



FEDERAL ELECTION COMMISSION

Washington, DC 20463

MEMORANDUM

TO: The Commission

FROM: Office of the Commission Secretary *LC*

DATE: March 18, 2024

SUBJECT: AOR 2024-01 (Texas Majority PAC) Responses
from the NRSC's comment

Attached is AOR 2024-01 (Texas Majority PAC) Responses from the NRSC's comment

Attachment

March 16, 2024

RECEIVED

By Office of the Commission Secretary at 9:48 am, Mar 18, 2024

Federal Election Commission
Office of the General Counsel
Federal Election Commission
1050 First Street, NE
Washington, DC 20463
ao@fec.gov

Re: Advisory Opinion Request 2024-1

Dear Acting General Counsel Stevenson:

We write in response to the NRSC’s comment submitted on the morning of Thursday’s Commission meeting.¹ The NRSC’s comment raises two important questions: *one*, which set of facts would support a finding that a federal candidate or political party is “spending” soft money or “controls” an organization that is doing so (both of which BCRA forbids); and, *two*, does part 114 of the Commission’s regulations impose additional restrictions on get-out-the-vote canvassing programs sponsored by corporations?

Neither question, however, is part of Texas Majority PAC’s (“*TMP*”) request. And for good reason: *TMP* is not a federal candidate or political party, and *TMP* is not proposing to spend corporate funds on the canvassing program. The Commission can – and by statute, *must* – respond to the request submitted by *TMP*. It may not simply “move on” from *TMP*’s request, as NRSC urges, nor may it issue an opinion colored by NRSC’s materially distinct hypothetical.²

But if it so chooses, the Commission can modify Draft B to acknowledge that *TMP*’s request – and the Commission’s opinion – is limited to the specific questions posed and does not address what level of candidate or party involvement is required to constitute impermissible “spending” or “control” under the soft money ban, or whether corporate funds may be used to finance the same program. In doing so, the Commission would be meeting its statutory obligations while properly limiting its opinion to the questions presented.

I. The Commission should answer the four questions that *TMP* poses.

Federal law permits any person to request an advisory opinion concerning the application of the Federal Election Campaign Act (“*FECA*” or “*the Act*”), regarding “a specific transaction or

¹ See FEC Adv. Op. Req. 2024-1 (Texas Majority PAC), Comment on Drafts A and B (NRSC) (“*NRSC Comment*”) (March 13, 2024) at 1..

² See 11 C.F.R. § 112.1(b) (“Requests presenting a general question of interpretation, or posing a hypothetical situation, or regarding the activities of third parties, do not qualify as advisory opinion requests.”).

activity that the requesting person plans to undertake or is presently undertaking and intends to undertake in the future.”³ The Commission is required to issue a written advisory opinion in response to the requester (or, alternatively, a response stating that the Commission was unable to approve an advisory opinion by the required number of votes).⁴

The advisory opinion process “exists so that the Commission may provide guidance as to how FECA applies to a requestor’s *specific circumstances*.”⁵ Accordingly, when considering an advisory opinion, the Commission must answer “the question presented by [the] requestor, based upon the unique facts and [] characteristics presented” by that requester.⁶ The advisory opinion must be “premised on the specific facts and circumstances posited in [the] request.”⁷ That is why requests “posing a hypothetical situation, or regarding the activities of third parties” do not qualify as advisory opinions, and the Commission has repeatedly declined to consider such requests.⁸ “Questions [that] are hypothetical and present general questions of interpretation of the Act, rather than specific transactions or activities . . . are [] not proper for an advisory opinion.”⁹

TMP has crafted a proper advisory opinion request (as confirmed by the Commission’s acceptance of it). TMP poses four questions to the Commission, each of which relates specifically to activities that TMP proposes to undertake and the answers to which directly affect TMP’s compliance with the Act and Commission regulations:

1. Are the Canvassing Literature or Script “public communications” under 11 C.F.R. § 109.26?
2. Are the Canvassing Literature or Script “coordinated communications” under 11 C.F.R. § 109.21?
3. Are the Production Costs or Distribution Costs “coordinated expenditures” under 11 C.F.R. § 109.20?
4. May TMP provide any of the data that arises from the paid canvasses to a federal

³ 52 U.S.C. § 30108(a)(1); 11 C.F.R. § 112.1.

⁴ 52 U.S.C. § 30108(a), (b); 11 C.F.R. § 112.4(a).

⁵ Statement of Reasons of Chairman Allen Dickerson and Commissioners Sean J. Cooksey and James E. “Trey” Trainor, MUR 7491 (emphasis added).

⁶ Concurring Statement of Vice Chair Caroline C. Hunter and Commissioners Lee E. Goodman and Matthew S. Petersen, FEC Adv. Op. 2017-12 (Take Back Action Fund).

⁷ FEC Adv. Op. 2003-37 (Americans for a Better Country) at 1.

⁸ 11 C.F.R. § 112.1(b); see FEC Adv. Op. 2003-37 (Americans for a Better Country) at 10; FEC Adv. Op. 2021-04 (Pray.com) at 2, n. 8; FEC Adv. Op. 2006-41 (NRSC and DSCC) at 11; FEC Adv. Op. 2006-32 (Progress for America).

⁹ FEC Adv. Op. 2003-37 (Americans for a Better Country) at 8.

candidate or party committee at no charge or less than its fair market value?

The Commission can issue an opinion answering TMP's four questions and nothing in the NRSC's comment affects that:

- In its comments, the NRSC makes clear its view that the answers to questions #1 and #2 are “no.”¹⁰ We agree. For the reasons we have previously articulated, the Commissioners should therefore issue an opinion that answers “no” to questions #1 and #2.
- The NRSC does not opine on the answer to Question #3. Both Drafts A and B agree that the answer to Question #3 is “no.” For the reasons we have previously articulated, the Commissioners should therefore answer “no” to Question #3.
- The NRSC does not opine on the answer to Question #4. Both Drafts A and B agree that the answer to Question #4 is that the provision of such data would constitute an in-kind contribution. TMP does not dispute that conclusion.

As noted above, the Commission can make clear in a modified Draft B that its opinion is limited to these questions and does not address what level of candidate or party involvement is required to constitute impermissible “spending” or “control” for purposes of the soft money ban, or whether corporate funds may be used to finance the same program.

II. Granting TMP's request does not prevent the Commission from answering the NRSC's questions if and when they are properly presented.

The NRSC's comment raises two issues not squarely before the Commission in TMP's request: the scope of the soft money ban and the regulations governing corporate GOTV drives. As the NRSC correctly observes, the so-called “soft money” ban is central to the “current campaign finance regime.”¹¹ The soft money ban makes it illegal for a federal candidate or “an entity directly or indirectly established, financed, maintained, or controlled by” a federal candidate to “solicit, receive, direct, transfer, or spend funds in connection with an election for Federal office, including funds for any Federal election activity, unless the funds are subject to the limitations, prohibitions, and reporting requirements of this Act.”¹² Similar rules govern party committees.

TMP agrees with the NRSC that there are hypothetical scenarios where a candidate or political party's participation in a paid canvassing program and/or in the organization that sponsored it rise to the level of impermissible “spending” or “control.” If such facts were substantiated in a

¹⁰ See NRSC Comment at 4 (“Draft B's coordinated communications analysis (as well as many commentors) correctly elucidates the errors plainly obvious in Draft A's first conclusion, and there is little need to reiterate the reasons to reject Draft A.”).

¹¹ NRSC Comment at 1.

¹² 52 U.S.C. § 30125(1)(A).

complaint to the Commission, for example, the Commission could find that the candidate or political party had violated the soft money bans found at 52 U.S.C. §§ 30125(a), (e)(1)(A).

TMP's request, however, is not the proper vehicle for the Commission to address this question. While TMP concedes that "it will come into possession of nonpublic plans, projects, activities, or needs of candidates (federal and nonfederal) and/or political parties within the meaning of 11 C.F.R. § 109.21(d)(3),"¹³ coordination is a distinct legal concept from the soft money ban. In *McConnell v. FEC*, the Supreme Court held that activity satisfies the conduct prong set forth in 11 C.F.R. § 109.21(d) does not violate BCRA's soft money ban, indicating that the conduct covered by section 109.21 is not coterminous with conduct covered by the soft money ban:

Nothing on the face of § 323(a) prohibits national party officers, whether acting in their official or individual capacities, from sitting down with state and local party committees or candidates to plan and advise how to raise and spend soft money. As long as the national party officer does not personally spend, receive, direct, or solicit soft money, § 323(a) permits a wide range of joint planning and electioneering activity.¹⁴

The Commission is bound by that holding, as it recognized in the Corzine AO in 2005.¹⁵ In the Corzine AO, in fact, the Commission specifically held that a federal officeholder may coordinate with an entity spending soft money on GOTV activities without violating the soft money ban:

McConnell has made clear as a matter of law that BCRA does not preclude parties and candidates from discussing campaign strategy and fundraising goals with one another. Therefore, if Senator Corzine or his agents discuss the spending plans of other specific candidates or committees, such discussions would not, in and of themselves, constitute "spending" or "disbursing" funds. ***For example, if Senator Corzine or his agents were to discuss with the State and local party committees plans to spend \$50,000 on get-out-the-vote ("GOTV") efforts, such discussions would not constitute spending or disbursing funds by Senator Corzine.***¹⁶

Answering TMP's questions, therefore, will not tie the Commission's hands if it is presented with the conduct set forth in NRSC's hypothetical. There are material differences between TMP's request and the NRSC's hypothetical. TMP makes clear that it will impose significant guardrails to curb any candidate or party committee involvement in its organization or programs:

TMP will not permit candidates (federal, state, or local), party committees, or their agents to finance, maintain, or control TMP. Specifically, candidates, party committees, and

¹³ FEC Adv. Op. Req. 2024-1 (Texas Majority PAC) (Jan. 12, 2024) at 3.

¹⁴ *McConnell v. FEC*, 540 U.S. 93, 160 (2003).

¹⁵ FEC Adv. Op. 2005-2 (Corzine) at 8-9.

¹⁶ *Id.* (emphasis added).

their agents will not be permitted to:

- direct or participate in the governance through provisions of constitutions, bylaws, contracts, or other rules, or through formal or informal practices or procedures;
- hire, appoint, demote, or otherwise control the officers, or other decision-making employees or members of TMP;
- have common or overlapping officers or employees with TMP; or
- make contributions, monetary or in-kind, in significant amounts or on an ongoing basis to TMP.

Candidates (federal, state, or local), party committees, and their agents will not have any spending authority within TMP. They will not have any authority to approve TMP budgets or TMP expenditures, nor will they have authority to sign checks or initiate wires. Nor will federal candidates, party committees, or their agents have final approval authority with respect to any Canvassing Literature, Script, or other aspect of the paid canvassing program. TMP itself will exercise full direction and control over all such programs.

In NRSC’s hypothetical, by contrast, candidates “make efforts to persuade [the spender]” to make expenditures in their jurisdiction; there is “extensive federal candidate involvement”; and “common canvassing vendors [are] used.”¹⁷ Whether the activity set forth in NRSC’s hypothetical rises to “spending” or “control” is a question that the Commission can consider if NRSC or another party wishes to submit its own request.

Finally, unlike NRSC’s hypothetical, TMP’s request does not involve the expenditure of corporate funds. The Commission maintains regulations governing corporate spending that could apply to the activities described in TMP’s request (if sponsored by a corporation) or NRSC’s hypothetical.¹⁸ The Commission’s issuance of an opinion to TMP does not necessarily “green light” corporations to engage in the same activities. This is another issue that the Commission could take up in response to a subsequent advisory opinion request.

The Commission should answer TMP’s four questions and make clear that it is only those four questions that it is answering.

Yours truly,

Jonathan S. Berkon
Courtney T. Weisman
Sarah N. Mahmood

¹⁷ NRSC Comment at 2-3.

¹⁸ See 11 C.F.R. § 114.4(a) (restricting GOTV drives sponsored by corporations).

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Counsel to Texas Majority PAC