FEDERAL ELECTION COMMISSION

Washington, DC

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of	)	
	)	
Unknown Respondent	)	MUR 7776
	)	

STATEMENT OF REASONS OF CHAIRMAN ALLEN J. DICKERSON AND COMMISSIONERS SEAN J. COOKSEY AND JAMES E. "TREY" TRAINOR, III

This Matter came to the Commission's attention when an individual who responded to a telephone survey conducted by Promark Research Services ("Promark")[1] on August 5, 2020 alleged that that survey was conducted in violation of 11 C.F.R. §110.11, which sets forth disclaimer requirements for certain types of political communications.[2] Our Office of General Counsel ("OGC") agreed, taking the view that the survey qualified as regulable "general public political advertising," as opposed to legitimate public opinion research, and recommended that we find reason to believe the survey's unknown sponsor violated the disclaimer requirements set forth by the Federal Election Campaign Act of 1971, as amended (the "Act") and Commission regulations.[3]

OGC's recommendation reflects a fundamental misunderstanding of common methods used by the public opinion and political survey research industry. In its analysis, OGC conflates garden-variety message testing with "general public political advertising" (which falls under the aegis of the Act) by labeling Promark's call a "push poll"—a term that does not appear anywhere in the Act or Commission regulations. Message testing, by its very definition, is not a form of advertising; it is designed and used to elicit, rather than disseminate, reactions and information about political messaging from the public. The available facts indicate that Promark's call was designed to accomplish just that, and no evidence before us suggests that it was intended for any purpose other than gathering

[1] Promark advertises itself as providing "research, data collection and tabulation services to market research firms, political analysts, consultants, corporations, public relations, investor relations, advertising agencies, universities and independent research organizations." *See* https://www.promarkresearch.com (last accessed May 11, 2022).

[2] Compl. at 1, MUR 7776.

[3] First Gen. Counsel's Rpt. at 9, MUR 7776.

information and measuring public sentiment about candidates and messaging.[4] Therefore, because Promark's telephone survey did not qualify as "general public political advertising" subject to our jurisdiction, we voted against OGC's recommendation that we find reason to believe a violation occurred.[5]

I. FACTUAL BACKGROUND

The Complaint alleges that on August 5, 2020, an individual representing Promark called the Complainant on his cellphone, told him that Promark was conducting an "independent research" survey, and asked if the Complainant would participate.[6] The Complainant agreed, and states to the Commission that the survey consisted of a series of multiple-choice questions regarding Representative Andy Kim (the incumbent Democratic candidate for New Jersey's 3rd Congressional District in the 2020 general election) and David Richter (Kim's Republican challenger).[7] The Complainant further asserts that despite his asking multiple times, the interviewer did not identify the survey's sponsor.[8] According to the Complaint, "The interviewer read statements most would believe were facts and asked questions that reinforced the statements. Questions beginning like 'Knowing David Richter is a patriot, and Andy Kim voted to give illegal immigrants $6,000 ...' were typical throughout the 34-minute call."[9]

In its Response, Promark states that it is a company that offers telephone survey research services, as well as online surveying, data collection, and analysis services.[10] Promark acknowledges that the Complainant was called to take a survey Promark was conducting on August 5, 2020, and asserts that this survey was not a "public communication" as defined by 11 C.F.R. § 100.26; rather, it "was a valid research tool used to gather data from Respondents on various issues of public and political import," and therefore could not be considered an advertisement.[11]

A review of Commission records shows that no disbursements to Promark were reported by Richter or any other federal committee or candidate during the 2020 election cycle.

[4] Nor do we have any indication that *any* candidate or committee (or agent of either) authorized, commissioned, or paid for Promark's survey.

[5] Certification ¶ 1, MUR 7776 (April 4, 2022).

[6] Compl. at 1, MUR 7776.

[7] *Id.*

[8] *Id.*

[9] *Id.*

[10] Resp. at 1, MUR 7776.

[11] *Id.*

II. APPLICABLE LAW

Under the Act, a disclaimer is required:

- "Whenever a political committee makes a disbursement for the purpose of financing any communication through any broadcasting station, newspaper, magazine, outdoor advertising facility, mailing, *or any other type of general public political advertising*; […]
- Whenever any person makes a disbursement for the purpose of financing communications expressly advocating the election or defeat of a clearly identified candidate, or solicits any contribution through any broadcasting station, newspaper, magazine, outdoor advertising facility, mailing, *or any other type of general public political advertising*[;] or
- [Whenever any person] makes a disbursement for an electioneering communication (as defined in section 30104(f)(3) of this title)."[12]

Commission regulations interpret the disclaimer requirement to reach "public communications" made by political committees, "public communications" containing express advocacy or solicitations of contributions, and electioneering communications.[13] A "public communication" is a communication "by means of any broadcast, cable, or satellite communication, newspaper, magazine, outdoor advertising facility, mass mailing, or telephone bank to the general public, *or any other form of general public political advertising*."[14] A telephone bank means that more than 500 calls of an identical or substantially similar nature were made within a 30-day period.[15]

When a communication is not authorized by a candidate, an authorized political committee of a candidate, or its agents, it must clearly state the name and permanent street address, telephone number, or World Wide Web address of the person who paid for the communication and state that the communication is not authorized by any candidate or candidate's committee.[16] The disclaimer must be "presented in a clear and conspicuous manner, to give the reader, observer, or listener adequate notice of the identity of the person or political committee that paid for, and where required, that authorized the communication."[17]

III. ANALYSIS

The key question before the Commission in this Matter is whether Promark's telephone call—which was allegedly made on a recorded line nearly three months before the 2020 general election, lasted for 34 minutes, and included both questions and statements

[12] 52 U.S.C. § 30120(a).

[13] 11 C.F.R § 110.11(a).

[14] 52 U.S.C. § 30101(22); 11 C.F.R. § 100.26 (emphasis added).

[15] 52 U.S.C. § 30101(24); 11 C.F.R. § 100.28.

[16] 52 U.S.C. § 30120(a)(3); 11 C.F.R. § 110.11(a)(2).

[17] 11 C.F.R. § 110.11(c).

that appeared to be intended to elicit the recipient's reaction—is the type of communication that requires a disclaimer. In our view, the answer to that question is no. The plain language of the Act governs only communications that qualify as general public political advertising or electioneering communications, and message testing calls like Promark's do not qualify as either. This very issue has come before the Commission in the past, and we adopt and incorporate by reference our predecessors' statement of reasons contrasting legitimate survey research and message testing with so-called "push polls" and holding that the former does not require a disclaimer.[18]

In its analysis, OGC first presumes—without citing any concrete evidence—that Promark's survey *must* have involved at least 500 calls, thus making it a "telephone bank," that qualified as a "public communication" and required a disclaimer.[19] Even assuming *arguendo* that Promark did, in fact, make more than 500 calls while its survey was in the field, this argument ignores the language of the Act, relevant legislative history, and the Commission's regulatory intent. When the Commission promulgated regulations implementing the 2002 Bipartisan Campaign Reform Act ("BCRA"), it determined that Congress had expanded disclaimer requirements to reach disbursements to finance any communication made by political committees *through any type of general public political advertising,* as well as electioneering communications.[20] The regulatory history, as well as the plain language of 52 U.S.C. § 30120(a), thus indicate that particular "communications" must take the form of either "general public political advertising" or "electioneering" to be subject to the disclaimer requirement.[21] And in passing BCRA, Congress evidenced no intent that the disclaimer requirements should *also* capture political survey research and polling.[22]

In an apparent attempt to shoehorn Promark's call into the "general public political advertising" category, OGC suggests that the survey, by virtue of including statements that

[18] *See generally* Statement of Reasons of Vice Chairman Matthew S. Petersen and Comm'rs Caroline C. Hunter and Donald F. McGahn, MUR 5835 (DCCC) ("Petersen/Hunter/McGahn Statement").

[19] Apart from the call cited in the Complaint, OGC's only basis for concluding that Promark made more than 500 calls is the notion that because "[New Jersey's 3rd Congressional] district has a population of approximately 735,981 people, consists of 53 municipalities, and is comprised of Burlington and portions of Ocean counties," "it would not be unreasonable to assume that over 500 surveys were conducted within a 30-day period." First Gen. Counsel's Rpt. at 7, MUR 7776.

[20] Disclaimers, Fraudulent Solicitation, Civil Penalties, and Personal Use of Campaign Funds, 67 Fed. Reg 76,962, 76,963 (Dec. 13, 2002) ("each form of communication specifically listed in the definition of 'public communication,' as well as each form of communication listed with reference to a 'communication' in 52 U.S.C. § 30120(a), *must be a form of 'general public political advertising*'" (emphasis added)). "Electioneering communications" are defined as broadcast, cable or satellite communications that refer to a clearly identified federal candidate, are publicly distributed within 30 days of a primary or 60 days of a general election, and are targeted to the relevant electorate. 11 C.F.R. § 100.29(a).

[21] 52 U.S.C. § 30120(a).

[22] Then-Senator Russell Feingold, one of BCRA's primary sponsors, issued a section-by-section analysis of BCRA noting, in a section entitled "Standards for Identification of Sponsors of Election-Related Advertising," that the bill's section amending the disclaimer provision "applies the requirement to any disbursement for public political advertising." 148 Cong. Rec. SI994 (Mar. 18, 2002).

were "disparaging of one candidate and supportive of the other," was a so-called "push poll."[23] The term "push poll" is not defined by the Act or Commission regulations, but it is colloquially used to describe telephone calls, disguised as research, which aim to persuade voters and affect election outcomes rather than measure public opinions.[24] While both push polls and message testing can involve the use of negative or politically-charged statements, the intent and methodology for each are distinguishing factors.

Our predecessors have observed that, in general, push polls do not record the respondent's answers to the questions asked, are very short in duration, involve only a few statements or questions, and occur very close to Election Day (to influence the respondent's vote most effectively).[25] Legitimate message testing calls, by contrast, are used to gauge the effectiveness of various possible political and campaign messages, generally last for more than just a few minutes, and involve more than five or six questions.[26] Promark's call, which (by the Complainant's own account) lasted for over a half an hour, was received more than three months prior to the general election, and was reportedly made on a recorded line, fits comfortably in the latter category. Instead of probing this distinction, however, OGC simply ignores it, concluding that the call was part of a telephone bank and was therefore a form of "general public political advertising" that required a disclaimer under the Act and Commission regulations.[27]

OGC also seems to imply that Promark's declining to identify the client that commissioned the survey is indicative of nefarious intent. But as any experienced pollster knows, the results of a political survey are only as good as the data input—and a key aspect of maintaining the quality of that data is ensuring that survey recipients' responses are not unduly influenced by their knowledge of a poll's sponsor.[28] In other words, if the recipient of a telephone poll must be told that the poll is being paid for by a certain institution (or company, or candidate), it could degrade the quality of the data.

If the Commission had approved this line of reasoning—that is, that all calls that happen to present negative information or messaging about candidates are "push polls"

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[23] First Gen. Counsel's Rpt. at 5, MUR 7776.

[24] *See, e.g.*, AMERICAN ASSOC. FOR PUBLIC OPINION RESEARCH, *What is a "Push" Poll?*, *available at* https://www.aapor.org/Education-Resources/Resources/What-is-a-Push-Poll.aspx (last accessed May 11, 2022). AAPOR is a § 501(c)(3) non-profit entity that describes itself as "a professional organization dedicated to advancing the science and practice of survey & opinion research").

[25] Petersen/Hunter/McGahn Statement at 11.

[26] *Id.* at 11–12.

[27] First Gen. Counsel's Rpt. at 5, MUR 7776.

[28] *See, e.g.*, Petersen/Hunter/McGahn Statement at 13 ("[A]s a policy matter, legitimate political survey research does not identify the campaign, committee, entity, group, or individual paying for the survey or telephone poll because doing so undermines the validity of the results. Many survey respondents, especially those who are less well-informed, look for clues to give the "correct" answer to a question … If an interviewer reveals who is paying for the poll, that knowledge can influence the response to the interviewer's questions…. If the responder knows who is sponsoring the poll, he or she is more or likely to think there is a "right" answer and may adjust his or her response accordingly. Introducing such bias degrades the value of the data obtained.").

qualifying as "general public political advertising" that fall within the Commission's jurisdiction—it would have significantly affected pollsters' ability to elicit information from the public to guide their own decision-making, as well as that of their clients (political or otherwise). This interpretation would make message testing difficult, if not impossible, in the political world.

OGC's suggested interpretation also bears implications for First Amendment-protected speech. Although the Supreme Court has held that regulators can require that a communication bear a disclaimer, that requirement must be narrowly tailored to serve an overriding government interest, such as helping the electorate parse the content of campaign advertising or protecting against corruption.[29] In this situation, such overriding government interests simply do not exist. A decision to enforce on OGC's theory would ultimately upend the entire political survey research industry and, relatedly, would likely flood the Commission's enforcement docket with meritless complaints about legitimate political survey and polling operations, while doing nothing to inform the public as to the sources of funding for true political advertisements.

Accordingly, we voted against finding reason to believe that an Unknown Respondent, acting through Promark, violated the Act or Commission regulations.

May 11, 2022
Date

Allen J. Dickerson
Chairman

May 11, 2022
Date

Sean J. Cooksey
Commissioner

May 11, 2022
Date

James E. "Trey" Trainor, III
Commissioner

[29] *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 347 (1995) (holding that state's prohibition against distribution of anonymous campaign literature did not satisfy exacting scrutiny and therefore violated the First Amendment).