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Washington, DC 20463

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May 8, 2003

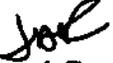
**AGENDA ITEM**  
For Meeting of: 5-15-03

**MEMORANDUM**

TO: The Commission

THROUGH: James A. Pehrkon   
Staff Director

FROM: Lawrence H. Norton   
General Counsel

James Kahl   
Deputy General Counsel

Rosemary C. Smith   
Acting Associate General Counsel

John C. Vergelli   
Acting Assistant General Counsel

Cheryl A. F. Hemsley   
Attorney

SUBJECT: Draft AO 2003-7

Attached is a proposed draft of the subject advisory opinion. We request that this draft be placed on the agenda for May 15, 2003.

Attachment

1 ADVISORY OPINION 2003-7  
2  
3 Ms. Regina Cordle  
4 Treasurer  
5 Virginia Highlands Advancement Fund  
6 Post Office Box 1176  
7 Damascus, VA 242236  
8

**DRAFT**

9 Dear Ms. Cordle:

10 This responds to your letter dated December 19, 2002, as supplemented by your letters of  
11 January 21, 2003, and March 11, 2003, requesting an advisory opinion concerning the  
12 application of the Federal Election Campaign Act of 1971, as amended ("the Act"), and  
13 Commission regulations, to the accounting method Virginia Highlands Advancement Fund  
14 ("VHAF") seeks to use when returning non-Federal funds to its donors.

15 ***Background.***

16 VHAF is a political organization qualified under 26 U.S.C 527. VHAF's registration  
17 statement with the IRS sets forth its purpose as being "to support state and local Democratic  
18 political candidates." VHAF is a state political organization registered in Virginia. It is not a  
19 Federal political committee and is not registered with the Commission.

20 You state that VHAF is "administered" and "supervised" by a Member of the U.S. House  
21 of Representatives. You also state that VHAF has never raised funds for the purpose of  
22 influencing a Federal election, and is not affiliated with or otherwise connected with a Federal  
23 political committee or political party. VHAF raised funds outside the limits and prohibitions of  
24 the Act, but in compliance with Virginia state law ("non-Federal funds"). You state that VHAF  
25 spent all of its funds prior to the November 6, 2002, effective date of the Bipartisan Campaign

1 Reform Act of 2002 (“BCRA”).<sup>1</sup> VHAF intends to close its account and terminate as a political  
2 organization.

3 In 2002, VHAF paid a late filing penalty to the IRS. The IRS, however, unexpectedly  
4 abated this penalty, and issued a refund check for \$690.10 in December of 2002, after VHAF had  
5 already disposed of all of its funds but before it terminated as a political organization.

6 In 2002, VHAF had two donors, one major donor that was a corporation, and one minor  
7 donor who was an individual. You state that VHAF would like to use a *pro rata* accounting  
8 method to return to the two donors proportionate amounts of the \$690.10 refund.

9  
10 ***Question Presented***

11 May VHAF dispose of the IRS refund it involuntarily received by making *pro rata*  
12 refunds to its donors based on the ratio of their donations to total donations in 2002?

13  
14 ***Legal Analysis and Conclusions***

15 Your request states that a Member of Congress “administered” and “supervised” VHAF.  
16 The Commission understands this to mean that you have concluded that the Member of Congress  
17 either (a) “directly or indirectly established, financed, maintained, or controlled” VHAF; or (b)  
18 that the Member received, directed, spent, or disbursed the refunded tax penalty. For purposes of  
19 this opinion only, the Commission accepts one or both of these conclusions, and thus concludes  
20 that 2 U.S.C. 441i(e)(1)(B) applies to the *pro rata* refunds to VHAF donors. Similarly, your  
21 request considers all donations received by VHAF to be non-Federal funds. For the purposes of  
22 this opinion, the Commission accepts this assumption as well. Thus, any refunds from the IRS

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<sup>1</sup> Public Law 107-155, 116 Stat. 81 (Mar. 27, 2002).

1 derived from penalties paid with non-Federal funds from non-Federal donations received must  
2 also be considered non-Federal funds.

3 Under the Act as amended by BCRA, an entity directly or indirectly established, financed,  
4 maintained, or controlled by a Federal officeholder may raise and spend funds in connection with  
5 State and local elections, but only in amounts and from sources that are consistent with State law,  
6 and that do not exceed the Act's contribution limits and that do not come from prohibited sources  
7 under the Act. 2 U.S.C. 441i(e)(1)(B); 11 CFR 300.60(d); 11 CFR 300.62. Similarly, Federal  
8 officeholders may not receive, direct, spend, or disburse funds in connection with a State or local  
9 election if the funds are in excess of the Act's contribution limits or from sources prohibited by  
10 the Act. 2 U.S.C. 441i(e)(1)(B); 11 CFR 300.62. The Commission understands that VHAF  
11 attempted to dispose of all funds by BCRA's November 6, 2002, effective date in order to  
12 terminate as a State political organization.

13 The Act, as amended by BCRA, does not expressly address VHAF's situation of having  
14 disposed of non-Federal funds prior to November 6, 2002, only to receive an unexpected and  
15 unsolicited refund of some of those funds after that date. In responding to your question, the  
16 Commission draws an analogy to the transition period during which national committees of  
17 political parties were required to disgorge all non-Federal funds (November 6 to December 31,  
18 2002), and to the particular methods of disgorgement required for national political party  
19 committees. 11 CFR 300.12(c). Since refunding monies to donors was one of the permitted  
20 means of disgorgement for national party committees, the Commission concludes that in

1 VHAF's unusual situation that is described above, it may dispose of the non-Federal funds  
2 involuntarily received by making refunds to VHAF donors.<sup>2</sup>

3 With regard to whether *pro rata* refunds to donors are appropriate under these unusual  
4 circumstances, the Commission notes that in the past it recognized a *pro rata* refund of  
5 contributions by a federal political committee as a lawful use of excess funds. *See, e.g.,* AO  
6 1980-30. Thus, VHAF may return *pro rata* portions of its unexpected non-Federal funds to its  
7 two donors from 2002.

8 This response constitutes an advisory opinion concerning the application of the Act and  
9 Commission regulations to the specific transaction or activity set forth in your request. *See* 2  
10 U.S.C. 437f. The Commission emphasizes that, if there is a change in any of the facts or  
11 assumptions presented, and such facts or assumptions are material to a conclusion presented in  
12 this opinion, then the requestor may not rely on that conclusion as support for its proposed  
13 activity.

14

15

Sincerely,

16

17

Ellen L. Weintraub

18

Chair

19

20

21 Enclosure: (AO 1980-30)

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<sup>2</sup> You do not inquire into, and the Commission does not address, other possible uses for the IRS refund.