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January 12, 2024

BY ELECTRONIC MAIL DELIVERY

Office of General Counsel
Attn: Lisa J. Stevenson, Esq.
Acting General Counsel
Federal Election Commission
1050 First Street NE
Washington, DC 20463

Re: Advisory Opinion Request

Dear Ms. Stevenson:

Pursuant to 52 U.S.C. § 30108, we seek an advisory opinion on behalf of Texas Majority PAC (“**TMP**”) regarding the applicability of the Federal Election Campaign Act of 1971 (the “**Act**”) and Federal Election Commission (the “**Commission**”) regulations to its proposed paid canvassing operations.

We thank the Commission for its thoughtfulness and time in responding to our initial request. To assist the Commission and regulated community, this new request breaks down the broader question into its component parts. The request first asks whether the two communications distributed via the paid canvassing operation are “public communications” (under 11 C.F.R. § 100.26) and/or “coordinated communications” (under 11 C.F.R. § 109.21). It argues that they are not because TMP does not rely on an intermediary to distribute them. The request then asks whether the production and distribution costs associated with these two communications are “coordinated expenditures” under 11 C.F.R. § 109.20. It argues that they are not because the costs are directly attributable to specific non-public communications and are not easily repurposed for a non-exempt or non-communicative use. Finally, the request asks whether TMP may provide the data that results from the paid canvass to candidates and party committees for free or below the normal and usual charge. It concludes that doing so would result in an in-kind contribution.

I. Background

TMP is a nonfederal political committee registered as a general-purpose committee (“**GPAC**”) with the Texas Ethics Commission.¹ It was not established by a candidate (federal, state, or local),

¹ Tex. Ethics Comm’n, Search Campaign Finance Reports, https://jasper.prd.tecprd.ethicsefile.com/jasperserver-pro/flow.html?_flowId=viewReportFlow&standAlone=true&_flowId=viewReportFlow&ParentFolderUri/public/publicData&reportUnit=/public/publicData/datasource/CFS/By_Filer_Name&decorate=no&SuperName=texas%20majority&FilerType=ANY&FirstName=&CorrFlag=N&tec-

party committee, or their agents.

Texas law permits GPACs to accept unlimited contributions but prohibits the use of corporate or labor treasury funds to make contributions to nonfederal candidates, party committees, or political committees other than committees that only undertake independent expenditure activity.² Corporate and labor treasury funds may only be used for establishment or administration costs, such as office space and equipment, and independent expenditures.³ Accordingly, TMP maintains corporate and labor treasury funds in a separate account. TMP would not – because, under Texas law, it may not – use corporate or labor treasury funds to pay for the paid canvassing expenses described in this request.

TMP will retain vendors to carry out the paid canvassing programs.⁴ Managed by TMP’s paid staff, the vendors will design and produce canvassing literature (the “*Canvassing Literature*”) and hire individuals to distribute it. These individuals will be instructed to go to the homes of preselected voters and trained to read a script (the “*Script*”) and record the voters’ answers to certain questions. TMP’s paid staff will select the voters whose homes will be visited by the canvassers. Neither the staff nor the vendors will have a contractual or other business relationship with the selected voters. Nor will the voters be customers of these vendors or canvassers. The canvassers will approach voters’ doors in the way that any volunteer canvasser might do so for a political or religious cause. While TMP will not ask residents to opt-in prior to the canvassers’ arrival, TMP will follow applicable law which generally permits residents to refuse to allow the canvasser to deliver the message by putting up a “no trespass” sign or asking the canvasser to leave their premises and not leave any literature.⁵ The voters, therefore, may effectively opt-out of receiving the Scripts and Canvassing Literature.

The expenditures associated with the Paid Canvass include:

- Payments to one or more vendor(s) to design and produce the Canvassing Literature and Script (the “*Production Costs*”), including the actual costs of design and production, and a commercially reasonable profit for the vendor(s).
- Payments to one or more vendor(s) to recruit, hire, train, and manage canvassers, (the “*Distribution Costs*”), including payments to compensate the canvassers for their time, actual costs to the vendor to recruit, hire, train, and manage the canvassers, and a commercially reasonable profit for the vendor(s).
- Payments to one or more vendor(s) to store (on a data platform) and analyze the voters’ answers to the questions posed by paid canvassers (“*Data Costs*”), including the actual costs of maintaining the platform and analyzing the data and a commercially reasonable

[\(https://www.legis.state.tx.us/lookup?orig=PUBLIC2&7CexpireTime=Tue%20Jul%2025%202023%2006:23:41%20GMT-0400%20\(Eastern%20Daylight%20Time\)\)](https://www.legis.state.tx.us/lookup?orig=PUBLIC2&7CexpireTime=Tue%20Jul%2025%202023%2006:23:41%20GMT-0400%20(Eastern%20Daylight%20Time)) (accessed Jan. 10, 2024).

² Tex. Admin. Code, tit. 1 § 24.19; Tex. Elec. Code Ann. § 252.003(a)(4).

³ Tex. Admin. Code, tit. 1 § 24.18(b); Tex. Elec. Code Ann. § 253.100(a).

⁴ TMP anticipates that the Scripts and Canvassing Literature will be disseminated to more than 500 homes within a 30-day period.

⁵ See Tex. Penal Code Ann. § 30.05(a) (“A person commits an offense if the person enters or remains on or in property of another ... without effective consent and the person: (1) had notice that the entry was forbidden; or (2) received notice to depart but failed to do so.”).

profit for the vendor(s).

TMP's major purpose is to elect Democrats to state and local office in Texas. TMP's major purpose does *not* include "[f]ederal campaign activity (*i.e.*, the nomination or election of a [f]ederal candidate)."⁶ Therefore, it is not a "political committee" under the Act and is not registered as such with the Commission. TMP anticipates that federal candidates, nonfederal candidates, and party committees will work together in Texas as they do in other states. TMP also plans to coordinate its activities with candidates and party committees in Texas to the extent permitted by law. Accordingly, TMP anticipates that it will come into possession of nonpublic plans, projects, activities, or needs of candidates (federal and nonfederal) and/or political parties within the meaning of 11 C.F.R. § 109.21(d)(3).

TMP wishes to refer to federal candidates and political parties in the Canvassing Literature and Scripts. It plans to do so within the pre-election timeframes described in 11 C.F.R. § 109.21(c)(4). TMP also plans that some Canvassing Literature and Scripts will include express advocacy or its functional equivalent with respect to federal candidates. Except for the Data Costs, TMP's paid canvasses will *not* have non-communicative components; for example, unlike some grassroots efforts, TMP's paid canvasses will not include offers to drive voters to polling places. Further, Canvassing Literature and Scripts will *not* disseminate, distribute, or republish federal candidate campaign materials under 11 C.F.R. § 109.23.

TMP will not permit candidates (federal, state, or local), party committees, or their agents to finance, maintain, or control TMP. Specifically, candidates, party committees, and their agents will **not** be permitted to:

- direct or participate in the governance through provisions of constitutions, bylaws, contracts, or other rules, or through formal or informal practices or procedures;
- hire, appoint, demote, or otherwise control the officers, or other decision-making employees or members of TMP;
- have common or overlapping officers or employees with TMP; or
- make contributions, monetary or in-kind, in significant amounts or on an ongoing basis to TMP.

Candidates (federal, state, or local), party committees, and their agents will not have any spending authority within TMP. They will not have any authority to approve TMP budgets or TMP expenditures, nor will they have authority to sign checks or initiate wires. Nor will federal candidates, party committees, or their agents have final approval authority with respect to any Canvassing Literature, Script, or other aspect of the paid canvassing program. TMP itself will exercise full direction and control over all such programs. In short, even though TMP plans to consult with federal candidates, party committees, and their agents on these paid canvassing programs, "[b]y themselves, such consultations do not constitute spending" by federal candidates,

⁶ Political Committee Status, 72 Fed. Reg. 5595, 5597 (Feb. 7, 2007).

party committees, or their agents.⁷

II. Questions Presented

1. Are the Canvassing Literature or Script “public communications” under 11 C.F.R. § 109.26?
2. Are the Canvassing Literature or Script “coordinated communications” under 11 C.F.R. § 109.21?
3. Are the Production Costs or Distribution Costs “coordinated expenditures” under 11 C.F.R. § 109.20?
4. May TMP provide any of the data that arises from the paid canvasses to a federal candidate or party committee at no charge or less than its fair market value?

III. Legal Analysis

1. *Are the Canvassing Literature or Script “public communications” under 11 C.F.R. § 109.26?*

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.”⁸ Neither the Canvassing Literature nor the Script is being distributed “by means of” any broadcast, cable, or satellite communication. Nor is the Canvassing Literature or Script being distributed “by means of” a newspaper, magazine, outdoor advertising facility, mass mailing, or telephone bank. “Because Congress did not include door-to-door canvassing in the list of media enumerated in the statutory definition of ‘public communication,’ door-to-door canvassing could qualify as a ‘public communication’ only if it is a form of advertising and therefore falls within the catch-all category of ‘general public political advertising.’”⁹

“The term ‘general public political advertising’ is not defined by the Act or Commission regulations.”¹⁰ In its Explanation and Justification for the 2006 Internet Communication rulemaking (hereinafter, “*the 2006 E&J*”), however, “the Commission clarified the types of communications that qualify as ‘general public political advertising.’”¹¹ The Commission noted that “[t]he forms of mass communication enumerated in the definition of ‘public communication’ ... each lends itself to distribution of content through an entity ordinarily owned or controlled by another person.”¹² For “an individual to communicate with the public using any of the forms of

⁷ FEC Adv. Op. 2005-02 (Corzine) at 8.

⁸ 11 C.F.R. § 100.26.

⁹ Concurring Statement of Vice Chair Caroline C. Hunter & Comm’rs Lee E. Goodman & Matthew S. Petersen, FEC Adv. Op. 2016-21 (Great America PAC) at 1-2 (Jan. 12, 2017) (quoting Internet Communications, 71 Fed. Reg. 18589, 18594 (Apr. 12, 2006)) (internal quotations omitted).

¹⁰ Statement of Comm’rs Shana M. Broussard & Ellen L. Weintraub Regarding Adv. Op. 2022-20 (Maggie for NH), FEC Adv. Op. 2022-20 (Maggie for NH) at 1 (Nov. 4, 2022).

¹¹ *Id.*

¹² Internet Communications, 71 Fed. Reg. at 18594.

media listed by Congress, he or she must ordinarily pay an intermediary (generally a facility owner) for access to the public through that form of media each time he or she wishes to make a communication.”¹³ The Commission contrasted these types of communications – those requiring payment *to an intermediary* – from those communications that are “analogous to a communication made from a soapbox in a public square” where no intermediary is required to disseminate the communication.¹⁴ This latter category of communications were *not* “general public political advertising” and therefore *not* “public communications.”

In Advisory Opinion 2022-20, the Commission opined that short-code text messages – a category of text messages that can only be sent to users who affirmatively opt-in to receive messages from the sender – are *not* “public communications.” Applying the analysis set forth in the 2006 E&J, the Commission reasoned that disseminating public communications “typically require[s] the person making the communication to pay to use a third party’s platform to gain access to the third party’s audience” and such communications are therefore sent “through a medium controlled, and to an audience established, by a third party.”¹⁵ The opinion, in other words, established a three-part test for a communication to qualify as “general public political advertising”: it must (1) require payment; (2) make use of a medium controlled by a third party intermediary; *and* (3) be received by an audience established by the third party intermediary “many of whom may have little or no interest in receiving the committee’s communications and do so only incidentally while reading the news” or “because they wish to use the third party’s website.”¹⁶

The Commission’s opinion received four votes. The two dissenting commissioners also cited favorably to the 2006 E&J. But rather than adopt the majority’s three-part test, the dissenters concluded that “[t]hese types of communications share *two* key characteristics. First, they are all communications for which a payment is required ... Second, *all general public political advertising communications rely on an intermediary to disseminate the message.*”¹⁷ The dissenters parted ways with the majority only on the third prong of the majority’s proposed test: the requirement that the audience be established by the intermediary.¹⁸ Notably, the dissenters agreed that a public communication encompasses only those communications that rely on an intermediary to disseminate the message.

Neither the Canvassing Literature nor the Script is a “public communication” under the majority test or minority test because TMP does *not* rely on an intermediary to disseminate the communications. The term “intermediary” means “an intermediate agent or agency; a go-between or mediator.”¹⁹ Vocabulary.com elaborates that “[a]n *intermediary* is someone who acts as a go-between or a mediator between two other people”²⁰ and that:

¹³ *Id.*

¹⁴ *Id.*

¹⁵ FEC Adv. Op. 2022-20 (Maggie for NH) at 4-5 (Oct. 4, 2022).

¹⁶ *Id.*

¹⁷ Statement of Comm’rs Shana M. Broussard & Ellen L. Weintraub Regarding Adv. Op. 2022-20 at 1-2, *supra* n.9 (emphasis added).

¹⁸ *Id.* at 4 (“Our colleagues do not address this apparent inconsistency between their claim that ‘public communication’ can only be one in which the speaker pays to access a third party’s audience and the plain language of the statute which includes all mass mailings with no limitation based on how the audience was assembled.”).

¹⁹ Dictionary.com, “Intermediary,” <https://www.dictionary.com/browse/intermediary> (accessed Jan. 10, 2024).

²⁰ Vocabulary.com, “Intermediary,” <https://www.vocabulary.com/dictionary/intermediary>. (accessed Jan. 10, 2024).

The word *intermediary* comes from the Latin *intermedius*, which is also the root word for *intermediate*. *Inter-* means between, and *medius* means the middle — *intermediary* retains that sense of being in the middle. Intermediaries are used to negotiate between two countries who are at odds, between a company and a client over a contract, between two bickering children, or between a boss and an employee in salary negotiations.²¹

An intermediary, in other words, does not include someone who is acting as the agent of one party (in this case, TMP) but not the other party (in this case, the voters).²² The vendors that TMP plans to hire and the individual canvassers hired by those vendors are agents of TMP for purposes of 11 C.F.R. § 109.3. Conversely, the individual canvassers have no contractual, business, or other relationship with the voters being canvassed. They have no more right to communicate with the voters than a campaign’s volunteers; voters may ask paid canvassers to leave their property or not leave behind the literature just like with volunteers. Hiring paid canvassers to go door-to-door, therefore, is no different than hiring a paid speaker to stand atop the proverbial “soapbox in a public square.”²³ In both circumstances, there is no intermediary. And therefore, in both circumstances, there is no public communication.

This is why a bipartisan group of FEC commissioners agreed in 2007 that paid canvassing communications are not “public communications.”²⁴ And why three commissioners found in 2006 that handbills are not “public communications.”²⁵ And why three commissioners observed in 2016 the “[t]he Commission’s longstanding position . . . is that door to-door canvassing is not a ‘public communication’ under 11 C.F.R. § 100.26, and therefore does not constitute a ‘coordinated communication’ under 11 C.F.R. § 109.21.”²⁶ And potentially why the Commission failed to approve a recommendation by the Audit Division and OGC to find that two state parties had made excessive contributions through their canvassing work.²⁷ The absence of an intermediary simply forecloses the possibility that the Paid Canvass can qualify as a “public communication” under the

²¹ *Id.*

²² See 11 C.F.R. § 110.6(b)(2)(i)(A), (D)-(E) (defining “conduit or intermediary” to *exclude* “[a]n individual who is an employee or a full-time volunteer working for the candidate’s authorized committee,” “[a] commercial fundraising firm retained by the candidate or the candidate’s authorized committee to assist in fundraising,” and “[a]n individual who is expressly authorized by the candidate or the candidate’s authorized committee to engage in fundraising . . .”).

²³ Internet Communications, 71 Fed. Reg. at 18594.

²⁴ See Statement of Reasons of Vice Chairman David M. Mason & Comm’r Hans A. von Spakovsky at 9, MUR 5564 (Alaska Democratic Party) (Dec. 21, 2007) (“Door-to-door canvassing is not ‘general public political advertising’ . . . [t]hus, door-to-door canvassing is [not] a ‘public communication.’”); Statement of Reasons of Chairman Robert D. Lenhard at 4, MUR 5564 (Dec. 31, 2007) (“Most of the costs related to the ADP’s field program were payments by the ADP for salaries and benefits of its employees, and for costs related to maintaining office space. . . . As such, these costs were not for ‘public communications’ (such as radio ads and direct mail) as that term is defined in our regulations. These costs include door to door canvassing, manning campaign offices and other traditional grass roots activities.”) (citations omitted).

²⁵ Statement of Reasons of Chairman Michael E. Toner & Comm’rs David M. Mason & Hans A. von Spakovsky at 5, MUR 5604 (Friends of William D. Mason) (Dec. 11, 2006).

²⁶ See Concurring Statement of Vice Chair Caroline C. Hunter & Comm’rs Lee E. Goodman & Matthew S. Petersen, FEC Adv. Op. 2016-21 (Great America PAC), *supra* n.8.

²⁷ Final Audit Rep. of the Comm, Ky. State Democratic Cent. Exec. Comm. (Oct. 13, 2022); Final Audit Rep. of the Comm, Democratic Party of Arkansas (Oct. 18, 2022).

Commission’s regulation and precedents.²⁸

2. *Are the Canvassing Literature or Script “coordinated communications” under 11 C.F.R. § 109.21?*

To qualify as a coordinated communication, a communication must satisfy a three-pronged test: the communication must (1) be paid for by a person other than the campaign or party committee to which it would be a contribution (the “*payment prong*”); (2) satisfy one of the content standards (the “*content prong*”),²⁹ and (3) be preceded by certain interactions between the sponsor of the communication and the federal candidate, authorized committee or political party committee (the “*conduct prong*”).³⁰

In a 2011 advisory opinion, the Commission opined that a sponsor’s “website and email communications to the general public soliciting contributions to certain Federal candidates will not result in in-kind contributions to those Federal candidates, because the communications will not be ‘coordinated communications’ under the Act and Commission regulations.”³¹ In the 2022 advisory opinion referenced above, the Commission once again confirmed that communications that “do not satisfy the content prong of the coordinated communications test ... are not in-kind contributions.”³² And in a recent enforcement action, the Office of General Counsel opined that “[b]ecause [a nonauthorized committee’s] emails soliciting contributions to [a federal candidate] do not satisfy the content prong, they cannot be coordinated communications under 11 C.F.R. § 109.21. In turn, because [the nonauthorized committee’s] email solicitations are not coordinated communications, their costs are not treated as in-kind contributions.”³³

Both the Canvassing Literature and the Script fail the content prong. “To meet the content prong, a communication must be either a ‘public communication’ ... or an ‘electioneering communication’”³⁴ As set forth above, neither the Canvassing Literature nor the Script is an electioneering communication or a public communication. Because these communications fail the

²⁸ In a few instances since adoption of the coordinated communication regulation in 2002, the Office of General Counsel has published analysis suggesting that literature distributed via a paid canvasses *was* a public communication. But in these cases, the Office of General Counsel’s analysis played no role in the ultimate disposition of the matter. *See* Factual & Legal Analysis, MUR 6924 (Andrew Winer, et al.) (Aug. 21, 2017) (dismissing a complaint alleging that a nonfederal committee’s mailers and doorhangers were impermissibly coordinated with a federal candidate committee after finding that the conduct prong was not met; therefore, whether doorhangers met the content prong by constituting public communications was immaterial to the analysis); Factual & Legal Analysis, MUR 6778 (David Hale for Congress) (Nov. 5, 2015) (exercising prosecutorial discretion to dismiss complaint alleging that a disclaimer printed on a doorhanger did not comply with the Commission’s technical requirements for disclaimers); *see also* Final Audit Rep. of the Comm’n at 19-20, Ky. State Democratic Cent. Exec. Comm. (LRA 1107) (Dec. 14, 2021) (noting that the Commission did not approve the Office of the General Counsel’s view that doorhangers were public communications and that the Office of the General Counsel had initially concluded that doorhangers were *not* public communications in its legal analysis dated December 14, 2021). In none of these cases did the Office of General Counsel attempt to square its analysis with the Commission’s conclusion in the 2006 E&J that a “public communication” requires dissemination through an intermediary.

²⁹ 11 C.F.R. § 109.21(c).

³⁰ *Id.* § 109.21(a).

³¹ FEC Adv. Op. 2011-14 (Utah Bankers Association) at 4 n. 3 (Sept. 22, 2011).

³² FEC Adv. Op. 2022-20 (Maggie for NH) at 5, *supra* n.14.

³³ First Gen. Counsel’s Rep. at 17, MUR 7943 (Common Good Virginia, *et. al.*) (March 8, 2023).

³⁴ FEC Adv. Op. 2011-14 at 5.

content prong, they are not coordinated communications.

3. *Are the Production Costs or Distribution Costs “coordinated expenditures” under § 109.20?*

Communication expenditures fall into two general categories: *production costs* and *distribution costs*. The cost of a television or radio ad includes the amounts paid to the media consultant to create and produce the ad; it also includes the amounts paid to television stations to place it and to the buyer to manage the distribution process. The cost of a mailer includes the amounts paid to the mail vendor to create and produce the mail piece; it also includes the amounts paid to the U.S. Postal Service to deliver it and to the mail vendor for managing that distribution process. Every medium of communication – whether public communication or non-public communication – follows this pattern.

The Commission’s electioneering communications regulation mirrors this two-part cost construct, defining the “[d]irect costs of producing or airing electioneering communications” to include “(i) [c]osts charged by a vendor, such as studio rental time, staff salaries, costs of video or audio recording media, and talent” (production costs) and “[t]he cost of airtime on broadcast, cable or satellite radio and television stations, studio time, material costs, and the charges for a broker to purchase the airtime” (distribution costs).³⁵ The Commission’s Form 5 and Form 9 instructions likewise instruct the regulated community to report production costs and distribution costs.³⁶

- a. The Commissions has generally applied section 109.21 – not section 109.20 – to assess whether a communication’s production and distribution costs are “contributions.”

For twenty years, the Commission has drawn a clear line between the communications it regulates and the communications it does not. Section 109.20, the Commission explained in 2003, “addresses expenditures *that are not made for communications* but that are coordinated with a candidate, authorized committee, or political party committee.” As then-Commissioner Lenhard correctly observed in a 2007 matter involving a paid canvass: “if 109.20 were read to apply to communications it would render meaningless the Commission’s coordinated communications and party coordinated communications at 11 CFR 109.21 and 109.37.”³⁷ Section 109.21, in turn, carefully distinguishes between electoral speech and nonelectoral speech, eliminating the uncertainty that plagued the regulated community during the *Christian Coalition* era and replacing it with a relatively clear set of rules. The regulatory framework has rested on two pillars: (1) distinguishing between public communications and other communications; and (2) defining

³⁵ 11 C.F.R. § 104.20(a)(2)(i) – (ii).

³⁶ See FEC, *Instructions For Preparing FEC Form 5*, available at <https://www.fec.gov/resources/cms-content/documents/policy-guidance/fecfrm5i.pdf> (requiring disclosure of “purchases of radio/television broadcast/cable time, print advertisements and related production costs.”); FEC, *Instructions For Preparing FEC Form 9*, available at <https://www.fec.gov/resources/cms-content/documents/fecfrm9i.pdf> (requiring speakers to disclose “(1) costs charged by a vendor (e.g., studio rental time, staff salaries, costs of video or audio recording media and talent) or (2) costs of airtime on broadcast, cable and satellite radio and television stations, studio time, material costs and the charges for a broker to purchase the airtime.”).

³⁷ Statement of Reasons of Commissioner Robert D. Lenhard at 4 n.5, MUR 5564 (Alaska Democratic Party, *et al.*) (Dec. 31, 2007).

communication expenditures with sufficient breadth to allow speakers to produce effective communications and efficiently distribute them to voters.

Applying this framework, the Office of General Counsel (“*OGC*”) has consistently opined that a communication qualifies as an in-kind contribution only if it meets the three-prong test set forth in section 109.21 and that section 109.20 does not apply to communications.³⁸

- In 2009, the OGC expressly stated that section 109.20 “applies only to those coordinated expenditures which are not made for communications” and “[a]ccordingly . . . is inapplicable” to a communication.³⁹ The Commission dismissed the complaint.⁴⁰
- In 2016, the OGC considered a complaint alleging that Facebook posts constituted in-kind contributions to a campaign committee. The OGC rejected the application of 11 C.F.R. § 109.20(b): “The Complaint alleges that the Facebook communications were coordinated pursuant to 11 C.F.R § 109.20(b). As noted, that regulation applies to expenditures that are not communications.”⁴¹ The Commission dismissed the complaint.⁴²
- In 2019, the OGC wrote that “[u]nder Commission regulations, expenditures for ‘coordinated communications’ are addressed under a three-prong test at 11 C.F.R. § 109.21 and other coordinated expenditures are addressed under 11 C.F.R. § 109.20(b). The Commission has explained that section 109.20(b) applies to ‘expenditures that are not made for communications but that are coordinated with a candidate, authorized committee, or political party committee.’”⁴³ The Commission dismissed the complaint.⁴⁴
- In 2020, in a matter also concerning Facebook posts, the OGC concluded that section 109.20 applied only to an expenditure “for something other than a communication.”⁴⁵ The Commission dismissed the complaint.⁴⁶
- In 2021, the OGC assessed whether Twitter had made in-kind contributions to a candidate committee, both in the form of expenditures for communications and expenditures that were unrelated to communications. The OGC exclusively applied section 109.21 to the communications and section 109.20 to the expenditures that were not communications, opining that “a communication is considered coordinated and thus treated as an in-kind

³⁸ See First Gen. Counsel’s Rpt., MUR 6477 (Right Turn USA, *et al.*) (Dec. 27, 2011); First Gen. Counsel’s Rpt., MUR 6502 (Nebraska Democratic Party, *et al.*) (May 17, 2012); First Gen. Counsel’s Rpt., MUR 6522 (Lisa Wilson-Foley for Congress, *et al.*) (Feb. 5, 2013); First Gen. Counsel’s Rpt., MUR 6657 (Akin for Senate, *et al.*) (May 6, 2013); First Gen. Counsel’s Rpt., MUR 6722 (House Majority PAC, *et al.*) (Aug. 6, 2013); First Gen. Counsel’s Rpt., MUR 7268 (Russian Federation, *et al.*) (Feb. 23, 2021).

³⁹ First Gen. Counsel’s Rpt. at 13, MUR 6037 (Oregon Democratic Party, *et al.*) (Sept. 17, 2009).

⁴⁰ Notification to Democratic Party of Oregon & Laura Calvo, MUR 6037 (Oregon Democratic Party, *et al.*) (Nov. 24, 2009).

⁴¹ First Gen. Counsel’s Rpt. at 12 n.38, MUR 7080 (Public Integrity Alliance) (Dec. 15, 2016).

⁴² Notification to Public Integrity Alliance, MUR 7080 (Public Integrity Alliance) (Oct. 30, 2017).

⁴³ First Gen. Counsel’s Rpt. at 6, MUR 7521 (Swing Left, *et al.*) (Oct. 30, 2019); *see also* First Gen. Counsel’s Rpt. at 6, MUR 7654 (America First Action, *et al.*) (Aug. 7, 2020).

⁴⁴ Notification to Swing Left, MUR 7521 (Swing Left, *et al.*) (Oct. 6, 2021).

⁴⁵ First Gen. Counsel’s Rpt. at 9, MUR 7641 (Facebook, Inc.) (Feb. 14, 2020)

⁴⁶ Notification with Factual & Legal Analysis MUR 7641 (Facebook, Inc.) (Feb. 4, 2022).

contribution when it is: (1) paid for by a third-party; (2) satisfies one of five content standards; and (3) satisfies one of five conduct standards [under section 109.21(a)],” whereas section 109.20 applied to any payments that “were not made for communications.”⁴⁷ The Commission dismissed the complaint.⁴⁸

- In another 2021 matter, the OGC reiterated that “section 109.20(b) applies to ‘expenditures that are not made for communications but that are coordinated with a candidate, authorized committee, or political party committee.’”⁴⁹ The Commission dismissed the complaint.⁵⁰
- In another 2021 matter, the OGC applied 11 C.F.R. § 109.21 to assess whether certain advertisements constituted an in-kind contribution, noting that “[e]xpenditures for ‘coordinated communications’ are addressed under a three-prong test at 11 C.F.R. § 109.21 and other coordinated expenditures are addressed under 11 C.F.R. § 109.20(b). The Commission has explained that section 109.20(b) applies to ‘expenditures that are not made for communications but that are coordinated with a candidate, authorized committee, or political party committee.’”⁵¹ The Commission dismissed the allegation.⁵²
- And earlier this year, OGC explained that “[w]e have analyzed this web posting under 11 C.F.R. § 109.21 (concerning coordinated communications), rather than 11 C.F.R. § 109.20(b) (concerning coordinated expenditures generally) because this web posting is a communication of the type contemplated by § 109.21.”⁵³ The Commission dismissed the complaint.⁵⁴

The Commission has taken the same approach in advisory opinions, noting in 2011 that section 109.20(b) governed only those expenditures not made for communications.⁵⁵

- b. The Production Costs are sufficiently direct inputs or components of the canvassing communications to *not* qualify as “coordinated expenditures” under 11 C.F.R. § 109.20.

To the extent that Commission regulations exempt a particular type of communication from the definition of “contribution” or “expenditure,” that exemption typically covers both production and distribution costs. For example, Commission regulations exempt “[t]he payment by a State or local

⁴⁷ Notification with Factual & Legal Analysis at 11, 18, MUR 7821 (Twitter, Inc., *et al.*) (Aug 16, 2021) (internal quotation marks omitted).

⁴⁸ Notification with Factual & Legal Analysis, MUR 7821 (Twitter, Inc., *et al.*) (Aug. 16, 2021).

⁴⁹ First Gen. Counsel’s Rpt. at 63-64, MUR 7274 (Internet Research Agency) (Feb. 23, 2021); *see also* First Gen. Counsel’s Rpt. at 16, MUR 7834 (Facebook, Inc., *et al.*) (Aug. 11, 2021); First Gen. Counsel’s Rpt. at 29 n.107, MUR 7313 (Michael D. Cohen, *et al.*) (Dec. 7, 2020); First Gen. Counsel’s Rpt. at 11, MUR 7497 (National Rifle Association of America Political Victory Fund, *et al.*) (May 10, 2019); First Gen. Counsel’s Rpt. at 63-64, MUR 7623 (Donald J. Trump, *et al.*) (Feb. 23, 2021).

⁵⁰ Notification to Internet Research Agency, MUR 7274 (Internet Research Agency) (Aug. 18, 2021).

⁵¹ First Gen. Counsel’s Rpt. at 18, MUR 7853 (Lance Harris, *et al.*) (Aug. 31, 2021).

⁵² Certification, MUR 7853 (Lance Harris, *et al.*) (May 16, 2022).

⁵³ First Gen. Counsel’s Rpt. at 8 n.29, MUR 8056 (Bob Healey for Congress, *et al.*) (May 16, 2023).

⁵⁴ Notification with Factual & Legal Analysis to Robert Healey, Jr., Bob Healey for Congress & Ronald R. Gravino, MUR 8056 (Bob Healey for Congress, *et al.*) (July 18, 2023).

⁵⁵ FEC Adv. Op. 2011-14 (Utah Bankers Association) at 4 n. 3 (Sept. 22, 2011).

committee of a political party of the costs of preparation, display, or mailing or other distribution incurred by such committee with respect to a printed slate card”⁵⁶ In resolving the *Correct the Record* matter at the administrative level, a controlling group of Commissioners relied largely on the principle – articulated in a 2013 matter involving Congressman Akin and unpaid Internet communications – that “[t]he Commission has narrowly interpreted the term Internet communication ‘placed for a fee,’ and has not construed that phrase to cover payments for services necessary to make an Internet communication.”⁵⁷

The federal district court adjudicating the Commission’s administrative dismissal in *Correct the Record* found the Akin matter to be inapposite. In remanding the matter to the Commission for resolution, the court warned that such an exemption must be “meaningfully bounded” to avoid abuse.⁵⁸ It was insufficient, in the court’s view, for an expense to merely be an “input” to an exempt communication; instead, such expenses must be “themselves communications or sufficiently direct components of communications to be exempt.”⁵⁹ Across multiple opinions, the court then articulated two principles to guide the Commission on remand. *First*, the court noted that the expenses in *Correct the Record* “are far broader categories of expenses, and *far less directly connected to a specific unpaid internet communication*, than email-list rentals and donation-processing software purchased to enable email blasts.”⁶⁰ *Second*, the court warned against exempting production expenses that “can just as easily be used to produce [nonexempt] versus [exempt] communications.”⁶¹ **Stated affirmatively, distribution and production costs are governed by section 109.21 if they bear a direct connection to specific exempt communication(s) and are not easily repurposed for a non-exempt or non-communicative use.**

The Production Costs satisfy that test. Like the amounts paid to vendors to create and produce a television ad, the Production Costs relate to specific communications – the Canvassing Literature and the Script. Moreover, they cannot be repurposed for a non-exempt or non-communicative use. Indeed, the services’ value to the Committee inheres entirely in the exempt communications and is exhausted as soon as the communications are disseminated. The disbursement(s) to the vendor(s) to create and produce the Script and Canvassing Literature secures only that Script and Canvassing Literature; the payment(s) cannot be redeemed for additional communications or funds. Therefore, the Production Costs are communication expenditures governed by section 109.21 rather than non-communication expenditures governed by section 109.20.

⁵⁶ 11 C.F.R. § 100.80.

⁵⁷ Factual and Legal Analysis, FEC Matter Under Review 6657 (Akin for Senate) (Sept. 17, 2013), at 3-4.

⁵⁸ *Campaign Legal Ctr. v. Fed. Election Comm’n*, 646 F. Supp. 3d 57, 64 (D.D.C. 2022) (“*CLC V*”).

⁵⁹ *Id.*

⁶⁰ *Campaign Legal Ctr. v. Fed. Election Comm’n*, 466 F. Supp. 3d 141, 157 (D.D.C. 2020) (“*CLC II*”), on reconsideration in part, 507 F. Supp. 3d 79 (D.D.C. 2020) (“*CLC III*”), *rev’d and remanded*, 31 F.4th 781 (D.C. Cir. 2022) (“*CLC IV*”).

⁶¹ *CLC V*, 646 F. Supp. at 65.

- c. The Distribution Costs are sufficiently direct inputs or components of the canvassing communications to *not* qualify as “coordinated expenditures” under 11 C.F.R. § 109.20.

Notably, *Correct the Record* involved *production* costs rather than *distribution* costs. Distribution costs are necessarily “directly connected to a specific ... communication.”⁶² The buying of a 30-second commercial block is directly connected to the 30-second television ad that airs in the block; the purchase of postage to send a mailer is directly connected to the mailer on which the postage is affixed; and the payment to individuals to deliver canvassing literature and the organization’s message is directly connected to those canvassing communications. There can be no re-purposing of such expenses for non-communicative uses. That is why, to our knowledge, neither the Commission nor any federal court has questioned whether the expenses associated with *distributing* a communication are “sufficiently direct components of communications” to be exempt.⁶³ And the regulated community, until now, has relied on that presumption in structuring its communication programs.

In any paid canvass, the canvassers are the means by which the canvassing communications are distributed. The direct costs of compensating canvassers are plainly exempt distribution costs. They are analogous to the cost of television or radio airtime, advertising space in a newspaper or magazine, USPS postage for a mail piece, and payments to vendors to manage the distribution process. All such expenses are necessary to distribute the underlying communication. All such expenses are directly connected to specific communications. And such expenses cannot be repurposed for non-communicative use.

The principal role of a canvassing vendor is to recruit, hire, train, and manage the paid canvassers. One cannot pay a canvasser without first hiring the canvasser; and it costs money to hire canvassers. And while TMP could theoretically send untrained canvassers to deliver their canvassing communications, no reasonable (or responsible) organization would willingly do so. TMP’s trainings will be specific to the paid canvass and will train canvassers on messaging: specifically, on TMP’s philosophy, the candidates it supports, and the most effective way to deliver messaging to TMP’s targets. The trainings serve no purpose other than facilitating and effectuating TMP’s canvassing communications. They cannot be re-purposed for a non-communicative use and they have no residual value to TMP once the communications are delivered.

Retaining a canvassing firm is analogous to a political organization retaining a broker to purchase television airtime. The organization could buy the time itself but instead chooses to retain a professional that specializes in the relevant communication or medium to manage the communication distribution process. Likewise, TMP could hire, train, and manage paid canvassers itself but prefers to outsource this task to an experienced vendor who can manage the process more effectively. The Commission’s regulations treat “the charges for a broker to purchase the airtime” as a “direct cost” of airing an electioneering communication.⁶⁴ There is no reasonable basis for the Commission to treat charges paid to a canvassing firm any differently.

⁶² *CLC V*, 646 F. Supp. at 65

⁶³ *Id.* at 64

⁶⁴ 11 C.F.R. § 104.20(a)(2)(ii).

4. May TMP provide any of the data that arises from the paid canvasses to a federal candidate or party committee at no charge or at less than its fair market value?

We presume the answer is “no.” The Data Costs are distinguishable from the Production Costs or Distribution Costs.

First, the Data Costs result in a product that has value independent of the communication itself. Most political organizations use data, polling, and research to inform their communications. But the Commission has recognized that data – such as poll results and research books – have value and constitute an in-kind contribution if provided without charge or at less than the usual and normal charge.⁶⁵ While the value of the Production Costs and Distribution Costs extinguishes once the specific communications are disseminated, the value of the Data Costs (like polling and research) does not. This factor provides the Commission with an administrable standard to distinguish between expenses that are “sufficiently direct components of communications to be exempt” and those that are not.⁶⁶

Second, although the raw data is derived from specific communications, the Data Costs themselves do not bear a direct connection to specific non-public communications. In addition to being a marketable asset that can be sold or rented to others, the resulting product “can just as easily be used to produce [nonexempt] versus [exempt] communications.”⁶⁷ That is simply not the case with the Production Costs or Distribution Costs, which purchase only exempt (non-public) communications and cannot be redeemed for non-exempt (public) communications. This, too, provides the Commission with an administrable standard to distinguish between expenses that are “sufficiently direct components of communications to be exempt” and those that are not.⁶⁸

For these reasons, we presume that TMP may not provide any of the data that arises from the paid canvasses to a federal candidate or party committee at no charge or at less than its fair market value.

Very truly yours,



Jonathan S. Berkon
Courtney T. Weisman
Sarah N. Mahmood
Counsel to Texas Majority PAC

⁶⁵ 11 C.F.R. § 106.4; FEC Adv. Op. 2022-05 (DSCC).

⁶⁶ *CLC V*, 646 F. Supp. at 64.

⁶⁷ *Id.* at 65.

⁶⁸ *Id.* at 64.

Lindsay Bird

From: Jon Berkon <jberkon@elias.law>
Sent: Monday, January 22, 2024 11:39 AM
To: Lindsay Bird; Courtney Weisman; Sarah Mahmood
Cc: Amy Rothstein; Robert Knop
Subject: RE: Advisory Opinion Request, Texas Majority PAC

Thanks all. Answers below.

Jon Berkon

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From: Lindsay Bird <lbird@fec.gov>
Sent: Monday, January 22, 2024 10:47 AM
To: Jon Berkon <jberkon@elias.law>; Courtney Weisman <cweisman@elias.law>; Sarah Mahmood <smahmood@elias.law>
Cc: Amy Rothstein <ARothstein@fec.gov>; Robert Knop <rknop@fec.gov>
Subject: Advisory Opinion Request, Texas Majority PAC

Good morning,

We received the advisory opinion request that you submitted on behalf of Texas Majority PAC (“TMP”). We need some additional information, as noted below.

1. Footnote 4 of the request indicates that TMP anticipates that the Scripts and Canvassing Literature will be disseminated to more than 500 homes within a 30-day period. Can you please confirm that the Scripts and Canvassing Literature will be identical or of a substantially similar nature? *Confirmed.*
2. Will the literature and scripts produced for the Paid Canvass be used for any purpose other than the Paid Canvass? *No.*
3. Will the people who are hired as canvassers engage in any work or complete any assignments for TMP other than delivering the Canvassing Literature, reading the Script, and recording the answers to the scripted questions? *No.*

Please note that your response may become part of the advisory opinion request. If so, it will be posted on the Commission’s website. If you have any questions or would like to discuss further, please feel free to contact me.

Sincerely,

Lindsay Bird
Attorney, Policy
Federal Election Commission
202-694-1314