



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C.

October 10, 2024

ADVISORY OPINION 2024-14

Jacquelyn K. Lopez, Esq.
Jonathan A. Peterson, Esq.
Emma R. Anspach, Esq.
Elias Law Group LLP
250 Massachusetts Ave., NW
Suite 400
Washington, DC 20001

Dear Counsel:

We are responding to the advisory opinion request you submitted on behalf of the Democratic Senatorial Campaign Committee (“DSCC”) and Rosen for Nevada, regarding the application of the Federal Election Campaign Act, 52 U.S.C. §§ 30101-45 (the “Act”), and Commission regulations to certain proposed hybrid television advertisements that DSCC and Rosen for Nevada would like to disseminate for the upcoming 2024 general election. Requestors ask whether they may evenly split the cost of hybrid television advertisements that clearly identify Senator Rosen and equally promote on a time/space basis her candidacy for the U.S. Senate and generic candidates of the Democratic Party and, for three proposed advertisements, whether certain audio and visual components of the advertisements serve as party or candidate advocacy.

The Commission concludes that DSCC and Rosen for Nevada may evenly split the cost of hybrid television advertisements so long as the time and space devoted to Senator Rosen does not exceed the time and space in the advertisement devoted to the generically referenced candidates. The Commission further concludes that, regarding advertisement (A), portions of the advertisement featuring Senator Rosen or narrated by Senator Rosen must be treated as candidate advocacy. The Commission did not approve a response to the questions regarding advertisements (B) and (C) by the required affirmative vote of at least four Commissioners.¹

¹ See 52 U.S.C §§ 30106(c), 30107(a)(7); see also 11 C.F.R. § 112.4(a).

Background

The facts presented in this advisory opinion are based on your letter received on September 18, 2024, attached exhibits, and publicly available information.

DSCC is a national party committee of the Democratic Party, dedicated to electing Democrats to the U.S. Senate.² Rosen for Nevada is the principal campaign committee of U.S. Senator Jacky Rosen, who currently represents Nevada and is a candidate for reelection in the 2024 general election.³

DSCC and Rosen for Nevada plan to split the costs of hybrid television advertisements disseminated in Nevada (between September 18, 2024, and November 5, 2024). They do not provide specific scripts for such advertisements but they describe them as advertisements that will clearly identify Senator Rosen and “equally promote” on a time/space basis “Senator Rosen’s candidacy for the U.S. Senate (either through advocacy for her or against her opponent) and generic candidates of the Democratic party (either through advocacy for generic Democratic candidates or against generic Republican candidates).”⁴ They plan to split the costs of such advertisements equally on the “assum[ption] that the basic framework laid out in Advisory Opinion 2006-11 [(Washington Democratic State Central Committee)] applies.”⁵

Requestors also have provided proposed audio and visual scripts for three specific advertisements. The proposed advertisements are reprinted in the tables below.

Table 1: Advertisement (A)⁶

Audio	Visual
Democrats passed Medicare 60 years ago and are still protecting it today.	Senior citizens in doctor’s office; pharmacy
Giving our seniors a safety net if they get sick and need care.	

² See Advisory Opinion Request (“AOR”) at AOR003; DSCC, Statement of Organization, FEC Form 1 (June 25, 2024), <https://docquery.fec.gov/pdf/369/202406259652490369/202406259652490369.pdf>.

³ See AOR003; Rosen for Nevada, Statement of Organization, FEC Form 1 (Sept. 5, 2024), <https://docquery.fec.gov/pdf/692/202409059675370692/202409059675370692.pdf>.

⁴ AOR004.

⁵ *Id.*

⁶ See AOR008.

<i>(spoken by Senator Rosen)</i>	
<p>Republicans like Sam Brown? They will prioritize big pharma and gut Medicare.</p> <p>Profits over care. No more safety net if you get sick.</p> <p><i>(spoken by Senator Rosen)</i></p>	<p>Senator Rosen to camera</p> <p>Images of big pharma execs, profit charts</p>
<p>I will always put our Seniors first and protect Medicare.</p> <p><i>(spoken by Senator Rosen)</i></p>	<p>Senator Rosen to camera</p>

Table 2: Advertisement (B)⁷

Audio	Visual
<p>Pharmaceutical costs are through the roof, making it hard to afford basic care.</p> <p><i>(spoken by generic non-candidate voiceover)</i></p>	<p>Doctor and patient in hospital setting</p>
<p>Greedy politicians don't care. They will prioritize big pharma's profits and won't fight to lower your costs.</p> <p><i>(spoken by generic non-candidate voiceover)</i></p>	<p>Pharmaceutical executives in suits; graphs of profit margins</p>
<p>Senator Rosen will always fight for you, voting to cap insulin prices and fighting against big pharma to protect your care.</p> <p><i>(spoken by generic non-candidate voiceover)</i></p>	<p>B-roll of Senator Rosen with seniors</p>

⁷ AOR009.

Table 3: Advertisement (C)⁸

Audio	Visual
<p>Republicans pushed for the overturn of Roe v. Wade.</p> <p>Now, women’s reproductive rights are under attack.</p> <p><i>(spoken by generic non-candidate voiceover)</i></p>	<p>Video of anti-abortion protests; newspaper headlines on abortion bans</p>
<p>Sam Brown? He’s just another vote for a nationwide abortion ban.</p> <p><i>(spoken by generic non-candidate voiceover)</i></p>	<p>Newspaper headlines on proposed national abortion ban; image of Sam Brown</p>
<p>Don’t let Sam Brown and Donald Trump take away your rights.</p> <p><i>(spoken by generic non-candidate voiceover)</i></p>	<p>Photos of Sam Brown and Donald Trump</p>

Questions Presented

1. *May Requestors evenly split the cost of hybrid television advertisements that clearly identify Senator Rosen and equally promote on a time/space basis Senator Rosen’s candidacy for the U.S. Senate (either through advocacy for her or against her opponent) and generic candidates of the Democratic party (either through advocacy for generic Democratic candidates or against generic Republican candidates)?*

2. *With respect to proposed Advertisement (A), do portions of the hybrid advertisement that feature the clearly identified candidate direct to camera and/or are narrated by the candidate need to be allocated as candidate advocacy?*

3. *With respect to Advertisement (B), is the phrase “greedy politicians” and the visual of pharmaceutical executives in suits sufficient to serve as the audio and visual references to generic candidates of the Republican Party, and thus, allocable as party advocacy?*

⁸ AOR010.

4. *With respect to Advertisement (C), can audio or visual references to Donald Trump qualify as a reference to generic candidates of the Republican Party, allocable as party advocacy?*

Legal Analysis

1. *May Requestors evenly split the cost of hybrid television advertisements that clearly identify Senator Rosen and equally promote on a time/space basis Senator Rosen’s candidacy for the U.S. Senate (either through advocacy for her or against her opponent) and generic candidates of the Democratic party (either through advocacy for generic Democratic candidates or against generic Republican candidates)?*

Yes, Requestors may evenly split the cost of a hybrid television advertisement that clearly identifies Senator Rosen and equally promotes on a time/space basis Senator Rosen’s candidacy for the U.S. Senate (either through advocacy for her or against her opponent) and generic candidates of the Democratic party (either through advocacy for generic Democratic candidates or against generic Republican candidates) provided that the time and space devoted to Senator Rosen will actually be equal to the time and space devoted to the generically referenced congressional candidates.⁹

Commission regulations do not definitively address the appropriate allocation of payments for the type of communication (hybrid television advertisements) proposed in this request. Commission regulations at 11 C.F.R. part 106 include both general allocation rules and rules for allocating specific types of expenses in particular circumstances. Section 106.1(a) provides the general rule that expenditures made on behalf of *more than one* clearly identified candidate “shall be attributed to each such candidate according to the benefit reasonably expected to be derived.”¹⁰ For a broadcast communication, the “attribution shall be determined by the proportion of space or time devoted to each candidate as compared to the total space or time devoted to all candidates.”¹¹ A candidate is clearly identified if his or her name or likeness appears or if his or her identity is apparent by unambiguous reference.¹² However, the expenditures for the advertisements at issue here are being made on behalf of only one clearly identified candidate, Senator Rosen, and the references to “Democrats” and “Republicans” do not clearly identify any other specific candidates.¹³ Thus, section 106.1 does not apply.

⁹ AOR004.

¹⁰ 11 C.F.R. § 106.1(a).

¹¹ *Id.*

¹² *See* 52 U.S.C. § 30101(18); 11 C.F.R. §§ 106.1(d), 100.17.

¹³ *See also* Advisory Opinion 2004-33 (Ripon Society) at 4 (determining, for purposes of electioneering communication regulation under 11 C.F.R. § 100.29(b)(2), that reference to “Republicans in

Commission regulations at 11 C.F.R. § 106.8 (which apply only to phone banks conducted by a party committee) do address the attribution required for a communication that possesses the same attributes as some of the broadcast advertisements described in the request (*i.e.*, reference to only one clearly identified federal candidate along with a generic reference to other party candidates; and no solicitation of funds).¹⁴ Under this regulation, a flat 50 percent of the costs of a phone bank communication must be attributed to the clearly identified candidate, and the other 50 percent must be attributed to the party committee, regardless of the amount of time devoted to each.¹⁵ However, the Commission’s Explanation and Justification (“E & J”) of this regulation specifically noted that the Commission had considered whether to include other forms of communications, such as broadcast media, within the regulation’s coverage but “decided to limit the scope of new section 106.8 to phone banks . . . because each type of communication presents different issues that need to be considered in further detail before establishing new rules.”¹⁶

Although neither section 106.1 nor section 106.8 definitively addresses the appropriate allocation of payments for the type of hybrid broadcast advertisements described in this request, the Commission previously addressed a similar issue in Advisory Opinion 2006-11 (Washington Democratic State Central Committee). There, the Commission considered hybrid mass mailings that expressly advocated for the election of only one clearly identified federal candidate, as well as the election of generically referenced candidates of the same party, but no other clearly identified candidates.¹⁷ The Commission concluded that the mailings largely served the purpose of influencing the election of the clearly identified federal candidate, no matter how much of the space in the mailing was devoted to that candidate.¹⁸ The Commission further concluded that “[a]dvocacy related to the election of the clearly identified candidate is the most salient feature of such a communication, as compared to the generic reference to the party’s candidates, which does not single out any particular candidate to the reader.”¹⁹ Accordingly, because the benefit reasonably expected to be derived favored the clearly identified candidate, the Commission concluded that no less than 50 percent of the costs

Congress” in advertisement did “not constitute an unambiguous reference to any specific Federal candidate”).

¹⁴ See 11 C.F.R. § 106.8(a).

¹⁵ See *id.* § 106.8(b).

¹⁶ Party Committee Telephone Banks, 68 Fed. Reg. 64517, 64518 (Nov. 14, 2003).

¹⁷ See Advisory Opinion 2006-11 (Washington Democratic State Central Committee) at 4.

¹⁸ *Id.*; see also 52 U.S.C. §§ 30101(8)(A)(i), (9)(A)(i); 11 C.F.R. § 100.52(a); 11 C.F.R. § 100.111(a).

¹⁹ Advisory Opinion 2006-11 (Washington Democratic State Central Committee) at 4.

of the mailings needed to be attributed to the candidate.²⁰ Additionally, where the space in the mailing devoted to the clearly identified candidate exceeded 50 percent, the Commission concluded that the costs attributed to the candidate should reflect the relative proportion of space devoted to the candidate.²¹ Consequently, the Commission concluded that the state party committee and the principal campaign committee of the clearly identified federal candidate could each pay 50 percent of the costs of the mailing “so long as the space devoted to the candidate in the mailing [did] not exceed the space in the mailing devoted to the generically referenced candidates.”²²

While Commission regulations and past advisory opinions do not directly address hybrid television advertisements, the Commission has long understood that no in-kind contribution results where two or more committees properly attribute the costs of a given communication. Section 106.1 is a specific recognition of this general rule, which flows from the Commission’s determination that in-kind contributions result from goods or services provided “without charge or at a charge that is less than the usual and normal charge for such goods or services.”²³ Where, by contrast, each party bears its own costs and appropriately allocates the expenses associated with a given communication, neither party receives “anything of value”²⁴ from the other and no in-kind contribution results.

The Commission recently applied this rule in the context of public communications. In Advisory Opinion 2024-07 (Team Graham), the Commission concluded that where a candidate committee pays its allocable share of the costs of a proposed joint fundraising committee’s public communications, those communications did not meet the payment prong of the coordinated communication test.²⁵ Similarly, in Advisory Opinion 2004-37 (Waters), the Commission considered whether a brochure expressly advocating the election of several clearly identified candidates would be a “coordinated communication.”²⁶ The Commission concluded that the brochure would not be a coordinated communication because it would not satisfy the payment part of the coordinated communication test where each of the candidates identified in the brochure reimbursed the full production and distribution costs attributed to that candidate.

²⁰ *Id.* at 2-3, 4.

²¹ *Id.* at 3, 4.

²² *Id.* at 2.

²³ 11 C.F.R. § 100.52(d)(1).

²⁴ 52 U.S.C. 30101(8)(A)(i).

²⁵ Advisory Opinion 2024-07 (Team Graham) at 7; 11 C.F.R. § 109.21(a)(1).

²⁶ Advisory Opinion 2004-37 (Waters) at 4; 11 C.F.R. § 109.21(a)(1).

Here, Requestors seek to evenly split the cost of broadcast advertisements that will “equally promote” on a time/space basis “Senator Rosen’s candidacy for the U.S. Senate (either through advocacy for her or against her opponent) and generic candidates of the Democratic party (either through advocacy for generic Democratic candidates or against generic Republican candidates).”²⁷ The Commission concludes that the framework utilized in Advisory Opinion 2006-11 (Washington Democratic State Central Committee) provides an appropriate way to allocate the costs as proposed, given Requestors’ assurance that the time/space balance in their proposed television advertisements will be equally divided between the clearly identified federal candidate (Senator Rosen) and the generically referenced candidates.

2. *With respect to proposed Advertisement (A), do portions of the hybrid advertisement that feature the clearly identified candidate direct to camera and/or are narrated by the candidate need to be allocated as candidacy advocacy?*

Yes, the portions of the advertisement that feature Senator Rosen, a clearly identified federal candidate, narrating or speaking directly to the camera, should be allocated as candidate advocacy.

As Requestors acknowledge in their request,²⁸ these portions meet the content prong of the Commission’s coordinated communications regulation.²⁹ Moreover, under the Commission’s analysis in Advisory Opinion 2006-11 (Washington Democratic State Central Committee), discussed in greater detail above, the “[a]dvocacy related to the election of the clearly identified candidate is the most salient feature” of that portion of the advertising.³⁰ In Respondents’ proposed Advertisement (A), the entire advertisement is either narrated by or directly features the clearly identified candidate, Senator Rosen.³¹

In the context of hybrid mass mailings, the Commission found that “[w]here the space in the mailing devoted to the clearly identified Federal candidate exceeds the space devoted to the generically referenced party candidates . . . it is appropriate to apply

²⁷ AOR004.

²⁸ AOR005 (“Both portions of the advertisement meet the content prong.”).

²⁹ 11 C.F.R. § 109.21(c)(4) (Content prong includes public communications “refer[ing] to a clearly identified House or Senate candidate and . . . publicly distributed or otherwise publicly disseminated in the clearly identified candidate's jurisdiction 90 days or fewer before the clearly identified candidate's general, special, or runoff election, or primary or preference election, or nominating convention or caucus.”).

³⁰ See Advisory Opinion 2006-11 (Washington Democratic State Central Committee) at 4.

³¹ In *Hispanic Leadership Fund, Inc. v. FEC*, 897 F.Supp.2d 407, 430 (E.D. Va. 2012), a federal court found that a recording of President Obama’s voice, without further identification, was not a “contextually unambiguous reference to President Obama.” Here, by contrast, Senator Rosen’s narration precedes her appearance on camera. Accordingly, the Commission determines that Senator Rosen is a clearly identified candidate throughout the advertisement.

analogous ‘space or time’ principles set out in 11 CFR § 106.1(a).”³² Similarly, the Commission finds this method appropriate to apply in the instant matter. Thus, those portions of the advertisement featuring Senator Rosen should be allocated as candidate advocacy. Moreover, because Rosen for Nevada will “pay the full cost of the public communications attributable to [Senator Rosen],” the proposed communication will “not meet the payment part of the coordinated communication test and, therefore, will not be [an] in-kind contribution[.]”³³

3. *With respect to proposed Advertisement (B), is the phrase “greedy politicians” and the visual of pharmaceutical executives in suits sufficient to serve as the audio and visual references to generic candidates of the Republican Party, and, thus, allocable as party advocacy?*

The Commission did not approve a response to this question by the required affirmative vote of at least four Commissioners.³⁴

4. *With respect to Advertisement (C), can audio or visual references to Donald Trump qualify as a reference to generic candidates of the Republican Party, allocable as party advocacy?*

The Commission did not approve a response to this question by the required affirmative vote of at least four Commissioners.³⁵

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.³⁶ 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.³⁷ 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,

³² Advisory Opinion 2006-11 (Washington Democratic State Central Committee) at 4.

³³ Advisory Opinion 2024-07 (Team Graham) at 7; 11 C.F.R. § 109.21(a)(1).

³⁴ See 52 U.S.C. §§ 30106(c), 30107(a)(7); see also 11 C.F.R. § 112.4(a).

³⁵ See 52 U.S.C. §§ 30106(c), 30107(a)(7); see also 11 C.F.R. § 112.4(a).

³⁶ See 52 U.S.C. § 30108.

³⁷ See *id.* § 30108(c)(1)(B).

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 style with a large, prominent "S" at the beginning.

Sean J. Cooksey,

Chairman