FEDERAL ELECTION COMMISSION
Washington, DC 20463

MEMORANDUM

TO: **Commissioners**
Staff Director

FROM: **Commission Secretary's Office** VJA

DATE: **January 26, 2024**

SUBJECT: **Statement Regarding Advisory Opinion 2024-05 (Nevadans for Reproductive Freedom) – Commissioner Shana M. Broussard**

Attached is a statement from Commissioner Shana M. Broussard. This matter was on the May 1, 2024 Open Meeting Agenda.

Attachment

FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

STATEMENT OF COMMISSIONER SHANA M. BROUSSARD REGARDING ADVISORY OPINION 2024-05 (NEVADANS FOR REPRODUCTIVE FREEDOM)

"Advisory opinions are official Commission responses to questions about how federal campaign finance law applies to specific, factual situations."[1] The Federal Election Campaign Act (the "Act") and Commission regulations, which authorize the Commission to issue advisory opinions, state that "any person involved in any specific transaction or activity which is indistinguishable in all its material aspects from the transaction or activity to which [an] advisory opinion is rendered" may rely on such advisory opinion."[2] In order to give weight to that statement, a person must be able to identify which specific transaction or activity is the subject of an advisory opinion and what facts or "aspects" were material to the legal analysis. Indeed, rather than simply giving a conclusory answer in response to an advisory opinion request, the Commission issues formal advisory opinions that contain a recitation of the relevant facts from the requestor's submission, as well as an application of the relevant law to those facts.

Recently, the Commission issued an advisory opinion in response to a request from Nevadans for Reproductive Freedom ("NFRF"), a 501(c)(4) organization. In the broadest sense, the question before the Commission was under what circumstances, if ever, can a federal candidate or officeholder solicit funds that are not subject to the Act's amount limitations, source prohibitions, and reporting requirements. As with many legal questions that come before the Commission, there are different ways to answer that question; in this case, the answer depends in part on what type of organization the federal candidate or officeholder is soliciting on behalf of, what kind of activity the organization engages in generally, and what the organization plans to do with the funds.

I. The Law

The Act prohibits federal candidates and officeholders from soliciting funds in connection with an election for federal office unless the funds are subject to the limitations, prohibitions, and reporting requirements of the Act ("nonfederal funds").[3] The Act specifies that "in connection with an election for federal office" includes funds for "federal election activity."[4] Although the Act lists

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[1] *The advisory opinion process*, FEDERAL ELECTION COMMISSION, https://www.fec.gov/legal-resources/advisory-opinions-process/ (last visited June 3, 2024).

[2] 52 U.S.C. § 30108(a)(1), (c)(1); 11 C.F.R. § 112.5(a); *see, e.g.*, Advisory Opinion 2024-05 (Nevadans for Reproductive Freedom) at 5.

[3] 52 U.S.C. § 30125(e)(1); *see also* 11 C.F.R. § 300.61.

[4] 52 U.S.C. § 30125(e)(1)(A).

four types of federal election activity,[5] only two are relevant to this discussion.[6] "Type 1 FEA" is described as voter registration activity during the period that begins on the date that is 120 days before the date a regularly scheduled federal election is held and ends on the date of the federal election.[7] "Type 2 FEA" is described as any of the following activities conducted in connection with an election in which one or more federal candidates appear on the ballot regardless of whether one or more state candidates also appears on the ballot: (i) voter identification; (ii) get-out-the-vote activity; or (iii) generic campaign activity.[8] With respect to Type 2 FEA, Commission regulations define "in connection with an election in which a candidate for Federal office appears on the ballot" to include activity occurring within "the period of time beginning on the date of the earliest filing deadline for access to the primary election ballot for Federal candidates as determined by State law, or in those States that do not conduct primaries, on January 1 of each even-numbered year and ending on the date of the general election, up to and including the date of any general runoff."[9]

In general, therefore, the Act prohibits a federal candidate or officeholder from soliciting nonfederal funds in connection with any election for federal office, including for certain activity, such as voter registration activity, voter identification activity, and get-out-the-vote activity, that is conducted within specified time frames relative to a federal election. A federal candidate or officeholder may, however, solicit nonfederal funds on behalf of a 501(c) organization[10] in two circumstances. First, if the 501(c) organization does *not* have the principal purpose of conducting Type 1 and 2 FEA and the solicitation does *not* specify how the funds will or should be spent, the federal candidate or officeholder may solicit funds without limit and from any source.[11] Second, even if the 501(c) organization *does* have the principal purpose of conducting Type 1 and 2 FEA, a federal candidate or officeholder may nonetheless solicit funds for the organization if: (i) the solicitation is made only to individuals; and (ii) the amount solicited from any individual during a calendar year does not exceed $20,000.[12] Thus, whether an organization is a 501(c) organization and, if so, whether its principal purpose is conducting Type 1 and 2 FEA are facts material to determining whether a federal candidate or officeholder may solicit nonfederal funds for such organization.

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5 52 U.S.C. § 30101(20)(A).

6 The other two types of federal election activity are: a public communication that refers to a clearly identified candidate for federal office and services provided by an employee of a State, district, or local committee of a political party under certain circumstances. 52 U.S.C. § 30101(20)(A)(iii) and (iv).

7 52 U.S.C. § 30101(20)(A)(i); *see also* 11 C.F.R. §§ 100.24(b)(1), 300.65(c)(1).

8 52 U.S.C. § 30101(20)(A)(ii); *see also* 11 C.F.R. §§ 100.24(b)(2), 300.65(c)(2).

9 11 C.F.R. § 100.24(a)(1)(i).

10 "[A]ny organization that is described in section 501(c) of the Internal Revenue Code of 1986 and exempt from taxation under section 501(a) of such Code (or has submitted an application for determination of tax exempt status under such section)." 52 U.S.C. § 30125(e)(4); *see also* 11 C.F.R. § 300.52.

11 52 U.S.C. § 30125(e)(4)(A); *see also* 11 C.F.R. § 300.65(a).

12 52 U.S.C. § 30125(e)(4)(B); *see also* 11 C.F.R. § 300.65(b). Under this provision, a federal candidate or officeholder may explicitly solicit funds to be used for carrying out Type 1 and 2 FEA. 52 U.S.C. § 30125(e)(4)(B); *see also* 11 C.F.R. § 300.65(b).

II. The Request and the Draft

In this case, the requestor NFRF was an organization with a stated mission "to enshrine reproductive freedom in the Nevada state constitution."[13] In furtherance of that goal, NFRF filed a constitutional initiative petition (the "Initiative").[14] At the time of its request, NFRF was in the process of collecting the signatures necessary to place the Initiative on the 2024 general election ballot.[15]

According to its initial request, NFRF "maintain[ed] two entities – a Nevada registered 'Committee for Political Action (PAC) Advocating Passage' ('***NFRF PAC***') and a 501(c)(4) organization also called Nevadans for Reproductive Freedom ('***NFRF [(c)(4)]***')."[16] The request stated that "NFRF plans to raise funds to support the Initiative into both NFRF PAC and NFRF [(c)(4)] from sources and amounts that are prohibited under federal law."[17] As part of its fundraising, NFRF planned to ask federal candidates and officeholders to solicit funds to be used "in connection with the Initiative, both before and after it has qualified for the ballot" and for its overall mission but did not plan to ask them to solicit funds to be used or earmarked for any specific purpose, "including federal election activity."[18] The question presented by the request was whether the Act and Commission regulations would prohibit a federal candidate or officeholder from soliciting nonfederal funds "for NFRF PAC and NFRF [(c)(4)]."[19]

Based upon the Commission's understanding of the information presented in the original request and supplements, on April 24, 2024 the Commission made public a draft response stating that "NFRF plans to raise funds to support the Initiative into both NFRF PAC and NFRF (c)(4) from sources and amounts that are prohibited under federal law."[20] The draft went on to treat NFRF (c)(4) and NFRF PAC as separate organizations – one a 501(c)(4) organization and one not – for the purpose of analyzing the proposed solicitations on behalf of each entity. Because NFRF (c)(4) was a 501(c) organization, the draft applied the 501(c) exemption at 52 U.S.C. § 30125(e)(4). As noted above, this provision requires the Commission to identify whether the organization on behalf of which the federal candidate or officeholder plans to solicit funds has a principal purpose of engaging in Type 1 and 2 FEA. Although the request did not directly address this question, because the request stated that NFRF(c)(4)'s principal purpose was "to advocate for the Initiative," the draft

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13 Advisory Opinion Request at AOR001-02.

14 *Id*.

15 AOR002.

16 AOR001.

17 AOR002.

18 *Id*.

19 AOR003.

20 Draft AO 2024-05, Agenda Document No. 24-17-A at 2. The only substantive difference between this draft and the advisory opinion approved by the Commission is the addition of a reference to the April 30, 2024 Supplement on page 1. Advisory Opinion 2024-05 (Nevadans for Reproductive Freedom).

assumed that it did *not* have the principal purpose of engaging in Type 1 and 2 FEA and, thus, that the prohibition on solicitations for nonfederal funds did not apply.[21]

The draft, however, took a different approach with NFRF PAC because the Office of General Counsel and the Commission understood the request to state that NFRF PAC was not a 501(c) organization. Rather than looking to NFRF PAC's principal purpose to determine whether the proposed solicitations were permissible, the draft applied only the general prohibition at 52 U.S.C. § 30125(e)(1). The draft concluded that because NFRF PAC's efforts were focused on a state ballot initiative (which are not elections under the Act),[22] the proposed solicitations were "not in connection with any election, for federal office or otherwise," and were therefore not restricted by section 30125(e)(1)(A) or (B).[23] The draft did not discuss the activities that NFRF PAC planned to undertake or evaluate whether NFRF PAC's activities would fall within the regulatory definition of Type 1 or 2 FEA.

III. The Supplement

In response to questions from the Commission after the draft was made public, the requestor provided additional information about its organizational structure and its plans.[24] Specifically, the requestor clarified that rather than two separate organizations, NFRF was a single 501(c)(4) organization; "NFRF PAC" was in fact an account of the 501(c)(4) organization registered under Nevada campaign finance law.[25] The requestor also asserted for the first time that its principal purpose was not to conduct election activities including voter registration activity, voter identification, get-out-the-vote activity, or generic campaign activity.[26]

These factual assertions were critical to the legal analysis and conclusion. Having now clarified that NFRF PAC was the same organization as NFRF (c)(4) for federal tax purposes, the Commission's treatment of the two entities as separate organizations was misleading, as was the application of different legal standards to solicitations to the two entities. In fact, the requestor planned only to solicit nonfederal funds to accounts of the same 501(c)(4) organization, which are exempt from the prohibition on solicitations for nonfederal funds under 52 U.S.C. § 30125(e)(4). Thus, the only question before the Commission was whether the proposed solicitations would fall under paragraph (e)(4)(A) (if NFRF did *not* have the principal purpose of conducting Type 1 and 2 FEA) or under (e)(4)(B) (if NFRF *did* have the principal purpose of conducting Type 1 and 2 FEA.)

Because the request stated that NFRF's principal purpose was to "advocate for the Initiative," Commission's draft assumed that NFRF (c)(4) did not have the principal purpose of

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21 Draft AO 2024-05 at 3-4; *see also* Advisory Opinion 2024-05 at 3.

22 *See* Factual & Legal Analysis at 5-6, MUR 7523 (Stop I-186 to Protect Mining and Jobs, *et al*.) (Oct. 4, 2021); Factual & Legal Analysis at 6-8, MUR 7512 (Pembina Pipeline Corporation, *et al*.) (Oct. 5, 2021).

23 Draft AO 2024-05 at 4-7; *see also* Advisory Opinion 2024-05 at 3-5.

24 Supplemental Material from Nevadans for Reproductive Freedom, April 30, 2024 ("April 30 Supplement").

25 *Id*. The requestor stated that the NFRF PAC and NFRF (c)(4) shared a federal tax identification number. *Id*.

26 *Id*.

engaging in Type 1 and 2 FEA. But without more information, "advocacy" could certainly include voter registration, voter identification, and get-out-the-vote activities within the relevant definitions to qualify as Type 1 and 2 FEA.[27] The requestor's assertion in the April 30 Supplement that NFRF's principal purpose was not to conduct activities described as Type 1 or 2 FEA[28] therefore was information material to the Commission's analysis.

IV. The Scope of the Commission's Response

Public commenters and the requestor raised important questions about the scope of the prohibition on nonfederal funds at 52 U.S.C. § 30125(e)(1)(A) and (B). These questions included: (i) whether 52 U.S.C. § 30125(e)(1)(A) prohibits a federal candidate or officeholder from soliciting nonfederal funds on behalf of an organization that may end up using the funds for federal election activity, but which are not earmarked for such purposes; and (ii) whether activities such as voter registration and get-out-the-vote activity that otherwise fall within the statutory and regulatory definitions of federal election activity can nonetheless *never* be federal election activity if they are geared toward a ballot measure, even if the ballot measure appears on the ballot alongside a federal candidate.[29]

To be sure these are important questions, but they were not implicated by the facts in this request. The requestor stated in its supplemental information and in the discussion at the Open Meeting that NFRF was not planning to use any funds solicited by federal candidates or officeholders for any activity that would qualify as federal election activity under the statutory definition, including voter registration, voter identification, or get-out-the-vote activities.[30] Whether

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[27] Neither the statute nor the regulations require that voter registration activity, voter identification activity, or get-out-the-vote activity be aimed at influencing a particular race or issue that appears on the ballot. Indeed, as discussed above, the regulations define "in connection with an election in which a candidate for Federal office is on the ballot" temporally. The definitions for "voter registration activity," "voter identification," and "get-out-the-vote activity" do not require that these activities target a specific race or issue or even mention any race or issue, merely that they occur within the relevant time frame before an election on which a federal candidate appears on the ballot. 11 C.F.R. § 100.24(a). Moreover, in promulgating the regulations at 100.24(a), the Commission explicitly rejected a proposal to create a "'non-partisan exception' for non-profit organizations that engage in non-partisan voter-drive activities such as GOTV and voter registration." Prohibited and Excessive Contributions: Non-Federal Funds or Soft Money, 67 Fed. Reg. 49,064, 49,067 (July 29, 2002). Nevertheless, as NFRF asserted that it does not intend to use funds solicited as described in its request for any activity that falls within these definitions, the question of whether "voter registration activity," "voter identification," or "get-out-the-vote activity" for a ballot initiative that appears on the ballot with a federal candidate constitute "federal election activity" was not properly before the Commission.

[28] "In response to question 5, NFRF [(c)(4)] confirms that its principal purpose is *not* to conduct election activities, including: voter registration activity (described in 11 C.F.R. 100.24(a)(2)) conducted during the period beginning on July 8, 2024 and running through November 5, 2024; or voter identification (as described in 11 C.F.R. 100.24(a)(3)), get-out-the-vote activity (as described in 11 C.F.R. 100.25), or generic campaign activity (described in 11 C.F.R. 100.25) between [now] and November 5, 2024." April 30 Supplement.

[29] As discussed above, whether certain activity constitutes voter identification, get-out-the-vote activity, and generic campaign activity "in connection with an election in which a candidate for Federal office appears on the ballot" is a question of temporal proximity to an election in which a federal candidate appears on the ballot. 11 C.F.R. § 100.24(a)(1).

[30] If there is a change in any of the facts or assumptions presented that are material to a conclusion presented in a given advisory opinion, then the requestor may not rely on that conclusion as support for its proposed activity. *See, e.g.* Advisory Opinion 2024-05 (Nevadans for Reproductive Freedom) at 5.

a federal candidate or officeholder may solicit nonfederal funds on behalf of an entity that is not a 501(c) organization and that may use the funds in the future for activity that falls within the definition of federal election activity at 52 U.S.C. § 30101(20)(A)(i) and (ii) but is geared toward a ballot initiative was a hypothetical question in the context of the NFRF request and, therefore, was not an appropriate subject for an advisory opinion.[31] Accordingly, the advisory opinion issued by the Commission should not be read as addressing this question.

As an agency tasked with providing transparency and fairly administering federal campaign finance laws, the Commission should not force members of the public to dig through the record to find an accurate statement of the material facts in an advisory opinion. Because the additional information provided by the requestor was material to the Commission's consideration of the request, I asked for the Commission to hold over the matter to give the Office of General Counsel time to incorporate the correct facts into the request and revise the legal analysis to match the facts. My colleagues decided to proceed with voting to approve a draft that includes a misstatement of facts and an incorrect legal analysis premised on such misstatement of facts. (Notably, the final advisory opinion approved by the Commission states that the "facts presented in this advisory opinion are based on your letters received on February 27, 2024 and March 15, 2024, and your supplemental emails received on April 4, 2024 and April 30, 2024." None of the facts contained in the April 30 email are included in the advisory opinion). Accordingly, while I agreed with the conclusion that the requestor's proposed activity is permissible, I was unable to vote to approve the draft.

June 26, 2024
Date

Shana M. Broussard
Commissioner

[31] "Requests presenting a general question of interpretation, or posing a hypothetical situation, or regarding the activities of third parties, *do not qualify* as advisory opinion requests." 11 C.F.R. § 112.1(b) (emphasis added).