



RECEIVED

By Office of the Commission Secretary at 3:55 pm, Nov 01, 2023

October 25, 2023

Federal Election Commission
1050 First Street, NE
Washington, DC 20463

Re: Advisory Opinion Request

Dear Commissioners and Staff:

Pursuant to 52 U.S.C. § 30108, we seek an advisory opinion from the Federal Election Commission (“FEC” or “Commission”) on behalf of our client Cowboy Analytics, LLC concerning the formation of a conduit committee to sell political merchandise and raise money for federal candidates.

BACKGROUND AND PROPOSAL

Cowboy Analytics provides voter and consumer data to political campaigns, businesses, and media organizations. The company also owns Rally Piryx, LLC (“Piryx”), an online payment processing platform for non-profit and political fundraising.

Cowboy Analytics proposes to form a “nonconnected” conduit PAC¹ (the “PAC”) that would focus on soliciting small-dollar earmarked contributions for federal candidates that the PAC chooses to support. The PAC would create and operate a website offering donors merchandise such as T-shirts, hats, and other paraphernalia imprinted with a political message in exchange for making a contribution to one of the PAC’s endorsed candidates. The messages imprinted on the merchandise may support the PAC’s endorsed candidates (e.g., “John Doe for President” or “Jane Roe 2024,” where Roe is a U.S. Senate candidate running in 2024), or the messages may relate to broader political themes (e.g., “Impeach Biden”).

The PAC intends to target solicitations to prospective donors by e-mail, peer-to-peer text messaging, and digital advertising using data provided at fair market value by Cowboy Analytics. For example, a typical solicitation message would say:

¹ In other words, the PAC would *not* be a “separate segregated fund” of any corporation. Pursuant to 11 C.F.R. § 110.6(b)(2)(ii), the PAC will be a “hard money” PAC that only accepts contributions within the federal amount limitations and source prohibitions.

Get your John Doe for President T-shirt by making a \$50 contribution now!
Go to [URL for PAC's website].

[Text would be accompanied by an image of the T-shirt.]

or

Show your support for Jane Roe for Senate with this water bottle. Get it for
only \$10 at [URL for PAC's website].

[Text would be accompanied by an image of the water bottle.]

The PAC intends to target solicitations to individuals who, based on the data, are likely to make small-dollar contributions to the candidates the PAC supports. Solicitations for contributions to presidential candidates will be targeted to potential donors nationwide. Solicitations for contributions to U.S. House of Representatives and Senate candidates will be targeted to potential donors both within and outside of those candidates' districts/states.

The PAC's contribution webpages will inform donors of the federal contribution limits and source prohibitions and collect the information from donors required by the FEC's earmarked contributions rules at 11 C.F.R. § 110.6. Contributions will be deposited into the PAC's bank account and then forwarded to the candidates designated by donors in accordance with the same FEC rules.

Before forwarding each earmarked contribution to the designated candidate's campaign, the PAC will deduct: (a) the cost it pays for the merchandise; (b) the cost of processing the contribution; and (c) the PAC's administrative and solicitation costs, and will provide donors with a breakdown of how much is being deducted for these costs and how much is being forwarded to the designated candidate's campaign.

With respect to contribution processing costs, the PAC will use Piryx as the payment processor. The PAC will pay Piryx its standard processing fee of 2.9% plus 30 cents per transaction.²

² See Piryx, Frequently Asked Questions ("Does it cost anything to sign up with Piryx?"), at [https://www.piryx.com/help/#::~:~:text=There%20are%20no%20monthly%20fees,Discover\)%20and%20eCheck%20processing%20fees](https://www.piryx.com/help/#::~:~:text=There%20are%20no%20monthly%20fees,Discover)%20and%20eCheck%20processing%20fees).

With respect to the PAC's administrative and solicitation costs, the PAC proposes to deduct an additional 10-15%³ of each contribution to cover costs associated with:

- establishing the PAC,
- accounting,
- FEC reporting and recordkeeping,
- legal compliance,
- developing and maintaining the website,
- paying consultants to operate the PAC,
- communicating with and advertising to prospective donors, including the standard fees that Cowboy Analytics charges to clients for the use of the company's data, and
- other operational costs.

Continuing with the example from above of the "John Doe for President" T-shirt, the PAC would offer the T-shirt to donors if they make a \$50 contribution earmarked for Doe's presidential campaign. From that amount, the PAC will deduct a total of \$19.25:

- \$10 for the cost it pays to have each T-shirt produced and shipped to donors,
- \$1.75 for payment processing fees (i.e., 2.9% of \$50 plus 30 cents), and
- \$7.50 for the PAC's administrative and solicitation costs (i.e., 15% of \$50).

The PAC will forward the remaining \$30.75 of a donor's contribution to Doe's presidential campaign.

The PAC will operate independently of any candidates and their campaigns and will not coordinate its merchandise or solicitations with candidates, their campaigns, or agents thereof, nor will the PAC enter into any contract or other legal agreement with candidates or their campaigns.

QUESTIONS

1. Would all of the costs the PAC proposes to deduct from a donor's contribution be considered contributions to the PAC and not contributions to the designated candidate?

³ The exact percentage is tentative and is subject to change based on how much the PAC ultimately determines it needs to charge in order to cover all of these costs.

Based on AO 2019-15 (NORPAC), it appears that all of these costs would be considered contributions to the conduit PAC and not to the designated candidate's campaign.

The activity proposed in this request is similar in all material respects to the activity addressed in the NORPAC AO, with the only exception being this request's proposal to additionally offer donors political merchandise to induce them to make an earmarked contribution, and to deduct the costs of such merchandise from the contribution that is forwarded to the designated candidates.

In the context of commercial entities that process and forward contributions to candidate committees, the Commission has analyzed whether the commercial entity is providing a service to the contributor or to the candidate committee. Where the commercial entity has a contractual relationship with the candidate committee, the Commission has treated the commercial entity as providing a service to the candidate committee. In such instances, the payment processing fee that is deducted from the contribution is treated as part of the donor's contribution to the candidate committee. By contrast, where the commercial entity does not have a contractual relationship with the candidate committee, the Commission has treated the commercial entity as providing a service to the donor. In such instances, the payment processing fee that is deducted from the contribution is not treated as part of the donor's contribution.⁴

The Commission does not appear to apply this same analysis to a conduit PAC that is not commercial entity. Rather, in the NORPAC AO, the Commission determined that the payment processing, administrative, and solicitation costs the conduit PAC proposed to deduct from each earmarked contribution were contributions from the donor to the conduit PAC and not to the designated candidate.⁵ This approach makes sense. While a conduit PAC is in some broad sense providing a service to both donors and candidates, it is not acting as a commercial service provider to either. Rather, the conduit PAC is advancing its own political interests by choosing to solicit earmarked contributions for only certain candidates that the PAC supports. Where, as here, there is also no contractual relationship between the conduit PAC and the candidates it is supporting, the conduit PAC is not providing any service to the candidates or their campaign committees within the meaning of the Commission's prior advisory opinions.

⁴ See, e.g., FEC AOs 2014-07 (Crowdpac), 2012-22 (Skimmerhat), 2011-06 (Democracy Engine, LLC).

⁵ AO 2019-15 at 5.

Moreover, the costs of the proposed political merchandise in this request appear to qualify as the PAC's own "solicitation costs" under the NORPAC AO.⁶ Therefore, the merchandise costs that the PAC proposes to deduct in this request, along with all of the PAC's other payment processing, administrative, and solicitation costs that it proposes to deduct from each contribution, should be treated as donors' contributions to the PAC and not to the designated candidates or their campaign committees.⁷

2. Would the PAC's initial payment for the production and distribution of the political merchandise as described in this request qualify as in-kind contributions from the PAC to the candidates receiving the earmarked contributions?

Based on the Commission's prior advisory opinions, the PAC's initial payment for the production and distribution of the political merchandise should not be treated as loans or in-kind contributions to benefitting candidates.

As the Commission stated in AO 1994-30 (Conservative Concepts, Inc.):

The Commission has considered situations involving business ventures by corporations and other entities involving candidate or party-related merchandise. If outlays of funds, goods, or services are made by a business entity selling items and these outlays are not paid for by the campaigns benefiting, referred to, or affected, the question arises as to whether such outlays are contributions or expenditures⁸

The Commission went on to discuss AOs 1976-50 (Friends of Dick Lugar Committee) and 1989-21 (Create-a-Craft). In both AOs 1976-50 and 1989-21, commercial vendors proposed to sell political merchandise as fundraising items for candidates, and to remit a portion of sales to those candidate's campaign committees. In both AOs, the Commission determined that the vendors would be making prohibited corporate contributions or loans to the campaign committees. The Commission apparently reached those conclusions

⁶ See also 11 C.F.R. § 100.53 (providing that "the entire amount paid as the purchase price for a fundraising item sold by a political committee is a contribution"). Here, the political merchandise sold by the conduit PAC should be considered fundraising items for the PAC, and their costs should be considered contributions to the PAC itself.

⁷ In the example provided above on Page 2, when a donor purchases a \$50 "John Doe for President" T-shirt, it appears that \$19.25 (the total merchandise, payment processing, and administrative and solicitation costs that are deducted) would be considered the donor's contribution to the conduit PAC, while the remaining \$30.75 that is forwarded to Doe's presidential campaign would be considered the donor's contribution to the campaign.

⁸ AO 1994-30 at 3-4.

because the vendors would be producing and selling the merchandise pursuant to agreements with the campaign committees.⁹

By contrast, where “there is *no arrangement* whereby [a vendor] would lay out funds for advertising expenses *in coordination with* a committee and no arrangements whereby a portion of the sales proceeds will be retained by or remitted to the committee of the referenced candidate,” there is no contribution.¹⁰

As stated above, the PAC does not intend to coordinate its production and distribution of political merchandise, its advertisements, or its solicitations of earmarked contributions with the benefitting candidates, their campaign committees, or any agents thereof.¹¹ Moreover, the PAC will deduct the full costs of the merchandise (along with the PAC’s payment processing, solicitation, and administrative costs) before forwarding the remainder of earmarked contributions to the candidates designated by donors. Therefore, no “portion of the sales proceeds [for the costs of the merchandise] will be retained by or remitted to the committee of the referenced candidate.”¹²

Accordingly, the Commission should conclude that the PAC would not be making any in-kind contributions to candidates’ campaign committees through the PAC’s initial outlays for the costs of producing and distributing the political merchandise. The fact that the PAC is not a vendor (the type of entity addressed in AO 1994-30) should not make a difference to the analysis.

Moreover, assuming the Commission determines in response to Question 1 that the portion of earmarked contributions that the PAC deducts for merchandise costs is a contribution from the donor to the PAC, it also logically follows that the PAC’s initial outlay for those costs is not a contribution to any candidate’s campaign committee. To wit,

⁹ See AO 1976-50 at 1 (“Friends of Dick Lugar Committee (Committee) *has authorized* Logo 7, Inc., and [*sic*] Indiana corporation, to produce and market a shirt bearing the candidate’s name.”) (emphasis added); AO 1989-21 at 1 (“*You are proposing to candidates and committees . . . that their campaigns use merchandise designed by you for the purpose of raising funds.*”) (emphasis added).

¹⁰ AO 1994-30 at 5 (emphasis added).

¹¹ In the event that the PAC determines it is necessary to communicate with candidates or their campaign committees “only in order to avoid a legal conflict over trademark or other trade usage,” this should not be considered coordination. See *id.* at 6. The PAC does not intend to produce merchandise that would constitute the “republication of campaign materials” under 11 C.F.R. § 109.23, and, in any event, we are aware that certain Commissioners have questioned the validity of this rule.

¹² AO 1994-30 at 5.

if the merchandise costs are treated as the PAC's own solicitation or "fundraising item" costs, those are not any costs of the candidate's campaign committee that the PAC is paying for.

3. Would the PAC have to report the costs of producing and distributing political merchandise that includes express advocacy language as independent expenditures?

The PAC should not have to report the costs of producing and distributing political merchandise as IEs because the donors are ultimately paying for these costs.

As a threshold matter, the Commission's rules define an IE as "*a communication expressly advocating the election or defeat of a clearly identified candidate*" that is not coordinated.¹³ Notably, unlike some other Commission rules, the IE definition does not use the term "public communication," which is a further and specifically defined term.¹⁴ The Commission's use of an incongruent and undefined term in the IE definition often creates confusion for the so-called "regulated community." Here, it is unclear whether the proposed political merchandise would qualify as independent expenditures.

In AO 1994-30 (Conservative Concepts, Inc.), the Commission raised the prospect that a commercial vendor's production of T-shirts bearing express advocacy language for sale to the general public could constitute IEs, but ultimately concluded that the activity may "fall within the category of commercial, rather than political, activity."¹⁵

Here, the proposed PAC would not be acting as a commercial vendor and would be soliciting earmarked contributions for candidates that the PAC supports. Therefore, the proposed activity here does not appear to fall within the Commission's commercial activities doctrine. Nonetheless, unlike in AO 1994-30, where the sale of the T-shirts was not being used as any fundraising item cost to raise money for candidates, here, the proposal is to have the donors ultimately pay for the costs of the political merchandise by deducting the costs from the earmarked contributions for the candidates.

Therefore, even assuming the merchandise containing express advocacy language is considered a "communication" under the IE definition, the PAC is ultimately not making any expenditures for the items. Assuming the Commission's answer to Question 1 is that the costs that are deducted for the merchandise from the earmarked contributions are contributions from the donor to the PAC, it would make no sense for those costs also to be

¹³ 11 C.F.R. § 100.16(a) (emphasis added).

¹⁴ *Id.* § 100.26.

¹⁵ AO 1994-30 at 5.

treated as the PAC's IEs. Under the logic of the regulatory scheme, a cost cannot be both a contribution to the PAC and an IE by the PAC. And even if the merchandise bearing express advocacy language were considered IEs, it would be more proper to treat them as IEs made by the individual contributors, since they are the ones ultimately making the expenditures for the items (because the PAC is deducting the full cost of the merchandise from the donors' contributions).

In a 2011 interpretive rule on reporting IEs, the Commission assumed that certain items, including T-shirts and hats, could be IE "communications" as a general matter if they included express advocacy language.¹⁶ However, the interpretive rule did not address the particular question presented here: Whether items that are sold for fundraising are reportable as IEs.

4. Would the PAC have to report its costs of soliciting donors to make earmarked contributions as independent expenditures?

Based on the literal definition of an "independent expenditure," the PAC should not have to report its costs of soliciting donors to make earmarked contributions as IEs.

This issue has been a longstanding and profound source of confusion in the so-called "regulated community" and within the Commission itself. As discussed above regarding Question 3, the Commission's rules define an IE as "a communication expressly advocating *the election or defeat* of a clearly identified candidate" that is not coordinated.¹⁷ The IE definition does not encompass advocacy for the "funding," "fundraising," or "financing" of a clearly identified candidate. The term "express advocacy" also has been litigated numerous times over the past 40-plus years and, to our knowledge, has never been construed to extend to fundraising solicitations.

This issue also was presented to the Commission in a pair of 2008 election-cycle audits of The Legacy Committee and National Campaign Fund. In those matters, the Commissioners did not approve by an affirmative four votes the position taken by the Audit Division, Office of General Counsel ("OGC"), and certain Commissioners that committees' fundraising expenses are reportable as IEs. Therefore, the issue was set aside as an "Additional Issue" in the audits.¹⁸ The Commissioners who voted against finding that

¹⁶ Interpretive Rule on When Certain Independent Expenditures Are "Publicly Disseminated" for Reporting Purposes, 76 Fed. Reg. 61254 (Oct. 4, 2011).

¹⁷ 11 C.F.R. § 100.16(a) (emphasis added).

¹⁸ See Final Audit Report on The Legacy Committee Political Action Committee (Jan. 1, 2007-Dec. 31, 2008), at https://www.fec.gov/resources/legalresources/enforcement/audits/2008/The_Legacy_Committee_Pol

fundraising solicitations are reportable IEs represent the “controlling” position of the Commission until that position is overturned or otherwise superseded.¹⁹ To our knowledge, the Commission has not revisited this issue since those audits and has not superseded the position established by those deadlocks.

The controlling Commissioners’ position also makes sense. Insofar as fundraising for Senate and House candidates long ago became nationalized, fundraising solicitations are often sent to donors outside of a candidate’s state or district. And this is especially so for solicitations made by independent organizations. It makes no sense to treat solicitations for contributions to a Senate candidate running in New York sent to donors in California as expressly advocating for the candidate’s election, since the organization sending such solicitations clearly is not asking for votes from California donors who are ineligible to vote for the candidate.

For these reasons, the PAC should not have to report its solicitation costs as IEs.

5. Would the Commission’s analysis for Questions 1-4 change if the PAC were to separate the sale of political merchandise from the making of earmarked contributions?

As an alternative to, or in addition to, the proposal described above, the PAC also is considering making solicitations for donors to purchase political merchandise that are decoupled from making an earmarked contribution to a designated candidate. Rather, after a donor completes a purchase of merchandise on the PAC’s website, the PAC would suggest that the donor make an optional earmarked contribution to a designated candidate using the PAC’s website.

[itical Action Committee/FinalAuditReportoftheCommission1223257.pdf](#); OGC Memo. on LRA #815 (May 4, 2011), *at*

https://www.fec.gov/resources/legalresources/enforcement/audits/2008/The_Legacy_Committee_Political_Action_Committee/OfficeofGeneralCounselLegalAnalysisInterimAuditReportoftheAuditDivision1223249.pdf; Final Audit Report on the National Campaign Fund (Feb. 4, 2008-Dec. 31, 2008), *at*

https://www.fec.gov/resources/legalresources/enforcement/audits/2008/National_Campaign_Fund/FinalAuditReportoftheCommission1229188.pdf; OGC Memo. on LRA #847 (May 2, 2012), *at*

https://www.fec.gov/resources/legalresources/enforcement/audits/2008/National_Campaign_Fund/OfficeofGeneralCounselLegalAnalysis-DraftFinalAuditReportoftheAuditDivision1229183.pdf;

Statement of Vice Chair Ellen L. Weintraub and Commissioners Cynthia L. Bauerly and Steven T. Walther on A09-26 (Nov. 6, 2012), *at*

https://www.fec.gov/resources/legalresources/enforcement/audits/2008/National_Campaign_Fund/NCFStatementComplete3.pdf.

¹⁹ *FEC v. Nat’l Republican Senatorial Comm.*, 966 F.2d 1471, 1476 (D.C. Cir. 1992).

Based on how the PAC believes the Commission would answer the questions presented above, under this scenario:

- (1) The PAC would treat the entire cost of the donor's purchase of the merchandise as a contribution from the donor to the PAC. The PAC would assume the payment processing, administrative, and solicitation costs associated with the transaction.

If a donor chooses to make an optional earmarked contribution to a designated candidate after completing his or her purchase of merchandise, the PAC would deduct Piryx's standard payment processing cost (as described above in the background section) before forwarding the remainder of the contribution to the designated candidate's campaign. The PAC would treat the deducted payment processing cost as a contribution to the PAC, and the remaining amount as the donor's contribution to the designated candidate. The PAC would inform the donor of this breakdown before the donor completes his or her contribution.

For example, if a donor makes an optional \$100 contribution earmarked for a candidate after purchasing a political merchandise item, the PAC will deduct \$3.20 for Piryx's processing costs (2.9% of \$100 plus 30 cents) and forward the remaining \$96.80 to the designated candidate. Based on the NORPAC AO, it is our understanding that the donor's optional \$100 contribution earmarked for a candidate will result in an \$8.20 contribution from the donor to the PAC, and a \$96.80 contribution to the designated candidate.

The PAC would not deduct any additional amounts for its administrative and solicitation costs from the optional contribution earmarked to a candidate under this alternative scenario because the additional solicitation is incidental to the underlying solicitation to purchase the political merchandise. Again, we assume the full amount of the initial transaction (i.e., to purchase the merchandise) would be treated as a contribution to the PAC, and the PAC would bear the full administrative and solicitation costs (e.g., identifying prospective donors and communicating with them) for that initial transaction. The cost of the additional solicitation for an optional earmarked contribution for a candidate would be negligible and we do not believe it would be fair to deduct an additional amount for the PAC's administrative and solicitation costs from that optional contribution earmarked for a candidate.

- (2) The PAC's payment for the production and distribution of the political merchandise would not qualify as in-kind contributions from the PAC if donors

choose to make optional earmarked contributions to designated candidates after purchasing the merchandise.

Again, the PAC is not coordinating any of its activities, including its production, promotion, and distribution of the political merchandise with any candidates, their campaigns, or agents thereof.

- (3) The PAC would not have to report the costs of producing and distributing political merchandise that includes express advocacy language as IEs.

Again, the merchandise does not clearly qualify as a “communication” under the Commission’s IE definition. Moreover, assuming the Commission confirms our understanding that the PAC’s cost of the merchandise is the donor’s contribution to the PAC when they purchase the merchandise from the PAC, the cost of the merchandise cannot be both a contribution to the PAC and an IE by the PAC.

- (4) The PAC would not have to report the costs of soliciting donors either to purchase the merchandise or to make optional earmarked contributions to designated candidates as IEs.

Again, these are fundraising costs, and solicitations for contributions to candidates or to purchase the PAC’s merchandise are not appeals for the donor to vote for or against any referenced candidate.

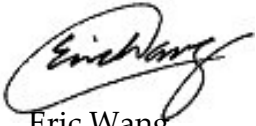
We ask the Commission to confirm our understanding of these points under the alternative scenario in which the sale of political merchandise is decoupled from the making of earmarked contributions.

6. Would the PAC’s proposed activities violate the Federal Election Campaign Act of 1971, as amended (“FECA”) or the Commission’s implementing regulations in any way?

The PAC’s proposed activities as described above do not appear to violate the FECA or the Commission’s regulations in any manner, but we would appreciate the Commission’s confirmation. Additionally, if there are any non-obvious FECA-related concerns (e.g., related to reporting or disclaimers) that the Commission wishes to flag about the PAC’s proposed activities that are not addressed in the questions presented above, we would welcome such guidance.

Thank you in advance for your consideration of these questions. Please do not hesitate to contact me if there are any points in this request that need clarification.

Sincerely,

A handwritten signature in black ink, appearing to read "Eric Wang". The signature is written in a cursive, flowing style with a large initial "E" and "W".

Eric Wang

Counsel to Cowboy Analytics

Joanna Waldstreicher

From: Eric Wang <ew@gobergroup.com>
Sent: Tuesday, October 31, 2023 5:22 PM
To: Joanna Waldstreicher
Subject: RE: Cowboy Analytics advisory opinion request

Joanna,

Thank you for clarifying those two points. Your e-mail below accurately summarizes what Cowboy Analytics is proposing and asking about.

Eric Wang | Partner | The Gober Group
ew@gobergroup.com | 202.417.3528

If you need to schedule a call with me, you can compare our schedules and book it [here](#)



From: Joanna Waldstreicher <JWaldstreicher@fec.gov>
Sent: Tuesday, October 31, 2023 5:04 PM
To: Eric Wang <ew@gobergroup.com>
Subject: Cowboy Analytics advisory opinion request

Dear Mr. Wang:

Thank you for speaking with us this afternoon to clarify your advisory opinion request on behalf of Cowboy Analytics. We would like to verify our understanding of the information we discussed. Please respond to this email to confirm the accuracy of the information below, or to clarify or correct any information as necessary. Please note that your response may become part of the advisory opinion request. If so, it will be posted on the Commission's website.

1. The proposal described on pages 1-3 of the request (scenario 1) and the proposal described in Question 5 (scenario 2) are both business models that Cowboy Analytics is seriously considering implementing in good faith. Scenario 2 is not a fallback option to be used only if Scenario 1 is not available. Both scenarios may be implemented concurrently. Therefore even if the Commission's responses to Questions 1-4 are favorable to Cowboy Analytics, Question 5 would not be moot.
2. On page 10, in the fourth paragraph, the final sentence should read ". . . the donor's optional \$100 contribution earmarked for a candidate will result in a \$3.20 contribution from the donor to the PAC, and a \$96.80 contribution to the designated candidate," correcting the \$3.20 contribution, which was previously stated as \$8.20.

Regards,
Joanna S. Waldstreicher
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