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Advisory Opinion 2024-01

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We are responding to your advisory opinion request on behalf of the Democratic Legislative Campaign Committee concerning whether certain actions the Committee intends to take in support of legislative candidates in Arizona constitute campaign media spending under the Voter's Right Know Act (the "Act" or the "VRKA"), A.R.S. §§ 16-971 to 16-979.

Questions Presented¹

- 1) Does a monetary donation by an organization to a political party in Arizona constitute campaign media spending under the Act?
- 2) When an organization spends money researching, polling, or on data analytics does that constitute campaign media spending if it is done solely for "internal" projects?
- 3) Does making an in-kind donation of research, polling or data analytics constitute campaign media spending if the recipient of the in-kind donation engages in campaign media spending?

¹ The questions presented have been rephrased from the request to better reflect the issues raised by the Advisory Opinion Request.

Commission Response

Question 1

A donation of money to a political party is not itself campaign media spending. The party has reporting requirements under the Act if it is a covered person.

Question 2

Research, polling and data analytics done only for an organization's internal use are not campaign media spending if those actions are not taken in preparation or conjunction with other campaign media spending.

Question 3

Spending money on an in-kind donation in preparation or in conjunction with another entity's campaign media spending is not campaign media spending, but is traceable money that must be reported by the covered person if used to enable campaign media spending, including the donor and the original source of funds.

Background

The facts presented in this advisory opinion are based on your letter received November 27, 2023 (Advisory Opinion Request or "AOR") and publicly available information.

The Democratic Legislative Campaign Committee (DLCC or Committee) is "organized under section 527 of the Internal Revenue Code." AOR at 1. It is a "political organization" for tax purposes. *See* 26 U.S.C. § 527 (e)(1) ("The term 'political organization' means a party, committee, association, fund, or other organization (whether or not incorporated) organized and operated primarily for the purpose of directly or indirectly accepting contributions or making expenditures, or both, for an exempt function."). Such organizations are generally exempt from income taxes. 26 U.S.C. § 527(a).²

In order "[t]o effectuate its purpose of electing Democrats to state legislative offices," the Committee states that it intends to take three actions. AOR at 1. First, it intends to make financial contributions to the Arizona Democratic Party ("ADP"). *Id.* Second, it intends to spend money to hire one or more consultants to

² In its AOR, the Committee asserts that it is not subject to political committee registration in Arizona. *See* A.R.S. § 16-905. While this opinion acknowledges this assertion, the Committee may not rely on that acknowledgment for any other purpose or with any Arizona filing officer or enforcement officer.

perform research, polling, and data analytics related to legislative elections to be used for its own “internal planning purposes.” *Id.* at 1-2. Finally, the Committee plans to make in-kind donations for research, polling, and data analytics to other persons engaged in campaign media spending. *Id.* at 3. The value of its cash, spending and in-kind donations will “exceed \$25,000 per legislative election that the DLCC seeks to influence during the 2023-2024 cycle.” *Id.* at 2.

The Committee represents that it will neither spend money on nor accept in-kind donations to pay for any activities defined under the Act as campaign media spending. *Id.*

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.*

When those spending thresholds are reached, covered persons must file reports that disclose the original sources of their funding as well other information. Reports include the identity of each donor of original monies who contributed, directly or indirectly, more than \$5,000 of traceable monies or in-kind contributions for campaign media spending during the election cycle to the covered person and the date and amount of each of the donor’s contributions, the identity of each person that acted as an intermediary and that transferred, in whole or in part, traceable monies of more than \$5,000 from original sources to the covered person and the date, amount and source, both original and intermediate, of the transferred monies, and the identity of each person that received from the covered person disbursements totaling \$10,000 or more of traceable monies during the election cycle and the date and purpose of each disbursement. A.R.S. § 16-973(A)(6), (7), (8). Traceable monies under the Act includes “[m]onies used to pay for in-kind contributions to a covered person to enable campaign media spending.” A.R.S. § 16-971(18)(b).

Question 1

The first question presented by the AOR concerns whether a donation of money by the Committee to a state political party is itself campaign media spending. Merely donating money to a political party is not campaign media spending. The party is subject to reporting requirements under the Act if it is a covered person that engages in campaign media spending.

Question 2

The next question presented by the AOR is whether the Committee's plan to spend money on research, polling and data analytics only for internal use is campaign media spending.

Campaign media spending is a defined term under the Act that “[m]eans spending monies or accepting in-kind contributions to pay for any of the following”:

- (i) A public communication that expressly advocates for or against the nomination, or election of a candidate.
- (ii) A public communication that promotes, supports, attacks or opposes a candidate within six months preceding an election involving that candidate.
- (iii) A public communication that refers to a clearly identified candidate within ninety days before a primary election until the time of the general election and that is disseminated in the jurisdiction where the candidate's election is taking place.
- (iv) A public communication that promotes, supports, attacks or opposes the qualification or approval of any state or local initiative or referendum.
- (v) A public communication that promotes, supports, attacks or opposes the recall of a public officer.
- (vi) 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.
- (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 activities described in items (i) through (vi) of this subdivision.

A.R.S. § 16-971(2)(a).

Section 16-971(2)(a)(vii) specifically addresses research, polling and data analytics. It provides that these actions are campaign media spending if they are “conducted in preparation for or in conjunction with any of the activities described in items (i) through (vi) of this subdivision.” *See also* Ariz. Admin. Code § R2-20-801(B) (addressing requirement that expenses under 16-972(a)(7)(vii) are not campaign media spending unless conducted “in preparation for or in conjunction with” other activities listed in the definition of campaign media spending).

As is apparent from the language in this definition, most campaign media spending involves “public communication.” Public communication “[m]eans a paid communication to the public by means of broadcast, cable, satellite, internet or another digital method, newspaper, magazine, outdoor advertising facility, mass mailing or another mass distribution, telephone bank or any other form of general public political advertising or marketing, regardless of medium.” A.R.S. § 16-971(17)(a).

Campaign media spending also includes “activit[ies] . . . that support[] 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” are “campaign media spending.” A.R.S. § 16-971(2)(a)(vi).

The Committee, by the terms of its AOR request, states that the spending it contemplates for research, polling and data analytics is to “effectuate its purpose of electing Democrats to state legislative offices” although it also asserts that such spending is for “internal planning purposes.” AOR at 1-2. The Act does not contemplate that purely internal planning by an organization is campaign media spending. However, where the organization’s express reason for being (including its chosen tax status) is electing partisan candidates to office, the organization may face additional concerns and should ensure such spending is actually for internal planning purposes and not used to prepare, or in conjunction with, other campaign media spending. However, provided that the Committee’s activities are in fact “internal” and not in preparation for or in conjunction with public communications under the act or “activity. . . that supports the election or defeat of candidates of an identified political party or the electoral prospects of an identified political party,” A.R.S. § 16-971(2)(a)(vi), these actions would not be campaign media spending.

Question 3

Finally, the Committee asks the Commission to confirm that an in-kind donation of research, polling or data analytics to another person who does engage in campaign media spending is not campaign media spending itself.

As explained above, [r]esearch . . . polling, [and] data analytics . . . conducted in preparation for or in conjunction with any of the activities [defining campaign media spending]” is campaign media spending. A.R.S. § 16-971(2)(a)(vii). While it is true, as the AOR notes (at 5) that the statute makes *acceptance* of such services by another person campaign media spending by the other person, the definition also states that the spending itself can be campaign media spending. A.R.S. § 16-971(2)(a). The statute resolves this tension by the way it defines this specific transaction. “Monies used to pay for in-kind contributions to a covered person to enable campaign media spending[,]” are “[t]raceable monies.” A.R.S. § 16-971(18)(b). Consequently, spending of this kind is not campaign media spending, but the in-kind donation, the donor and the original sources of funds must be disclosed by the donor to the covered person on request and reported by the covered person if the in-kind donation of research, polling, or data analytics is used for campaign media spending and the thresholds in the Act are met. A.R.S. § 16-973(A)(6)-(7).

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