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September 8, 2022

VIA ELECTRONIC DELIVERY
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Ms. Heather Hebdon, Executive Director
Alaska Public Offices Commission
2221 East Northern Lights Boulevard, Room 128
Anchorage, Alaska 99508-4149

RE: Unite America PAC, Inc.
Request for Advisory Opinion Re: Reporting "True Sources" in AS 15.13.040(r) Reports
Our File No.: 508,736.1

Dear Ms. Hebdon:

Pursuant to AS 15.13.374, Unite America PAC, Inc. ("Unite America PAC") respectfully requests an advisory opinion from the Alaska Public Offices Commission ("APOC") regarding its "true source" reporting obligations under AS 15.13.040(r).

FACTUAL BACKGROUND AND SCENARIO

Unite America PAC is a federally-registered "hybrid PAC."¹ Since 2018, Unite America PAC has filed with the Federal Election Commission ("FEC") reports disclosing its donors.²

In June 2022, Unite America PAC contributed \$30,000 to Putting Alaskans First Committee, a registered group that intends to make independent expenditures in candidate elections for state office.³

¹ See Registering as a Federal Hybrid Pac, available at: <https://www.fec.gov/help-candidates-and-committees/filing-pac-reports/registering-hybrid-pac/>

² Unite America PAC's reports are available online at: <https://www.fec.gov/data/committee/C00677773/?cycle=2018&tab=filings>; a sample are attached as Exhibit A.

³ See Putting Alaskans First Committee, Group Registration Form (Jan. 3, 2022), available at: <https://aws.state.ak.us/ApocReports/Common/View.aspx?ID=5455&ViewType=GR>

Unite America PAC reported the contribution to the Alaska Public Offices Commission on a Statement of Contributions Form 15-5.⁴ As disclosed on the Statement of Contributions Form, Unite America PAC reported two “true sources” of the \$30,000 it contributed to Putting Alaskans First Committee: \$15,000 from each of two named individuals.⁵

Following the report of that \$30,000 contribution to Putting Alaskans First Committee, Unite America PAC requested an advisory opinion on the questions listed below in the “Request For Advisory Ruling” section. APOC Staff rejected that request on August 29, 2022 and suggested that Unite America PAC could re-file its request with (1) clarification as to whether Unite America PAC is presently engaged in or intends to undertake a specific transaction in the future; and (2) further description of all relevant facts related to the request, such as how Unite America PAC chose the individuals it identified as the true sources of the contribution at issue.

Unite America PAC now confirms that it intends to make another contribution and then file a Statement of Contributions in the same manner as it did in the subject of this Advisory Opinion Request and provides the following additional information in response to APOC Staff’s questions about how Unite America PAC identified the true sources of the contribution to report on the previously-filed Form 15-5, and how it would identify the true sources of the contribution on a future Form 15-5:

1. Are contributions to support a contribution to an Alaska independent expenditure group solicited for that purpose or does Unite America PAC simply write a check from its general funds and then choose who to name?

As explained in Footnote 5 of the original advisory opinion request, Unite America PAC did not, and does not intend to, solicit contributions for an Alaska independent expenditure group. Unite America PAC solicits funds in support of its mission, but generally does not solicit funds for particular purposes or for use in particular elections, and indeed has not done so in or in connection with Alaska elections. In the case of the previous contribution, and as would be the case of the intended future contribution, Unite America PAC used its general funds for the contribution and, as explained in more detail below, used a reasonable and rational method to link those general funds to individuals who had contributed to Unite America PAC.

⁴ See Unite America PAC, Inc., Statement of Contributions Form 15-5 (June 29, 2022), available at: <https://aws.state.ak.us/ApocReports/Common/View.aspx?ID=4489&ViewType=SC>, and attached as Exhibit B.

⁵ See *id.* Of note, Unite America PAC solicits funds in support of its mission, but does not solicit funds for particular purposes, or for use in particular elections. Donations provided to Unite America PAC by the two disclosed individual donors were therefore not, themselves, “contributions” directed at specific races to influence the election of candidates, as the term is defined in AS 15.13.400(4).

2. How did Unite America PAC choose which of its contributors to name and how would Unite America PAC choose contributors to name if future contributions requiring true source reporting are made?

As shown in the FEC reports attached as Exhibit A, Unite America PAC has hundreds of donors who collectively donated well in excess of \$30,000 to Unite America PAC. As explained above, Unite America PAC did not, and does not, solicit contributions for an Alaska independent expenditure group or specifically to influence the nomination or election of a candidate in Alaska. Accordingly, Unite America PAC did not see clear direction as to how to identify the individual donors that provided Unite America PAC with the funds it contributed to Putting Alaskans First Committee.

To address this ambiguity, Unite America PAC reported to APOC the identity of two donors whose contributions to Unite America PAC were at least the equivalent of the \$30,000 Unite America PAC contributed to Putting Alaskans First Committee (in actuality, their combined contributions to Unite America PAC were significantly higher than \$30,000). Unite America PAC allocated \$30,000 of their total giving to the Putting Alaskans First contribution in order to identify some individuals as the source of the unrestricted general funds that Unite America PAC contributed to Putting Alaskans First Committee.

Unite America PAC believes that, under these circumstances, this was a reasonable and rational method for linking its previously-received general donations to the contribution that flowed to Putting Alaskans First Committee. The alternative would be to identify every donor Unite America PAC has ever had, which would require reporting contributions in excess of \$30,000, would capture funds not intended to be covered by Alaska's campaign disclosure laws, and would raise constitutional issues (as discussed below).

Unite America PAC intends to use the same method to identify contributors if future contributions require true source reporting, unless it receives guidance from APOC on an alternative method for reporting such contributions.

LEGAL BACKGROUND

Alaska Statute 15.13.040(r) now requires every person that contributes more than \$2,000 to an entity that makes independent expenditures in a candidate election to disclose to APOC the "true sources of the contribution":

- (r) Every individual, person, nongroup entity, or group that contributes more than \$2,000 in the aggregate in a calendar year to an entity that made one or more independent expenditures in one or more candidate elections in the previous election cycle, that is making one or more independent expenditures in one or more candidate elections in the current election cycle, or that the contributor knows or has reason to know is likely to make independent expenditures in one or more candidate elections in the current election cycle shall report making the

contribution or contributions on a form prescribed by the commission not later than 24 hours after the contribution that requires the contributor to report under this subsection is made. The report must include the name, address, principal occupation, and employer of the individual filing the report and the amount of the contribution, as well as the total amount of contributions made to that entity by that individual, person, nongroup entity, or group during the calendar year. For purposes of this subsection, the reporting contributor is required to report and certify the true sources of the contribution, and intermediaries, if any, as defined by AS 15.13.400(18) [sic]⁶. This contributor is also required to provide the identity of the true source to the recipient of the contribution simultaneously with providing the contribution itself.

“True source” is defined in AS 15.13.400(19) to mean a person whose contribution is funded from “wages, investment income, inheritance, or revenue generated from selling goods or services,” and not from “funds [derived] via contributions [or] donations.”⁷

This definition of “true source” was adopted by Ballot Measure 2, a voter-approved initiative in 2020. Among the express purposes of Ballot Measure 2 was the intent to “increas[e] transparency” by “prohibiting the use of dark money in candidate elections.”⁸ To that end, Ballot Measure 2 added to the uncodified law of Alaska a finding that “[t]he people of Alaska have the right to know in a timely manner the source, quantity, timing, and nature of resources used to influence candidate elections in Alaska,” which “requires . . . public disclosure of the true and original sources of funds used to influence these elections[.]”⁹

Ballot Measure 2 also codified a definition of “dark money,” now found at AS 15.13.400(5):

“dark money” means a contribution whose source or sources, whether from wages, investment income, inheritance, or revenue generated from selling goods or services, is not disclosed to the public; notwithstanding the foregoing, to the extent

⁶ The reference to AS 15.13.400(18) in the statute should be to AS 15.13.400(19).

⁷ The full text of AS 15.13.400(19) provides:

“true source” means the person or legal entity whose contribution is funded from wages, investment income, inheritance, or revenue generated from selling goods or services; a person or legal entity who derived funds via contributions, donations, dues, or gifts is not the true source, but rather an intermediary for the true source; notwithstanding the foregoing, to the extent a membership organization receives dues or contributions of less than \$2,000 per person per year, the organization itself shall be considered the true source.

⁸ See BALLOT MEASURE 2 at § 1(1), (2).

⁹ See *id.* at §1(3).

a membership organization receives dues or contributions of less than \$2,000 per person per year, the organization itself shall be considered the true source.

REQUEST FOR ADVISORY RULINGS

Unite America PAC seeks an advisory opinion to confirm that the “Statement of Contribution” Form 15-5 that it filed on June 29, 2022 complied with the “true source” reporting requirement of AS 15.13.040(r). Specially, Unite America PAC requests answers to the following questions:

1. Can the Commission confirm that Unite America PAC’s \$30,000 contribution triggered a reporting obligation under AS 15.13.040(r) that required it to disclose “true sources” *of the contribution* (i.e., the true sources of funds amounting to \$30,000), and not funds in excess of the contribution?
2. Can the Commission confirm that Unite America PAC’s \$30,000 contribution did not trigger an obligation to report to APOC the true sources of all funds it has ever received, at any time?

LEGAL DISCUSSION

Unite America PAC’s request for an advisory opinion is prompted by concern, raised in discussion with staff for the Commission, that AS 15.13.040(r) could be read to require Unite America PAC to disclose the true sources of not just the \$30,000 it contributed to an Alaska independent expenditure group, but the true source *of all funds Unite America PAC has ever received*.

As an initial matter, an “all sources of all funds ever received” interpretation would be impractical, needlessly burdensome, and unhelpful to Alaskan voters. In the present circumstance, for instance, requiring Unite America PAC, after making its \$30,000 contribution, to transcribe into the APOC online reporting system substantially all of its donor information (such as what is contained in the 752-pages of FEC reports attached as Exhibit A) would be exceedingly onerous and effectively transparency-defeating: loading several million dollars of transactions into a Form 15-5 report would likely *obscure* rather than illuminate the “true sources” of the particular \$30,000 contribution Unite America PAC made.

Moreover, an “all sources of all funds ever received” construction of AS 15.13.040(r) is: (a) not required by the language of the statute; (b) at odds with the intent of Ballot Measure 2; (c) not required by prior decisions of the Commission; and (d) inconsistent with the majority practice in other states. These points are discussed in more detail below.

A. AS 15.13.040(r) Requires Disclosure of the True Sources “Of the Contribution,” Not the True Sources of All Funds Ever Received by a Contributing Organization.

To begin, Alaska Statute 15.13.040(r) plainly requires a person making triggering contributions to disclose the true sources “of the contribution”—not the true sources of all funds ever received by the contributing person: “the reporting contributor is required to report and certify the true sources of the contribution, and intermediaries, if any.”¹⁰

B. Disclosing the True Sources “Of the Contribution” Fulfills the Intent of Ballot Measure 2 as It Eliminates All “Dark Money”; Ballot Measure 2 Was Not Intended to Require Contributing Organizations to Disclose the True Sources of Funds *Not Used* to Influence Alaska Candidate Elections.

As quoted above, Ballot Measure 2 was expressly intended to eliminate the use of dark money in Alaska candidate elections by requiring “public disclosure of the true and original sources of funds *used to influence these elections*[.]”¹¹

Requiring disclosure of the true source of every dollar used to influence an Alaska candidate election fulfills that purpose. Requiring disclosure of the “true sources” of funds that were never used to influence a candidate election in Alaska does not.

Further, as reflected in the attached letter by the primary author of Ballot Measure 2,¹² the law was not intended to require organizations, as a condition of contributing to an Alaska independent expenditure group, to report to APOC the true sources of all funds it had ever received. That requirement would not only be needlessly and incredibly burdensome, it would also likely be unconstitutional.

The United States Supreme Court has long recognized that states must have a “compelling interest” to require “the names of contributors to be disclosed” and “there must be a substantial relation between the governmental interest and the information required to be disclosed,” as the Alaska Supreme Court has summarized:

In *Buckley v. Valeo*, 424 U.S. 1, 60–84 & n. 76, (1976) (per curiam), the Court noted that “compelled disclosure, in itself, can seriously infringe on privacy of association and belief guaranteed by the First Amendment.” See also *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460–66 (1958). Such disclosure requirements, if significant enough to burden First Amendment activity as a practical matter, must be justified by a compelling interest and there must be a substantial relation between the governmental interest and the information

¹⁰ AS 15.13.040(r), quoted in full above on page 2.

¹¹ Ballot Measure 2 §1(3).

¹² See Letter of August 22, 2022 from Scott Kendall, attached as Exhibit C.

required to be disclosed. *Buckley*, 424 U.S. at 64–65, 96 S.Ct. at 656–57; *NAACP*, 357 U.S. at 460–62, 78 S.Ct. at 1170–72. Such scrutiny is invoked where the disclosure requirements would entail divulging the names of contributors.¹³

Here, Alaska has no “compelling interest” to require entities to disclose the “true sources” of funds that will never be used to influence candidate elections in Alaska. There is no “relationship,” substantial or otherwise, between APOC’s interest in campaign disclosure and, for instance, the identity of persons who contributed funds to Unite America PAC in 2018, and whose funds were never used in Alaska.

C. AO 22-01-CD is Not to the Contrary.

The Commission does not appear to have yet squarely addressed the issue raised by this request for an advisory opinion. In AO 22-01-CD, the Commission provided guidance to an “Organization” required to file AS 15.13.040(r) reports. The Organization intended to contribute to an “Alaska Account” that, itself, would be used to contribute more than \$2,000 to “an Alaska IE group.” The funds that the Organization proposed to contribute to the Alaska Account would come from either of what the organization termed its “IRS” or “Contribution” accounts.

In that circumstance, the Commission advised the Organization that it would have to report the true sources of the funds that its Alaska Account received from the IRS or Contribution accounts, regardless of whether the IRS or Contribution accounts received the contributed funds before Ballot Measure 2’s effective date of February 27, 2021:

The Organization understands and is prepared to file the reports required under AS 15.13.040(r) when the Alaska Account contributes more than \$2,000 to an Alaska IE group, and those required under AS 15.13.110(k) when the Alaska Account receives a contribution in excess of \$2,000. Because the Alaska Account will receive the contribution after February 27, 2021, it must report the true sources

¹³ *Caucus Distributors, Inc. v. State, Dep’t of Com. & Econ. Dev., Div. of Banking, Sec. & Corps.*, 793 P.2d 1048, 1057 (Alaska 1990) (some citations omitted). To the extent that Ballot Measure 2 is ambiguous and *could* be read either: (a) as requiring certain contributing organizations to disclose the true sources of all funds they have received, ever, regardless of whether the funds are used to influence candidate elections, or (b) more narrowly, as targeting “dark money” and requiring fuller disclosure of the “true source” of money actually used to influence Alaska candidate elections— Alaska courts would apply the “doctrine of constitutional avoidance” and adopt the narrower interpretation of the law that “avoids constitutional problems.” *Cf. Est. of Kim ex rel. Alexander v. Coxe*, 295 P.3d 380, 388 (Alaska 2013) (“The doctrine of constitutional avoidance “is a tool for choosing between competing plausible interpretations of a statutory text.” Under this tool, “as between two possible interpretations of a statute, by one of which it would be unconstitutional and by the other valid, [this court’s] plain duty is to adopt that which will save the Act.”) (footnotes omitted and citing *Bigley v. Alaska Psychiatric Inst.*, 208 P.3d 168, 184 (Alaska 2009) (interpreting ambiguous statute to avoid constitutional problems)).

of all funds received from the IRS and Contribution accounts whether or not the IRS and Contribution accounts received the funds before or after February 27, 2021.¹⁴

In other words, the Commission advised that if the Organization made a 2022 contribution to its Alaska Account, using funds that its IRS account had received in, say, 2018, the Organization would have to disclose the “true sources” of the funds received by the IRS account in 2018. The requesting Organization had suggested that it would report true sources along the lines of a “last in, first out”-type model.¹⁵ There was no suggestion in the Commission’s opinion that it rejected that approach, or that it would require the Organization to disclose the true sources of *all funds* it had *ever* received in the IRS Account whenever it transferred *any particular* amount out of the IRS Account (and into the Alaska Account).

Indeed, the Commission confirmed that, so long as the true sources of “all funds received”¹⁶ were disclosed, “there would be no dark money,”¹⁷ and the requirements of Ballot Measure 2 are fulfilled.

D. The Practice of Other States is to Require “True Source” Disclosure of Funds in the Amount of the Contribution.

Last, it may bear mentioning that the practice of states outside of Alaska that have adopted something like “true source” reporting is to require disclosure of true sources *in the amount of the contribution*. By way of a few examples:

- Minnesota requires only disclosure of persons whose funds are “attributable” to a contribution¹⁸

¹⁴ AO 2022-01-CD at 2 (emphasis added).

¹⁵ See AO 2022-01-CD at Exhibit 2 (“The IRS Account and Contribution Account have each received over one million dollars in contributions since February 28, 2021 – more than enough to cover the amount either Account is ever likely to transfer to the Alaska Account. Under the Organization’s proposal in AO Request 22-01-CD, all of the true sources of the contributions received by either Account on or after February 28, 2021 would be reported to the recipient Alaska IE group and to APOC.”).

¹⁶ See *id.* at 2 (quoted in the text).

¹⁷ AO 2022-01-CD at 4.

¹⁸ See MINN. STAT. ANN. § 10A.27, subd. 15(b) (emphasis added):

an association that has contributed more than \$5,000 in aggregate to independent expenditure political committees or funds during the calendar year or has contributed more than \$5,000 in aggregate to ballot question political committees or funds during the calendar year must provide in writing to the recipient’s treasurer

- California has codified a “last in, first out” method.¹⁹

Indeed, we are not aware of any jurisdiction that requires organizations making campaign contributions to disclose the true source of all of the funds the organization has ever received.

Thank you, in advance, for your review of this matter. Please do not hesitate to contact us if you need any additional information.

Sincerely,

BIRCH HORTON BITTNER & CHEROT



Jason Brandeis

JMB:ajl

a statement that includes the name, address, and amount attributable to each person that paid the association dues or fees, or made donations to the association that, in total, aggregate more than \$5,000 of the contribution from the association to the independent expenditure or ballot question political committee or fund. The statement must also include the total amount of the contribution attributable to persons not subject to itemization under this section. The statement must be certified as true by an officer of the donor association.

Compare Minnesota reporting form at:

https://cfb.mn.gov/pdf/forms/cf_reports/2020_IEPCF_underlying_disclosure.pdf

¹⁹ See CAL. GOV'T CODE § 84222(e)(1)(C) (“A multipurpose organization shall report . . . for the balance of its contributions or expenditures shall further report contributors based on a last in, first out accounting method.”).