

**RECEIVED**

By Office of the Commission Secretary at 3:13 pm, Dec 07, 2023



FEDERAL ELECTION COMMISSION  
Washington, DC

**AGENDA DOCUMENT NO. 23-28-B**  
**AGENDA ITEM**  
**For meeting of Dec. 14, 2023**

December 7, 2023

**MEMORANDUM**

TO: The Commission

FROM: Lisa J. Stevenson *NFS for LJS*  
Acting General Counsel

Neven F. Stipanovic *NFS*  
Associate General Counsel

Amy Rothstein *NFS for ALR*  
Assistant General Counsel

Joanna Waldstreicher *JSW*  
Attorney

Luis Lipchak *LML*  
Attorney

Subject: Draft AO 2023-08 (Cowboy Analytics LLC) 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 12:00 p.m. (Eastern Time) on December 13, 2023.

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 2023-08

2

3 Eric Wang  
4 The Gober Group  
5 1501 Wilson Boulevard  
6 Suite 1050  
7 Arlington, VA 22209

**DRAFT B**

8

9 Dear Mr. Wang:

10

11 We are responding to your advisory opinion request on behalf of Cowboy  
12 Analytics, LLC (“Cowboy Analytics”), concerning the application of the Federal Election  
13 Campaign Act, 52 U.S.C. §§ 30101-45 (the “Act”), and Commission regulations to a  
14 proposal by Cowboy Analytics to form a nonconnected political committee to solicit  
15 funds for itself and for certain federal candidates that the PAC supports. The  
16 Commission concludes that Cowboy Analytics may form the proposed political  
17 committee and determines that (1) funds deducted from earmarked contributions by the  
18 committee to cover its costs would be contributions to the committee and not  
19 contributions to the designated candidate; (2) the initial payment for the production and  
20 distribution of merchandise would not constitute an in-kind contribution from the  
21 committee to the candidates receiving the earmarked contributions; (3) the committee  
22 would have to report the costs of producing and distributing political merchandise that  
23 includes express advocacy as independent expenditures; and (4) the committee would  
24 have to report its costs of solicitations for earmarked contributions that contain express  
25 advocacy as independent expenditures. The Commission reaches the same conclusions to  
26 each of these questions regarding the second scenario posed in Question 5 of the advisory

1 opinion request, where the purchase of the committee’s political merchandise is

2 “decoupled from making an earmarked contribution.”<sup>1</sup>

3 ***Background***

4 The facts presented in this advisory opinion are based on your letter received on  
5 October 25, 2023, and email received October 31, 2023.

6 Cowboy Analytics is a limited liability company that provides voter and  
7 consumer data to political campaigns, businesses, and media organizations. Cowboy  
8 Analytics proposes to form a nonconnected political committee (“PAC”) that will solicit  
9 small-dollar earmarked contributions to federal candidates that the PAC supports. The  
10 PAC will target potential contributors nationwide through email, text messaging, and  
11 digital advertising, using data provided by Cowboy Analytics.<sup>2</sup> In addition to raising  
12 funds for candidates, Cowboy Analytics intends the PAC’s solicitations to raise funds for  
13 the PAC itself.

14 The PAC will solicit contributions in specific amounts, and each person who  
15 makes a contribution in that amount will receive merchandise (such as a t-shirt or hat)  
16 imprinted with a message supporting the PAC’s endorsed candidates (such as “John Doe  
17 for President” or “Jane Roe 2024,” where Roe is a U.S. Senate candidate running in  
18 2024), or the messages may relate to broader political themes (such as “Impeach Biden”).

19 The PAC’s solicitations will say, for example:

---

<sup>1</sup> Advisory Opinion Request (“AOR”) at 009.

<sup>2</sup> The PAC will pay fair market value to Cowboy Analytics for the data. AOR001.

1 (1) Get your John Doe for President T-shirt by making a \$50 contribution

2 now! Go to [URL for PAC's website].<sup>3</sup>

3 (2) Show your support for Jane Roe for Senate with this water bottle. Get

4 it for only \$10 at [URL for PAC's website].

5 Each solicitation will include an image of the imprinted merchandise as described

6 in the solicitation.

7 The PAC will deposit into its bank account all funds received in response to its

8 solicitations. After deducting sufficient funds to cover: (1) its costs to purchase and ship

9 the merchandise to the contributor; (2) its costs to process the contribution<sup>4</sup>; and (3) a

10 percentage of its administrative and solicitation costs,<sup>5</sup> the PAC will forward the

11 contribution to the designated candidate. For example:

12 The PAC will offer to provide an imprinted T-shirt to each person who

13 makes a \$50 contribution earmarked to a specific presidential candidate.

14 From that amount the PAC will deduct a total of \$19.25: \$10 to cover its

15 cost to produce and ship the T-shirt; \$1.75 for payment processing (*i.e.*, 2.9%

---

<sup>3</sup> AOR002. The PAC's website will inform contributors of federal contribution limits and source prohibitions, and collect the information required to comply with the Commission's earmarked contribution rules, 11 C.F.R. § 110.6. *Id.*

<sup>4</sup> The PAC will pay its payment processor, Rally Piryx, LLC, the standard processing fee of 2.9% plus 30 cents per transaction. *Id.*

<sup>5</sup> Cowboy Analytics estimates that 10-15% of each contribution will be deducted to pay the PAC's administrative and solicitation costs. The PAC's administrative and solicitation costs will include costs incurred to: establish and operate the PAC; comply with the Commission's reporting and recordkeeping requirements; develop and maintain the PAC's website; communicate with and advertise to prospective contributors (including the fee for data provided by Cowboy Analytics); and pay other compliance, accounting, and operational expenses. AOR003.

1 of \$50 plus 30 cents); and \$7.50 for its administrative and solicitation costs  
2 (*i.e.*, 15% of \$50). The PAC will forward the remaining \$30.75 to the  
3 designated candidate’s campaign.

4 The PAC will provide each contributor with a breakdown of the amount deducted by the  
5 PAC for its own costs and the amount forwarded to the designated candidate’s  
6 committee.

7 Cowboy Analytics also proposes for the PAC to solicit the purchase of its  
8 political merchandise “decoupled from making an earmarked contribution.”<sup>6</sup> “[A]fter a  
9 donor completes a purchase of merchandise on the PAC’s website, the PAC would  
10 suggest that the donor make an optional earmarked contribution.”<sup>7</sup> The PAC would treat  
11 the entire amount paid for the merchandise as a contribution from the purchaser to the  
12 PAC, with the PAC paying all costs (including payment processing, administrative, and  
13 solicitation costs) associated with the transaction. For each earmarked contribution,  
14 Cowboy Analytics plans for the PAC to deduct the standard payment processing fee  
15 (2.9% plus 30 cents) and forward the remaining amount to the designated candidate. The  
16 PAC will treat the amount deducted for payment processing costs as a contribution to the  
17 PAC. Before an earmarked contribution is made, the PAC will provide each contributor  
18 of an earmarked contribution with a breakdown of the amount deducted by the PAC for  
19 payment processing costs and the amount forwarded to the designated candidate’s  
20 committee.

---

<sup>6</sup> AOR009.

<sup>7</sup> AOR009.

1 Cowboy Analytics stated that the PAC will “operate independently of any  
2 candidates and their campaigns.”<sup>8</sup> Cowboy Analytics asserts that the PAC will not  
3 coordinate regarding its merchandise or solicitations with candidates, their campaigns, or  
4 agents, nor will the PAC enter into any contract or other legal agreement with candidates  
5 or their campaigns.

6 ***Questions Presented***

7 1. *Would all the costs the PAC proposes to deduct from each contribution be*  
8 *considered contributions to the PAC and not contributions to the designated candidate?*

9 2. *Would the PAC’s initial payment for the production and distribution of the*  
10 *political merchandise as described in this request qualify as in-kind contributions from*  
11 *the PAC to the candidates receiving the earmarked contributions?*

12 3. *Would the PAC have to report the costs of producing and distributing*  
13 *political merchandise that includes express advocacy language as independent*  
14 *expenditures?*

15 4. *Would the PAC have to report its costs of soliciting contributors to make*  
16 *earmarked contributions as independent expenditures?*

17 5. *Would the Commission’s analysis for Questions 1-4 change if the PAC*  
18 *were to separate the sale of political merchandise from the making of earmarked*  
19 *contributions?*

---

<sup>8</sup> AOR003.

1           6.        *Would the PAC’s proposed activities violate the Federal Election*  
2 *Campaign Act of 1971, as amended (“FECA”) or the Commission’s implementing*  
3 *regulations in any way?*

4        ***Legal Analysis***

5           1.        *Would all the costs the PAC proposes to deduct from each contribution be*  
6 *considered contributions to the PAC and not contributions to the designated candidate?*

7           Yes, the costs the PAC proposes to deduct from an earmarked contribution would  
8 be contributions to the PAC and not contributions to the designated candidate.

9           Under the Act, a contribution is “any gift, subscription, loan, advance or deposit  
10 of money or anything of value made by any person for the purpose of influencing any  
11 election for Federal office.”<sup>9</sup> Commission regulations state that the “entire amount paid  
12 as the purchase price for a fundraising item sold by a political committee is a  
13 contribution.”<sup>10</sup>

14           Further, “all contributions made by a person, either directly or indirectly, on  
15 behalf of a particular candidate, including contributions which are in any way earmarked  
16 or otherwise directed through an intermediary or conduit to such candidate, shall be  
17 treated as contributions from such person to such candidate.”<sup>11</sup> Any “person who  
18 receives and forwards an earmarked contribution to a candidate or a candidate’s

---

<sup>9</sup>        52 U.S.C. § 30101(8)(A)(i); *see also* 11 C.F.R. § 100.52(a).

<sup>10</sup>       11 C.F.R. § 110.53.

<sup>11</sup>       52 U.S.C. § 30116(a)(8); *see also* 11 C.F.R. § 110.6(a). The term “earmarked” means “a designation, instruction, or encumbrance, whether direct or indirect, express or implied, oral or written, which results in all or any part of a contribution...being made to...a clearly identified candidate or a candidate’s authorized committee.” 11 C.F.R. § 110.6(b)(1).

1 authorized committee” is a “conduit or intermediary.”<sup>12</sup> An earmarked contribution does  
2 not count against the conduit’s contribution limits unless the conduit exercises “direction  
3 or control over the choice of the recipient candidate;” if that occurs, then the entire  
4 earmarked contribution is treated as a contribution to the recipient from both the original  
5 contributor and the conduit.<sup>13</sup>

6 As proposed here, the PAC will solicit contributions earmarked for certain  
7 candidate committees. Before forwarding an earmarked contribution to the designated  
8 candidate committee, the PAC will deduct funds to pay its own: (1) merchandise and  
9 shipping costs, (2) payment processing costs, and (3) administration and solicitation  
10 costs.<sup>14</sup>

11 The Commission has previously considered how to treat fees deducted from  
12 earmarked contributions by a conduit committee in circumstances similar to those  
13 proposed here. In Advisory Opinion 2019-15 (NORPAC), NORPAC, a nonconnected  
14 committee, proposed to serve as a conduit for contributions earmarked to candidate  
15 committees. NORPAC proposed to deduct a “convenience fee” from each earmarked  
16 contribution to pay its own processing, solicitation, and administrative costs before  
17 forwarding the remaining amount to the designated candidate committee. The  
18 Commission concluded that the entire amount of the convenience fee deducted by

---

<sup>12</sup> 11 C.F.R. § 110.6(b)(2).

<sup>13</sup> 11 C.F.R. § 110.6(d).

<sup>14</sup> AOR002.



1 NORPAC “would constitute a contribution from the original contributor to NORPAC,”<sup>15</sup>  
2 and that NORPAC should report the amount forwarded to the designated candidate as a  
3 receipt and disbursement.

4 Similarly, here, each solicitation by the PAC will contemplate two separate  
5 contributions. The amount of each earmarked contribution withheld by the PAC to pay  
6 its own costs will be a contribution from the original contributor to the PAC.<sup>16</sup> The PAC  
7 must then forward the remaining amount of each earmarked contribution to the  
8 designated candidate committee and disclose it in reports to the Commission pursuant to  
9 11 C.F.R. §§ 102.8 and 110.6.

10 2. *Would the PAC’s initial payment for the production and distribution of the*  
11 *political merchandise as described in this request qualify as in-kind contributions from*  
12 *the PAC to the candidates receiving the earmarked contributions?*

13 No, the PAC’s initial payment for the production and distribution of the political  
14 merchandise as proposed would not qualify as in-kind contributions from the PAC to the  
15 candidates receiving the earmarked contributions, because the expenditure would not be  
16 coordinated with any candidate or candidate’s authorized committee.

---

<sup>15</sup> Advisory Opinion 2019-15 (NORPAC) at 5. The Commission also concluded that NORPAC must forward the portion of each earmarked contribution allocated to the designated candidate committee pursuant to 11 C.F.R. §§ 102.8 and 110.6 and, “[b]ecause there is no indication that NORPAC would exercise any direction or control concerning the choice of the recipient candidate,” the forwarded amount “would constitute a contribution from the original contributor to the candidate committee and not from NORPAC.” *Id.* Likewise, here, there is no indication that the PAC will exercise any direction or control concerning the choice of the recipient candidate. Thus, the forwarded amount will not constitute a contribution from the PAC to the recipient candidate committee.

<sup>16</sup> The Commission assumes that the PAC will inform each potential contributor before they make the solicited contribution that they will be making contributions to both Cowboy Analytics and the designated candidate committee.

1 Under the Act, a contribution is “any gift, subscription, loan, advance or deposit  
2 of money or anything of value made by any person for the purpose of influencing any  
3 election for Federal office.”<sup>17</sup> “[T]he term ‘anything of value’ includes all in-kind  
4 contributions.”<sup>18</sup>

5 As explained in response to Question 3, below, the Commission concludes that  
6 the political merchandise at issue here will be a “communication.” Thus, the question of  
7 whether the PAC’s costs to produce and distribute the merchandise will be an in-kind  
8 contribution from the PAC to the candidates receiving the earmarked contributions is  
9 appropriately analyzed under the coordinated communication regulation, 11 C.F.R.  
10 § 109.21.<sup>19</sup>

11 Under Commission regulations, expenditures for coordinated communications are  
12 those that meet all three prongs of the test at 11 C.F.R. § 109.21. First, the  
13 communication must be paid for, in whole or in part, by a person other than the candidate  
14 or the candidate’s authorized committee.<sup>20</sup> Second, the communication must satisfy one  
15 of five content standards (the “content prong”).<sup>21</sup> Finally, the communication must  
16 satisfy one of five conduct standards (the “conduct prong”).<sup>22</sup> The political merchandise

---

<sup>18</sup> 11 C.F.R. § 100.52(d)(1).

<sup>19</sup> *See also* 52 U.S.C. (a)(7)(B), (C).

<sup>20</sup> 11 C.F.R. § 109.21(a)(1).

<sup>21</sup> 11 C.F.R. §§ 109.21(a)(2), (c).

<sup>22</sup> 11 C.F.R. §§ 109.21(a)(3), (d)(1)-(5).

1 in this case will not be a coordinated communication because it will not satisfy the  
2 conduct prong of the three-prong test.

3 Here, Cowboy Analytics states that the PAC “does not intend to coordinate its  
4 production and distribution of political merchandise, its advertisements, or its  
5 solicitations of earmarked contributions with the benefitting candidates, their campaign  
6 committees, or any agents.”<sup>23</sup> Nor will the PAC republish candidates’ campaign  
7 materials.<sup>24</sup> Because the PAC will engage in the proposed activity independently of any  
8 candidates, candidate committees, political party committees, or their agents, the  
9 proposed activity will not satisfy the conduct prong and thus will not be a coordinated  
10 communication. Therefore, the PAC’s costs to produce and distribute the merchandise  
11 will not be an in-kind contribution from the PAC to the candidates receiving the  
12 earmarked contributions.

13 3. *Would the PAC have to report the costs of producing and distributing*  
14 *political merchandise that includes express advocacy language as independent*  
15 *expenditures?*<sup>25</sup>

---

<sup>23</sup> AOR006, *see* note 11. Cowboy Analytics indicates that the PAC may determine that it is necessary to communicate with candidates or their campaign committees to avoid legal conflict over trademark or other trade usage and asserts that such communication should not be considered coordination. The Commission does not make a determination regarding these hypothetical communications because questions posing a hypothetical situation do not qualify as advisory opinion requests. *See* 11 C.F.R. § 112.1(b).

<sup>24</sup> AOR003.

<sup>25</sup> For purposes of this advisory opinion, the Commission accepts the requestor’s representation that the merchandise identified in the PAC’s solicitations will bear messages containing “express advocacy” under 11 C.F.R. § 100.22. The requestor has not asked, and the Commission does not determine, whether the specific messages in the examples provided in the AOR are express advocacy under the Act and Commission regulations.

1 Yes, the PAC would have to report the costs of producing and distributing  
2 political merchandise that includes express advocacy as independent expenditures.

3 Under the Act, an “expenditure” is “any purchase, payment, distribution, loan,  
4 advance, deposit or gift of money or anything of value made by any person for the  
5 purpose of influencing any election for Federal office.”<sup>26</sup> An “independent expenditure”  
6 is an expenditure by a person for a communication expressly advocating the election or  
7 defeat of a clearly identified candidate that is not made in cooperation or consultation  
8 with a candidate, a candidate’s authorized committee, a party committee, or their agent.<sup>27</sup>

9 The Commission has long treated political merchandise as communications  
10 subject to the independent expenditure regulation. In 2011, the Commission voted  
11 unanimously to approve a draft Notice of Interpretive Rule to address “independent  
12 expenditure communications that take the form of items such as . . . t-shirts, hats, and  
13 buttons.”<sup>28</sup> The Notice explained that Commission regulations require “persons making  
14 independent expenditures (‘Filers’)” to “ensure that the Commission receives . . . reports  
15 . . . following the date on which a communication that constitutes an independent

---

<sup>26</sup> 52 U.S.C. § 30101(9)(A)(i); 11 C.F.R. § 100.111(a)

<sup>27</sup> 52 U.S.C. § 30101(17); *see also* 11 C.F.R. § 100.16(a).

<sup>28</sup> Draft Interpretive Rule on When Certain Independent Expenditures Are “Publicly Disseminated” for Reporting Purposes, Agenda Document No. 11-52 at 1, 3, [https://www.fec.gov/resources/updates/agendas/2011/mtgdoc\\_1152.pdf](https://www.fec.gov/resources/updates/agendas/2011/mtgdoc_1152.pdf); Minutes of an Open Meeting of the Federal Election Commission Thursday, September 22, 2011, Agenda Document No. 11-61 (Approved October 6, 2011) at 3, [https://www.fec.gov/resources/updates/agendas/2011/approved2011\\_61.pdf](https://www.fec.gov/resources/updates/agendas/2011/approved2011_61.pdf) (“Chair Bauerly recognized Commissioner Weintraub who MOVED to approve Agenda Document No. 11-52, subject to the following edits . . . The motion carried on a vote of 6-0”).

1 expenditure is publicly distributed or otherwise publicly disseminated.”<sup>29</sup> The Notice  
2 acknowledged, however, that “[t]he actual public dissemination date of independent  
3 expenditure communications that take the form of items such as . . . t-shirts, hats, and  
4 buttons may be difficult to ascertain.”<sup>30</sup> Accordingly, “[t]his particular rule interprets  
5 ‘publicly disseminated’ for those items that do not have an inherent date certain for  
6 public dissemination, such as . . . t-shirts, hats, and buttons.”<sup>31</sup> Although not binding on  
7 the Commission or the public, the Commission intended the Notice to “provide[] Filers  
8 with an administratively workable method for determining the date of dissemination for  
9 these types of independent expenditure communications.”<sup>32</sup>

10 Previously, in Advisory Opinion 1994-30 (Conservative Concepts), the  
11 Commission considered whether costs incurred by a corporate vendor of political  
12 merchandise to advertise and market T-shirts bearing express advocacy messages would  
13 be independent expenditures.<sup>33</sup> The Commission noted that, even though the T-shirts  
14 “undoubtedly display messages that ‘expressly advocate’ the election or defeat of a  
15 candidate,” absent coordination or consultation with political committees resulting in  
16 contributions by the vendor, the Commission would recognize “an alternative” to treating

---

<sup>29</sup> Interpretive Rule on When Certain Independent Expenditures Are “Publicly Disseminated” for Reporting Purposes, 76 Fed. Reg. 61254, 61255 (Oct. 4, 2011) (“Notice”) (citing 11 CFR § 104.4(b)(2); *id.* § 104.4(c), (f); *id.* § 109.10(c), (d)) (internal brackets omitted).

<sup>30</sup> *Id.*

<sup>31</sup> *Id.* at n.1.

<sup>32</sup> Notice at 61255.

<sup>33</sup> Advisory Opinion 1994-30 (Conservative Concepts, Inc.) at 5. The Commission noted that “If the company's activities constitute independent expenditures, . . . then such activity . . . would be prohibited.” *Id.*

1 the activity as independent expenditures if it “fall[s] within the category of commercial,  
2 rather than political, activity.”<sup>34</sup> The Commission noted, however, that the purely  
3 commercial nature of the activity would be “compromise[d]” and the activity would be  
4 brought into “the category of independent expenditure” if, in addition to manufacturing  
5 and offering a shirt with a message of express advocacy, the vendor “gear[s] the  
6 motivation for making a purchase to those who wish to support or express support for a  
7 particular candidate.”<sup>35</sup>

8 Unlike the entity in Advisory Opinion 1994-30 (Conservative Concepts), the  
9 proposed PAC here “is not a vendor.”<sup>36</sup> Instead, it will be a political committee whose  
10 major purpose is the nomination or election of a candidate to federal office.<sup>37</sup> As such,  
11 the costs the PAC incurs to raise funds to further this purpose and to support its preferred  
12 candidates cannot reasonably be viewed as “merely entrepreneurial or commercial  
13 activity unlimited by the Act.”<sup>38</sup>

14 Here, as discussed above, the proposed PAC will incur the costs of producing and  
15 distributing fundraising items, and according to the request the fundraising items would

---

<sup>34</sup> *Id.* at 5.

<sup>35</sup> *Id.* at 6. In addition, although not directly on point, the Commission’s disclaimer regulation may also be instructive in determining whether political merchandise is a “communication.” *See* 11 C.F.R. § 110.11. The regulation requires disclaimers to appear on “public communications” that contain express advocacy or solicit contributions, but explicitly exempts “wearing apparel” and small items on which a disclaimer cannot be conveniently printed, such as bumper stickers, pens, and buttons. *Id.* § 110.11(f)(1)(i)-(ii).

<sup>36</sup> AOR006.

<sup>37</sup> *See Buckley v. Valeo*, 424 U.S. 1, 80 (1976).

<sup>38</sup> Advisory Opinion 1994-30 (Conservative Concepts, Inc.) at 4.

1 bear messages that expressly advocate the election or defeat of clearly identified federal  
2 candidates. The requestor also represents that the PAC will not coordinate with  
3 candidates regarding its merchandise or solicitations and will “operate independently of  
4 any candidates and their campaigns.”<sup>39</sup> Based on these representations, the Commission  
5 concludes that the costs incurred by the PAC to produce and distribute the merchandise  
6 as described in the request will be independent expenditures reportable by the PAC.

7 4. *Would the PAC have to report its costs of soliciting contributors to make*  
8 *earmarked contributions as independent expenditures?*

9 Yes, the PAC would have to report its costs of soliciting earmarked contributions  
10 as independent expenditures if the solicitations contained express advocacy.

11 An “independent expenditure” is an expenditure by a person for a communication  
12 expressly advocating the election or defeat of a clearly identified candidate that is not  
13 made in cooperation or consultation with a candidate, an authorized committee, a  
14 political party committee, or their agent.<sup>40</sup> Express advocacy occurs when (1) the  
15 communication uses phrases like “vote for the President,” “Smith for Congress,” “defeat”  
16 accompanied by a picture of one or more candidates, etc.; or (2) when taken as a whole  
17 and with limited reference to external events, the communication could only be  
18 interpreted by a reasonable person as advocating the election or defeat of a clearly  
19 identified candidate because the electoral portion of the communication is “unmistakable,  
20 unambiguous, and suggestive of only one meaning,” and “[r]easonable minds could not

---

<sup>39</sup> AOR003.

<sup>40</sup> 52 U.S.C. § 30101(17); *see also* 11 C.F.R. § 100.16(a).

1 differ as to whether it encourages actions to elect or defeat one or more clearly identified  
2 candidates.”<sup>41</sup> When adopting the “express advocacy” definition, the Commission  
3 explained that “exhortations to contribute time or money to a candidate would also fall  
4 within the revised definition of express advocacy.”<sup>42</sup> Furthermore, the Commission has  
5 concluded that fundraising solicitations containing express advocacy should be reported  
6 as independent expenditures.<sup>43</sup> As part of the costs of independent expenditures, the  
7 production and distribution costs must also be reported as expenses for any such  
8 independent expenditures.<sup>44</sup>

9 Cowboy Analytics states that the PAC will not coordinate or consult with  
10 candidates or their committees regarding the PAC’s solicitations or merchandise. Since  
11 the PAC plans to make its solicitations independently, its solicitations containing express  
12 advocacy will constitute independent expenditures by the PAC. Therefore, the PAC  
13 should report the costs of those solicitations as independent expenditures.

---

<sup>41</sup> 52 U.S.C. § 30101(17); *see also* 11 C.F.R. § 100.22.

<sup>42</sup> Express Advocacy; Independent Expenditures; Corporate and Labor Expenditures, 60 Fed. Reg. at 35,294 (July 6, 1995).

<sup>43</sup> MUR 5809 (Christian Voter Project) (finding reason to believe that an entity failed to file independent expenditure notices for the costs of fundraising letters that expressly advocated the election/defeat of candidates.). *See also* LRA 815 (The Legacy Committee Political Action Committee). The Commission there voted to approve an audit finding that the committee failed to file notices and properly disclose independent expenditures regarding a portion of the fundraising communications at issue that contained express advocacy. However, the Commission did not reach a consensus on whether another portion of the communications at issue contained express advocacy and accordingly did not approve the Audit staff’s finding that such communications required reporting as independent expenditures.

<sup>44</sup> 11 C.F.R. § 100.22; *see also* Advisory Opinion 2003-23 (WE LEAD) at 5 (concluding that if solicitations by a nonconnected political committee were made independently of any candidate, candidate’s authorized committee, or its agents, the direct costs of solicitation incurred by the committee would constitute independent expenditures).



1           5.       *Would the Commission’s analysis for Questions 1-4 change if the PAC*  
2 *were to separate the sale of political merchandise from the making of earmarked*  
3 *contributions?*

4           No, the Commission’s analysis for Questions 1-4 would not change if the PAC  
5 were to separate the sale of political merchandise from the making of an earmarked  
6 contribution.<sup>45</sup>

7           First, regarding Question 1, the payment processing fee that the requestor  
8 proposes to deduct from each earmarked contribution would still be a contribution to the  
9 PAC and not to the designated candidate for the reasons provided in response to Question  
10 1, above.<sup>46</sup>

11           Regarding question 2, the PAC’s initial payment for the production and  
12 distribution of political merchandise would not constitute an in-kind contribution to the  
13 candidates receiving the earmarked contributions for the reasons provided in response to  
14 Question 2, above.

15           Regarding Question 3, the PAC’s expenses to produce and distribute the  
16 merchandise as described in the request will still constitute independent expenditures  
17 reportable by the PAC for the same reasons provided in the response to Question 3,  
18 above.

---

<sup>45</sup> Although the AOR posed Question 5 in the conditional tense, Cowboy Analytics subsequently confirmed that the question is not hypothetical or moot. *See* AOR013. As such, it is appropriate for an advisory opinion request. *See* 11 C.F.R. 112.1(b).

<sup>46</sup> Because the contributor would earmark the contribution for a specific candidate at the time that they make the contribution, the PAC would not exercise direction or control over the contribution.

1           Finally, concerning Question 4, the PAC would still have to report as independent  
2 expenditures its costs of soliciting earmarked contributions when the solicitations contain  
3 express advocacy for the same reasons provided in response to Question 4, above.

4           6.       *Would the PAC's proposed activities violate the Federal Election*  
5 *Campaign Act of 1971, as amended ("FECA") or the Commission's implementing*  
6 *regulations in any way?*

7           The PAC's proposed activities would be subject to all applicable disclaimer  
8 requirements,<sup>47</sup> source prohibitions,<sup>48</sup> amount limitations,<sup>49</sup> and reporting requirements<sup>50</sup>  
9 of the Act and Commission regulations. In addition, the PAC must comply with all  
10 contribution forwarding requirements, including forwarding contributions within the  
11 required time periods, and collecting contribution information and forwarding it to the  
12 recipient candidate committees.<sup>51</sup>

13           This response constitutes an advisory opinion concerning the application of the  
14 Act and Commission regulations to the specific transaction or activity set forth in your  
15 request.<sup>52</sup> The Commission emphasizes that, if there is a change in any of the facts or  
16 assumptions presented, and such facts or assumptions are material to a conclusion  
17 presented in this advisory opinion, then the requestor may not rely on that conclusion as

---

<sup>47</sup>       52 U.S.C. § 30120; *see also* 11 C.F.R. § 110.11.

<sup>48</sup>       52 U.S.C. §§ 30118, 30119, 30121, 30122; *see also* 11 C.F.R. §§ 110.4(b), 110.20, 114.2, 115.2.

<sup>49</sup>       52 U.S.C. § 30116; *see also* 11 C.F.R. § 110.1.

<sup>50</sup>       52 U.S.C. § 30104; *see also* 11 C.F.R. Part 104.

<sup>51</sup>       52 U.S.C. § 30116(a)(8); *see also* 11 C.F.R. § 110.6.

<sup>52</sup>       *See* 52 U.S.C. § 30108.

1 support for its proposed activity. Any person involved in any specific transaction or  
2 activity which is indistinguishable in all its material aspects from the transaction or  
3 activity with respect to which this advisory opinion is rendered may rely on this advisory  
4 opinion.<sup>53</sup> Please note that the analysis or conclusions in this advisory opinion may be  
5 affected by subsequent developments in the law including, but not limited to, statutes,  
6 regulations, advisory opinions, and case law. Any advisory opinions cited herein are  
7 available on the Commission's website.

8 On behalf of the Commission,

9  
10 Dara Lindenbaum,

11 Chair

---

<sup>53</sup> See *id.* § 30108(c)(1)(B).