

February 16, 2018

Office of the General Counsel  
Attn: Lisa J. Stevenson, Esq.  
Federal Election Commission  
999 E Street NW  
Washington, DC 20463

2018 FEB 20 PM 1: 00

RE: Advisory Opinion Request

Dear Ms. Stevenson:

Pursuant to 52 U.S.C. § 30108, Conservative Primary LLC (“LLC”) requests an Advisory Opinion from the Federal Election Commission (“Commission” or “FEC”) concerning the permissibility of its business plan under the Federal Election Campaign Act (“the Act” or “FECA”) of 1971, as amended.

### FACTUAL BACKGROUND

Conservative Primary LLC’s primary purpose and business model is to create and administer a website platform (“Conservative Primary”) providing straw poll functionality in congressional races. Users of this platform (“Customers”) will pay a fee to register and cast a vote in a particular straw poll. The LLC will subsequently advertise the results of each Conservative Primary Straw Poll (“Poll(s)”) on various mediums.

The LLC is a for-profit limited liability company operated for commercial purposes and not for the purpose of influencing any federal election. The LLC is not established, maintained, financed, or controlled by any candidate or political party. The LLC will not conduct its activities in cooperation, consultation or concert with, or at the request or suggestion of, any candidate or party.

#### Business Plan and Operation of Conservative Primary

The LLC will administer straw polls on its platform that include at least two Republican candidates in a primary election, excluding the Republican incumbent. The LLC will advertise Conservative Primary to individuals in congressional districts in which it is operating Polls to draw in potential Customers to the website. These ads would target politically conservative Customers through email, social media, television, and conservative talk and radio shows. For example:

**Ad #1:** “Let’s go RINO hunting. Congressman Doe in District 8 does not represent the conservatives in this district. Conservative Primary gives you a tool to help elect someone who better represents conservatives like you. Join Conservative Primary, pool your conservative vote, and help nominate a real conservative to the general election.”

Conservative Primary will be a public website but have a password protected section for those paying Customers who choose to participate in a Poll. The public portion of the site will have general information for visitors to view about Conservative Primary and how it works, including an explanation about how a visitor may register to vote in a Poll. There will be a notice that Conservative Primary intends to spend a portion of the revenue it generates from Customers on any particular Poll to advertise the winner of that Poll. The public website will also contain information about different ongoing Polls that may be of particular public interest, including identifying the district, slate of candidates, polling period when a Customer may cast a vote, and current vote breakdown. If a visitor does not want to participate in a Poll but is interested in supporting the concept, they will be able to donate to help fund Conservative Primary. If a visitor chooses to become a Customer, they will be required to pay a fee, potentially \$10.00, to

participate in each Poll. The LLC charges Customers this fee to cover costs associated with platform development, maintenance, overhead, and other technical costs; credit card payments; advertising for Conservative Primary and the Poll results; and to generate a commercially reasonable profit.

When a polling period closes for a particular Poll, the LLC will tally the votes and announce the winner of the Poll. The LLC will employ different methods of advertisements to reach both its Customers as well as the general public within the Congressional district in which the Poll is focused. The LLC will communicate the results via email to Customers and on the Conservative Primary website for the general public to view. The LLC will also produce and purchase advertisements to announce the results. These advertisements will initially be distributed online, and through conservative talk and radio shows, but the LLC will consider disseminating ads on television and in other media as well.

In the email to Customers and on the Conservative Primary website, the LLC will announce the results of the Poll(s) and encourage Customers and viewers to support the winner(s) using the following text (“Support Ad”) as part of the display:

**Ad #2:** “Please join your friends in supporting the winners of the Conservative Primary. Vote for these winners and support their campaign with your time and money.”

The winner advertisements (“Winner Ad(s)”) disseminated over the internet and radio, and potentially on television, will be formatted in three ways:

**Ad #3:** “Your friends and neighbors have participated in a Conservative Primary in District 8. They have chosen Sally Smith as the best pick to challenge incumbent John Doe. Please join your friends in voting for the winner of the Conservative Primary.”

**Ad #4:** “Your friends and neighbors have participated in a Conservative Primary in District 8. They have chosen Sally Smith as the winner.”

**Ad #5:** “Sally Smith has won the Conservative Primary in District 8. Will you support her in the Primary?”

Depending on the Ad<sup>1</sup> used, and in some cases the timing of disbursement, the LLC may trigger reporting requirements for independent expenditures or electioneering communications. If the Ad qualifies as an independent expenditure, the LLC will file independent expenditure reports as required by Commission regulations under 11 C.F.R. § 109.10. If the Ad qualifies as an electioneering communication, the LLC will file electioneering communication reports as required by Commission regulations under 11 C.F.R. § 104.20(b). Each report the LLC files will include the content required by Commission regulations under 11 C.F.R. §§ 109.10(e), 104.20(c). For any independent expenditure or electioneering communication, an appropriate disclaimer will be included as required under 52 U.S.C. § 30120; 11 C.F.R. §§ 110.11(b)(3), (c)(1), (c)(4).

## QUESTIONS PRESENTED

1. *How should funds the LLC spends on advertising the straw poll results be characterized and reported?*
  - a. *Do the advertisements constitute “expenditures” by the LLC?*
  - b. *If the advertisements constitute “expenditures,” do they qualify as “independent expenditures” by the LLC?*

---

<sup>1</sup> For reference herein, Ad #2-5 will be collectively referred to as (“Ad(s)”).

- c. Do the advertisements constitute “electioneering communications” by the LLC?*
- 2. May the LLC, in its emails to Customers, and on its webpage, include a message calling on the reader to support and donate to the winning candidate? If so, may the LLC include a link to the candidate or candidate committee’s webpage in its email and on the LLC website?*
- 3. Are payments from Customers to the LLC partly or entirely “contributions?”*
- 4. Does the LLC’s planned arrangement require the formation of one or more political committees?*
  - a. Does the LLC qualify as a political committee?*
  - b. In the alternative, do the Customers who collectively participate in a particular straw poll, which funds the purchase of one or more advertisements relaying the results of that Poll, constitute a political committee?*

## LEGAL ANALYSIS

- 1. How should funds the LLC spends on the planned advertisements be characterized and reported?*

To the extent such planned advertisements meet the legal definition, corporations are permitted to make independent expenditures and electioneering communications. *See Citizens United v. FEC*, 558 U.S. 310, 365 (2010); Independent Expenditures and Electioneering Communications by Corporations and Labor Organizations, 79 Fed. Reg. 62797, 62798-99 (Oct. 21, 2014). The Act and Commission regulations require persons who spend above certain threshold amounts on independent expenditures or electioneering communications to file reports with the Commission. *See* 52 U.S.C §§ 30104(c), (f); 11 C.F.R. §§ 109.10, 104.20(b).

- a. Do the advertisements constitute “expenditures” by the LLC?*

An “expenditure” is a “purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value, made by any person for the purpose of influencing any election for Federal office.” 52 U.S.C. § 30101(9)(A)(i); 11 C.F.R. § 100.111(a).

Conservative Primary will allow Customers to vote for a candidate in a Poll, and the LLC will use a portion of the voting fee of all respondents in that poll to fund advertisements announcing the winner of the poll that may contain express advocacy. The fee a voting Customer, or donated funds a non-voting visitor, pays to the LLC will be retained by the LLC in its general account. Those funds are derived from the LLC’s commercial activities, and the subsequent use of those funds is subject to the LLC’s exclusive discretion and control.

Using the revenue from Conservative Primary, the LLC will create, produce, and distribute Ads. If necessary, the LLC may provide additional funding to provide such services. The LLC will create a standard advertisement template, subsequently tailored to each candidate who wins a Poll. As the creator and financier of an Ad and its distribution to the general public, the LLC may be considered the “maker” of an expenditure. The LLC would incur all costs as part of providing its services. These costs may need to be reported if the communication constitutes an independent expenditure or electioneering communication as discussed below.

Whether the funds are spent on advertisements, the operation and maintenance of Conservative Primary, or for any other reason, no Customer or donor will have discretion over the use of those funds. The Customer merely provides the LLC with payment for its services. If the advertisements are expenditures, because the

LLC pays to have the advertisement created and distributed to the public, those expenses will only be attributable to the LLC.

***b. If the advertisements constitute “expenditures,” do they qualify as “independent expenditures” by the LLC?***

An “independent expenditure” is “an expenditure by a person for a communication expressly advocating the election or defeat of a clearly identified candidate that is not made with the cooperation or prior consent of, in consultation with, or at the request or suggestion of, a candidate or an agent or authorized committee of a candidate or political party committee or its agents.” 52 U.S.C. § 30101(17); 11 C.F.R. § 100.16. In determining whether a communication contains express advocacy, the Commission analyzes the message under 11 C.F.R. § 100.22(a) or the broader definition at 11 C.F.R. § 100.22(b). Political Committee Status: Supplemental Explanation and Justification, 72 Fed. Reg. 5595, 5606 (Feb. 7, 2007) (hereinafter “PCS E&J”) Here, depending on the advertisement the LLC disseminates, the communication may or may not expressly advocate and thus may or may not be an independent expenditure.

Under 11 C.F.R. § 100.22(a), a communication expressly advocates if it uses phrases including, but not limited to, “vote for,” “support the Republican nominee,” “vote against Old Hickory,” “reject the incumbent,” or communications of campaign slogan(s) or individual words(s), which in context can have no other reasonable meaning than to urge the election or defeat of one or more clearly identified candidates, such as posters, bumper stickers, advertisements, etc., which say “Reagan/Bush.” A communication also encompasses express advocacy when “it provides, in effect, an explicit directive” to vote for named candidates. *See FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 249 (1986).

Under 11 C.F.R. § 100.22(b), a communication that “when taken as a whole with limited reference to external events, such as the proximity to the election, could only be interpreted by a reasonable person as containing advocacy of the election or defeat of one or more clearly identified candidates because (1) the electoral portion is unmistakable, unambiguous, and suggestive of only one meaning; and (2) reasonable minds could not differ as to whether it encourages actions to elect or defeat one or more clearly identified candidates or encourages some other kind of action.”

If the LLC disseminates Ad #2, Ad #3, or Ad #5, the communication includes statements explicitly calling for the election of a clearly identified candidate and, therefore, contains § 100.22(a) express advocacy. Since Ad #2, Ad #3, and Ad #5 contain express advocacy, they are independent expenditures and will be required to be reported if they exceed the applicable threshold.

If the LLC disseminates Ad #4, the communication includes a reference to a clearly identifiable candidate. However, the communication does not contain any phrases of express advocacy similar to those found in 11 C.F.R. § 100.22(a). It is not a communication including campaign slogans or individual words, such as “Sally Smith in ‘18” that in this context would have no other reasonable meaning than to urge the election or defeat of a clearly identified candidate. Finally, there are no explicit directives to vote for Sally Smith. Therefore, Ad #4 does not contain express advocacy under § 100.22(a).

Whether the communication, when taken as a whole, could only be interpreted by a reasonable person as containing advocacy of the election or defeat of a clearly identified candidate is not patently definitive. There is no electoral portion that is unmistakably, unambiguously, or suggestive of only one meaning, that being the election of Sally Smith, that puts Ad #4 “squarely [] within the context of an election.” *Cf.* MUR 6697 (League of Conservation Voters, *et al.*), First General Counsel’s Report (Mar. 7, 2014), at 9. Reasonable minds may differ as to what the communication is encouraging. Nothing is directive, instructive, or encouraging any action by the listener to respond accordingly by electing Sally Smith. After listening to Ad #4, one could alternatively interpret the meaning of the advertisement as the announcement of a poll result, or as an advertisement for Conservative Primary, both of which are fundamental goals of

the LLC in making these communications. If a reasonable person could interpret Ad #4 in any way other than “only” the election or defeat of a clearly identified candidate, Sally Smith, then Ad #4 is not an independent expenditure under §100.22(b).

***c. Do the advertisements constitute “electioneering communications” by the LLC?***

An “electioneering communication” is “any broadcast, cable or satellite communication which (a) refers to a clearly identified candidate for federal office; (b) is publicly distributed within 60 days before a general election and 30 days before a primary election; and (c) is targeted to the relevant electorate. 52 U.S.C. § 30104(f)(3); 11 C.F.R. § 100.29. The term “electioneering communication” does not include a communication that constitutes an expenditure or independent expenditure. 52 U.S.C. § 30104(f)(3)(B)(ii); 11 C.F.R. § 100.29(c)(3). A communication is “targeted to the relevant electorate” when it can be received by 50,000 or more persons in the congressional district the candidate seeks to represent or the state in the case of a candidate for senator. 11 C.F.R. § 100.29(b)(5)(i), (ii).

If the LLC disseminates Ad #4 via radio as planned, or via television, it will be an electioneering communication if done within 30 days before a primary election and targeted to the relevant electorate. 11 C.F.R. § 100.29(b)(7)(i)(A)-(D).

***2. May the LLC, in its emails to Customers, and on its webpage, include a message calling on the reader to support and donate to the winning candidate? If so, may the LLC include a link to the candidate or candidate committee’s webpage in its email and on the LLC website?***

A “contribution” is “any gift . . . or anything of value made by any person for the purpose of influencing any election for Federal office.” 52 U.S.C. § 30101(8)(A); 11 C.F.R. § 100.52(a). A “coordinated expenditure” is an expenditure made by any person “in cooperation, consultation, or concert, with, or at the request or suggestion of” a candidate or his agents, and is also a contribution to the candidate. 52 U.S.C. § 30116(a)(7)(B); *see also* 11 C.F.R. § 109.20. A “coordinated communication” is a coordinated expenditure that constitutes an in-kind contribution to the candidate with whom it is coordinated. 11 C.F.R. § 109.20(b).

The Commission regulations apply a three-prong test to determine whether a communication constitutes a “coordinated communication.” 11 C.F.R. § 109.21(a). First, the communication must satisfy the “payment prong,” where a person other than the federal candidate or the candidate’s authorized committee must pay for all or part of the communication. 11 C.F.R. § 109.21(a)(1). Second, the communication must satisfy the “content prong,” with at least one content standard in 11 C.F.R. § 109.21(c). Third, the communication must satisfy the “conduct prong,” with at least one conduct standard in 11 C.F.R. § 109.21(d). A communication must satisfy all three prongs to be deemed a “coordinated communication.”

The LLC’s use of a link to a candidate’s website in its emails and posted on the Conservative Primary results page along with the Support Ad will not result in a coordinated communication because the LLC does not satisfy all three prongs of the coordinated communication test. First, the LLC will pay for the communication. Second, because the communication would not constitute an electioneering communication or public communication, the LLC will not satisfy the content prong. Finally, there will be no interaction between the LLC and the candidate or candidate’s committee that would satisfy the conduct prong.

Commission regulations provide certain “public communications,” as defined at 11 C.F.R. § 100.26, will satisfy the content prong. 11 C.F.R. § 109.21(c)(2)-(5). A “public communication” is a “communication by means of any broadcast, cable, or satellite communication, newspaper, magazine, outdoor advertising facility, mass mailing, or telephone bank to the general public, or any other form of general public political advertising.” 11 C.F.R. § 100.26. “General public political advertising” specifically excludes communications over the Internet, except for communications placed for a fee on another person’s website. *Id.* In Advisory Opinion 2017-10 (Citizens Against Plutocracy), the Commission held the committee’s

“proposal to encourage candidates to sign a Contract . . . , and to place those Contracts on [the committee’s] website or email the Contracts to current or potential supporters” would not constitute electioneering communications or public communications by the committee. *Id.* at 3. The LLC will be emailing its Customers and posting on its website the results of the Poll along with the Support Ad. The posting of the Support Ad with Poll results on the LLC’s website or in an email would not constitute an electioneering communication under 11 C.F.R. §§ 100.29; 109.21(c)(2). While the content of the Support Ad does include express advocacy as defined in 11 C.F.R. § 100.22, the content is not a public communication as defined in 11 C.F.R. § 100.26 because it is an Internet communication.

The LLC will not act in cooperation, consultation, or concert with, or at the request or suggestion of any candidate. The LLC has no intention of creating any relationship with any candidate or candidate’s committee beyond providing them notice of the platform. The Commission has previously stated coordination does not result “where [the person paying for a public communication] merely informs a candidate . . . of its plans.” Coordinated and Independent Expenditures, 68 Fed. Reg. 421, 432 (Jan. 3, 2003). If the LLC reaches out to candidates in a Poll, they may provide them a link to the Conservative Primary website or page featuring the Poll results. Providing a link would not, by itself, result in any of the LLC’s subsequent Ads becoming coordinated communications under 11 C.F.R. § 109.21. Due to the limited engagement by the LLC with the candidates or candidate’s committees, the LLC will not satisfy the conduct prong. 11 C.F.R. § 109.21(d)(1)-(5).

When the LLC distributes the Support Ad in its emails and on its website, it plans to include a link to a candidate’s publicly available website, likely the homepage. The Commission created a safe harbor for the use of publicly available information in communications. This safe harbor “ensures the use or conveyance of publicly available information in creating, producing, or distributing a communication would not, in and of itself, satisfy any of the conduct standards in 11 C.F.R. § 109.21(d).” Explanation and Justification for Final Rules on Coordinated Communications, 71 Fed. Reg. 33190, 33205 (June 8, 2006). Sources of public information include “materials on a candidate’s Web site or other publicly available Web site.” *Id.* A candidate’s website and the link are publicly available. The LLC will not be including candidate website links in its emails or on its webpage at the request or suggestion, or in cooperation with any candidate or candidate’s committee. Thus, any representation on its website or subsequent communication would not constitute a coordinated communication. As initially stated, if Ad #2 is disseminated in a manner that does require independent expenditure reporting, the LLC will file the appropriate report with the FEC and include any required disclaimers on its communications.

### ***3. Are payments from Customers to the LLC partly or entirely “contributions”?***

The Act and Commission regulations prohibit a corporation from making any contribution in connection with Federal elections. 52 U.S.C. § 30118(a); 11 C.F.R. § 114.2(b)(1). A “contribution” includes “any gift, subscription, loan, advance, or deposit of money or anything of value made by any person for the purpose of influencing any election for Federal office.” 52 U.S.C. § 30101(8)(A)(i); 11 C.F.R. § 100.52(a). The Act also defines “contribution” in the context of corporations to include “any direct or indirect payment, distribution . . . or any services, or anything of value . . . to any candidate, campaign committee, or political party or organization, in connection with any [Federal] election or for any applicable electioneering communication.” 52 U.S.C. § 30118(b)(2). “Anything of value” includes in-kind contributions, such as the provision of services without charge or at a charge that is less than the usual and normal charge. 11 C.F.R. § 100.52(d)(1). The Commission regulations further define “usual and normal charge” as “the price of those goods in the market from which they ordinarily would have been purchased at the time of the contribution,” or “the commercially reasonable prevailing rate at the time the services were rendered.” 11 C.F.R. § 100.52(d)(2). The Supreme Court has consistently upheld the ban on direct corporate contributions to candidates as a preventative means to ensure against quid pro quo corruption. *See Citizens United v. FEC*, 558 U.S. 310, 359 (2010). Although, the Court has found no sufficient governmental interests limiting political speech of corporations. *Id.* at 365.

The Commission has previously concluded that commercial entities were permitted to charge users a fee to cover their costs and provide a commercially reasonable profit without that fee being considered a contribution because the fee was not a gift or donation to the commercial entity but a commercial payment in exchange for their services. *See e.g.*, Advisory Opinion 2017-06 (Stein and Gottlieb) at 5 (fees charged to users for services to cover costs and generate profit are not contributions but payments in exchange for processing services); Advisory Opinion 2015-08 (Repledge) at 8 (fees charged to members for providing services are not contributions because they are not gifts or donations and are commercial payments in exchange for processing services); Advisory Opinion 2012-22 (skimmerhat) at 6, Advisory Opinion 2011-06 (Democracy Engine) at 6 (payment of a convenience fee by subscribers would not constitute contribution because services are provided at request of and for the benefit of its customers); *see also* Advisory Opinion 2006-08 (Brooks) at 4 (service fees paid by subscribers were not contributions but compensation to the Corporation incidental to services offered). The voting fee the LLC charges its Customers is not a contribution because it is a commercial payment in exchange for services provided by Conservative Primary and not for the purpose of influencing any election for Federal office. The LLC provides the Polls for the use and benefit of Customers. There are no payments or services provided to any candidates or political committees or parties in connection with any Federal election.

In Advisory Opinion 2004-19 (DollarVote), the Commission approved an internet-based service where users paid a subscription fee of \$10.00 to access a website containing position statements (“DollarBills”) and allowed users to “vote” for those candidates listed as promising to support certain DollarBills by contributing to those candidates. The user’s contribution was separate and in addition to the subscription fee for access alone. The user completes their transaction with a credit card, and DollarVote retains the subscription fee and any processing fees in the corporation’s general accounts. *Id.* at 2. Any of the funds used to contribute to candidates were placed into a merchant account separate from the corporation’s general accounts. DollarVote then forwards all contributions “voted” for on a DollarBill, minus transaction costs, to the candidate(s) listed as supporting that DollarBill. Since the pre-disclosed transaction costs and subscription fee were processed into the corporate treasury accounts, the subscription fee was considered payment for commercial activities and not a contribution. *Id.* at 4.

Like DollarVote, the LLC will charge Customers a fee to participate in a Poll. Unlike DollarVote, the LLC will not be facilitating the transfer of any contributions to candidates nor maintaining a separate merchant account. Instead, the Customer fee to vote and donations received are used to cover the operations of the LLC’s entire platform and to facilitate the creation and dissemination of communications as part of its service to its Customers. When a Customer initiates their transaction with the LLC, they are given notice a portion of their payment will go toward creating and airing an advertisement for the winners of the Polls. The other portion of their payment will cover the remaining operating expenses for the services the LLC provides. The scope of the LLC’s services includes determining media strategies and serving as the purchaser of commercial airtime. The Customer has no discretion or involvement in how their payment is subsequently used by the LLC. The Customers payment should be considered a commercial payment in exchange for the LLC’s services as mentioned above.

**4. Does the LLC’s planned arrangement require the formation of one or more political committees?**

**a. Does the LLC qualify as a political committee?**

The LLC is a commercial enterprise engaged in bona fide commercial activity and does not meet the “major purpose test” and is not a political committee.

The Act and Commission regulations define a “political committee” as “any committee, club, association, or other group of persons which receives contributions aggregating in excess of \$1,000 during a calendar year or which make expenditures aggregating in excess of \$1,000 during a calendar year.” 52 U.S.C. § 30101(4); 11 C.F.R § 100.5(a). The Supreme Court construed the term “political committee” to encompass only organizations under the control of a candidate or the major purpose of which is the nomination or election of a candidate. *Buckley v. Valeo*, 424 U.S. 1, 79 (1976). An organization making expenditures in excess of \$1,000 will not be considered a “political committee” unless it’s “major purpose is Federal campaign activity (i.e., the nomination or election of a Federal candidate.)” PCS E&J at 5597; see *Buckley*, 424 U.S. at 79; *MCFL*, 479 U.S. at 262. The Commission adopted the policy of determining whether an organization is a political committee on a case-by-case basis. PCS E&J at 5596.

### **The nomination or election of a candidate is not Conservative Primary LLC’s major purpose**

When applying the case-by-case approach to determine whether the LLC’s major purpose is Federal campaign activity, the Commission will consider the LLC’s “overall conduct,” including its disbursements, activities, and statements. PCS E&J at 5597. This conduct may include “public statements as well as internal documents about an organizations mission; the full range of campaign activities . . . including whether the organization engaged in any activities that were not campaign related.” *Id.* at 5605. Since this request is seeking to confirm the permissibility of the LLC’s business concept, there are no definitive statements, budgets, or activities established for evaluation but rather proposed activities subject to the opinion of the Commission in this request.

#### **i. Public Statements**

The LLC intends to release Ad #1 to attract consumers to Conservative Primary. The Marketing Ad contains statements that indicate the commercial nature of the activity and may also contain statements that encompass express advocacy. Reasonable minds may differ as to whether the message is encouraging the defeat of the incumbent, while at the same time advertising a service that hosts straw polls.

In Advisory Opinion 1994-30 (Conservative Concepts/Pence), the Commission stated that the commercial nature of an activity might be compromised by a message that would bring it under the category of an independent expenditure. *Id.* at 6. Particularly, by “gear[ing] the motivation” for engaging a customer to register for Conservative Primary to “those who wish to support or express support for a particular candidate” or in this case defeat an incumbent, along with “targeting the geographic area of the purchase,” the overall message could be compromised. *Id.* For a message to be commercial, it should “make no mention of the motivation of the purchaser as being the support of a candidate.” *Id.*

The LLC, by eliminating language such as “elect someone who better represents your district” and “help nominate a real conservative,” and rephrasing with something more descriptive of the platform itself could aid in promoting the commercial aspect of the Conservative Primary. However, the LLC believes, similar to the “Project” (an LLC) in Advisory Opinion 2017-06 (Stein and Gottlieb), it may rely on commercial considerations to target customers, and determine the best way to market its services to attract conservative users and promote Conservative Primary’s “commercial success in the current political environment.” *Id.* at 6. If the LLC’s use of the language in its marketing communications, as indicated in the Marketing Ad, is “the most marketable way for [the LLC] to provide a service to [Customers]” “based on its own research and analysis” then the LLC will be employing a “commercially reasonable criteria to attract [Customers] and encourage [Customer] participation and thereby grow as a business.” *Id.*

#### **ii. Range of activities**

Lower courts have consistently clarified and upheld the major purpose test as proscribed in *Buckley*. In *North Carolina Right to Life, Inc. v. Leake*, 525 F.3d 274, 287-88 (4th Cir. 2008), the court explained that



*Buckley's* major purpose test requires that the nomination or election of a candidate must be *the* (i.e., sole and exclusive) major purpose of an organization, not merely *a* (i.e., one of several) major purpose.

In Advisory Opinion 2017-06, the Commission approved a Project (an LLC) with a business plan that allowed users of its mobile application (“App”) and services to contribute exclusively to federal Democratic candidates in targeted swing districts as determined by the Project and marketed primarily to Democratic contributors. The Project was considered to have a purpose of providing a similar service to other contribution processing platforms the Commission previously approved. Although, arguably, another purpose was to assist and encourage Democratic “voter[s] and donor[s] [with] an interest in swinging the U.S. House of Representatives to Democratic Control” to take action for the purpose of influencing a Federal election. *Id.* at 3.

Like the Project in Advisory Opinion 2017-06, the LLC will be providing a service to its Customers, not candidates or political committees. The LLC is relying on its internal research and analysis to determine what primary races will meet an objective criterion to be included in Conservative Primary and generate the most engagement with consumers. The LLC believes the best way to market and apply its business concept for commercial success is to engage conservative voters in districts that meet its criterion, whether that includes a few or a hundred districts are to be determined. One purpose of the LLC is to administer a straw poll featuring candidates in a primary election. Another purpose is to provide conservative voters, in targeted districts, with a mechanism to engage in political speech by advertising the Poll results that may encourage others to take action.

### iii. Commercial Activity

The Commission has previously concluded a commercial entity was not a political committee when acting and operating for genuine commercial purposes and not for the purpose of influencing any Federal election or nominating or electing a candidate to federal office. *See* Advisory Opinion 2009-13 (Black Rock Group); Advisory Opinion 2008-10 (VoterVoter.org). In determining whether an entity is engaging in bona fide commercial activity that results in an expenditure or contribution, the Commission will consider a range of factors including whether the entity: (1) is owned, controlled, or affiliated with a candidate or political committee; (2) is “in the business” of conducting the type of activity involved; (3) follows usual and normal business practices and industry standards; and in the context of advertising: (4) whether the activity is engaged in for genuinely commercial purposes; (5) whether the activity involves fundraising for candidates or solicitation for political contributions; (6) whether items are sold at the usual and normal charge; or (7) whether the purchase is made for the individuals personal use. *See* MURs 5474 and 5539 (Dog Eat Dog Films/Michael Moore), First General Counsel’s Report, dated May 25, 2005; MUR 5485 (Conversagent), First General Counsel’s Report, dated October 25, 2005; *see also* Advisory Opinions 1994-30 (Conservative Concepts/Pence) and 1989-21 (Create-a-Craft).

Conservative Primary LLC provides a tool for its Customers to engage in free speech by administering a straw poll in their district and advertising the winner the Customers select to the district before the actual primary election. The LLC is not owned, controlled, or affiliated with any candidate or political committee. There will be absolutely no fundraising for or transfer of funds to candidates or committees nor a solicitation of contributions. The LLC seeks to provide a unique service and is unaware of another entity providing a similar type of activity in the marketplace to evaluate whether its service will be provided at a usual and normal charge. A corporation may also be providing commercial services when it engages in activities for the purpose of “maximizing its commercial success” and not supporting a candidate. *See* Advisory Opinion 2008-10 (VoterVoter.org). Like VoterVoter.org, the LLC seeks to attract consumers to Conservative Primary to take Polls without regard to their specific candidate preference as a means to maximize the LLC’s commercial success and is not supporting particular candidates for its own political purpose.

The LLC's intention to run its enterprise focusing on primary elections and conservative candidates in those elections is not a substantial factor alone to determine a major purpose of Federal campaign activity. The Commission has reasoned that "[c]ompanies often determine to direct their business activities toward one type of political orientation" and "[that] does not, by itself, negate the merely commercial nature of an activity." Advisory Opinion 1994-30 (Conservative Concepts/Pence) at 6. The decision by an entity "to limit itself to certain candidates is a factor relevant to determining whether a business enterprise's activities are merely commercial, rather than political, particularly in view of its intent to focus on candidates of a particular ideology." *Id.* at 7. And, "there is nothing in the Act requiring a business entity to target its business toward clients or individuals that represent all parties or ideologies." *Id.*

For the reasons stated above, and similar to the Project in AO 2017-06, the LLC would be engaged in commercial activity, regardless of its partisan pursuit. If the LLC's subsequent activities, including the distribution of Ads, result in expenditures, it does not negate the commercial nature of the services provided and such expenditures related to the LLC's proposed activity is permissible. The LLC will be no different than an entity selling political merchandise such as hats or shirts.

#### **iv. Relevant Spending & Time Period**

In *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 252-53 (1986), the Court stated that all "organizations whose major purpose is not campaign advocacy, but who occasionally make independent expenditures on behalf of candidates, are subject to these [independent expenditure-specific reporting] regulations." The Court further noted that if a group's "independent spending become[s] so extensive that the organization's major purpose may be regarded as campaign activity, the corporation would be classified as a political committee." *Id.* at 262 (citing *Buckley*, 424 U.S. at 79). In *Citizens for Responsibility & Ethics in Washington V. FEC*, 209 F. Supp. 3d 77, 93-94 (D.D.C. 2016), the court agreed with the FEC that no part of "FECA nor any judicial decision specifies a particular time period for determining a group's major purpose." (citing FEC's MSJ 41-45).

There is no defined spending threshold to determine an entity's major purpose. The LLC's spending related to Federal campaign activity may not be sufficiently extensive to conclude that the LLC has a major purpose of Federal campaign activity because that is not its only activity or disbursements. The LLC may occasionally make independent expenditures, predominantly only related to a primary election. Depending on the circumstances surrounding when a primary may occur, there may be little or no spending related to campaign activity in a calendar year. However, there would be spending related to the LLC's general business operations. Though the actual costs have yet to be determined, the other disbursements that the LLC will likely incur may cover administration, payroll, website development and management, payment processing, and communications related to marketing Conservative Primary itself.

#### ***b. In the alternative, do the Customers who collectively participate in a particular straw poll and fund the purchase of one or more advertisements relaying the results of that Poll constitute a political committee?***

In Advisory Opinion 2008-10 (VoterVoter.org), the Commission concluded where there was no collaboration about when communications would be made, what media outlets would be used, what the communications would say, and which candidates and elections they would target, a group of persons would not be considered a political committee. The Commission has previously declined to address collaborations between the creator and a purchaser in this context.

Here, the LLC will be providing notice to a Customer that a portion of their fee to vote will be used to create and distribute an advertisement for the winner of the Poll. When advertising the winner of the Poll, the LLC will select the appropriate market, medium, place and time to air the Ads and will control the

content of an Ad. There will be no collaboration with the Customers regarding any plans, strategies, or activities the LLC intends to use to provide its services. The Winner Ads are an essential part of the services the LLC provides, and the extent of the Customers involvement is payment for the overall service.

## CONCLUSION

For these reasons, Conservative Primary LLC respectfully requests the Commission issue an advisory opinion confirming:

- If the funds for planned advertisements are expenditures, they are only attributable to the LLC.
- Ads like Ad #2, Ad #3, and Ad #5 are independent expenditures if including § 100.22(a) express advocacy.
- Ad #4 is not an independent expenditure because it does not satisfy the requirements of § 100.22(a) and reasonable minds would not conclude the only reasonable interpretation is the advocacy for the election or defeat of a clearly identified candidate. Ad #4 is an electioneering communication if it satisfies all factors under 11 C.F.R. § 100.29.
- The dissemination of Ad #2 with a link to a candidate's website would not result in a coordinated communication and may be used in emails to Customers and on the Conservative Primary website.
- The fee the LLC charges a Customer is not a "contribution" because it is a payment for providing commercial services. The funds received from non-voting donors are not "contributions" because they are eleemosynary donations to the LLC in consideration for its commercial services in the marketplace. Both revenue streams are taxable income to the commercial enterprise.
- Conservative Primary LLC is not a political committee because it is engaged in commercial activity and does not have the sole and exclusive major purpose of Federal campaign activity. Conservative Primary LLC and its Customers are not a "group of persons" forming a political committee because there is no agreement or collaboration about the LLC's communications.

Respectfully submitted,



Petra A. Mangini  
petra@political.law

## Joanna Waldstreicher

---

**From:** Petra Mangini <Petra@political.law>  
**Sent:** Tuesday, March 13, 2018 10:40 AM  
**To:** Joanna Waldstreicher  
**Subject:** RE: Conservative Primary advisory opinion request

Hello Ms. Waldstreicher,

Please find my responses below.

- 1) That is correct.
- 2) That is correct, but to clarify: only Ad #2 will include a display of straw poll winning candidate's names and links to campaign websites, in addition to the text of Ad #2.
- 3) That is correct.

Thank you,

Petra A. Mangini  
political.law  
203 South Union Street, Suite 300  
Alexandria VA 22314  
202.930.2783 direct // 202.478.0750 fax  
fb.me/political.law // @political\_lawDB

-----Original Message-----

From: Joanna Waldstreicher [mailto:JWaldstreicher@fec.gov]  
Sent: Monday, March 12, 2018 9:49 AM  
To: Petra Mangini <Petra@political.law>  
Subject: Conservative Primary advisory opinion request

Dear Ms. Mangini:

Thank you for speaking with me recently to clarify some of the information in the advisory opinion request you have submitted on behalf of Conservative Primary LLC. I have set out below my understanding of some of that information. Please either confirm the accuracy of these statements or correct them.

- 1) Conservative Primary is an LLC, but wishes to be considered as a corporation for purposes of its advisory opinion.
- 2) Because the website and ads are still in development, Conservative Primary does not yet know the full content of the proposed ads, other than the text indicated in the advisory opinion request and the names of winning candidates and links to their websites.
- 3) The straw polls will not be conducted in all races; the races will be selected based on criteria such as statistics about the districts. Conservative Primary has not yet determined how many races will be selected, nor has it determined whether straw polls will be conducted for districts where the incumbent is not a Republican.

We would appreciate your response by email. Your response may be considered to be part of Conservative Primary's advisory opinion request; if so, it will be posted as such on the Commission's website.

Joanna S. Waldstreicher  
Office of the General Counsel, Policy Division Federal Election Commission  
1050 First Street NE  
Washington, DC 20463  
(202) 694-1650