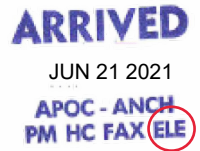


BEFORE THE ALASKA PUBLIC OFFICES COMMISSION



In Re: Request for )
Advisory Opinion by )
Building Alaska, Inc. )
\_\_\_\_\_ )

AO No. 21-02-CD

FINAL ORDER APPROVING ADVISORY OPINION

Building Alaska, Inc. sought an advisory opinion from the Alaska Public Offices Commission on whether an entity that has been in existence for less than 12 months must use Ballot Measure 2's newly enacted disclaimer language in paid-for-by identifiers in its political communications. The Commission considered staff's draft advisory opinion, dated April 26, 2021, at its regular meeting on June 9, 2021, and approves the opinion in its entirety.<sup>1</sup>

The approved advisory opinion is attached to this order. This is a final Commission decision and may be appealed to the superior court within 30 days.<sup>2</sup>

Dated: June 21, 2021.

BY ORDER OF THE ALASKA PUBLIC OFFICES COMMISSION<sup>3</sup>

Table with 2 columns: Certificate of Service (I hereby certify that on this date, I served, by certified mail and email a true and correct copy of the foregoing in this proceeding on the following: Stacey Stone, Holmes Weddle & Barcott, P.C., 701 W. 8th Avenue, Suite 700, Anchorage, AK 99501, sstone@hwb-law.com) and by email to: Heather Hebdon, Executive Director, Alaska Public Offices Commission, heather.hebdon@alaska.gov

Handwritten signature and date 6/21/21
Paralegal Date

1 See AS 15.13.374, 2 AAC 50.826.

2 AS 44.62.560, 2 AAC 50.826(c)(3), Alaska R. App. P. 602.

3 Commissioners Anne Helzer, Richard Stillie, Suzanne Hancock, Dan LaSota, and Van Lawrence participated in this matter. The decision was made on a 5-0 vote.

## ADVISORY OPINION REQUEST

**Number:** AO 21-02-CD  
**Requested By:** Stacey Stone on behalf of Building Alaska, Inc.  
**Prepared By:** Thomas Lucas, Campaign Disclosure Coordinator  
**Date Issued:** April 26, 2021  
**Subject:** Application of disclaimer provision enacted under Ballot Measure 2 (“BM2”)<sup>1</sup>  
**Commission Decision:** On June 9, 2021, the Alaska Public Offices Commission heard and approved this advisory opinion by a vote of 5-0.

### I. BACKGROUND

In November 2020, BM2 appeared on the state’s general election ballot.<sup>2</sup> The measure, among other things, sought to prohibit the use of “dark money” in Alaska’s candidate elections.<sup>3</sup> A majority of votes cast favored the adoption of BM2 and the election results were certified on November 30, 2020.<sup>4</sup> Therefore, provisions of BM2 became effective on February 28, 2021.<sup>5</sup>

Among others, BM2 added several new terms to APOC statutes<sup>6</sup>, including the terms dark money and outside-funded entity and added a new disclaimer provision requiring an outside-funded entity to add the following language to its paid-for-by identifier: “A MAJORITY OF CONTRIBUTIONS TO (OUTSIDE-FUNDED ENTITY’S NAME) CAME FROM OUTSIDE THE STATE OF ALASKA.”<sup>7</sup> In essence, the law’s new term of outside-funded entity means an entity that is making independent expenditures and during the previous 12-month period received more than 50 percent of its aggregate contributions from contributors outside the state of Alaska.<sup>8</sup>

Building Alaska, Inc. is an independent expenditure group that first registered with APOC on January 8, 2021.<sup>9</sup> The group’s stated purpose is “to influence elections and promote candidates for office who will help to build and grow Alaska.”<sup>10</sup>

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<sup>1</sup> Ex. 1, Request for Advisory Opinion.

<sup>2</sup> Ex. 2, Sample General Election Ballot.

<sup>3</sup> *Id.* See also AS 15.13.400(5).

<sup>4</sup> Ex. 3, Ballot Measure 2 Certificate.

<sup>5</sup> AS 15.45.220.

<sup>6</sup> *Infra* at IV; See also AS 15.13.400(5), (15).

<sup>7</sup> AS 15.13.090(g).

<sup>8</sup> “[O]utside-funded entity” means an entity that makes one or more independent expenditures in one or more candidate elections and that, during the previous 12-month period, received more than 50 percent of its aggregate contributions from true sources, or their equivalents, who, at the time of the contribution, resided or had their principal place of business outside Alaska.” AS 15.13.400(15).

<sup>9</sup> Ex. 4, Group Registration.

<sup>10</sup> *Id.*

## **II. QUESTION PRESENTED**

Building Alaska, Inc. asks if an entity that has been in existence for less than 12 months is required to use the new law's disclaimer language in its paid-for-by identifier. Building Alaska, Inc. suggests that it is not required to do so until it has been existence for a full 12 months in order to allow for a 12 month lookback period.

## **III. SHORT ANSWER**

Staff disagrees with Building Alaska, Inc.'s position and asserts that even if an entity has been in existence for less than 12 months, the law's provisions will still apply to its activities. More specifically, the law's "...during the previous 12-month period..." does not mean that a threshold period of 12 months is required to pass after an entity's creation before the law's identifier provision applies to the entity's activities. Instead, the law merely requires an entity to look back at the preceding 12 months to determine the source of its contributions, whether it's been existence for the full 12 months or not. As such, if the majority of the total contributions an entity has received are from outside contributors at the time it disseminates a communication, the entity is required to include in its communication a paid-for-by identifier. In other words, if the majority of an entity's total contributions come from outside contributors, the new law is triggered, and the additional disclaimer is required.

## **IV. LAW**

BM 2 amended AS 15.13.090 to add a new subsection requiring an outside-funded entity to add an additional disclaimer to its paid-for-by identifier. The law provides:

To satisfy the requirements of (a)(1) of this section and, if applicable, (a)(2)(C) of this section, a communication paid for by an outside-funded entity as that term is defined in AS 15.13.400(19) that includes a print or video component must have the following statement placed in the communication so as to be easily discernible, and in broadcast, cable, satellite, internet or other digital communication the statement must remain on the screen throughout the entirety of the communication; the statement is not required if the outside entity paying for the communication has no contributors or is a political party: "A MAJORITY OF CONTRIBUTIONS TO (OUTSIDE-FUNDED ENTITY'S NAME) CAME FROM OUTSIDE THE STATE OF ALASKA."<sup>11</sup>

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<sup>11</sup> AS 15.13.090(g).

Additionally, BM2 was amended to define an outside-funded entity as one making at least one independent expenditure “in one or more candidate elections and that, during the previous 12-month period, received more than 50 percent of its aggregate contributions from true sources, or their equivalents, who, at the time of the contribution, resided or had their principal place of business outside Alaska.”<sup>12</sup>

This previous 12-month period, or lookback period, exists elsewhere in APOC statutes. Specifically, AS 15.13.090(a)(2)(c) provides that apart from a political party, a person who makes a communication is required to name its top three contributors (if any) “during the 12-month period before the date of the communication.”<sup>13</sup> This has been interpreted to require a person to look back at the 12 months immediately preceding the communication, or the lookback period, to determine which contributors are to be identified. The “previous 12-month period” referred to in the definition of outside-funded entity should be interpreted the same.

## V. ANALYSIS

Building Alaska, Inc. asks the Commission to conclude that an entity does not meet the law’s definition of an outside-funded entity until it has been in existence for at least 12 months. This interpretation would invite evasion of, and would effectively nullify, the law’s new disclaimer requirement. The proper interpretation is that an entity is an outside-funded entity if during the last 12 months the majority of its aggregate contributions were received from contributors outside the state of Alaska. This is consistent with the Commission’s recent determination in *Yes on 2 for Better Elections v. Defend Alaska Elections – Vote No on 2*, concerning the 12-month look back period for determining top 3 contributors.<sup>14</sup>

In the simplest of terms, any combination of two or more individuals acting jointly for the principal purpose of influencing elections, and who take action to do so, is a group.<sup>15</sup> Anyone, at any time can form a group, including an independent expenditure group. Once a group is formed it may disband at any time by disbursing its campaign account.<sup>16</sup> One of the ways a group may disburse its campaign account is by contributing to another group – even a group that was just formed.<sup>17,18</sup>

Following Building Alaska, Inc.’s interpretation, a savvy political operator could easily evade the identification requirement provided for in AS 15.13.090(g) by simply forming a group at the beginning of a campaign, collecting its funding from contributors

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<sup>12</sup> AS 15.13.400(15).

<sup>13</sup> AS 15.13.090(a)(2)(C).

<sup>14</sup> 20-06-CD

<sup>15</sup> AS 15.13.400(9).

<sup>16</sup> 2 AAC 50.384(b).

<sup>17</sup> 2 AAC 50.384(b)(2)(A)

<sup>18</sup> The group may also donate its funds to a 501(c)(3) charity, repay its contributors, or pay for a thank you or victory party. 2 AAC 50.384(b)(2)(B)-(D).

outside of Alaska, disbanding the group at the end of the campaign, and forming a new group using the same outside-Alaska funders for the next campaign without any recourse.

Moreover, Building Alaska, Inc.'s assertion that an entity is incapable of satisfying the definition of an outside-funded entity until it has existed for 12 months would nullify the law's requirement and effectively eliminate its new outside-funding disclaimer requirement. Furthermore, it would be contrary to the findings and intent of the law, which provides 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. This right requires the prompt, accessible, comprehensible, and public disclosure of the true and original sources of funds used to influence these elections, and is essential to the rights of free speech, assembly, and petition guaranteed by the First Amendment to the United States Constitution and shall be construed broadly.<sup>19</sup>

Finally, Building Alaska, Inc.'s interpretation is contrary to precedent. In *Yes on 2 for Better Elections v. Defend Alaska Elections – Vote No on 2*, Defend Alaska Elections (DAE) was a group formed on August 27, 2020.<sup>20</sup> One of the issues in the case was how to determine the group's top three contributors for its paid-for-by identifier in radio ads beginning on September 23, 2020.<sup>21</sup> AS 15.13.090 requires that a person's top three contributors during the 12-month period before the date of a communication be identified in a paid-for-by disclaimer by name, city, and state.<sup>22</sup>

Like Building Alaska, Inc., DAE had been in existence for less than 12 months. Despite the group's young age, the Commission determined that DAE had violated AS 15.13.090(a)(2)(C) by failing to name its top three contributors as those who were top three as of the date of its most recent independent expenditure report filed before the communication was disseminated.<sup>23</sup>

The lookback period provided for in the definition of outside-funded entity closely mirrors the identification language requirement in AS 15.13.090, which sets a maximum period of time a person, or entity, is required to evaluate for reporting purposes. Instead of requiring a person to look back to all the months or years it has been in existence, the law only requires an evaluation of the previous 12-month period.

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<sup>19</sup> Ballot Measure 2, Sec.1 Findings and Intent at (3).

<sup>20</sup> Exhibit 5, Group Registration.

<sup>21</sup> Exhibit 6, Commission Emergency Order.

<sup>22</sup> AS 15.13.090(a)(2)(C).

<sup>23</sup> Ex. 6.

Indeed, this 12-month lookback requirement puts newly created entities at an advantage over older entities. For example, a 3-month old entity would only have 3 months of records to evaluate, whereas a 2-year old entity would necessarily have to evaluate 12 months of records. Contrary to Building Alaska, Inc.’s position, there is no logical reason, or precedent, that would indicate that the “previous 12-month period” in the law’s definition of outside-funded entity should be interpreted differently.

**VII. CONCLUSION**

Despite being existence for less than 12 months, if the majority of Building Alaska, Inc.’s aggregate contributions are from contributors outside the state of Alaska as of the date of its most recent independent expenditure report preceding dissemination of a communication, Building Alaska, Inc. must include the disclaimer provided for in AS 15.13.090(g) in its paid-for-by identifier.

**VIII. COMMISSION DECISION**

On June 9, 2021, the Alaska Public Offices Commission heard and approved this advisory opinion by a vote of 5-0.

<p><b>Certificate of Service:</b> I hereby certify that on this date, I served, by <b>certified mail and email</b> a true and correct copy of the foregoing in this proceeding on the following:</p>	<p>and by <b>email to:</b></p>
<p>Stacey Stone Holmes Weddle &amp; Barcott, P.C. 701 W. 8<sup>th</sup> Avenue, Suite 700 Anchorage, AK 99501 sstone@hwb-law.com</p>	<p>Heather Hebdon Executive Director Alaska Public Offices Commission heather.hebdon@alaska.gov</p>

  
 Paralegal Date 6/21/21

## APPLICABLE LAW

### ALASKA STATUTES

#### **Sec. 15.13.040. Contributions, expenditures, and supplying of services to be reported.**

...

(d) Every person making an independent expenditure shall make a full report of expenditures made and contributions received, upon a form prescribed by the commission, unless exempt from reporting.

(e) Each person required to report under (d) of this section shall file a full report in accordance with AS 15.13.110(h) on a form prescribed by the commission. The report must contain

- (1) the name, address, principal occupation, and employer of the individual filing the report;
- (2) an itemized list of all expenditures made, incurred, or authorized by the person;
- (3) the name of the candidate or the title of the ballot proposition or question supported or opposed by each expenditure and whether the expenditure is made to support or oppose the candidate or ballot proposition or question;
- (4) the name and address of each officer and director, when applicable;
- (5) the aggregate amount of all contributions made to the person, if any, for the purpose of influencing the outcome of an election; for all contributions, the date of the contribution and amount contributed by each contributor; and, for a contributor
  - (A) who is an individual, the name and address of the contributor and, for contributions in excess of \$50 in the aggregate during a calendar year, the name, address, principal occupation, and employer of the contributor; or
  - (B) that is not an individual, the name and address of the contributor and the name and address of each officer and director of the contributor.

...

(s) 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). 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.

**Sec. 15.13.050. Registration before expenditure.**

(a) Before making an expenditure in support of or in opposition to a candidate or before making an expenditure in support of or in opposition to a ballot proposition or question or to an initiative proposal application filed with the lieutenant governor under AS 15.45.020, each person other than an individual shall register, on forms provided by the commission, with the commission.

...

**Sec. 15.13.052. Independent expenditures; political activities accounts.**

(a) Before making an independent expenditure in support of or in opposition to a candidate or before making an independent expenditure in support of or in opposition to a ballot proposition or question, each person other than an individual, candidate, or nongroup entity with an annual operating budget of \$250 or less shall establish a political activities account. The political activities account may be a separate account in the person's general treasury. The political activities account must be administered using generally accepted accounting principles. All funds used by the person to make independent expenditures must be drawn from the person's political activities account.

...

**Sec. 15.13.110. Filing of reports.**

...

(h) An independent expenditure report required under AS 15.13.040(e) shall be filed with the commission not later than 10 days after an independent expenditure has been made. However, an independent expenditure that exceeds \$250 and that is made within nine days of an election shall be reported to the commission not later than 24 hours after the expenditure is made.

...

(k) Once contributions from an individual, person, nongroup entity, or group 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 exceed \$2,000 in a single year, that entity shall report that contribution, and all subsequent contributions, not later than 24 hours after receipt. For purposes of this subsection, the entity is required to certify and report the true source, and all intermediaries if any, of the contribution as defined by AS 15.13.400(18).



**Sec. 15.13.390. Civil penalty; late filing of required reports.**

(a) A person who

- (1) fails to register when required by AS 15.13.050(a) or who fails to file a properly completed and certified report within the time required by AS 15.13.040, 15.13.060(b)-(d), 15.13.110(a)(1), (3), or (4), (e), or (f) is subject to a civil penalty of not more than \$50 a day for each day the delinquency continues as determined by the commission subject to right of appeal to the superior court. A person who fails to file a properly completed and certified report within the time required by AS 15.13.110(a)(2) or 15.13.110(b) is subject to a civil penalty of not more than \$500 a day for each day the delinquency continues as determined by the commission subject to right of appeal to the superior court;
- (2) whether as a contributor or intermediary, delays in reporting a contribution as required by AS 15.13.040(s) is subject to a civil penalty of not more than \$1,000 a day for each day the delinquency continues as determined by the commission subject to right of appeal to the superior court;
- (3) whether as a contributor or intermediary, misreports or fails to disclose the true source of a contribution in violation of AS 15.13.040(s) or AS 15.13.074(b) is subject to a civil penalty of not more than the amount of the contribution that is the subject of the misreporting or failure to disclose. Upon a showing that the violation was intentional. A civil penalty of not more than three times the amount of the contribution in violation may be imposed. These penalties as determined by the commission are subject to right of appeal to the superior court;

...

**Sec. 15.13.400. Definitions.**

...

(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 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.

...

(15) "outside-funded entity" means an entity that makes one or more independent expenditures in one or more candidate elections and that, during the previous 12-month period, received more than 50 percent of its aggregate contributions from true sources, or their equivalents, who, at the time of the contribution, resided or had their principal place of business outside Alaska.

...

(19) "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.

**Sec. 15.45.220. Adoption and effective date of proposed law.**

If a majority of the votes cast on the initiative proposition favor its adoption, the proposed law is enacted, and the lieutenant governor shall so certify. The act becomes effective 90 days after certification.