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By Office of the Commission Secretary at 4:12 pm, Sep 20, 2024

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By Office of General Counsel at 4:19 pm, Sep 18, 2024

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September 18, 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

Dear Ms. Stevenson:

Pursuant to 52 U.S.C. § 30108, we seek an advisory opinion on behalf of the DSCC, Montanans for Tester and Gallego for Arizona (“*Requestors*”). Requestors seek guidance regarding whether, and under what conditions, the Federal Election Campaign Act of 1971, as amended (the “*Act*”) and Federal Election Commission (the “*Commission*”) regulations permit Requestors to use a joint fundraising committee to run television advertisements that primarily advocate for the election of either Senator Tester or Congressman Gallego but also contain a brief fundraising solicitation at the end of the advertisements. Given that Respondents want to run the proposed advertisements in this upcoming general election, we respectfully ask the Commission to act as soon as possible and no later than the twenty-day deadline imposed by the Act.¹

I. FACTUAL BACKGROUND

Jon Tester is a United States Senator from Montana and a current candidate in the 2024 general election for U.S. Senate in Montana. Montanans for Tester is his principal campaign committee.² Ruben Gallego is a Congressman from Arizona and a current candidate in the 2024 general election for U.S. Senate in Arizona. Gallego for Arizona is his principal campaign committee.³ DSCC is a national political party committee established pursuant to 52 U.S.C. § 30101(14). It is dedicated

¹ 52 U.S.C. § 30108 (a)(2) (providing that if “an advisory opinion is requested by a candidate, or any authorized committee of such candidate, during the 60-day period before any election for Federal office involving the requesting party, the Commission shall render a written advisory opinion relating to such request no later than 20 days after the Commission receives a complete written request”).

² FEC, Form 1 – Statement of Organization, Montanans for Tester (Aug. 28, 2024), <https://docquery.fec.gov/pdf/568/202408289675289568/202408289675289568.pdf>.

³ FEC, Form 1 – Statement of Organization, Gallego for Arizona (Aug. 2, 2024), <https://docquery.fec.gov/pdf/876/202408029666056876/202408029666056876.pdf>.

to electing Democrats to the U.S. Senate.⁴

DSCC wishes to establish two separate joint fundraising committees – one between the DSCC and Montanans for Tester and one between the DSCC and Gallego for Arizona (each a “**Joint Fundraising Committee**” and collectively the “**Joint Fundraising Committees**”). The Joint Fundraising Committees plan to engage in a variety of fundraising activities, including financing television advertisements that contain a solicitation for the relevant Joint Fundraising Committee.

Requestors will establish each Joint Fundraising Committee according to the procedures laid out in 11 C.F.R. § 102.17, including filing a Form 1 with the FEC to establish the Joint Fundraising Committee and entering into a written agreement. The written agreement will identify the Joint Fundraising Committee as a fundraising representative. It will also specify that the first two thirds of fundraising proceeds will be allocated to the DSCC while the last third will be allocated to the participating campaign, either Montanans for Tester or Gallego for Arizona, subject to contribution limits and contributors’ ability to designate their contribution for a particular participant (the “**Allocation Formula**”). For each Joint Fundraising Committee, expenses will be allocated among participants according to the Allocation Formula.

Once established, Requestors wish to use the Joint Fundraising Committees to finance television advertisements that will primarily advocate for Senator Tester’s re-election (in the case of the Joint Fundraising Committee between Montanans for Tester and the DSCC) or Congressman Gallego’s election (in the case of the Joint Fundraising Committee between Gallego for Arizona and the DSCC). The end of each advertisement will contain a fundraising solicitation for the relevant Joint Fundraising Committee. Specifically, each advertisement will include a QR code during the final few seconds that, when scanned, links to an online fundraising page for the applicable Joint Fundraising Committee. The advertisement will also include a brief oral solicitation. Any contributions received through the fundraising page associated with the QR code will be divided according to the Allocation Formula. Expenses for the advertisement will also be divided between participants on the basis of the Allocation Formula. Each Joint Fundraising Committee would like to disseminate the advertisements beginning this month and continuing through the 2024 general election. The advertisements supporting Senator Tester will run in Montana, while the advertisements supporting Congressman Gallego will run in Arizona. The candidates and/or their agents will be materially involved in decisions regarding their advertisements’ content, timing and mode of distribution. The cost of the advertising would exceed the DSCC’s contribution limit or coordinated party spending limit with respect to each candidate.

A sample script is as follows:

Audio	Visual
I have worked my whole life as a teacher and planned carefully for my retirement. Then the price of my insulin skyrocketed, leaving me to choose between lifesaving	Senior citizen to camera, sitting at kitchen table.

⁴ See FEC, Form 1 – Statement of Organization, DSCC (June 25, 2024), <https://docquery.fec.gov/pdf/369/202406259652490369/202406259652490369.pdf>.

medication and buying groceries.	
Senator Tester gets it. He voted to cap insulin prices at \$35 a month. Keeping greedy pharmaceutical companies at bay and letting Seniors afford their care.	Senior citizen to camera, sitting at kitchen table.
Now I can afford my insulin and enjoy my retirement.	Senior citizen to camera, outdoors with grandkids.
I am Jon Tester, and I approve this message. Join my team and donate now.	Senator Tester to camera On screen: a QR code that links to a fundraising page for the Joint Fundraising Committee.

II. QUESTIONS PRESENTED

- 1- May each Joint Fundraising Committee finance the entire costs of the proposed television advertising, allocating the costs according to the Allocation Formula?
- 2- In the alternative, may each Joint Fundraising Committee finance the portion of the television advertising that includes a solicitation for the Joint Fundraising Committee, calculated on a time/space basis (approximately four seconds in the example provided), allocating the costs according to the Allocation Formula?
- 3- If the answer to question 1 or 2 is yes, does the Act require that the television advertising contain an on-screen disclaimer that meets the requirements of 11 C.F.R. § 102.17(c)(2)?

III. LEGAL ANALYSIS

A. Legal Background

1. Joint Fundraising Procedures

The Act and Commission regulations allow political committees, including a national party committee and an authorized candidate committee, to simultaneously raise contributions for multiple entities, subject to a set of procedures that “govern all joint fundraising activity.”⁵ The committees must establish a separate political committee to serve as the joint fundraising representative and enter into a written agreement that “state[s] a formula for the allocation of fundraising proceeds.”⁶ A joint fundraising committee has a limited role -- to “collect contributions, pay fundraising costs from gross proceeds and from funds advanced by the

⁵ 52 U.S.C. § 30102(e)(3)(ii); 11 C.F.R. § 102.17(a)(1)(i), (2).

⁶ 11 C.F.R. §§ 102.17(c)(1). The participants may also designate an existing committee as the fundraising representative. *Id.* § 102.17(a)(1)(i).

participants, and disburse net proceeds to each participant.”⁷ Each participant in a joint fundraising committee must cover expenses proportional to their percentage of allocated receipts.⁸ A participant “may only pay expenses on behalf of another participant subject to the contribution limits.”⁹ A joint fundraising notice is required to be included with “every solicitation for contributions.”¹⁰ This notice must identify the participating committees, provide the allocation formula, and inform contributors that they may choose to designate their contributions for a particular committee.¹¹

Taken as a whole, these procedures allow for joint fundraising while ensuring that: (1) individual donors to a joint fundraising effort understand how their contribution will be divided among participants; and (2) joint fundraising efforts are not used to allow one committee to subsidize the operations of another committee in violation of the contribution limits.

2. Joint Fundraising Advertising

Under the Act, “expenditures made by any person in cooperation, consultation, or concert, with, or at the request or suggestion of, a candidate, his authorized political committees, or their agents shall be considered to be a contribution to such candidate.”¹² Commission regulations set forth a three part test to determine whether an expenditure by a party committee for a communication is made “in cooperation, consultation or concert” with a candidate (“a **coordinated communication**”).¹³ In relevant part, the test is met if: (1) the communication is “paid for by a political party committee or its agent”¹⁴ (the “**payment prong**”); (2) the communication is a “public communication” that “expressly advocates the election or defeat of a clearly identified candidate” or “refers to a clearly identified [] Senate candidate and is publicly distributed or otherwise publicly disseminated in the clearly identified candidate’s jurisdiction 90 days or fewer before the clearly identified candidate’s general . . . election” (the “**content prong**”);¹⁵ and (3) a candidate or their agent is “materially involved” in decisions regarding the “content” of the communication, the “means or mode” or “specific media outlet used” for the communication, or the “timing or frequency” of the communication (“**conduct prong**”).¹⁶ A coordinated communication paid for by a national party committee must be treated either as a contribution or a coordinated party expenditure, subject to the applicable limits.¹⁷

Nothing in the Act or Commission regulations exempt a joint fundraising committee from the coordinated communication test. In a recent advisory opinion, the Commission approved of a joint fundraising committee paying for “public communications in the form of solicitations, invitations

⁷ *Id.* § 102.17(b)(1).

⁸ *Id.* § 102.17(c)(7).

⁹ *Id.* § 102.17(c)(7)(i)(B).

¹⁰ *Id.* § 102.17(c)(2).

¹¹ *Id.*

¹² 52 U.S.C. § 30116(a)(7)(B)(i).

¹³ *Id.*; 11 C.F.R. § 109.37(a).

¹⁴ 11 C.F.R. § 109.37(a)(1).

¹⁵ *Id.* § 109.37(a)(2)(ii), (iii)(A).

¹⁶ *Id.* §§ 109.37(a)(3); 109.21(d)(2).

¹⁷ *Id.* § 109.37(b). The DSCC is not given a coordinated party expenditure limit as a matter of law, but rather can receive an assignment of this authority from the Democratic National Committee or a state party. 52 U.S.C. § 30116(d)(1); 11 C.F.R. § 109.33(a).

and similar fundraising event announcements.”¹⁸ The requestors specified that the advertising costs would be divided by participant according to funds received under the allocation formula.¹⁹ On that basis, the Commission held that the “communications will not meet the payment part of the coordinated communication test” because the participating candidate would “pay the full cost of the public communications attributable to [the candidate committee].”²⁰ However, the request did not provide any detail on the content of the advertising and nothing indicated that the advertising would serve any purpose beyond soliciting contributions for the joint fundraising committee.

There is no Commission guidance that addresses whether or how a joint fundraising committee may finance an advertisement with the dual purpose of soliciting for the committee and advocating for a candidate. Commission precedent, however, does establish guiding principles. First, the Commission has explained that “Commission regulations generally permit (and in some cases require) the proceeds of fundraising activities to be used to defray the costs of those activities.”²¹ Second, where a communication qualifies as a coordinated communication but also contains a solicitation, the Commission has required the payor to use a “reasonable method to allocate the costs for its solicitation purposes”²² The only method recognized by Commission regulations for dividing the costs of television advertising with multiple purposes is division on a time/space basis. Specifically, under 11 C.F.R. § 106.1(a), 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.”²³ For broadcast communications, this allocation requires allocating the expenses based on a “space or time” basis, which looks to the “proportion of space or time devoted to each candidate.”²⁴

B. Legal Analysis

1. May the Joint Fundraising Committees finance the entire cost of the proposed advertising?

Requestors propose distributing 30-second television advertisements that would be materially indistinguishable from the sample advertisement. Twenty-six seconds of the advertisement will be devoted to messaging supporting either Senator Tester or Congressman Gallego and may include express advocacy. Only the final four seconds will include a solicitation for the applicable Joint Fundraising Committee. The solicitation will be spoken and displayed via an on-screen QR code. Nowhere will the advertisement expressly mention the DSCC, either in audio or visual elements. Therefore, only approximately 13 percent of the advertisement will include fundraising for the applicable Joint Fundraising Committee. The rest will be indistinguishable to the viewer from a standard campaign advertisement.

¹⁸ FEC, AO 2024-07 (Team Graham) at 7.

¹⁹ FEC, AO 2024-07, Request by Team Graham at 5.

²⁰ FEC, AO 2024-07 (Team Graham) at 7.

²¹ FEC, AO 2010-14 (DSCC) at 5 (citing 11 C.F.R. §§ 102.17(c)(7)(i)(A); 9003.3(a)(2)(i)(E), FEC, AO 2003-15 (Majette)).

²² FEC, AO 2022-21 at 5 (DSCC, Bennet for Colorado, and People for Patty Murray).

²³ 11 C.F.R. § 106.1(a).

²⁴ *Id.*

The proposed advertising meets the content and conduct prong of the coordinated communication test. Each advertisement will clearly identify either Senator Tester or Congressman Gallego and will air in Montana or Arizona less than 90 days before the general election. The candidates or their agents will be materially involved in the content, timing and mode of distribution of the advertisements. Therefore, the only way that the advertising will not result in an in-kind contribution or party coordinated expenditure is if it fails the payment prong, which requires only that the “communication is paid for by a political party committee.”²⁵

Commission regulations and guidance consistently stand for the proposition that advertising with dual purposes must be reasonably allocated.²⁶ In Advisory Opinion 2022-21, the Commission considered the exact scenario of television advertising with the dual purpose of candidate advocacy and fundraising and required reasonable allocation of costs. Therefore, Requestors are uncertain that the Act permits the Joint Fundraising Committee to finance the full cost of the proposed advertising without meeting the payment prong, given 87 percent of the advertising is dedicated to candidate advocacy. Further, Requestors worry that allowing the Joint Fundraising Committee to finance the full cost of the advertising runs contrary to the joint fundraising regulations, which prohibit joint fundraising in a manner that allows one participant to subsidize the costs of another participant.

However, should the Commission disagree, Requestors would like to use the Joint Fundraising Committees to pay for the full costs of the proposed advertising, subject to the Allocation Formula.

2. May the Joint Fundraising Committees finance the portion of the advertising that contains a solicitation for the Joint Fundraising Committee on a time/space basis?

If the Commission answers no to the first question, Requestors propose that each Joint Fundraising Committee would instead only finance the portion of each advertisement that contains a solicitation for the applicable Joint Fundraising Committee, calculated on a time/space basis. Requestors believe that a time/space allocation ensures that the payment prong is not met, preventing a coordinated communication.

Under this proposal, the applicable Joint Fundraising Committee will only pay for the final four seconds of the advertisement, which is the portion of the advertisement that fundraises for the Joint Fundraising Committee. This division ensures that the relevant candidate’s campaign pays the full costs for the part of the advertisement dedicated to advocacy for their election. The DSCC in turn would only pay for the portion of the advertisement that fundraises for the DSCC, in proportion to the amount of money it receives from those fundraising efforts. Under these circumstances, it is reasonable to conclude that the payment prong is not met because the costs of the dual-purpose advertisement have been “reasonably allocated” consistent with Commission

²⁵ *Id.* § 109.37(a)(1).

²⁶ *Id.* §§ 106.8; 106.1; FEC, AO 2022-21 (DSCC, Bennet for Colorado, and People for Patty Murray); FEC, Report of the Audit Division on Bush-Cheney ’04, Inc. and the Bush-Cheney ’04 Compliance Committee, Inc. (April 24, 2007) at 10–11; FEC, MUR 7530 (NRCC), Statement of Reasons of Vice Chair Dickerson and Commissioners Cooksey and Trainor (Nov. 8, 2021), https://www.fec.gov/files/legal/murs/7530/7530_16.pdf; FEC, MUR 7169 (Santarsiero for Congress) (Nov. 22, 2017), Factual and Legal Analysis, <https://www.fec.gov/files/legal/murs/7169/17044432804.pdf> (applying time/space allocation analysis to multicandidate advertisements).

precedent.

Accordingly, Requestors seek confirmation that each Joint Fundraising Committee may pay for the last four seconds of the proposed advertisements.

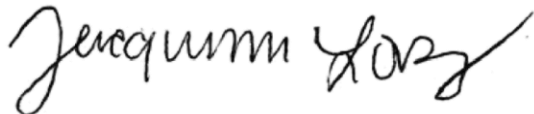
3. *If the answers to question one or two is yes, is an on-screen disclaimer that meets the requirements of 11 C.F.R. § 102.17(c)(2) required?*

Commission regulations state that “a joint fundraising notice shall be included with *every solicitation* for contributions.”²⁷ The notice must include the following information:

- The names of all committees participating in the joint fundraising committee;
- The allocation formula;
- A statement informing contributors that they may designate their contributions for a particular participant; and
- A statement that the allocation formula may change if a contributor makes a contribution that exceeds the limits.

Because the advertisement itself contains an oral solicitation, Requestors read Commission regulations to require that the advertisement itself contain a disclaimer, printed on screen alongside the QR code. Requestors ask the Commission to confirm this is the case.

Very truly yours,



Jacquelyn Lopez
Jonathan Peterson
Emma Anspach

Counsel to DSCC, Montanans for Tester, and Gallego for Arizona

²⁷ 11 C.F.R. § 102.17(c)(2) (emphasis added).