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FEDERAL ELECTION COMMISSION
Washington, DC 20463

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January 30, 2004


MEMORANDUM


AGENDA ITEM


For Meeting of: 02-05-04


SUBMITTED LATE


TO: The Commission

THROUGH: James A. Pehrkon
Staff Director 

FROM: Lawrence H. Norton
General Counsel 

Rosemary C. Smith 
Acting Associate General Counsel

Mai T. Dinh 
Acting Assistant General Counsel

Robert M. Knop 
Attorney

SUBJECT: Draft AO 2003-38– Alternative Drafts

Attached are two proposed drafts of Advisory Opinion 2003-38, which responds to a request from United States Representative Eliot Engel, submitted by Cassandra Lentchner of Perkins Coie, LLP. Representative Engel seeks the Commission's determination whether funds he plans to raise and spend on behalf of a redistricting committee to defray legal expenses incurred in redistricting litigation are in connection with a Federal or non-Federal election within the meaning of 2 U.S.C. 441i(e)(1)(A) or (B).

Draft A concludes that such funds are not in connection with a Federal or non-Federal election and, therefore, Representative Engel may raise and spend non-Federal funds on behalf of the proposed committee. Draft B reaches the opposite conclusion. On balance, the Office of the General Counsel believes that Draft B is the preferred approach. We request that these drafts be placed on the agenda for February 5, 2004.

Attachments
Drafts A and B

1 ADVISORY OPINION 2003-38

2

3 Cassandra F. Lentchner, Esq.

4 Perkins Coie, LLP

5 607 Fourteenth St., N.W.

6 Washington, D.C. 20005

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8 Dear Ms. Lentchner:

9 This responds to your letter dated December 5, 2003, requesting an advisory
10 opinion on behalf of United States Representative Eliot Engel, concerning the application
11 of the Federal Election Campaign Act of 1971, as amended (“the Act”), and Commission
12 regulations to the raising and spending of funds for reapportionment-related activities in
13 his home state of New York.

14 ***Background***

15 Representative Engel, a Member of the United States House of Representatives
16 from the Seventeenth Congressional District of New York, is a candidate for re-election
17 to that seat in 2004.¹ You state that Democratic leaders in New York, including
18 Democratic Members of Congress such as Representative Engel, have traditionally
19 attempted to influence the State legislature’s Congressional reapportionment decisions
20 and have become involved in litigation concerning the redistricting process. You state
21 that, in previous years, they have formed organizations not registered with the
22 Commission and exempt from taxation under the Internal Revenue Code.

23 There were lengthy court proceedings involving the New York Congressional map
24 last year. *See Rodriguez v. Pataki*, No. 02 Civ. 618, 2003 U.S. Dist. LEXIS 15934
25 (S.D.N.Y., Sept. 10, 2003). Representative Engel participated in this lawsuit and incurred
26

¹ Representative Engel’s principal campaign committee is “Engel for Congress.”

1 legal fees. You state that his involvement in redistricting proposals was not intended to
2 influence any election and did not involve any advocacy of any candidate for office. You
3 state that Representative Engel would like to participate in the formation and operation of
4 a redistricting committee (“the Committee”) to pay for the legal fees incurred in
5 connection with the redistricting litigation and you wish to know whether he may do so
6 consistent with the Act’s restrictions on the solicitation, receipt, direction, transfer, or
7 spending of non-Federal funds in connection with Federal and non-Federal elections by
8 Federal candidates and officeholders. *See* 2 U.S.C. 441i(e)(1)(A) and (B). In a
9 subsequent conversation, you state that prior to soliciting funds on behalf of the
10 Committee, Representative Engel intends to obtain the approval of the Committee on
11 Standards of Official Conduct of the U.S. House of Representatives, as required by House
12 ethics rules. In another subsequent communication, you confirm that the Committee
13 would be an entity completely separate from Engel for Congress or any other authorized
14 committee of Representative Engel.

15 ***Question Presented***

16 *Are the amounts raised and spent by Representative Engel on behalf of a*
17 *redistricting committee subject to the provisions of the Act?*

18 ***Legal Analysis and Conclusions***

19 They are not, for the reasons discussed below. On November 6, 2002, the
20 Bipartisan Campaign Reform Act of 2002, Pub. L. 107-155, 116 Stat. 81 (2002)
21 (“BCRA”) took effect. As amended by BCRA, the Act regulates certain actions of
22 Federal candidates and officeholders, their agents, and entities directly or indirectly

1 established, financed, maintained, or controlled by them (collectively, “covered
2 persons”), when they raise or spend funds in connection with either Federal or non-
3 Federal elections. 2 U.S.C. 441i(e)(1). Both BCRA and the Commission’s regulations
4 implementing BCRA prohibit covered persons from soliciting, receiving, directing,
5 transferring, or spending any “funds in connection with an election for Federal office” or
6 any “funds in connection with an election other than an election for Federal office” unless
7 such funds are “subject to the limitations, prohibitions, and reporting requirements of this
8 Act” or are consistent with FECA’s amount limitations and source prohibitions,
9 respectively. 2 U.S.C. 441i(e)(1)(A) and (B); 11 CFR 300.61 and 300.62.

10 In analyzing the application of 2 U.S.C. 441i(e), the threshold question is whether
11 the funds involved are in connection with a Federal or non-Federal election under
12 subsection (e)(1). *See* Advisory Opinion 2003-20. If they are, then the analysis proceeds
13 to whether the exceptions to subsection (e)(1) in subsections (e)(2) through (e)(4) apply.
14 If the funds are not raised or spent in connection with an election, then the funds do not
15 fall within the scope of section 441i(e).

16 In advisory opinions issued prior to the enactment of BCRA, the Commission has
17 approved proposals for the establishment by candidates or officeholders of separate
18 entities that are established exclusively for activity related to redistricting, including the
19 defrayal of reapportionment-related legal expenses. Such entities were permitted to
20 receive and spend funds that were not subject to the limitations and prohibitions of the
21 Act. In approving such proposals, the Commission has stated that the influencing of
22 reapportionment decisions, although a political process, is not considered election-

1 influencing activity subject to the requirements of the Act. Advisory Opinions 1982-37
2 and 1981-35. Because they were not considered made “for the purpose of influencing any
3 election for Federal office,” the Commission determined that funds received and spent
4 solely for reapportionment-related activities were not contributions or expenditures under
5 the Act. *Id.* The Commission has stated, however, that any accounts and entities
6 established for the purpose of receiving and disbursing funds for reapportionment-related
7 activities must be separate and independent from a candidate’s principal (or any
8 authorized) campaign committee. Advisory Opinion 1990-23; *see also* Advisory Opinion
9 1996-39 (stating that account established for purpose of receiving and disbursing funds to
10 pay legal expenses incurred in relation to challenge of sufficiency of candidate’s
11 nominating petitions must be completely separate and independent from candidate’s
12 principal (or any authorized) committee).

13 The Commission concludes that 2 U.S.C. 441i(e)(1)(A) and (B) do not change
14 this result. There is no indication in the legislative history of BCRA that Congress
15 intended sections 441i(e)(1)(A) or (B) to change an area that is both well-familiar to
16 Members of Congress and the subject of longstanding interpretation through Commission
17 advisory opinions. Therefore, donations to, and disbursements by, the Committee for the
18 sole purpose of defraying legal expenses incurred in the reapportionment lawsuit are
19 neither “in connection with an election for Federal office” nor “in connection with any
20 election other than an election for Federal office” for purposes of 2 U.S.C. 441i(e)(1)(A)
21 and (B). As such, the funds are not subject to the limitations and prohibitions of the Act.
22 Accordingly, Representative Engel and any agents he authorizes, may solicit funds on

1 behalf of the Committee to defray the legal expenses incurred in the reapportionment
2 lawsuit, provided that the funds received in response to such solicitations are deposited
3 solely in an account of the Committee which, as you describe, is an entity that is
4 completely separate and independent of Engel for Congress and any other authorized
5 committees of Representative Engel.

6 Solicitations for the Committee may be made in person or by mail and should be
7 accompanied by a letter stating the purpose of the Committee and noting that no
8 donations to the Committee would be used for the purpose of influencing any Federal or
9 non-Federal election. *See* Advisory Opinion 1996-39 (prescribing manner in which
10 solicitations to fund to pay legal expenses incurred in relation to challenge of sufficiency
11 of candidate's nominating petitions should be made); *see also* Advisory Opinions 2003-
12 15 (approving solicitation method for donations to legal expense fund related to challenge
13 of legality of Federal election ballot) and 1983-30 (approving solicitation method for
14 donations to legal expense fund related to challenge of State constitutional provisions).
15 Solicitations on behalf of the Committee should be completely separate from any
16 solicitations on behalf of Engel for Congress or any authorized committee of any
17 candidate. *See id.*

18 The Commission expresses no opinion regarding the possible applicability of any
19 Federal or State tax laws or other laws, or the rules of the House of Representatives, to
20 the matters presented in your request, as those issues are outside its jurisdiction.

21 This response constitutes an advisory opinion concerning the application of the
22 Act and Commission regulations to the specific transaction or activity set forth in your

1 request. *See* 2 U.S.C. 437f. The Commission emphasizes that, if there is a change in any
2 of the facts or assumptions presented, and such facts or assumptions are material to a
3 conclusion presented in this advisory opinion, then the requestor may not rely on that
4 conclusion as support for its proposed activity.

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Sincerely,

Bradley A. Smith
Chairman

Enclosures (AOs 2003-20, 2003-15, 1996-39, 1990-23, 1983-30, 1982-37, and 1981-35)

1 ADVISORY OPINION 2003-38

2
3 Cassandra F. Lentchner, Esq.
4 Perkins Coie, LLP
5 607 Fourteenth St., N.W.
6 Washington, D.C. 20005

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8 Dear Ms. Lentchner:

9 This responds to your letter dated December 5, 2003, requesting an advisory
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11 of the Federal Election Campaign Act of 1971, as amended (“the Act”), and Commission
12 regulations to the raising and spending of funds for reapportionment-related activities in
13 his home state of New York.

14 ***Background***

15 Representative Engel, a Member of the United States House of Representatives
16 from the Seventeenth Congressional District of New York, is a candidate for re-election
17 to that seat in 2004.¹ You state that Democratic leaders in New York, including
18 Democratic Members of Congress such as Representative Engel, have traditionally
19 attempted to influence the State legislature’s Congressional reapportionment decisions
20 and have become involved in litigation concerning the redistricting process. You state
21 that, in previous years, they have formed organizations not registered with the
22 Commission and exempt from taxation under the Internal Revenue Code.

23 There were lengthy court proceedings involving the New York Congressional map
24 last year. *See Rodriguez v. Pataki*, No. 02 Civ. 618, 2003 U.S. Dist. LEXIS 15934
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¹ Representative Engel’s principal campaign committee is “Engel for Congress.”

1 legal fees. You state that his involvement in redistricting proposals was not intended to
2 influence any election and did not involve any advocacy of any candidate for office. You
3 state that Representative Engel would like to participate in the formation and operation of
4 a redistricting committee (“the Committee”) to pay for the legal fees incurred in
5 connection with the redistricting litigation and you wish to know whether he may do so
6 consistent with the Act’s restrictions on the solicitation, receipt, direction, transfer, or
7 spending of non-Federal funds in connection with Federal and non-Federal elections by
8 Federal candidates and officeholders. *See* 2 U.S.C. 441i(e)(1)(A) and (B). In a
9 subsequent conversation, you stated that prior to soliciting funds on behalf of the
10 Committee, Representative Engel intends to obtain the approval of the Committee on
11 Standards of Official Conduct of the U.S. House of Representatives, as required by House
12 ethics rules. In another subsequent communication, you confirmed that the Committee
13 would be an entity completely separate from Engel for Congress or any other authorized
14 committee of Representative Engel.

15 ***Question Presented***

16 *Are the amounts raised and spent by Representative Engel on behalf of a*
17 *redistricting committee subject to the provisions of the Act?*

18 ***Legal Analysis and Conclusions***

19 They are, for the reasons discussed below. On November 6, 2002, the Bipartisan
20 Campaign Reform Act of 2002, Pub. L. 107-155, 116 Stat. 81 (2002) (“BCRA”) took
21 effect. As amended by BCRA, the Act regulates certain actions of Federal candidates and
22 officeholders, their agents, and entities directly or indirectly established, financed,

1 maintained, or controlled by them (collectively, “covered persons”), when they raise or
2 spend funds in connection with either Federal or non-Federal elections. 2 U.S.C.
3 441i(e)(1). Both BCRA and the Commission’s regulations implementing BCRA prohibit
4 covered persons from soliciting, receiving, directing, transferring, or spending any “funds
5 in connection with an election for Federal office” or any “funds in connection with an
6 election other than an election for Federal office” unless such funds are “subject to the
7 limitations, prohibitions, and reporting requirements of this Act” or are consistent with
8 FECA’s amount limitations and source prohibitions, respectively. 2 U.S.C. 441i(e)(1)(A)
9 and (B); 11 CFR 300.61 and 300.62.

10 In analyzing the application of 2 U.S.C. 441i(e), the threshold question is whether
11 the funds involved are in connection with a Federal or non-Federal election under
12 subsection (e)(1). *See* Advisory Opinion 2003-20. If they are, then the analysis proceeds
13 to whether the exceptions to subsection (e)(1) in subsections (e)(2) through (e)(4) apply.
14 If the funds are not raised or spent in connection with an election, then the funds do not
15 fall within the scope of section 441i(e).

16 In upholding section 441i(e)’s solicitation restrictions, the Supreme Court stated
17 that “[l]arge soft-money donations at a candidate’s or officeholder’s behest give rise to all
18 of the same corruption concerns posed by contributions made directly to the candidate or
19 officeholder.” *McConnell v. FEC*, 124 S. Ct. 619, 683 (2003). The Court went on to
20 state that the donation’s value to the candidate or officeholder “is evident from the fact of
21 the solicitation itself” regardless of whether the candidate or officeholder ultimately
22 controls how the funds are spent. *Id.* Elsewhere in its opinion, the Court stressed that

1 “Congress’ legitimate interest extends beyond preventing simple cash-for-votes
2 corruption to curbing ‘undue influence on an officeholder’s judgment, and the appearance
3 of such influence.’” *Id.* at 664 (quoting *FEC v. Colorado Republican Fed. Campaign*
4 *Comm.*, 533 U.S. 431, 441 (2001)).

5 The Court recognized that the purpose of 2 U.S.C. 441i(e) is to prevent the flow
6 of non-Federal funds to or through organizations controlled by Federal candidates or
7 officeholders if those funds are used to affect any Federal, State, or local election. The
8 outcome of the redistricting litigation will directly and significantly affect subsequent
9 elections including decisions by individuals as to whether to become candidates.
10 Therefore, donations to the Committee are in connection with an election for Federal or
11 non-Federal office under 2 U.S.C. 441i(e)(1)(A) or (B). The Commission also concludes
12 that none of the exceptions to section 441i(e)(1)’s solicitation restrictions, in subsections
13 (e)(2) through (e)(4), apply. Accordingly, Representative Engel may only raise and spend
14 funds that are subject to the limitations, prohibitions, and reporting requirements of the
15 Act on behalf of the Committee. In addition, as an entity directly established by a Federal
16 candidate and officeholder, the Committee is subject to the same requirements.
17 Consequently, the Commission concludes that under 2 U.S.C. 441a(a)(1)(C) and
18 441i(e)(1), Representative Engel and the Committee may raise up to a total of \$5,000 per
19 calendar year from any particular permissible source, without regard to the amounts
20 contributed by that source to Engel for Congress. *See* Advisory Opinions 2003-36 and
21 2003-12. Once the Committee receives contributions or makes expenditures in excess of
22 \$1,000 during a calendar year, it will become a political committee under 2 U.S.C.

1 431(4)(A) and 11 CFR 100.5(a).² Upon becoming a political committee, it must register
2 with the Commission and comply with the reporting requirements of 11 CFR part 104.

3 In advisory opinions issued prior to the enactment of BCRA, the Commission had
4 approved proposals for the establishment by candidates or officeholders of separate
5 entities that were established exclusively for activity related to redistricting, including the
6 defrayal of reapportionment-related legal expenses. Advisory Opinions 1982-37 and
7 1981-35; *see also* Advisory Opinion 1990-23 (rejecting proposed establishment of
8 separate segregated reapportionment account by Federal candidate's authorized
9 committee but stating that candidate may establish independent reapportionment entity).
10 Such entities were permitted to receive and spend funds that were not subject to the
11 limitations and prohibitions of the Act. In approving such proposals, the Commission
12 had stated that the influencing of reapportionment decisions, although a political process,
13 was not considered election-influencing activity subject to the requirements of the Act.
14 Given the broad language of 2 U.S.C. 441i(e) and the Court's interpretation of that
15 language, it is inappropriate to maintain the proposition that funds raised and spent on
16 reapportionment-related activities are not subject to the limitations and prohibitions of the
17 Act. Consequently, prior advisory opinions that stand for this proposition are superseded.

18 The Commission expresses no opinion regarding the possible applicability of any
19 Federal or State tax laws or other laws, or the rules of the House of Representatives, to
20 the matters presented in your request, as those issues are outside its jurisdiction.

21 This response constitutes an advisory opinion concerning the application of the

22 _____
² Because Representative Engel controls the Committee, the major purpose analysis is not applicable in determining whether the Committee is a political committee. *Buckley v. Valeo*, 424 U.S. 1, 79 (1976).

1 Act and Commission regulations to the specific transaction or activity set forth in your
2 request. *See* 2 U.S.C. 437f. The Commission emphasizes that, if there is a change in any
3 of the facts or assumptions presented, and such facts or assumptions are material to a
4 conclusion presented in this advisory opinion, then the requestor may not rely on that
5 conclusion as support for its proposed activity.

6 Sincerely,

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8
9
10 Bradley A. Smith
11 Chairman

12
13 Enclosures (AOs 2003-36, 2003-20, 2003-12, 1990-23, 1982-37, and 1981-35)