



FEDERAL ELECTION COMMISSION
Washington, DC 20463

MEMORANDUM

TO: The Commission

FROM: Office of the Commission Secretary *LC*

DATE: August 28, 2024

SUBJECT: AOR 2024-11 (Caroline Gleich) Comment
on Draft A from Campaign Legal Center

The following is an AOR 2024-11 (Caroline Gleich) Comment on Draft A from Campaign Legal Center. This matter will be discussed on the next Open Meeting of August 29, 2024.

Attachment



RECEIVED

By Office of General Counsel at 12:46 pm, Aug 28, 2024

RECEIVED

By Office of the Commission Secretary at 1:15 pm, Aug 28, 2024

August 28, 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 on the Federal Election Commission’s (the “FEC” or “Commission”) draft advisory opinion regarding Advisory Opinion request 2024-11 (Gleich), which is designated as Agenda Document No. 24-33-A (Draft A) for the Commission’s August 29, 2024, open meeting.¹ For the reasons explained in our initial comment submitted in response to this advisory opinion request, CLC maintains that the request should be rejected in its entirety, and that a rulemaking is the proper mechanism for any modifications the Commission wishes to consider regarding the commercial transactions safe harbor from the coordinated communications rules.² However, to the extent the Commission is inclined to approve this request, as Draft A suggests, the Commission should, at a minimum, clarify that the commercial transactions safe harbor in 11 C.F.R. § 109.21(i) is available only for communications that meet the regulatory criteria by advancing the commercial and non-electoral interests of *both* the candidate and the entity paying for the communication. Draft A currently analyzes only the candidate’s commercial interest, which is inconsistent with the narrowness of the safe harbor and would enable candidate-advertiser coordination well beyond anything the Commission has previously authorized in this context.

¹ See Agenda Doc. No. 24-33-A, Draft AO 2024-11 (Caroline Gleich) Draft A, <https://www.fec.gov/files/legal/aos/2024-11/202411.pdf> (Aug. 23, 2024) (“Draft A”).

² See CLC, Comment re: Advisory Op. Request 2024-11 (Gleich) (Aug. 12, 2024), https://www.fec.gov/files/legal/aos/2024-11/202411C_1.pdf. CLC’s original comment also included practical proposals, such as requiring ad targeting to remain consistent and to avoid linking campaign content to influencer ads, which Draft A fails to incorporate. See *id.* at 5-7.

Ms. Gleich’s request, and the comment she subsequently submitted, focus on language in the Commission’s Explanation and Justification stating that the purpose of the safe harbor is to exempt “*bona fide* business communications” from regulation as coordinated communications.³ Draft A seems to embrace this view—while seemingly ignoring other parts of the Explanation and Justification demonstrating that the exemption was intended to have a narrower scope—and states that the safe harbor’s three-part test is meant to check that the communication “serve[s] a non-electoral business and commercial purpose[].”⁴

Applying the test to the facts Ms. Gleich presents, the draft concludes that the requisite commercial purpose is present because there is a “marketplace” that assigns “commercial value” to Ms. Gleich’s influencer brand; Ms. Gleich will be paid fair market value for her promotional services; and Ms. Gleich will use “her ‘personal brand’ that has been incorporated as BMD,” rather than her status as a candidate, to support the “brands and companies paying” to place the advertisements.⁵ Draft A, however, is conspicuously silent about any factors that show that the “brands and companies” paying Ms. Gleich have a commercial—and not an electoral—purpose in using her services.

While it may be clear when a for-profit company trying to sell a product is acting with a commercial purpose, the analysis may be less straightforward for “brands.” Neither the request nor the draft even clarifies what the term “brands” means, but an examination of Ms. Gleich’s portfolio reveals that diverse interests, including politically active nonprofits, fall under that umbrella. For example, one of Ms. Gleich’s recent clients appears to be Climate Power,⁶ a nonprofit organization whose mission is to “secure progress by electing climate champions” and “educate and mobilize Americans to vote for clean energy progress.”⁷ Climate Power also has an associated super PAC, Climate Power Action.⁸

As a nonprofit, Climate Power, by definition, lacks a commercial purpose. Indeed, Ms. Gleich’s paid content for Climate Power appears to be aimed at encouraging people to join Climate Power’s contact list and educating the public about

³ See Advisory Op. Request 2024-11 (Gleich) at 5 (July 10, 2024) (quoting Coordinated Communications, 75 Fed. Reg. 55,947, 55,959 (Sept. 15, 2010); Caroline Gleich, Comment re: Advisory Op. Request 2024-11 (Gleich) at 2 (Aug. 21, 2024), https://www.fec.gov/files/legal/aos/2024-11/202411C_2.pdf (same).

⁴ Draft A at 10.

⁵ See *id.* at 4, 12.

⁶ See Caroline Gleich (@carolinegleich), Instagram (Sept. 25, 2023), <https://www.instagram.com/p/Cxn-nVQrBsw/> (posting in “[p]aid partnership with climatepower”); Caroline Gleich (@carolinegleich), Instagram (Aug. 30, 2023) (same).

⁷ *About Us*, Climate Power, <https://climatepower.us/about/> (last visited Aug. 27, 2024); see *Donate to Climate Power*, ActBlue, https://secure.actblue.com/donate/climate-power-1?refcode=web_cp-footer (last visited Aug. 27, 2024) (including a disclaimer for “charitable donations”). A tax-exempt organization search on the IRS website confirms that Climate Power is a 501(c)(4) organization. See *Tax Exempt Organization Search*, IRS, <https://apps.irs.gov/app/eos/> (last visited Aug. 27, 2024).

⁸ See *Climate Power Action*, FEC, <https://www.fec.gov/data/committee/C00817536/?cycle=2022> (last visited Aug. 27, 2024).

environmental issues.⁹ It also bears noting that the environment and green energy—the topics that Climate Power has paid Ms. Gleich to post about—feature prominently in her Senate campaign.¹⁰

Draft A’s lack of sufficient requirements for defining which entities may pay influencers to appear in “commercial” ads during the pre-election period opens the door to politically active nonprofits paying candidates to appear in political ads while simultaneously paying to place those ads. If the Commission intends to allow Gleich and other influencer-candidates to use the 11 C.F.R. § 109.21(i) safe harbor, it should require *both* the candidate and the entity paying for influencer services to have a commercial purpose. This is consistent with the Explanation and Justification, which states that the Commission’s focus in creating the safe harbor was crafting a rule that “capture[s] only *bona fide* business communications.”¹¹ Leaving the advertiser out of the analysis allows corporations to use soft money to influence elections, a result that is fundamentally at odds with the Federal Election Campaign Act.

Respectfully submitted,

/s/ Shanna (Reulbach) Ports

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⁹ See *supra* note 6.

¹⁰ *Issues*, Caroline Gleich United States Senate, <https://www.carolineforutah.com/issues> (last visited Aug. 27, 2024); Caroline Gleich, X, <https://x.com/carolinegleich/status/1772986945104404628> (Mar. 27, 2024).

¹¹ Coordinated Communications, 75 Fed. Reg. 55,947, 55,959 (Sept. 15, 2010).