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March 25, 2024

TO: Clients

FROM: Trister, Ross, Schadler & Gold, PLLC

RE: New FEC Advisory Opinion Enables “Coordinated” Canvassing

This memo explains [Advisory Opinion 2024-01 \(Texas Majority PAC\)](#), which was issued by the Federal Election Commission (“FEC”) on March 21, 2024 and addresses the treatment of door-to-door canvassing activities under the Federal Election Campaign Act (“FECA”).¹ This new advisory opinion enables organizations and political committees to undertake certain canvassing activities that refer, even with express advocacy, to a federal candidate or a political party committee *in coordination* with the supported candidate or party without any limit and without treatment as an in-kind contribution. And, only a federal PAC would be required to report this spending to the FEC, and only as an operating expenditure on a regularly scheduled report.

What Led to the Advisory Opinion?

A state PAC, Texas Majority PAC (“TMP”), requested an advisory opinion from the FEC regarding its communications with voters about federal candidates via a door-to-door canvass that it described in detail;² its key features are spelled out below because they relate directly to how other organizations may take advantage of the opinion.

¹ Adv. Op. 2024-01 (Texas Majority PAC) (“AO 2024-01”), available here:

<https://www.fec.gov/files/legal/aos/2024-01/2024-01.pdf>.

² TMP’s advisory opinion request is available here: https://www.fec.gov/files/legal/aos/2024-01/202401R_1.pdf. Our firm prepared comments to the FEC on behalf of the AFL-CIO in support of the request; see https://www.fec.gov/files/legal/aos/2024-01/202401C_5.pdf.

What Did the FEC Decide?

The FEC decided that TMP’s prospective canvass would not qualify as “general public political advertising,” which means that if it were “coordinated” with a supported federal candidate or political party committee it wouldn’t be treated as an “in-kind contribution” to that candidate or party. Under FECA, most expenditures that are coordinated with a candidate or party are treated as in-kind contributions and, for that reason, they are subject to the law’s source restrictions, amount limitations and reporting requirements.³ A group’s paid communication is a “coordinated communication” if it’s a form of “general public political advertising” and certain conduct about it occurs between the group and a supported candidate or party.⁴ The FEC concluded that the proposed canvassing is *not* such advertising because it is “a traditional grassroots activity fundamentally different from the types of mass media” that FECA specifies, and it “involves individual people talking face-to-face with voters” who are selected by the organization using a “forum” – here, the doors of voters’ residences – that is not controlled by a third party.⁵

As a result, canvassing that resembles TMP’s isn’t subject to the FEC’s coordinated-contribution rules regardless of any interaction about it between the group undertaking it and a candidate or party. With this opinion, then, the FEC has determined that such canvassing – including dissemination of printed literature – will be treated similarly to Internet communications that are disseminated online without paying a fee to access someone else’s website or platform (*i.e.*, the so-called “free Internet exception”)⁶, and text messages that are sent to individuals who opt in to receive them from the sender.⁷

How Should a Canvass be Structured in Order to Benefit From the FEC’s Action?

An FEC advisory opinion guarantees legal safety both to the requester (here, TMP) and any other group that acts in a materially identical manner. This doesn’t necessarily mean that any variation of a canvass from what TMP proposed would cross a legal line, but it does create a legal “safe harbor” for canvasses that are operated essentially the same as TMP’s. Specifically, that means:

- The organization *either* recruits, employs, trains and directs the canvassers itself *or*

³ 52 U.S.C. § 30116(a)(7)(B).

⁴ The quoted phrase is what FECA more generally defines as a “public communication,” namely, numerous identified media outlets other than canvassing (such as broadcasts, newspapers and mass mailings), plus an undefined catch-all, “any other form of general public political advertising,” which the FEC may identify administratively. See 52 U.S.C. § 30101(22); 11 C.F.R. § 100.26.

⁵ See AO 2024-01 at 5-6. The FEC also concluded that TMP’s canvass is not covered by a separate regulation that treats “coordinated expenditures” as in-kind contributions because that regulation only applies to expenditures that are *not* for communications. See 11 C.F.R. § 109.20.

⁶ See 11 C.F.R. § 100.26 (“The term general public political advertising shall not include communications over the internet, except for communications placed for a fee on another person’s website, digital device, application, or advertising platform.”).

⁷ AO. 2022-20 (Maggie for NH) at 4-5, available here: <https://www.fec.gov/files/legal/aos/2022-20/2022-20.pdf>.

retains a vendor to do so;

- If a vendor is retained, the organization and *not* the vendor determines *who* – what “audience” – will be canvassed, but *either* the organization or the vendor may design and produce the canvassing literature and canvasser scripts;
- The canvass does not distribute a federal candidate campaign’s own materials (because this remains barred by other FEC regulations⁸); and
- The canvass does not entail any activities other than communicating with voters and recording their reactions – for example, the FEC concluded that any data collected, if provided to a candidate or party for less than fair market value, would be an in-kind contribution⁹; and, canvassers likely may not also offer voters rides to the polls.

How Will Such a Canvass Be Regulated If It’s *Coordinated* with a Candidate or Party?

Any canvass with the features above may be paid without limit by, or using the funds of, a *union*, *corporation* (nonprofit or for-profit), *other association*, *state PAC* (subject to state law) or *other nonfederal 527 political group*, and the canvass may be operated fully in coordination with a supported federal candidate or political party. *None* of these costs – including designing and producing literature and scripts; hiring, training, managing and compensating canvassers; and using data collected through the canvass – will be treated as in-kind contributions to the candidate or party. Likewise, *none* of these costs need be reported to the FEC. And, no “paid for by” self-identifying disclaimer will be required (unless a state PAC must include one due to state law).¹⁰

If a *federal PAC* conducts such a canvass – either a regular PAC or a “super” PAC – then all of the above will be true, with two exceptions. First, the PAC must report the costs to the FEC, but only as operating expenditures on the PAC’s regular periodic reports. Second, the canvass literature and possibly the scripts will require the usual federal “paid for by” disclaimers that apply to a coordinated communication, even though it will not be an in-kind contribution.

How Will Such a Canvass Be Regulated If It’s *Independent* of a Candidate or Party?

If such a canvass is operated independently of a federal candidate or political party, then it will continue to be treated like any uncoordinated communication to the public: if its message content *expressly advocates* the election or defeat of a clearly identified candidate, then it will be an *independent expenditure* subject to the usual rules about FEC reporting and self-identifying

⁸ See 11 C.F.R. § 109.23.

⁹ AO 2024-01 at 8.

¹⁰ However, there could be an adverse federal tax consequence for an Internal Revenue Code § 501(c) tax-exempt organization that directly undertakes these political communications: a 21% tax on the lesser of these expenditures or its net investment income during the year. See 26 U.S.C. § 527(f). In each case such an organization should determine whether it would be preferable to use a separate segregated political account for this activity in order to avoid that tax.

disclaimers. Or, if its messaging instead contains other candidate or party references, then it will *not* be an independent expenditure, but a 501(c) organization may be subject to federal taxation, and a federal PAC will be required to disclose it to the FEC as an operating expenditure on its regular periodic report.

What Are Other Practical and Legal Implications of the Advisory Opinion?

Here a few preliminary matters to consider as organizations determine whether and how to coordinate their canvasses with federal candidates and parties:

- *Effect on a group’s other, independent public communications:* Organizations commonly adopt “firewalls” to separate their independent-expenditure and other public-communications programs from their direct contacts with candidates and parties (either or both of which often also influence the organization’s membership communications). Because substantial categories of paid public contact, such as digital advertising, direct mail and phone-banking, remain subject to the coordinated-contribution rules, groups that undertake them must keep them independent while also pursuing a coordinated canvass – and they must particularly figure out how to do both if they also plan to layer communications through those other methods to their canvass universe.
- *Canvasses that also support state and local candidates:* AO 2024-21 only deals with *federal* campaign finance law; state campaign laws are unaffected by the opinion. Organizations that plan to canvass in support of both federal *and* state or local candidates should consider (a) whether state law (and potentially a local ordinance) requires independence from state and local candidates or parties, and (b) if so, how that independence is defined and whether they can still avoid “coordination” under the applicable state or local definition while coordinating with a federal candidate or party committee.

NOTE: This is a general explanation to clients of the Firm regarding a significant legal development. It is not and should not be construed as legal advice to a specific client or other reader. Please consult legal counsel about the application of the information here to particular circumstances.