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August 23, 2024

MEMORANDUM

TO: The Commission

FROM: Lisa J. Stevenson *LJS by RMK*
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Subject: Draft AO 2024-11 (Caroline Gleich) Draft A

Attached is a proposed draft of the subject advisory opinion. We have been asked to place this draft on the Agenda by one or more Commissioners.

Members of the public may submit written comments on the draft advisory opinion. We are making this draft available for comment until 12:00 pm (Eastern Time) on Wednesday, August 28, 2024.

Members of the public may also attend the Commission meeting at which the draft will be considered. The advisory opinion requestor may appear before the Commission at this meeting to answer questions.

For more information about how to submit comments or attend the Commission meeting, go to <https://www.fec.gov/legal-resources/advisory-opinions-process/>.

Attachment

1 ADVISORY OPINION 2024-11

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Jonathan S. Berkon, Esq.
Jonathan Peterson, Esq.
Elias Law Group LLP
250 Massachusetts Ave., NW
Suite 400
Washington, DC 20001

DRAFT A

11 Dear Messrs. Berkon and Peterson:

12 We are responding to your advisory opinion request on behalf of Caroline Gleich,
13 a candidate for the U.S Senate in Utah, regarding the application of the Federal Election
14 Campaign Act, 52 U.S.C. §§ 30101-45 (the “Act”), and Commission regulations to her
15 proposed use of campaign funds to receive compensation from her campaign committee
16 during the 20-day period after she ceases to become a candidate for work performed
17 during her candidacy, and whether her appearances in certain paid advertisements are
18 exempt from regulation as coordinated communications. The Commission concludes that
19 the proposed receipt of compensation is permissible and that the proposed appearances in
20 certain paid advertisements would not be coordinated communications if, when
21 published, they fall under the commercial transactions safe harbor.

22 **Background**

23 The facts presented in this advisory opinion are based on your letters received on
24 July 10, 2024, and July 26, 2024, your email received on August 2, 2024, and publicly
25 available information.

26 Caroline Gleich is a candidate for the U.S. Senate in Utah and will appear on the
27 state’s November 2024 general-election ballot as the Democratic Party’s nominee for that

1 office.¹ The Committee to Elect Caroline Gleich is her principal campaign committee,
2 which was established on January 10, 2024.²

3 Ms. Gleich “has been building a career as a professional skier, outdoorswoman,
4 mountaineer and activist for clean air, climate action, and protection of public lands” for
5 nearly two decades.³ She is also the sole business owner of Big Mountain Dreams
6 (“BMD”), a limited liability company (“LLC”) she formed in 2016.⁴ Through this
7 business, she provides “influencer services, media content development and production
8 services, and promotional marketing services, among others, to nonprofit organizations,
9 global brands, and small business.”⁵ The contracts into which BMD enters provide
10 various payment structures, including retainer agreements and payment on a per-project
11 basis.⁶ During the last year, Ms. Gleich earned income from more than a dozen clients.⁷

12 Ms. Gleich states that her “income has dropped significantly because of her
13 federal campaign.”⁸ For this reason, Ms. Gleich intends to receive compensation from

¹ Advisory Opinion Request (“AOR”) at AOR001; *see also* Caroline Gleich, Statement of Candidacy, FEC Form 2 (Jan. 10, 2024), <https://docquery.fec.gov/pdf/928/202401109600015928/202401109600015928.pdf>

² AOR001; *see also* Committee to Elect Caroline Gleich, Statement of Organization, FEC Form 1, (Jan. 10, 2024), <https://docquery.fec.gov/pdf/096/202401109600012096/202401109600012096.pdf>.

³ AOR001.

⁴ *Id.*

⁵ *Id.*

⁶ AOR001-2.

⁷ AOR002.

⁸ *Id.*

1 her campaign committee.⁹ Ms. Gleich has determined — based on her average annual
2 income during the last five calendar years — that she is eligible to receive \$87,000 in
3 annual compensation under the Commission’s candidate salary regulations.¹⁰ She plans
4 to continue working through BMD while campaigning and to reduce any compensation
5 she receives from the campaign by the amount of income earned through that business.¹¹

6 Rather than receive compensation during her candidacy, Ms. Gleich proposes to
7 “recapture” compensation payments in the 20-day period following her candidacy.¹² She
8 so proposes because she is not compensated through BMD on a fixed schedule (*e.g.*,
9 hourly or annually), making it impossible for her to determine during her candidacy the
10 actual amount of compensation she is ultimately entitled to receive from her campaign.¹³
11 During the 20-day post-candidacy window, Ms. Gleich will be able to determine how
12 much income she lost during her campaign.¹⁴

13 To continue earning income through BMD contemporaneously with her
14 campaign, Ms. Gleich “wishes to appear in paid advertisements . . . that promote the
15 products and services of the brands and companies she endorses.”¹⁵ These include
16 advertisements “placed for a fee or promoted for a fee on a third-party website, platform,

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.* Ms. Gleich further states that she “has no plans to draw a salary from her campaign prior to the 20-day window but reserves the right to do so, consistent with the regulation.” *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

1 or application” as well as “printed communications that are paid for and distributed by
2 companies and brands.”¹⁶

3 According to Ms. Gleich, the paid advertisements in which she may appear “will
4 be materially indistinguishable from the commercial advertisements that identified her
5 prior to her candidacy”¹⁷ For instance, the commercial sponsors would contract with
6 BMD for Ms. Gleich’s services and pay BMD for the services at fair market value.¹⁸
7 Ms. Gleich would appear in advertisements “solely in her capacity as an owner of BMD,”
8 and the advertisements would not refer to her candidacy or promote, attack, support, or
9 oppose (“PASO”) Ms. Gleich or any federal candidate.¹⁹ The advertisements will
10 primarily appear on Instagram, Facebook, “and similar digital platforms and
11 applications,” as well as print communications, like catalogs and magazines.²⁰ The
12 advertisements will appear throughout the current election cycle, including within 90
13 days of an election, in Utah and “elsewhere.”²¹ Finally, Ms. Gleich states that the timing
14 and distribution of these future advertisements “will be driven by the business needs of
15 Ms. Gleich’s clients.”²²

16 ***Questions Presented***

16 AOR008.

17 *Id.*

18 AOR001-2, 8.

19 AOR002.

20 AOR007.

21 AOR002.

22 AOR008.

1 1. *During the 20-day period following the termination of Ms. Gleich’s federal*
2 *candidacy, may she recapture any salary payments to which she would have been entitled*
3 *during her candidacy?*

4 2. *May Ms. Gleich continue to appear in the proposed paid advertisements, even*
5 *if the appearances are within 90 days of an election?*

6 ***Legal Analysis***

7 1. *During the 20-day period following the termination of Ms. Gleich’s federal*
8 *candidacy, may she recapture any salary payments to which she would have been entitled*
9 *during her candidacy?*

10 Yes, during the 20-day period following Ms. Gleich’s candidacy, she may receive
11 any salary payments to which she would have been entitled during her candidacy.

12 The Act prohibits a candidate’s authorized committee from converting campaign
13 funds to “personal use.”²³ “Personal use” is defined as the use of campaign funds “to
14 fulfill any commitment, obligation, or expense of a person that would exist irrespective of
15 the candidate’s election campaign or individual’s duties as a holder of Federal office.”²⁴
16 The Act and Commission regulations provide a non-exhaustive list of expenses that,
17 when paid using campaign funds, constitute *per se* conversion of those funds to personal
18 use.²⁵ The Commission determines on a case-by-case basis whether the use of campaign
19 funds to pay expenses other than those listed would be a prohibited conversion of the

²³ 52 U.S.C. § 30114(b).

²⁴ *Id.* § 30114(b)(2); *see also* 11 C.F.R. § 113.1(g) (defining “personal use”).

²⁵ *See* 52 U.S.C. § 30114(b)(2); 11 C.F.R. § 113.1(g)(1)(i).

1 funds to personal use.²⁶ The Act does not identify the use of campaign funds to pay
2 candidate compensation as a *per se* personal use.

3 Under Commission regulations, the use of campaign funds by a candidate’s
4 principal campaign committee to pay compensation to the candidate is not personal use
5 provided that “the compensation does not exceed the lesser of: 50% of the minimum
6 annual salary paid to a Member of the United States House of Representatives under 2
7 U.S.C. § 4501, and the average annual income the candidate earned during the most
8 recent five calendar years in which the candidate earned income prior to becoming a
9 candidate.”²⁷ Additionally, the committee “must reduce the maximum amount of
10 candidate compensation permissible” by “the amount of any earned income the candidate
11 receives from any other source after filing a Statement of Candidacy under 11 CFR
12 101.1(a).”²⁸ Candidates become eligible to receive compensation from campaign funds
13 on the date the candidate files a Statement of Candidacy with the Commission.²⁹ A
14 candidate’s principal campaign committee “may pay the candidate compensation from

²⁶ See 11 C.F.R. § 113.1(g)(1)(ii) (providing non-exhaustive list of expenses to be determined for personal use on a case-by-case basis).

²⁷ *Id.* § 113.1(g)(6)(ii). The committee must calculate compensation, minimum annual salary, and the average annual income at the daily rate, rounded to the nearest dollar. Although the Commission’s regulations have long provided that the use of campaign funds to pay some compensation to the candidate did not constitute personal use, *see* Disclaimers, Fraudulent Solicitation, Civil Penalties, and Personal Use of Campaign Funds, 67 Fed. Reg. 76962, 76971 (Dec. 13, 2002), the Commission issued new rules on candidate compensation effective March 1, 2024, *see* Candidate Salaries, 89 Fed. Reg 5 (Jan. 2, 2024).

²⁸ 11 C.F.R. § 113.1(g)(6)(iv). “Compensation” is defined as “direct payments to the candidate unless the payments are otherwise permitted by law, such as candidate expense reimbursements and candidate loan repayments under 11 CFR part 116.” *Id.* § 113.1(g)(6)(iii).

²⁹ *Id.* § 113.1(g)(6)(v)(A). The candidate must provide evidence of earned income from the relevant years upon request of the Commission. *Id.* § 113.1(g)(6)(vii). Any such evidence of earned income must be maintained and preserved for three years after the report disclosing the reimbursement is filed, pursuant to 11 CFR §§ 102.9 and 104.14(b). *Id.*

1 campaign funds up to 20 days after the candidate wins the general election, general
2 election runoff, special election, or special election runoff, or otherwise ceases to be a
3 candidate, such as by losing an election or withdrawing from the race.”³⁰ Commission
4 regulations do not specify when within that period a candidate may receive
5 compensation. However, debts and obligations owed by a political committee that
6 remain outstanding, including an obligation to pay compensation to a candidate, must be
7 continuously reported until extinguished.³¹

8 Here, Ms. Gleich explains that under Commission regulations, she is eligible to
9 receive up to \$87,000 as compensation from her principal campaign committee,
10 depending on how much income she earns outside the campaign.³² Because Ms. Gleich
11 does not receive income from BMD on a fixed schedule that is knowable in advance, she
12 wishes to receive the payments during the 20-day post-candidacy period once the actual
13 amounts of the payments are known. The Commission concludes that she may do so.

14 Although Ms. Gleich would receive the compensation after her candidacy ends,
15 the payment would be made within the allowable period and only up to the amount that
16 she would be eligible to receive. The Commission’s regulations permit compensation to
17 be paid to the candidate from campaign funds for 20 days after the candidacy,³³ and
18 allowing Ms. Gleich to receive the compensation to which she would be entitled during

³⁰ *Id.* § 113.1(g)(6)(v)(B).

³¹ 11 C.F.R. § 104.11(a) (implementing 52 U.S.C. § 30104(b)(8)).

³² \$87,000 is 50% of the minimum salary paid to a Member of the United States House of Representatives under 2 U.S.C. § 4501. *See* Candidate Salaries, 89 Fed. Reg. at 12.

³³ 11 C.F.R. § 113.1(g)(6)(v)(B).

1 her candidacy during the 20-day post-candidacy window provides a reasonable method
2 for complying with the requirement to reduce compensation for any earned income the
3 candidate receives from any other source after filing the Statement of Candidacy.³⁴

4 The committee, however, must continuously disclose a reasonable estimate of any
5 payments as an outstanding debt until it is extinguished.³⁵ For any report for which the
6 committee will not know the exact amount of the debt at the time of filing the report, the
7 committee must report an estimated amount of the outstanding debt and indicate it as
8 such.³⁶ The committee must either amend the report (and all subsequent reports) to
9 indicate the accurate amount, once it is known, or include the accurate amount, along
10 with an explanation of the change, in the report for the reporting period during which the
11 amount is determined.³⁷ Provided that the committee makes a reasonable, good-faith
12 effort to estimate accurately the amount of compensation due to Ms. Gleich and reports
13 the actual amount once known, the committee will be considered to have used its “best

³⁴ *Id.* § 113.1(g)(6)(iv).

³⁵ A debt or obligation, including a loan, written contract, written promise, or written agreement to make an expenditure, the amount of which is \$500 or less, must be reported as of the time payment is made or not later than 60 days after the obligation is incurred, whichever comes first. 11 C.F.R. § 104.11(b). For such items above \$500, they must be reported as of the date on which the debt or obligation is incurred, except that any obligation incurred for rent, salary, or other regularly reoccurring administrative expenses must not be reported as a debt before the payment due date. *Id.* For purposes of 11 C.F.R. § 104.11(b), payments of compensation to a candidate from campaign funds do not constitute a “salary,” for two reasons. First, the new regulations denote the use of campaign funds for candidate “compensation,” not salary. *See id.* § 113.1(g)(6). Second, payments of compensation to a candidate, especially when paid as a lump sum in the 20-day post candidacy period, are not a “regularly reoccurring administrative expense.” *See id.* § 104.11(b). Therefore, the Committee is required to continuously report such a debt beginning at the time the debt is incurred, not at the payment due date. The Commission expresses no opinion on the applicability of any tax or other laws or regulations to the payment of compensation from the committee to Ms. Gleich.

³⁶ *See* 11 C.F.R. § 104.11(b) (addressing continuous reporting of debts and obligations).

³⁷ *See id.*; FEC, How to Report, Debts owed by the committee, <https://www.fec.gov/help-candidates-and-committees/filing-reports/debts-owed-committee/> (last visited Aug. 15, 2024).

1 efforts” to meet its reporting obligations. Thus, as long as the payments are properly
2 reported as described here, Ms. Gleich may, in the 20-day period following her
3 candidacy, receive any compensation to which she would have been entitled during her
4 candidacy.

5 *2. May Ms. Gleich continue to appear in the proposed paid advertisements, even*
6 *if the appearances are within 90 days of an election?*

7 Yes, Ms. Gleich may continue to appear in certain paid advertisements within 90
8 days of an election in Utah, provided that: (1) the advertisements identify her only in her
9 capacity as the owner of BMD; (2) the advertisements are consistent with public
10 communications she made prior to her candidacy with respect to their medium, timing,
11 content, and geographic distribution; and (3) the advertisements do not PASO her or any
12 other candidate running for the U.S. Senate in Utah.

13 Under the Act, expenditures that are coordinated with a candidate or political
14 party committee are treated as contributions to that candidate or political party
15 committee.³⁸ Specifically, Commission regulations provide that if a communication is
16 “coordinated with a candidate, an authorized committee, a political party committee, or
17 an agent of any of the foregoing,” the payment for the communication is an in-kind
18 contribution to that candidate or the political party committee from the payor.³⁹
19 Commission regulations set forth a three-prong test to determine whether a
20 communication is a coordinated communication.⁴⁰ If all three prongs of this test (the

³⁸ 52 U.S.C. § 30116(a)(7)(B).

³⁹ 11 C.F.R. § 109.21(a), (b)(1).

⁴⁰ *Id.* § 109.21(a).

1 payment prong, the content prong, and the conduct prong) are met then a communication
2 is deemed to be a coordinated communication.⁴¹

3 Commission regulations provide a safe harbor, however, for certain business and
4 commercial communications that would otherwise satisfy the three-prong test.⁴² For a
5 communication to satisfy this “commercial transactions safe harbor” and, thus, be
6 excluded from the definition of a coordinated communication, it must satisfy another set
7 of three elements: (1) The communication is a public communication in which a federal
8 candidate is clearly identified only in his or her capacity as the owner or operator of a
9 business that existed prior to the candidacy; (2) the medium (*e.g.*, television or
10 newspaper), timing (*e.g.*, frequency, time of year, duration, and time of day),⁴³ content,
11 and geographic distribution of the public communication are consistent with public
12 communications made prior to the candidacy; and (3) the public communication does not
13 PASO that candidate or another candidate who seeks the same office as that candidate.⁴⁴
14 Commercial advertisements that meet this criteria “serve non-electoral business and
15 commercial purposes.”⁴⁵

⁴¹ *Id.*

⁴² *See id.* § 109.21(i); Coordinated Communications, 75 Fed. Reg. 55947, 55959 (Sept. 15, 2010).

⁴³ The Commission’s Explanation and Justification for the commercial transactions safe harbor lists duration and time of day as relevant specifically to television or radio communications. *See* Coordinated Communications, 75 Fed. Reg. at 55959. However, those were merely examples and were not intended to limit the safe harbor only to television and radio communications. The duration and time of day for advertisement placement are also relevant to other types of public communications, including those made on social media.

⁴⁴ 11 C.F.R. § 109.21(i); Coordinated Communications, 75 Fed. Reg. at 55959.

⁴⁵ Coordinated Communications, 75 Fed. Reg. at 55959.

1 Concerning the safe harbor’s first element regarding whether Ms. Gleich will be
2 clearly identified only in her capacity as the owner or operator of a business that existed
3 prior to her candidacy, the Commission considered an analogous situation in Advisory
4 Opinion 2004-31 (Darrow).⁴⁶ There, the candidate, Russ Darrow, Jr., was the founder,
5 Chief Executive Officer, and Chairman of the Board of the Russ Darrow Group
6 (“RDG”), a Wisconsin corporation that owned and operated 22 vehicle franchise
7 dealerships in Wisconsin, all of which included “Russ Darrow” as part of the dealership’s
8 name.⁴⁷ At the time of his candidacy, Mr. Darrow had not appeared in RDG
9 advertisements for over a decade.⁴⁸ Rather, his son, Russ Darrow, III, had become the
10 public face in RDG’s advertisements and also was primarily responsible for all day-to-
11 day operations, plans, and advertising decisions of the business.⁴⁹ Also during this
12 period, “RDG ha[d] focused on developing ‘Russ Darrow’ as a brand name for its
13 dealerships.”⁵⁰ Under these circumstances, the Commission concluded that references to
14 “Russ Darrow” in the company’s advertising would not be a reference to a “clearly
15 identified candidate,” in part, because “‘Russ Darrow’ [wa]s part of the name of all of
16 RDG’s dealerships, which RDG ha[d] worked for a decade to develop as a brand name

⁴⁶ Although Advisory Opinion 2004-31 (Darrow) addressed whether the name “Russ Darrow” would be clearly identifying a federal candidate for purposes of electioneering communications, *see* 52 U.S.C. § 30104(f)(3)(A)(i); 11 C.F.R. § 100.29, its analysis of whether the candidate was “clearly identified” in advertisements in his capacity as a candidate versus as a business owner is instructive.

⁴⁷ Advisory Opinion 2004-31 (Darrow) at 1-2.

⁴⁸ *Id.* at 2.

⁴⁹ *Id.*

⁵⁰ *Id.* at 1.

1 for all its dealerships.”⁵¹ The Commission further observed that, even though some of
2 the proposed advertisements included “a single reference to ‘Russ Darrow,’” rather than
3 the full name of a dealership, those references “taken together with the other references in
4 the advertisement, also refer[red] to the business entity and not to the Candidate.”⁵²
5 Finally, the Commission noted that the candidate himself would not speak or appear on
6 screen in any of the advertisements.⁵³

7 Likewise, Ms. Gleich has been building her career as an athlete, activist, and
8 influencer for nearly two decades, and, she asserts, “the marketplace finds commercial
9 value in [her] personal brand.”⁵⁴ And though Ms. Gleich has and will personally appear
10 in the paid advertisements, she states that “[j]ust as she did prior to her candidacy,
11 Requestor would appear solely in her capacity as an owner of BMD.”⁵⁵ Thus, Ms. Gleich
12 will satisfy the first element of the safe harbor, provided that the paid advertisements in
13 which she will appear clearly identify her in her capacity as the owner of BMD. In other
14 words, to satisfy the first element of the safe harbor, it must be clear to a person viewing
15 the advertisement that Ms. Gleich, using her “personal brand” that has been incorporated
16 as BMD, is promoting the products and services of brands and companies paying for the
17 advertisement, not promoting herself in her capacity as a candidate.

⁵¹ *Id.* at 3.

⁵² *Id.*

⁵³ *Id.*

⁵⁴ AOR001, 5.

⁵⁵ AOR002.

1 Next, to satisfy the second element of the safe harbor, the medium, timing,
2 content, and geographic distribution of the public communication must be consistent with
3 public communications made prior to the candidacy.⁵⁶ Ms. Gleich states that the
4 advertisements will primarily appear on Instagram and Facebook, as well as some print
5 materials; that they will appear in Utah and “elsewhere”; and, in the advertisements, she
6 “will promote the products and services of brands and companies.”⁵⁷ Ms. Gleich further
7 states that “the medium, timing, content, and geographic distribution” of the paid
8 advertisements identifying her “will be consistent with other advertisements featuring her
9 prior to her candidacy.”⁵⁸ Additionally, she states that the timing and distribution of the
10 future paid advertisements “will be driven by the business needs of Ms. Gleich’s
11 clients.”⁵⁹ To the extent that the future paid advertisements are, indeed, consistent with
12 her past public communications in terms of medium, timing, content, and geographic
13 distribution, element two will be satisfied.

14 Finally, to meet the third element of the safe harbor, the public communication
15 cannot PASO the candidate appearing in the public communication or another candidate
16 seeking the same office.⁶⁰ Ms. Gleich states that the advertisements will not PASO her

⁵⁶ 11 C.F.R. § 109.21(i)(1).

⁵⁷ AOR002, 7-8.

⁵⁸ AOR005.

⁵⁹ AOR008.

⁶⁰ 11 C.F.R. § 109.21(i)(2). PASO is not further defined by regulation. And “[t]he Supreme Court, in rejecting a constitutional vagueness challenge to the PASO standard, held that ‘the words ‘promote,’ ‘oppose,’ ‘attack,’ and ‘support’ . . . provide explicit standards for those who apply them and ‘give the person of ordinary intelligence a reasonable opportunity to know what is prohibited.’” Coordinated Communications, 71 Fed. Reg. 33190, 33199 n.38 (June 8, 2006) (quoting *McConnell v. FEC*, 540 U.S. 93, 170 n.64 (2003), *rev’d on other grounds*).

1 nor any other candidate running for the U.S. Senate in Utah. Provided that the future
2 advertisements do not PASO Ms. Gleich or another candidate for the U.S. Senate in Utah,
3 the third element of the safe harbor will be satisfied.

4 Therefore, the proposed paid advertisements will satisfy the coordinated
5 communications safe harbor so long as (1) the advertisements identify her only in her
6 capacity as the owner of BMD; (2) the advertisements are consistent with public
7 communications she made prior to her candidacy with respect to their medium, timing,
8 content, and geographic distribution; and (3) the advertisements do not PASO her or any
9 other candidate running for the U.S. Senate in Utah.

10 This response constitutes an advisory opinion concerning the application of the
11 Act and Commission regulations to the specific transaction or activity set forth in your
12 request.⁶¹ The Commission emphasizes that, if there is a change in any of the facts or
13 assumptions presented, and such facts or assumptions are material to a conclusion
14 presented in this advisory opinion, then the requestor may not rely on that conclusion as
15 support for its proposed activity. Any person involved in any specific transaction or
16 activity which is indistinguishable in all its material aspects from the transaction or
17 activity with respect to which this advisory opinion is rendered may rely on this advisory
18 opinion.⁶² Please note that the analysis or conclusions in this advisory opinion may be
19 affected by subsequent developments in the law including, but not limited to, statutes,

⁶¹ See 52 U.S.C. § 30108.

⁶² See *id.* § 30108(c)(1)(B).

1 regulations, advisory opinions, and case law. Any advisory opinions cited herein are
2 available on the Commission's website.

3 On behalf of the Commission,

4

5 Sean J. Cooksey,

6 Chairman

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9