

RECEIVED

By Office of the Commission Secretary at 8:03 am, Mar 21, 2024



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C.

March 20, 2024

ADVISORY OPINION 2024-01

Jonathan S. Berkon, Esq.
Courtney T. Weisman, Esq.
Sarah N. Mahmood, Esq.
Elias Law Group LLP
250 Massachusetts Avenue, NW
Suite 400
Washington, DC 20001

Dear Counsel:

We are responding to your advisory opinion request on behalf of Texas Majority PAC (“TMP”), asking several questions regarding the application of the Federal Election Campaign Act, 52 U.S.C. §§ 30101 – 30145 (the “Act”), and Commission regulations to TMP’s proposal to hire vendors to canvass potential voters, namely whether canvassing literature and scripts, and their associated costs, are public communications, coordinated communications, or coordinated expenditures, and whether TMP can provide data acquired during the canvass to a federal candidate or party committee at less than fair market value.

The Commission concludes that the canvassing literature and scripts are not public communications, and as a result are not coordinated communications under Commission regulations. Further, the costs to produce and distribute the canvassing literature and scripts are not coordinated expenditures. Finally, the Commission concludes that if TMP provides the data that arises from its paid canvass to a federal candidate or party committee at less than its fair market value, it would be an in-kind contribution.

Background

The facts presented in this advisory opinion are based on your letter received on January 12, 2024, and email received on January 22, 2024. TMP is a nonfederal

“general-purpose committee” registered with the Texas Ethics Commission.¹ TMP’s major purpose is to elect Democrats to state and local office in Texas.² TMP is not registered with the Commission and states that it is not established, financed, maintained, or controlled by any federal, state, or local candidate, party committee, or their agents.³

TMP seeks to retain and pay third-party vendors, managed by TMP’s paid staff, to execute a paid canvassing program (“Paid Canvass”).⁴ The vendors will design and produce canvassing literature (“Canvassing Literature”) and a script (“Script”) to be used solely for the Paid Canvass.⁵ The vendors will also hire, train and manage canvassers, who will go to voters’ homes to distribute the Canvassing Literature, read the Script, and record answers to the scripted questions.⁶ The canvassers will not engage in any other work or complete any other assignments for TMP.⁷

TMP will preselect the voters who will be visited by the canvassers.⁸ The Paid Canvass will not be limited to the homes of individuals who have opted-in or otherwise sought out a visit by the canvassers.⁹ The vendors and individual canvassers will not have a contractual or business relationship with the voters whose homes will be visited.¹⁰ TMP anticipates the Paid Canvass will disseminate identical or substantially similar Campaign Literature and Scripts to more than 500 homes within a 30-day period.¹¹

The Paid Canvass will include three categories of expenditures: (1) production costs, (2) distribution costs, and (3) data costs.¹² The production costs are the “[p]ayments to one or more vendor(s) to design and produce the Canvassing Literature and Script . . . including the actual costs of design and production, and a commercially

¹ Advisory Opinion Request (“AOR”) at 001. Texas law defines “[g]eneral-purpose committee” as a political committee that has among its principal purposes supporting or opposing: two or more candidates who are unidentified or are seeking offices that are unknown; one or more measures that are unidentified; or assisting two or more officeholders who are unidentified. Texas Elec. Code § 251.001(14).

² AOR003.

³ AOR001-3. TMP states that its major purpose does not include federal campaign activity. AOR003.

⁴ AOR002.

⁵ *Id.* The Canvassing Literature and Script will not be used for any purpose other than TMP’s proposed Paid Canvass. AOR014.

⁶ AOR002.

⁷ AOR014.

⁸ AOR002.

⁹ *Id.*

¹⁰ *Id.*

¹¹ AOR002, 14.

¹² AOR002.

reasonable profit for the vendor.”¹³ The distribution costs are the “[p]ayments to one or more vendor(s) to recruit, hire, train, and manage canvassers . . . including payments to compensate the canvassers for their time, actual costs to the vendor to recruit, hire, train, and manage the canvassers, and a commercially reasonable profit for the vendor(s).”¹⁴ The data costs are the “[p]ayments to one or more vendor(s) to store (on a data platform) and analyze the voters’ answers to the questions posed by paid canvassers . . . including the actual costs of maintaining the platform and analyzing the data and a commercially reasonable profit for the vendor(s).”¹⁵ TMP states that except for the data costs, the Paid Canvass “will not have non-communicative components; for example, unlike some grassroots efforts, [it] will not include offers to drive voters to polling places.”¹⁶

The Paid Canvass will disseminate the Canvassing Literature and Scripts within the pre-election timeframes described in Commission regulations,¹⁷ will refer to federal candidates and political parties, and may also include express advocacy or its functional equivalent with respect to federal candidates.¹⁸ TMP will consult with federal candidates, party committees, and their agents on the canvassing program.¹⁹ Accordingly, TMP anticipates “it will come into possession of nonpublic plans, projects, activities, or needs of candidates (federal and nonfederal) and/or political parties,” and thus will engage in substantial discussion as defined in Commission regulations.²⁰ However, the canvassing program will not involve the dissemination, distribution, or republication of federal candidate campaign materials.²¹

¹³ *Id.*

¹⁴ *Id.*

¹⁵ AOR002-3.

¹⁶ AOR003.

¹⁷ *See* 11 C.F.R. § 109.21(c)(4).

¹⁸ AOR003.

¹⁹ AOR003-4.

²⁰ AOR003. *See also* 11 C.F.R. § 109.21(d)(3).

²¹ AOR003. *See* 11 C.F.R. § 109.23.

Questions Presented

- (1) *Are the Canvassing Literature and Script “public communications” under 11 C.F.R. § 100.26?*
- (2) *Are the Canvassing Literature and 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 candidate or party committee at no charge or less than its fair market value?*

Legal Analysis

- (1) *Are the Canvassing Literature and Script “public communications” under 11 C.F.R. § 100.26?*
- (2) *Are the Canvassing Literature and Script “coordinated communications” under 11 C.F.R. § 109.21?*

No, the Canvassing Literature and Script are not public communications and, therefore, are not coordinated communications.

Under the Act, expenditures that are coordinated with a candidate or political party committee are treated as contributions to that candidate or political party committee.²² Specifically, Commission regulations provide that if a communication is “coordinated with a candidate, an authorized committee, a political party committee, or an agent of any of the foregoing,” the payment for the communication is an in-kind contribution to that candidate or the political party committee from the payor.²³ Commission regulations set forth a three-prong test to determine whether a communication is a coordinated communication.²⁴ All three prongs of this test must be met in order for a communication to be deemed a coordinated communication.

The Commission concludes that the Canvassing Literature and the Scripts do not constitute coordinated communications because they do not meet the content prong of the coordinated communication test. The content prong provides that a communication is a

²² 52 U.S.C. § 30116(a)(7)(B).

²³ 11 C.F.R. § 109.21(a), (b)(1).

²⁴ *Id.* § 109.21(a).

coordinated communication only if it is an “electioneering communication” or a “public communication” that meets at least one of five content standards.²⁵

An “electioneering communication” is defined as “any broadcast, cable, or satellite communication” that refers to a clearly identified federal candidate, is publicly distributed within certain time periods, and is targeted to the relevant electorate.²⁶ TMP’s proposal does not involve any “broadcast, cable, or satellite communications” and thus, would not constitute electioneering communications.

Therefore, only if the Canvassing Literature and Script are “public communications” could they be coordinated communications. A public communication is defined as “a communication by means of any broadcast, cable, or satellite communication, newspaper, magazine, outdoor advertising facility, mass mailing, or telephone bank to the general public, *or any other form of general public political advertising.*”²⁷

Because paid door-to-door canvassing as proposed in the request is not expressly enumerated in the statutory or regulatory definition of “public communication,” the Commission must determine whether the Paid Canvass constitutes “general public political advertising.” The catch-all term “general public political advertising” is not defined by the Act or Commission regulations. However, “the Commission interprets each term listed in the definition of ‘public communication’ or in [52 U.S.C. § 30120(a)] as a specific example of one form of ‘general public political advertising.’”²⁸

In a 2006 rulemaking concerning internet communications, the Commission discussed the common elements of communications that fall within the category of general public political advertising.²⁹ The Commission observed that one of the common elements is that such communications typically require the person making the communication to pay “for access to an established audience using a forum controlled by another person, rather than using a forum that he or she controls to establish his or her own audience.”³⁰

²⁵ *Id.* § 109.21(c)(2).

²⁶ 52 U.S.C. § 30104(F)(3); 11 C.F.R. § 100.29(a).

²⁷ 52 U.S.C. § 30101(22) (emphasis added); *see also* 11 C.F.R. § 100.26.

²⁸ *See* Disclaimers, Fraudulent Solicitation, Civil Penalties, and Personal Use of Campaign Funds, 67 Fed. Reg. 76,962, 76,963 (Dec. 13, 2002).

²⁹ Internet Communications, 71 Fed. Reg. 18,589, 18,594 (Apr. 12, 2006).

³⁰ *Id.* at 18,594-95.

The Commission discussed this common element in Advisory Opinion 2022-20 (Maggie for NH). In that opinion, the Commission observed that general public political advertising “typically require[s] the person making the communication to pay to use a third party’s platform to gain access to the third party’s audience.”³¹ The Commission explained that traditional forms of paid advertising generally require a speaker to pay “to disseminate a message through a medium controlled, and to an audience established, by a third party.”³² The Commission concluded that short-code text messages — which were only sent to individuals who agreed to receive messages from the Committee — lacked this common element and therefore did not constitute “general public political advertising.”³³

Here, the Canvassing Literature and Script will not be disseminated “through a medium controlled, and to an audience established, by a third party.”³⁴ 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 TMP.³⁵ The vendors will also not establish or identify the audience for the canvassing program.³⁶ Instead, TMP will preselect the voters whose homes will be visited.³⁷ The vendors will simply act as TMP’s agents in carrying out a canvassing program that TMP controls. Under TMP’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.”

Furthermore, door-to-door canvassing is a traditional grassroots activity fundamentally different from the types of mass media enumerated in the statutory definition of “public communication.”³⁸ Unlike communications made via television, newspapers, magazines, mass mailings, or telephone banks, door-to-door canvassing involves individual people talking face-to-face with voters. It is not the type of mass

³¹ Advisory Opinion 2022-20 (Maggie for NH) at 4-5.

³² *Id.*

³³ *Id.* at 5. The Commission further noted that text messages sent only to individual subscribers who affirmatively opt-in to the messaging — and “therefore have sought out the speaker and speech through a forum controlled by the speaker” — are analogous to “to speech disseminated through a political committee’s own website, which the Commission previously concluded is not a public communication.” *Id.*

³⁴ *See id.*

³⁵ AOR002, 6.

³⁶ AOR002.

³⁷ *Id.*

³⁸ 52 U.S.C. § 30101(22).

communication contemplated in the definition of “public communication.”

Accordingly, the Commission concludes that the Canvassing Literature and Script are not “public communications,” and thus would not satisfy the content prong of the coordinated communications test. Because the content prong is not satisfied, the Canvassing Literature and Script are not coordinated communications.³⁹

(3) Are the production costs or distribution costs “coordinated expenditures” under 11 C.F.R. § 109.20?

No, the costs to produce and distribute the Campaign Literature and Script are not coordinated expenditures under 11 C.F.R. § 109.20, because they are expenditures made for communications.

Coordinated expenditures are defined in 11 C.F.R. § 109.20(b), which provides:

Any expenditure that is coordinated within the meaning of paragraph (a) of this section, but that is not made for a coordinated communication under 11 CFR 109.21. . . is either an in-kind contribution to, or a coordinated party expenditure with respect to, the candidate or political party committee with whom or with which it was coordinated. . .⁴⁰

The Commission has explained that section 109.20(b) applies to “expenditures that *are not made for communications* but that are coordinated with a candidate, authorized committee, or political party committee.”⁴¹

The Canvassing Literature and Script are communications.⁴² TMP’s proposed production costs are limited to payments to the vendor to design and produce these specific communications, which will not be used outside of the Paid Canvass.⁴³ Similarly, TMP’s proposed distribution costs are limited to payments to the vendor to

³⁹ Because the Paid Canvass would not satisfy the content prong of the coordinated communication test, the Commission need not, and does not, address the third and final part of the test, the conduct prong. *See* 11 C.F.R. § 109.21(a)(3), (d).

⁴⁰ 11 C.F.R. § 109.20(b). Section 109.20(a) defines “coordinated” as “made in cooperation, consultation or concert with, or at the request or suggestion of, a candidate, a candidate's authorized committee, or a political party committee.” 11 C.F.R. § 109.20(a).

⁴¹ Coordinated and Independent Expenditures, 68 Fed. Reg. 421, 425 (Jan. 3, 2003) (emphasis added); *see also* Advisory Opinion 2011-14 (Utah Bankers Association).

⁴² *See communication*, BLACK’S LAW DICTIONARY (11th ed. 2019) (defining “communication” as “1. The interchange of messages or ideas by speech, writing, gestures, or conduct; the process of bringing an idea to another's perception. 2. The messages or ideas so expressed or exchanged.”).

⁴³ AOR002, 14.

recruit, hire, train, and manage the canvassers who will disseminate the canvassing communications.⁴⁴ The canvassers will not engage in any work for TMP other than disseminating the communications and recording voters' answers to scripted questions.⁴⁵ The payments to the vendor(s) to produce and distribute the Canvassing Literature and Script will not be redeemed for any other purpose.⁴⁶ Because the expenditures at issue here will be made solely to produce and distribute communications, they do not constitute coordinated expenditures under 11 C.F.R. § 109.20(b), which only applies to expenditures that are "not made for communications."⁴⁷

(4) May TMP provide any of the data that arises from the paid canvasses to a federal candidate or party committee at no charge or less than its fair market value?

If TMP provides the data that arises from the paid canvass to a federal candidate or party committee for less than its fair market value, it would result in an in-kind contribution to the candidate or party committee.

A contribution includes "any gift, subscription, loan, advance, or deposit of money or anything of value made by any person for the purpose of influencing any election for Federal office."⁴⁸ "[T]he provision of any goods or services without charge or at a charge that is less than the usual and normal charge" is an "in-kind" contribution.⁴⁹ Commission regulations define "usual and normal charge" as the price of goods in the market from which they ordinarily would have been purchased at the time of the contribution, or the commercially reasonable rate prevailing at the time services were rendered.⁵⁰

TMP acknowledges that the data gathered from its Paid Canvass is a thing of value.⁵¹ Indeed, it characterizes the data as a "marketable asset that can be sold or rented to others."⁵² Accordingly, if TMP provides the data to a federal candidate or party committee for "less than the usual and normal charge" it would result in an in-kind contribution.

⁴⁴ AOR002.

⁴⁵ AOR014.

⁴⁶ AOR011.

⁴⁷ Coordinated and Independent Expenditures, 68 Fed. Reg. 421, 425 (Jan. 3, 2003) (emphasis added).

⁴⁸ 52 U.S.C. § 30101(8)(A)(i).

⁴⁹ 11 C.F.R. § 100.52(d)(1).

⁵⁰ *Id.* § 100.52(d)(2).

⁵¹ *See* AOR013.

⁵² AOR013.

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.⁵³ 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 the requestor may not rely on that conclusion as support for its 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.⁵⁴ 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,

A handwritten signature in black ink that reads "Sean J. Cooksey". The signature is written in a cursive, flowing style.

Sean J. Cooksey,
Chairman

⁵³ See 52 U.S.C. § 30108.

⁵⁴ See *id.* § 30108(c)(1)(B).