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By Office of General Counsel at 9:27 am, Jul 10, 2024

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By Office of the Commission Secretary at 9:45 am, Aug 01, 2024

250 Massachusetts Ave NW, Suite 400 | Washington, DC 20001

July 10, 2024

BY ELECTRONIC MAIL DELIVERY

Office of General Counsel
Attn: Lisa J. Stevenson, Esq.
Acting General Counsel
Federal Election Commission
1050 First Street NE
Washington, DC 20463

Re: Advisory Opinion Request

Dear Ms. Stevenson:

On behalf of Caroline Gleich, we seek an advisory opinion from the Federal Election Commission (“*FEC*” or “*Commission*”) pursuant to 52 U.S.C. § 30108 of the Federal Election Campaign Act of 1971, as amended (the “*Act*”). Specifically, Requestor seeks confirmation that: (1) she may receive salary payments from her campaign committee during the 20-day period after she ceases to become a candidate for work performed prior to end of her candidacy; and (2) she may continue appearing in paid advertisements to promote the products and services of brands and companies in her capacity as an owner of her business, even if those ads air within 90 days of an election in Utah, without satisfying the content prong at 11 C.F.R. § 109.21(c)(4)(i).

I. FACTUAL DISCUSSION

Requestor is a candidate for U.S. Senate in Utah and will appear on the November 2024 general election ballot as the Democratic Party’s nominee for that office. The Committee to Elect Caroline Gleich is her principal campaign committee.¹

For the last 18 years, Requestor has been building her career as a professional skier, outdoorswoman, mountaineer and activist for clean air, climate action, and protection of public lands. In 2016, Requestor incorporated an LLC under the name Big Mountain Dreams (“*BMD*”),² and in 2021, it elected to be treated as an S Corporation.

In her capacity as the sole owner of BMD, Requestor provides influencer services, media content development and production services, and promotional marketing services, among others, to nonprofit organizations, global brands, and small businesses. BMD enters into contracts with

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

² Utah Secretary of State, Division of Corporations and Commercial Code, Big Mountain Dreams LLC, <https://secure.utah.gov/bes/index.html> (last visited May 30, 2024).

these clients and is paid in a variety of way, including retainer agreements and on a per project basis, for Requestor's services.

In the last year, Requestor's business has earned income from over a dozen clients. However, Requestor's income has dropped significantly because of her federal campaign and the reluctance of companies to work with her because of the uncertainty around whether such work would violate federal campaign finance laws. To compensate for the lost work and opportunities, Requestor intends to draw a salary from her campaign. Based on her average annual income during the most recent five calendar years, Requestor is eligible to receive \$87,000 in annual compensation under the Commission's revised candidate salary regulations.³ Requestor plans to continue working through her small business and will reduce any salary compensation she receives from her campaign by the amount of income earned through her business, in full compliance with the Commission's revised regulations.

In addition, Requestor proposes to recapture any salary payments to which she would have been entitled to receive during her candidacy in the 20-day period after her candidacy. It is impossible for Requestor to determine how much salary she is entitled to receive from her campaign at this time because any such payments must be offset by income from outside sources. Requestor is not compensated on an hourly or annual basis, or any other fixed schedule, so she proposes to recapture any permissible salary payments following the conclusion of her candidacy but within the 20-day post-candidacy window. During this period, Requestor will be able to determine the exact amount of income that was lost due to her candidacy. Requestor 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.⁴

Finally, as part of Requestor's continued promotional and marketing work through BMD, Requestor wishes to appear in paid advertisements (including those placed for a fee on third-party websites) that promote the products and services of the brands and companies she endorses. Just as she did prior to her candidacy, Requestor would appear solely in her capacity as an owner of BMD. The commercial sponsors would contract with BMD for Requestor's services and pay BMD for the services. The ads would not refer to Requestor's candidacy or promote, attack, support, or oppose ("PASO") Requestor or any federal candidate. The ads would appear throughout the election cycle, including within 90 days of an election, in Utah and elsewhere. We will refer to the ads as the "*Commercial Advertisements.*"

II. QUESTIONS PRESENTED

1. During the 20-day period following the termination of Requestor's federal candidacy, may Requestor recapture any salary payments to which she would have been entitled during her candidacy?
2. May Requestor continue to appear in the Commercial Advertisements, even if they appear within 90 days of an election?

³ Candidate Salaries, 89 Fed. Reg. 5, 10 (Jan. 2, 2024) (hereinafter "Candidate Salaries Final Rule").

⁴ Should Requestor elect to draw a salary prior to the 20-day post-election window, Requestor will reimburse her campaign for any salary payments that she otherwise would not have been entitled to receive based on her income from BMD.

III. LEGAL ANALYSIS

A. Requestor May Recapture Salary Payments During the 20-Day Period Following the General Election or Termination of Her Campaign

In revising its regulations governing candidate salaries, the Commission reaffirmed that the payment of a salary to a candidate is not personal use when “it compensate[s] candidates for lost income that is foregone due to becoming a candidate.”⁵ “[B]ut for the candidacy, the candidate would be paid a salary in exchange for services rendered to an employer.”⁶

Under the revised regulations, candidates may receive salaries from their campaign, “provided that the compensation does not exceed the lesser of: either 50% of the minimum salary paid to a Member of the United States House of Representatives under 2 U.S.C. 4501, and the average annual income that the candidate earned during the most recent five calendar years in which the candidate earned income prior to candidacy.”⁷ Campaigns must also reduce the maximum amount of compensation permissible by any outside earned income the candidate receives after filing the statement of candidacy.⁸

The new regulations also revise the period under which candidates may receive a salary from their campaign. Under the old regulation, candidates were prohibited from receiving salary payments after losing a primary, withdrawing from the race, or otherwise ceasing to become a candidate.⁹ If the candidate won the primary, they were prohibited from receiving salary payments after the date of the general election.¹⁰ Under the new regulations, all candidates may receive compensation from campaign funds for 20 days after winning or losing the election or otherwise ceasing to become a federal candidate.¹¹ In adopting the 20-day period, the Commission noted that all candidates must spend time winding down their campaigns, and that this 20-day period reflects the time period that campaigns disclose reportable activity for post-general election reports.¹²

⁵ Candidate Salaries Final Rule at 10 (alteration in original) (quoting Disclaimers, Fraudulent Solicitation, Civil Penalties, and Personal Use of Campaign Funds, 67 Fed. Reg. 76,962, 76,972 (Dec. 13, 2002)).

⁶ *Id.* at 6 (quoting Disclaimers, Fraudulent Solicitation, Civil Penalties, and Personal Use of Campaign Funds, 67 Fed. Reg. at 76,971).

⁷ 11 C.F.R. § 113.1(g)(6)(ii); Candidate Salaries Final Rule at 10. The compensation is calculated at a daily rate, rounded to the nearest dollar. Candidate Salaries Final Rule at 10; 11 CFR § 113.1(g)(6)(ii).

⁸ 11 C.F.R. § 113.1(g)(6)(iv); Candidate Salaries Final Rule at 11.

⁹ Candidate Salaries Final Rule at 12.

¹⁰ *Id.*

¹¹ 11 C.F.R. § 113.1(g)(6)(v)(B); Candidate Salaries Final Rule at 13.

¹² Candidate Salaries Final Rule at 13.

Based on Requestor's average income earned through BMD in the last five years, she is eligible to receive \$87,000 from her campaign committee.¹³ The new regulations require that Requestor's campaign committee reduce the amount of salary payments by the amount Requestor receives from outside sources, which includes any funds received through BMD. However, Requestor does not receive income on a fixed schedule, which complicates her ability to calculate the amount of salary she is entitled to receive at any given time. As such, Requestor proposes to recapture salary payments during the 20-day post-candidacy period that she otherwise could receive during her candidacy.

Under this proposal, Requestor will be able to calculate how much of her income was lost due to her candidacy. Specifically, during the 20-day post-candidacy period, Requestor will be able to calculate precisely how much outside income she received from BMD during her candidacy which, in turn, will allow her to subtract that outside income from amounts available as compensation from her campaign. This proposal provides Requestor with reassurance and flexibility that is tailored to her specific circumstances while also complying with the Commission's regulations governing candidate salaries. Accordingly, we request that the Commission confirm that Requestor may recapture any salary payments during the 20-day wind down period following the conclusion of her federal candidacy.

B. Requestor's Appearance in Commercial Advertisements are not Coordinated Communications

Requestor may appear in Commercial Advertisements in Utah within 90 days of an election, without the costs of the advertisements constituting impermissible contributions to her Senate campaign because the advertisements are not "coordinated communications" under 11 C.F.R. § 109.21.

Under the Act, any expenditure made "in cooperation, consultation or concert with, or at the request or suggestion of," a candidate, the candidate's authorized committee, or their agents is considered a contribution.¹⁴ Under Commission regulations, expenditures for "coordinated communications" are addressed under a three-part test at 11 C.F.R. § 109.21. A communication is considered "coordinated" if it is paid for by someone other than the candidate, the candidate's authorized committee, or their agents (payment prong); satisfies one of the enumerated content standards (content prong); and satisfies one of the six conduct standards (conduct prong).¹⁵ Relevant here, the content standard may be satisfied if the communication refers to a clearly identified Senate candidate and is publicly distributed in that candidate's jurisdiction within 90 days of the candidate's primary or general election.¹⁶ If all three prongs are satisfied, the

¹³ BMD is currently an S Corporation, which means that it passes its income, losses, deductions, and gains through to Requestor, its shareholder, for federal taxation purposes. *See* IRS, S Corporations, <https://www.irs.gov/businesses/small-businesses-self-employed/s-corporations#:~:text=S%20corporations%20are%20corporations%20that,shareholders%20for%20federal%20tax%20purposes> (last visited May 30, 2024). Requestor determined her earned income using the income attributable to her as reported on her personal tax returns.

¹⁴ 52 U.S.C § 30116(a)(7)(B).

¹⁵ 11 C.F.R. § 109.21(a), (c)-(d).

¹⁶ 11 C.F.R. § 109.21(c)(4)(i).

communication is considered coordinated and therefore treated as an-kind contribution to the candidate.¹⁷

Not *all* communications that satisfy the three-part test are “coordinated communications,” however. The regulations provide a safe harbor that exempts business communications from the definition of a coordinated communication. Specifically, a public communication in which a federal candidate is clearly identified in the candidate’s “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” so long as two conditions are met: (1) the medium, timing, content, and geographic distribution of the public communication must be consistent with public communications made prior to the candidacy; and (2) the public communication must not “promote, support, attack, or oppose that candidate or another candidate who seeks the same office as that candidate.”¹⁸ The Commission has explained that the safe harbor was specifically designed to exempt “*bona fide* business communications” from the coordination regulations.¹⁹

The Commercial Advertisements satisfy the safe harbor. Prior to her candidacy, Requestor established a business, BMD, to receive income in exchange for promoting the products and services of the brands and companies she endorses. Requestor owns and operates BMD. The brands and companies contract with and compensate BMD for the services that Requestor provides, including her appearance in the Commercial Advertisements. Requestor is clearly identified in the Commercial Advertisements solely in that capacity – not as a candidate. Her candidacy would not be referenced in the Commercial Advertisements. Neither the Requestor nor any other federal candidate would be PASO’d. And the medium, timing, content, and geographic distribution of the Commercial Advertisements identifying Requestor will be consistent with other advertisements featuring her prior to her candidacy. Therefore, the safe harbor is satisfied.

The fact that the Requestor’s business is not the sponsor of the Commercial Advertisements and is not referenced in the Commercial Advertisements is immaterial. The regulation does not require that the candidate’s business sponsor the ad. It merely requires that the candidate is clearly identified in a commercial capacity – as the owner and operator of a business – rather than in her capacity as a candidate.²⁰ In today’s business world, thousands of people earn income every day because the marketplace finds commercial value in their personal brand. Requestor is no different. To deny Requestor the protection that the safe harbor affords merely because the ads are not sponsored by and do not explicitly reference BMD is plainly inconsistent with the purpose behind the safe harbor, and it would place the Commission in the untenable position of regulating commercial activities that have absolutely no connection with a federal election. The Commission’s regulatory interest starts and ends with activities made “for the purpose of *influencing a federal election*.”²¹ Requestor’s clients are paying her to appear in commercial advertisements to promote and market their products and services; they are not paying her to appear in any advertisements for the purpose of influencing any federal election.

¹⁷ 11 C.F.R. 109.21(b).

¹⁸ 11 C.F.R. § 109.21(i).

¹⁹ Coordinated Communications, 75 Fed. Reg. 55,947, 55,959 (Sept. 15, 2010).

²⁰ 11 C.F.R. 109.21(i)

²¹ 52 USC § 30101(8)(B), (9)(A).

Moreover, the Commission has long recognized that “an individual may pursue gainful employment while a candidate for Federal office.”²² For instance, the Commission explained that a candidate may receive compensation while running for office without having to treat the compensation as campaign contributions, so long as the compensation was earned “irrespective of candidacy.”²³ The Commission considers, among other things, whether the compensation is the result of *bona fide* employment that is genuinely independent of the campaign.²⁴ The reasoning behind these rules applies with equal force here. Requestor’s commercial activities predate her federal candidacy and are completely independent of her candidacy. She will be compensated through her business activities, like she was prior to her candidacy, based on services rendered that reflect bona fide commercial considerations.

IV. CONCLUSION

For these reasons, Requestor asks that the Commission confirm that she may recapture any permissible salary payments from her campaign committee in the 20-day period following her candidacy; and that she may continue to appear in commercial advertisements in Utah within 90 days of an election, so long as the advertisements do not reference any federal candidate, solicit contributions, contain express advocacy, or PASO any federal candidate.

Very truly yours,



Jon Berkon
Jonathan Peterson
Counsel to Caroline Gleich

²² See Advisory Opinion 2004-17 (Klein) (quoting Advisory Opinion 1979-74 (Emerson)); Expenditures; Reports by Political Committees; Personal use of Campaign Funds, 60 Fed. Reg. 7,862, 7,871-72 (Feb. 9, 1995).

²³ Expenditures; Reports by Political Committees; Personal Use of Campaign Funds, 60 Fed. Reg. at 7,872.

²⁴ *Id.*

July 26, 2024

BY ELECTRONIC MAIL DELIVERY

Office of General Counsel
Attn: Sarah Peck
Acting General Counsel
Federal Election Commission
1050 First Street NE
Washington, DC 20463

Re: Supplement to Advisory Opinion Request

Dear Ms. Peck:

Below are the responses to the questions you sent via email on July 23, 2024, regarding an advisory opinion request submitted on behalf of Caroline Gleich on July 10, 2024. We urge the Office of General Counsel to move expeditiously in concluding that this request is now a complete advisory opinion request.

1. Could you give us more detail about the kinds of advertisements that Ms. Gleich will be engaging in?

Ms. Gleich will primarily appear in advertisements on Instagram, Facebook, and similar digital platforms and applications. Ms. Gleich may also appear in printed communications such as catalogs and magazines that promote the products and services of the brands and companies she endorses. As the request explains, these advertisements will not reference her candidacy, solicit contributions, contain express advocacy, or PASO any federal candidate.

a. Are you asking only about her appearances in advertisements placed for a fee on third-party websites?

Ms. Gleich's request covers advertisements that are placed for a fee on a third-party website, platform, or application by companies and brands; advertisement that are promoted (i.e., "boosted") by companies and brands; and communications printed by companies and brands, such as magazines and catalogs.

b. What about all the other services she typically provides, such as influencer services?

Ms. Gleich's influencer services are commercial in nature just like the advertisements that are placed or promoted by brands and companies on third-party websites, platforms, or applications.

c. What encompasses a “paid advertisement?”

For purposes of this request, a “paid advertisement” includes: (1) any advertisement that clearly identifies Ms. Gleich and is placed for a fee or promoted for a fee on a third-party website, platform, or application; and (2) printed communications that are paid for and distributed by companies and brands. As the request explains, Ms. Gleich appears in these commercial advertisements to promote the products and services of the brands and companies she endorses.

d. Do her contracts pay fair market value?

Yes.

2. How will the potential future public communications be consistent with other public communications made by her business prior to the candidacy in terms of medium, timing, content, and geographic distribution?

The potential future commercial advertisements identifying Ms. Gleich will be materially indistinguishable from the commercial advertisements that identified her prior to her candidacy. In these communications, Ms. Gleich will promote the products and services of brands and companies, and these advertisements will primarily appear on Instagram and Facebook. Ms. Gleich may also appear in written materials promoting these products and services. The timing and distribution of these future communications will be driven by the business needs of Ms. Gleich’s clients.

3. Could you explain more about what you meant by satisfying the content standard? Are you asking the Commission to ask whether the content standard is satisfied or whether the safe harbor is satisfied?

The request asks whether these paid advertisements are exempt from regulation as coordinated communications if they are distributed within 90 days of Utah’s upcoming general election. The request sets forth the arguments as to why these communications satisfy the safe harbor and thus are not subject to regulation by the Commission.

Very truly yours,



Jon Berkon
Jonathan Peterson
Counsel to Caroline Gleich