

## Despite Political Divide, FEC Found Common Ground In '24

By **Zachary Parks, Derek Lawlor and Andrew Garrahan** (January 22, 2025, 4:24 PM EST)

With a game-changing advisory opinion on political coordination for a Texas PAC, 2024 started out with a bang at the Federal Election Commission.[1] Other consequential opinions, enforcement actions and regulations continued in the following months, challenging the notion that the politically divided commission cannot find consensus.

While the commissioners continued to deadlock on some enforcement and litigation matters, such as the evidence needed to investigate potential violations of the Federal Election Campaign Act and the appropriate penalties for violations, they found common ground on the use of campaign funds, rules related to regulatory modernization and implementation of the Freedom of Information Improvement Act of 2016.

The commission also advanced proposals related to the FEC's administrative fines and redaction of contributor information. In its advisory opinions, the commission provided guidance on key topics, including coordinated communications and contribution limits for ranked choice voting.

Reflecting on his year as FEC chair, Republican Commissioner Sean Cooksey said one of his goals was to "emphasize to anyone who will listen that the commission is not structurally deadlocked and ineffective, and that actually we are getting a lot done on all fronts." [2]

Cooksey highlighted the FEC's efficacy in cataloging the enormous amount of political spending this election cycle — more than \$24 billion — which marked an 11% increase from the previous cycle.[3]

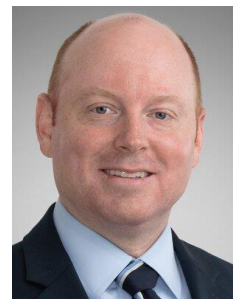
In line with several of the FEC's notable actions in 2024, Cooksey conveyed his hope that the commission would continue streamlining its regulatory processes in 2025.[4]

Below we highlight the FEC's major developments in 2024 across three areas: advisory opinions, rules, and enforcement and litigation.

### Advisory Opinions

#### ***Coordinated Communications: Advisory Opinion 2024-01***

In a transformative opinion to start the year, the commission said the plan of Texas Majority PAC, a



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Texas state political committee, to distribute door-to-door canvassing literature and scripts would not raise coordination concerns.[5]

The state political committee told the FEC that it planned to "consult with federal candidates and political party committees" about the canvassing program, and that the candidates and political parties would provide it with their "nonpublic plans, projects, activities or needs" and "engage in substantial discussion" with the committee about its door-knocking program.

The commission determined that the political committee's costs to produce and distribute canvassing literature were expenditures for communications, and therefore should be evaluated under the FEC's three-prong test for coordinated communications.

Even though the literature and scripts were set to "refer to federal candidates and political parties" and potentially "include express advocacy," the commission said the literature and scripts did not meet the "content prong" of the coordinated communication test.

The commission focused on whether they were a "public communication" — and therefore a coordinated communication — under the law.

It determined that the activity did not meet this threshold, in part because "door-to-door canvassing involves individual people talking face-to-face with voters" and such outreach was not the type of "mass communication" contemplated under the definition of "public communication."

This advisory opinion request was very narrowly tailored to the types of communications and supporting costs described by the state political committee.

It would be wise for anyone seeking to engage in these types of activities to also be aware of the commissioners' dueling "statements of reasons" in the Correct the Record matter discussed in more detail below, where the commissioners describe different ways to analyze the types of activities and costs that might be permissible under this exception to the general prohibition on "coordination." [6]

### ***Contribution Limits for Ranked Choice Voting: Advisory Opinion 2024-12***

As ranked choice voting grew in popularity in several states, the commission issued an important decision, in which it determined that a single contribution limit applied throughout Maine's entire ranked choice voting process, including all necessary rounds of vote tallying.[7]

The opinion reasoned that the process constituted a single general election under federal campaign finance law. Federal candidates will need to take this into account as they build campaign budgets in states with ranked choice voting.

### ***Splitting Costs of Hybrid TV Ads: Advisory Opinion 2024-14***

The commission found that the Democratic Senatorial Campaign Committee and Sen. Jacky Rosen's campaign committee could evenly split the cost of hybrid television ads, so long as the time and space devoted to Rosen, a Nevada Democrat, did not exceed the time and space devoted to generically referenced candidates.[8]

The commission said portions of one hybrid ad that featured Rosen on camera or narrated by her should

be allocated as "candidate advocacy." This clarifies the correct approach to payment for candidates and parties running joint ads, an increasingly common approach to advertising.

## **Rulemaking**

### ***Candidate Use of Funds***

The FEC finalized two rules related to candidates' use of their campaign funds. In January, the commission published a final rule, approved in December 2023, to broaden the eligibility criteria for candidates who may collect a salary from their campaign and to extend the window of time in which candidates may do so.[9]

Later in the year, the agency codified existing advisory opinions that clarify that the use of campaign funds to pay for certain security expenses is not prohibited.[10] The ability to use campaign funds for security expenses, in particular, is a welcome development for campaigns, some of which face threats.

### ***Technical Modernization***

More than a decade in the making, the FEC's rule to modernize its regulations was finalized.[11]

The rule updates existing regulations to account for electronic modes of communication, payment and bookkeeping; facilitate compliance; and implement other edits.

In addition, the rule updated the definition of a "public communication" to include communications that are "promoted for a fee," which clarified how social media activity should be treated under certain FEC rules.

Because the FEC defined "promoted for a fee" to include only situations in which a payment is made to a website or platform to promote or boost content, the definition does not cover payments to social media influencers to post content on their accounts.

This revision clarifies instances when FEC disclaimers are required on social media content and also when such communications are subject to the FEC's coordinated communications rules.

### ***Administrative Fines***

The commission proposed a new rule to expand its administrative fine program to cover additional reporting violations for political committees related to certain 24-hour and 48-hour reports and notices.[12]

The program is intended to provide a consistent and efficient mechanism for resolving filing violations, with fines commensurate with the report's election sensitivity, tardiness (or total failure to have been filed) and activity levels disclosed, as well as the offending committee's history of noncompliance.

Committees can now expect streamlined enforcement for covered cases, while the commission benefits from a routine process for assessing fines for common violations.

### ***Contributor Information Redaction***

The FEC approved a draft rule to create a means for contributors to request that their information be redacted from disclosures if there is a reasonable likelihood that publicizing the information would lead to threats, harassment or reprisal.[13] Public comments are due by Feb. 18.

Such a rule could lead to donations from people who were previously concerned about public exposure of their personal information.

### ***Declined Rulemaking Petitions***

The commission declined to initiate rules regarding artificial intelligence in campaign ads;[14] equal-value exchanges of mailing lists;[15] adding "valuable information" to the definition of "contribution";[16] and requiring all contributions from corporations or organizations to be traceable to a person.[17]

While the FEC declined to initiate new rulemaking on AI, it did issue an interpretive rule to emphasize that in communications that relied on AI, the agency would apply the existing statutory prohibitions on candidates "fraudulently misrepresenting themselves" as speaking, writing or otherwise acting for or on behalf of another candidate in a way that is damaging to that candidate, or misrepresenting themselves in the same ways to solicit a donation.[18] Each of these rules was focused on issues that have generated controversy in recent election cycles.

### **Enforcement and Litigation**

#### ***Prohibited Corporate Contributions***

When does sharing "political intelligence" become a "contribution"? In November, the commission found that information shared by Fox Corp. chairman emeritus Rupert Murdoch with an agent of the Trump campaign in 2020 did not constitute a prohibited corporate contribution.

The commission's Office of General Counsel had concluded that the information Murdoch shared about President Joe Biden's nonpublic campaign strategy to air a particular ad during an NFL football game on Sept. 27, 2020, qualified as valuable and was therefore a prohibited contribution.

The commissioners, however, split on whether the information Murdoch shared was anything of value. Cooksey concluded that the information had no value, as the ad at issue was already in the public domain at the time and the Biden campaign had already disseminated a "substantially similar ad" several weeks earlier.[19]

Commissioners Allen J. Dickerson and James E. "Trey" Trainor III, both Republicans, agreed that the previous public airing of the ad largely resolved the matter.

They also emphasized that the fact that the Trump campaign did not make any use of the information meant it had little or no value.[20]

However, Vice Chair Ellen L. Weintraub and fellow Democratic Commissioners Shana M. Broussard and Dara Lindenbaum deemed the information valuable because it was material information about Biden's campaign strategy that was not public — specifically, that the Biden campaign was airing this particular ad, to a particular and large audience, during a particular broadcast.[21]

This decision highlights an ongoing split at the commission over when sharing information can be considered a contribution to the recipient, a split that seems unlikely to resolve soon. Corporations, nonprofits and others should be wary of providing information, particularly nonpublic information, to campaigns, PACs or political parties lest they be accused of making an unreported or impermissible contribution.

### ***The Internet Exception***

Through a series of opinions, recent court decisions provided additional color on when coordinated activities are not in-kind contributions because they fall within the FEC's exemption for certain internet activities.

On Oct. 6, 2016, the Campaign Legal Center and one of its senior executives, Catherine Hinckley Kelly, filed an administrative complaint with the FEC alleging that the PAC Correct the Record had illegally engaged in coordinated communications with Hillary for America during the 2016 election.

They alleged that Correct the Record had spent close to \$6 million in coordination with the Clinton campaign and publicized that it was doing so but characterized all of its expenditures as unreportable inputs to unpaid communications over the internet.

The procedural history of the matter is complex, but eventually the U.S. District Court for the District of Columbia found that the commission's dismissal was contrary to law and also concluded that there was ample evidence of coordination the commission had failed to consider.

On July 9, the U.S. Court of Appeals for the D.C. Circuit agreed. It found that the internet exception was never intended as a loophole in the Federal Election Campaign Act enabling political committees to launder all their coordinated expenditures via unpaid internet postings.[22]

Rather, the appeals court concluded that the internet exception "cannot be read to exempt from disclosure those expenditures that are only tangentially related to an eventual internet message or post" and that the exemption does not allow "wholesale deregulation of coordinated expenditures" that contribute to an eventual posting.[23]

The matter was sent back to FEC to "draw the line" for expenses that are exempt as inputs to "unpaid internet communications." [24]

On Oct. 10, the commission dismissed the complaint because the statute of limitations had expired, among other reasons, but voted to begin a rulemaking to more clearly define the types of expenses covered by the internet exception.[25]

The D.C. Circuit's eventual conclusion that the commission must tighten the exception means that it applies to a smaller slice of communications than those that Correct the Record believed should fall within its scope. The rule could help make some clear lines in this blurry area.

### ***Engaging the Same Lawyer***

On Jan. 5, 2024, the FEC released a statement of reasons from four commissioners saying that the fact that the Stop Socialism Now PAC and Rep. Marjorie Taylor Greene, R-Ga., engaged the same lawyer, and that the lawyer "reviewed and approved" a possible coordinated advertisement, did not support a

finding that the parties coordinated the advertisement.[26]

The commissioners declined to "adopt the presumption that attorneys, sworn officers of the court, may be serving as conduits for illegal coordination merely because they provide legal counsel to both parties."

With this decision, lawyers are not presumptively prohibited from representing both a campaign or party and an outside group active in the race, but the commission did not foreclose that such relationships may sometimes be prohibited.

## **Conclusion**

Through the advisory opinions, rulemakings, and enforcement and litigation matters described above, the commission has offered welcome clarity on some key questions facing campaigns, PACs and parties.

This is particularly true for issues involving how closely campaigns can work with outside organizations, as well as with political parties. The coming year is likely to bring follow-on requests to these developments, the outcomes of the above rulemakings and more decisions on enforcement arising from the end of the 2024 campaign season.

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[1] AO 2024-01.

[2] Interview with Chairman Cooksey, Politico Pro's Morning Score (Nov. 22, 2024).

[3] Id.

[4] Id.

[5] <https://www.fec.gov/files/legal/aos/2024-01/2024-01.pdf>.

[6] MUR 7146R.

[7] <https://www.fec.gov/files/legal/aos/2024-12/2024-12.pdf>.

[8] <https://www.fec.gov/files/legal/aos/2024-14/2024-14.pdf>.

[9] <https://www.federalregister.gov/documents/2024/01/02/2023-27906/candidate-salaries>.

[10] <https://www.federalregister.gov/documents/2024/09/25/2024-21918/use-of-campaign-funds-for-candidate-and-officeholder-security>.

[11] <https://www.federalregister.gov/documents/2024/01/02/2023-27908/technological-modernization>.

[12] <https://www.federalregister.gov/documents/2024/08/01/2024-16841/administrative-fines-program-expansion>.

[13] <https://www.fec.gov/resources/cms-content/documents/mtgdoc-24-44-B.pdf>.

[14] <https://www.federalregister.gov/documents/2024/09/26/2024-21979/artificial-intelligence-in-campaign-ads>.

[15] <https://www.federalregister.gov/documents/2024/09/05/2024-19900/requiring-reporting-of-exchanges-of-email-lists>.

[16] <https://www.federalregister.gov/documents/2024/04/24/2024-08698/amending-definition-of-contribution-to-include-valuable-information>.

[17] <https://www.federalregister.gov/documents/2024/04/24/2024-08695/contributions-from-corporations-and-other-organizations-to-political-committees>.

[18] <https://www.govinfo.gov/content/pkg/FR-2024-09-26/pdf/2024-21983.pdf>.

[19] [https://www.fec.gov/files/legal/murs/8118/8118\\_16.pdf](https://www.fec.gov/files/legal/murs/8118/8118_16.pdf).

[20] [https://www.fec.gov/files/legal/murs/8118/8118\\_17.pdf](https://www.fec.gov/files/legal/murs/8118/8118_17.pdf).

[21] [https://www.fec.gov/files/legal/murs/8117/8117\\_20.pdf](https://www.fec.gov/files/legal/murs/8117/8117_20.pdf).

[22] Campaign Legal Ctr. v. Fed. Election Comm'n, 106 F.4th 1175, 1192 (D.C. Cir. 2024).

[23] Id. at 1179, 1192.

[24] Id.

[25] Proposed NPRM on 11 CFR § 100.26 (Oct. 23, 2024).

[26] [https://www.fec.gov/files/legal/murs/7908/7908\\_20.pdf](https://www.fec.gov/files/legal/murs/7908/7908_20.pdf).