



FEDERAL ELECTION COMMISSION

Washington, DC 20463

**MEMORANDUM**

**TO:** The Commission

**FROM:** Office of the Commission Secretary *LC*

**DATE:** August 13, 2024

**SUBJECT:** AOR 2024-11 (Caroline Gleich) Comment  
from Campaign Legal Center

Attached is AOR 2024-11 (Caroline Gleich) Comment from Campaign Legal Center.

Attachment



**RECEIVED**

By Office of General Counsel at 9:26 am, Aug 13, 2024

**RECEIVED**

By Office of the Commission Secretary at 9:47 am, Aug 13, 2024

August 12, 2024

Lisa J. Stevenson, Esq.  
Acting General Counsel  
Federal Election Commission  
1050 First St. NE  
Washington, DC 20463  
ao@fec.gov

**Re: Advisory Opinion Request 2024-11 (Gleich)**

Dear Ms. Stevenson:

Campaign Legal Center (“CLC”) respectfully submits this comment regarding Advisory Opinion Request 2024-11 (Gleich).<sup>1</sup> The requestor, Caroline Gleich, is a federal candidate who asserts that because she makes her living as an influencer, primarily promoting products and brands through ads paid for by corporations and placed for a fee online, she faces a loss of income during the 90 days prior to the November general election; during that window of time, ads that she would otherwise appear in would satisfy the legal test for “coordinated communications” and would therefore result in prohibited in-kind contributions to her campaign.<sup>2</sup> She requests that the Federal Election Commission (“FEC” or “Commission”) treat these ads as exempt from the coordinated communications rules under the regulatory safe harbor for commercial transactions.<sup>3</sup> CLC urges the Commission to decline to approve this request.

As explained below, the request effectively asks the Commission to expand the commercial transactions safe harbor, and it should think twice before doing so. The fast-growing influencer marketing industry was already worth \$21.1 billion as of 2023,<sup>4</sup> and its participants include major companies that possess the resources to

<sup>1</sup> See Advisory Op. Request 2024-11 (Caroline Gleich) (July 10, 2024), [https://www.fec.gov/files/legal/aos/2024-11/202411R\\_1.pdf](https://www.fec.gov/files/legal/aos/2024-11/202411R_1.pdf) (“AOR”).

<sup>2</sup> *Id.* at 1-2.

<sup>3</sup> *Id.*; see 11 C.F.R. § 109.21(i).

<sup>4</sup> Nic Dunn, *Top 20 Influencer Marketing Statistic You Need to Know!*, Charle (May 22, 2024), <https://www.charleagency.com/articles/influencer-marketing->

invest heavily in influencer-driven marketing campaigns. Gleich is, in all likelihood, neither the first nor the last influencer to run for federal office. The FEC must ensure that corporations cannot deploy their vast corporate treasuries to underwrite influencer-candidates, under the guise of commercial speech, during the crucial preelection period.

While the advisory opinion process is a legally improper mechanism to expand FEC regulations,<sup>5</sup> should the Commission wish to amend the commercial transaction safe harbor as proposed in this request, it could do so through the rulemaking process, in which case the amended safe harbor should include sufficient guardrails to prevent influencers and companies from abusing the commercial transactions exemption to usher in the type of coordinated soft-money communications that the Bipartisan Campaign Reform Act (“BCRA”) was enacted to foreclose.

### **Background**

Gleich is a paid influencer running for the U.S. Senate in Utah.<sup>6</sup> She has personal social media accounts on Instagram,<sup>7</sup> Facebook<sup>8</sup>, and X (formerly Twitter),<sup>9</sup> and has her own website.<sup>10</sup> She also has a separate campaign website<sup>11</sup> and campaign accounts on Instagram,<sup>12</sup> Facebook,<sup>13</sup> and X.<sup>14</sup> In addition, Gleich owns her own business, Big Mountain Dreams (“BMD”)—a limited liability company (“LLC”) that she created in 2016 to receive payments and enter into contracts for her influencer work.<sup>15</sup>

Gleich explains in her request that companies and nonprofit organizations pay her to be a spokesperson or ambassador for their products or brands.<sup>16</sup> Her clients either place the advertisements that Gleich films directly, or Gleich posts the

---

[statistics/#:~:text=Influencer%20marketing%20is%20worth%2021.1,a%20record%2021.1%20billion%20dollars.](#)

<sup>5</sup> See 52 U.S.C. § 30108(b); 11 C.F.R. § 112.4(e).

<sup>6</sup> AOR at 1.

<sup>7</sup> Caroline Gleich (@carolinegleich), Instagram (Aug. 9, 2024), <https://www.instagram.com/carolinegleich/>.

<sup>8</sup> Caroline Gleich (@carolinegleich), Facebook (Aug. 9, 2024), <https://www.facebook.com/carolinegleich/>.

<sup>9</sup> Caroline Gleich (@carolinegleich), X (Aug. 9, 2024), <https://x.com/carolinegleich>.

<sup>10</sup> CAROLINE GLEICH, <https://carolinegleich.com/> (last visited Aug. 9, 2024).

<sup>11</sup> CAROLINE GLEICH, <https://www.carolineforutah.com/> (last visited Aug. 9, 2024).

<sup>12</sup> Caroline Gleich (@carolineforutah), Instagram (Aug. 9, 2024), <https://www.instagram.com/carolineforutah/>.

<sup>13</sup> Caroline for Utah (@carolineforutah), Facebook (Aug. 9, 2024), <https://www.facebook.com/carolineforutah>.

<sup>14</sup> Caroline for Utah (@carolineforutah), X (Aug. 9, 2024), <https://x.com/carolineforutah>.

<sup>15</sup> AOR at 1-2.

<sup>16</sup> See *id.*

advertisements to her personal social media accounts and the clients pay to promote Gleich's posts.<sup>17</sup> In the past year, Gleich has worked with over a dozen clients.<sup>18</sup>

Because Gleich's influencer advertisements are paid for by third parties, are made "in cooperation, consultation or concert with, or at the request or suggestion of" Gleich,<sup>19</sup> and constitute public communications that feature Gleich, they are coordinated communications if disseminated within 90 days of her election, unless an exemption applies.<sup>20</sup>

Gleich argues that the ads she appears in would be covered by the safe harbor for commercial transactions at 11 C.F.R. § 109.21(i),<sup>21</sup> which provides:

A public communication in which a Federal candidate is clearly identified *only in his or her capacity as the owner or operator of a business* that existed prior to the candidacy is not a coordinated communication with respect to the clearly identified candidate if:

- (1) The medium, timing, content, and geographic distribution of the public communication are consistent with public communications made prior to the candidacy; and
- (2) The public communication does not promote, support, attack, or oppose that candidate or another candidate who seeks the same office as that candidate.<sup>22</sup>

Gleich argues that because she owns BMD and has appeared in influencer advertisements prior to her candidacy; will appear in future influencer ads only in her capacity as owner of BMD; and will not promote, support, attack, or oppose a candidate or political party in future ads, she can continue appearing in influencer ads within 90 days of the November general election without accepting (likely prohibited or excessive) in-kind contributions from the companies paying for the ads.

---

<sup>17</sup> Supplement to AOR at 1 (July 26, 2024), [https://www.fec.gov/files/legal/aos/2024-11/202411R\\_1.pdf](https://www.fec.gov/files/legal/aos/2024-11/202411R_1.pdf).

<sup>18</sup> AOR at 2.

<sup>19</sup> 52 U.S.C § 30116(a)(7)(B). The Commission has concluded that where a federal candidate appears in a communication, there is effectively a presumption that the candidate is "materially involved" under the conduct prong of the coordinated communications test: "Given the importance of and potential campaign implications for each public appearance by a Federal candidate, it is highly implausible that a Federal candidate would appear in a communication without being materially involved in one or more of the listed decisions regarding the communication." Advisory Op. 2003-25 (Weinzapfel) at 6; *see* 11 C.F.R. § 109.21(d)(2).

<sup>20</sup> 11 C.F.R. § 109.21(a)(1), (c)(4)(i).

<sup>21</sup> AOR at 4-6.

<sup>22</sup> 11 C.F.R. § 109.21(i) (emphasis added).

Gleich's request should be rejected because it conflicts with the narrow scope of the commercial transactions safe harbor, which the Commission created to cover situations in which a candidate owns or operates a business and is appearing in ads *paid for by the candidate's business to promote its own goods or services*. That is simply not the scenario presented here.

As such, Gleich's proposal threatens to transform a narrow exception into a major loophole allowing corporations to coordinate with—and thus effectively underwrite—federal candidates. To the extent the Commission wishes to address the novel scenario of influencer candidates appearing in ads paid for by companies to promote *the companies'* products or services, it must do so through the rulemaking process—*i.e.*, in a careful manner that ensures sufficient safeguards are in place to avoid opening the door to major corporate electoral influence, in direct contravention of BCRA's clear purposes.

### Analysis

Gleich's request seeks a material expansion of the existing safe harbor for commercial transactions. The safe harbor applies to situations in which a candidate owns a business and appears in ads *paid for by the candidate's business to promote its own goods or services*, which is not the situation presented in the request. The safe harbor's history undermines Gleich's position that denying her request would be "plainly inconsistent with the purpose behind the safe harbor."<sup>23</sup> The Commission has previously explained that the safe harbor was "intended to encompass the types of communications that were the subjects of several recent enforcement actions," all of which "concerned advertisements paid for by businesses owned by Federal candidates."<sup>24</sup> In Gleich's case, however, her business—BMD—is merely the contracting entity for her personal marketing services and would not be paying for the communications at issue; instead, the ads would be paid for, either through direct placement or paid promotion, by the companies that hire her to promote their products or services.

The ads that Gleich would appear in are clearly distinguishable from the type of ads this safe harbor was designed to exempt. An opinion allowing Gleich to rely on the safe harbor to exempt ads paid for *by other companies to promote their own products or services* would thus amount to an improper expansion of the regulatory safe harbor through the advisory opinion process.<sup>25</sup>

In addition to being legally improper, this requested expansion of the commercial safe harbor via advisory opinion raises a serious potential for companies and

---

<sup>23</sup> AOR at 5.

<sup>24</sup> Coordinated Communications, 75 Fed. Reg. 55,947, 55,959 (Sep. 15, 2010) (citing MURs 6013 (Teahen), 5517 (Stork), and 5410 (Oberweiss)), <https://sers.fec.gov/fosers/showpdf.htm?docid=5395#page=13>.

<sup>25</sup> See 52 U.S.C. § 30108(b) ("Any rule of law which is not stated in this Act or in chapter 95 or chapter 96 of title 26 may be initially proposed by the Commission only as a rule or regulation pursuant to procedures established in section 30111(d) of this title."); 11 C.F.R. § 112.4(e).

candidates to engage in a corrupt bargain: a quid pro quo arrangement in which the companies benefit from their products' promotion by a recognized political figure, while the candidate benefits from increased visibility—right before an election—that is paid for by a third party. One can just imagine the possibilities: *e.g.*, a presidential candidate with a history of promoting products and licensing out his own surname for a fee appears in a national ad campaign extolling the delicious (and distinctly patriotic) taste of “Heartland USA Steaks,” thus allowing the manufacturer of Heartland USA Steaks to underwrite a massive ad blitz putting the candidate’s face (and love of American-bred beef) on every television and phone screen in the nation.

If the Commission decides to explore expanding the commercial transactions safe harbor through a rulemaking, we would respectfully urge the adoption of sufficient guardrails to limit the risk of corporate-subsidized electoral influence in the 90 days before an election. Such safe harbors must, at a minimum, address the following concerns:

The commercial transactions safe harbor states that the candidate must be “clearly identified only in his or her capacity as owner or operator of a business,”<sup>26</sup> *i.e.*, not as a candidate. Thus, clear identification in the context of this safe harbor requires excluding references to candidacy, because a candidate cannot be permitted to shoehorn promotion of their candidacy into a commercial marketing message. Gleich’s promotions illustrate what should not be allowed to qualify for the safe harbor, as her commercial and campaign messages have bled together.

Since Gleich registered her principal campaign committee on January 10, 2024,<sup>27</sup> she appears to have posted over a dozen sponsored posts<sup>28</sup> on her personal

---

<sup>26</sup> 11 C.F.R. § 109.21(i).

<sup>27</sup> Committee to Elect Caroline Gleich, Statement of Org. (FEC Form 1) (Jan. 10, 2024), <https://docquery.fec.gov/cgi-bin/forms/C00865253/1742413/>.

<sup>28</sup> A “sponsored post” is a post a company pays an influencer to place on their own social media account. Sponsored posts organically reach the influencer’s followers, and the company can also pay to boost or promote the post to reach a wider audience. *See* Althea Storm, *Instagram Sponsored Posts: Everything You Need to Know in 2022*, AdEspresso (May 12, 2022), <https://adespresso.com/blog/instagram-sponsored-posts/>. Under Federal Trade Commission (“FTC”) guidelines, influencers are encouraged to disclose brand relationships through “tags, likes, pins” among other methods, but are not required to include specific disclosures in the content of a post or in the hashtags of a post. This means it is not always clear what is and is not a sponsored post. *See* Disclosures 101 for Social Media Influencers, FTC (Nov. 2019), [https://www.ftc.gov/system/files/documents/plain-language/1001a-influencer-guide-508\\_1.pdf](https://www.ftc.gov/system/files/documents/plain-language/1001a-influencer-guide-508_1.pdf). We looked at posts where Gleich tagged a third-party business or nonprofit and ad copy appeared to be used in the post’s text. *See, e.g., Caroline Gleich (@carolinegleich)*, (@ikonpass, Jan. 10, Feb. 20, Apr. 13, and Apr. 14, 2024), (@patagonia\_snow, Jan. 19, Apr. 7, and July 18, 2024), (@goeshealth, Mar. 6, Apr. 7 2024), (@elanskis, @lekiusa, @prehelmets, Apr. 7, 2024), (@clifbar, Apr. 7, July 13, 2024), (@julboeyewearna, Apr. 7, Apr. 21, and July 13, 2024), (#ExploreArizona, May 2, 2024), (mentalhealthishealth.us, May 16, 2024), (@patagonia and the Bears Ears Inter-Tribal Coalition, June 11, 2024), (@saltlakeclimbers, @americanalpine, @patagonia\_climb, July 13, 2024), (@nuzzlesandco, July 17, 2024), (@mammutna, July 18, 2024), (@World\_Wildlife, Aug. 6, 2024), Instagram, *supra* note 6.

Instagram account, several of which mention her candidacy or tag her campaign's Instagram account as well as the post's sponsors.<sup>29</sup> Gleich's personal Instagram page, on which she posts these communications, also says in the bio section: "[C]heck out my U.S. Senate Candidate page: @carolineforutah" and includes a link to that page and her ActBlue donation page.<sup>30</sup> Because Gleich uses tags to link her influencer ads to her campaign account, mentions her candidacy, and uses her personal account's bio to promote her campaign, she is not conveying an exclusively commercial message or appearing "only in [ ] her capacity as owner or operator of a business."<sup>31</sup>

The Commission should make clear that influencers or other business owners availing themselves of the commercial transactions safe harbor cannot concurrently promote a product or service as well as their candidacy, including by specifically mentioning their candidacy, tagging a campaign account, cross-posting with a campaign account, or running ads from an account that references or links to a campaign committee. Indeed, in a prior matter where a candidate sought to appear in communications promoting their family business, the Commission deadlocked at least partly because the candidate had engaged in this kind of "cross-pollination" between their commercial and campaign interests: the factual record in Advisory Opinion 2012-20 (Mullin) indicated that "campaign literature . . . prominently features the name and logo of [the candidate's business], and points to the [business's] success as Mr. Mullin's primary qualification for election."<sup>32</sup> Accordingly, as two Commissioners noted at the time, the candidate's business had "become intertwined" with his campaign "to the point where it can no longer be said that the companies' ads are 'plainly and unquestionably not related to the election.'"<sup>33</sup>

It is also important that the Commission clarify through the rulemaking process exactly how, in the context of the influencer marketing industry, the "content" of a commercial communication is "consistent with public communications made prior to candidacy," as already required by the safe harbor.<sup>34</sup> Unlike ads paid for by a candidate's own business, which only promote that business's products or services, ads paid for by third parties that feature an influencer-candidate like Gleich may be promoting dozens of different companies or brands, raising important questions

---

<sup>29</sup> See, e.g., Gleich's posts on March 19, April 7, May 17, and July 13, all of which tag Gleich's campaign Instagram and her sponsors or were posted to her campaign and personal Instagrams along with the hashtag for her business BMD, Caroline Gleich (@carolinegleich), Instagram, *supra* note 6.

<sup>30</sup> See Caroline Gleich, Instagram, *supra* note 6. Gleich's Instagram bio also includes a link to her personal website, but her personal website has a banner on the homepage asking people to click to visit CarolineforUtah.com. *Id.* Gleich's personal, business, and candidate personas are thus completely intertwined.

<sup>31</sup> 11 C.F.R. § 109.21(i).

<sup>32</sup> Vice Chair Ellen L. Weintraub and Comm'r Cynthia L. Bauerly, Statement on Advisory Opinion Request 2021-20 (Mullin) at 2 (May 31, 2012), <https://www.fec.gov/files/legal/aos/2012-20/1210272.pdf>.

<sup>33</sup> *Id.*

<sup>34</sup> See 11 C.F.R. § 109.21(i).



about whether those ads are, in fact, “consistent” with ones “made prior to candidacy.”

This is particularly concerning because many influencers enter into product-placement contracts that provide them with flexibility to say or do whatever they’d like in a video—including content that, after becoming a candidate, is designed to boost their candidacy—so long as the client’s product appears in the ad. For example, an influencer might appear in an ad talking about their views on hot-button social or political issues while using the products they’re being paid to promote, *e.g.*, applying their makeup, shaving, making coffee, or cleaning and assembling a rifle.<sup>35</sup> It would be problematic for the Commission to conclude that this kind of coordinated “sham issue ad,” paid for by a third party and published in the 90 days before an election, is “consistent” with pre-candidacy influencer ads that did not feature such commentary. That would transform the safe harbor into a loophole allowing corporations to inject soft money into elections using the very tactics that BCRA—which required the FEC to promulgate its coordination regulations—sought to prohibit.<sup>36</sup>

Finally, the safe harbor currently requires ads to continue to have the same “geographic distribution.”<sup>37</sup> The Commission should clarify how that requirement would apply to digital ads, which are often targeted based on users’ demographics rather than their physical location. Advertisers can also pay different rates to reach different audience sizes when they place paid social media ads. The Commission should thus require not just the “geographic distribution” of an influencer’s ads to remain the same, but also require the demographic targets and audience size to remain consistent with pre-candidacy ads. Otherwise, a company interested in influencing an election could deliberately alter the targeted audience for an ad featuring a candidate-influencer so as to maximize the influencer’s exposure to the relevant electorate.

## Conclusion

The advisory opinion process is not the appropriate mechanism for amending FEC rules. Because Ms. Gleich’s request seeks to expand the commercial transactions safe harbor, it should be denied. To the extent the FEC seeks to reconsider the scope of that safe harbor to cover ads paid for by companies promoting their own products or services using influencer candidates, it should do so through the rulemaking process, allowing for notice and comment to ensure that changes to the safe harbor

---

<sup>35</sup> See *How To: Product Placement on Instagram*, Kolsquare (Mar. 7, 2024), <https://www.kolsquare.com/en/blog/how-to-product-placement-on-instagram#:~:text=Product%20placement%20on%20Instagram%20is,for%2C%20just%20like%20any%20other.>

<sup>36</sup> See *McConnell v. FEC*, 540 U.S. 93, 132 (2003) (“BCRA’s central provisions are designed to address Congress’ concerns about the [ ] use of soft money and issue advertising to influence federal elections.”); see also *id.* at 131 (observing that sham issue ads “accomplished the same purpose as express advocacy” and were often coordinated).

<sup>37</sup> 11 C.F.R. § 109.21(i).



would work in this new context. Guardrails, like those listed above, are necessary to prevent a narrow exemption from swallowing the coordination rules.

Caroline Gleich is unlikely to be the last influencer to run for office; without robust guardrails, allowing companies to underwrite candidate-influencer ads in close temporal proximity to elections would invite the very harms that BCRA and the FEC's coordination regulations were explicitly designed to prevent.

Respectfully submitted,

          /s/ Saurav Ghosh          

Saurav Ghosh  
Shanna (Reulbach) Ports  
Campaign Legal Center  
1101 14th St. NW, Suite 400  
Washington, DC 20005