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Washington, DC 20463

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For meeting of November 21, 2013
SUBMITTED LATE

November 20, 2013

MEMORANDUM

TO: The Commission

FROM: Lisa J. Stevenson *LJS*
Deputy General Counsel

Adav Noti *AN*
Acting Associate General Counsel

Amy Rothstein *AR*
Assistant General Counsel

Joanna Waldstreicher *JW*
Attorney

Subject: Draft AO 2013-16 (PoliticalRefund.org)

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 9:00 am (Eastern Time) on November 21, 2013.

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 <http://www.fec.gov/law/draftaos.shtml>.

Attachment

1 ADVISORY OPINION 2013-16

2

3 Dan Backer, Esq.
4 DB Capitol Strategies PLLC
5 717 King Street
6 Suite 300
7 Alexandria, VA 22314

DRAFT

8

9 Mr. Paul D. Kamenar
10 Coolidge Reagan Foundation
11 1629 K Street, N.W.
12 Suite 300
13 Washington, D.C. 20006

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15 Dear Messrs. Backer and Kamenar:

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We are responding to your advisory opinion request on behalf of

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PoliticalRefund.org. PoliticalRefund.org asks about the application of the Federal

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Election Campaign Act of 1971, as amended (the "Act"), and Commission regulations to

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its proposal to use data obtained from filings with the Commission to contact persons

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who have made contributions to candidates, to inform those contributors of their right to

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seek a refund of their contributions, and to facilitate requests for refunds.

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PoliticalRefund.org also asks whether it may display on its website the aggregate number

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of contributors who have requested refunds, and whether it may accept advertising on its

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website and sponsorship of its communications with contributors. The Commission

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concludes that the proposed use of contributor data, display of the aggregate number of

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contributors who have requested refunds, and acceptance of advertising and sponsorship

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are consistent with the Act and Commission regulations.

1 **Background**

2 The facts presented in this advisory opinion are based on your letter received on
3 September 10 and your email dated September 20, 2013 (collectively, “Advisory Opinion
4 Request”).

5 PoliticalRefund.org is a non-profit organization¹ whose stated mission is “to
6 provide political campaign contributors a simple, user-friendly means to request a refund
7 of their contributions.” Advisory Opinion Request at 2. PoliticalRefund.org plans to
8 focus its efforts on contributions made to federal officeholders “whose dramatically
9 shifting issue positions or scandals” might cause contributors to seek refunds of their
10 campaign contributions. *Id.* PoliticalRefund.org’s directors will decide whether to target
11 a particular officeholder’s contributors, although in some cases the officeholder might be
12 suggested by third parties, including paying sponsors (as described below).

13 PoliticalRefund.org plans to use data obtained from reports filed with the
14 Commission and posted on the Commission’s website to identify persons who have
15 contributed to a given officeholder. PoliticalRefund.org will contract with a vendor to
16 match that information with data from other sources to fill in missing address information
17 and obtain contributors’ email addresses, when available. PoliticalRefund.org states that,
18 once the vendor provides the information to PoliticalRefund.org, the vendor will destroy
19 its records of the data to prevent any further use of the contributor information.

20 PoliticalRefund.org plans to communicate with contributors either by
21 conventional mail (letter or postcard) or, to reduce costs, by email when email addresses

¹ PoliticalRefund.org states that its application for federal tax-exempt status under section 501(c)(4) of the Internal Revenue Code is currently pending. Advisory Opinion Request at 2.

1 are available. Recipients of letters and postcards will decide whether to visit
2 PoliticalRefund.org's website and use its platform to request a contribution refund,
3 whereas recipients of email communications will be able to click on a link to access
4 PoliticalRefund.org's website. Whether by traditional mail or email, each
5 communication will inform contributors about their right to request a refund of their
6 contributions and about PoliticalRefund.org's website and services, although these
7 communications also will state that no candidate or political committee is under any
8 obligation to refund contributions. Each communication will be personalized with the
9 contributor's name and address, the name of the officeholder to whom the contribution
10 was made, and the amount of the contribution. PoliticalRefund.org represents that once it
11 sends the communication, it will destroy its records of the data to prevent further use of
12 contributor information.

13 A contributor who visits PoliticalRefund.org's website will be able to complete a
14 form with the information necessary to request a refund; data entered into the form will
15 automatically populate a refund request letter, which the contributor will send to the
16 appropriate authorized committee. PoliticalRefund.org also wishes to give contributors
17 who generate refund request letters the option of having PoliticalRefund.org follow up
18 with the committees from which the contributors request refunds. Except for contributors
19 who affirmatively consent to be contacted again by PoliticalRefund.org,
20 PoliticalRefund.org will contact each contributor only once per election cycle concerning
21 contributions made to a given candidate. PoliticalRefund.org may contact a person who
22 has made contributions to multiple candidates multiple times, but only once for each
23 candidate per election cycle. PoliticalRefund.org will not retain, sell, or otherwise use

1 the information provided by contributors, other than to populate the refund request letter
2 and for any follow-up communications requested by the contributor.

3 PoliticalRefund.org also proposes to publish on its website the aggregate number
4 of contributors who have requested refunds from specific authorized committees. The
5 data will be collected to measure the efficacy of PoliticalRefund.org's efforts and will
6 provide the public with information about trends in refund requests, including trends
7 regarding particular authorized committees. The data will be solely numerical and will
8 not disclose any contributor's identifying information.

9 PoliticalRefund.org will not solicit donations from visitors to its website to help
10 fund its activities, nor will it charge a fee for its services. To cover the costs of its
11 website and activities, PoliticalRefund.org wishes to accept banner advertising on its
12 website and sponsorship for its communications. PoliticalRefund.org will not accept
13 such advertising or sponsorship from candidates, political committees, or any other
14 entities engaging primarily in political activities. Sponsors will be identified as such in
15 the communications that they sponsor. Because PoliticalRefund.org does not seek to
16 make a profit on its activities, it will charge sponsorship fees only to cover the costs of
17 the sponsored communication, and it will charge advertising fees only to cover the
18 administrative costs of operating the website. PoliticalRefund.org will not enable or
19 encourage anyone to make a contribution to any candidate or political committee.

20 ***Questions Presented***

21 1. *May PoliticalRefund.org send a personalized letter with its website URL*
22 *to contributors whose names and contact information were obtained in part from the*
23 *Commission and securely matched to provide necessary additional mailing information?*

1 2. *May PoliticalRefund.org instead send a postcard with its website URL to*
2 *contributors whose names and contact information were similarly obtained from the*
3 *Commission and matched for full addresses?*

4 3. *May PoliticalRefund.org instead send an email containing a link to its*
5 *website to contributors whose names and contact information were similarly obtained*
6 *from the Commission and matched for email addresses?*

7 4. *May PaliticalRefund.org send a personalized email containing computer*
8 *code embedded in the individual contributor's link to the website, which would then pre-*
9 *populate the form letter at the website with the contributor's name and address*
10 *information?*

11 5. *May PoliticalRefund.org offer contributors who respond to its*
12 *communications the option of having PoliticalRefund.org follow up with their refund*
13 *requests and communicate that information back to the contributors?*

14 6. *Without disclosing the identifying information of any contributor, may the*
15 *PoliticalRefund.org website display on its home page the aggregate number of persons*
16 *who have requested a refund and the total dollar amount requested from any individual*
17 *authorized committee and from all authorized committees through the*
18 *PoliticalRefund.org system?*

19 7. *May the PoliticalRefund.org website sell banner advertising and other*
20 *sponsorship opportunities on its website in order to pay the costs of maintaining the*
21 *website?*

1 ***Legal Analysis and Conclusion***

2 1. ***May PoliticalRefund.org send a personalized letter with its website URL***
3 ***to contributors whose names and contact information were obtained in part from the***
4 ***Commission and securely matched to provide necessary additional mailing information?***

5 2. ***May PoliticalRefund.org instead send a postcard with its website URL to***
6 ***contributors whose names and contact information were similarly obtained from the***
7 ***Commission and matched for full addresses?***

8 3. ***May PoliticalRefund.org instead send an email containing a link to its***
9 ***website to contributors whose names and contact information were similarly obtained***
10 ***from the Commission and matched for email addresses?***

11 4. ***May PoliticalRefund.org send a personalized email containing computer***
12 ***code embedded in the individual contributor's link to the website, which would then pre-***
13 ***populate the form letter at the website with the contributor's name and address***
14 ***information?***

15 Yes, PoliticalRefund.org may use publicly available contributor information
16 obtained from the Commission to contact contributors as proposed via letter, postcard, or
17 email, and may embed computer code in its emails to pre-populate a web form with a
18 contributor's name and address, because the contributor information would not be used
19 for the purpose of soliciting contributions or for any commercial purpose.²

² PoliticalRefund.org intends to contact contributors to federal candidates with regard to the candidates' "dramatically shifting issue positions," "scandals," "controversial actions or other occurrences of potential concern." Advisory Opinion Request at 2. PoliticalRefund.org has not expressed any intention to make contributions or expenditures in connection with a federal election. However, if PoliticalRefund.org makes contributions or expenditures, PoliticalRefund.org may be required to register and file reports as a political committee under the Act. The Act and Commission regulations define a "political committee" as "any committee, club, association or other group of persons which receives

1 The Act requires each political committee to report the “identification” of each
2 person who makes aggregate contributions to the committee exceeding \$200 for the
3 calendar year (or election cycle in the case of an authorized committee). 2 U.S.C.
4 § 434(b)(3)(A); *see also* 11 C.F.R. § 104.8(a). For contributions by individuals,
5 “identification” consists of reporting the individual’s name, mailing address, occupation,
6 and employer’s name. 2 U.S.C. § 431(13)(A); 11 C.F.R. § 100.12. The Act requires the
7 Commission to make these reports available for public inspection and copying, 2 U.S.C.
8 § 438(a)(4); *see also* 2 U.S.C. § 438a (requiring Commission to make all reports publicly
9 available online), but Congress was concerned about “protect[ing] the privacy of the
10 generally very public-spirited citizens who may make a contribution to a political
11 campaign or a political party.” 117 Cong. Rec. S30057 (daily ed. Aug. 5, 1971)
12 (statement of Sen. Bellmon). Congress therefore provided a limitation to ensure that
13 public contributor information was not misused: “[A]ny information copied from such
14 reports or statements may not be sold or used by any person for the purpose of soliciting
15 contributions or for commercial purposes, other than using the name and address of any
16 political committee to solicit contributions from such committee.” 2 U.S.C. § 438(a)(4);
17 *see also* 11 C.F.R. § 104.15(a). The prohibition on using contributor information to
18 solicit contributions applies to soliciting any kind of contribution or donation, including
19 charitable donations. 11 C.F.R. § 104.15(b). The Commission has characterized this

contributions aggregating in excess of \$1,000 during a calendar year or which makes expenditures aggregating in excess of \$1,000 during a calendar year.” 2 U.S.C. § 431(4)(A); *see also* 11 C.F.R. § 100.5. However, an organization that has made contributions or expenditures in excess of \$1,000 will not be considered a “political committee” unless, in addition, its “major purpose is Federal campaign activity (*i.e.*, the nomination or election of a Federal candidate).” Political Committee Status: Supplemental Explanation and Justification, 72 Fed. Reg. 5595, 5597 (Feb. 7, 2007); *see Buckley v. Valeo*, 424 U.S. 1, 79 (1976).

1 limitation as “a broad prophylactic measure intended to protect the privacy of the
2 contributors about whom information is disclosed” in reports and statements filed with
3 the Commission. Advisory Opinion 2003-24 (NCTFK) at 4; *see generally* *FEC v. Legi-*
4 *Tech, Inc.*, 967 F. Supp. 523 (D.D.C. 1997) (discussing scope and purpose of provision).

5 The Commission has determined that the Act and Commission regulations do not
6 prohibit the use of contributor information in circumstances similar to those presented
7 here. In Advisory Opinion 2009-19 (Club for Growth), the Commission concluded that a
8 nonprofit membership organization and its separate segregated fund (“SSF”) could use
9 information obtained from a candidate’s disclosure reports to compile a list of the
10 candidate’s contributors and to inform each contributor by letter or telephonically that the
11 candidate had changed his party affiliation and had offered to refund contributions upon
12 request. In concluding that the proposed use of contributor information was permissible,
13 the Commission emphasized that the organization and its SSF would neither solicit
14 contributions nor use contributor information for any commercial purpose; the
15 communications would be made only once to each contributor and would not require any
16 follow-up contact; and the organization and its SSF would safeguard the contributor
17 information against misuse by themselves or third parties. *Id.* at 4-5; *see also* Advisory
18 Opinion 1984-02 (Gramm) (concluding that Representative Gramm’s authorized
19 committee could use information obtained from disclosure reports to inform contributors
20 to a nonconnected committee calling itself “Americans for Phil Gramm in ’84” that the
21 nonconnected committee was not an authorized committee); Advisory Opinion 1981-05
22 (Findley) (concluding that a candidate could use information obtained from disclosure
23 reports to mail letters to his opponent’s contributors to correct allegedly defamatory

1 statements made by his opponent). In each of these advisory opinions, the Commission
2 noted that the purpose of the prohibition is to prevent contributor information from being
3 used for commercial purposes or for making solicitations. The prohibition does not
4 “foreclose the use of this information for other, albeit political, purposes, such as
5 correcting contributor misperceptions.” Advisory Opinion 1984-02 (Gramm).

6 Like Club for Growth, PoliticalRefund.org will use contributor information for
7 the limited purpose of identifying and informing contributors about a candidate’s change
8 in position and about their right to request a refund of their contributions, rather than for
9 commercial purposes or to solicit contributions or donations. Moreover,
10 PoliticalRefund.org has stated that it will safeguard contributor information to ensure that
11 it is not misused by its vendors or by PoliticalRefund.org itself. Finally, as explained
12 further in response to Question 5 below, PoliticalRefund.org will contact each contributor
13 only once per candidate per election cycle (unless the contributor affirmatively consents
14 to be contacted again), which is consistent with the limited activity the Commission
15 found permissible in Advisory Opinion 2009-19 (Club for Growth).

16 Accordingly, PoliticalRefund.org’s proposed use of contributor information
17 obtained from the Commission to contact contributors via letter, postcard, or email is
18 consistent with the Act and Commission regulations.

19 5. *May PoliticalRefund.org offer contributors who respond to its*
20 *communications the option of having PoliticalRefund.org follow up with their refund*
21 *requests and communicate that information back to the contributors?*

22 Yes, PoliticalRefund.org may offer contributors who respond to its
23 communications the option of having PoliticalRefund.org follow up with their refund

1 requests and communicate that information back to the contributors because any such
2 follow-up communications would not be to solicit donations or for commercial purposes,
3 would occur solely at the request of the contributors, and would be limited in quantity.

4 PoliticalRefund.org generally proposes to contact contributors only once per
5 election cycle for each targeted candidate. The only exception PoliticalRefund.org
6 identifies to this one-contact rule is that the organization would follow up with
7 contributors regarding the status of their refund requests if the contributors authorize
8 PoliticalRefund.org to do so.

9 PoliticalRefund.org's proposal is consistent with that approved by the
10 Commission in Advisory Opinion 2009-19 (Club for Growth), for three reasons. First, as
11 discussed above, the substance of PoliticalRefund.org's communications regarding
12 contribution refunds would not constitute solicitations or commercial communications
13 within the meaning of the Act or Commission regulations.

14 Second, in Advisory Opinion 2009-19 (Club for Growth), the Club for Growth
15 stated that it would not contact a contributor more than once unless the contributor
16 affirmatively requested additional communications. The Commission incorporated this
17 limitation into its conclusion that the Club for Growth's proposal was permissible
18 because its communications would be "made only once to each donor" and would not
19 necessarily entail "any further contact." PoliticalRefund.org similarly states that it would
20 require affirmative authorization from a contributor before contacting that contributor
21 more than once per candidate.

22 Third, in both Advisory Opinion 2009-19 (Club for Growth) and in the current
23 request, any authorized follow-up communications would necessarily be limited in

1 quantity. In Advisory Opinion 2009-19 (Club for Growth), the only additional
2 information that would be provided in a subsequent contact would be “further
3 information . . . on how to request a refund.” This is equivalent to the scope of
4 PoliticalRefund.org’s proposal, which would provide a status update on the contributor’s
5 refund request. In both cases, once the requested information is provided, there would be
6 no further communications. This limitation distinguishes the instant request from the
7 broad and open-ended interaction with contributors that the Commission found to be
8 impermissible in Advisory Opinion 2003-24 (NCTFK). In that advisory opinion, the
9 National Center for Tobacco Free Kids proposed to use contributor information obtained
10 from reports filed with the Commission to send direct mail communications regarding
11 tobacco use to certain contributors and to share the contributor information with allied
12 organizations to enable them to contact the contributors for similar purposes. The
13 Commission concluded that the proposed use of contributor information was not
14 permissible under the Act and Commission regulations because it “present[s] the
15 possibility of repetitive and intrusive communications to contributors,” which “would fall
16 within the realm of ‘harassment’ that Congress wanted to prevent.” Advisory Opinion
17 2003-24 (NCTFK) at 4. The instant request presents no potential for such “open-ended”
18 communications.

19 In sum, because PoliticalRefund.org proposes to contact each contributor only
20 once per election cycle per candidate and will limit any further contacts to refund-status
21 updates that the contributor affirmatively requests, the Commission concludes that this
22 aspect of the proposal is consistent with the Act and Commission regulations.

1 6. *Without disclosing the identifying information of any contributor, may the*
2 *PoliticalRefund.org website display on its home page the aggregate number of persons*
3 *who have requested a refund and the total dollar amount requested from any individual*
4 *authorized committee and from all authorized committees through the*
5 *PoliticalRefund.org system?*

6 Yes, PoliticalRefund.org may display the aggregate number of persons who have
7 requested a refund and the total dollar amount requested from specified committees and
8 from all committees through the PoliticalRefund.org system because the display would
9 not include any identifiable contributor information.

10 The principal purpose of restricting the use of information from Commission
11 reports is to protect individual contributors from having their information used for
12 solicitation or commercial purposes or sold to others who use the information for such
13 purposes. *See Legi-Tech*, 967 F. Supp. at 530; *see also, e.g.*, Advisory Opinion 2009-19
14 (Club for Growth); Advisory Opinion 1998-04 (White Oak Technologies); Advisory
15 Opinion 1995-09 (NewtWatch); Advisory Opinion 1986-25 (Public Data); Advisory
16 Opinion 1984-02 (Gramm). The Commission has previously considered whether
17 promotional displays based on aggregate contributor data constitute such a use. In
18 Advisory Opinion 1998-04 (White Oak Technologies), the requestor had developed
19 software that could analyze large datasets, such the Commission's public databases, for
20 "fraud detection" and other purposes. The requestor proposed to create marketing
21 materials that would not contain any identifiable information filed with the Commission
22 but would include sample analyses of aggregate contributor data to illustrate the efficacy
23 of the requestor's data-mining product. The Commission concluded that the requestor's

1 proposed use of contributor data was not prohibited by the Act or Commission
2 regulations because neither the marketing materials nor the underlying software being
3 marketed would include contributors' identifying information.

4 Here, PoliticalRefund.org proposes to display aggregate numbers of persons who
5 have used its platform to request refunds. This information will neither identify any
6 contributor nor include contributor information that could be used for solicitations or
7 commercial purposes. Accordingly, PoliticalRefund.org's proposal to display aggregate
8 information about refund requests is not a prohibited use of contributor data.

9 7. *May the PoliticalRefund.org website sell banner advertising and other*
10 *sponsorship opportunities on its website in order to pay the costs of maintaining the*
11 *website?*

12 Yes, PoliticalRefund.org may sell advertising on its website and other sponsorship
13 opportunities. As explained above, none of PoliticalRefund.org's proposed uses of
14 contributor information violates the prohibition on using contributor data to solicit
15 contributions or for commercial purposes. Because these activities are consistent with
16 the Act, and because, based on the representations made in the request,
17 PoliticalRefund.org is not a political committee³ or otherwise subject to the Act's
18 financing restrictions, PoliticalRefund.org's sources of income are not governed by the
19 Act. Therefore, as long as PoliticalRefund.org continues to comply with 2 U.S.C.
20 § 438(a)(4) by using contributor data only to contact contributors regarding refunds in the
21 manner approved above in the responses to Questions 1-5 — and by publicizing only
22 aggregate data in the manner approved in the response to Question 6 —

³ See supra note 2.

1 PoliticalRefund.org may sell advertising and other sponsorship opportunities to defray
2 the costs of maintaining its website.

3 This response constitutes an advisory opinion concerning the application of the
4 Act and Commission regulations to the specific transaction or activity set forth in your
5 request. *See* 2 U.S.C. § 437f. The Commission emphasizes that, if there is a change in
6 any of the facts or assumptions presented, and such facts or assumptions are material to a
7 conclusion presented in this advisory opinion, then the requestor may not rely on that
8 conclusion as support for its proposed activity. Any person involved in any specific
9 transaction or activity that is indistinguishable in all its material aspects from the
10 transaction or activity with respect to which this advisory opinion is rendered may rely on
11 this advisory opinion. *See* 2 U.S.C. § 437f(c)(1)(B). Please note that the analysis or
12 conclusions in this advisory opinion may be affected by subsequent developments in the
13 law including, but not limited to, statutes, regulations, advisory opinions, and case law.
14 All advisory opinions cited herein are available on the Commission's website.

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On behalf of the Commission,

Ellen L. Weintraub
Chair