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For meeting of October 10, 2024

October 3, 2024

MEMORANDUM

TO: The Commission

FROM: Lisa J. Stevenson *LJS by RMK*
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Subject: AO 2024-13 (DSCC, Montanans for Tester, and Gallego for Arizona)
Draft B

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

DRAFT B

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 may each pay for only the portion of the
20 proposed advertisements that solicit contributions for the joint fundraising committee,
21 with the cost of that portion allocated among the committee’s participants according to
22 their agreed allocation formula. Each proposed advertisement must also include the joint
23 fundraising notice required under 11 C.F.R. § 102.17(c)(2), in addition to any disclaimer
24 required by 11 C.F.R. § 110.11.

25 ***Background***

26 The facts presented in this advisory opinion are based on your email received on
27 September 18, 2024.

28 Jon Tester is a United States Senator from Montana and a current candidate in the
29 2024 general election for U.S. Senate in Montana. Montanans for Tester is his principal

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

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

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

14 The written agreement will also state the allocation formula for each Joint
15 Fundraising Committee. Under the proposed allocation formula, two thirds of all joint
16 fundraising receipts will be allocated to DSCC and one third of receipts will be allocated
17 to the participating candidate committee, either Montanans for Tester or Gallego for
18 Arizona. Requestors state that all receipts will be subject to the Act’s contribution

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 limitations and that, as required by Commission regulations, contributors will be able to
2 designate the allocation of their contributions between participants notwithstanding the
3 allocation formula. Further, Requestors state that the joint fundraising costs will be
4 allocated to and paid proportionally by the participants of each Joint Fundraising
5 Committee based on the total receipts each participant is allocated.

6 Under Requestors' proposal, the Joint Fundraising Committees' fundraising
7 activity will include airing 30-second television advertisements that advocate for the
8 election of the candidates associated with each Joint Fundraising Committee and solicit
9 donations for that Joint Fundraising Committee. Requestors describe the proposed
10 television advertisements as serving to "primarily advocate" for the election of the
11 associated candidate, either Senator Tester or Congressman Gallego, and including a
12 brief fundraising solicitation for the relevant Joint Fundraising Committee.⁴ According
13 to Requestors, 26 seconds (approximately 87 percent) of each advertisement will be
14 messaging in support of either Senator Tester or Congressman Gallego that will be
15 "indistinguishable to the viewer from a standard campaign advertisement" and may
16 include express advocacy.⁵ Requestors state that the last four seconds (approximately 13
17 percent) of each advertisement will contain a brief, spoken fundraising solicitation and a
18 QR code which, when scanned by the person viewing the ad, will link to a fundraising
19 webpage for the Joint Fundraising Committee distributing the advertisement. The
20 proposed television advertisements will not expressly refer to DSCC.

⁴ Advisory Opinion Request ("AOR") at AOR002.

⁵ AOR005.

1 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.

2

3 Under Requestors' proposal, any contributions received through each television
4 advertisement will be allocated among the participants according to the allocation
5 formula in their joint fundraising agreement, and the expenses will be allocated in the
6 same way. Requestors state that the costs of the television advertising, if allocated
7 entirely to DSCC, would exceed DSCC's contribution limit or coordinated party
8 spending limit with respect to each participating candidate.

9 Requestors propose to distribute the television advertisements supporting Senator
10 Tester in Montana and the advertisements supporting Congressman Gallego in Arizona
11 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?*

No, each Joint Fundraising Committee may not finance the entire costs of the proposed television advertising and allocate the costs among its participants according to the allocation formula in its joint fundraising agreement.

The Act and Commission regulations allow political committees to engage in joint fundraising activities, the procedures for which are described in 11 C.F.R.

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

12 At the same time, the Act and Commission regulations require a political party
13 committee to treat a public communication that is coordinated with a candidate or a
14 candidate’s authorized committee as either an in-kind contribution to that candidate or a
15 coordinated party expenditure, both of which are subject to amount limitations.¹⁰ A
16 communication is deemed to be a party coordinated communication when it is paid for by
17 a political party committee or its agent, satisfies at least one of the content standards in 11

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 11 C.F.R. § 109.37(b).

1 C.F.R. § 109.37(a)(2)(i) through (iii), and satisfies at least one of the conduct standards in
2 11 C.F.R. § 109.21(d)(1) through (6).¹¹

3 A public communication like Requestors' proposed television advertisement that
4 refers to a clearly identified candidate for the U.S. Senate and is publicly disseminated in
5 the candidate's jurisdiction within 90 days before the candidate's general election would
6 meet the content standard in 11 C.F.R. § 109.37(a)(2)(iii)(A). The material involvement
7 of the candidate or the candidate's agents in decisions regarding the advertisement's
8 content, timing and mode of distribution as posited here would meet the conduct standard
9 in 11 C.F.R. § 109.21(d)(2).¹²

10 The only remaining question is whether Requestors' proposed advertisements
11 would meet the third part of the coordination test — the payment prong. The
12 Commission recently analyzed the payment prong in the joint fundraising context in
13 Advisory Opinion 2024-07 (Team Graham).¹³ In that advisory opinion, the Commission
14 concluded that a joint fundraising committee's solicitations and other public
15 communications would not meet the payment prong of the coordinated communication
16 test and, thus, would not provide an in-kind contribution to the participating candidate,

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 The material involvement conduct standard is not satisfied if the information material to the creation, production, or distribution of the communication was obtained from a publicly available source. *Id.* § 109.21(d)(2).

¹³ 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.

1 where the candidate’s committee paid its allocable share of the communications’ costs
2 pursuant to the formula in the joint fundraising agreement.¹⁴

3 Nothing in Advisory Opinion 2024-07 (Team Graham) suggested, however, that
4 the public communications at issue would be “indistinguishable to the viewer from a
5 standard campaign advertisement” by the participating candidate, as Requestors propose
6 here.¹⁵ Indeed, almost the entire script of Requestors’ proposed sample ad is devoted to
7 the candidate’s position on a policy issue; nowhere in the script does it refer to either
8 DSCC or the Joint Fundraising Committee. Although the ad would show the candidate
9 exhorting viewers to “Join my team” and “Donate now,” the QR code linking the ad to
10 the Joint Fundraising Committee would be onscreen for just four seconds. A sufficiently
11 alert viewer might be able to scan the QR code in that limited amount of time, thereby
12 accessing the Joint Fundraising Committee’s online contribution page, but most viewers
13 would simply see what appears to be a campaign ad for the featured candidate.
14 Requestors’ intention to air each candidate’s ads in that candidate’s home state in the
15 month prior to the general election reinforces their apparent campaign purpose.

¹⁴ 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).

¹⁵ AOR005. Similarly, when the Commission concluded in Advisory Opinion 2007-24 (Burkee/Walz) at 5 that “[e]xpenses for joint advertising efforts that include solicitations must be allocated to the [participating] under the joint fundraising agreement based on each candidate’s allocation of receipts from the joint advertising efforts,” there was no indication that the communications at issue would appear to be campaign advertisements for just one participant.

1 Under these circumstances, Requestors' proposed television advertisements
2 would serve primarily as campaign advertising for the candidate featured in each ad.
3 Thus, if the Joint Fundraising Committee pays the entire cost of the proposed ad and
4 allocates two-thirds of that cost to DSCC and only one-third to the candidate pursuant to
5 the allocation formula in the joint fundraising agreement, DSCC's payment of that cost
6 would result in either an in-kind contribution to the candidate or a coordinated party
7 expenditure. To avoid potential circumvention of the contribution and coordinated party
8 expenditure limits through the joint fundraising framework, the Commission concludes
9 that the Joint Fundraising Committee may not pay the entire cost of the ad and allocate it
10 according to the formula in the joint fundraising agreement.

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

15 Yes, each Joint Fundraising Committee may pay for the portion of the television
16 advertising that includes a solicitation for the Joint Fundraising Committee, calculated on
17 a time/space basis, and allocate the cost of that portion among its participants according
18 to the allocation formula in its joint fundraising agreement.

19 The Commission has explained previously that its regulations "generally permit
20 (and in some cases require) the allocation of expenses attributable to more than one

1 purpose.”¹⁶ The allocation regulations “stand generally for the proposition that allocation
2 is an appropriate way to fund activities with multiple purposes”¹⁷ and rely on the
3 principle that each person’s cost for participating in an activity should be in proportion to
4 the benefit that person receives from the activity.¹⁸

5 The Commission concludes that Requestors’ proposal to allocate the
6 advertisements’ costs based on the time/space method is reasonable.¹⁹ Under this
7 method, the candidate featured in the sample ad would pay 87 percent of the proposed
8 advertisement’s cost because 87 percent of the advertisement’s running time would be
9 devoted to the candidate; the Joint Fundraising Committee would pay 13 percent of the
10 cost because 13 percent of the ad’s running time would be devoted to soliciting
11 contributions to the Joint Fundraising Committee. The Joint Fundraising Committee
12 would allocate that 13 percent among its participants according to the formula in the joint
13 fundraising agreement.

14 The Commission therefore concludes that each Joint Fundraising Committee may
15 pay for the portion of the television advertising that includes a solicitation for the Joint
16 Fundraising Committee, because such allocation is a reasonable method to ensure that the

¹⁶ Advisory Opinion 2010-14 (DSCC) at 6 (citing 11 C.F.R. § 102.5(a), Part 106, Part 300, and § 9003.3(a)(2)(ii)); Advisory Opinion 2022-21 (DSCC *et al.*) at 5.

¹⁷ Advisory Opinion 2010-14 (DSCC) at 6; Advisory Opinion 2022-21 (DSCC *et al.*) at 5.

¹⁸ 11 C.F.R. § 106.1(a)(1) (requiring expenditure made on behalf of more than one clearly identified federal candidate to “be attributed to each such candidate according to the benefit reasonably expected to be derived”).

¹⁹ *Id.* (requiring expenditures for broadcast communications made on behalf of more than one clearly identified candidate to be attributed to each candidate based on proportion of space or time devoted to that candidate as compared to total space or time devoted to all candidates).

1 Joint Fundraising Committee and the respective candidate committee pay for the costs of
2 the proposed ads in proportion to the benefit that each committee receives from them.

3 3. *If the answer to question 1 or 2 is yes, does the Act require that the television*
4 *advertising contain an on-screen disclaimer that meets the requirements of 11 C.F.R.*
5 *§ 102.17(c)(2)?*

6 The proposed television advertisement must include a disclaimer that meets the
7 requirements of 11 C.F.R. § 102.17(c)(2), in addition to any disclaimer required by 11
8 C.F.R. § 110.11.

9 Commission regulations require solicitations by a joint fundraising committee to
10 include a notice that identifies all participating committees by name, sets out the
11 allocation formula to be used for distributing proceeds, informs contributors that they
12 may designate their contributions for particular participants notwithstanding the
13 allocation formula, and informs contributors that the allocation formula may change if a
14 contribution exceeds that contributor's contribution limit for a participant.²⁰ This notice
15 is "[i]n addition to any [disclaimer] notice required under 11 C.F.R. § 110.11."²¹

16 Here, the proposed ad would be a public communication made by two political
17 committees — the participating candidate's authorized committee and the Joint
18 Fundraising Committee. Therefore, it must include both the notice required by the joint

²⁰ *Id.* § 102.17(c)(2).

²¹ *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).

fundraising committee rules in section 102.17(c)(2) and the disclaimer required for all political committees' public communications in section 110.11.

This response constitutes an advisory opinion concerning the application of the Act and Commission regulations to the specific transaction or activity set forth in your request.²² The Commission emphasizes that, if there is a change in any of the facts or assumptions presented, and such facts or assumptions are material to a conclusion presented in this advisory opinion, then Requestors may not rely on that conclusion as support for their proposed activity. Any person involved in any specific transaction or activity which is indistinguishable in all its material aspects from the transaction or activity with respect to which this advisory opinion is rendered may rely on this advisory opinion.²³ Please note that the analysis or conclusions in this advisory opinion may be affected by subsequent developments in the law including, but not limited to, statutes, regulations, advisory opinions, and case law. Any advisory opinions cited herein are available on the Commission's website.

On behalf of the Commission,

Sean J. Cooksey,

Chairman

²² See 52 U.S.C. § 30108.

²³ See *id.* § 30108(c)(1)(B).