



FEDERAL ELECTION COMMISSION

Washington, DC

MEMORANDUM

TO: The Commission

FROM: Office of the Commission Secretary ^{VFV}

DATE: October 9, 2024

SUBJECT: AO 2024-14 (DSCC & Rosen for Nevada Drafts A, B, & C) Comments from Wiley Rein, LLP.

Attached are comments on AO 2024-14 (DSCC & Rosen for Nevada Drafts A, B, & C) from Wiley Rein, LLP. This matter is on the October 10, 2024 Open meeting.

Attachment

RECEIVED

By Office of the Commission Secretary at 12:56 pm, Oct 09, 2024

RECEIVED

By Office of General Counsel at 11:40 am, Oct 09, 2024

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October 9, 2024

VIA E-MAIL (AO@FEC.GOV)

Federal Election Commission
1050 First Street NE
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Re: Comment on Drafts A, B, and C, Advisory Opinion 2024-14 (DSCC and Rosen for Nevada)

Dear Commissioners:

The NRSC, by and through counsel, provides this comment on Drafts A, B, and C of Advisory Opinion 2024-14 (DSCC and Rosen for Nevada).¹

As explained below, the NRSC urges the Commission to adopt a straightforward time/space analysis—with no minimum percentage required to be allocated to referenced federal candidates—for hybrid television advertisements. Although AO 2006-11’s allocation framework may be appropriate in the context of mailers, it is a poor fit for television advertisements because video communications are capable of having more than one “salient feature.” Applying a unified time/space analysis for hybrid television advertisements and multicandidate allocated advertisements would eliminate the unnecessary handwringing in Question 4 over whether particular references are generic party references or multicandidate references because there would no longer be a difference in the final allocation. The NRSC supports Draft C’s response to Question 2, which concludes that a candidate’s narrative voiceover must be allocated as candidate advocacy when the voiceover amounts to a reference to a clearly identified candidate. Finally, the NRSC supports Draft C’s response to Question 3 because it recognizes that a wide variety of content “bestow[s] a benefit to the party as a whole” and may be allocable as party advocacy.

I. The Commission should adopt a straightforward time/space ratio analysis for hybrid television advertisements and limit the allocation methodology of AO 2006-11 to hybrid mailers only.

In response to Question 1, Drafts A, B, and C correctly conclude that the “Requestors may evenly split the cost of a hybrid television advertisement that clearly identifies Senator Rosen and

¹ See Agenda Doc. No. 24-43-A, AO 2024-14 (DSCC and Rosen for Nevada) (Oct. 3, 2024) (“Draft A”); Agenda Doc. No. 24-43-B, AO 2024-14 (DSCC and Rosen for Nevada) (Oct. 4, 2024) (“Draft B”); Agenda Doc. No. 24-43-C, AO 2024-14 (DSCC and Rosen for Nevada) (Oct. 7, 2024) (“Draft C”).

equally promotes on a time/space basis Senator Rosen’s candidacy for the U.S. Senate . . . and generic candidates of the Democratic party . . . provided that the time and space devoted to Senator Rosen will actually be equal to the time and space devoted to the generically referenced congressional candidates.”² To reach this conclusion, Drafts A, B, and C rely on “the framework utilized in Advisory Opinion 2006-11 (Washington Democratic State Central Committee).”³ Although the ultimate conclusion to Question 1 in Drafts A, B, and C is correct based on the Requestors’ representation that an equal amount of time and space will be devoted to candidate advocacy and generic party advocacy, the NRSC disagrees with the analysis in all three drafts. The NRSC believes that AO 2006-11’s allocation framework is ill-suited for hybrid television advertisements, and it would be more appropriate to adopt a straightforward time/space analysis based on Section 106.1(a).

AO 2006-11’s allocation framework is a combination of Sections 106.1 and 106.8 that the Commission specifically created for hybrid mailers. Print communications, such as mailers, are static with only visual elements. Video communications not only employ audio *and* visual elements, but also are dynamic and change over the course of the communication. The Commission reasonably concluded in AO 2006-11 that candidate advocacy would be “the most salient feature” of a hybrid mailer due to the static, visual nature of print communications. Video communications, on the other hand, are capable of having more than one “salient feature.” There is no need to require that a minimum 50% of a hybrid video communication be allocated to the referenced federal candidate. The NRSC believes that a straightforward time/space analysis—with no mandatory 50% minimum allocated to a referenced federal candidate regardless of the content of the advertisement—best captures the expected benefit that a political party and candidate each receive in a hybrid television advertisement.

If the Commission were to conclude that hybrid television advertisements may be allocated on a time/space basis, this would give political parties and campaigns the freedom to craft hybrid advertisements such as Advertisement C, which references a federal candidate benefitting from the advertisement and her opponent (Senator Rosen, Sam Brown), generically references a political party (Republican Party), and references a political party leader who is a federal candidate (President Trump) to help contrast positions between the Democratic and Republican parties. Both the generic party reference and reference to a party leader who is a federal candidate benefits the DSCC. If a straightforward time/space analysis applied to Advertisement C, the portions referencing Senator Rosen would be allocable as candidate advocacy and the portions referencing Republicans and President Trump would be allocable as party advocacy.

In the enforcement context, the distinctions between AO 2006-11 hybrid advertisements and Section 106.1(a) multicandidate allocated advertisements have eroded over time. For example, in MUR 6685 (Horsford for Congress, *et al.*), the Office of General Counsel (“OGC”) acknowledged that the advertisement at issue clearly identified non-federal candidates in the visual imagery and “one could argue that the ad is properly allocated to those . . . candidates pursuant to

² Draft A at 6; Draft B at 6; Draft C at 6.

³ Draft A at 10; Draft B at 10; Draft C at 11.

the general allocation rule at 11 C.F.R. § 106.1 simply as a multi-candidate ad.”⁴ However, OGC viewed the non-federal candidate reference as “fleeting” and “would likely cause a ‘reasonable viewer’ to conclude that it is a reference to the ‘party as a whole.’”⁵ OGC viewed the non-federal candidate reference as a generic party reference and proceeded to analyze the advertisement at issue under AO 2006-11’s allocation framework.⁶

In MURs 7169, *et al.* (DCCC, *et al.*), the DCCC jointly sponsored television advertisements with a number of Democratic congressional campaigns.⁷ Several of the advertisements at issue clearly identified, but did not expressly advocate for the defeat of, President Trump, who was seeking re-election.⁸ Because the advertisements did not contain a generic party reference and instead referenced President Trump, OGC “believe[d] it was reasonable . . . to allocate the costs of the advertisements on a time and space basis pursuant to Section 106.1(a).”⁹ The Commission agreed, further concluding that the DCCC was permitted to pay for the portion of the advertisements referencing President Trump as an operating expense.¹⁰ In a subsequent enforcement matter, OGC characterized these references to President Trump “as conferring a benefit to the entire Democratic Party” and therefore allocable to the DCCC.¹¹ OGC explained that “[i]n those ads, Trump’s positions and policies were used as a foil to compare and criticize the positions and policies of the Democratic candidate’s Republican opponent.”¹²

Drafts A, B, and C state that “[a]llocation between a candidate and their party has been permitted previously because the communication’s message is reasonably expected to bestow a benefit to the party as a whole in addition to candidate.”¹³ But as the enforcement matters above indicate (and as Draft C acknowledges), references to other candidates—particularly those who hold leadership positions in a political party or are high-profile members of a political party—function as “a reference to the ‘party as a whole’”¹⁴ and “confer[] a benefit to the entire [p]arty.”¹⁵

The distinction between AO 2006-11’s hybrid advertisements and Section 106.1(a)’s multicandidate allocated advertisements elevates form over substance. The time/space devoted to referencing a benefitting federal candidate or his/her opponent should be allocable as candidate

⁴ MUR 6685 (Horsford for Congress, *et al.*), First General Counsel’s Report, at 10 n.8 (June 27, 2014).

⁵ *Id.*

⁶ *Id.*

⁷ MURs 7169, *et al.* (DCCC, *et al.*), First General Counsel’s Report, at 3 (June 16, 2017).

⁸ *Id.* at 7.

⁹ *Id.* at 9.

¹⁰ MURs 7169, *et al.* (DCCC, *et al.*), Factual & Legal Analysis, at 9-10 (Nov. 22, 2017).

¹¹ MUR 7627 (NRCC, *et al.*), First General Counsel’s Report, at 16 (Mar. 19, 2020) (discussing MURs 7169, *et al.*).

¹² *Id.*

¹³ Draft A at 13; Draft B at 13; Draft C at 15.

¹⁴ MUR 6685 (Horsford for Congress, *et al.*), First General Counsel’s Report, at 10 n.8

¹⁵ MUR 7627 (NRCC, *et al.*), First General Counsel’s Report, at 16

advocacy; the time/space devoted to generically referencing a political party, its leaders, and its positions, or otherwise “bestow[ing] a benefit to the party as a whole,”¹⁶ should be allocable as party advocacy.¹⁷ We urge the Commission to revisit its analysis to Question 1 and adopt a unifying approach by determining that a straight-up time/space ratio may be used to allocate the costs between a candidate and party for hybrid advertising.¹⁸

II. The portions of a hybrid television advertisement’s time and space that refer to a clearly identified federal candidate or the federal candidate’s opponent should be allocable to the federal candidate’s campaign.

The NRSC supports Draft C’s response to Question 2, which concludes that “the portions of the hybrid advertisement that feature Senator Rosen speaking directly to the camera, and portions narrated by Senator Rosen wherein she is clearly identified as a candidate for Federal office, should be allocated as candidate advocacy.”¹⁹ Draft C finds it “appropriate to apply in the instant matter” Section 106.1(a)’s time/space principles, which allocate costs to a candidate based on the time and space that clearly identify the candidate.²⁰

Draft A, on the other hand, concludes that “[p]ortions of the hybrid advertisement that feature Senator Rosen speaking directly to the camera should be allocated as candidate advocacy,” but “portions of the hybrid advertisement being narrated by Senator Rosen do not—by virtue of the narration alone—need to be allocated as candidate advocacy.”²¹ Draft A further explains that “the mere use of Senator Rosen’s voice to narrate text—paired with visuals that do not include Senator Rosen or her opponent—does not clearly provide a benefit to Senator Rosen.”²² The NRSC disagrees with Draft A’s conclusion that the portions of the proposed advertisement using Senator Rosen’s narrative voiceover need not *ever* be allocable as candidate advocacy.

Draft A also invokes Section 106.1(a), which provides that “expenditures made on behalf of more than one *clearly identified Federal candidate* shall be attributed to each such candidate according to the benefit reasonably derived.”²³ For television advertisements, “the attribution shall be determined by the proportion of space or time devoted to each candidate as compared to the

¹⁶ Draft C at 18.

¹⁷ We note that if party advocacy involves expressly advocating the election or defeat of a party leader who is a federal candidate, such portion of the advertisement would need to be reported as an independent expenditure. *See, e.g.,* MURs 7169, *et al.* (DCCC, *et al.*), Factual & Legal Analysis, at 8.

¹⁸ Draft C appears to imply, but does not explicitly state, that a straightforward time/space analysis based on Section 106.1(a)—without a minimum 50% attributable to candidate advocacy—could potentially be a permissible way to allocate the costs of a hybrid television advertisement. *See* Draft C at 10-11.

¹⁹ Draft C at 12.

²⁰ *Id.* at 12-13.

²¹ Draft A at 10.

²² *Id.* at 11.

²³ 11 C.F.R. § 106.1(a) (emphasis added).

total space or time devoted to all candidates.”²⁴ In practice, the Commission has allocated hybrid and multicandidate television advertisements based on the time/space devoted to references to a clearly identified federal candidate vs. references to generic party advocacy or other clearly identified candidates.²⁵

“Clearly identified” means:

[T]he candidate’s name, nickname, photograph, or drawing appears, or the identity of the candidate is otherwise apparent through an unambiguous reference such as “the President,” “your Congressman,” or “the incumbent,” or through an unambiguous reference to his or her status as a candidate such as “the Democratic presidential nominee” or “the Republican candidate for Senate in the State of Georgia.”²⁶

A federal district court has further concluded that the use of a federal candidate’s voice only—*without any other reference* to the federal candidate in the communication—is not “a contextually unambiguous reference” to the federal candidate and, accordingly, is not a “clearly identified” reference to the federal candidate.²⁷

The Requestors’ proposed Advertisement A contains audio of Senator Rosen narrating while other visuals appear on-screen (*i.e.*, imagery that does not depict Senator Rosen or her opponent) as well as video of Senator Rosen speaking directly to the camera. These portions of proposed Advertisement A qualify as references to a clearly identified federal candidate, Senator Rosen, and should be allocable as candidate advocacy. Although Senator Rosen’s narrative voiceover, by itself, is not a reference to a clearly identified federal candidate, she subsequently appears in the advertisement speaking directly to the camera. When these elements appear in the same advertisement, the narrative voiceover portion becomes clearly identifiable. After all, it will be clear to the audience that Senator Rosen narrated the entire advertisement. Accordingly, the NRSC urges the Commission to adopt Draft C’s response to Question 2 and conclude that the portion of proposed Advertisement A featuring Senator Rosen’s voiceover is allocable as candidacy advocacy.

III. Political parties should have wide latitude to determine what type of content qualifies as party advocacy.

The NRSC supports Draft C’s response to Question 3, which acknowledges that the phrase “greedy politicians” paired with images of “pharmaceutical executives in suits” “are not sufficient to serve as the audio and visual references to generic candidates of a political party,” but

²⁴ *Id.*

²⁵ *See, e.g.*, MURs 7169, *et al.* (DCCC, *et al.*), Factual and Legal Analysis, at 8

²⁶ 11 C.F.R. § 100.17.

²⁷ *See Hispanic Leadership Fund, Inc. v. Fed. Elec. Comm’n*, 897 F.Supp.2d 407, 429-30 (E.D. Va. Oct. 4, 2012) (discussing candidate references in the context of electioneering communications).

“[n]evertheless . . . may be allocated as party advocacy.”²⁸ Draft C takes a practical position on the type of content that should qualify as party advocacy. Drafts A and B, on the other hand, conclude that the phrase “greedy politicians” paired with images of “pharmaceutical executives in suits” “cannot be allocable as party advocacy” because they do not qualify as generic party references.²⁹

The NRSC believes that political parties should have wide latitude to determine the type of content that qualifies as party advocacy. Nevertheless, if generic party references remain an important concept in the Commission’s final opinion, the NRSC believes that political parties should also have wide latitude to determine how to generically reference candidates of their own party or candidates of the opposing party, provided it is clear to the audience that the advertisement is doing so. Although the NRSC is sympathetic to Drafts A and B concluding that the phrase “greedy politicians” paired with images of “pharmaceutical executives in suits” is not a generic party reference for this particular advertisement,³⁰ it is concerned with aspects of both drafts’ analyses.

Drafts A and B acknowledge that “the Commission has never stated that the generic party reference must use the specific or office names of the political party being advocated for or against in the advertisement,” but both drafts then proceed to list a rather limiting set of generic party references.³¹ If the generic party reference concept remains important in the Commission’s final opinion, political parties should have the flexibility to generically refer to a political party in ways other than “referring generally to candidates that share the political party’s ideology, displaying an array of party leaders who are not on the ballot in the relevant jurisdiction,³² or using a party’s historical nickname.”³³ For example, attacking a policy advanced by an opposing political party—without necessarily “referring generally to *candidates* that share the political party’s ideology—should qualify as party advocacy because it benefits the party as a whole.

For these reasons, the NRSC supports Draft C’s response to Question 3, which concludes that messaging “reasonably expected to bestow a benefit to the party as a whole” may be allocated

²⁸ Draft C at 13.

²⁹ Draft A at 12; Draft B at 11.

³⁰ Given that Democratic U.S. Senate campaigns have accepted hundreds of thousands of dollars from the pharmaceutical industry this election cycle, the NRSC questions whether a reference to “greedy politicians” combined with images of “pharmaceutical executives in suits” is a sufficiently unambiguous reference to generic Republican candidates. See Open Secrets, *Pharmaceutical Manufacturing Recipients: Top 20 Senators, 2023-2024*, <https://tinyurl.com/46ysp3d6>.

³¹ Draft A at 13; Draft B at 13.

³² As discussed below, references to a political party’s leaders—even when they appear on the ballot in the relevant jurisdiction—should qualify as party advocacy.

³³ Draft A at 13; Draft B at 13.

as party advocacy “regardless of medium and does not depend upon any explicit reference to generic party candidates.”³⁴

IV. References to party leaders should be allocable as party advocacy, regardless of whether the party leader appears on the ballot.

The NRSC supports Draft C’s response to Question 4, which asks whether audio or visual references to President Trump qualify as generic party references and further demonstrates that the distinction between AO 2006-11 and Section 106.1(a) is a fiction. Drafts A, B, and C conclude that such references “do[] not constitute a generic party reference” because President Trump “is a current candidate for federal office in the 2024 cycle and will be on the ballot in the jurisdiction where the advertisements are run.”³⁵ While Draft C views the references as “specific, not generic,”³⁶ Drafts A and B “suggest[] that the benefit of such a reference is reasonably expected to accrue to the Democratic presidential candidate, not to the party as a whole.”³⁷

All drafts take the position that “displaying an array of leaders who are not on the ballot in the relevant jurisdiction” *is* a generic party reference,³⁸ but identifying a party leader who is on the ballot *is not* a generic party reference.³⁹ As discussed above, and as Draft C acknowledges,⁴⁰ references to other candidates who hold leadership positions in a political party or are high-profile members of a political party can serve as “a reference to the ‘party as a whole’”⁴¹ and “confer[] a benefit to the entire [p]arty.”⁴² The fact that, under Drafts A and B, whether the referenced party leader is on the ballot determines whether the advertisement is allocated pursuant to AO 2006-11 or Section 106.1(a) is unsound.⁴³ Under either framework, the portion of the advertisement related to referencing the party leader would be allocable as party advocacy.⁴⁴ Draft C implicitly acknowledges that this distinction should be irrelevant, taking the position that the references to

³⁴ Draft C at 15.

³⁵ Draft A at 15; Draft B at 15; Draft C at 17-18.

³⁶ Draft C at 18.

³⁷ Draft A at 15; Draft B at 15.

³⁸ Draft A at 13; Draft B at 13; Draft C at 15.

³⁹ Draft A at 15; Draft B at 15; Draft C at 17-18.

⁴⁰ Draft C at 18 (“[T]he references to Donald Trump reflect his status as ‘the head of the Republican Party’ who ‘defines the issues that many Republican candidates support.’ Accordingly, the references to ‘his name or likeness’ are intended as a ‘contrast tool to encourage support for generic candidates of the Democratic Party.’” (citations omitted)).

⁴¹ MUR 6685 (Horsford for Congress, *et al.*), First General Counsel’s Report, at 10 n.8

⁴² MUR 7627 (NRCC, *et al.*), First General Counsel’s Report, at 16

⁴³ Draft A suggests that the Requestors “nevertheless could allocate [Advertisement C] under 11 C.F.R. § 106.1(a)” as a multicandidate allocated advertisement. Draft A at 15.

⁴⁴ If a reference to a party leader who appears on the ballot contains express advocacy, the portion allocable to party advocacy also would be an independent expenditure by the political party. *See, e.g.*, MURs 7169, *et al.* (DCCC, *et al.*), Factual & Legal Analysis, at 8.

President Trump are “allocable as party advocacy” because of “the benefit reasonably expected to be derived” by the political party through such messaging.⁴⁵

Although the NRSC supports Draft C’s response to Question 4, it again urges the Commission to revisit its analysis to Question 1 and determine that a straightforward time/space ratio may be used to allocate the costs between a candidate and party for hybrid advertising.

* * *

We appreciate the opportunity to submit this comment concerning Drafts A, B, and C of AO 2024-14.

Respectfully Submitted,

/s/ Michael E. Toner

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⁴⁵ Draft C at 18.