

February 5, 2024

TO: Interested Parties

FROM: Jacquelyn K. Lopez

RE: **Federal Campaign Finance Restrictions on Super PAC Efforts to Gather Presidential Candidate Petitions**

This memorandum provides an overview of restrictions placed by the Federal Election Campaign Act of 1971, as amended (“*FECA*” or the “*Act*”) on a super PAC’s collection of petition signatures on behalf of an independent candidate for President. The legality of any specific activity depends on the factual circumstances. This memorandum is intended only as an overview of the relevant law.

I. Overview

Federal super PACs¹ are permitted to raise funds outside of the federal source restrictions and amount limitations, but are prohibited from making a contribution in any amount to a federal candidate.² A federal candidate, in turn, is prohibited from accepting a contribution from a super PAC.³

There are two ways that a super PAC’s efforts to gather petitions for an independent candidate for President could result in a contribution to that candidate in violation of the Act: (1) if the super PAC provides the candidate with petition signatures without charging fair market value for the underlying services; or (2) if the super PAC spends funds to collect petition signatures in

¹ A super PAC may also be organized within a “hybrid” or “Carey” PAC. A hybrid PAC is an entity with two accounts, one that functions as a super PAC and one as a regular PAC (meaning a PAC that raises and spends funds within the federal limits and source restrictions). See *Carey v. FEC*, Civ. No. 11-259-RMC (D.D.C. 2011); FEC Statement on *Carey v. FEC* (Oct. 6, 2011), available at <https://www.fec.gov/updates/fec-statement-on-carey-v-fec/>.

² *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 365-366 (2010); *SpeechNow.org v. Fed. Election Comm’n*, 599 F.3d 686, 696 (D.C. Cir. 2010); 52 U.S.C. § 30116(a) (prohibition on excessive contributions); *id.* § 30118(a) (prohibition on corporate contributions); FEC, Adv. Op. 2017-10 (Citizens Against Plutocracy) at 2 (“An independent expenditure-only political committee ‘may not make contributions to candidates or political party committees, including in-kind contributions such as coordinated communications.’”) (quoting Adv. Op. 2016-21 (Great America PAC) at 3-4); FEC, Adv. Op. at 2010-11 (Commonsense Ten) at 2-3.

³ 52 U.S.C. §§ 30116(f); 30118(a).

coordination with the candidate. These are independent bases for a violation of the Act; either would create legal liability for the super PAC and the candidate.

I. Providing Petition Signatures Without Payment

A contribution includes “any gift, subscription, loan, advance, or deposit of money or anything of value made by any person for the purpose of influencing any election for Federal office.”⁴ The “provision of any goods or services without charge or at a charge that is less than the usual and normal charge” is an “in-kind” contribution.⁵ The Federal Election Commission (“*FEC*”) has previously held that a third party collecting and providing a candidate with petition signatures without charge results in an in-kind contribution.⁶ Coordination in advance, or during the signature collection process, is not necessary for a contribution to result under the plain text of the Act and *FEC* regulations. Providing the thing of value – here the petition signatures – is sufficient to cause an in-kind contribution.⁷

The United States District Court for the District of Columbia recently analyzed the scope of a contribution under *FECA* in a very similar context – a super PAC proposing to collect email addresses on behalf of a potential federal candidate. The court held that such conduct would result in a prohibited in-kind contribution in the form of a gift, as the email addresses would have been provided free of charge and were a “uniquely effective, tangible tool designed to assist [the candidate] in purs[u]ing [sic] the presidency.”⁸ The court noted that such a result is not only “consistent with the term [gift’s] ordinary meaning, it is the only one that is plausible in context. *FECA*’s concern is the provision of benefits to candidates—i.e. the giving of things to candidates—in ways that might give rise to corruption or its appearance . . . The plain meaning of ‘gift’ addresses precisely this concern.”⁹

A super PAC could submit petition signatures collected on behalf of a presidential candidate either by: (1) providing the signatures to the candidate for submission; or (2) providing the signatures directly to the relevant state authority. The feasibility of the second option depends on state law. The distinction between the two options is unlikely to have legal significance under *FECA*. In either instance, the spending on the petition collection has only one beneficiary – the presidential candidate. The candidate receives the benefit of the petitions in the form of ballot access whether the candidate submits the petitions directly or the petitions get submitted on their behalf.

⁴ *Id.* § 30101(8)(A)(i).

⁵ 11 C.F.R. § 100.52(d)(1).

⁶ *FEC*, MUR 5581 (Arizona Republican Party), Factual and Legal Analysis at 3 (June 8, 2005), <https://www.fec.gov/files/legal/murs/5581/000055CA.pdf> (finding reason to believe that the Arizona Republican Party funding petition gathering efforts for Nader for President was an excessive in-kind).

⁷ See 52 U.S.C. § 30101(8)(A)(i); see also *Ready for Ron v. Fed. Election Comm’n*, No. CV 22-3282, 2023 WL 3539633, at *18 (D.D.C. May 17, 2023) (holding a potential candidate accepting a large contact list is subject to *FECA*’s limitations).

⁸ *Ready for Ron v. Fed. Election Comm’n*, No. CV 22-3282, 2023 WL 3539633, at *16-18 (D.D.C. May 17, 2023)

⁹ *Id.* at 17-18 (emphasis added) (internal citations omitted).

II. Coordinating on Gathering Petition Signatures

A contribution to a candidate also includes an “expenditure” made “in *cooperation, consultation, or concert, with, or at the request or suggestion of*” a candidate, their political committee, or their agents.¹⁰ An “expenditure,” in turn, broadly includes “any purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value, made by any person for the purpose of influencing any election for Federal office.”¹¹

The FEC has long held that funds spent on gathering signatures for nomination petitions are “expenditures” under FECA.¹² Therefore, if signature gathering efforts are done “in cooperation, consultation, or concert, with, or at the request or suggestion of” a candidate, funds spent on such efforts will result in a contribution to the candidate.¹³ The plain statutory text sets forth a low bar to establish coordination: mere cooperation or consultation is enough.¹⁴

Avoiding cooperation or consultation with a candidate in the petition collection and submission process is likely impossible in many states given rules that require participation by the candidate themselves. By way of example only, in Arizona, the independent presidential candidate is required to themselves “designate in writing to the secretary of state the names of the candidates who will represent the presidential candidate *before* any signatures for the candidate can be accepted for filing.”¹⁵ In Michigan, the filing officer (1) provides the blank qualifying petitions *to the candidate*; and (2) receives the petitions *from a candidate* who meets the requirements of Michigan law.¹⁶

¹⁰ 52 U.S.C. § 30116(a)(7)(B)(i) (emphasis added); 11 C.F.R. § 109.20. FEC regulations provide a separate analysis for when a payment for a communication cost is considered to be coordinated with a candidate and results in an in-kind contribution. 11 C.F.R. § 109.21(a), (b). Expenditures for gathering and submitting petitions are not communication costs; the purpose of the spending is not to communicate a message but rather to secure ballot access. The mere presence of some form of communication in the process of making the expenditure (speaking to petition signers) does not turn the overall expense into a communication cost. *See Campaign Legal Ctr. v. Fed. Election Comm’n*, 646 F. Supp. 3d 57, 64-66 (D.D.C. 2022).

¹¹ 52 U.S.C. § 30101(9)(A)(i); *See also Common Cause Georgia v. Fed. Election Comm’n*, No. 22-CV-3067, 2023 WL 6388883, at *10 (D.D.C. Sept. 29, 2023) (also noting that when the Federal Election Commission carves out exceptions to “expenditure,” it does so expressly, such as nonpartisan voter registration activity or news stories).

¹² FEC, Adv. Op. 1994-05 (White) at 4, <https://www.fec.gov/files/legal/aos/1994-05/1994-05.pdf>; FEC, MUR 5581 (Arizona Republican Party), Factual and Legal Analysis at 3 (June 8, 2005), <https://www.fec.gov/files/legal/murs/5581/000055CA.pdf>; FEC, Adv. Op. 2006-20 (Unity08) (Oct. 10, 2006) at 4, <https://www.fec.gov/files/legal/aos/2006-20/2006-20.pdf>. While the D.C. Circuit held that funds spent on ballot access expenditures by a 527 organization to form a new political party were not expenditures sufficient to trigger political party status, the conclusion was based on the organization never supporting a clearly identified candidate. *Unity08 v. F.E.C.*, 596 F.3d 861, 869 (D.C. Cir. 2010).

¹³ 52 U.S.C. § 30116(a)(7)(B)(i); 11 C.F.R. § 109.20.

¹⁴ *See e.g., See Common Cause Georgia v. Fed. Election Comm’n*, No. 22-CV-3067, 2023 WL 6388883, at *10 (D.D.C. Sept. 29, 2023) (holding that 52 U.S.C. § 30116(a)(7)(B)(i) is not a but for test but rather only requires that the payor coordinated with or acted at the request or suggestion of the beneficiary).

¹⁵ Ariz. Rev. Stat. § 16-341(G) (emphasis added).

¹⁶ Mich. Comp. Laws §§ 168.590e, 168.590f(3).

And, in North Carolina, the law provides the “*unaffiliated candidate* shall” file written petitions with the State Board of Elections.¹⁷

¹⁷ N.C. Gen. Stat. § 163-122(a) (emphasis added).