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FEDERAL ELECTION COMMISSION
Washington, DC

AGENDA DOCUMENT NO. 24-42-A
AGENDA ITEM
For meeting of October 10, 2024

October 3, 2024

MEMORANDUM

TO: The Commission

FROM: Lisa J. Stevenson *LJS by RMK*
Acting General Counsel

Neven F. Stipanovic *NFS by RMK*
Associate General Counsel

Amy Rothstein *ALR by RMK*
Assistant General Counsel

Joanna Waldstreicher *LML for JW*
Attorney

Luis Lipchak *LML*
Attorney

Subject: AO 2024-13 (DSCC, Montanans for Tester, and Gallego for Arizona)
Draft A

Attached is a proposed draft of the subject advisory opinion. We have been asked to place this draft on the Agenda by one or more Commissioners.

Members of the public may submit written comments on the draft advisory opinion. We are making this draft available for comment until 12:00pm (Eastern Time) on October 9, 2024.

Members of the public may also attend the Commission meeting at which the draft will be considered. The advisory opinion requestor may appear before the Commission at this meeting to answer questions.

For more information about how to submit comments or attend the Commission meeting, go to <https://www.fec.gov/legal-resources/advisory-opinions-process/>.

Attachment

1 ADVISORY OPINION 2024-13

2
3 Jacquelyn Lopez, Esq.

4 Jonathan Peterson, Esq.

5 Emma Anspach, Esq.

6 Elias Law Group

7 250 Massachusetts Ave NW, Suite 400

8 Washington, DC 20001

9
10 Dear Ms. Lopez, Mr. Peterson, and Ms. Anspach:

11
12 We are responding to your advisory opinion request on behalf of the Democratic

13 Senatorial Campaign Committee (“DSCC”), Montanans for Tester, and Gallego for

14 Arizona (collectively, “Requestors”), concerning the application of the Federal Election

15 Campaign Act, 52 U.S.C. §§ 30101-45 (the “Act”), and Commission regulations to

16 Requestors’ proposed formation of joint fundraising committees to run television

17 advertisements featuring Senator Jon Tester or Congressman Ruben Gallego and

18 soliciting contributions to the joint fundraising committees. The Commission concludes

19 that Requestors’ joint fundraising committees each may pay the entire cost of the

20 proposed television advertising, allocating the costs according to the allocation formula in

21 the joint fundraising agreement, because the advertising would be joint fundraising

22 activity containing a solicitation. Each proposed advertisement may satisfy the joint

23 fundraising notice requirement under 11 C.F.R. § 102.17(c)(2) by including, in addition

24 to any disclaimer required by 11 C.F.R. § 110.11, a QR code that directs viewers to a

25 fundraising webpage that displays the complete joint fundraising notice.

26 ***Background***

27 The facts presented in this advisory opinion are based on your email received on

28 September 18, 2024.

DRAFT A

1 Jon Tester is a United States Senator from Montana and a current candidate in the
2 2024 general election for U.S. Senate in Montana. Montanans for Tester is his principal
3 campaign committee.¹ Ruben Gallego is a Congressman from Arizona and a current
4 candidate in the 2024 general election for U.S. Senate in Arizona. Gallego for Arizona is
5 his principal campaign committee.² Democratic Senatorial Campaign Committee
6 (“DSCC”) is a national committee of the Democratic Party.³

7 Requestors propose to establish two separate joint fundraising committees.
8 DSCC will participate in each joint fundraising committee. One joint fundraising
9 committee will include DSCC and Montanans for Tester, while the other will include
10 DSCC and Gallego for Arizona (each a “Joint Fundraising Committee” and collectively
11 the “Joint Fundraising Committees”).

12 Requestors state that the Joint Fundraising Committees will be established
13 pursuant to the Commission’s regulations for joint fundraising activity. The participants
14 of each Joint Fundraising Committee will enter into a written agreement that will identify
15 the Joint Fundraising Committee as a fundraising representative for all participants.

16 The written agreement will also state the allocation formula for each Joint
17 Fundraising Committee. Under the proposed allocation formula, two thirds of all joint
18 fundraising receipts will be allocated to DSCC and one third of receipts will be allocated

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

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

³ See DSCC, Statement of Organization, FEC Form 1 (June 25, 2024),
<https://docquery.fec.gov/pdf/369/202406259652490369/202406259652490369.pdf>.

1 to the participating candidate committee, either Montanans for Tester or Gallego for
2 Arizona. Requestors state that all receipts will be subject to the Act’s contribution
3 limitations and that, as required by Commission regulations, contributors will be able to
4 designate the allocation of their contributions between participants notwithstanding the
5 allocation formula. Further, Requestors state that the joint fundraising costs will be
6 allocated to and paid proportionally by the participants of each Joint Fundraising
7 Committee based on the total receipts each participant is allocated.

8 Under Requestors’ proposal, the Joint Fundraising Committees’ fundraising
9 activity will include airing 30-second television advertisements that advocate for the
10 election of the candidates associated with each Joint Fundraising Committee and solicit
11 donations for that Joint Fundraising Committee. Requestors describe the proposed
12 television advertisements as serving to “primarily advocate” for the election of the
13 associated candidate, either Senator Tester or Congressman Gallego, and including a
14 brief fundraising solicitation for the relevant Joint Fundraising Committee.⁴ According
15 to Requestors, 26 seconds (approximately 87 percent) of each advertisement will be
16 messaging in support of either Senator Tester or Congressman Gallego that will be
17 “indistinguishable to the viewer from a standard campaign advertisement” and may
18 include express advocacy.⁵ Requestors state that the last four seconds (approximately 13
19 percent) of each advertisement will contain a brief, spoken fundraising solicitation and a
20 QR code which, when scanned by the person viewing the ad, will link to a fundraising

⁴ Advisory Opinion Request (“AOR”) at AOR002.

⁵ AOR005.

1 webpage for the Joint Fundraising Committee distributing the advertisement. The

2 proposed television advertisements will not expressly refer to DSCC.

3 Requestors provided a sample television advertisement script below.

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 medication and buying groceries.	Senior citizen to camera, sitting at kitchen table.
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.

4

5 Under Requestors' proposal, any contributions received through each television

6 advertisement will be allocated among the participants according to the allocation

7 formula in their joint fundraising agreement, and the expenses will be allocated in the

8 same way. Requestors state that the costs of the television advertising, if allocated

9 entirely to DSCC, would exceed DSCC's contribution limit or coordinated party

10 spending limit with respect to each participating candidate.

Requestors propose to distribute the television advertisements supporting Senator Tester in Montana and the advertisements supporting Congressman Gallego in Arizona between September 2024 through the 2024 general election. In addition, Requestors state that the candidates will be materially involved in decisions regarding their respective advertisements' content, timing, and mode of distribution.

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)?*

Legal Analysis

1. *May each Joint Fundraising Committee finance the entire costs of the proposed television advertising, allocating the costs according to the Allocation Formula?*

Yes, each Joint Fundraising Committee may pay the entire cost of the proposed television advertising, allocating the costs according to the allocation formula in the joint fundraising agreement, because the proposed television advertising would be joint fundraising activity containing a solicitation.

1 The Act and Commission regulations allow political committees to engage in
2 joint fundraising activities, the procedures for which are described in 11 C.F.R.
3 § 102.17.⁶ Section 102.17 is premised on allowing multiple political committees and
4 other entities to work together to raise money, while ensuring that each participant pays
5 its share of the fundraising costs to avoid receiving an in-kind contribution. The
6 participants in a joint fundraising effort must enter into a written agreement that “shall
7 state a formula for the allocation of fundraising proceeds.”⁷ Each participant’s share of
8 joint fundraising expenses must be calculated based on the percentage of receipts the
9 participant has been allocated under the joint fundraising agreement.⁸ The payment by
10 one participant of another participant’s expenses is treated as a contribution subject to
11 contribution limits.⁹ As a result, each participant must pay its proportionate share of joint
12 fundraising expenses, and no participant may subsidize or make a contribution to any
13 other participant in excess of the contribution limits.

14 At the same time, the Act and Commission regulations require a political party
15 committee to treat a public communication that is coordinated with a candidate or a
16 candidate’s authorized committee as either an in-kind contribution to that candidate or a
17 coordinated party expenditure, both of which are subject to amount limitations.¹⁰ A

⁶ *See also* 52 U.S.C. § 30102(e)(3)(A)(ii) (“[C]andidates may designate a political committee established solely for the purpose of joint fundraising by such candidates as an authorized committee.”).

⁷ 11 C.F.R. § 102.17(c)(1)-(2).

⁸ *Id.* § 102.17(c)(7)(A).

⁹ *Id.* § 102.17(c)(7)(B).

¹⁰ *Id.* § 109.37(b).

1 communication is deemed to be a party coordinated communication when it is paid for by
2 a political party committee or its agent, satisfies at least one of the content standards in 11
3 C.F.R. § 109.37(a)(2)(i) through (iii), and satisfies at least one of the conduct standards in
4 11 C.F.R. § 109.21(d)(1) through (6).¹¹

5 The Commission recently analyzed the payment prong for coordinated
6 communications in the joint fundraising context in Advisory Opinion 2024-07 (Team
7 Graham).¹² In that advisory opinion, the Commission concluded that a joint fundraising
8 committee’s solicitations and other public communications would not meet the payment
9 prong of the coordinated communication test and, thus, would not provide an in-kind
10 contribution to the participating candidate, where the candidate’s committee paid its
11 allocable share of the communications’ costs pursuant to the formula in the joint
12 fundraising agreement.¹³

13 Similarly, here, the Requestors’ proposed television advertisement is joint
14 fundraising activity containing a solicitation of contributions. The sample script contains
15 a clear request for funds (“donate now”) and facilitates the making of contributions via a

¹¹ *Id.* § 109.37(a)(2)-(3); *see also id.* § 109.21 (coordinated communications paid for by persons other than candidates or political party committees). Coordinated party expenditures in connection with the general election campaign of a federal candidate are limited to an amount calculated according to a formula set forth in Commission regulations. *Id.* §§ 109.32, 110.17.

¹² Differences between the coordinated communication rules at 11 C.F.R. § 109.21 and the party coordinated communication rules at 11 C.F.R. § 109.37 are not relevant to the current analysis.

¹³ Advisory Opinion 2024-07 (Team Graham) at 7; *see also* Advisory Opinion 2024-02 (Waters) (concluding that payment prong was not satisfied where each candidate referenced in public communication paid for portion of communication attributable to that candidate); Advisory Opinion 2004-37 (Waters) (same).

1 QR code linked to the Joint Fundraising Committee’s online fundraising page.¹⁴
2 Consistent with the Commission’s conclusion in Advisory Opinion 2024-07 (Team
3 Graham), the Requestors’ proposed communication here will not meet the payment prong
4 of the party coordinated expenditure test, and no in-kind contribution or party
5 coordinated expenditure will result, if each participant pays its share of the cost pursuant
6 to the allocation formula in the joint fundraising agreement.

7 Accordingly, because the proposed television advertising would be joint
8 fundraising activity containing a solicitation, the Commission concludes that the Joint
9 Fundraising Committee may pay the entire cost of the proposed television advertising,
10 allocating the costs according to the allocation formula contained in the joint fundraising
11 agreement.¹⁵

12 2. *In the alternative, may each Joint Fundraising Committee finance the portion of*
13 *the television advertising that includes a solicitation for the Joint Fundraising*
14 *Committee, calculated on a time/space basis (approximately four seconds in the example*
15 *provided), allocating the costs according to the Allocation Formula?*

16 Because the Commission has answered Question 1 in the affirmative, it need not
17 address Question 2.

¹⁴ Compare Advisory Opinion 2003-14 (Home Depot) at 4 (concluding that wearable pin bearing word “PAC” and Home Depot logo containing words “The Home Depot” does not solicit contributions to PAC where message “does not, by itself, encourage or facilitate the making of a contribution”).

¹⁵ See also Advisory Opinion 2007-24 (Burkee/Walz) at 5 (concluding that “[e]xpenses for joint advertising efforts that include solicitations must be allocated” to the participants “under the joint fundraising agreement based on each candidate’s allocation of receipts from the joint advertising efforts”).

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)?*

Each proposed television advertisement will meet the requirements of 11 C.F.R. § 102.17(c)(2) if it includes, in addition to any disclaimer required by 11 C.F.R. § 110.11, a QR code that, when scanned, immediately directs viewers to a fundraising webpage for the applicable Joint Fundraising Committee containing the complete joint fundraising notice required by 11 C.F.R. § 102.17(c)(2).

Commission regulations require joint fundraising committee activity containing solicitations to include a notice that identifies all participating committees by name, sets out the allocation formula to be used for distributing proceeds, informs contributors that they may designate their contributions for particular participants notwithstanding the allocation formula, and informs contributors that the allocation formula may change if a contribution exceeds that contributor's contribution limit for a participant.¹⁶ This notice is "[i]n addition to any [disclaimer] notice required under 11 C.F.R. § 110.11."¹⁷

However, the Commission "has long recognized that in certain circumstances it is impracticable to provide a full disclosure statement in the prescribed manner."¹⁸ For example, 11 C.F.R. § 110.11(f)(1)(ii) exempts from disclaimer obligations certain

¹⁶ *Id.* § 102.17(c)(2).

¹⁷ *Id.* The disclaimer required by section 110.11 applies to public communications made by any political committee, not just joint fundraising committees. *Id.* § 110.11(a)(1).

¹⁸ Advisory Op. 2004-10 (Metro Networks) at 3.

1 communications “of such a nature that the inclusion of a disclaimer would be
2 impracticable.”¹⁹ Similarly, Commission regulations permit placement of an “adapted
3 disclaimer” on internet public communications when a complete disclaimer statement
4 “cannot be provided or would occupy more than 25 percent of the communication due to
5 character or space constraints intrinsic to the advertising product or medium.”²⁰ While
6 these exceptions concern the disclaimer requirements of 11 C.F.R. § 110.11, they support
7 the Commission applying a flexible approach to the notices required for joint fundraising
8 activity containing solicitations under § 102.17(c)(2).

9 Here, it would be “impracticable” for the Joint Fundraising Committees to include
10 both the notice required by the joint fundraising committee rules in section 102.17(c)(2)
11 and the disclaimer required for all political committees’ public communications in
12 section 110.11. Requestors state that “[o]nly the final four seconds [of each 30-second
13 television advertisement] will include a solicitation for the applicable Joint Fundraising
14 Committee,” while the rest of the ad will convey “messaging supporting either Senator
15 Tester or Congressman Gallego.”²¹ Moreover, each advertisement will display “a QR
16 code during the final few seconds that, when scanned, links to an online fundraising page
17 for the applicable Joint Fundraising Committee.”²² Like adapted disclaimers on internet

¹⁹ 11 C.F.R. § 110.11(f)(1)(ii).

²⁰ *Id.* § 110.11(g)(2).

²¹ AOR005.

²² AOR002.

1 public communications, the QR Code will provide a mechanism to enable recipients of
2 the advertising to view the full joint fundraising notice “after no more than one step.”²³

3 Under these circumstances, if the fundraising webpage linked to the QR code on
4 each proposed advertisement itself clearly and conspicuously displays the complete
5 notice required by 11 C.F.R. § 102.17(c)(2), and if each advertisement otherwise
6 complies with the disclaimer requirements of § 110.11, then the proposed television
7 advertising does not also need to contain an on-screen notice that meets the requirements
8 of § 102.17(c)(2). This “approach is practical and as faithful as possible” to the notice
9 requirements “while avoiding unnecessary burdens on political speech that could result
10 from a rigid application of all disclaimer provisions in all instances.”²⁴

11 This response constitutes an advisory opinion concerning the application of the
12 Act and Commission regulations to the specific transaction or activity set forth in your
13 request.²⁵ The Commission emphasizes that, if there is a change in any of the facts or
14 assumptions presented, and such facts or assumptions are material to a conclusion
15 presented in this advisory opinion, then Requestors may not rely on that conclusion as
16 support for their proposed activity. Any person involved in any specific transaction or
17 activity which is indistinguishable in all its material aspects from the transaction or
18 activity with respect to which this advisory opinion is rendered may rely on this advisory

²³ 11 C.F.R. § 110.11(g)(1)(iii).

²⁴ Advisory Op. 2004-10 (Metro Networks) at 3.

²⁵ See 52 U.S.C. § 30108.

1 opinion.²⁶ Please note that the analysis or conclusions in this advisory opinion may be
2 affected by subsequent developments in the law including, but not limited to, statutes,
3 regulations, advisory opinions, and case law. Any advisory opinions cited herein are
4 available on the Commission's website.

5 On behalf of the Commission,

6

7 Sean J. Cooksey,

8 Chairman

²⁶ See *id.* § 30108(c)(1)(B).