability Companies Under the Federal Election Campaign Act, 64
20 FR 37,397, 37,399 (July 12, 1999).

21 TPN is a single natural person member LLC that has not elected to be treated as a
22 corporation for Federal income tax purposes. Under Commission regulations, therefore,
23 TPN is subject to the contribution limits of its sole member, Mr. Hanauer.

1 The Commission has never before opined on whether expenditures by a single
2 member LLC, like contributions, are attributable solely to the LLC's single member.
3 Under the circumstances presented here, the Commission concludes that they are.
4 Because of the unity of Mr. Hanauer and TPN, it is appropriate for attribution of
5 expenditures to pass through the LLC and attach to Mr. Hanauer. There is no material
6 difference between expenditures made by Mr. Hanauer and expenditures made by TPN.
7 TPN receives all funding exclusively from Mr. Hanauer's personal funds. Mr. Hanauer,
8 as the only member and manager of TPN, has exclusive control over how those funds are
9 spent. He receives all distributions and allocations of TPN's net income, and he alone
10 determines when and how much cash or other assets to withdraw from TPN. Indeed,
11 TPN would dissolve if Mr. Hanauer were to withdraw as a member. Because of the unity
12 between Mr. Hanauer and TPN, the independent expenditures made by TPN shall be
13 treated as if they were made by Mr. Hanauer.

14 The Commission recognizes, however, that should circumstances change such
15 that TPN could be construed as a "group of persons," TPN may need to consider whether
16 it also would be a political committee under 2 U.S.C 431(4)(A) and 11 CFR 100.5(a).

17 This response constitutes an advisory opinion concerning the application of the
18 Act and Commission regulations to the specific transaction or activity set forth in your
19 request. *See* 2 U.S.C. 437f. The Commission emphasizes that, if there is a change in any
20 of the facts or assumptions presented, and such facts or assumptions are material to a
21 conclusion presented in this advisory opinion, then the requestor may not rely on that
22 conclusion as support for its proposed activity. Any person involved in any specific
23 transaction or activity which is indistinguishable in all its material aspects from the

1 transaction or activity with respect to which this advisory opinion is rendered may rely on
2 this advisory opinion. *See* 2 U.S.C. 437f(c)(1)(B). Please note the analysis or
3 conclusions in this advisory opinion may be affected by subsequent developments in the
4 law including, but not limited to, statutes, regulations, advisory opinions, and case law.

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On behalf of the Commission,

Steven T. Walther
Chairman