



FEDERAL ELECTION COMMISSION
Washington, DC 20463

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By Office of the Commission Secretary at 3:03 pm, Oct 26, 2023

AGENDA DOCUMENT NO. 23-23-A
AGENDA ITEM
For meeting of Nov. 2, 2023

October 26, 2023

MEMORANDUM

TO: The Commission

FROM: Lisa J. Stevenson
Acting General Counsel

Neven F. Stipanovic
Associate General Counsel

Robert Knop
Assistant General Counsel

Lindsay Bird
Attorney

Subject: Draft AO 2023-06 (Texas Majority PAC) Draft A

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 12:00 p.m. (Eastern Time) on November 1, 2023.

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 2023-06

2

3 Jonathan S. Berkon
4 Elias Law Group
5 250 Massachusetts Avenue, NW
6 Suite 400
7 Washington, DC 20001

DRAFT A

8

9 Dear Mr. Berkon:

10

11 We are responding to your advisory opinion request on behalf of Texas Majority
12 PAC (“TMP”), asking whether the costs associated with TMP’s paid canvassing program
13 would constitute contributions under the Federal Election Campaign Act, 52 U.S.C.
14 § 30101 *et seq.* (the “Act”), and Commission regulations. The Commission concludes
15 that the costs of the proposed paid canvassing program would constitute coordinated
16 expenditures and therefore result in the making of in-kind contributions to the federal
17 candidates or political party committees depicted or referenced in the canvassing
18 materials.

19 ***Background***

20 The facts presented in this advisory opinion are based on your letter received on
21 August 22, 2023, email received on September 11, 2023, and supplementary information
22 received on September 30, 2023. TMP is a nonfederal “general-purpose committee”
23 registered with the Texas Ethics Commission.¹ TMP’s major purpose is to elect

1 Advisory Opinion Request (“AOR”) at 001. Texas law defines “[g]eneral-purpose committee” as a political committee that has among its principal purposes supporting or opposing: two or more candidates who are unidentified or are seeking offices that are unknown; or one or more measures that are unidentified; or assisting two or more officeholders who are unidentified. Texas Elec. Code § 251.001(14).

1 Democrats to state and local office in Texas.² TMP is not registered with the
2 Commission, and states that it is not established, financed, maintained, or controlled by
3 any federal, state, or local candidate, party committee, or their agents.³

4 TMP seeks to retain and pay third-party vendors, managed by TMP's paid staff,
5 to execute a paid canvassing program ("Paid Canvass").⁴ The vendors will design and
6 produce canvassing literature and will hire individuals to distribute the literature at
7 voters' homes.⁵ These individuals will also read prepared scripts to the voters and record
8 their responses to certain questions.⁶ TMP states that the Paid Canvass "will not have
9 non-communicative components; for example [it] will not include offers to drive voters
10 to polling places."⁷ TMP anticipates that the Paid Canvass will reach more than 500
11 homes within a 30-day period.⁸

12 TMP will preselect the voters who will be visited by the canvassers.⁹ The Paid
13 Canvass will not be limited to the homes of individuals who have opted-in or otherwise
14 sought out a visit by the canvassers.¹⁰ The vendors and individual canvassers will not

2 AOR002.

3 *Id.* TMP states that its major purpose does not include federal campaign activity. *Id.*

4 *Id.*

5 *Id.*

6 *Id.* TMP states that although the paid canvass will use multiple scripts, each script will be associated with at least 500 homes. Advisory Opinion Request Supplement ("AOR Supp.") at 5.

7 AOR Supp. at 1.

8 AOR Supp. at 4-5.

9 AOR002.

10 AOR Supp. at 5.

1 have a contractual or business relationship with the voters whose homes will be visited.¹¹

2 The costs of the Paid Canvass include “the canvassing literature and the personnel that
3 will walk the literature to voters’ doors and read scripts to voters (if the voters permit
4 them to do so).”¹²

5 TMP’s canvassing literature and scripts will be disseminated within the pre-
6 election timeframes described in Commission regulations,¹³ will refer to federal
7 candidates and political parties, and may also expressly advocate the election or defeat of
8 clearly identified federal candidates.¹⁴ TMP will consult with federal candidates, party
9 committees, and their agents on the canvassing program.¹⁵ Accordingly, TMP anticipates
10 “it will come into possession of nonpublic plans, projects, activities, or needs of
11 candidates (federal and nonfederal) and/or political parties,” and thus will engage in
12 substantial discussion as defined in Commission regulations.¹⁶ However, the canvassing
13 program will not involve the dissemination, distribution, or republication of federal
14 candidate campaign materials.¹⁷

11 AOR002.

12 *Id.*

13 *See* 11 C.F.R. § 109.21(c)(4).

14 *Id.*

15 AOR002-3.

16 AOR002. *See* 11 C.F.R. § 109.21 (d)(3).

17 AOR Supp. at 4. *See* 11 C.F.R. § 109.23.

1 ***Question Presented***

2 *Are costs associated with TMP’s proposed paid canvassing program*
3 *“contributions” to any federal candidate or political party committee that is depicted or*
4 *referenced in the literature or script?*

5 ***Legal Analysis***

6 Yes, the costs associated with the paid canvassing program described in the
7 request would be in-kind contributions to the federal candidates or political party
8 committees depicted or referenced in the canvassing materials. Although the costs
9 associated with the paid canvassing program would not constitute coordinated
10 communications, they would constitute coordinated expenditures.

11 Under the Act, expenditures that are coordinated with a candidate or political
12 party committee are treated as contributions to that candidate or political party
13 committee.¹⁸ Under Commission regulations, expenditures for “coordinated
14 communications” are those that meet the three-prong test at 11 C.F.R. § 109.21, and other
15 coordinated expenditures are those that are “coordinated” as defined by 11 C.F.R.
16 § 109.20(a).

17 *Coordinated Communications, 11.C.F.R. § 109.21*

18 The first prong of the coordinated communications test is the payment prong,
19 which requires that the communication be paid for, in whole or in part, by a person other

¹⁸ 52 U.S.C. § 30116(a)(7)(B).

1 than the candidate or party committee.¹⁹ In this instance, the payment prong is satisfied
2 because TMP states that it would pay for the canvassing materials that would reference or
3 depict the federal candidate or party committee.

4 The second prong of the coordinated communication test is the content prong.
5 The content prong provides that a communication is a coordinated communication only if
6 it is an electioneering communication or a “public communication” that meets at least
7 one of five content standards.²⁰

8 An “electioneering communication” is defined as “any broadcast, cable, or
9 satellite communication” that refers to a clearly identified federal candidate, is publicly
10 distributed within certain time periods, and is targeted to the relevant electorate.²¹ TMP’s
11 proposal does not involve any “broadcast, cable, or satellite communications” and thus,
12 would not constitute electioneering communications.

13 Therefore, only if canvassing communications are “public communications”
14 could they be coordinated communications. A public communication is defined as “a
15 communication by means of any broadcast, cable, or satellite communication, newspaper,
16 magazine, outdoor advertising facility, mass mailing, or telephone bank to the general
17 public, or any other form of general public political advertising.”²²

¹⁹ 11 C.F.R. § 109.21(a)(1).

²⁰ *Id.* § 109.21(c)(2).

²¹ 52 U.S.C. § 30104(F)(3); 11 C.F.R. § 100.29(a).

²² 52 U.S.C. § 30101(22) (emphasis added); *see also* 11 C.F.R. § 100.26.

1 Because paid door-to-door canvassing as proposed in the request is not expressly
2 enumerated in the statutory or regulatory definition of “public communication,” the
3 Commission must determine whether the Paid Canvass constitutes “general public
4 political advertising.” The catch-all term “general public political advertising” is not
5 defined by the Act or Commission regulations. However, “the Commission interprets
6 each term listed in the definition of ‘public communication’ or in [52 U.S.C. § 30120(a)]
7 as a specific example of one form of ‘general public political advertising.’”²³

8 In a 2006 rulemaking concerning internet communications, the Commission
9 discussed the common elements of communications that fall within the category of
10 general public political advertising.²⁴ The Commission observed that one of the common
11 elements is that such communications typically require the person making the
12 communication to pay “for access to an established audience using a forum controlled by
13 another person, rather than using a forum that he or she controls to establish his or her
14 own audience.”²⁵

15 The Commission discussed this common element in Advisory Opinion 2022-20
16 (Maggie for NH). In that opinion, the Commission observed that general public political
17 advertising “typically require[s] the person making the communication to pay to use a
18 third party’s platform to gain access to the third party’s audience.”²⁶ The Commission

²³ See Disclaimers, Fraudulent Solicitation, Civil Penalties, and Personal Use of Campaign Funds, 67 Fed. Reg. 76,962, 76,963 (Dec. 13, 2002).

²⁴ Internet Communications, 71 Fed. Reg. 18,589, 18,594 (Apr. 12, 2006).

²⁵ *Id.* at 18,594-95.

²⁶ Advisory Opinion 2022-20 (Maggie for NH) at 4-5.

1 explained that traditional forms of paid advertising generally require a speaker to pay “to
2 disseminate a message through a medium controlled, and to an audience established, by a
3 third party.”²⁷ The Commission concluded that short-code text messages — which were
4 only sent to individuals who agreed to receive messages from the Committee — lacked
5 this common element and therefore did not constitute “general public political
6 advertising.”²⁸

7 Here, the canvassing materials will not be disseminated “through a medium
8 controlled, and to an audience established, by a third party.”²⁹ Unlike a newspaper or
9 television company, the canvassing vendors will have no preexisting relationship with the
10 canvass’s audience and will have no more right to communicate with the audience than
11 TMP.³⁰ The vendors will also not establish or identify the audience for the canvassing
12 program.³¹ Instead, TMP will preselect the voters whose homes will be visited.³² The
13 vendors will simply act as TMP’s agents in carrying out a canvassing program that TMP
14 controls.

²⁷ *Id.*

²⁸ *Id.* at 5. The Commission further noted that text messages sent only to individual subscribers who affirmatively opt-in to the messaging— and “therefore have sought out the speaker and speech through a forum controlled by the speaker”— are analogous to “to speech disseminated through a political committee’s own website, which the Commission previously concluded is not a public communication.” *Id.*

²⁹ *See id.*

³⁰ AOR002,5.

³¹ AOR008-9.

³² *Id.*

1 Under TMP’s proposal, the canvassing vendors neither establish the audience nor
2 control the forum. Accordingly, the proposed Paid Canvass is distinguishable from the
3 types of communications that fall within the definition of “general public political
4 advertising.”

5 Furthermore, door-to-door canvassing is a traditional grassroots activity
6 fundamentally different from the types of mass media enumerated in the statutory
7 definition of “public communication.”³³ Unlike communications made via television,
8 newspapers, magazines, mass mailings, or telephone banks, door-to-door canvassing
9 involves individual people talking face-to-face with voters. It is not the type of mass
10 communication contemplated in the definition of “public communication.”

11 Accordingly, the Commission concludes that the proposed Paid Canvass would
12 not involve “public communications,” and thus would not satisfy the content prong of the
13 coordinated communications test. Because the content prong is not satisfied, the Paid
14 Canvass is not a coordinated communication.³⁴

15 *Other Coordinated Expenditures, 11 C.F.R. 109.20*

16 Even if the Paid Canvass’s direct canvassing activities are not “public
17 communications” and therefore not “coordinated communications” under 11 C.F.R.

³³ 52 U.S.C. § 30101(22).

³⁴ Because the Paid Canvass would not satisfy the content prong of the coordinated communication test, the Commission need not, and does not, address the third and final part of the test, the conduct prong. See 11 C.F.R. §109.21(a)(3), (d).

1 § 109.21, at least some of the expenses necessary to prepare and execute the Paid
2 Canvass, as described in TMP’s request, still constitute coordinated expenditures under
3 11 C.F.R. § 109.20(b), which provides:

4 Any expenditure that is coordinated within the meaning of paragraph (a) of this
5 section, but that is not made for a coordinated communication under 11 CFR
6 109.21. . . is either an in-kind contribution to, or a coordinated party expenditure
7 with respect to, the candidate or political party committee with whom or with
8 which it was coordinated. . .³⁵

9
10 Section 109.20(a) defines “coordinated” as “made in cooperation, consultation or
11 concert with, or at the request or suggestion of, a candidate, a candidate's authorized
12 committee, or a political party committee.”³⁶

13 TMP seeks to make expenditures not only for canvassing communications that
14 will refer to federal candidates and party committees, but also for goods and services
15 provided by third parties to support the overall canvassing effort. These expenses include
16 hiring vendor consultants, hiring and training paid canvassers, and creating and managing
17 a canvass questionnaire.³⁷ These supportive expenses are not for canvassing
18 communications themselves, and, based on the information available, at least some are
19 not sufficiently direct inputs or components of the canvassing communications to be

³⁵ 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.” Coordinated and Independent Expenditures, 68 Fed. Reg. 421, 425 (Jan. 3, 2003) (“2003 Coordination E&J”); *see also* Advisory Opinion 2011-14 (Utah Bankers Association).

³⁶ 11 C.F.R. §109.20(a).

³⁷ AOR002.

1 considered part of those communications. They are therefore non-communication
2 expenditures that fall under 11 C.F.R. § 109.20(b).

3 TMP acknowledges that it will consult with federal candidates, party committees,
4 and their agents on the Paid Canvass.³⁸ As a result of the consultation, TMP “anticipates
5 that it will come into possession of nonpublic plans, projects, activities, or needs of
6 candidates . . . and/or political parties.”³⁹ Accordingly, non-communication expenditures
7 for TMP’s Paid Canvass will be made in “cooperation, consultation, or concert with
8 federal candidates, political party committees, and their agents,” and will therefore be
9 coordinated within the meaning of 11 C.F.R. § 109.20(a).⁴⁰ Thus, the Paid Canvass’s
10 non-communication expenditures are coordinated expenditures under 11 C.F.R.
11 § 109.20(b).

12 Because the Paid Canvass will include coordinated expenditures under 11 C.F.R.
13 § 109.20(b), the costs of the non-communication expenditures would be in-kind
14 contributions under the Act and Commission regulations.

15 This response constitutes an advisory opinion concerning the application of the
16 Act and Commission regulations to the specific transaction or activity set forth in your
17 request.⁴¹ The Commission emphasizes that, if there is a change in any of the facts or
18 assumptions presented, and such facts or assumptions are material to a conclusion

³⁸ AOR003.

³⁹ AOR002.

⁴⁰ *See* 11 C.F.R. § 109.20(a).

⁴¹ *See* 52 U.S.C. § 30108.

1 presented in this advisory opinion, then the requestor may not rely on that conclusion as
2 support for its proposed activity. Any person involved in any specific transaction or
3 activity which is indistinguishable in all its material aspects from the transaction or
4 activity with respect to which this advisory opinion is rendered may rely on this advisory
5 opinion.⁴² Please note that the analysis or conclusions in this advisory opinion may be
6 affected by subsequent developments in the law including, but not limited to, statutes,
7 regulations, advisory opinions, and case law. Any advisory opinions cited herein are
8 available on the Commission's website.

9 On behalf of the Commission,
10

11
12
13 Dara Lindenbaum,
14 Chair

⁴² See *id.* § 30108(c)(1)(B).