



FEDERAL ELECTION COMMISSION
Washington, DC 20463

MEMORANDUM

TO: The Commission

FROM: Office of the Commission Secretary *LC*

DATE: April 06, 2021

SUBJECT: AO 2021-04 (Pray.com) Draft A

Attached is a comment received from Campaign Legal Center.

This matter will be discussed on the April 8, 2021 Open Meeting

Agenda.

Attachment

RECEIVED

By Office of the Commission Secretary at 10:17 am, Apr 06, 2021



April 6, 2021

Lisa J. Stevenson, Esq.
Acting General Counsel
Federal Election Commission
1050 First Street NE
Washington, DC 20463
Submitted via ao@fec.gov

Re: Advisory Opinion 2021-04 (Pray.com), Draft A

Dear Ms. Stevenson,

Campaign Legal Center respectfully submits the following comments regarding Draft A of Advisory Opinion 2021-04.

Draft A's main conclusion is that the proposed communications are not "public communications" because they are not distributed on another person's internet site for a fee. Even assuming the Commission can create regulatory exemptions to the statutory definition of coordination,¹ there are three major problems with Draft A's analysis.

First, Draft A fundamentally mischaracterizes the activity at issue by stating that the requestor "proposes to disseminate [candidates'] statements exclusively 'over the internet'" on a website and an app. In fact, the request explicitly states that the requestor also "promotes its product on . . . social media, television, podcasts, and many other platforms" and "may or may not" include the communications at issue "in those advertising mediums." Draft A treats such promotion as an ancillary question and relegates it to a footnote that "welcome[s]" the requestor to submit a

¹ *But see Shays v. FEC*, 528 F. 3d 914, 925-929 (D.C. Cir. 2008) (striking down Commission regulations that "directly frustrat[ed] [Congress's] purpose" by permitting coordination prohibited by statutes); *cf. CREW v. FEC*, 299 F. Supp. 3d 83 (D.D.C. 2018) (striking down Commission regulation that unlawfully narrowed statute "[i]n contravention of the broad disclosure that Congress intended").

separate advisory opinion request. But the request asks whether “*any* of this anticipated activity” (emphasis added) would be a coordinated communication. The “anticipated activity” is the requestor’s use of candidates’ statements, which includes promotion in “advertising mediums.” Draft A is therefore fatally flawed because it opines only on the initial uploading of communications, rather than analyzing them in the manner described in the request: as material the requestor “may or may not” use in a variety of formats, including advertising and other media, once uploaded. As Draft A’s footnote suggests, the conclusion might be quite different if the request were analyzed as written.

Second, Draft A provides no facts to support its conclusion that the communications would fall outside the regulatory definition of public communications. The only relevant fact even mentioned in Draft A appears to be that the requestor “operates a mobile application and website.” Draft A conclusorily repeats this fact in its analysis, stating that the requestor “proposes to disseminate Member-Candidates’ statements exclusively ‘over the internet’ on Pray.com’s own website and digital application, and not for a fee on another person’s website.”

It is unclear how Draft A determines that the site and app at issue are the requestor’s for purposes of the relevant regulation. Draft A states that the requestor “operates” the site, but this in no way establishes it as the requestor’s site. Millions of websites are “operated” by entities acting on behalf of others. Similarly, what is the requestor’s relationship to the app? And how do materials get onto either of those platforms? Does the requestor pay to have communications uploaded? The communications at issue cannot appear online by themselves; what fees does the requestor pay to have the content placed? All of these questions may bear on Draft A’s conclusion, but none of them are addressed.

Finally, Draft A discusses the requestor’s subjective intent in posting the messages in question. This portion of Draft A does not even cite, much less analyze, any statute or regulation, and the legal significance of the considerations it raises is unclear.² For example, Draft A states without citation that “matters of faith” are “less election-related” than certain other topics. Such a distinction — in addition to being highly questionable as a matter of fact and history — is not a relevant consideration under any Commission regulation of which we are aware.

² See *FEC v. Wisc. Right to Life, Inc.*, 551 U.S. 449, 468 (2007) (noting that “a test focused on . . . intent could lead to the bizarre result” that certain spending could be legal if conducted by one corporation, “while leading to criminal penalties for another”).

For these reasons, Campaign Legal Center recommends the Commission reject Draft A of Advisory Opinion 2021-04.

Respectfully submitted,

/s/ Adav Noti

Adav Noti

Erin Chlopak

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