



FEDERAL ELECTION COMMISSION
Washington, D.C. 20463

ADVISORY OPINION 2021-12
(Schiff and Schiff for Congress)

CONCURRING STATEMENT OF CHAIR SHANA M. BROUSSARD AND
COMMISSIONERS STEVEN T. WALTHER AND ELLEN L. WEINTRAUB

Congressman Adam Schiff is a member of the U.S. House of Representatives and a candidate for re-election in 2022; Schiff for Congress (“the Committee”)¹ is his principal campaign committee. Advisory Opinion Request (“AOR”) at AOR001.

Congressman Schiff and the Committee requested an advisory opinion from the Commission concerning the application of the Federal Election Campaign Act, 52 U.S.C. §§ 30101-45 (the “Act”), and Commission regulations to two alternative proposals to rent the Committee’s email list to a book publisher to promote a book written by Congressman Schiff and published by Random House. The Committee proposed either to rent its list directly to the book’s publisher or to rent the list to Congressman Schiff, who would later be reimbursed by the book publisher. The Commission concluded that, under the circumstances described in the request, both proposals are permissible under the Act and Commission regulations,² but the Commission did not agree on a rationale for this conclusion by the required four affirmative votes.

The facts of this matter are well-represented in the Advisory Opinion issued by the Commission. We write to explain the reasoning behind our votes in this matter.

Congressman Schiff and the Committee posed two questions to the Commission:

- 1. Under the conditions proposed, may the Committee enter into an agreement to rent its email list to Random House for fair market value to be used to promote a book published by Random House and written by Congressman Schiff?*
- 2. In the alternative, may Congressman Schiff be reimbursed by Random House if he pays for the list rental using his personal funds?*

We found that the proposal to rent the list to Random House, either directly or indirectly, was permissible because the conditions proposed met the standard set by the Commission in similar matters: 1) the rental of the Committee’s email list for its fair market value, as determined by an independent list broker, is not a personal use of a committee asset, and 2) the payment to rent the

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

² Advisory Opinion 2021-12 (Schiff and Schiff for Congress). See <https://www.fec.gov/data/legal/advisory-opinions/2021-12/>

list is not a contribution where the Committee would receive the fair market value of the list rental, as determined by an independent list broker, in a *bona fide* arm's length transaction to promote the book.

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

The Act provides that a "contribution accepted by a candidate, and any other donation received by an individual as support for activities of the individual as a holder of Federal office... shall not be converted by any person to personal use." 52 U.S.C. § 30114(a-b); *see also* 11 C.F.R. § 113.2(e). Personal use occurs if a "contribution or amount is used to fulfill any commitment, obligation, or expense of a person that would exist irrespective of the candidate's election campaign or individual's duties as a holder of Federal office, including," but not limited to, any of the enumerated *per se* personal uses. 52 U.S.C. § 30114(b)(2); *see also* 11 C.F.R. § 113.1(g)(1).

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

Here, Random House proposed to pay the fair market value, as determined by an independent list broker, to rent the Committee's email list either by making a direct payment to the Committee or by reimbursing Congressman Schiff for his payment of fair market value to the Committee to rent the list. AOR002-3. Further, no Committee resources or personnel would be used to promote the book, and any royalties paid to Congressman Schiff would reflect net profits under the publishing agreement after Random House recoups its costs in promoting the book. *Id.* Thus, because Random House would pay fair market value to rent the list, the transfer would not result in a prohibited personal use of a committee asset under 11 C.F.R. § 113.1(g)(3).^{3, 4}

³ As the Commission has explained, "[i]t makes no difference whether the [person paying fair market value for a committee asset] is the candidate or an unrelated third party." *See* Expenditures; Reports by Political Committees; Personal Use of Campaign Funds, 60 Fed. Reg. 7862, 7870 (Feb. 9, 1995). Regardless of who pays to rent the list, the Committee will receive the list's fair market value, ensuring that no "indirect conversion" of campaign funds occurs. *Id.* at 7869.

⁴ Section 113.1(g)(6) of Commission regulations does not apply to this transaction. That regulation provides: "Notwithstanding that the use of funds for a particular expense would be a personal use under this section, payment

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

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

The Act and Commission regulations define “contribution” to include “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); *see also* 11 C.F.R. § 100.52. For corporations, the term “contribution”... also includes any direct or indirect payment, distribution, loan, advance, deposit, or gift of money, or any services, or anything of value... to any candidate [or] campaign committee... in connection with” a federal election. 52 U.S.C. § 30118(b)(2); *see also* 11 C.F.R. § 114.1(a)(1). “[A]nything of value” includes goods or services provided at less than the usual and normal charge. 11 C.F.R. § 100.111(e)(1).

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

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

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


PAC's mailing list in order to promote his book.

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


Regardless of whether Random House pays for the list directly or indirectly, the proposed transaction does not constitute a personal use of a committee asset or a corporate contribution. However, if Congressman Schiff pays to rent the Committee's email list using personal funds and is reimbursed by Random House, we advise that the Committee consult with its assigned analyst in the Commission's Reports Analysis Division regarding any reporting implications.

We conclude that the Committee's proposal to rent its email list to Random House, either directly or indirectly, is permissible because: 1) the rental of the Committee's email list for fair market value is not a personal use of a committee asset, and 2) the payment to rent the list is not a contribution where the Committee would receive the fair market value of the list rental, as determined by an independent list broker, in a *bona fide* arm's length transaction to promote the book.


November 23, 2021
Date


Shana M. Broussard
Chair

November 23, 2021
Date


Steven T. Walther
Commissioner

November 23, 2021
Date


Ellen L. Weintraub
Commissioner