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FEDERAL ELECTION COMMISSION
Washington, DC 20463

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August 1, 2012

AGENDA ITEM

MEMORANDUM

TO: The Commission

For Meeting of 8-2-12

FROM: Anthony Herman
General Counsel

Anthony Herman

SUBMITTED LATE

Kevin Deeley
Acting Associate General Counsel

Kevin Deeley

Amy Rothstein
Assistant General Counsel

Amy Rothstein

Esther Heiden
Attorney

Esther Heiden

Subject: AO 2012-24 (Peterson) (Revised Draft B)

Attached is a proposed draft of the subject advisory opinion. We have been asked to have this draft placed on the Open Session agenda for August 2, 2012.

Attachment

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Tony P. Trimble, Esq.
Matthew W. Haapoja, Esq
Trimble & Associates, Ltd.
10201 Wayzata Boulevard
Suite 130
Minneapolis, MN 55305

REVISED DRAFT B

10 Dear Messrs. Trimble and Haapoja:

11 We are responding to your advisory opinion request on behalf of Mr. Dean
12 Peterson concerning the application of the Federal Election Campaign Act of 1971, as
13 amended (the “Act”), and Commission regulations to Mr. Peterson’s proposed
14 publication and marketing of Mr. Lee Byberg’s autobiography. The Commission
15 concludes that the proposed activities will not constitute an in-kind contribution to Mr.
16 Byberg or his authorized campaign committee.

17 ***Background***

18 The facts presented in this advisory opinion are based on your letter received on
19 July 11, 2012.

20 Mr. Byberg is a candidate for the U.S. House of Representatives from the 7th
21 Congressional District of the State of Minnesota. Byberg for Congress (the
22 “Committee”) is Mr. Byberg’s authorized campaign committee. Mr. Peterson is a
23 businessman in Willmar, Minnesota, who plans to form a limited liability company (the
24 “Publishing Company”), which will publish, market, and distribute Mr. Byberg’s
25 autobiography.

26 Mr. Byberg and Mr. Peterson are acquainted through their involvement in the
27 Willmar business and civic communities, as well as local charitable ministry
28 organizations. Mr. Peterson has made contributions and volunteered his services to Mr.

1 Byberg's congressional campaign. Mr. Peterson is not a paid employee or consultant for
2 the Committee and plays no official role with the Committee.

3 Mr. Byberg is currently writing an autobiography, the primary subjects of which
4 are his life and faith story, and various public policy issues. Mr. Peterson expects the
5 book will also address potential legislative approaches to those issues. Mr. Byberg's
6 previous involvement in political campaigns, including his 2010 candidacy for U.S.
7 House of Representatives, may also be covered. The book will not, however, expressly
8 or by implication, advocate the election or defeat of any candidate for Federal office.

9 Mr. Peterson previously helped another individual self-publish a book and is
10 generally interested in entering the "self-publishing" industry by offering publication and
11 distribution services to authors not signed with a more traditional publishing company.
12 Because Mr. Peterson believes Mr. Byberg's life story to be compelling and likely both
13 educational and profitable, he plans to form the Publishing Company and publish the
14 autobiography. Mr. Peterson will own the Publishing Company either by himself or with
15 other individuals, none of whom will be employees, officers, agents, or other
16 representatives of the Committee.

17 Mr. Peterson plans for the Publishing Company to enter into a publishing and
18 distribution agreement with Mr. Byberg, which will be negotiated on an arm's-length
19 basis. The agreement, as set forth fully in your request, is expected to contain the
20 following terms:

21 i. The Publishing Company will receive exclusive worldwide publishing,
22 distribution and marketing/promotional rights for the book for a two-year
23 term, renewable at Mr. Byberg's option.
24

- 1 ii. The Publishing Company will not be able to change the book without Mr.
2 Byberg's prior written approval.
3
- 4 iii. Mr. Byberg will be entitled to reasonable approval rights relative to
5 marketing/promotional content but cannot otherwise control or direct,
6 whether expressly or by implication, any activities of the Publishing
7 Company.
8
- 9 iv. The Publishing Company will exercise commercially reasonable efforts to
10 market, promote, sell, and distribute the book in hard copy and electronic
11 format through local bookstores in Minnesota and on-line through
12 commercial sellers, such as Amazon.com. Hard copy publication will
13 consist of the Publishing Company purchasing a "run" of printed books
14 from a printing company (likely several hundred or thousand copies),
15 storing the books at the Publishing Company's offices, and selling the
16 books through brick and mortar bookstores or on the Publishing
17 Company's own website.¹ Electronic publication will involve an on-line
18 "e-book" for which compensation is paid to the on-line retailer for each
19 book sold.
20

21 The Publishing Company may also market, promote, sell and distribute the
22 book through civic organizations and churches in Minnesota, such as
23 through book-signing events and parties. The content and subject matter
24 of the Publishing Company's book promotional events will be limited to
25 promoting the book and will not, expressly or by implication, advocate the
26 election or defeat of any Federal candidate, regardless of whether Mr.
27 Byberg is in attendance. The Publishing Company will pay all costs of the
28 book promotional events, including Mr. Byberg's travel costs to attend.
29 None of those costs will be spent at the request or suggestion of Mr.
30 Byberg, the Committee, or any officers directors, agents or other
31 representatives of the Committee.²
32

33 No Committee funds will be used to pay any costs of the Book
34 promotional events or the travel costs of Mr. Byberg's attendance at such
35 events. No Book promotional activity will occur at any event or during
36 any trip for which travel expenses have been paid by the Committee, and
37 no Committee or election-related activity will occur at any event or during

¹ The requestor represents that this up-front payment for "runs" of the book is consistent with normal industry practice.

² You also represent that no part of the advertising or promotional materials will constitute a coordinated communication pursuant to 11 CFR 109.21 or an electioneering communication pursuant to 100.29. While these representations are legal conclusions rather than factual statements, the Commission understands the intent of these representations is to obtain an answer premised on these assumptions.

1 any trip for which travel expenses have been paid by the Publishing
2 Company.

3
4 v. Mr. Byberg will be entitled to royalties in the amount of ten percent of
5 gross sales of the book. The book will be sold at a 50 percent discount for
6 "bulk purchases" of 50 copies or more.³ While Mr. Byberg is a candidate
7 for Federal office, the Publishing Company will donate his royalties
8 directly to charitable organizations recognized by the Internal Revenue
9 Service as exempt from taxation under 26 U.S.C. 501(c)(3), as selected by
10 Mr. Byberg. Mr. Byberg will report the royalties as having been received
11 and donated to these charitable organizations on his Federal and State
12 income tax returns. The Publishing Company will not transmit any
13 royalty monies directly to him during his candidacy.

14
15 vi. Mr. Byberg will not receive any other compensation or remuneration from
16 the Publishing Company relative to the book, other than for actual and
17 necessary travel expenses in connection with marketing or promotional
18 appearances, as described above. Mr. Byberg will undertake all marketing
19 and promotional appearances on his own time and will not use Committee
20 resources. The appearances will not be in conjunction with Committee
21 activities or events.

22
23 vii. None of the Publishing Company's officers, directors, or employees will
24 be officers, employees, or contractors of the Committee, and the
25 Publishing Company's efforts will not be controlled or directed by any
26 officers, employees, or contractors of the Committee. Committee funds
27 will not be used to fund any of the Publishing Company's publication,
28 marketing/promotional, or distribution efforts relative to the book
29 (including the payment of costs of any book promotional events).

30
31
32 ***Questions Presented***

33 1. *May the Publishing Company be wholly owned and operated by Mr. Peterson*
34 *without the activities of the Publishing Company in printing, marketing/promoting, and*
35 *selling the book being deemed an in-kind contribution to the Committee by virtue of Mr.*
36 *Byberg's status as a candidate for Federal office and Mr. Peterson's status of having*
37 *contributed the maximum amount permitted to the Committee in 2012?*

³ The requestor represents that these terms are commercially reasonable and consistent with industry practice.

1 2a. *If the Commission determines that the Publishing Company's activities would be*
2 *deemed an in-kind contribution to the Committee, would the Commission's opinion differ*
3 *if Mr. Peterson was not the majority owner of the Publishing Company, and the majority*
4 *owners of the Publishing Company were not contributors to the Committee, even if such*
5 *persons were related to and/or acquainted with Mr. Peterson?*

6 2b. *If the Commission determines that the Publishing Company's activities would be*
7 *deemed an in-kind contribution to the Committee, would the Commission's opinion differ*
8 *if Mr. Peterson were not an officer and/or was not the sole governor/director of the*
9 *Publishing Company?*

10 3. *Would payment by the Publishing Company of Mr. Byberg's book promotional*
11 *travel expenses constitute an in-kind contribution to the Committee?*

12 ***Legal Analysis and Conclusions***

13 1. *May the Publishing Company be wholly owned and operated by Mr. Peterson*
14 *without the activities of the Publishing Company in printing, marketing/promoting, and*
15 *selling the book being deemed an in-kind contribution to the Committee by virtue of Mr.*
16 *Byberg's status as a candidate for Federal office and Mr. Peterson's status of having*
17 *contributed the maximum amount permitted to the Committee in 2012?*

18 Yes, the Publishing Company may be wholly owned and operated by Mr.
19 Peterson without the activities described in the request of the Publishing Company in
20 printing, marketing/promoting, and selling the book being deemed an in-kind
21 contribution to the Committee.

22 The Act and Commission regulations define "contribution" to include "any gift,
23 subscription, loan, advance, or deposit of money or anything of value made by any

1 person for the purpose of influencing any election for Federal office.” 2 U.S.C.
2 431(8)(A)(i); 11 CFR 100.52(a); *see also* 2 U.S.C. 441b(b)(2); 11 CFR 114.2(b)(1).
3 “Anything of value” includes all in-kind contributions, including the provision of goods
4 or services without charge or at a charge that is less than the usual and normal charge.
5 *See* 11 CFR 100.52(d)(1). The term “usual and normal charge” means the price of goods
6 in the market from which they ordinarily would have been purchased at the time of the
7 contribution, or the commercially reasonable rate prevailing at the time the services were
8 rendered. *See* 11 CFR 100.52(d)(2).

9 The Commission has previously considered questions concerning business ventures
10 by corporations and other entities that involve candidate or party-related merchandise.⁴ “If
11 outlays of funds, goods, or services are made by a business entity selling items and these
12 outlays are not paid for by the candidates benefiting, referred to, or affected, the question
13 arises as to whether such outlays are contributions or expenditures subject to the Act's limits
14 under 2 U.S.C. 441a or prohibited by 2 U.S.C. 441b(a), or whether they are merely
15 entrepreneurial or commercial activity unlimited by the Act.” Advisory Opinion 1994-30
16 (Conservative Concepts/Pence).

17 The Commission has recognized that “entrepreneurial activity involving candidate-
18 related merchandise is commonplace” and has identified factors to consider in determining
19 whether the activity is a contribution or expenditure. Advisory Opinion 1989-21 (Create-a-
20 Craft). These include whether: (1) the sales involve fundraising efforts or solicitations for
21 political contributions; (2) the vendor is engaged in the activity for genuinely commercial

⁴ The Commission has also previously considered questions involving candidate autobiographies. *See, e.g.*, Advisory Opinion 1995-46 (D’Amato); Advisory Opinion 2001-08 (Specter). Unlike here, though, those advisory opinions involved whether the candidates’ principal campaign committees could purchase copies of candidate autobiographies at bulk rates, rather than whether the publications themselves were in-kind contributions to the candidates.

1 purposes; (3) the items are sold at the vendor's usual and normal charge; and (4) the
2 purchases are made by individuals for their personal use. *See id.*; Advisory Opinion
3 1994-30 (Conservative Concepts/Pence). The Commission has also considered whether the
4 entity engaging in the activity: (1) was owned, controlled, or affiliated with a candidate or
5 political committee; (2) was in the business of conducting the type of activity involved;
6 and (3) followed usual and normal business practices and industry standards. *See* MURs
7 5474 and 5539 (Dog Eat Dog Films/Michael Moore), First General Counsel's Report, at
8 13-17, May 25, 2008; MUR 5485 (Conversagent), First General Counsel's Report,
9 at 7-10, Oct. 25, 2005.

10 With respect to promotional activities, in prior advisory opinions, the Commission
11 has determined that the financing of activities in which a Federal candidate participates
12 will result in a contribution to that candidate if the activities involve (1) the solicitation,
13 making or acceptance of contributions to the candidate's campaign, (2) communications,
14 including communications by a candidate, expressly advocating the nomination, election
15 or defeat of the candidate or that candidate's opponent, and/or (3) the identification of the
16 candidate as such. *See* Advisory Opinions 1999-11 (Byrum), 1994-15 (Byrne), 1992-37
17 (Terry), 1992-06 (Duke), 1986-37 (National Conservative Foundation); *see also*
18 Advisory Opinion 2009-26 (Coulson).⁵

19 Here, the terms of the proposed agreement between the Publishing Company and
20 Mr. Byberg indicate that the Publishing Company's activities in publishing, marketing,

⁵ "The Commission has also indicated that the absence of solicitations for contributions or express advocacy regarding candidates will not preclude a determination that an activity is 'campaign-related.'" Advisory Opinion 1994-15 (Byrne). *Cf.* Advisory Opinions 1999-02 (Premera) (concluding that forums were "in connection with an election" when invitations were based on individuals' status as federal candidates).

1 and selling Mr. Byberg's autobiography will not result in a contribution or expenditure.
2 First, sales of the book will not involve fundraising activity or solicitations for political
3 contributions. Although Mr. Byberg will be entitled to royalties, the Publishing Company
4 will not transmit any royalty funds to him during his candidacy; instead, the Publishing
5 Company will donate his royalties directly to charitable organizations.⁶ Nor will Mr.
6 Byberg receive any other compensation or remuneration from the Publishing Company
7 regarding the book, other than for actual and necessary travel expenses in connection
8 with his marketing and promotional appearances. Mr. Byberg will undertake such travel
9 entirely on his own time and without using Committee resources or in conjunction with
10 Committee activities or events.

11 Second, Mr. Peterson has represented that he has previously helped another
12 individual self-publish a book and is generally interested in entering the "self-publishing"
13 industry by offering publication and distribution services to authors not signed with a
14 more traditional publishing company. Mr. Peterson has decided to publish the
15 autobiography because he believes Mr. Byberg's life story to be compelling and likely
16 both educational and profitable.⁷ While the request contains no representations with

⁶ A contribution will not result merely from Mr. Byberg's reporting the royalties as having been received and donated to charitable organizations on his Federal and State income tax returns. *See* Advisory Opinion 1995-46 (D'Amato).

⁷ Although this would be the first publishing project for the Publishing Company and therefore we have no track record with which to compare this project, for the purpose of this advisory opinion, the Commission accepts the requester's representations with respect to his motivations for deciding to publish Mr. Byberg's autobiography. While the Commission acknowledges that providing the opportunity for Mr. Byberg to tell his story and introduce himself to voters of Minnesota's Seventh Congressional District will likely confer some benefit on Mr. Byberg's campaign, we are cognizant of the extensive efforts set forth in the request to keep book-related activities separate from Mr. Byberg's campaign activities. If, however, the Request presented facts indicating Mr. Peterson's publication of Mr. Byberg's autobiography was intended to influence Mr. Byberg's campaign for Federal office, the answer would likely be different. As with all advisory opinions, the Commission notes that, if there is a change in any of the facts or assumptions presented, and such facts or assumptions are material to a conclusion presented in this advisory opinion,

1 respect to price, for the purpose of the request the Commission assumes that copies of the
2 books will be sold at a charge that would qualify as usual and normal within the
3 publishing industry and consistent with future publishing endeavors by the Publishing
4 Company.

5 Additionally, the Publishing Company will not be owned or controlled by, or
6 affiliated with, Mr. Byberg or any other Federal candidate or political committee. The
7 Publishing Company will be owned solely by the requestor or by the requestor and other
8 individuals, none of whom will be employees, officers, agents, or other representatives of
9 the Committee. Although Mr. Byberg will have reasonable approval rights over the
10 content of marketing and promotional efforts of the Publishing Company,⁸ he will not
11 otherwise control or direct, expressly or by implication, any activities of the Publishing
12 Company. According to the request, no Committee or campaign funds will be used to
13 pay costs relating to the publication and marketing of Mr. Byberg's book, including
14 travel for promotional events.

15 Finally, the request indicates that the agreement between the Publishing Company
16 and Mr. Byberg is commercially reasonable and consistent with the practices of the
17 industry. The requestor asserts that the Publishing Company's payment for the initial run
18 of hard copy books and the royalty rate are both consistent with industry practice.
19 Moreover, the requestor indicates that the services provided by the Publishing Company
20 to Mr. Byberg for the publication, marketing, and promotion of his book will be offered

then the requestor may not rely on that conclusion as support for its proposed activity.

⁸ The requestor represents that these reasonable approval rights will not result in the Publishing Company's advertising constituting a coordinated communication under 11 CFR 109.21. While this representation is a legal conclusion rather than a factual statement, the Commission understands the intent of the representation is to obtain an answer premised on this assumption.

1 at the usual and normal charge for such services (as will be the planned discount rate for
2 bulk sales of the book).

3 The requestor further states that none of the Publishing Company's advertising of
4 the book will constitute either a coordinated communication under 11 CFR 109.21 or an
5 electioneering communication under 11 CFR 100.29. As noted above, the agreement
6 between the Publishing Company and Mr. Byberg will require that all promotional events
7 at which Mr. Byberg appears will be performed on Mr. Byberg's own time, will be
8 limited to promotion of the book only, will not be in conjunction with Committee
9 activities or events, and will not involve any election-related activity. Accordingly, the
10 Commission does not anticipate that Mr. Byberg will be identified as a candidate for
11 Federal office at any such events.

12 For the foregoing reasons, based upon the representations set forth in the request
13 as well as the necessary enumerated conditions, the Commission concludes that the
14 proposed activities would not constitute an in-kind contribution to the Committee.

15 *2a. If the Commission determines that the Publishing Company's activities would be*
16 *deemed an in-kind contribution to the Committee, would the Commission's opinion differ*
17 *if Mr. Peterson was not the majority owner of the Publishing Company, and the majority*
18 *owners of the Publishing Company were not contributors to the Committee, even if such*
19 *persons were related to and/or acquainted with Mr. Peterson?*

20 *2b. If the Commission determines that the Publishing Company's activities would be*
21 *deemed an in-kind contribution to the Committee, would the Commission's opinion differ*
22 *if Mr. Peterson were not an officer and/or was not the sole governor/director of the*
23 *Publishing Company?*

1 Because the Commission has determined that the activities proposed in the
2 request would not constitute an in-kind contribution by Mr. Peterson or the Publishing
3 Company to the Committee, Question 2 is moot.

4 3. *Would payment by Publishing Company of Mr. Byberg's book promotional travel*
5 *expenses constitute an in-kind contribution to the Committee?*

6 No, payment by the Publishing Company of Mr. Byberg's book promotional
7 travel expenses as described in the request would not constitute an in-kind contribution
8 from the Publishing Company to the Committee.

9 As discussed above, the Act and Commission regulations define "contribution" to
10 include "any gift, subscription, loan, advance, or deposit of money or anything of value
11 made by any person for the purpose of influencing any election for Federal office."

12 2 U.S.C. 431(8)(A)(i); 11 CFR 100.52(a); *see also* 2 U.S.C. 441b(b)(2); 11 CFR
13 114.2(b)(1). The requestor states that all marketing and promotional appearances by Mr.
14 Byberg will be conducted on Mr. Byberg's personal time and will be limited to
15 promotion of the book, and that the Publishing Company's promotional events for the
16 book will not advocate the election or defeat of any candidate for Federal elective office,
17 including Mr. Byberg, either expressly or by implication, regardless of whether Mr.
18 Byberg is in attendance. The proposed agreement also stipulates that no marketing or
19 book promotional appearances by Mr. Byberg will occur in conjunction with Committee
20 activities or events.⁹ The agreement provides for complete separation of election-related
21 and book-related events and trips: "No Book promotional activity will occur at any event

⁹ The Commission notes that, in general, candidates seeking election to the House of Representatives are prohibited from traveling on private, non-commercial aircraft in connection with their campaign. 11 CFR 100.93(c)(2). Accordingly, Mr. Byberg would be prohibited from engaging in any campaign-related activity if non-commercial travel is used to reach a location in connection with a book promotion event. *Id.*

1 or during any trip for which travel expenses have been paid by Committee, and no
2 Committee/election-related activity will occur at any event or during any trip for which
3 travel expenses have been paid by Publishing Company.” Under these facts, the
4 Commission concludes that the Publishing Company’s payments of Mr. Byberg’s book
5 promotional travel expenses will not constitute an in-kind contribution to the Committee.

6 This response constitutes an advisory opinion concerning the application of the
7 Act and Commission regulations to the specific transaction or activity set forth in your
8 request. *See* 2 U.S.C. 437f. The Commission emphasizes that, if there is a change in any
9 of the facts or assumptions presented, and such facts or assumptions are material to a
10 conclusion presented in this advisory opinion, then the requestor may not rely on that
11 conclusion as support for its proposed activity. Any person involved in any specific
12 transaction or activity which is indistinguishable in all its material aspects from the
13 transaction or activity with respect to which this advisory opinion is rendered may rely on
14 this advisory opinion. *See* 2 U.S.C. 437f(c)(1)(B). Please note that the analysis or
15 conclusions in this advisory opinion may be affected by subsequent developments in the
16 law including, but not limited to, statutes, regulations, advisory opinions, and case law.
17 The cited advisory opinions are available on the Commission’s website, or directly from
18 the Commission’s Advisory Opinion searchable database at <http://www.fec.gov/searchao>.

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20 On behalf of the Commission,

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24 Caroline C. Hunter
25 Chair
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