FEDERAL ELECTION COMMISSION

Washington, DC

MEMORANDUM

TO: **The Commission**

FROM: **Office of the Commission Secretary** VFV

DATE: **October 9, 2024**

SUBJECT: **AOR 2024-13 (DSCC, Montanans for Tester, and Gallego for Arizona) Comment on Draft A from Elias Law Group**

Attached are comments on AOR 2024-13 (DSCC, Montanans for Tester, and Gallego for Arizona) Draft A from Elias Law Group.
This matter is on the October 10, 2024 Open meeting.

Attachment

ELIAS LAW GROUP

250 Massachusetts Ave NW, Suite 400 | Washington, DC 20001

October 9, 2024

BY ELECTRONIC MAIL DELIVERY

Office of General Counsel
Attn: Lisa J. Stevenson, Esq.
Acting General Counsel
Federal Election Commission
1050 First Street NE
Washington, DC 20463

Re: Advisory Opinion Request 2024-13

Dear Commissioners:

We write as counsel to the DSCC, Montanans for Tester, and Gallego for Arizona ("***Requestors***") regarding Draft A of Advisory Opinion Request 2024-13. Draft A relies on 11 C.F.R. § 110.11(f)(1)(ii), Advisory Opinion 2004-10 (Metro Networks), and 11 C.F.R. § 110.11(g)(2) as the basis to hold that the fundraising notice required by 11 C.F.R. § 102.17(c)(2) is not required on television advertisements. The cited authority offers no such support and in fact directly contradicts the Draft's conclusion.

Draft A reads an impracticability exception into 11 C.F.R. § 102.17(c)(2) because "the Commission 'has long recognized that in certain circumstances it is impracticable to provide a full disclosure statement in the prescribed manner.'"[1] This is a quote from Advisory Opinion 2004-10 (Metro Networks). That advisory opinion dealt with candidate advertising as part of live news and weather reports. The requestor asked simply if the radio announcer doing the live broadcast could read the stand-by-your-ad disclaimer instead of the candidate, as it was "'physically impossible' for Metro Networks to include any statement spoken by a candidate himself or herself."[2]

Here is what the Commission said:

> The specific physical and technological limitations you describe **do not make it impracticable to include a disclaimer at all. Rather, the impracticability caused by these limitations extends only to one particular aspect of the disclaimer otherwise required by section 110.11, specifically that the provision requiring the approving candidate himself or herself to speak the "stand-by-your-ad" statement**. 11 CFR 110.11(c)(3). Thus, the Commission concludes **that a disclaimer is required**, but that it would be permissible for a Metro Networks reporter to speak for the candidate, or candidates, who authorized the advertisement. As in Advisory Opinion 2004-1, this

[1] Draft A at 9 (citing FEC, Adv. Op. 2004-10 (Metro Networks) at 3).
[2] FEC, Adv. Op. 2004-10 (Metro Networks) at 2.

> approach is practical and as faithful as possible to the "stand by your ad" statute while avoiding unnecessary burdens on political speech that could result from a rigid application of all disclaimer provisions in all instances.[3]

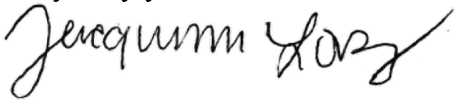
This advisory opinion offers no support for Draft A's conclusion that a full thirty second television advertisement can leave a required disclaimer off entirely. Here, the question being considered is not the narrow issue of who is speaking a disclaimer, but rather if one is included at all. Moreover, nothing makes the inclusion of the joint fundraising notice physically impossible. Including the fundraising notice is perfectly possible.

Draft A further cites as support for an impracticability exception 11 C.F.R. § 110.11(f)(1)(ii) which "exempts from disclaimer obligations certain communications 'of such a nature that the inclusion of a disclaimer would be impracticable.'" However, 11 C.F.R. § 110.11 not only expressly applies its disclaimer requirements to the communication medium of television, it dedicates an entire subsection to imposing *more burdensome* requirements on television that any other communication medium contemplated by the regulation.[4] It is therefore illogical to say that 11 C.F.R. § 110.11 supports the idea that disclaimers on television are impracticable.

Last, the comparison of a QR Code to the adapted disclaimer for internet public communications is off base. The adapted disclaimer requirement mandates that the viewer must take "no more than one action" to see the disclaimer, and offers hover-over text, pop-up screens, scrolling text, rotating panels, and hyperlinks to a landing page as examples.[5] With a QR Code, the viewer is required to have another device at the ready and use that device in as a little as four seconds to scan the QR Code – something that many viewers would by physically unable to do in the time allotted (if at all).

The Commission should faithfully follow its regulations and precedent to require a full notice and disclaimer on all television and radio communications paid for by a joint fundraising committee.

Very truly yours,



Jacquelyn Lopez
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[3] *Id.* at 3 (emphasis added).
[4] *See* 11 C.F.R. § 110.11(c)(3).
[5] *Id.*§ 110.11(g)(2)(3).