FEDERAL ELECTION COMMISSION
Washington, DC 20463

January 12, 2017

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

ADVISORY OPINION 2016-21

Michael T. Morley, Esq.
Dan Backer, Esq.
DB Capitol Strategies PLLC
203 South Union Street, Suite 300
Alexandria, VA 22314

Dear Messrs. Morley and Backer:

We are responding to your request on behalf of Great America PAC (the "Committee") regarding the application of the Federal Election Campaign Act, 52 U.S.C. §§ 30101-46 (the "Act"), and Commission regulations to the Committee's proposed employment of persons who have previously been employed by a candidate or political party, and whether certain communications made by those employees would constitute coordinated communications. The Commission concludes that the proposed communications would be coordinated communications if the employees in question used material information from their prior employment in their work for the Committee or conveyed such information to the Committee.

Background

The facts presented in this advisory opinion are based on your advisory opinion request ("AOR") dated September 26, 2016, your statements at the Commission's open meeting on December 8, 2016, and your supplemental email dated December 16, 2016.

The Committee is a non-connected hybrid political committee. AOR002. The Committee plans to hire individuals and vendors to contact potential voters through phone banks to expressly advocate the election of presidential candidate Donald Trump. *Id.* The Committee also plans to engage in materially similar activities expressly advocating the election of other candidates in future elections. These phone bank personnel will contact potential voters selected by the Committee or its vendors. *Id.* The phone bank personnel will make more than 500 calls of an identical or substantially similar nature within a 30-day period. *Id.* The Committee will provide training and information — such as scripts, talking points, and answers to frequently

asked questions — to phone bank personnel prior to them engaging in these communications. AOR002-03.

The Committee anticipates that many of the employees it will hire for this work will have performed similar work for Mr. Trump's campaign, state party committees, or the Republican National Committee within the previous 120 days. AOR003. In performing such work previously, the employees may have received training from their previous employers, including technical training in specific software and telephonic platforms, and training in communication elements such as tone and pacing, persuasion techniques, answers to common objections, and handling rude callers. Advisory Opinion Request Supplement (Dec. 16, 2016). The Committee believes "it is reasonably possible" that, because such employees have received training in how to advance the candidate's or the party's objectives, the employees might, despite the Committee's instructions to the contrary, either discuss with other Committee employees information relating to their previous employment that may be material to their work for the Committee, or decide on their own initiative to use such information in communicating with potential voters on behalf of the Committee. AOR003.

Questions Presented

1. Does 11 C.F.R. § 109.21(d)(5) apply to the Committee's front-line field employees engaged in voter outreach via phone-banking?

2. When the Committee hires someone who, within the previous 120 days, performed front-line, ground-level voter outreach efforts for a candidate or political party, does 11 C.F.R. § 109.21(d)(5) require some or all of the Committee's subsequent communications to be treated as coordinated expenditures if the Committee takes certain specified measures to avoid making coordinated communications?[1]

3. Is information concerning the geographic areas in which a former employee of a candidate or political party previously engaged in voter outreach efforts — either in person or by phone — "material" to the Committee's communications, if the former employee conveys information to one or more persons who have input in determining the geographic areas in which the Committee will conduct its own voter outreach efforts, and is the information "available from a publicly available source"?

---

[1] The Committee flags several scenarios for the Commission's consideration in its response to Question 2, including where the Committee: (1) has no interaction with any candidate, campaign, or political party concerning either its communications or the former employee; (2) strictly prohibits such former employees from using or conveying information they acquired in their previous positions, but a former employee nevertheless unilaterally decides to do so anyway; (3) does not wish or intend to make a coordinated expenditure, and takes reasonable precautions against doing so; (4) has no reason to believe the former employee was ordered or encouraged to quit his previous job by the candidate, campaign, or political party for which he used to work, for the purpose of taking a new position in order to coordinate communications or expenditures; (5) has no reason to believe the former employee is continuing to act as an agent, or otherwise at the direction of, the candidate, campaign, or political party for which he used to work; and (6) has no reason to believe the candidate, campaign, or political party for whom the former employee used to work is using the former employee as a conduit through which to pass information to his new employer. *See* AOR004.

4. Is information derived from the contents of scripts, talking points, or responses to potential voter questions a former employee of a candidate or political party previously used in voter outreach efforts, either in person or by phone, on behalf of that candidate or party:

a. "material" to a new employer's communications, if the former employee conveys such information to one or more persons who have input into developing the scripts that the new employer will require its employees to use in conducting voter outreach;

b. "material" to a new employer's communications, if the former employee unilaterally decides—in violation of the new employer's strict instructions—to quote excerpts from those scripts, talking points, or responses while speaking with voters on behalf of the new employer;

c. "use[d]" by the former employee, if the former employee unilaterally decides—in violation of the new employer's strict instructions—to quote excerpts from those scripts, talking points, or responses while speaking with voters on behalf of the new employer;

d. "material" to a new employer's communications, if the former employee unilaterally decides—in violation of the new employer's strict instructions—to convey such information to one or more of the new employer's other front-line personnel responsible for engaging in voter outreach efforts, who use such information while speaking with voters;

e. "available from a publicly available source," on the grounds the contents of the scripts were effectively made public when they were used in the course of the previous employer's voter outreach efforts.

5. If a former employee of a candidate or political party violates 11 C.F.R. § 109.21(d)(5) through his or her work for the Committee, may the Committee continue to treat its expenditures as independent if it terminates the employee immediately upon learning of the violation?

Legal Analysis and Conclusion

1. Does 11 C.F.R. § 109.21(d)(5) apply to the Committee's front-line field employees engaged in voter outreach via phone-banking?

Yes, the conduct standard at 11 C.F.R. § 109.21(d)(5) applies to all employees, including "front-line field employees."

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. 52 U.S.C. § 30116(a)(7)(B). More specifically, Commission regulations provide that a payment for a communication "coordinated with a candidate, an authorized committee, a political party committee, or an agent of any of the foregoing" is an in-kind contribution to the candidate or political party committee. 11 C.F.R. § 109.21(a), (b)(1). A coordinated communication is not prohibited if the person making the payment is not prohibited from making contributions, but the payment must be reported as a contribution to the candidate or political party committee. 11 C.F.R. § 109.21(b)(1). A hybrid committee may not make contributions to candidates or

political party committees, including in-kind contributions such as coordinated communications, from its non-contribution account. Press Release, FEC Statement on *Carey v. FEC*: Reporting Guidance for Political Committees that Maintain a Non-Contribution Account (Oct. 5, 2011), http://www.fec.gov/press/press2011/20111006postcarey.shtml.

To determine whether a communication constitutes a "coordinated communication," Commission regulations apply a three-prong test. 11 C.F.R. § 109.21(a). First, the communication must be paid for, in whole or in part, by a person other than the candidate committee or political party committee (the "payment prong"). 11 C.F.R. § 109.21(a)(1). Second, the communication must satisfy one of five content standards (the "content prong"), most of which apply only to a "public communication" as defined in 11 C.F.R. § 100.26. 11 C.F.R. § 109.21(a)(2), (c). Finally, the communication must satisfy one of five conduct standards (the "conduct prong"). 11 C.F.R. § 109.21(a)(3), (d)(1)-(5).

In this instance, the payment prong is satisfied because the Committee states that it plans to pay individuals and vendors to contact potential voters in support of a specified candidate. As to the content prong, the Committee states that its phone banks will expressly advocate the election of Mr. Trump, which implicates the third content standard, "[a] public communication, as defined in 11 C.F.R. 100.26, that expressly advocates, as defined in 11 C.F.R. 100.22, the election or defeat of a clearly identified candidate for [f]ederal office."[2] 11 C.F.R. § 109.21(c)(3). A "public communication" is "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." 11 C.F.R. § 100.26. A "telephone bank" is "more than 500 telephone calls of an identical or substantially similar nature within any 30-day period." 11 C.F.R. § 100.28. Thus, because the requestor's phone bank would meet the definition of a "public communication" and would expressly advocate the election of Mr. Trump, that phone bank would satisfy the content prong of the coordinated communication standard.[3]

The conduct standard at 11 C.F.R. § 109.21(d)(5) provides that a communication satisfies the conduct prong if an employee of the person paying for the communication (a) was employed by the candidate identified in the communication or that candidate's opponent, or a political party committee, within the previous 120 days, and (b) that employee uses or conveys to the payor information about the candidate's or party's plans, projects, activities, or needs, or information used by the employee in providing services to the candidate or party, and the information is material to the creation, production, or distribution of the communication. 11 C.F.R. 109.21(d)(5). This prong of the conduct standard is not satisfied if the information in question "was obtained from a publicly available source." 11 C.F.R. § 109.21(d)(5)(ii).

---

[2] The Committee also plans to engage in substantially similar activity in support of other candidates in future elections, and thus the content standard will continue to be met even if Mr. Trump is not a candidate.

[3] The Committee also represents in its request that it would conduct door-to-door canvassing, which the Committee asserts would constitute "public communications." AOR001. The Commission could not agree whether door-to-door canvassing would constitute a "public communication" under 11 C.F.R. § 100.26 and therefore whether such activity could constitute a coordinated communication under 11 C.F.R. § 109.21. In any event, if the requestor were correct that its door-to-door canvassing would be a public communication, the Commission's analysis below with respect to the requestor's planned phone banks would apply to such canvassing as well.

The former employee conduct standard turns entirely on the former employment of the employee and the materiality of the information that the employee uses or conveys. The regulation does not make any distinction between categories or ranks of employees. Indeed, when the Commission promulgated this regulation, several commenters suggested that the Commission "limit the application of this presumption of coordination to a specified class of employees who are likely to 'possess material political information,'" and the Commission declined to impose that limit. Coordinated and Independent Expenditures, 68 Fed. Reg. 421, 437 (Jan. 3, 2003). Thus, while a "front-line field employee" might be relatively unlikely to possess or use information that is "material" within the meaning of the regulation, the regulation nonetheless applies to any employee who does so, including employees engaged in the requestor's planned phone banking.

2. When the Committee hires someone who, within the previous 120 days, performed front-line, ground-level voter outreach efforts for a candidate or political party, does 11 C.F.R. § 109.21(d)(5) require some or all of the Committee's subsequent communications to be treated as coordinated expenditures if the Committee takes certain specified measures to avoid making coordinated communications?

The former employee conduct standard is satisfied where the employee uses or conveys to the Committee information about the candidate's or party's plans, projects, activities, or needs, or information used by the employee in providing services to the candidate or party, and the information is material to the creation, production, or distribution of the communication. 11 C.F.R. § 109.21(d)(5).

The Committee asserts that this standard is not met if an employee who is a former employee of the candidate or party, acting against the Committee's "strict[] prohibit[ion]," uses or conveys information acquired in the former employment despite the Committee (a) having no intention of coordinating with the former employer, (b) having no knowledge of the employee's intention to coordinate or act on behalf of or "as a conduit" for the former employer, and (c) taking "reasonable precautions" against making coordinated expenditures. But because no aspect of the former employee conduct standard implicates the state of mind of the person paying for the communication, or of the employee, or of the former employer, none of the knowledge- or intent-based conditions suggested by the Committee is relevant to the application of the standard. In fact, when the Commission promulgated the coordinated communications regulation, it expressly declined to "require a subjective determination as to the intent of the spender" and instead took the "approach of establishing clear guidance through objective determinations where possible." Coordinated and Independent Expenditures, 68 Fed. Reg. 421, 440 (Jan. 3, 2003). The Commission also stated that the former employee conduct standard "does not require that the former employee act under the continuing direction or control of, at the behest of, or on behalf of, his or her former employer," *id.* at 439, and that it "encompasses both situations in which the former employee assumes the role of a conduit of information and situations in which the former employee makes use of the information but does not share it with the person who is paying for the communication." *Id.* at 438.

Another condition that the Committee posits as negating former employee coordination is the absence of "interaction" between the Committee and the former employer. But pursuant to

Congress's express instruction that the Commission's coordinated communications regulation "shall not require agreement or formal collaboration to establish coordination," Bipartisan Campaign Reform Act, Pub. L. No. 107-155, § 214(c) (2002); 52 U.S.C. § 30116(7)(B)(ii) note, the regulation provides that "[a]greement or formal collaboration between the person paying for the communication and the [candidate or political party committee] is not required for a communication to be a coordinated communication." 11 C.F.R. § 109.21(e); 68 Fed. Reg. at 440. This principle is particularly manifested by the former employee conduct standard, which, unlike several of the other conduct standards, does not require *any* communication between the payor and the candidate or party committee. *Compare* 11 C.F.R. § 109.21(d)(5), *with* 11 C.F.R. § 109.21(d)(1)-(3). The former employee conduct standard (like the similar common vendor conduct standard in 11 C.F.R. § 109.21(d)(4)) applies even where there is no interaction between the payor and the candidate or political party, thereby preventing circumvention of the coordination regulation through employees.

Finally, the Committee argues that the Commission should not construe the former employee conduct standard to allow a communication to be deemed coordinated if the Committee expressly instructs its employees not to use or convey information obtained from a previous position, and an employee nonetheless does so "based solely on the unilateral decisions of that . . . employee." AOR012. Although the former employee conduct standard applies to the use of information without regard to whether the payor directs employees to use that information, the Committee's concern is largely addressed by the regulation's requirement that the used information be "material to the creation, production, or distribution of the communication." 11 C.F.R. § 109.21(d)(5)(ii)(A)-(B). The Commission has explained that "[f]or the purposes of 11 CFR part 109, 'material' has its ordinary legal meaning, which is 'important; more or less necessary; having influence or effect; going to the merits.' . . . The term 'material' is included to safeguard against the inclusion of incidental participation that is not important to, or does not influence, decisions regarding a communication." 68 Fed. Reg. at 434 (citing BLACK'S LAW DICTIONARY at 976 (6th ed. 1990)). The provision's reference to information that is "material to the creation, production, or distribution of the communication" therefore covers circumstances where the information is material to decisions such as those regarding the content, means or mode, specific media outlet, timing or frequency, or size, prominence or duration of the communication. *Cf.* 11 C.F.R. § 109.21(d)(2) (applying same materiality requirement as section 109.21(d)(5)).

The Committee states that phone bank employees will be given scripts or lists of talking points and will contact potential voters "selected by [the Committee] or its vendors." AOR002-03. Though the request does not state who will decide the timing of the phone banks, the Commission assumes that the Committee or its vendors, not the employees making the calls, will also make that decision. The content, means, timing, and target audience of the phone bank will also all be determined by the Committee. If a phone bank employee disobeys the Committee and "uses" information acquired through a previous position with a candidate campaign or political party committee (including technical training in phone or software systems, or communication techniques) merely in the course of his or her conversation with a potential voter, that information is highly unlikely to be material to the phone bank's creation, production, or distribution, and therefore equally unlikely to satisfy the former employee conduct standard.

3. Is information concerning the geographic areas in which a former employee of a candidate or political party previously engaged in voter outreach efforts — either in person or by phone — "material" to the Committee's communications, if the former employee conveys information to one or more persons who have input in determining the geographic areas in which the Committee will conduct its own voter outreach efforts, and is the information "available from a publicly available source"?

As discussed above, the former employee conduct standard is not satisfied unless the information is "material to the creation, production, or distribution of the communication." Thus, if the employee conveys the described information to a person with input into decisions about the geographic area of the Committee's voter outreach, *and* that information is in fact material to decisions about the geographic area in which the Committee will distribute its communication, the former employee conduct standard would be satisfied. If the information is not material to such decisions, the standard would not be satisfied.

Under the circumstances described in the request, information about the geographic areas of the Trump campaign's voter outreach efforts would not be "obtained from a publicly available source" within the meaning of 11 C.F.R. § 109.21(d). In promulgating the "publicly available source" safe harbor, the Commission stated that "a communication created with information found, for instance, on a candidate's or political party's Web site, or learned from a public campaign speech, is not a coordinated communication if that information is subsequently used in connection with a communication," and that "sources of public information for the purposes of the safe harbor include, but are not limited to: Newspaper or magazine articles; candidate speeches or interviews; materials on a candidate's Web site or other publicly available Web site; transcripts from television shows; and press releases." Coordinated Communications, 71 Fed. Reg. 33190, 33205 (June 8, 2006). The Commission also stated that "information obtained from a television station's public inspection file" could be considered a publicly available source. *Id.* While these examples are not exhaustive, the common element among these "publicly available sources" is that they can all be viewed or accessed in their entirety by the general public, not only by certain people to whom they are targeted. Unless the general public has a way of obtaining or viewing "the geographic areas in which a former employee of a candidate or political party previously engaged in voter outreach efforts," any information that the employee conveys to the Committee about such geographic targeting would not be "obtained from a publicly available source."

4. Is information derived from the contents of scripts, talking points, or responses to potential voter questions a former employee of a candidate or political party previously used in voter outreach efforts, either in person or by phone, on behalf of that candidate or party:

a. "material" to the Committee's communications, if the former employee conveys such information to one or more persons who have input into developing the scripts that the Committee will require its employees to use in conducting voter outreach;

b. "material" the Committee's communications, if the former employee unilaterally decides—in violation of the Committee's strict instructions—to quote excerpts from those scripts, talking points, or responses while speaking with voters on behalf of the Committee;

c. "use[d]" by the former employee, if the former employee unilaterally decides—in violation of the Committee's strict instructions—to quote excerpts from those scripts, talking points, or responses while speaking with voters on behalf of the Committee;

d. "material" to the Committee's communications, if the former employee unilaterally decides—in violation of the Committee's strict instructions—to convey such information to one or more of the Committee's other front-line personnel responsible for engaging in voter outreach efforts, who use such information while speaking with voters;

e. "available from a publicly available source," on the grounds the contents of the scripts were effectively made public when they were used in the course of the previous employer's voter outreach efforts.

As explained above, the application of section 109.21(d)(5) to these scenarios would depend upon the materiality of the information to the Committee's communication, and such information would not be from a publicly available source. *See supra* Question 2 (addressing employee's use of information against Committee's direction), Question 3 (addressing publicly available sources and employee's conveying information to Committee).

5. If a former employee of a candidate or political party violates 11 C.F.R. § 109.21(d)(5) through his or her work for the Committee, may the Committee continue to treat its expenditures as independent if it terminates the employee immediately upon learning of the violation?

No, terminating an employee whose conduct satisfied the conduct prong of section 109.21(d)(5) would not render the subsequent communications independent. As noted above, the phone bank would be considered a coordinated communication under that provision if the information that the employee used or conveyed was material to the phone bank's creation, production, or distribution. In other words, the employee would have "violated"[4] section 109.21(d)(5) if he or she used or conveyed material information that the Committee took into account in making decisions relating to the phone bank's creation, production, and distribution. Terminating the employee would not change the use or conveyance of the information or its materiality to the Committee's decisions relating to the phone bank. The Commission reiterates, however, that a single phone bank employee's use of information without the Committee's knowledge seems unlikely to be material to the creation, production, or distribution of the communication, and if that information is not material, the phone bank would not constitute a coordinated communication.

[4] Coordinated communications are not themselves prohibited; they are merely a type of contribution to a candidate. Therefore, it is not possible to "violate" 11 C.F.R. § 109.21. If an entity that pays for a coordinated communication is prohibited from making contributions to candidates, as is a corporation or a foreign national, then such entity is prohibited from making contributions in the form of coordinated communications. The Committee is not prohibited from making contributions to candidates (subject to applicable contribution limits) from its contribution account but is prohibited from making such contributions from its non-contribution account. The Commission therefore understands the Committee to be asking whether the proposed phone bank, if found to constitute a coordinated communication, would continue to constitute a coordinated communication after the employee's termination, such that the Committee would continue to be prohibited from financing the communication from its non-contribution account.

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. *See* 52 U.S.C. § 30108. 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. *See* 52 U.S.C. § 30108(c)(1)(B). 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,

Steven T. Walther
Chairman