

SANDLER REIFFSANDLER REIFF LAMB
ROSENSTEIN & BIRKENSTOCK, P.C.1620 Eye Street NW, Suite 900
Washington, DC 20006
www.sandlerreiff.com
T: 202-479-1111
F: 202-479-1115

November 26, 2024

Ms. Wanda D. Brown
Assistant General Counsel
Office of Complaints Examination
and Legal Administration
Federal Election Commission
Attn: Christal Dennis, Paralegal
1050 First Street, N.E.
Washington, D.C. 20463

VIA E-mail to CELA@fec.gov

Re: MUR 8341

Dear Ms. Brown:

The undersigned serves as counsel to the Alaska Democratic Party (“ADP”) and Monica Southworth, in her official capacity as Treasurer (collectively, “Respondents”). This letter responds on behalf of Respondents to the Commission’s notification that it received a complaint (the “Complaint”) from Jay McDonald (the “Complainant”) alleging that the Respondents violated the Federal Election Campaign Act (the “Act”) and Federal Election Commission (the “Commission”) regulations.

The Complainant alleges that the Party disseminated a prerecorded message opposing Republican candidate for Congress, Nick Begich, without including a disclaimer. However, the prerecorded message was neither a “telephone bank” nor a “form of general public political advertising” that required a disclaimer, and the Complaint should be dismissed because it fails to allege a violation of the Act.

Even if the Commission finds that the prerecorded message was a public communication, this Complaint is ripe for dismissal under the Commission’s prosecutorial discretion because (i) there was no likelihood that a recipient of the prerecorded message would be confused about who sponsored it as it was directly connected to a mailer that contained ADP’s disclaimer, and (ii) the total cost for the prerecorded message was \$27.14.

Background

ADP disseminated mailers during the 2024 election that supported its incumbent candidate Rep. Mary Peltola in her bid for re-election against Nick Begich. These mailers each refer to Begich’s company and its alleged fraudulent practices, suggesting that the recipient call

“1-877-AK-SCAMS” to learn more. ADP paid \$27.14 on September 23, 2024 for use of the phone number “1-877-AK-SCAMS”. When a person calls the number, they hear a prerecorded message with content that is largely identical to the information on the mailers regarding Begich and his company.

Legal Analysis

1. A phone call requiring the recipient to call in order to hear a message is neither a telephone bank nor a form of general public political advertising and does not require a disclaimer.

A “public communication” includes communications that are “telephone bank[s] to the general public” and “any other form of general public political advertising.”¹ The Commission’s regulations define a “telephone bank” as a communication that consists of “more than 500 telephone calls of an identical or substantially similar nature within any 30-day period,”² but the regulations themselves do not clearly define “general public political advertising.”

The Commission has previously held that automated prerecorded telephone messages (“robocalls”) qualify as either a “telephone bank” or a form of “general public political advertising,”³ but the calls in those previous actions were placed by the committee.⁴ Here, ADP made no outgoing calls to deliver the prerecorded message. Instead, it invited recipients of its mailers to choose to call the number on the printed mailer, thereby allowing recipients to opt into receiving the content of the prerecorded message. This factual distinction differentiates the prerecorded message available by calling “1-877-AK-SCAMS” from robocalls in other enforcement actions.

- a. The prerecorded message did not constitute a “telephone bank.”

A “telephone bank” is subject to the Commission’s disclaimer requirements, but the prerecorded message described in the Complaint is not the same as other forms of phone calls or robocalls.⁵ In previous enforcement actions, the Commission has held that “robocalls” are

¹ 11 C.F.R. § 100.26.

² 11 C.F.R. § 100.28.

³ *See, e.g.*, MUR 5401 (Cuellar Congressional Campaign), Factual & Legal Analysis at 2-3, General Counsel’s Report #2 at 4-5.

⁴ *See, e.g.*, MUR 7987 (Phill Rizzo for Congress), Second General Counsel’s Report at 2-3; MUR 7780 (Thom Tillis Committee *et al.*), Factual & Legal Analysis at 6-7; MUR 7513 (Community Issues Project), Factual & Legal Analysis at 19; MUR 6690 (Sobhani for Maryland), Factual & Legal Analysis at 3; MUR 5401 (Cuellar Congressional Campaign), Factual & Legal Analysis at 3.

⁵ *See* Fed. Elect. Comm’n, *Political Party Committee Guide* at 78 n. 8 (citing 11 C.F.R. § 110.11(a)).

“public communications,”⁶ but each of those enforcement actions dealt with calls *placed* by the committees directly to the recipient.⁷

The prerecorded message at issue here, however, is not a typical telephone bank where a political committee places a phone call to a person at their phone number without any decision made by the recipient of the call. Rather, the recipients of the mailers had to affirmatively make the decision to call the “1-877-AK-SCAMS” phone number. As a result, the prerecorded message available at “1-877-AK-SCAMS” is not a “telephone bank” under the Commission’s definition.

b. The prerecorded message did not constitute “general public political advertising.”

The Commission has also held that robocalls can be “general public political advertising” subject to the Commission’s disclaimer requirements. “General public political advertising” is not specifically defined in the regulations, meaning that the Commission must look to the “common elements” of the enumerated communications.⁸ These prerecorded messages do not share these common elements, are not public communications, and therefore, do not require a disclaimer.

In Advisory Opinion 2022-20, the Commission considered whether sending short-code text messages with a link to an ActBlue “split-it” page would be coordinated expenditures – a question that hinged on whether the texts were “public communications.”⁹ When considering the “common elements” of public communications, the Commission noted that one of these elements is “that they typically require the person making the communication to pay to use a third party’s platform to gain access to the third party’s audience,” such as through a newspaper or online ad that the recipient only receives because of their use of the newspaper or website.¹⁰

Conversely, the text messages at issue in Advisory Opinion 2022-20 would only be sent to those who affirmatively opted into receiving them. Specifically, recipients of the texts “sought out the speaker and speech through a forum controlled by the speaker (i.e., the short code number the committee leases)” as opposed to a situation where “a speaker pays to disseminate a message through a medium controlled, and to an audience established, by a third party.”¹¹ From this, the Commission held that the texts were not public communications.¹²

⁶ See, e.g., MUR 7987 (Phill Rizzo for Congress), Second General Counsel’s Report at 2-3; MUR 7780 (Thom Tillis Committee *et al.*), Factual & Legal Analysis at 6-7; MUR 7513 (Community Issues Project), Factual & Legal Analysis at 19; MUR 6690 (Sobhani for Maryland), Factual & Legal Analysis at 3; MUR 5401 (Cuellar Congressional Campaign), Factual & Legal Analysis at 3.

⁷ See, e.g., MUR 7987 (Phill Rizzo for Congress), Factual & Legal Analysis at 1-2; MUR 7780 (Thom Tillis Committee *et al.*), Factual & Legal Analysis at 3; MUR 7513 (Community Issues Project), Factual & Legal Analysis at 4; MUR 6690 (Sobhani for Maryland), Factual & Legal Analysis at 1.

⁸ Fed. Elect. Comm’n, Adv. Op. 2022-20 at 4.

⁹ *Id.* at 3-4.

¹⁰ *Id.* at 4-5.

¹¹ *Id.* at 5; see also Fed. Elect. Comm’n, Adv. Op 2024-01 at 6 (quoting Fed. Elect. Comm’n, Adv. Op. 2022-20 at 4-5).

¹² Fed. Elect. Comm’n, Adv. Op. 2022-20 at 5.

In Advisory Opinion 2024-01, the Commission relied on similar reasoning to determine that paid canvassing was also not a form of “general public political advertising.” There, the Commission explained that:

[T]he Canvassing Literature and Script will not be disseminated “through a medium controlled, and to an audience established, by a third party.” Unlike a newspaper or television company, the canvassing vendors will have no preexisting relationship with the canvass’s audience and will have no more right to communicate with the audience than [the committee]. The vendors will also not establish or identify the audience for the canvassing program. Instead, [the committee] will preselect the voters whose homes will be visited. The vendors will simply act as [the committee’s] agents in carrying out a canvassing program that [the committee] controls. Under [the committee’s] proposal, the canvassing vendors neither establish the audience nor control the forum. Accordingly, the proposed Paid Canvass is distinguishable from the types of communications that fall within the definition of “general public political advertising.”¹³

With these considerations in mind, the prerecorded message available by calling “1-877-AK-SCAMS” was not “general public political advertising.” As in Advisory Opinion 2022-20, the recipient of the mailer had to affirmatively opt into receiving the message by making the choice to call the number printed on the mailer. Furthermore, as in Advisory Opinion 2024-01, the vendor here did not establish or control the audience for the prerecorded message. Instead, the recipients of the mailers had the choice of whether to call the number printed on the mailer, effectively self-selecting whether they were part of the audience for the prerecorded message or not.

Because the recipients of the mailers had to consent to the receipt of the prerecorded message and the audience was not established by anyone other than each recipient’s own decision to call “1-877-AK-SCAMS”, the prerecorded message cannot be considered “general public political advertising.”

2. If the Commission finds that the prerecorded message was a “public communication” subject to the Act’s disclaimer requirement, the lack of confusion and *de minimis* amount at issue warrant dismissal based on the Commission’s prosecutorial discretion.

If the Commission takes the position that the prerecorded message is a “public communication,” the low cost at issue here and the lack of confusion about who sponsored the message both warrant dismissal based on the Commission’s prosecutorial discretion.

The Commission has dismissed a number of enforcement actions related to disclaimer requirements, including actions related to robocalls, under its prosecutorial discretion. When reviewing enforcement actions, the Commission “us[es] formal, pre-determined scoring criteria

¹³ Fed. Elect. Comm’n, Adv. Op. 2024-01 at 6 (internal citations omitted).

to allocate agency resources and assess whether particular matters warrant further administrative enforcement proceedings.”¹⁴ Specifically:

These criteria include: (1) the gravity of the alleged violation, taking into account both the type of activity and the amount in violation; (2) the apparent impact the alleged violation may have had on the electoral process; (3) the complexity of the legal issues raised in the matter; and (4) recent trends in potential violations and other developments in the law.¹⁵

Based on these criteria, the Commission has repeatedly dismissed matters as low priority if they involved low dollar amounts or if there was an “unlikeliness that the general public would have been confused as to whether the Committee paid for the communications at issue.”¹⁶ In particular, “[t]he Commission has elected to dismiss or close the file rather than seeking to conciliate in several past matters where the cost of the robocalls lacking the appropriate disclaimer was particularly low.”¹⁷

Here, the prerecorded message was only accessible by calling the “1-877-AK-SCAMS” phone number printed on ADP’s mailers. Those mailers advertising the call-in number included the proper disclaimer, disclosing that ADP paid for the communication and providing contact information for the Party. As a result, the likelihood that a person calling the phone number would be confused about who paid for the prerecorded message would be quite low.¹⁸

Further, the prerecorded message cost ADP \$27.14, which is far below other enforcement actions regarding disclaimers that the Commission has previously dismissed for the low dollar amount involved – ranging from \$43.97 to \$3,399.84.¹⁹ The low costs here, in addition to the

¹⁴ See, e.g., MUR 8224 (Republicans of Northeast Ohio), Enforcement Priority System Dismissal Report at 2.

¹⁵ See, e.g., *id.*

¹⁶ See, e.g., *id.* at 1-2.

¹⁷ MUR 7987 (Phill Rizzo for Congress), Second General Counsel’s Report at 3 (citing MUR 7780 (Thom Tillis Committee, *et al.*), Factual & Legal Analysis at 2; MUR 6721 (Beth Steele, *et al.*), Third General Counsel’s Report at 5.

¹⁸ See MUR 8231 (Charlie Kim in US Congress), Enforcement Priority System Dismissal Report at 2-3; MUR 8224 (Republicans of Northeast Ohio), Enforcement Priority System Dismissal Report at 1-2; MUR 8219 (Tief Gibbs Jensen 4 Congress 2024), Enforcement Priority System Dismissal Report at 2-3 (all dismissing a Complaint because the likelihood for the public to be confused about who actually paid for a communication missing an adequate disclaimer was low).

¹⁹ See MUR 8224 (Republicans of Northeast Ohio), Enforcement Priority System Dismissal Report at 1-2 (dismissing a Complaint regarding \$879.46 in federal mailers because of the low cost of the expenditures involved); MUR 8219 (Tief Gibbs Jensen 4 Congress 2024), Enforcement Priority System Dismissal Report at 2-3 (dismissing a Complaint regarding \$335.25 in door hangers because of the low cost of the expenditures involved); MUR 8054, (Steve Wells for Congress, *et al.*), Enforcement Priority System Dismissal Report at 2-3 (dismissing a Complaint regarding \$3,399.84 for producing and distributing mailers because of the low cost of the expenditures involved); MUR 8054, (Steve Wells for Congress, *et al.*), Enforcement Priority System Dismissal Report at 2 (dismissing a Complaint regarding \$3,399.84 for producing and distributing mailers because of the low cost of the expenditures involved); MUR 7987, (Phil Rizzo for Congress), Second General Counsel’s Report at 2-4 (recommending dismissal of a Complaint regarding \$43.97 for placing robocalls because of the low cost of the expenditures involved); MUR 7559, (Kootenai County Republican Central Committee, *et al.*), Enforcement Priority System Dismissal Report at 1-2 (dismissing a Complaint regarding \$83.81 for producing and distributing mailers because of the low cost of the expenditures involved).

lack of confusion about who paid for the ad, warrant dismissal pursuant to the Commission's prosecutorial discretion.

Conclusion

In summary, ADP's prerecorded message was not a "public communication" under the Act and Commission regulations because it required recipients to affirmatively call the "1-877-AK-SCAMS" number in order to receive the message. In doing so, the prerecorded message is distinct from a typical "telephone bank," where a committee would be placing calls *to* the recipient, and from "general public political advertising," by allowing the recipient of the mailer to opt into the message's content by choosing whether or not to call "1-877-AK-SCAMS". As a result, the Commission should find that no reason to believe exists here and should summarily dismiss this Complaint.

That said, even if the Commission decides that the message was a public communication, the low cost of the disseminating the message and the low likelihood of confusion regarding who sponsored it both weigh heavily in favor of the Commission dismissing the Complaint under its prosecutorial discretion.

If you have any questions regarding this Response, my daytime number is (202) 479-1111. My email address is reiff@sandlerreiff.com.

Sincerely,

A handwritten signature in blue ink, appearing to read 'N. Reiff', is positioned above the typed name.

Neil P. Reiff
Aaron Barden
Counsel to Alaska Democratic Party and
Monica Southworth