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Washington, DC 20463

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For meeting of April 08, 2021
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April 7, 2021

MEMORANDUM

TO: The Commission

FROM: Lisa J. Stevenson *NFS for LJS*
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Subject: Draft AO 2021-04 (Pray.com) - Revised Draft A

Attached is a proposed draft of the subject advisory opinion. We have been asked to place this draft on the Agenda by one or more Commissioners.

Members of the public may attend the Commission meeting at which the draft will be considered. The advisory opinion requestor may appear before the Commission at this meeting to answer questions.

For more information about how to submit comments or attend the Commission meeting, go to <https://www.fec.gov/legal-resources/advisory-opinions-process/>.

Attachment

1 ADVISORY OPINION 2021-04

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Michael Lynn
Chief Financial Officer
Pray.com
Mike@Pray.com

REVISED DRAFT A

9 Dear Mr. Lynn:

10 We are responding to your request on behalf of Pray.com for an advisory opinion
11 concerning the application of the Federal Election Campaign Act, 52 U.S.C. §§ 30101-45
12 (the “Act”), and Commission regulations to Pray.com’s proposal to invite Members of
13 Congress to produce five-minute audio and video statements discussing matters of faith
14 that it will share with users of its digital platforms. The Commission concludes that the
15 Act and Commission regulations would not prohibit Pray.com from posting the described
16 statements on its digital platforms as proposed in the request, because the activity would
17 not result in coordinated communications or otherwise provide a prohibited corporate in-
18 kind contribution to participating Members who are also candidates for federal office
19 (“Member-Candidates”).¹

20 ***Background***

21 The facts presented in this advisory opinion are based on your letter received on
22 February 18, 2021. Pray.com is a for-profit corporation and “a free mobile application”

¹ The request asks generally whether the proposed activities involving Members of Congress are permissible under relevant provisions of the Act and Commission regulations. *See* Advisory Opinion Request at AOR001. This advisory opinion, however, addresses only the proposed activities involving Members of Congress who are also candidates for federal office, because neither the Act nor Commission regulations apply to the activities described in the request involving individuals who are not candidates for federal office. *See* 11 C.F.R. § 112.1(a) (any person may request an advisory opinion “concerning the application of the Act . . . or any regulation prescribed by the Commission”). Additionally, the Commission expresses no opinion concerning any aspects of the proposed activities that fall within the jurisdiction of the House Ethics Committee, General Counsel of the House of Representatives, Senate Select Committee on Ethics, or Office of Senate Legal Counsel.

1 and website that provide users with faith-based digital content.² Users of Pray.com’s
2 platforms can access “faith-based audio content” and “connect directly with faith leaders
3 and explore faith communities.”³ The mobile application is free to download. Sixty
4 percent of the digital content is available through the application and website at no cost;
5 the remaining 40% of Pray.com’s digital content, however, is only accessible with a paid
6 subscription.

7 Pray.com proposes to feature audio and video statements by Members “on the
8 subject of prayer” and other matters of faith on its digital platforms.⁴ Pray.com will
9 invite all Members, irrespective of party, to record and submit a five-minute, self-
10 narrated segment for its platforms. Pray.com will encourage participating Members to
11 respond to a list of prepared prompts, including “[w]hat does the power of prayer mean to
12 you?” and “[w]hat is your favorite Bible verse and why?”⁵ Members will have “full
13 creative approval” over their own segments; “however, Pray.com will reserve the right to
14 edit the [recorded] message if the Member deviates from the topic of the script regarding
15 prayer.”⁶ Members’ statements will be accessible to all Pray.com users for free; access
16 will not be limited to paid subscribers. Pray.com may also include Members’ statements
17 in its advertisements on various media (including social media and television) “as a way
18 to showcase the breadth of content offered on the Pray.com platform.”⁷

2 AOR001.

3 *Id.*

4 *Id.*

5 *Id.* Pray.com’s other prompts for participants to address include: (1) “Who are you, where are you from, and where do you live today”; (2) “Give us a quick high-level overview of what you do”; (3) “Why is faith a requirement for successful leadership?”; and (4) “What positive message of hope and encouragement can you give to people during these challenging times?”.

6 *Id.*

7 AOR001-02.

1 ***Question Presented***⁸

2 *Will Pray.com’s posting of Member-Candidates’ statements on its digital*
3 *platforms be a “coordinated communication” or otherwise provide a prohibited*
4 *corporate in-kind contribution to the participating Member-Candidates?*

5 ***Legal Analysis and Conclusion***

6 No, Pray.com’s posting of Member-Candidates’ statements on its digital
7 platforms will not be a “coordinated communication” or otherwise provide a prohibited
8 corporate in-kind contribution to the participating Member-Candidates.

9 The Act and Commission regulations prohibit corporations from making
10 contributions to candidates.⁹ A “contribution” includes “any gift, subscription, loan,
11 advance, or deposit of money or anything of value made by any person for the purpose of
12 influencing any election for Federal office.”¹⁰ For corporations, the term “contribution”
13 also includes “any direct or indirect payment, distribution, loan, advance, deposit, or gift
14 of money, or any services, or anything of value . . . to any candidate, campaign
15 committee, or political party or organization, in connection with any [federal] election.”¹¹
16 “Anything of value” encompasses all in-kind contributions, including the provision of
17 goods or services without charge or at less than the usual and normal charge.¹²

⁸ The Commission does not address any “personal use” issues potentially arising under the Act or Commission regulations if Members use campaign devices to record and submit their statements, as such issues are both hypothetical and concern the activities of third parties and therefore do not qualify as an advisory opinion request. *See* 11 C.F.R. § 112.1(b).

⁹ *See* 52 U.S.C. § 30118(a); 11 C.F.R. § 114.2(b)(1).

¹⁰ 52 U.S.C. § 30101(8)(A)(i); 11 C.F.R. § 100.52(a).

¹¹ 52 U.S.C. § 30118(b)(2); 11 C.F.R. § 114.1(a)(1).

¹² 11 C.F.R. § 100.52(d)(1).

1 Under the Act and Commission regulations, a third-party’s payment for a
2 communication coordinated with a candidate, a candidate’s authorized committee, or
3 their agents is an in-kind contribution to the candidate.¹³ Any person prohibited from
4 making contributions or expenditures under the Act or Commission regulations is thus
5 prohibited from paying for a coordinated communication.¹⁴ Because the Act prohibits
6 corporations from making contributions to candidates, corporations may not pay for
7 coordinated communications.¹⁵

8 To determine whether a communication constitutes a “coordinated
9 communication” with a candidate, Commission regulations prescribe a three-prong test.¹⁶
10 First, the communication must be paid for, in whole or in part, by a person other than the
11 candidate or the candidate’s authorized committee (the “payment prong”).¹⁷ Second, the
12 communication must satisfy one of five content standards (the “content prong”).¹⁸
13 Finally, the communication must satisfy one of five conduct standards (the “conduct
14 prong”).¹⁹

15 In this instance, a Member-Candidate’s statement would not be a “coordinated
16 communication” because it would not satisfy the content prong. This prong of the
17 coordinated communication analysis applies only to communications that are either a

¹³ See 52 U.S.C. § 30116(a)(7)(B)(i); 11 C.F.R. §§ 109.21(a), (b)(1).

¹⁴ 11 C.F.R. § 109.22.

¹⁵ *Id.*

¹⁶ See *id.* § 109.21(a).

¹⁷ *Id.* § 109.21(a)(1).

¹⁸ *Id.* §§ 109.21(a)(2), (c).

¹⁹ *Id.* §§ 109.21(a)(3), (d)(1)-(5).

1 “public communication”²⁰ or an “electioneering communication.”²¹ Communications
2 made over the internet are expressly exempt from the definition of “public
3 communication,” unless they are placed for a fee on another person’s website.²²
4 Similarly, any communication “over the internet” cannot be an electioneering
5 communication.²³ The request states that Pray.com proposes to disseminate Member-
6 Candidates’ statements exclusively “over the internet” on Pray.com’s own website and
7 digital application.²⁴ Therefore, because the activity described by the requestor would
8 not involve the placement of Member-Candidates’ statements for a fee on another
9 person’s website²⁵, these communications will be neither public communications nor
10 electioneering communications.²⁶ Accordingly, Pray.com’s dissemination of Member-
11 Candidates’ statements on its mobile application and website as proposed will not
12 constitute “coordinated communications” under 11 C.F.R. § 109.21.

²⁰ *Id.* § 109.21(c)(2)-(5). A “public communication” is “a communication by means of any broadcast, cable, or satellite communication, newspaper, magazine, outdoor advertising facility, mass mailing, or telephone bank to the general public, or any other form of general public political advertising.” *Id.* § 100.26; *see also* 52 U.S.C. § 30101(22).

²¹ 11 C.F.R. § 109.21(c)(1). The term “electioneering communication” applies only to communications that are “publicly distributed by a television station, radio station, cable television system, or satellite system.” *Id.* §§ 100.29(b)(1), (c)(1); *see also* 52 U.S.C. § 30104(f)(3)(A)(i).

²² 11 C.F.R. § 100.26.

²³ *Id.* § 100.29(c)(1).

²⁴ AOR001.

²⁵ The request indicates that Pray.com may consider using clips of Member-Candidates’ statements in its advertisements on various media platforms, including social media and television, but does not provide specific information on that activity. The Commission, therefore, does not opine on that activity, but notes that distributing Member-Candidates’ statements in paid advertising could potentially constitute coordinated communications or electioneering communications. *See* 11 C.F.R. §§ 100.29, 109.21. Pray.com is welcome to submit an advisory opinion request containing sufficient facts for the Commission to address any specific questions that it might have about the application of the Act and Commission regulations to such advertisements.

²⁶ *See* Advisory Opinion 2011-14 (Utah Bankers Association) at 4-5 (concluding that requestor’s communications exclusively on requestor’s own website and in its emails cannot be “coordinated communications” and their costs are not in-kind contributions).

1 Moreover, the Commission has previously considered whether for-profit
2 corporations like Pray.com may post candidate-provided content on their own digital
3 platforms without making an in-kind contribution to the candidates. In Advisory Opinion
4 2012-22 (skimmerhat) and Advisory Opinion 2014-07 (Crowdpac), for instance, the
5 Commission considered whether corporations in the business of matching contributors to
6 candidates through the corporations' online platforms or websites would themselves
7 make contributions by allowing candidates to post their biographical information and
8 issue positions on those websites. The Commission concluded that no contributions
9 would result where the corporations acted to advance their commercial interests rather
10 than to influence a federal election.²⁷ Similarly, outside of the internet context, the
11 Commission has previously determined that financing a candidate's platform for speech
12 will not result in an in-kind contribution where the invitation to speak is based on an
13 individual's status as a legislator rather than as a candidate, and the candidate's remarks
14 do not contain express advocacy or solicit contributions.²⁸

15 Here, Pray.com proposes to invite all Members, irrespective of party and
16 candidate status, to provide statements for its platforms. This fact indicates that invitees

²⁷ Advisory Opinion 2012-22 (skimmerhat) at 7-8 (internal citations omitted); Advisory Opinion 2014-07 (Crowdpac) at 8-9 (relying on Advisory Opinion 2012-22 (skimmerhat) for this proposition and noting that requestor's proposal "to allow candidates to provide content through videos, [rather than] through graphics or text, does not materially distinguish [its] proposal from those previously approved by the Commission"); *see also* Advisory Opinion 2015-12 (Ethiq) at 3 (finding no contribution resulted from corporation's compiling and displaying candidate information on its digital application to help users identify candidates to whom they might contribute).

²⁸ *See* Advisory Opinion 1992-06 (Duke) at 3-4 (concluding that university's payment of honorarium and travel expenses to presidential candidate is not a contribution if candidate does not solicit contributions or support or discuss candidacy in speech); Advisory Opinion 1996-21 (National Right to Life Conventions) at 5 (concluding that no contribution resulted from non-profit's invitation for Members to give speeches on pro-life issues at convention because invitations were based on their roles as legislators, not candidates, and speeches staged in manner that did not allow candidates to expressly advocate or solicit contributions).

1 will be asked to participate due to their status as legislators rather than as candidates.
2 Furthermore, Pray.com will provide participating Members with a list of questions and
3 prompts that relate to general biographical and professional information and the
4 Members' personal views on matters of faith — the very content that Pray.com is in the
5 business of providing to its users. The posting of their statements would thus serve
6 Pray.com's commercial interests by increasing the volume of its freely-accessible faith-
7 based content and potentially attracting users from diverse ideological backgrounds to its
8 platforms—some of whom, presumably, would then choose to become paid subscribers
9 to access the platforms' "premium" content.²⁹ Moreover, Pray.com will reserve the right
10 to edit audio or video content if the participating "Member deviates from the topic of the
11 script regarding prayer."³⁰ Accordingly, the Commission concludes that Pray.com would
12 not make corporate in-kind contributions to participating Member-Candidates by posting
13 their statements on its digital platforms.

14 This response constitutes an advisory opinion concerning the application of the
15 Act and Commission regulations to the specific transaction or activity set forth in your
16 request. *See* 52 U.S.C. § 30108. The Commission emphasizes that, if there is a change
17 in any of the facts or assumptions presented, and such facts or assumptions are material to
18 a conclusion presented in this advisory opinion, then the requestor may not rely on that
19 conclusion as support for its proposed activity. Any person involved in any specific
20 transaction or activity which is indistinguishable in all its material aspects from the
21 transaction or activity with respect to which this advisory opinion is rendered may rely on

²⁹ *See* AOR001-02 (stating requestor's desire to utilize Member Statements to "showcase the breadth of [its] content").

³⁰ AOR001.

1 this advisory opinion. *See id.* § 30108(c)(1)(B). Please note that the analysis or
2 conclusions in this advisory opinion may be affected by subsequent developments in the
3 law including, but not limited to, statutes, regulations, advisory opinions, and case law.
4 Any advisory opinions cited herein are available on the Commission’s website.

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On behalf of the Commission,

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Shana M. Broussard

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Chair