



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C.

December 20, 2023

ADVISORY OPINION 2023-08

Eric Wang
The Gober Group
1501 Wilson Boulevard
Suite 1050
Arlington, VA 22209

Dear Mr. Wang:

We are responding to your advisory opinion request on behalf of Cowboy Analytics, LLC (“Cowboy Analytics”), concerning the application of the Federal Election Campaign Act, 52 U.S.C. §§ 30101-45 (the “Act”), and Commission regulations to a proposal by Cowboy Analytics to form a nonconnected political committee to solicit funds for itself and for certain federal candidates that the PAC supports. The Commission concludes that Cowboy Analytics may form the proposed political committee and determines that (1) funds deducted from earmarked contributions by the committee to cover its costs would be contributions to the committee and not contributions to the designated candidate; and (2) the initial payment for the production and distribution of merchandise would not constitute an in-kind contribution from the committee to the candidates receiving the earmarked contributions. The Commission was unable to reach a response by the required four affirmative votes on the questions of whether the committee would have to report the costs of producing and distributing political merchandise that includes express advocacy as independent expenditures and whether the committee would have to report its costs of solicitations for earmarked contributions that contain express advocacy as independent expenditures. The Commission reaches the same conclusions to Questions 1 and 2 regarding the second scenario posed in Question 5 of the advisory opinion request, where the purchase of the committee’s political merchandise is “decoupled from making an earmarked contribution,”¹ and was unable to reach a response by the required four affirmative votes as to Questions 3 and 4 under the second scenario.

¹ Advisory Opinion Request (“AOR”) at 009.

Background

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

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

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

The PAC’s solicitations will say, for example:

- (1) Get your John Doe for President T-shirt by making a \$50 contribution now! Go to [URL for PAC’s website].³
- (2) Show your support for Jane Roe for Senate with this water bottle. Get it for only \$10 at [URL for PAC’s website].

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

The PAC will deposit into its bank account all funds received in response to its solicitations. After deducting sufficient funds to cover: (1) its costs to purchase and ship the merchandise to the contributor; (2) its costs to process the contribution⁴; and (3) a

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

³ 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.*

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

percentage of its administrative and solicitation costs,⁵ the PAC will forward the contribution to the designated candidate. For example:

The PAC will offer to provide an imprinted T-shirt to each person who makes a \$50 contribution earmarked to a specific presidential candidate. From that amount the PAC will deduct a total of \$19.25: \$10 to cover its cost to produce and ship the T-shirt; \$1.75 for payment processing (*i.e.*, 2.9% of \$50 plus 30 cents); and \$7.50 for its administrative and solicitation costs (*i.e.*, 15% of \$50). The PAC will forward the remaining \$30.75 to the designated candidate's campaign.

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

Cowboy Analytics also proposes for the PAC to solicit the purchase of its political merchandise "decoupled from making an earmarked contribution."⁶ "[A]fter a donor completes a purchase of merchandise on the PAC's website, the PAC would suggest that the donor make an optional earmarked contribution."⁷ The PAC would treat the entire amount paid for the merchandise as a contribution from the purchaser to the PAC, with the PAC paying all costs (including payment processing, administrative, and solicitation costs) associated with the transaction. For each earmarked contribution, Cowboy Analytics plans for the PAC to deduct the standard payment processing fee (2.9% plus 30 cents) and forward the remaining amount to the designated candidate. The PAC will treat the amount deducted for payment processing costs as a contribution to the PAC. Before an earmarked contribution is made, the PAC will provide each contributor of an earmarked contribution with a breakdown of the amount deducted by the PAC for payment processing costs and the amount forwarded to the designated candidate's committee.

Cowboy Analytics stated that the PAC will "operate independently of any candidates and their campaigns."⁸ Cowboy Analytics asserts that the PAC will not coordinate regarding its merchandise or solicitations with candidates, their campaigns, or

⁵ 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.

⁶ AOR009.

⁷ AOR009.

⁸ AOR003.

agents, nor will the PAC enter into any contract or other legal agreement with candidates or their campaigns.

Questions Presented

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

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

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

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

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

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

Legal Analysis

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

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

Under the Act, a contribution is "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."⁹ Commission regulations state that the "entire amount paid as the purchase price for a fundraising item sold by a political committee is a contribution."¹⁰

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

¹⁰ 11 C.F.R. § 110.53.

Further, “all contributions made by a person, either directly or indirectly, on behalf of a particular candidate, including contributions which are in any way earmarked or otherwise directed through an intermediary or conduit to such candidate, shall be treated as contributions from such person to such candidate.”¹¹ Any “person who receives and forwards an earmarked contribution to a candidate or a candidate’s authorized committee” is a “conduit or intermediary.”¹² An earmarked contribution does not count against the conduit’s contribution limits unless the conduit exercises “direction or control over the choice of the recipient candidate;” if that occurs, then the entire earmarked contribution is treated as a contribution to the recipient from both the original contributor and the conduit.¹³

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

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

¹¹ 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).

¹² 11 C.F.R. § 110.6(b)(2).

¹³ 11 C.F.R. § 110.6(d).

¹⁴ AOR002.

¹⁵ 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.*

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

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

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

Under the Act, a contribution is "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."¹⁷ "[T]he term 'anything of value' includes all in-kind contributions."¹⁸

Under Commission regulations, expenditures for coordinated communications are those that meet all three prongs of the test at 11 C.F.R. § 109.21. First, the communication must be paid for, in whole or in part, by a person other than the candidate or the candidate's authorized committee.¹⁹ Second, the communication must satisfy one of five content standards (the "content prong").²⁰ Finally, the communication must satisfy one of five conduct standards (the "conduct prong").²¹ The political merchandise in this case will not be a coordinated communication because it will not satisfy the conduct prong of the three-prong test.

Here, Cowboy Analytics states that the PAC "does not intend to coordinate its production and distribution of political merchandise, its advertisements, or its solicitations of earmarked contributions with the benefitting candidates, their campaign

¹⁶ 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.

¹⁷ 52 U.S.C. § 30101(8)(A)(i).

¹⁸ 11 C.F.R. § 100.52(d)(1).

¹⁹ 11 C.F.R. § 109.21(a)(1).

²⁰ 11 C.F.R. §§ 109.21(a)(2), (c).

²¹ 11 C.F.R. §§ 109.21(a)(3), (d)(1)-(5).

committees, or any agents.”²² Nor will the PAC republish candidates’ campaign materials.²³ Because the PAC will engage in the proposed activity independently of any candidates, candidate committees, political party committees, or their agents, the proposed activity will not satisfy the conduct prong and thus will not be a coordinated communication. Therefore, the PAC’s costs to produce and distribute the merchandise will not be an in-kind contribution from the PAC to the candidates receiving the earmarked contributions.

3. *Would the PAC have to report the costs of producing and distributing political merchandise that includes express advocacy language as independent expenditures?*²⁴

The Commission was unable to reach a response by the required four affirmative votes on the question of whether the PAC would have to report the costs of producing and distributing political merchandise that includes express advocacy as independent expenditures.

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

The Commission was unable to reach a response by the required four affirmative votes on the question of whether the PAC would have to report its costs of soliciting earmarked contributions as independent expenditures.

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

²² AOR006. 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. *Id.* n.11. 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).

²³ AOR003.

²⁴ 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.

No, the Commission's analysis for Questions 1-4 would not change if the PAC were to separate the sale of political merchandise from the making of an earmarked contribution.²⁵

First, regarding Question 1, the payment processing fee that the requestor proposes to deduct from each earmarked contribution would still be a contribution to the PAC and not to the designated candidate for the reasons provided in response to Question 1, above.

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

Regarding Questions 3 and 4, the Commission was unable to reach a response by the required four affirmative votes.

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

The PAC's proposed activities would be subject to all applicable disclaimer requirements,²⁶ source prohibitions,²⁷ amount limitations,²⁸ and reporting requirements²⁹ of the Act and Commission regulations. In addition, the PAC must comply with all contribution forwarding requirements, including forwarding contributions within the required time periods, and collecting contribution information and forwarding it to the recipient candidate committees.³⁰

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.³¹ 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

²⁵ 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).

²⁶ 52 U.S.C. § 30120; *see also* 11 C.F.R. § 110.11.

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

²⁸ 52 U.S.C. § 30116; *see also* 11 C.F.R. § 110.1.

²⁹ 52 U.S.C. § 30104; *see also* 11 C.F.R. Part 104.

³⁰ 52 U.S.C. § 30116(a)(8); *see also* 11 C.F.R. § 110.6.

³¹ *See* 52 U.S.C. § 30108.

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.³² 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, appearing to read 'Dara Lindenbaum', written in a cursive style.

Dara Lindenbaum,
Chair

³²

See id. § 30108(c)(1)(B).