



FEDERAL ELECTION COMMISSION

Washington, DC

MEMORANDUM

TO: The Commission

FROM: Office of the Commission Secretary ^{VFV}

DATE: November 1, 2023

SUBJECT: AO 2023-06 (Texas Majority PAC) Comment on Drafts A & B

Attached is a comment received from Sandler Reiff regarding AO 2023-06 (Texas Majority PAC) Drafts A & B. This matter is on November 2, 2023 Open Meeting Agenda.

Attachment

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November 1, 2023

Federal Election Commission
Office of General Counsel
1050 First Street, NE
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ao@fec.gov**COMMENT ON ADVISORY OPINION 2023-06
(TEXAS MAJORITY PAC) DRAFTS A&B**

Ms. Stevenson:

We write to express our concerns with the drafts submitted by the General Counsel's Office in response to Advisory Opinion Request 2023-06. Our firm represents a multitude of federal candidates, PACs, and state party committees that would be adversely affected by the Commission's approval of either draft. Furthermore, we believe these drafts to be in conflict with the Federal Election Campaign Act and Commission regulations. For the reasons described below, we would urge the Commission to vote down both drafts and hold over the issue to another meeting to allow for an additional draft or drafts to be presented. In the alternative, the Commission should either approve a pared down version of Draft A per our comments below, or propose changes to the rules to give the regulated community time to better grapple with what would be a major change in federal campaign finance regulation.

I. Draft A

With regards to Draft A, we would first like to state our agreement with the draft's initial conclusion that paid canvassing is not a public communication under 109.21.¹ We will further address our reasoning for that conclusion below in our comments on Draft B. However, our concurrence with Draft A stops there. The draft goes on to advise that despite its conclusion that paid canvassing is not a public communication, and therefore not a "coordinated communication" that "at least some of the expenses *necessary to prepare and execute the Paid Canvass*, as described in TMP's request, still constitute coordinated expenditures under 11

¹ FEC Adv. Op. 2023-06 Draft A at 7-8 [hereinafter "Draft A"]. The Commission can and should approve an opinion that adheres solely with that conclusion and determine that all costs associated with the proposed canvassing program would not result in an in-kind contribution to a federal candidate.

C.F.R. § 109.20(b).”² This conclusion is in direct conflict with the plain language in 109.20(b), which states:

Any expenditure that is coordinated within the meaning of paragraph (a) of this section, **but that is not made for a coordinated communication** under 11 CFR 109.21 . . . is either an in-kind contribution to, or a coordinated party expenditure with respect to, the candidate or political party committee with whom or with which it was coordinated . . .³

The plain language of the regulation differentiates between (1) expenditures made for coordinated communications and (2) coordinated expenditures **not made for** coordinated communications. There is no further detail or explanation provided in 109.20 as to what it means for an expenditure to be made “for” a coordinated communication, but the regulated community has long operated under the understanding that coordinated communication costs included all ancillary costs of the communication, not just the costs of production and dissemination. It should also hold true that for a communication that is exempt from the coordinated communication definition because it is not a public communication, that communication costs should include both direct and ancillary costs.

The standard adopted in Draft A is both bizarre and illogical. The draft states that the Requestor seeks to make expenditures not only for the communications themselves, but also “for goods and services provided by third parties to support the overall canvassing effort” and then specifically identifies “hiring vendor consultants, hiring and training paid canvassers, and creating and managing a canvass questionnaire.”⁴ Draft A then makes the inexplicable conclusion that those “supportive expenses are not for the canvassing communications themselves, and . . . at least some are not sufficiently direct inputs or components of the canvassing communications to be considered part of communications.”⁵ Without any further explanation, analysis, or guidance, the draft continues on to the next prong of the coordinated communication analysis and ultimately concludes that these input costs should be considered an in-kind contribution to any candidate with which the committee “coordinated” its activities.

To our knowledge, this concept of supportive expenses, direct inputs, and components are not defined or otherwise addressed anywhere in the Commission’s regulations or in FECA. Furthermore, the drafters do not provide any definitions of those terms or guidance on how to determine whether a cost is merely supportive or indirect, or

² Draft A at 8-9 (emphasis added); *see also id.* at 5 (“Although the costs associated with the paid canvassing program would not constitute coordinated communications, they would constitute coordinated expenditures”).

³ 11 CFR 109.20(b) (emphasis added).

⁴ Draft A at 9.

⁵ *Id.*

whether it should be considered a direct input or component of the communication.⁶ To confuse matters more, the list of examples of “supportive” expenses are very clearly components of the communication itself.

First – the creating and managing of the canvassing questionnaire, which is referring to the script that is read to potential voters at their door. It is, in fact, a communication itself. The cost of creating and managing this questionnaire is very clearly a direct input and component of the communication expense. The same should be said for the hiring and training the canvassers who are the communicators of the message. It defies logic to untether the costs of creating and disseminating the message from the overall costs of the communication for purposes of a coordination analysis. One could not exist without the other and should not be subject to different rules. In practice, this creates even more confusion – how would a PAC determine what cost is covered and which is not?

The final example of “supportive” expenses listed is that of “vendor consultants”, which is only discussed in the AOR in relation to the vendor hired to “carry out the paid canvassing programs”, including designing and producing the literature and hiring the canvassers.⁷ Again, these expenses *are a component of the proposed communications* – the materials left with potential voters to read and the people who carry those messages to their door. Parsing these expenses would result in an untenable situation, which is also contrary to law, where committees are no longer able to pay for the strategy, production, and dissemination of non-public communications coordinated with candidates.

It is our understanding that the definition of a “coordinated expenditure” in 109.20(b) is intended to catch “non-communication expenditures” that are coordinated with candidates and provide independent value to the candidate; it is intended to be read together with the other existing regulations regarding coordinated and independent expenditures.⁸ In other words, it is intended to cover payments made or things of value given to a candidate to influence their election and that otherwise provide a direct benefit to the candidate, such as sharing a poll or other common in-kind contributions such as providing rent, equipment or staff directly to the candidate.⁹ This new concept of supportive expenses or insufficiently direct input costs to support the overall communication effort is, in our view, neither practical nor a proper reading of the Commission’s regulations – nor is it consistent with the treatment of other non-public

⁶ Furthermore, the Commission Draft provides no citations or support for its position in the Draft Opinion.

⁷ FEC Adv. Op. Req. 2023-06 at AOR002.

⁸ FEC, *Explanation and Justification for the Regulations on Internet Communications*, 71 Fed. Reg. 18,589, 18,594 (Apr. 12, 2006); FEC, *Explanation and Justification for Regulations on Coordinated and Independent Expenditures*, 68 Fed. Reg. 421, 425-26 (Jan. 3, 2003).

⁹ 11 CFR 100.111(e).

communications.¹⁰ An advisory opinion request is simply not the best place to make new law in this way, with such a wide-reaching effect on the regulated community.

Finally, the draft does not discuss the practical impact this guidance would have on the interpretation of Part 106, which discusses in detail the rules regarding the allocation of expenses between candidates and committees or the impact on state party committees that are partaking in coordinated activities with candidates. The broad interpretation suggested by Draft A calls into question how the Commission will parse expenses between those that it considers day-to-day operating expenses of a political committee under 11 C.F.R. § 106.1 and those it considers to be a coordinated expenditure. It has generally been understood that consulting expenses paid for by political committees are operating costs of the committee. Consultants provide a myriad of services, including general strategic advice and specific advice related to communications by a committee. Under Draft A, committees would be required to determine which expenses are not covered by the regulation and how to allocate them between operating costs and coordinated expenditures. For this reason, we believe the Commission created this exception in 11 C.F.R. § 106.1(c).

In addition, while the Requestor is not a party committee, the Draft Opinion would have a significant potential impact on party committees. As a general matter, political parties have relied on past pronouncements that canvassing was not a public communication.¹¹ If Draft A were to be approved, party committees would be required to fundamentally alter their operations since most, if not all, of their operations, even ones that do not reference federal candidates are done in coordination with both their federal and non-federal nominees. Does this mean that the “input costs” of a communication that says “Vote Democratic” or “Vote Republican” would be required to be considered an in-kind contribution to its federal candidates if it was coordinated with those candidates?

¹⁰ See MUR 6657 (Akin for Senate), Factual & Legal Analysis at 5-6, where the Commission unanimously agreed that where a communication was not a “public communication”, “significant related expenses” to the communication were not in-kind contributions.

¹¹ FEC Adv. Op. Req. 2023-06 at AOR005-006 (describing Commission precedent that paid canvassing and handbills are not “public communications”) (citing 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); 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); 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)).

In a Statement of Reasons in MUR 5564, Commissioners Mason and von Spakovsky acknowledged that parsing what Draft A would classify as input costs of party get-out-the-vote activities as coordinated expenditures would be impossible without conducting a rulemaking to address party spending.¹² The Commissioners correctly acknowledged that a rulemaking would be necessary to treat similarly situated parties alike and provide the needed “advance notice of the standards to which they are expected to confirm in the future.”¹³ To fundamentally alter the way that party committees conduct their business through an advisory opinion that was not requested by a party committee would deprive political parties of the opportunity to substantively address the catastrophic effect that Draft A would cause on their operations. To be sure, providing committees only a few days to comment on a draft advisory opinion that fundamentally departs from Commission precedent is nothing near the ordinary notice and comment required by Commission regulations and the Administrative Procedures Act.¹⁴

We urge the Commission to vote down Draft A (or in the alternative, approve a modified draft) and adopt the position held by the Requestor – namely that since a paid canvass is not a public communication, the expenses associated with the communication are not treated as in-kind contributions.

II. **Draft B**

As described above, we agree with the position taken by the Requestor and in Draft A that a paid canvass is not a public communication because it does not qualify as “general public political advertising.”¹⁵ That conclusion is consistent with the analysis in the Commission’s recent Advisory Opinion 2022-20 and with its past enforcement actions as cited by the Requestor.¹⁶

Draft B relies on the argument from the rulemaking on internet communications that the use of the word “advertising” signifies that payment is required for the communication to be considered “general public political advertising” and that public communications typically require that an intermediary is paid to disseminate the communication.¹⁷ The draft concludes that since the paid canvassing program described in the AOR would include paying a vendor to

¹² MUR 5564 (Alaska Democratic Party), Statement of Reasons of Vice Chairman David M. Mason & Comm’r Hans A. von Spakovsky at 2.

¹³ *Id.* at 2-3.

¹⁴ 5 U.S.C. § 553; 11 CFR 200.3.

¹⁵ *See supra* note 1.

¹⁶ *See* FEC Adv. Op. 2022-20 (Maggie for NH) at 4; *see supra* note 11.

¹⁷ FEC, Adv. Op. 2023-06 Draft B at 6 [hereinafter “Draft B”] (citing Internet Communications, 71 Fed. Reg. 18,589, 18,594 (Apr. 12, 2006)).

create and distribute the communications, the canvass is a public communication.¹⁸ This conclusion is questionable at best as it seems to distinguish a paid canvassing program from canvassing done by paid employees or even volunteers, even though the communication at issue (the discussion at the door and literature) is the same in each scenario. The paid canvass vendor is simply an agent of the Requestor, stepping into the Requestor's shoes to execute its canvassing program to an audience determined by the Requestor. The communications at issue should not be treated any differently than a volunteer or staff canvass since the Requestor is given no advantage and no improved or additional access to its intended audience by virtue of using a vendor for the paid canvass.

In addition, Draft B's sole citations to support the proposition that canvassing is a "public communication" is that "door hangers" have been determined to be "public communications" in two previous enforcement matters.¹⁹ It should be noted that the two matters involved the use of disclaimers and neither implicated the definition of "coordinated communications."²⁰ In neither matter did the Commission consider the implications of whether the communications resulted in an in-kind contribution to, or a coordinated expenditure on behalf of a candidate, and should not be relied upon as precedent for the intended position in Draft B or provide any persuasive guidance to the Commission.

For these reasons, we urge the Commission to reject Draft B outright.

The questions presented by this Advisory Opinion Request are not a nominal or obscure technical point solely affecting the Requestor. To determine that canvassing is a "public communication" or that "input costs" are somehow contributions or coordinated expenditures on behalf of candidates will have far reaching implications for the campaign activities of both political committees and political party committees alike. It will upend over twenty years of

¹⁸ Draft B at 7.

¹⁹ Draft B at 7-8 (citing MUR 4741 (Mary Bono Committee *et al.*), Factual & Legal Analysis at 4-5; MUR 6778 (David Hale for Congress *et al.*), Factual & Legal Analysis at 5). Not only that, but the Commission's treatment of door hangers as "public communications" has been inconsistent, even within the same Audit. *Compare* FEC, Office of the General Counsel's Comments on the Draft Final Audit Report of the Audit Division on the Ky. State Dem. Central Exec. Cmte. at 5-6 ("Distribution of a door hanger by hand does not require payment to an intermediate facility owner each time communication with an audience is sought (though payment to a printer for the creation of the door hanger may be required), but rather may be accomplished independently by the communicator. A door hanger is therefore more akin to a printed slate card, handbill, brochure, or bumper sticker than it is to any of the communication modalities enumerated in the definition of public communication"), *with* FEC, Office of the General Counsel's Comments on the Audit Division Recommendation Memorandum on the Ky. State Dem. Central Exec. Cmte. at 4 ("door hangers, if not within the VME, are likely public communications that otherwise meet the definition of 'party coordinated communication' in 11 C.F.R. § 109.37.13"). We note that the Commission has been similarly inconsistent with its treatment of canvassing and reiterate that an advisory opinion is not the proper avenue for resolving any inconsistency.

²⁰ *See generally* MUR 4741 (Mary Bono Committee *et al.*), Factual & Legal Analysis; MUR 6778 (David Hale for Congress *et al.*), Factual & Legal Analysis.

understood practice and profoundly reorder the way regulated committees conduct their campaign activities.

If you have any questions or need additional information in connection with this Comment, I can be reached at (202) 479-1111 or reiff@sandlerreiff.com.

Sincerely,

A handwritten signature in blue ink, appearing to read "N. Reiff".

Neil P. Reiff
Dave Mitrani
Erin Tibe