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May 16, 2024
Advisory Opinion 2024-04

D. Andrew Gaona
Austin Yost
Coppersmith Brockelman
2800 N. Central Ave., Ste. 1900
Phoenix, Arizona 85004

Dear Mr. Gaona:

We are responding to your advisory opinion request (“AOR”) on behalf of the Arizona Democratic Party project known as the Arizona Democratic Legislative Campaign Committee concerning whether activities by employees may be campaign media spending subject to the reporting requirements of the Voter’s Right Know Act (the “Act” or the “VRKA”), A.R.S. §§ 16-971 to 16-979.

Question Presented¹

Does the payment of employee salary and selected benefits (health, dental, vision, and retirement) and other select costs (such as training, coaching, and travel) constitute campaign media spending and does the determination turn on the duties of a particular employee?

¹ The questions presented have been condensed from the request to avoid redundancy. The question presented identified each benefit category and the select costs in separate questions. Because those differences are not relevant to the Commission’s analysis, this response does not repeat them.

Summary answer

Yes, salaries, benefits and other costs associated with an employee who is hired for the election and who works on projects that are activities contained in the definition of campaign media spending or specifically conducted in preparation for or in conjunction with campaign media spending under the Act are included in determining the amount of campaign media spending in which the employer has engaged.

Background

The facts presented in this advisory opinion are based on your AOR received April 3, 2024 and publicly available information.

The Arizona Democratic Party is a political party organized in Arizona. AOR at 1. The Arizona Democratic Legislative Campaign Committee (“ADLCC”) describes itself as a project of the ADP. *Id.* The project “recruits, trains, and supports legislative candidates by vetting, selecting, and managing award winning direct mail [and] digital consultants; providing comprehensive legal services; investing in high-quality polling and opposition research; and connecting local and national donors to the most competitive legislative races.” *Id.* The Arizona Democratic Party is a covered person. *Id.*

The ADLCC intends to begin hiring additional staff for the election to help it in its “general mission of electing Democrats.” *Id.* The staff members are in addition to the ADLCC’s existing staff. *Id.* If hired, an ADLCC employee will receive a salary and “traditional benefits” like health and vision insurance *Id.* Employees may also receive a stipend for transportation expenses and other expenses. *Id.* Employees may receive retirement benefits. *Id.* They will also receive training. *Id.*

Describing the staff role as having a “common goal: helping elect Democrats,” ADLCC states that staff members may

- “craft the messaging and design of a public advertisement (including conducting research),”
- “craft the language of poll[s]”
- “work with candidates on strategy (including communications strategy) and fundraising appeals (which may take the form of individual communications or mass email appeals). *Id.*
- additionally, other staff members “may be responsible for helping organize and arrange the logistics of canvasses in targeted areas to

allow volunteers to go door-to-door in support of Democratic candidates and policies.” *Id.*

The AOR notes that while ADLCC employees may work on advertisements, the advertisements themselves will be run by third party vendors, as will any polls.

Legal analysis

Voters passed the VRKA as Proposition 211 at the 2022 General Election, and it was certified by Governor Doug Ducey in December 2022. The Act provides for reports by covered persons, that is, “any person whose total campaign media spending or acceptance of in-kind contributions to enable campaign media spending, or a combination of both, in an election cycle is more than \$50,000 in statewide campaigns or more than \$25,000 in any other type of campaigns.” A.R.S. § 16-971(7)(a). “For the purposes of [the VRKA], the amount of a person’s campaign media spending includes campaign media spending made by entities established, financed, maintained or controlled by that person.” *Id.*

Background

Reports of disbursements and receipts by political committees and parties

Arizona law requires political committees, including political parties, to disclose their “receipts” and “disbursements”, including contributions that these organizations receive and expenditures that they make. A.R.S. § 16-926(B)(2)-(3). Expenditure is a defined term that means “any purchase, payment or other thing of value that is made by a person for the purpose of influencing an election.” A.R.S § 16-901(25).

However, eight categories of spending are excluded from the definition of expenditure:

1. The value of an individual's volunteer services or expenses that are provided without compensation or reimbursement, including the individual's:
 - (a) Travel expenses.
 - (b) Use of real or personal property.
 - (c) Cost of invitations, food or beverages.
 - (d) Use of e-mail, internet activity or social media messages, only if the individual's use is not paid for by the individual or any other person and if the e-mails, social media messages or other internet activities do not contain or include transmittal of a paid advertisement or paid fund-raising solicitation.

2. The value of any news story, commentary or editorial by any broadcasting station, cable television operator, video service provider, programmer or producer, newspaper, magazine, website or other periodical publication that is not owned or operated by a candidate, a candidate's spouse or any committee.
3. The payment by any person to defray a political party's operating expenses or party-building activities, including:
 - (a) Party staff and personnel.
 - (b) Studies and reports.
 - (c) Voter registration, recruitment, polling and turnout efforts.
 - (d) Party conventions and party meetings.
 - (e) Construction, purchase or lease of party buildings or facilities.
4. The value of any of the following to a committee:
 - (a) Interest earned on the committee's deposits or investments.
 - (b) Transfers between committees to reimburse expenses and distribute monies raised through a joint fund-raising effort, except that contributions shall be allocated as described in the fund-raising solicitation and expenses shall be allocated in the same proportion as contributions.
 - (c) Payment of a committee's legal or accounting expenses.
 - (d) An extension of credit for goods and services on a committee's behalf by a creditor if the terms are substantially similar to extensions of credit to nonpolitical debtors that are of similar risk and size of obligation. The creditor must make a commercially reasonable attempt to collect the debt, except that if an extension of credit remains unsatisfied by the committee after six months the committee is deemed to have received a contribution but the creditor is not deemed to have made a contribution.
5. The value of nonpartisan communications that are intended to encourage voter registration and turnout efforts.
6. Any payment by a person that is not a committee to a filing officer for arguments in a publicity pamphlet.
7. Any payment for legal or accounting services that are provided to a committee.
8. The payment of costs of publishing a book or producing a documentary, if the publication and production are for distribution to the general public through traditional distribution mechanisms or a fee is obtained for the purchase of the publication or viewing of the documentary.

Reports by covered person's donations and disbursements

Covered persons are required to report donations of traceable monies and disbursements of traceable monies over \$10,000 under the Voter's Right to Know Act. A.R.S. § 16-973(A)(8). "All records required to be retained by Chapter 6.1 of Title 16 shall be kept in such order that a reasonable person could confirm the accuracy of transactions, transfer records, *reports*, opt out notices, and other information by review of the documents and other information." Ariz. Admin. Code § R2-20-807(A) (emphasis added). "Traceable monies" means "[m]onies that have been given, loaned or promised to be given to a covered person and for which no donor has opted out of their use or transfer for campaign media spending . . . [and] [m]onies used to pay for in-kind contributions to a covered person to enable campaign media spending." A.R.S. § 16-971(18). Political action committees and parties are subject to the same substantive reporting requirements as other covered persons. A.R.S. § 16-973.

Campaign media spending is a separately defined term under the Voter's Right to Know Act. The definition includes a number of public communications related to types of campaigns, including candidate campaigns, ballot measure campaigns, and recalls. A.R.S. § 16-971(2)(a)(i)-(v). The definition also includes two other provisions that address spending in addition to public communications. These include:

An activity or public communication that supports the election or defeat of candidates of an identified political party or the electoral prospects of an identified political party, including partisan voter registration, partisan get-out-the-vote activity or other partisan campaign activity.
[and]

Research, design, production, polling, data analytics, mailing or social media list acquisition or any other activity conducted in preparation for or in conjunction with any of the activities described in items (i) through (vi) of this subdivision.

A.R.S. § 16-971(2)(a)(vi)-(vii).²

² The VRKA also provides for exceptions. Section 16-971(2)(b)(i)-(iv) provides that campaign media spending does not include:

(i) A news story, commentary or editorial by any broadcasting station, cable television operator, video service provider, programmer or producer, newspaper, magazine, website or other periodical publication that is not owned or operated by a candidate, a candidate's spouse or a candidate committee, political party or political action committee.

(ii) A nonpartisan activity intended to encourage voter registration and turnout.

(iii) Publishing a book or producing a documentary, if the publication or production is for distribution to the general public through traditional distribution mechanisms or if a fee is required to purchase the book or view the documentary.

Under the Commission’s rules:

[f]or purposes A.R.S. § 16-971(2)(a)(vii), research, design, production, polling, data analytics, mailing or social media list acquisition or any other activity conducted in preparation for or in conjunction with any of the other activities described in A.R.S. § 16-971(2)(a) shall not be considered campaign media spending unless these activities are *specifically conducted* in preparation for or in conjunction with those other activities.

Ariz. Admin. Code R2-20-802(B), available at <https://storageccec.blob.core.usgovcloudapi.net/public/docs/957-Arizona-Administrative-Register-for-R2-20-801-to-R2-20-808.pdf> (emphasis added).

Question: Does the payment of employee salary and selected benefits (health, dental, vision, and retirement) and other select costs (such as training, coaching, and travel) constitute campaign media spending and does the determination turn on the duties of a particular employee?

The question presented by the AOR essentially asks when a political party hires staff for the election, for the purpose of electing its nominees and candidates, and identifies research, polling design, and communications work to be used in the preparation for or in conjunction with public communications and activities, could monies spent on staff for those purposes count as campaign media spending.³ With respect to staff salaries, benefits, reimbursements, and other employee related expenses, the answer is yes.

Similarly, where, as the AOR proposes, a person is hired to work on the election of party candidates whose duties involve preparing for canvassing and similar activities that will later involve volunteers, and those activities “support[] the election or defeat of candidates of an identified political party or the electoral prospects of an identified political party” payments to the person involve campaign media spending under the Act.

(iv) Primary or nonpartisan debates between candidates or between proponents and opponents of a state or local initiative or referendum and announcements of those debates.

³ This response does not address the permanent staff of the party referred to at 1.

The Commission's rules provide that, for purposes of A.R.S. § 16-971(2)(a)(vii), "research, design, production, polling, data analytics, mailing or social media list acquisition or any other activity," in order to be campaign media spending, must be "specifically conducted" in preparation or conjunction with other campaign media spending. This standard is met under these facts. The AOR identifies the employees as hired for the election and identifies the activities the employees would undertake that are in conjunction with or in preparation for campaign media spending.

If one of an employee's several duties may be to work on projects in preparation for other campaign media spending, or some of the employee's work may be used for campaign media spending but not all of it, the employee's activities that are included under the definition may still be "specifically conducted" in preparation or conjunction with campaign media. A contrary analysis would turn compliance into a semantic exercise where a party, by avoiding certain words in a job posting or description, or in assigning a particular activity, could claim that hiring employee to engage in campaign media spending and other activities was not a hiring "specifically conducted" in preparation or conjunction with campaign media spending despite objective evidence to the contrary.

On the other hand, where an activity is undertaken for another purpose and later used for campaign media spending, it would not be "specifically conducted" in preparation or in conjunction with campaign media spending.⁴ For example, if the ADLCC hires a press aide for the election, that person's salary and benefits are not in and of themselves campaign media spending. But if the press aide wrote ad copy for a mailer or a television script for a 30-second spot that are subject to the definition of campaign media spending, the press aide's salary and benefits for those activities would be campaign media spending, while other job duties, such as writing press releases or communicating with journalists, would not be. These acts generally have different purposes, serve different audiences, and result in different products, one of which may be a public communication in the form of a political advertisement or mailer.

To illustrate the point, the statute provides that partisan get-out-the-vote efforts, such as canvassing, are campaign media spending. A.R.S. § 16-971(2)(a)(vi). The Act and rules also provide that work specifically conducted in preparation for or in conjunction with campaign media spending is to be included in calculating the amount of campaign media spending. A.R.S. § 16-971(2)(a)(vii);

⁴ General management and training costs attributable to an employee are not in preparation or conjunction with campaign media spending.

Ariz. Admin. Code R2-20-801(B). Consequently, under the facts presented, if a staff person organizes a partisan canvassing effort to be performed by volunteers, those preparatory activities fit squarely within the statutory definition and their costs must be included in determining the amount of campaign media spending.⁵

The ADLCC is correct that the Act did not alter the definition of expenditure in Chapter 6, Article 1. However, the analysis here is not based on the definition of expenditure in Article 1. It is based on the definition of campaign media spending. Where the facts presented demonstrate that staff is being hired for the election in order to support party candidates by performing activities that fit squarely under the Act's relevant statutes, disclosure is required subject to the Act's thresholds.

Comparing the definitions of traceable monies and campaign media spending in the Act to the definition of expenditure under A.R.S. § 16-901(25) and the exemptions under A.R.S. § 16-921 leads to the conclusion that spending that is not an "expenditure" under those statutes can be "campaign media spending" under the VRKA. For example, A.R.S. § 16-921(B)(3) provides for an exemption for certain "party building activities" like voter registration. The Act, on the other hand, specifically includes partisan voter registration as campaign media spending. A.R.S. § 16-971(2)(a)(vi). With regard to disclosure requirements, the Act chose to use different terms and different definitions than the Legislature chose to use in Article 1. The result is merely additional disclosure. Nothing in the definition of campaign media spending blocks or limits spending.

This analysis necessarily means that an employee's particular job duties (i.e. activities) determine whether or not the activity itself is specifically conducted in preparation or conjunction with other campaign media spending or is an activity that itself is campaign media spending, such as "partisan voter registration, partisan get-out-the-vote activity or other partisan campaign activity."

A party need not attribute the entirety of an employee's salary and benefits to campaign media spending just because an employee performs some work in preparation for or in conjunction with campaign media spending. The party need only keep "records required to be retained by Chapter 6.1 of Title 16 in such order that a reasonable person could confirm the accuracy of . . . reports . . . and other information . . ." Ariz. Admin. Code R2-20-807(A).

⁵ The AOR itself acknowledges that some staff may do preparation for paid advertising, but other staff will be paid to organize get-out-the vote efforts. AOR at 1-2.

The Federal Election Commission has enacted a rule providing that “[e]xpenditures for rent, personnel, overhead, general administrative fund-raising, and other day-to-day costs of political committees need not be attributed to individual candidates, unless these expenditures are made on behalf of a clearly identified candidate and the expenditure can be directly attributed to that candidate.” The upshot of this rule is that costs such as overhead that would exist regardless of a specific candidate’s campaign are not attributable to that candidate for reporting purposes. This FEC rule, however, doesn’t really address the issue raised in the AOR. The FEC rule contemplates that a political committee need not allocate certain spending to individual candidates it supports as an expenditure in support of that candidate. The VRKA requires covered persons to disclose disbursements of “traceable monies” over \$10,000 on reports filed with the Secretary of State. These are distinct requirements.

The party may make reasonable determinations about how to keep records of “activities” included in the definition of campaign media spending and spending in conjunction or in preparation for campaign media spending to accurately reflect their campaign media spending. For instance, the Act does not require time sheets be kept for each employee. But the Act’s definition of campaign media spending does not grant an exemption comparable to the federal rule described above for candidate expenditures. Consequently, the party may not take expenses contemplated by the Act’s plain terms “off the books.”

Because the statute requires at least disclosure of outlays greater than \$10,000, A.R.S. § 16-973(A)(8), the party must track its campaign media spending in a reasonable manner, including personnel costs of activities that are campaign media spending.⁶

⁶ The AOR argues that the Act and related campaign materials were not focused on the kinds of activities identified in the request. Whatever descriptions were involved, the terms of the statute here are clear. Although the Commission recognizes the potential for too much information cluttering reports, spending must reach the \$10,000 threshold to be required on the reports.

Conclusion

A Commission advisory opinion “may be relied upon by any person involved in the specific transaction or activity with respect to which such advisory opinion is rendered, and any person involved in any specific transaction or activity which is indistinguishable in all its material aspects from the transaction or activity with respect to which such advisory opinion is rendered.” Ariz. Admin. Code R2-20-808(C)(3). A “person who relies upon an advisory opinion and who acts in good faith in accordance with that advisory opinion shall not, as a result of any such act, be subject to any sanction provided in Chapter 6.1 of Title 16.” *Id.* at (C)(4). Advisory opinions may be affected by later events, including changes in law.

Sincerely,

Mark S. Kimble
Chair