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Washington, DC 20463

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AGENDA ITEM
For Meeting of: 07-16-09

MEMORANDUM

TO: The Commission

FROM: Thomasenia P. Duncan *TPD*
General Counsel

Rosemary C. Smith *RCS*
Associate General Counsel

Robert M. Knop *RMK*
Assistant General Counsel

Neven F. Stipanovic *NFS*
Attorney

Subject: Draft AO 2009-13 (The Black Rock Group)

Attached are two proposed drafts of the subject advisory opinion. We request that these drafts be placed on the agenda for July 16, 2009.

Attachment

1 ADVISORY OPINION 2009-13

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William J. McGinley
Patton Boggs LLP
2550 M Street, NW
Washington, D.C. 20037

DRAFT A

9 Dear Mr. McGinley:

10 We are responding to your advisory opinion request on behalf of The Black Rock
11 Group (“BRG”), concerning the application of the Federal Election Campaign Act of
12 1971, as amended (the “Act”), and Commission regulations to activities of BRG, a newly
13 formed consulting company.

14 The Commission concludes that BRG may serve as a commercial vendor to one
15 or more single member limited liability companies that make independent expenditures
16 concerning Federal elections or candidates without triggering political committee status.

17 ***Background***

18 The facts presented in this advisory opinion are based on your letter received on
19 May 27, 2009 and publicly available materials.

20 BRG is a limited liability company (“LLC”) established in 2009 under the laws of
21 the State of Delaware. BRG was established to provide clients, including CEOs, elected
22 officials, and Fortune 500 companies, with communication, “earned media,” and
23 grassroots messaging services. It helps clients build successful public policy campaigns
24 by making sure that they are “asking the right questions, framing the debate in the
25 appropriate manner and are delivering messages so they are heard and [their] objectives
26 achieved.” See http://www.blackrockgrp.com/services_publicpolicy.php. It advises

1 companies on media strategy and message campaigning.

2 See http://www.blackrockgrp.com/services_mediastrategy.php. It advises clients on how

3 to manage their reputations in the media, and offers training on how to improve their

4 media skills. *Id.* It also advises clients on how to manage and avoid crises.

5 See http://www.blackrockgrp.com/services_crisismgt.php.

6 BRG proposes to offer strategic communication and general consulting services to
7 single member natural-person LLCs. These LLCs will be established for the sole purpose
8 of making independent expenditures that expressly advocate the election or defeat of one
9 or more Federal candidates. Each LLC client will be a separate and distinct entity, and
10 each will have the following characteristics:

11 (1) One individual will serve as the LLC's only member and manager;

12 (2) For Federal income tax purposes, the LLC will be treated as a
13 disregarded entity and not a corporation;

14 (3) All capital contributions for each LLC will come solely from the
15 personal funds of the LLC's only member; and

16 (4) The LLC will not engage in any for-profit business activities, receive
17 income from any other types of activities, or accept donations from any
18 other individual or entity.

19 BRG may encourage its individual clients to establish LLCs with the above
20 characteristics. BRG also may be approached by clients who have already established, or
21 are contemplating establishing, an LLC with the above characteristics.

22 BRG will advise these LLCs on the development of messages that expressly
23 advocate the election or defeat of the Federal candidates chosen by the client. BRG's

1 role will be to advise each LLC concerning how best to communicate its sole member's
2 views on these Federal candidates. The individual member of each LLC will retain
3 ultimate control over the timing, content, method of communication, and the candidate
4 referenced in each communication constituting an independent expenditure.

5 Each LLC will spend more than \$1,000 per calendar year on independent
6 expenditures for television, radio, direct mail, phone bank, and print advertisements. In
7 no case, however, will any communication be funded by more than one individual. Each
8 LLC may make independent expenditures for or against one or more Federal candidates.
9 In some cases more than one LLC may make independent expenditures for or against the
10 same Federal candidate. BRG, its LLC clients, and any other vendor providing services
11 to each LLC will not coordinate any communications with any Federal candidate or
12 political party committee.

13 The same BRG personnel will service all of the LLCs. BRG also will manage
14 other consultants such as pollsters, media production, media placement, direct mail, and
15 phone vendors, who will also provide services to each LLC. BRG will not have firewalls
16 preventing BRG personnel advising one LLC from discussing that LLC's private plans,
17 projects, strategies, activities, and needs with the BRG personnel advising any other
18 LLCs, though BRG does not indicate that it will communicate such information to the
19 LLCs themselves. BRG also may facilitate communication between LLCs by scheduling
20 conference calls or meetings between certain LLCs, or conveying messages between
21 them.

1 ***Questions Presented***

- 2 1. *May BRG serve as a commercial vendor to one LLC making independent*
3 *expenditures concerning several Federal candidates and elections without*
4 *triggering political committee status?*
- 5 2. *May BRG serve as a commercial vendor for several LLCs making independent*
6 *expenditures concerning Federal candidates or elections without triggering*
7 *political committee status for one or more of the LLCs?*
- 8 3. *Do the answers in Questions 1 and 2 change if none of the LLCs directly*
9 *communicate with any of the other LLCs, or if BRG does not convey messages*
10 *between LLCs?*

11 ***Legal Analysis and Conclusions***

- 12 1. *May BRG serve as a commercial vendor to one LLC making independent*
13 *expenditures concerning several Federal candidates and elections without*
14 *triggering political committee status?*
- 15 Yes, BRG may serve as a commercial vendor to one LLC making independent
16 expenditures concerning several Federal candidates and elections without triggering
17 political committee status.

18 Treatment of an LLC as an Individual

19 Under the Act and Commission regulations, contributions and independent
20 expenditures made by a single natural member LLC are treated as if they were made by
21 an individual. *See* 2 U.S.C. 431(8) and (9); 11 CFR 110.1(g); Advisory Opinion 2009-02
22 (True Patriot Network); *see also*, Explanation and Justification for the Treatment of
23 Limited Liability Companies Under the Federal Election Campaign Act, 64 FR 37397,

1 37399 (Jul. 12, 1999). In Advisory Opinion 2009-02, the Commission concluded that
2 independent expenditures made by Mr. Hanauer, the sole member of True Patriot
3 Network LLC (“TPN”), were treated as if they were made by Mr. Hanauer. The
4 Commission explained that, “[b]ecause of the unity between Mr. Hanauer and TPN, it is
5 appropriate for attribution of expenditures to pass through the LLC and attach to Mr.
6 Hanauer.” *See* Advisory Opinion 2009-02 (TPN) at 3. Here, BRG asks whether it can
7 serve as a commercial vendor to an LLC that appears to have a similar degree of unity
8 between the individual member and the LLC. As in Advisory Opinion 2009-02 (TPN),
9 the LLC will have one individual who serves as the LLC’s sole member and manager; for
10 Federal income tax purposes, each LLC will be treated as a disregarded entity and not a
11 corporation; and the LLC’s capital contributions will come solely from the personal funds
12 of the LLC’s only member.

13 The LLC is a third party and is not the requestor of this advisory opinion.
14 However, as discussed above, BRG represents that: (1) the LLC will have only one
15 individual member and manager; (2) for Federal income tax purposes, the LLC will be
16 treated as a disregarded entity and not a corporation; (3) all capital contributions for the
17 LLC will come solely from the personal funds of the LLC’s only member; (4) the LLC
18 will not engage in any for-profit business activities, receive income from any other types
19 of activities, or accept donations from any other individual or entity; and (5) the LLC’s
20 sole purpose is to sponsor independent expenditures, and the LLC’s sole member will
21 retain ultimate control concerning the timing, content, method of communication, and the
22 candidate referenced in each independent expenditure sponsored by his or her LLC.
23 Given these representations, the Commission determines that the LLC as described has

1 the kind of unity with the sole member of the LLC as was demonstrated in Advisory
2 Opinion 2009-02 (TPN). Accordingly, the single member LLC here is treated as an
3 individual.

4 Political Committee Status

5 This advisory opinion request raises two “political committee” status issues.
6 First, is BRG itself a “political committee” under the Act? Second, do BRG and the LLC
7 constitute a “group of persons” so that together they are a “political committee”? The
8 Commission concludes that neither BRG by itself, nor BRG and its LLC client, are a
9 “political committee.”

10 Status of BRG

11 The Act and Commission regulations define a “political committee” as “any
12 committee, club, association, or other group of persons which receives contributions
13 aggregating in excess of \$1,000 during a calendar year or which makes expenditures
14 aggregating in excess of \$1,000 during a calendar year.” 2 U.S.C. 431(4)(A);
15 11 CFR 100.5(a). The Supreme Court construed the term “political committee” to
16 encompass only organizations that are under the control of a candidate or whose major
17 purpose is the nomination or election of a candidate. *See Buckley v. Valeo*, 424 U.S. 1,
18 79 (1976); *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 262 (1986).

19 The facts presented in the request, and the information available on BRG’s
20 website, indicate that BRG is organized and operated for commercial purposes, and not
21 for purposes of influencing any Federal election. BRG is in the business of providing
22 consulting services to a variety of clients, including Fortune 500 companies and corporate
23 executives. Moreover, BRG does not indicate that it has ever advocated the election of

1 any Federal candidate, or has ever supported any political party, or has expressed any
2 political goal, or stated any political purpose, or intends to do so in the future. *Cf. FEC v.*
3 *Malenick*, 310 F. Supp. 2d 230 (D.D.C. 2004) (the organization’s public statements
4 demonstrated that the organization’s major purpose was to elect specific Federal
5 candidates and to encourage major donors to consider supporting Federal candidates);
6 Advisory Opinion 1994-25 (Libertarian National Committee) (corporation not a true
7 vendor because its sole purpose was to organize a political convention and several
8 principals were members of the National Committee). Nor is BRG owned or controlled
9 by any Federal candidate. Accordingly, the Commission concludes that BRG by itself is
10 not a “political committee” under the Act.

11 “Group of Persons”

12 Under the facts presented here, BRG and a single LLC will not act together to
13 form a “group of persons,” and therefore will not be a political committee. BRG’s LLC
14 client will make independent expenditures that expressly advocate the election or defeat
15 of one or more Federal candidates.¹ BRG, however, will work with the LLC as a
16 commercial vendor for genuinely commercial purposes. Commission regulations define
17 a “commercial vendor,” for the purposes of permissible extensions of credit to political
18 committees, as “any persons providing goods or services to a candidate or political
19 committee whose usual and normal business involves the sale, rental, lease or provision
20 of those goods or services.” 11 CFR 116.1(c). BRG will provide strategic
21 communication and general consulting services to the LLC consistent with its usual and
22 normal business practice. Specifically, it will advise the LLC on how to develop its

¹ The single-member LLC also is not a “political committee” because it is treated as an individual under the Act. Advisory Opinion 2009-02 (TPN).

1 messages and how best to communicate its views on Federal candidates. BRG indicates
2 that it offers similar consulting services to its non-political clients.² For example, BRG
3 advises clients on media strategy and message campaigning, and helps clients build
4 successful public policy campaigns.³ The LLC also will retain ultimate control over the
5 timing, content, method of communication, and the candidate referenced in each
6 communication constituting an independent expenditure.⁴ Moreover, BRG itself will not
7 pay for any communication; all communications will be paid for solely by the LLC.
8 Therefore, the consulting services BRG will provide to the LLC here appear to be
9 consistent with the company's usual and normal consulting practice.

10 Accordingly, the Commission concludes that BRG and its LLC client will not
11 constitute a "group of persons," and no "political committee" will be created when BRG
12 serves as its commercial vendor.

13

14 2. *May BRG serve as a commercial vendor for several LLCs making independent*
15 *expenditures concerning Federal candidates or elections without triggering*
16 *political committee status for one or more of the LLCs?*

17 Yes, BRG may serve as a commercial vendor for several LLCs making
18 independent expenditures concerning Federal candidates or elections without triggering
19 political committee status.

² Cf. *FEC v. Malenick*, 310 F. Supp. 2d 230, 236 (D.D.C. 2004) (Triad Inc.'s primary source of funding was one donor and the company's client billing was "basically nonexistent").

³ See http://www.blackrockgrp.com/services_publicpolicy.php.

⁴ Compare Advisory Opinion 2009-02 (TPN) ("Mr. Hanauer will be the final decision-maker on all TPN actions, although TPN's employees and consultants might advise TPN in the making of these communications.").

1 The Commission concluded in its answer to Question 1 that political committee
2 status is not triggered when BRG serves as a commercial vendor to only one LLC making
3 independent expenditures. The question here is whether serving as a commercial vendor
4 to two or more LLCs will cause BRG and the LLCs to become a “group of persons” and,
5 hence, trigger political committee status under the Act. 2 U.S.C. 431(4)(A). The
6 Commission concludes neither BRG nor the LLCs will be a political committee.

7 BRG is a commercial vendor operating for commercial purposes, and not for
8 purposes of influencing any Federal elections. Merely arranging conference calls,
9 scheduling meetings, or conveying messages between two or more clients is insufficient
10 to conclude that those clients become a “group of persons” for purposes of the definition
11 of “political committee.” BRG does not indicate that there is any agreement between the
12 LLCs themselves. Nor is BRG aware of any possible collaboration between the LLCs
13 themselves at this point. For example, despite the fact that BRG may facilitate meetings
14 between its LLC clients, BRG does not know what will be discussed at those meetings,
15 how many meetings will be arranged, or whether there will be any collaboration between
16 the LLCs beyond the meetings arranged by BRG. It also is possible that some LLCs may
17 urge the election of candidates running against each other in the same election.

18 Each LLC is a separate and distinct person, treated as an individual under the Act
19 and Commission regulations. *See* 2 U.S.C. 431(11); 11 CFR 100.10; *see also* 11 CFR
20 110.1(g)(4). Each LLC will pay all costs of its own communications, and no
21 communication will be funded by more than one LLC. The LLCs will not establish a
22 common bank account or otherwise pool their financial resources with one another or

1 with BRG.⁵ Each LLC will have ultimate control over when its communications are
2 made, how they are made, what the communications will say, and which candidates and
3 elections they will discuss. Without any additional information to indicate concerted
4 activity by the LLCs, the Commission concludes that the arrangements by BRG – a *bona*
5 *fide* commercial vendor – do not trigger political committee status for the LLCs.

6 BRG also plans to use the same personnel to service all of its LLCs, without any
7 firewalls. However, this practice will not further facilitate communications or
8 arrangements between the LLCs. The request indicates that BRG personnel will share
9 *amongst themselves* the private plans, strategies, activities, and needs of its clients. There
10 is no indication, however, that BRG will communicate this information to its clients.

11 The Commission notes that the requestor presents a fundamentally different
12 situation than the situation in *FEC v. Malenick*, 310 F. Supp. 2d 230 (D.D.C. 2004). In
13 *Malenick*, the United States District Court concluded that Triad Inc. was a political
14 committee. Triad Inc. represented itself as a marketing company that advised clients and
15 donors prior to making contributions to charitable and political causes. *Malenick*, at 234.
16 The court, however, found that Triad Inc.’s major purpose was the nomination or election
17 of specific candidates in 1996. *Id.* at 237. Public statements showed that Triad Inc.
18 advocated the election of specific candidates, and that the entire purpose of the

⁵ Pooling of resources has commonly been viewed as relevant in determining political committee status. *See, e.g., McConnell v. FEC*, 540 U.S. 93, 135 (2003) (noting that “contributions serve ‘to affiliate a person with a candidate’ and ‘enabl[e] like-minded persons to pool their resources,’” quoting *Buckley v. Valeo*, 424 U.S. 1, 22 (1976)) (emphasis added); *Calif. Med. Assoc. v. FEC*, 453 U.S. 182, 203 (1981) (“By pooling their resources, adherents of an association amplify their own voices . . . Accordingly, I believe that contributions to political committees can be limited only if those contributions implicate the governmental interest in preventing actual or potential corruption . . .”) (Blackmun, J., concurring in part and dissenting in part) (emphasis added); *Buckley*, 424 U.S. at 246, (“Finally, it seems clear to me that in approving these limitations on contributions the Court must rest upon the proposition that “pooling” money is fundamentally different from other forms of associational or joint activity.”) (Burger, C.J., concurring in part and dissenting in part) (emphasis added).

1 corporation was to get major donors involved to elect specific candidates. Unlike in
2 *Malenick*, the facts presented here indicate that BRG operates for commercial purposes,
3 and not for purposes of influencing Federal elections. BRG expressly states that it will
4 not solicit or accept contributions for the purpose of making independent expenditures.
5 Thus, BRG will not pool contributions to make independent expenditures.

6 Accordingly, the Commission concludes that BRG may serve as a commercial
7 vendor for several LLCs under the facts presented here without triggering political
8 committee status for itself or the LLCs.

9

10 3. *Do the answers in Questions 1 and 2 change if none of the LLCs directly*
11 *communicate with any of the other LLCs, or if BRG does not pass messages*
12 *between LLCs?*

13 No, the answers to Questions 1 and 2 above do not change if the LLCs refrain
14 from communicating with one another, or if BRG does not convey messages between
15 them.

16 This response constitutes an advisory opinion concerning the application of the
17 Act and Commission regulations to the specific transaction or activity set forth in your
18 request. *See* 2 U.S.C. 437f. The Commission emphasizes that, if there is a change in any
19 of the facts or assumptions presented, and such facts or assumptions are material to a
20 conclusion presented in this advisory opinion, then the requestor may not rely on that
21 conclusion as support for its proposed activity. Any person involved in any specific
22 transaction or activity which is indistinguishable in all its material aspects from the
23 transaction or activity with respect to which this advisory opinion is rendered may rely on

1 this advisory opinion. *See* 2 U.S.C. 437f(c)(1)(B). Please note 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 The cited advisory opinions are available on the Commission's Web site at
5 <http://saos.nictusa.com/saos/searchao>.

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7 On behalf of the Commission,

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Steven T. Walther
Chairman

1 ADVISORY OPINION 2009-13

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William J. McGinley
Patton Boggs LLP
2550 M Street, NW
Washington, D.C. 20037

DRAFT B

9 Dear Mr. McGinley:

10 We are responding to your advisory opinion request on behalf of The Black Rock
11 Group (“BRG”), concerning the application of the Federal Election Campaign Act of
12 1971, as amended (the “Act”), and Commission regulations to activities of BRG, a newly
13 formed consulting company.

14 The Commission concludes that BRG may serve as a commercial vendor to one
15 single-member natural-person limited liability company (“LLC”) that makes independent
16 expenditures concerning Federal elections or candidates without triggering political
17 committee status. BRG also may serve as a commercial vendor to two or more single-
18 member natural-person LLCs without triggering political status if BRG does not facilitate
19 communications between the LLCs and does not convey information from one LLC to
20 another.

21 ***Background***

22 The facts presented in this advisory opinion are based on your letter received on
23 May 27, 2009 and publicly available materials.

24 BRG is itself an LLC established in 2009 under the laws of the State of Delaware.
25 BRG was established to provide clients, including CEOs, elected officials, and Fortune
26 500 companies, with communication, “earned media,” and grassroots messaging services.

1 BRG helps clients build public policy campaigns by making sure that they are “asking the
2 right questions, framing the debate in the appropriate manner and are delivering messages
3 so they are heard and [their] objectives achieved.” *See*
4 http://www.blackrockgrp.com/services_publicpolicy.php. It advises companies on media
5 strategy and message campaigning.
6 *See* http://www.blackrockgrp.com/services_mediastrategy.php. It advises clients on how
7 to manage their reputations in the media, and offers training on how to improve their
8 media skills. *Id.* It also advises clients on how to manage and avoid crises.
9 *See* http://www.blackrockgrp.com/services_crisismgt.php.

10 BRG proposes to offer strategic communication and general consulting services to
11 single-member natural-person LLCs. These LLCs will be established for the sole
12 purpose of making independent expenditures that expressly advocate the election or
13 defeat of one or more Federal candidates. Each LLC client will be a separate and distinct
14 entity, and each will have the following characteristics:

- 15 (1) One individual will serve as the LLC’s only member and manager;
- 16 (2) For Federal income tax purposes, the LLC will be treated as a
17 disregarded entity and not a corporation;
- 18 (3) All capital contributions for each LLC will come solely from the
19 personal funds of the LLC’s only member; and
- 20 (4) The LLC will not engage in any for-profit business activities, receive
21 income from any other types of activities, or accept donations from any
22 other individual or entity.

1 BRG may encourage its individual clients to establish LLCs with the above
2 characteristics. BRG also may be approached by clients who have already established, or
3 are contemplating establishing, an LLC with the above characteristics.

4 BRG will advise these LLCs on the development of messages that expressly
5 advocate the election or defeat of the Federal candidates chosen by the client. BRG's
6 role will be to advise each LLC concerning how best to communicate its sole member's
7 views on these Federal candidates. The individual member of each LLC will retain
8 ultimate control over the timing, content, method of communication, and the candidate
9 referenced in each communication constituting an independent expenditure.

10 Each single-member natural-person LLC will spend more than \$1,000 per
11 calendar year on independent expenditures for television, radio, direct mail, phone bank,
12 and print advertisements. In no case, however, will any communication be funded by
13 more than one LLC. Each LLC may make independent expenditures for or against one or
14 more Federal candidates. In some cases more than one LLC may make independent
15 expenditures for or against the same Federal candidate. BRG, its LLC clients, and any
16 other vendor providing services to each LLC will not coordinate any communications
17 with any Federal candidate or political party committee.

18 The same BRG personnel will service all of the LLCs. BRG also will manage
19 other consultants such as pollsters, media production, media placement, direct mail, and
20 phone vendors, who will also provide services to each LLC. BRG will not have firewalls
21 preventing BRG personnel advising one LLC from discussing that LLC's private plans,
22 projects, strategies, activities, and needs with the BRG personnel advising any other
23 LLCs. BRG also anticipates that it will facilitate communication between LLCs by

1 scheduling conference calls or meetings between certain LLCs, or conveying messages
2 between them.

3 ***Questions Presented***

4 1. *May BRG serve as a commercial vendor to one LLC making independent*
5 *expenditures concerning several Federal candidates and elections without*
6 *triggering political committee status?*

7 2. *May BRG serve as a commercial vendor for several LLCs making independent*
8 *expenditures concerning Federal candidates or elections without triggering*
9 *political committee status for one or more of the LLCs?*

10 3. *Do the answers in Questions 1 and 2 change if none of the LLCs directly*
11 *communicate with any of the other LLCs, or if BRG does not convey messages*
12 *between LLCs?*

13 ***Legal Analysis and Conclusions***

14 1. *May BRG serve as a commercial vendor to one LLC making independent*
15 *expenditures concerning several Federal candidates and elections without*
16 *triggering political committee status?*

17 Yes, BRG may serve as a commercial vendor to one LLC making independent
18 expenditures concerning several Federal candidates and elections without triggering
19 political committee status for BRG, or for BRG and the LLC together.

20 Treatment of an LLC as an Individual

21 Under the Act and Commission regulations, contributions and independent
22 expenditures made by a single-member natural-person LLC are treated as if they were
23 made by an individual. See 2 U.S.C. 431(8) and (9); 11 CFR 110.1(g); Advisory Opinion

1 2009-02 (True Patriot Network); *see also*, Explanation and Justification for the Treatment
2 of Limited Liability Companies Under the Federal Election Campaign Act, 64 FR 37397,
3 37399 (July 12, 1999). In Advisory Opinion 2009-02, the Commission concluded that
4 independent expenditures made by Mr. Hanauer, the sole natural-person member of True
5 Patriot Network LLC (“TPN”), were treated as if they were made by Mr. Hanauer. The
6 Commission explained that, “[b]ecause of the unity between Mr. Hanauer and TPN, it is
7 appropriate for attribution of expenditures to pass through the LLC and attach to Mr.
8 Hanauer.” *See* Advisory Opinion 2009-02 (True Patriot Network) at 3. Here, BRG asks
9 whether it can serve as a commercial vendor to an LLC that appears to have a similar
10 degree of unity between the individual member and the LLC. As in Advisory Opinion
11 2009-02 (True Patriot Network), the LLC will have one individual who serves as the
12 LLC’s sole member and manager; for Federal income tax purposes, each LLC will be
13 treated as a disregarded entity and not a corporation; and the LLC’s capital contributions
14 will come solely from the personal funds of the LLC’s only member.

15 Because the LLC is a third party and is not the requestor of this advisory opinion,
16 the Commission cannot determine conclusively that the LLC at issue has the kind of
17 unity with the sole member of the LLC as was demonstrated in Advisory Opinion 2009-
18 02 (True Patriot Network). For purposes of this advisory opinion, however, the
19 Commission assumes that the LLC to which BRG is providing service will be similar in
20 all material respects to the single-member LLC in Advisory Opinion 2009-02 (True
21 Patriot Network). Accordingly, the single-member LLC here is treated as an individual.

1 Political Committee Status

2 This advisory opinion request raises two “political committee” status issues.
3 First, is BRG itself a “political committee” under the Act? Second, do BRG and the LLC
4 constitute a “group of persons” so that together they are a “political committee”? The
5 Commission concludes that neither BRG by itself, nor BRG and its LLC-client, is a
6 “political committee.”

7 Status of BRG

8 The Act and Commission regulations define a “political committee” as “any
9 committee, club, association, or other group of persons which receives contributions
10 aggregating in excess of \$1,000 during a calendar year or which makes expenditures
11 aggregating in excess of \$1,000 during a calendar year.” 2 U.S.C. 431(4)(A);
12 11 CFR 100.5(a). The Supreme Court construed the term “political committee” to
13 encompass only organizations that are under the control of a candidate or whose major
14 purpose is the nomination or election of a candidate. *See Buckley v. Valeo*, 424 U.S. 1,
15 79 (1976); *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 262 (1986).

16 The facts presented in the request, and the information available on BRG’s
17 website, indicate that BRG is organized and operated for commercial purposes, and not
18 for purposes of nominating or electing a candidate. BRG is in the business of providing
19 consulting services to a variety of clients, including Fortune 500 companies and corporate
20 executives. Moreover, BRG does not indicate that it has ever advocated the election of
21 any Federal candidate, or has ever supported any political party, or has expressed any
22 political goal, or stated any political purpose, or intends to do so in the future. *Cf. FEC v.*
23 *Malenick*, 310 F. Supp. 2d 230 (D.D.C. 2004) (the organization’s public statements

1 demonstrated that the organization’s major purpose was to elect specific Federal
2 candidates and to encourage major donors to consider supporting Federal candidates);
3 Advisory Opinion 1994-25 (Libertarian National Committee) (corporation not a true
4 vendor because its sole purpose was to organize a political convention, it had no other
5 clients, and several principals were members of the National Committee). Nor is BRG
6 owned or controlled by any Federal candidate. Accordingly, the Commission concludes
7 that BRG by itself is not a “political committee” under the Act.

8 Group of Persons

9 Under the facts presented here, BRG and a single LLC will not act together to
10 form a “group of persons,” and therefore will not be a political committee.¹ BRG’s LLC
11 client will make independent expenditures that expressly advocate the election or defeat
12 of one or more Federal candidates. BRG, however, will work with the LLC as a
13 commercial vendor for genuinely commercial purposes. Commission regulations define
14 a “commercial vendor,” for the purposes of permissible extensions of credit to political
15 committees, as “any persons providing goods or services to a candidate or political
16 committee whose usual and normal business involves the sale, rental, lease or provision
17 of those goods or services.” 11 CFR 116.1(c). BRG will provide strategic
18 communication and general consulting services to the LLC consistent with BRG’s usual
19 and normal business practice. Specifically, BRG will advise the LLC on how to develop
20 the LLC’s messages and how best to communicate its views on Federal candidates. BRG

¹ The single-member LLC also is not a “political committee” because it is treated as an individual under the Act. Advisory Opinion 2009-02 (True Patriot Network).

1 indicates that it offers similar consulting services to its non-political clients.² For
2 example, BRG advises clients on media strategy and message campaigning, and helps
3 clients build public policy campaigns.³ The LLC also will retain ultimate control over
4 the timing, content, method of communication, and the candidate referenced in each
5 communication constituting an independent expenditure. Moreover, BRG itself will not
6 pay for any communication; all communications will be paid for solely by the LLC.
7 Therefore, the consulting services BRG will provide to the LLC here appear to be
8 consistent with the company's usual and normal consulting practice.

9 Accordingly, the Commission concludes that BRG and its LLC client will not
10 constitute a "group of persons," and no "political committee" will be created when BRG
11 serves as its commercial vendor.

12

13 2. *May BRG serve as a commercial vendor for several LLCs making independent*
14 *expenditures concerning Federal candidates or elections without triggering*
15 *political committee status for the LLCs?*

16 Not if BRG's services include the facilitation of communication between the
17 LLCs and permit the sharing of information between staff working for each LLC. Under
18 the facts presented, the LLCs making independent expenditures concerning Federal
19 candidates or elections will likely be a "group of persons" whose major purpose is the
20 election or defeat of candidates. Once the group spends over \$1,000 on these

² The facts presented indicate that BRG has multiple clients including, but not limited to the LLCs. *Cf.* *FEC v. Malenick*, 310 F. Supp. 2d 230, 236 (D.D.C. 2004) (Triad Inc.'s primary source of funding was one donor and the company's client billing was "basically nonexistent"); Advisory Opinion 1994-25 (Libertarian National Committee) (supposed vendor had only one client).

³ See http://www.blackrockgrp.com/services_publicpolicy.php.

1 independent expenditures, it is a “political committee” under the Act. 2 U.S.C.
2 431(4)(A).

3 Group of Persons

4 As noted above, the definition of a “political committee” includes “a group of
5 persons.” 2 U.S.C. 431(4)(A); 11 CFR 100.5(a). As explained by the requestor, each
6 LLC will be formed exclusively to make independent expenditures for communications
7 that expressly advocate the election or defeat of one or more Federal candidates.
8 According to the request, BRG will “facilitate communications among various LLCs by
9 scheduling conference calls or meetings between certain LLCs, or passing along
10 messages between the LLCs.” By sharing information in this way and using that
11 information to coordinate their efforts to advocate for the election or defeat of Federal
12 candidates, the LLCs would be acting jointly and in concert to achieve a common goal.

13 BRG does not propose any limits on the nature or amount of the information that
14 the LLCs may share at the meetings arranged by BRG, or the information that BRG may
15 convey between the LLCs. The express advocacy communications, which may be made
16 through TV, radio, direct mail, phone bank, and print advertising, may be closely
17 synchronized at these meetings. The decision making about the communications,
18 although ultimately controlled by each individual LLC, may involve close collaboration
19 of multiple LLCs.⁴

⁴ The issue of control in this context is different than in Advisory Opinion 2009-02 (True Patriot Network). In Advisory Opinion 2009-02, the Commission concluded that a single-member natural-person LLC would be treated as an individual under the Act because, among other reasons, only the individual’s personal funds were used in making the independent expenditures. Thus, in Advisory Opinion 2009-02, although other individuals may have been involved in the decision making process, the funding for the independent expenditure came from one individual. And that individual was the final decision maker on all LLC actions and positions. In this request, multiple individuals from multiple LLCs, each using personal funds

1 The facts presented here contemplate that BRG will facilitate collaboration
2 between two or more LLCs, each making independent expenditures, about when
3 communications are made, which media outlets will be used, what the communications
4 will say, and which candidates and elections they will target. Although the requestor
5 states that each LLC will pay only for specific communications, the LLCs nonetheless
6 may act in concert with respect to their expenditures to support or oppose the election or
7 defeat of one or more Federal candidates.⁵ The actions of BRG will enable LLCs to
8 share or collaborate on their strategies to advocate the election of the same candidate, or
9 they may coordinate the messages they plan to communicate. Moreover, the same BRG
10 personnel will service all of the LLCs, without any firewalls. Sharing the private plans,
11 strategies, activities, and needs of the LLCs, even if only internally within BRG, would
12 aid and actualize the LLCs efforts to act as a group. Accordingly, the Commission
13 concludes that the LLCs acting together through BRG as their common vendor would
14 constitute a “group of persons.”

15 If a “group of persons” receives more than \$1,000 in contributions or makes more
16 than \$1,000 in expenditures per calendar year, it will meet the statutory definition of a
17 political committee. BRG states in its request that each LLC will make expenditures
18 exceeding \$1,000 per calendar year, so the group of LLCs will also be making more than

to make independent expenditures, would collaborate as they each make decisions with respect to their expenditures.

⁵ While the requestor states that “each individual client will pay for the production and placement costs of his or her own advertisements” such that “the creation and placement costs will not be split between two different individuals,” it is entirely possible that different clients will fund advertisements that are substantially similar. The practical effect of such an arrangement would be the sharing of creation, development, or consulting costs between multiple LLCs.

1 \$1,000 in expenditures and will therefore satisfy both statutory criteria for a political
2 committee.

3 Major Purpose

4 The other requirement for a group of persons to constitute a political committee is
5 that its “major purpose” is the nomination or election of a candidate. *Buckley v. Valeo*,
6 424 U.S. 1, 79 (1975); *Massachusetts Citizens for Life, Inc. v. FEC*, 479 U.S. 238, 262
7 (1986). BRG has stated that the LLCs will be formed “for the sole purpose of sponsoring
8 independent expenditures that expressly advocate the election or defeat of one or more
9 federal candidates.” Each LLC’s “major purpose” and therefore that of the “group of
10 persons” is the nomination or election of candidates.

11 Although the LLCs would constitute a political committee under the facts
12 presented, BRG may provide services to a political committee so long as it does so as a
13 *bona fide* commercial vendor. 11 CFR 116.1(c). If circumstances change, however, such
14 that BRG becomes part of the “group of persons,” it would also be a part of the political
15 committee. See *FEC v. Malenick*, 310 F. Supp. 2d 230 (D.D.C. 2004).

16

17 3. *Do the answers in Questions 1 and 2 change if none of the LLCs directly*
18 *communicates with any of the other LLCs, or if BRG does not convey messages*
19 *between LLCs?*

20 The answer to Question 1 will not change, but the answer in Question 2 will
21 change if none of the LLCs directly communicates with one another and if BRG does not
22 facilitate communications between them. In that case, there is nothing in the request

1 suggesting that either the LLCs or the LLCs together with BRG would be a political
2 committee.

3 The Commission previously concluded that, under similar circumstances,
4 individuals using a common commercial vendor did not constitute a “group of persons”
5 and, hence, were not a “political committee.” *See* Advisory Opinion 2008-10
6 (VoterVoter.com). In Advisory Opinion 2008-10, VoterVoter.com sought to operate a
7 website that would allow individuals to create political advertisements and to purchase
8 advertisements created by others. The Commission concluded that VoterVoter.com, the
9 creators of the advertisements, and the purchasers of the advertisements did not constitute
10 a “group of persons.” The Commission relied on the facts that VoterVoter.com, as a
11 commercial vendor, did not facilitate communications or arrangements between any of
12 the purchasers and any of the creators of advertisements, and that VoterVoter.com did not
13 convey information about any creator to any purchaser or *vice versa*. Unlike the facts
14 presented here, however, the purchasers and the creators of advertisements at issue in
15 Advisory Opinion 2008-10 (VoterVoter.com) were different persons.

16 If BRG does not facilitate any communications between the LLCs or otherwise
17 convey any information about one LLC to any other LLC, then under these facts, the
18 conclusions set forth in the answer to Question 2 are no longer valid. BRG, like
19 VoterVoter.com, would simply establish a separate commercial relationship with each
20 individual LLC.

21 In addition, the LLCs would not be using a commercial vendor – BRG – to
22 facilitate the sharing of information or collaboration on strategies for purposes of

1 influencing any Federal election.⁶ Accordingly, the actions of BRG would not result in
2 the LLCs taking concerted, collective action as a “group of persons.” Therefore, the
3 Commission concludes that the LLCs themselves would not be a “political committee”
4 simply because each LLC chooses to employ BRG.

5 The Commission does not address whether any agreements or collaboration
6 between the LLCs but not involving BRG would result in the formation of a “group of
7 persons” that would be considered a political committee, because in light of the
8 information provided by BRG, that question is hypothetical and pertains only to third
9 parties that have not joined in this request.

10 This response constitutes an advisory opinion concerning the application of the
11 Act and Commission regulations to the specific transaction or activity set forth in your
12 request. *See* 2 U.S.C. 437f. The Commission emphasizes that, if there is a change in any
13 of the facts or assumptions presented, and such facts or assumptions are material to a
14 conclusion presented in this advisory opinion, then the requestor may not rely on that
15 conclusion as support for its proposed activity. Any person involved in any specific
16 transaction or activity which is indistinguishable in all its material aspects from the
17 transaction or activity with respect to which this advisory opinion is rendered may rely on
18 this advisory opinion. *See* 2 U.S.C. 437f(c)(1)(B). Please note the analysis or
19 conclusions in this advisory opinion may be affected by subsequent developments in the
20 law including, but not limited to, statutes, regulations, advisory opinions, and case law.

21

⁶ The Commission lacks information as to whether the LLCs would be communicating directly among themselves and this Advisory Opinion may not be relied upon to approve the specific actions of any individual LLC.

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2 The cited advisory opinions are available on the Commission's Web site at

3 <http://saos.nictusa.com/saos/searchao>.

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On behalf of the Commission,

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Steven T. Walther

9

Chairman