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October 9, 2024

MEMORANDUM

TO: The Commission

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Subject: AO 2024-14 (DSCC and Rosen for Nevada)
Revised Draft B

Attached is a proposed draft of the subject advisory opinion. We have been asked to place this draft on the Agenda by one or more Commissioners.

Members of the public may submit written comments on the draft advisory opinion. We are making this draft available for comment until 9:00am (Eastern Time) on October 10, 2024.

Members of the public may also attend the Commission meeting at which the draft will be considered. The advisory opinion requestor may appear before the Commission at this meeting to answer questions.

For more information about how to submit comments or attend the Commission meeting, go to <https://www.fec.gov/legal-resources/advisory-opinions-process/>.

Attachment

1 ADVISORY OPINION 2024-14

2
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4 Jonathan A. Peterson, Esq.

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7 250 Massachusetts Ave., NW

8 Suite 400

9 Washington, DC 20001

REVISED DRAFT B

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11
12 Dear Counsel:

13 We are responding to the advisory opinion request you submitted on behalf of the
14 Democratic Senatorial Campaign Committee (“DSCC”) and Rosen for Nevada, regarding
15 the application of the Federal Election Campaign Act, 52 U.S.C. §§ 30101-45 (the
16 “Act”), and Commission regulations to certain proposed hybrid television advertisements
17 that DSCC and Rosen for Nevada would like to disseminate for the upcoming 2024
18 general election. Requestors ask whether they may evenly split the cost of hybrid
19 television advertisements that clearly identify Senator Rosen and equally promote on a
20 time/space basis her candidacy for U.S. Senate and generic candidates of the Democratic
21 Party and, for three proposed advertisements, whether certain audio and visual
22 components of the advertisements serve as party or candidate advocacy.

23 The Commission concludes that DSCC and Rosen for Nevada may evenly split
24 the cost of hybrid television advertisements so long as the time and space devoted to
25 Senator Rosen does not exceed the time and space in the advertisement devoted to the
26 generically referenced candidates. The Commission further concludes that, regarding
27 advertisement (A), the content of the advertisement featuring Senator Rosen or narrated
28 by Senator Rosen must be treated as candidate advocacy; regarding advertisement (B),
29 the phrase “greedy politicians” and the visual of pharmaceutical executives are not

allocable as party advocacy; and regarding advertisement (C), the proposed audio and visual references to Donald J. Trump, a federal candidate for U.S. President, are not allocable as party advocacy.

Background

The facts presented in this advisory opinion are based on your letter received on September 18, 2024, attached exhibits, and publicly available information.

DSCC is a national party committee of the Democratic Party, dedicated to electing Democrats to the U.S. Senate.¹ Rosen for Nevada is the principal campaign committee of U.S. Senator Jacky Rosen, who currently represents Nevada and is a candidate for reelection in the 2024 general election.²

DSCC and Rosen for Nevada plan to split the costs of hybrid television advertisements disseminated in Nevada (between September 18, 2024, and November 5, 2024). They do not provide specific scripts for such advertisements but they describe them as advertisements that will clearly identify Senator Rosen and “equally promote” on a time/space basis “Senator Rosen’s candidacy for the U.S. Senate (either through advocacy for her or against her opponent) and generic candidates of the Democratic party (either through advocacy for generic Democratic candidates or against generic Republican candidates).”³ They plan to split the costs of such advertisements equally on

¹ See Advisory Opinion Request (“AOR”) at AOR003; DSCC, Statement of Organization, FEC Form 1 (June 25, 2024), <https://docquery.fec.gov/pdf/369/202406259652490369/202406259652490369.pdf>.

² See AOR003; Rosen for Nevada, Statement of Organization, FEC Form 1 (Sept. 5, 2024), <https://docquery.fec.gov/pdf/692/202409059675370692/202409059675370692.pdf>.

³ AOR004.

1 the “assum[ption] that the basic framework laid out in Advisory Opinion 2006-11
2 [(Washington Democratic State Central Committee)] applies.”⁴

3 Requestors also have provided proposed audio and visual scripts for three specific
4 advertisements. The proposed advertisements are reprinted in the tables below.

5 Table 1: Advertisement (A)⁵

Audio	Visual
Democrats passed Medicare 60 years ago and are still protecting it today. Giving our seniors a safety net if they get sick and need care. <i>(spoken by Senator Rosen)</i>	Senior citizens in doctor’s office; pharmacy
Republicans like Sam Brown? They will prioritize big pharma and gut Medicare. Profits over care. No more safety net if you get sick. <i>(spoken by Senator Rosen)</i>	Senator Rosen to camera Images of big pharma execs, profit charts
I will always put our Seniors first and protect Medicare. <i>(spoken by Senator Rosen)</i>	Senator Rosen to camera

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⁴ *Id.*

⁵ *See* AOR008.

1 Table 2: Advertisement (B)⁶

Audio	Visual
Pharmaceutical costs are through the roof, making it hard to afford basic care. <i>(spoken by generic non-candidate voiceover)</i>	Doctor and patient in hospital setting
Greedy politicians don't care. They will prioritize big pharma's profits and won't fight to lower your costs. <i>(spoken by generic non-candidate voiceover)</i>	Pharmaceutical executives in suits; graphs of profit margins
Senator Rosen will always fight for you, voting to cap insulin prices and fighting against big pharma to protect your care. <i>(spoken by generic non-candidate voiceover)</i>	B-roll of Senator Rosen with seniors

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⁶ AOR009.

1 Table 3: Advertisement (C)⁷

Audio	Visual
Republicans pushed for the overturn of Roe v. Wade. Now, women’s reproductive rights are under attack. <i>(spoken by generic non-candidate voiceover)</i>	Video of anti-abortion protests; newspaper headlines on abortion bans
Sam Brown? He’s just another vote for a nationwide abortion ban. <i>(spoken by generic non-candidate voiceover)</i>	Newspaper headlines on proposed national abortion ban; image of Sam Brown
Don’t let Sam Brown and Donald Trump take away your rights. <i>(spoken by generic non-candidate voiceover)</i>	Photos of Sam Brown and Donald Trump

2
3 ***Questions Presented***

4
5 1. *May Requestors evenly split the cost of hybrid television advertisements that*
6 *clearly identify Senator Rosen and equally promote on a time/space basis Senator*
7 *Rosen’s candidacy for the U.S. Senate (either through advocacy for her or against her*
8 *opponent) and generic candidates of the Democratic party (either through advocacy for*
9 *generic Democratic candidates or against generic Republican candidates)?*

10 2. *With respect to proposed Advertisement (A), do portions of the hybrid*
11 *advertisement that feature the clearly identified candidate direct to camera*

⁷ AOR010.

1 *and/or are narrated by the candidate need to be allocated as candidate advocacy?*

2 3. *With respect to Advertisement (B), is the phrase “greedy politicians” and the*
3 *visual of pharmaceutical executives in suits sufficient to serve as the audio and visual*
4 *references to generic candidates of the Republican Party, and thus, allocable as party*
5 *advocacy?*

6 4. *With respect to Advertisement (C), can audio or visual references to Donald*
7 *Trump qualify as a reference to generic candidates of the Republican Party, allocable as*
8 *party advocacy?*

9 ***Legal Analysis***

10 1. *May Requestors evenly split the cost of hybrid television advertisements that*
11 *clearly identify Senator Rosen and equally promote on a time/space basis Senator*
12 *Rosen’s candidacy for the U.S. Senate (either through advocacy for her or against her*
13 *opponent) and generic candidates of the Democratic party (either through advocacy for*
14 *generic Democratic candidates or against generic Republican candidates)?*

15 Yes, Requestors may evenly split the cost of a hybrid television advertisement
16 that clearly identifies Senator Rosen and equally promotes on a time/space basis Senator
17 Rosen’s candidacy for the U.S. Senate (either through advocacy for her or against her
18 opponent) and generic candidates of the Democratic party (either through advocacy for
19 generic Democratic candidates or against generic Republican candidates) provided that
20 the time and space devoted to Senator Rosen will actually be equal to the time and space
21 devoted to the generically referenced congressional candidates.⁸

⁸ AOR004.

Neither the Act nor Commission regulations definitively address the appropriate allocation of payments for the type of communication (hybrid television advertisements) proposed in this request. Commission regulations at 11 C.F.R. part 106 include both general allocation rules and rules for allocating specific types of expenses in particular circumstances. Section 106.1(a) provides the general rule that expenditures made on behalf of *more than one* clearly identified candidate “shall be attributed to each such candidate according to the benefit reasonably expected to be derived.”⁹ For a broadcast communication, the “attribution shall be determined by the proportion of space or time devoted to each candidate as compared to the total space or time devoted to all candidates.”¹⁰ A candidate is clearly identified if his or her name or likeness appears or if his or her identity is apparent by unambiguous reference.¹¹ However, the expenditures for the advertisements at issue here are being made on behalf of only one clearly identified candidate, Senator Rosen, and the references to “Democrats” and “Republicans” do not clearly identify any other specific candidates.¹² Thus, section 106.1 does not apply.

Commission regulations at 11 C.F.R. § 106.8 (which apply only to phone banks conducted by a party committee) do address the attribution required for a communication

⁹ 11 C.F.R. § 106.1(a).

¹⁰ *Id.*

¹¹ *See* 52 U.S.C. § 30101(18); 11 C.F.R. §§ 106.1(d), 100.17.

¹² *See also* Advisory Opinion 2004-33 (Ripon Society) at 4 (determining, for purposes of electioneering communication regulation under 11 C.F.R. § 100.29(b)(2), that reference to “Republicans in Congress” in advertisement did “not constitute an unambiguous reference to any specific Federal candidate”).

1 that possesses the same attributes as some of the broadcast advertisements described in
2 the request (*i.e.*, reference to only one clearly identified federal candidate along with a
3 generic reference to other party candidates; and no solicitation of funds).¹³ Under this
4 regulation, a flat 50 percent of the costs of a phone bank communication must be
5 attributed to the clearly identified candidate, and the other 50 percent must be attributed
6 to the party committee, regardless of the amount of time devoted to each.¹⁴ However, the
7 Commission’s Explanation and Justification (“E & J”) of this regulation specifically
8 noted that the Commission had considered whether to include other forms of
9 communications, such as broadcast media, within the regulation’s coverage but “decided
10 to limit the scope of new section 106.8 to phone banks . . . because each type of
11 communication presents different issues that need to be considered in further detail
12 before establishing new rules.”¹⁵

13 Although neither section 106.1 nor section 106.8 definitively addresses the
14 appropriate allocation of payments for the type of hybrid broadcast advertisements
15 described in this request, the Commission previously addressed a similar issue in
16 Advisory Opinion 2006-11 (Washington Democratic State Central Committee). There,
17 the Commission considered hybrid mass mailings that expressly advocated for the
18 election of only one clearly identified federal candidate, as well as the election of
19 generically referenced candidates of the same party, but no other clearly identified

¹³ See 11 C.F.R. § 106.8(a).

¹⁴ See *id.* § 106.8(b).

¹⁵ Party Committee Telephone Banks, 68 Fed. Reg. 64517, 64518 (Nov. 14, 2003).

1 candidates.¹⁶ The Commission concluded that the mailings largely served the purpose of
2 influencing the election of the clearly identified federal candidate, no matter how much of
3 the space in the mailing was devoted to that candidate.¹⁷ The Commission further
4 concluded that “[a]dvocacy related to the election of the clearly identified candidate is the
5 most salient feature of such a communication, as compared to the generic reference to the
6 party’s candidates, which does not single out any particular candidate to the reader.”¹⁸
7 Accordingly, because the benefit reasonably expected to be derived favored the clearly
8 identified candidate, the Commission concluded that no less than 50 percent of the costs
9 of the mailings needed to be attributed to the candidate.¹⁹ Additionally, where the space
10 in the mailing devoted to the clearly identified candidate exceeded 50 percent, the
11 Commission concluded that the costs attributed to the candidate should reflect the relative
12 proportion of space devoted to the candidate.²⁰ Consequently, the Commission
13 concluded that the state party committee and the principal campaign committee of the
14 clearly identified federal candidate could each pay 50 percent of the costs of the mailing
15 “so long as the space devoted to the candidate in the mailing [did] not exceed the space in
16 the mailing devoted to the generically referenced candidates.”²¹

¹⁶ See Advisory Opinion 2006-11 (Washington Democratic State Central Committee) at 4.

¹⁷ *Id.*; see also 52 U.S.C. §§ 30101(8)(A)(i), (9)(A)(i); 11 C.F.R. § 100.52(a); 11 C.F.R. § 100.111(a).

¹⁸ Advisory Opinion 2006-11 (Washington Democratic State Central Committee) at 4.

¹⁹ *Id.* at 2-3, 4.

²⁰ *Id.* at 3, 4.

²¹ *Id.* at 2.

1 Here, Requestors seek to evenly split the cost of broadcast advertisements that
2 will “equally promote” on a time/space basis “Senator Rosen’s candidacy for the U.S.
3 Senate (either through advocacy for her or against her opponent) and generic candidates
4 of the Democratic party (either through advocacy for generic Democratic candidates or
5 against generic Republican candidates).”²² The Commission concludes that the
6 framework utilized in Advisory Opinion 2006-11 (Washington Democratic State Central
7 Committee) provides an appropriate way to allocate the costs as proposed, given
8 Requestors’ assurance that the time/space balance in their proposed television
9 advertisements will be equally divided between the clearly identified federal candidate
10 (Senator Rosen) and the generically referenced candidates.

11 2. *With respect to proposed Advertisement (A), do portions of the hybrid*
12 *advertisement that feature the clearly identified candidate direct to camera and/or are*
13 *narrated by the candidate need to be allocated as candidacy advocacy?*

14 Yes, the content of the advertisement that features Senator Rosen narrating or
15 speaking directly to the camera, should be allocated as candidate advocacy.

16 As Requestors acknowledge in their request,²³ under the Commission’s analysis
17 in Advisory Opinion 2006-11 (Washington Democratic State Central Committee),
18 discussed in greater detail above, the “[a]dvocacy related to the election of the clearly
19 identified candidate is the most salient feature” of that portion of the advertising.²⁴ In

²² AOR004.

²³ AOR005 (“[M]ust both of these portions of advertisement [A] be treated as candidate advocacy? . . . Requestors assume the answer to this question is yes.”)

²⁴ See Advisory Opinion 2006-11 (Washington Democratic State Central Committee) at 4.

1 Respondents’ proposed Advertisement (A), the entire advertisement is either narrated by
2 or directly featuring the clearly identified candidate, Senator Rosen.²⁵

3 In the context of hybrid mass mailings, the Commission found that “[w]here the
4 space in the mailing devoted to the clearly identified Federal candidate exceeds the space
5 devoted to the generically referenced party candidates . . . it is appropriate to apply
6 analogous ‘space or time’ principles set out in 11 CFR § 106.1(a).”²⁶ Similarly, the
7 Commission finds this method appropriate to apply in the instant matter. In proposed
8 Advertisement (A), the benefit reasonably expected to be derived from the content
9 provided to the Commission in the request is completely attributable to Senator Rosen
10 and should be allocated as candidate advocacy.

11 3. *With respect to proposed Advertisement (B), is the phrase “greedy*
12 *politicians” and the visual of pharmaceutical executives in suits sufficient to serve as the*
13 *audio and visual references to generic candidates of the Republican Party, and, thus,*
14 *allocable as party advocacy?*

15 No, the phrase “greedy politicians” and the visual of pharmaceutical executives in
16 suits are not sufficient to serve as the audio and visual references to generic candidates of
17 a political party. Therefore, these references are not allocable as party advocacy and must
18 be paid for by Rosen for Nevada.

²⁵ In *Hispanic Leadership Fund, Inc. v. FEC*, 897 F.Supp.2d 407, 430 (E.D. Va. 2012), a federal court found that a recording of President Obama’s voice, without further identification, was not a “contextually unambiguous reference to President Obama.” Here, by contrast, Senator Rosen’s narration precedes her appearance on camera. Accordingly, the Commission determines that Senator Rosen is a clearly identified candidate throughout the advertisement.

²⁶ See Advisory Opinion 2006-11 (Washington Democratic State Central Committee) at 4.

Neither the Act nor Commission regulations define a “generic candidate” of a political party. As mentioned above, one relevant Commission regulation to address hybrid communications explicitly is the phone bank regulation at 11 C.F.R. § 106.8, which allows an allocation when there is a reference to a clearly identified candidate along with “another reference that generically refers to other candidates of the Federal candidate’s party without clearly identifying them,” the so-called “generic party reference.”²⁷ The rule “reflect[s] that such communications benefit both the candidate and the party.”²⁸

The regulation does not define generic party reference, but the rulemaking’s E & J states that “[g]eneric references to ‘our great Republican team’ or ‘our great Democratic ticket’ would satisfy the [generic reference] requirement.”²⁹ But, as noted above the E & J cabined the regulation’s scope to phone banks “because each type of communication presents different issues that need to be considered in further detail before establishing new rules.”³⁰

Then, as discussed previously, in Advisory Opinion 2006-11 (Washington Democratic State Central Committee), the Commission extended the hybrid-communication allocation rules to mass mailings. There, the Commission noted, via

²⁷ This regulation provides that a flat 50% allocation is appropriate regardless of the space or time devoted to the clearly identified Federal candidate. 11 C.F.R. § 106.8.

²⁸ Party Committee Telephone Banks, 68 Fed. Reg. at 64517.

²⁹ *Id.* at 64518. In a later, now-dormant rulemaking, the Commission proposed amending 11 C.F.R. § 106.8 to apply to all public communications as defined in 11 C.F.R. § 100.26, and, among other things, define “generic party reference” in a public communication. *See Hybrid Communications*, 72 Fed. Reg. 26569, 26571 (May 10, 2007).

³⁰ Party Committee Telephone Banks, 68 Fed. Reg. at 64518.

1 example, that “[v]ote for John Doe and our great Democratic team” — a reference similar
2 to the examples given in the phone bank E & J — would qualify as a communication that
3 advocates the election of a clearly identified Federal candidate and other candidates of
4 the Democratic Party who are referred to only generically.³¹ At the same time, the
5 Commission has never stated that the generic party reference must use the specific or
6 official names of the political party being advocated for or against in the advertisement.
7 A hybrid advertisement may make a generic party reference through other words, images,
8 or means, such as referring generally to candidates that share the political party’s
9 ideology, displaying an array of party leaders who are not on the ballot in the relevant
10 jurisdiction, or using a party’s historical nickname.

11 Here, however, the audio phrase “greedy politicians” and visual of
12 pharmaceutical executives do not amount to generic references to any political party.
13 Allocation between a candidate and their party has been permitted previously because the
14 communication’s message is reasonably expected to bestow a benefit to the party as a
15 whole in addition to the candidate.³² The phrase “greedy politicians” refers to all
16 politicians and, therefore, is not a placeholder for candidates of any particular political
17 party. Nor does the added visual of pharmaceutical executives convey a message that is
18 associated with or a reference to one political party or its candidates generally. Therefore,
19 because the proposed audio and visual components in Advertisement (B) do not make

³¹ See Advisory Opinion 2006-11 (Washington Democratic State Central Committee) at 1 & n.1.

³² See Party Committee Telephone Banks, 68 Fed. Reg. at 64517 (explaining that the allocation rule for hybrid telephone banks “reflect[s] that such communications benefit both the candidate and the party”); see also 11 C.F.R. § 106.1(a)(1) (allowing allocation of expenditures between candidates “according to the benefit reasonably expected to be derived”).

clear that they are referring generically to candidates of any particular party, they cannot be allocable as party advocacy.

4. *With respect to Advertisement (C), can audio or visual references to Donald Trump qualify as a reference to generic candidates of the Republican Party, allocable as party advocacy.*

No, neither the audio nor visual references to Donald Trump as presented in Advertisement (C) qualify as references to generic candidates of the Republican Party. Thus, they are not allocable as party advocacy and must be paid for by Rosen for Nevada.

The Commission previously considered a similar question in a series of related Matters Under Review (“MUR”) from the 2016 election cycle. In those MURs, the Foundation for Accountability and Civic Trust had filed complaints against, as relevant here, the Democratic Congressional Campaign Committee (“DCCC”) and the campaigns committees of 14 Democrat congressional candidates.³³ The MURs involved 15 television advertisements that referenced one of the 14 Democrat candidates, the Democrat candidate’s Republican opponent, and then-Republican-presidential candidate Donald Trump.³⁴ The complaints alleged that the respondents violated the Act by improperly treating the advertisements as hybrid television advertisements and allocating costs between DCCC and the relevant Democrat congressional candidate.³⁵ In finding no

³³ See, e.g., Factual & Legal Analysis Cover Letter, MUR 7169 (Santasiero for Congress) (Nov. 22, 2017), <https://www.fec.gov/files/legal/murs/7169/17044432788.pdf>.

³⁴ See, e.g., Factual & Legal Analysis at 2, MUR 7169 (Santasiero for Congress) (Nov. 22, 2017), <https://www.fec.gov/files/legal/murs/7169/17044432804.pdf>.

³⁵ See, e.g., Complaint at 1-4, MUR 7169 (Santasiero for Congress) (Oct. 24, 2016), <https://www.fec.gov/files/legal/murs/7169/17044432655.pdf>; Factual & Legal Analysis, MUR 7169 at 4 n.8 (Nov. 22, 2017), <https://www.fec.gov/files/legal/murs/7169/17044432804.pdf>.

1 reason to believe that the respondents violated the Act, the Commission explained that,
2 although the advertisements did not qualify as hybrid television advertisements because
3 “there [we]re no generic references, such as ‘Democrats’ or ‘Republicans,’ in any of the
4 15 ads at issue,” the respondents nevertheless could allocate the expenses under 11
5 C.F.R. § 106.1(a),³⁶ which allows allocation for expenditures made on behalf of more
6 than one clearly identified federal candidate.

7 In keeping with the Commission’s conclusion in these MURs, the Commission
8 hereby concludes that Advertisement (C)’s reference to Donald Trump does not
9 constitute a generic party reference. Like in the relevant MURs, Donald Trump is a
10 current candidate for federal office in the 2024 cycle and will be on the ballot in the
11 jurisdiction where the advertisements are run, suggesting that the benefit of such a
12 reference is reasonably expected to accrue to the Democratic presidential candidate, not
13 to the party as a whole. No other audio or visual elements related to the reference to
14 Donald Trump can be reasonably interpreted as referring to Republican candidates
15 generally. Therefore, in Requestors’ proposed Advertisement (C), audio and visual
16 references to Donald Trump do not qualify as generic party references and, for that
17 reason, cannot be allocated as party advocacy.

18 This response constitutes an advisory opinion concerning the application of the
19 Act and Commission regulations to the specific transaction or activity set forth in your
20 request.³⁷ The Commission emphasizes that, if there is a change in any of the facts or

³⁶ See, e.g., Factual & Legal Analysis at 4 n.8, 9-10, MUR 7169 (Santasiero for Congress) (Nov. 22, 2017), <https://www.fec.gov/files/legal/murs/7169/17044432804.pdf>.

³⁷ See 52 U.S.C. § 30108.

1 assumptions presented, and such facts or assumptions are material to a conclusion
2 presented in this advisory opinion, then the requestor may not rely on that conclusion as
3 support for its proposed activity. Any person involved in any specific transaction or
4 activity which is indistinguishable in all its material aspects from the transaction or
5 activity with respect to which this advisory opinion is rendered may rely on this advisory
6 opinion.³⁸ Please note that the analysis or conclusions in this advisory opinion may be
7 affected by subsequent developments in the law including, but not limited to, statutes,
8 regulations, advisory opinions, and case law. Any advisory opinions cited herein are
9 available on the Commission's website.

10 On behalf of the Commission,

11
12 Sean J. Cooksey,

13 Chairman
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³⁸ See *id.* § 30108(c)(1)(B).