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MEMORANDUM

AGENDA ITEM
For Meeting of: 7-17-03

TO: The Commission
FROM: Caroline Goodson *CG*
DATE: 07/17/2003

SUBMITTED LATE

SUBJECT: Proposed Amendments to Agenda Document 03-48 (Flake)

Chair Weintraub would like the attached amendments to be included as an agenda document for today's meeting.

Proposed Amendments to Agenda Document No. 03-48 (Draft "C")

1. pp. 5-10:

- p. 6, lines 6-7: delete "Both BCRA and the Commission's rules implementing BCRA prohibit" and replace with "BCRA prohibits"
- p. 6, line 8: delete ": (A)"
- p. 6, line 10: delete "and (B)" and replace with ". 2 U.S.C. 441i(e)(1)(A); 11 CFR 300.61. In addition, BCRA prohibits covered persons from soliciting, receiving, directing, transferring, or spending"
- p. 6, line 11: italicize "other than"
- p. 6, line 13: add "prohibited" before "sources"
- p. 6: move the first six lines of p. 6 ending with "2 U.S.C. 441i(e)(1)" to the beginning of question 1(b) on line 3 of p. 10.
- p. 7, line 1: delete in its entirety and replace with "under the Act."
- p. 7, line 2: delete in its entirety and replace with "2 U.S.C. 441i(e)(1)(B); 11 CFR 300.62."
- p. 9: delete "to" from line 9 and delete "(see the response to question 1 b., below)" from line 13.
- pp. 5-10: switch the order of question 1(a) and question 1(b). Rename question 1(b) as "1", and rename question 1(a) as "2".

2. p. 10, line 22 through p. 12, line 2: delete old question 2 in its entirety. (No renumbering of other questions will be needed if the changes in item 1 above are made.)

3. p. 14, line 7: add "so" after "of"

4. p. 14, lines 17-18: delete "However, Representative Flake's communications must not extend beyond this to become solicitations that do not comply with section 441i(e)." and replace with "However, any solicitation of funds by Representative Flake on STMP's behalf must comply with section 441i(e)(1)."

5. p. 15, lines 10 through 16: delete in its entirety.

6. p. 15, line 19 through p. 16, line 4: delete beginning with "Because STMP"

7. p. 16, line 5: delete "Also, because" and replace with "Because"

8. p. 16, lines 6-7: delete "(other than its Federal election activities and electioneering communications)"

9. p. 16, lines 9-10: Delete sentence beginning "Therefore," and ending with "STMP" and replace with "See the response to question 2, above."

10. p. 16, line 14: Add the following sentence: "Therefore, Representative Flake and STMP may only solicit funds for STMP from individuals and other federally permissible sources, in amounts that do not exceed \$5,000 per donor in any calendar year." Add footnote to end of this sentence, "This \$5,000 limit is separate and distinct from the limitations on contributions to Representative Flake's PCC; thus, for example, it would be permissible for an individual to donate \$5,000 per calendar year to STMP and \$2,000 per election to Representative Flake's PCC."

11. p. 16, between lines 14 and 15: add the following paragraph:

Moreover, because STMP is "established, maintained, financed or controlled by Representative Flake," both Representative Flake and STMP are subject to the

restrictions of section 441i(e)(1)(A), which prohibits them from soliciting, receiving, directing, transferring or spending funds for any Federal election activities unless the funds are "subject to the limitations, prohibitions, and reporting requirements of the Act. 2 U.S.C. 441i(e)(1)(A); 11 CFR 300.61. Thus, to the extent any voter registration activity were to constitute Federal election activity, it would be subject to the same source and amount restrictions under section 441i(e)(1)(A) as described above under section 441i(e)(1)(B).

[Add the following as a footnote to the paragraph above:]

One potentially significant difference between the two sections is the reference to the "reporting requirements of the Act," which appears in section 441i(e)(1)(A) but not in section 441i(e)(1)(B). However, because STMP has not indicated any intent to accept "contributions" or make "expenditures," as defined in 2 U.S.C. 431(8) and (9), there is no basis to conclude that STMP has triggered or will trigger political committee status under 2 U.S.C. 431(4), which would subject it to the reporting requirements for political committees under 2 U.S.C. 434. It therefore appears that the only reporting requirements for funds raised and spent by STMP would arise from an electioneering communication, as discussed in the answer to question 17, below.

12. p. 16, line 15: delete "Specifically" and replace with "In sum, as long as Representative Flake and STMP comply with the restrictions described above,"
13. p. 18, line 8: add "from any donor" after "STMP".
14. p. 19, line 7 through p. 20, line 7: delete in its entirety.
15. p. 20, line 11 through p. 21, line 4: delete in its entirety and replace with "No. STMP may not raise money that is not legal under the Act. See the response to question 9, above."
16. p. 21, line 17: delete "must" and replace with "may"
17. p. 21, lines 8-9: delete and replace with "However, any solicitation of funds by Representative Flake on STMP's behalf must comply with section 441i(e)(1)."
18. p. 21, line 10: rename this question "13(a)" and add "Yes; see the response to question 9, above."
19. p. 21, lines 11-12: rename this question "13(b)" and add "No."
20. p. 21, lines 17-20: delete beginning with "Federal" and ending with "(B)" and replace with "funds from individuals or other federally permissible sources, in amounts that do not exceed \$5,000 per donor in any calendar year"
21. p. 21, lines 21 and 22: delete "reference to 'non-federal funds' in this question means funds not subject to the amount limitations and source prohibitions of the Act" and replace with "non-federal funds at issue do not comply with these restrictions,"
22. p. 22, lines 5 and 7: delete "see generally Advisory Opinion 2003-03" and just answer "Yes" to both questions.
23. p. 22, line 18 through p. 23, line 19: delete and replace with "Yes, provided that the activities are paid for with funds from individuals or other federally permissible sources, in amounts that do not exceed \$5,000 per donor in any calendar year. See the answer to question 9, above. To determine whether reporting requirements would apply, see the answer to question 17, below."
24. p. 25, line 9: Replace "must" with "may".

25. p. 28, lines 3-11: delete and replace with "No; see the answer to question 9, above."

1 ADVISORY OPINION 2003-12

2
3 Benjamin L. Ginsberg, Esq.
4 Patton Boggs L.L.P.
5 2550 M Street, N.W.
6 Washington, D.C. 20037-1350

7
8 Dear Mr. Ginsberg:

9 This responds to your letters dated March 3, March 24, and April 7, 2003,
10 requesting an advisory opinion on behalf of the Stop Taxpayer Money for Politicians
11 Committee ("STMP") and United States Representative Jeff Flake concerning the
12 application of the Federal Election Campaign Act of 1971 ("the Act"), and Commission
13 regulations, to a ballot measure campaign that STMP and Representative Flake plan to
14 undertake for the November 2, 2004, election in Arizona.

15 ***Background***

16 Representative Flake is a candidate for re-election to the House of Representatives
17 in 2004. Jeff Flake for Congress ("the PCC" or "his PCC") is his principal campaign
18 committee.

19 STMP is an unincorporated, section 527 political organization that wishes to
20 qualify a State referendum to repeal portions of Arizona's campaign finance statute.
21 STMP is not a Federal political committee. You state that STMP and Representative Flake
22 plan to qualify the ballot measure for the November 2, 2004, election and campaign for its
23 passage, if it qualifies.

24 STMP was established on January 17, 2003. Representative Flake signed the
25 documents filed with the Arizona Secretary of State that formed STMP, and he was
26 STMP's first Chairman. You state that an individual who served as Representative Flake's

1 part-time campaign consultant aided STMP with its State filings and with establishing its
2 bank account.

3 On March 21, 2003, Representative Flake resigned from STMP, and he has not
4 held any other office in STMP since then. All funds raised while Representative Flake was
5 associated with STMP have been returned.

6 You represent that Representative Flake wishes to resume his role as Chairman of
7 STMP, and that he and/or agents of his authorized committee wish to provide significant
8 support to STMP. You state that Representative Flake plans to assist STMP to the extent
9 permitted under the law as interpreted by the Commission, and that Representative Flake,
10 and his agents and employees of his authorized campaign committee, have been asked to
11 be involved in all aspects of STMP, including its governance. STMP also wishes to
12 employ both current and former employees of Representative Flake's PCC and
13 congressional office, and STMP contemplates hiring individuals who are, or have been,
14 consultants to Mr. Flake's PCC, some in this election cycle and some in previous election
15 cycles. You expect that such individuals would engage in a variety of STMP's activities,
16 and that, if permitted, such individuals would also perform similar activities for
17 Representative Flake's PCC, with each committee paying a proportionate share of the
18 individual's costs. Representative Flake and his agents would like to be able to direct and
19 participate in the governance of STMP, as well as to formulate its strategy and tactics for
20 the ballot referendum.

21 You state that STMP wishes Representative Flake and his agents to bring their
22 expertise to bear on all STMP's planned public communications. STMP would like

1 Representative Flake to play a role in selecting the media firm used for STMP's public
2 communications, and STMP wishes to receive his and his agents' ideas for specific scripts
3 and copy.

4 You tell us that neither Representative Flake's PCC, nor any employee or agent of
5 that committee, has provided financial support for STMP.

6 In the signature-gathering and ballot qualification stage, STMP will hire full-time
7 employees and part-time consultants; their duties will be fundraising or political
8 organizing. STMP plans to hire consultants to draft the ballot measure. The political
9 organizing will involve hiring staff and recruiting volunteers, who will gather signatures
10 through June 2004 and maintain a web site. These personnel will also be responsible for
11 satisfying the administrative requirements of qualifying the ballot measure. You state that
12 STMP plans to raise funds permitted by State law to qualify for the State ballot, and that
13 this will include raising funds outside of the Act's amount limitations and source
14 prohibitions. You state that, in the signature-gathering and ballot qualification phase
15 through June 2004, STMP will not engage in any Federal election activity ("FEA") as
16 defined in 11 CFR 100.24, nor make any electioneering communications as defined in 11
17 CFR 100.29. You state that STMP anticipates engaging in voter registration and voter
18 identification programs from the beginning of its activities.

19 Once the ballot measure has qualified, STMP plans to engage in activities designed
20 to win passage for the measure. First, STMP will conduct voter registration programs
21 designed to identify voters who agree with the initiative and to register them to vote if they
22 are not already registered. This will include contacting voters by telephone, in-person, by

1 mail, or over the Internet to assist them in registering to vote for the November 2004
2 general election. Second, STMP will engage in a broad-based advertising campaign
3 regarding the State campaign finance statute through public broadcast communications,
4 and mail, phone and Internet messages. Third, STMP will engage in get-out-the-vote
5 programs ("GOTV") designed to get the measure's supporters to the polls in November
6 2004 by means of telephone, in person door-to-door activity, and other individualized
7 means. This will include providing voters in the three days before the election with
8 information about when and where polling places are open and offering transportation to
9 the polls. You state that STMP anticipates engaging in GOTV activities beginning about
10 30 days before the November 2004 election and continuing through election day. Fourth,
11 STMP will engage in an "aggressive" program to raise the funds permitted by Arizona law
12 to fund these activities, including funds not permitted by the Act.

13 STMP intends to clearly identify a Federal officeholder or candidate in its broad-
14 based advertising campaign promoting the Arizona ballot measure, and you state that such
15 messages will likely meet the definition of "public communication" in 11 CFR 100.26.
16 You state that the statute that STMP wishes to repeal is closely identified with Senator
17 McCain among Arizona residents and that Representative Flake is one of the statute's most
18 visible and vocal critics. None of the communications will refer to anyone "in his or her
19 role as a Federal candidate" or advocate the election or defeat of a Federal candidate. You
20 expect that these communications will be distributed from the beginning of STMP's
21 activities, which will be more than 120 days before the election, through November 2,
22 2004. You state that any communications by STMP will be directed to all voters in

1 Arizona, including those in Representative Flake's district, but that there will not be
2 special messages directed to voters in Representative Flake's district. STMP anticipates
3 that any broadcast communications will be receivable by more than 50,000 people in the
4 state as a whole and in Representative Flake's district in particular.

5 ***Legal Analysis and Conclusions***

6 A written advisory opinion request must "set forth a *specific* transaction or activity
7 that the requesting person plans to undertake or is presently undertaking and intends to
8 undertake in the future. *Requests presenting a general question of interpretation, or*
9 *posing a hypothetical situation . . . do not qualify as advisory opinion requests."* 11 CFR
10 112.1(b) (emphasis added).

11 The Commission concludes that several of your questions are "general question[s]
12 of interpretation," within the meaning of 11 CFR 112.1(b), rather than questions regarding
13 "a specific transaction or activity" as required by 2 U.S.C. 437f(a). Other questions,
14 however, do relate to specific activities that STMP and Representative Flake intend to
15 undertake, and are therefore appropriately addressed in an advisory opinion. Many of your
16 questions are posed in the alternative, asking for answers assuming that STMP is organized
17 as a section 501(c)(4) organization and as a section 527 organization.¹ Except as noted in
18 the answer to question 9, the answers to the questions below do not depend on STMP's
19 form of organization under the Internal Revenue Code.

20 _____
21 _____

¹ 26 U.S.C. 501(c)(4) and 26 U.S.C. 527.

1 On November 6, 2002, the Bipartisan Campaign Reform Act of 2002 (BCRA), Pub. L. No. 107-
2 155, Nov. 6, 2002 (BCRA) took effect. As amended by BCRA, the Act regulates
3 the activities of federal candidates and officeholders, their agents, and entities that
4 are directly, indirectly, maintained, or controlled by them (see 11
5 C.F.R. 100.5(a)(1) and 100.5(a)(2) for the definition of "agent" and "entity").
6 Under 2 U.S.C. 4412(e)(1),
7 "[i]n determining factors (1) [CFR 100.5(a)] and (2) [CFR 100.5(a)(2)] determining whether a person or
8 entity (including, if indirectly established, financed, maintained or controlled by
9 another person or entity) under BCRA, "Prohibited and Excessive Contributions; Non-
10 Use of Money or Soft Money; Final Rules," 67 Fed. Reg. 49,064, 49,083 (July 29, 2002)
11 the factors set forth in 11 CFR 300.2(c)(2)(i) through (x) must be examined in the
12 context of the overall relationship between the sponsor and the entity to determine whether
13 any one or more factor or factors is evidence that the sponsor directly or indirectly
14 maintains, controls, or dominates the entity." 11 CFR 100.2(c)(2)(x).
15 Under 11 CFR 100.2(c)(2)(x) the Commission concludes that Representative Flake established STMP
16 through the assistance of individuals who formed STMP, and he subsequently
17 worked with the Arizona Secretary of State's office creating STMP. He was STMP's
18 primary contact from its establishment on January 17, 2003, to March 21, 2003, when he
19 resigned as a paid individual who also served as Representative Flake's part-time campaign
20 manager. Representative Flake's compliance with its State filings and expense work

² Under 2 U.S.C. 431(3), "Federal office" means "the office of President or Vice President, or of Senator or Representative in, or Delegate or Resident Commissioner to, the Congress." See also 11 CFR 100.4.

³ 11 CFR 300.2(b)(3).

⁴ 11 CFR 300.60.

1 section 441i(e)(1)(B) should not depend on one word in isolation.¹¹ Likewise, 11 CFR
2 100.2(a), which defines “election ... to Federal office,” does not explain the meaning of
3 subparagraph (B), which, by its own terms, applies to elections *other than* elections to
4 Federal office.

5 As used in subparagraph (B) of section 441i(e)(1), the term, “in connection with
6 *any election other than* an election for Federal office” is, on its face, clearly intended to
7 apply to a different category of elections than those covered by subparagraph (A), which
8 refers to “an election for Federal office.” This phrasing, “in connection with any election
9 other than an election for Federal office” also differs significantly from the wording of
10 other provisions of the Act that reach beyond Federal elections. Particularly relevant is the
11 prohibition on contributions or expenditures by national banks and corporations organized
12 by authority of Congress, which applies “in connection with any election to *any political*
13 *office.*” 2 U.S.C. 441b(a).¹² Where Congress uses different terms, it must be presumed
14 that it means different things.¹³ Congress expressly chose to limit the reach of section
15 441b(a) to those non-Federal elections for a “political office,” while intending a broader
16 sweep for section 441i(c)(1)(B), which applies to “any election” (with only the exclusion
17 of elections to Federal office). Therefore, the Commission concludes that the scope of

¹¹ *Davis v. Mich. Dep't of Treas.*, 489 U.S. 803, 809, 109 S.Ct. 1500, 1504, 103 L.Ed.2d 891 (1989) (“It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.”).

¹² Before BCRA, the prohibition on contributions by foreign nationals similarly applied “in connection with an election to any political office. As amended by BCRA, this prohibition now applies “in connection with a Federal, State, or local election.” 2 U.S.C. 441e(a)(1)(A).

¹³ There is a presumption in statutory construction that the use of different language indicated a legislative intention to mean different things. *See, e.g., E.E.O.C. v. Gilbarco, Inc.*, 615 F.2d 985, 999 (4th Cir. 1980).

1 section 441i(e)(1)(B) is not limited to elections for a political office,¹⁴ and that the
2 activities of STMP as described in your request (other than its Federal election activities
3 and electioneering communications) are in connection with an election other than an
4 election for Federal office. 2 U.S.C. 441i(e)(1)(B).

5 The Commission's previous advisory opinions, stating or otherwise indicating that
6 "contributions or expenditures" relating exclusively to ballot referenda measures are not in
7 connection with an election, are not to the contrary. Advisory Opinions 1989-32, 1984-62,
8 n.2, 1982-10, 1980-95. BCRA and the implementing regulations not only regulate certain
9 activity by Federal candidates and officeholders more broadly than before, they also
10 explicitly reach fundraising and spending by entities established, financed, maintained, or
11 controlled by such candidates or officeholders. In this respect, the Act, as amended by
12 BCRA, is now materially different than it was when those advisory opinions were issued.
13 Thus, those previous advisory opinions are not applicable to your request to the extent that
14 they could be read to mean that donations to, or disbursements on behalf of, an entity that
15 was established for the purpose of campaigning for a ballot measure, and not for any
16 Federal candidacy, are presumptively outside the provisions of the Act and Commission
17 regulations.¹⁵

18 The Commission finds that all activities of a ballot measure committee
19 "established, financed, maintained or controlled" by a Federal candidate, as is the case here

¹⁴ This statutory construction of 2 U.S.C. 441i(e) is also consistent with the Commission's decision not to create an exception to the definition of electioneering communications for ballot initiatives or referenda because ballot initiatives are becoming "increasingly linked with the public officials who support or oppose them . . . [and] the initiative or referenda . . . [can be] a proxy for the candidate . . ." "Electioneering Communications; Final Rules," 67 *Fed. Reg.* 65,190, 65,202 (October 23, 2002).

¹⁵ Advisory Opinion 1989-32 holds that foreign national donations to a ballot measure committee controlled by a State candidate are prohibited under the Act. 2 U.S.C. 441e. This holding does apply to your request.

1 ~~of the response to question 1(b) below~~, are “in connection with an election other than an
2 election for Federal office.” This includes activity in the signature-gathering and ballot
3 qualification stage, as well as activity to win passage of the measure after it qualifies for
4 the ballot. On the other hand, activities of a ballot measure committee that is not
5 “established, financed, maintained or controlled” by a Federal candidate, officeholder, or
6 agent of either, would not be “in connection with any election other than an election for
7 Federal office” before the last day to file a ballot initiative petition under applicable State
8 law, but would be “in connection with any election other than an election for Federal
9 office” on and after that date. 2 U.S.C. 441i(e)(1)(A), (B).

10 ~~The Commission has previously established, directly or indirectly, established, financed, maintained,~~
11 ~~or controlled STAMP.~~

12 ~~The affiliation factors (11 CFR 101.51(g) and 110.3) determine whether~~
13 ~~person or entity “is” “directly or indirectly established, financed, maintained,~~
14 ~~or controlled” by the person or entity under BCRA. “Prohibited and Excessive~~
15 ~~Contributions to and Excess of Funds or Soft Money, Final Rules.” (C.F.R. Reg. 101.51(g)~~

16 ~~21.7.02). The affiliation factor set out at 11 CFR 101.51(g) is a~~
17 ~~measure of the causal relationship between the person or~~
18 ~~entity and the person or entity. The presence of any factor or factors is evidence that the~~
19 ~~person or entity is directly or indirectly established, financed, maintained, or controlled by the~~

20 ~~person or entity.~~
21 ~~The Commission concludes that Representative Flake established STAMP,~~
22 ~~and that he is among the individuals who formed STAMP, and he signed~~

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1 ~~Analysis of the relationship between Representative Flake and STMP officer~~

2 ~~of STMP and the relationship between a Federal Election Commission~~

3 ~~candidate and the relationship between a candidate and a political~~

4 ~~committee is not the same as the relationship between a candidate~~

5 ~~and a political committee. The relationship between a candidate~~

6 ~~and a political committee is not the same as the relationship between~~

7 ~~a candidate and a political committee. STMP is not a political~~

8 ~~committee. STMP is a 501(c)(4) organization.~~

9 ~~Commissioner further concludes that under 2 U.S.C. 11261(a)(1) and~~

10 ~~11261(a)(2), STMP and Representative Flake may raise up to a total of \$5,000 per~~

11 ~~calendar year, if particular permissible, without regard to the amount~~

12 ~~of money raised under Representative Flake's PCC.~~

13 Your advisory opinion request presents the following specific questions:

14 3. *May Representative Flake serve as Chair, Officer, or Director of STMP? If so, will this*
15 *result in "coordination" between STMP and his PCC? Does STMP's form of organization*
16 *as a section 527 political organization, or as a section 501(c)(4) organization affect the*
17 *answer to this question?*

18 Yes, Representative Flake may serve as Chair, Officer, or Director of STMP,
19 subject to the restrictions explained in the answer to question 9 below, with regard to
20 fundraising.

21 Your advisory opinion request presents numerous facts and questions that raise
22 issues as to "coordination" between STMP and Representative Flake. *See generally* 11

1 CFR Part 109, Subpart C. Under 11 CFR 109.20(a), “coordinated” means, “made in
2 cooperation, consultation, or concert with, or at the request or suggestion of, a candidate, a
3 candidate’s authorized committee, or their agents”¹⁶ The regulations in 11 CFR
4 109.21 set forth a three-pronged test that must be satisfied to conclude that payments for a
5 coordinated communication are made for the purpose of influencing a Federal election, and
6 therefore constitute in-kind contributions. First, the communication must be paid for by
7 someone other than a candidate, an authorized committee, a political party committee, or
8 an agent of any of the foregoing. 11 CFR 109.21(a)(1). The second prong is a “content
9 standard” regarding the subject matter of the communication. 11 CFR 109.21(a)(2). The
10 third prong is a “conduct standard” regarding the interactions between the person paying
11 for the communication and the candidate or the candidate’s agents. 11 CFR 109.21(a)(3).
12 These conduct standards include “requests or suggestions” for communications by
13 candidates and “material involvement” in the making and airing of communications. 11
14 CFR 109.21(d)(1), (2).

15 The Commission cannot resolve whether particular communications are
16 coordinated communications without more specific information regarding those
17 communications. As such, this question is hypothetical, and presents a general question of
18 interpretation of the Act, rather than a specific transaction or activity, and is thus not
19 proper for an advisory opinion. 2 U.S.C. 437f(a)(1); 11 CFR 112.1(b).

¹⁶ An expenditure is considered to be a contribution to a candidate when it is “made by any person in cooperation, consultation, or concert, with, or at the request or suggestion of,” that candidate, the authorized committee of that candidate, or their agents. 2 U.S.C. 441a(a)(7)(B)(i). Also, an expenditure is not “independent” if it is “made in cooperation, consultation, or concert, with, or at the request or suggestion of,” a candidate, authorized committee, or a political party committee. See 11 CFR 100.16.

1 *4. May Representative Flake serve as Honorary Chair of STMP if he has no legal*
2 *responsibilities? Does STMP's form of organization as a section 527 political*
3 *organization, or as a section 501(c)(4) organization affect the answer to this question?*

4 Given the Commission's response to question 3 that Representative Flake can serve
5 as the actual Chair, he may also serve as the honorary Chair of STMP.

6 *5. May agents and employees of Representative Flake's authorized committee be involved*
7 *in all aspects of STMP, including directing and participating in its governance, and*
8 *formulating strategy and tactics for the ballot referendum?*

9 Yes, subject to the restrictions explained in the answers to questions 9 and 10,
10 below, with regard to fundraising, and subject to the consequences resulting from
11 coordinated activity included in the Act and Commission regulations. 2 U.S.C. 441a(a); 11
12 CFR 100.52(d)(1); 11 CFR 109.20 to 109.21. Note that 11 CFR 300.2(b) defines "agent"
13 as any person who has actual authority, either express or implied, to solicit, receive, direct,
14 transfer, or spend funds in connection with any election on behalf of a Federal candidate or
15 officeholder.

16 *6. May STMP employ both current and former employees of Representative Flake's PCC*
17 *and congressional office?*

18 Yes; the consequences of doing are based on the legal principles discussed in the
19 responses to questions 3 and 5, above.

20 *7. May STMP hire individuals who are, or have been, consultants to Representative*
21 *Flake's authorized committee, some in this election cycle and some in previous election*
22 *cycles?*

1 Yes; the consequences of doing are based on the legal principles discussed in the
2 responses to questions 3 and 5, above.

3 8. *During the signature-gathering and ballot qualification phase, may Representative*
4 *Flake publicly urge Arizona voters to sign the petition?*

5 Yes, merely encouraging voters to sign a petition does not trigger the applicability
6 of 2 U.S.C. 441i(e). However, ~~any solicitation of funds by Representative Flake— or~~
7 ~~_____ extending to the general public—~~
8 ~~_____~~ comply with section 441i(e).

9 9. *May Representative Flake raise money for STMP generally? May he raise money for*
10 *STMP specifically for the purpose of signature-gathering and ballot qualification*
11 *activities? Does STMP's form of organization as a section 527 political organization, or*
12 *as a section 501(c)(4) organization affect the answer to this question? Specifically, may he*
13 *do so:*

- 14 (a) *By attending fundraising events for STMP?*
- 15 (b) *By appearing as a featured guest at a STMP fundraiser?*
- 16 (c) *By speaking at STMP fundraising events?*
- 17 (d) *By making telephone calls to raise money for STMP?*
- 18 (e) *By signing fundraising letters for STMP?*
- 19 (f) *By hosting fundraising events for STMP?*

20 *Fundraising if STMP is a 527 Organization or a Tax-Exempt Organization*

21 ~~_____ has indicated that STMP will be registering voters as part of its signature-~~
22 ~~_____ qualifications activities under the voter registration act.~~

1 ~~_____~~
2 ~~_____~~
3 ~~_____~~
4 ~~_____~~
5 ~~_____~~
6 Representative Flake may raise funds for STMP, but he must comply with the
7 Act's restrictions on fundraising by Federal candidates and officeholders.¹⁷ 2 U.S.C.

8 441i(e); 11 CFR Part 300, Subpart D. ~~Because STMP is "established, financed,~~
9 ~~maintained or controlled" by Representative Flake, it, too, is subject to these restrictions.~~
10 ~~Flake and STMP may not directly receive, direct transfer, or contribute~~
11 ~~to or from election for Federal office, including funds for any Federal election~~
12 ~~campaign, and may not use the funds to pay political expenses.~~
13 ~~2 U.S.C. 441i(e); 11 CFR 300.301.~~

14 ~~_____~~ because STMP is an entity "established, financed, maintained or controlled"
15 by Representative Flake, the activities of STMP as described in your request ~~(including~~
16 ~~fundraising activities and disseminating communications) are in connection with an~~
17 election other than an election for Federal office, and thus within the scope of 2 U.S.C.
18 441i(e)(1)(B). ~~See the response to question 2, above. Therefore, the criteria in~~

19 ~~_____~~ and Federal election law applicable was identified by ~~_____~~
20 ~~_____~~. Under section 441i(c)(1)(B), a person subject to 2 U.S.C. 441i(c) must

¹⁷ AO 2003-03 addressed a Federal officeholder's request to raise funds for State candidates in Virginia. The conclusions in AO 2003-03 are not applicable in this advisory opinion because none of the requestors in AO 2003-03 were "established, financed, maintained or controlled by" a Federal candidate or officeholder, as STMP is here.

1 9(b)), may speak at STMP fundraising events (question 9(c)), may make fundraising
2 telephone calls (question 9(d)), may sign fundraising letters for STMP (question 9(e)), and
3 may host fundraising events for STMP (question 9(f)).

4 *Fundraising if STMP Becomes a Tax-Exempt Organization*

5 2 U.S.C. 441i(c)(4)(A) provides that, if a 501(c) organization satisfies certain
6 conditions, a candidate for Federal office, an individual holding Federal office, or an agent
7 of either (a "covered individual"), may make "general solicitations" or "specific
8 solicitations" for the 501(c) organization.

9 A "general solicitation" is made without regard to the Act's amount limitations or
10 source prohibitions. 2 U.S.C. 441i(e)(4)(A), 11 CFR 300.65(a); *cf.* 2 U.S.C. 441i(e)(1).
11 Such a "general solicitation" may be made on behalf of a 501(c) organization if two
12 conditions are met: (1) the 501(c) organization does not have as its "principal purpose"
13 engaging in FEA described in 2 U.S.C. 431(20)(A)(i) to (ii), and (2) the solicitation does
14 not specify how the funds will or should be spent. 2 U.S.C. 441i(c)(4)(A). These two
15 types of FEA are (i) voter registration within 120 days of a regularly scheduled Federal
16 election, and (ii) voter identification, generic campaign activity, and GOTV "in connection
17 with an election in which a candidate for Federal office appears on the ballot."²⁰ 11 CFR
18 100.24(b)(1) and (2).

²⁰ Commission regulations define "voter registration activity," voter identification," "generic campaign activity," and "get-out-the-vote activity". "Voter registration activity" means contacting individuals by telephone, in person, or by other individualized means to assist them in registering to vote. 11 CFR 100.24(a)(2). "Voter identification" means creating or enhancing voter lists by verifying or adding information about the voters' likelihood of voting in an upcoming election or their likelihood of voting for specific candidates. 11 CFR 100.24(a)(4). "Generic campaign activity" means a public communication [defined in 11 CFR 100.26 and discussed below] that promotes or opposes a political party and does not promote or oppose a clearly identified Federal or non-Federal candidate. 11 CFR 100.25. "Get-out-the-vote activity means contacting registered voters by telephone, in person, or by other individualized means to assist

1 A "specific solicitation" is one made only to individuals for amounts up to \$20,000
2 during any calendar year. 2 U.S.C. 441i(e)(4)(B); 11 CFR 300.65(b). Such "specific
3 solicitations" may be made explicitly to obtain funds for carrying out the types of FEA
4 described above, or may be made for a section 501(c) organization whose principal
5 purpose is to conduct these types of FEA. 2 U.S.C. 441i(e)(4)(B).

6 The Commission concludes that a covered individual may not make a "general
7 solicitation" or a "specific solicitation" for a 501(c) organization under 2 U.S.C. 441i(e)(4)
8 where the covered individual has "established, financed, maintained or controlled" the
9 501(c) organization under 2 U.S.C. 441i(e)(1). 2 U.S.C. 441i(e)(1)(A), (B). The
10 provisions of 2 U.S.C. 441i(e)(4) only apply to those 501(c) organizations that are not
11 "established, financed, maintained or controlled" by a covered individual. Given that
12 Representative Flake established STMP, he and STMP may only solicit up to \$5,000 per
13 calendar year for STMP for the date. The Commission notes, however, that a 501(c)
14 organization will be not be treated as an entity "established, financed, maintained or
15 controlled by" a covered individual solely because the covered individual attends
16 fundraising events, and / or participates in, fundraising activities to some extent.²¹ 2
17 U.S.C. 441i(e)(1); 11 CFR 300.2(c).

18 *10. May STMP engage in ballot qualification activities, such as hiring consultants to draft*
19 *the ballot measure, gathering signatures, maintaining a website, performing*

them in engaging in the act of voting, such as providing individual voters, within 72 hours of an election, information such as the election date, and the location and operating hours of polling places, and offering to transport, or actually transporting, voters to the polls. 11 CFR 100.24(a)(3).

²¹ A different result may occur if the covered individual is the source of a such a significant amount of funds for the 501(c) organization that the covered individual is effectively financing the organization. See generally 11 CFR 300.2(c)(2).

1 administrative tasks, and raising funds? Are there any restrictions imposed by the Act on
2 STMP in engaging these ballot qualification activities? Does STMP's form of organization
3 as a section 527 political organization, or as a section 501(c)(4) organization affect the
4 answer to this question?

5 As to fundraising, see the response to question 9, above.

6 To the extent that the "signature-gathering and ballot qualification activities" about
7 which you inquire are voter drive-type activities, see the response to question 11, below.

8 11. May staff hired by STMP and paid for with money legal under Arizona ballot initiative
9 law, but not the Act,

10 (a) Engage in voter registration activities for STMP paid for with non-federal
11 funds for the November 2004 election where federal candidates will be on the ballot?
12 Does STMP's form of organization as a section 527 political organization, or as a section
13 501(c)(4) organization affect the answer to this question?

14 ~~Under the Act, as amended by BCRA, "voter registration activity" is the direct~~
15 ~~or indirect solicitation of signatures within 120 days of a regularly scheduled Federal election. 2 U.S.C.~~
16 ~~2112(a)(1)(A); 49 P.S. 2410(d). Both the November 2, 2004, general election and~~
17 ~~the November 2, 2004, primary election are regularly scheduled Federal elections.~~
18 ~~Under the Act, as amended by BCRA, "paid for" means that the candidate, officeholder,~~
19 ~~or officeholder's campaign committee, or a committee established to raise or spend~~
20 ~~money for the candidate, officeholder, or officeholder's campaign committee, or~~
21 ~~any other officeholder must be paid for entirely with funds subject to the limitations~~

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16 (b) *Engage in GOTV activities paid for with non-federal funds for that election?*

17 *Does STMP's form of organization as a section 527 political organization, or as a section*
18 *501(c)(4) organization affect the answer to this question?*

19 No. STMP may not raise money that is not legal under the Act. See 11 C.F.R. § 101.11.

20 _____
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1 Does STMP's form of organization as a section 527 political organization, or as a
2 section 501(c)(4) organization affect the answer to this question?

3

4 14. During the ballot initiative campaign phase, may Representative Flake appear at
5 fundraising events paid for by STMP with non-federal funds as a speaker or honored
6 guest?

7 STMP ~~may~~ raise and spend only ~~money made for federal election~~
8 ~~non-federal funds subject to the limitations and prohibitions of the Act on the~~
9 ~~fundraising events referred to in question 14, above, if the money is raised from~~
10 ~~individuals, corporations, partnerships, or other organizations, or from~~
11 ~~any other source, other than the Federal Government, State Government, or~~

12 see the response to question 9, above. Therefore, to the extent that the ~~term~~ "non-
13 federal funds" does not comply with these restrictions, ~~in this specific~~
14 ~~context~~ ~~of the~~ ~~Act~~, the answer is *no*.

15 15. With regard to the fundraising events referenced in question 14, are the following
16 activities permissible:

17 (a) May Representative Flake attend such events if he is not on the invitation and is not
18 introduced?

19 Yes

20 15. (b) May he be introduced at the event if he is not on the invitation?

21 Yes

1 15. (c) Is there any effect if the fact that he is a candidate on the ballot is or is not
2 mentioned?

3 No.

4 15. (d) Does STMP's form of organization as a section 527 political organization, or as a
5 section 501(c)(4) organization affect the answer to questions 15(a) – (c)?

6 No; see the answer to question 9, above.

7 16. May STMP conduct a "broad-based advertising campaign" in support of the ballot
8 measure, which will include public communications that clearly identify a Federal
9 candidate, and which will be distributed from the beginning of STMP's activities (which
10 will be more than 120 days before the election) through election day?

11 Yes, so long as the activities are paid for with funds from individuals or other
12 persons or entities, so long as no anonymous gifts do not exceed \$5,000 per donor, and
13 so long as the answer to question 9, above, is a determination that an individual
14 is not a candidate for the answer to question 17, below.

15 Yes, so long as the activities are paid for with funds from individuals or other
16 persons or entities, so long as no anonymous gifts do not exceed \$5,000 per donor, and
17 so long as the answer to question 9, above, is a determination that an individual
18 is not a candidate for the answer to question 17, below.
19 Yes, so long as the activities are paid for with funds from individuals or other
20 persons or entities, so long as no anonymous gifts do not exceed \$5,000 per donor, and

22 Yes, so long as the activities are paid for with funds from individuals or other
persons or entities, so long as no anonymous gifts do not exceed \$5,000 per donor, and
so long as the answer to question 9, above, is a determination that an individual
is not a candidate for the answer to question 17, below.

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17 *17. May STMP conduct "a broad-based advertising campaign" in support of the ballot*
18 *measure that will include public communications that clearly identify a Federal candidate,*
19 *and that will be broadcast to 50,000 or more people in either Representative Flake's*
20 *congressional district, or Arizona voters in general?*

21 This question turns on the status of STMP's communications as "electioneering
22 communications" under 2 U.S.C. 434(f). Subject to certain exceptions, an "electioneering

1 communication” is any broadcast, cable or satellite communication that refers to a clearly
2 identified candidate for Federal office, and is publicly distributed for a fee within 60 days
3 of a general, special or runoff election for the office sought by the candidate, or within 30
4 days of a primary or preference election for the office sought by the candidate, and, in the
5 case of a communication which refers to a candidate for office other than President or Vice
6 President, is targeted to the relevant electorate. 2 U.S.C. 434(f)(3)(A)(i); 11 CFR
7 100.29(a) and (b). “Targeted to the relevant electorate” means that the communication can
8 be received by 50,000 or more persons in the district the candidate seeks to represent, in
9 the case of a candidate for the House of Representatives, or in the State the candidate seeks
10 to represent, in the case of a candidate for Senate. 11 CFR 100.29(b)(5). The legislative
11 history indicates that the electioneering communications provisions, set out at 2 U.S.C.
12 434(f) and 441b(b)(2), are designed to ensure that such communications are not paid for by
13 corporations and labor organizations and are reported by persons who make them.

14 “Electioneering Communications; Final Rules,” 67 Fed. Reg. 65,190 (October 23, 2002).

15 You state that STMP will engage in a “broad-based advertising campaign” through
16 broadcast communications to the general public. You have not inquired about advertising
17 in other media. These communications will clearly identify a Federal officeholder and/or
18 candidate for Federal office, likely to be Senator McCain or Representative Flake, or both.
19 You state that the communications will be publicly distributed within 60 days of the
20 November 2, 2004 general election, and 30 days before the September 7, 2004 Arizona
21 primary election, and will be “targeted to the relevant electorate” within the meaning of 11
22 CFR 100.29(b)(5) because they can be received by 50,000 or more persons in

1 Representative Flake's congressional district or throughout the State. Accordingly, these
2 STMP communications will be electioneering communications, as defined in 11 CFR
3 100.29(a).

4 Funds from national banks, corporations, labor organizations or foreign nationals
5 ~~may~~ not be used to pay for electioneering communications under BCRA's
6 amendments to 2 U.S.C. 441b, 2 U.S.C. 441b(b)(2); 441e(a)(2); 11 CFR 114.2. *See also*
7 "Electioneering Communications; Final Rules," 67 *Fed. Reg.* 65,190, 65,203 (October 23,
8 2002).

9 The Commission concludes that STMP may broadcast the communications
10 described in this question. Assuming STMP follows Commission guidance in response to
11 question 9, it will have only permissible funds to pay for these communications. *See* 2
12 U.S.C. 441b and 441e, and 11 CFR 114.14. STMP's form of organization as an
13 unincorporated section 527 organization or as an unincorporated section 501(c)
14 organization does not affect the answer to this question. *See* 2 U.S.C. 441b(c)(2) to (4).²³

15 STMP must disclose, among other things, persons sharing or exercising direction or
16 control over the activities of STMP, as well as certain payments for electioneering
17 communications and certain donors to STMP. *See* 2 U.S.C. 434(f); 11 CFR 104.20.

18 *18. May Representative Flake and his agents be involved in the creation, production, and*
19 *distribution of the public communications that STMP intends to include in its broad-based*
20 *advertising campaign supporting the ballot measure? This would include involvement in*
21 *decisions regarding: the contents, means, or mode of the communications, the specific*

²³ You state that STMP is unincorporated. If STMP were to incorporate (e.g., become an incorporated section 501(c)(4) organization), then it could not make electioneering communications unless it were a qualified non-profit corporation ("QNC"). 11 CFR 114.2(b)(2)(iii) and 114.10.

1 *media outlets used, the timing or frequency of the communications, the size or prominence*
2 *of a printed communication, and the duration of a broadcast, cablecast, or satellite-*
3 *delivered communication.*

4 Yes; the consequences of doing are based on the legal principles discussed in the
5 responses to questions 3 and 5, above.

6 *19. May Representative Flake play a role in selecting the media firm used to create*
7 *STMP's public communications and to receive his and his agents ideas for specific scripts*
8 *and copy?*

9 Yes; the consequences of doing are based on the legal principles discussed in the
10 responses to questions 3 and 5, above.

11 *20. May an independent consultant hired by STMP for its referendum ads also assist in*
12 *making ads advocating Representative Flake's election for his authorized committee where*
13 *each committee would independently pay the consultant the fair market value of his*
14 *services?*

15 Yes; the consequences of doing are based on the legal principles discussed in the
16 responses to questions 3 and 5, above.

17 *21. May an independent consultant who has been hired by Rep. Flake's authorized*
18 *committee also assist STMP with its public communications?*

19 Yes; the consequences of doing are based on the legal principles discussed in the
20 responses to questions 3 and 5, above.

1 22. *May an independent consultant to STMP discuss STMP's public communications with*
2 *any consultant in Arizona who is working for any Federal candidate's authorized*
3 *committee?*

4 The Commission cannot address this question without further information
5 regarding the discussions. This question is hypothetical, and presents a general question of
6 interpretation of the Act, rather than a specific transaction or activity, and is thus not
7 proper for an advisory opinion. 2 U.S.C. 437f(a)(1); 11 CFR 112.1(b).

8 23. *May an independent consultant to STMP discuss STMP's communications and plans*
9 *with another independent consultant whose clients include a 2004 presidential campaign*
10 *or the Arizona or Republican or Democratic Party?*

11 The Commission cannot address this question without further information
12 regarding the discussions. This question is hypothetical, and presents a general question of
13 interpretation of the Act, rather than a specific transaction or activity, and is thus not
14 proper for an advisory opinion. 2 U.S.C. 437f(a)(1); 11 CFR 112.1(b).

15 24. *May any of the following messages be paid for by STMP exclusively with funds legal*
16 *under Arizona law but not permissible under the Act? Does STMP's form of organization*
17 *as a section 527 political organization, or as a section 501(c)(4) organization affect the*
18 *answer to this question?*

19 (a) *A message that says, "Support Ballot Measure X."*

20 (b) *A message that says, "Support Ballot Measure X. Go vote on November 2."*

21 (c) *A message that says, "Support Ballot Measure X and State Senator Jones and State*
22 *Representative Smith by voting on November 2."*

~~1 May we answer to question 24(b) as~~
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~~3 _____~~
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11 *25. May a combination of State funds and Levin Account funds pay for public*
12 *communications by STMP?*

13 No. Only State, district, and local political parties committees may raise and spend
14 Levin funds. 2 U.S.C. 441i(b)(2); 11 CFR 300.2(h) and (i); 11 CFR 300.30 to 300.36.

15 *26. May STMP's staff communicate about STMP's activities and plans with the*
16 *Republican and Democratic state parties, county parties, or local parties?*

17 It is not possible to answer this question without further information about the
18 subject, timing, and actions taken as a result of the "communications." As presented, this
19 question is hypothetical, and calls for general interpretation of the Act, and is thus not
20 proper for an advisory opinion. 11 CFR 112.1(b).

21 The Commission expresses no opinion regarding qualification for tax-exempt status
22 under 26 U.S.C. 501(c)(4) or any other ramifications of the proposed activities under the

1 Internal Revenue Code because those questions are outside the Commission's jurisdiction.

2 This response constitutes an advisory opinion concerning the application of the Act
3 and Commission regulations to the specific transaction or activity set forth in your request.
4 See 2 U.S.C. 437f. The Commission emphasizes that, if there is a change in any of the
5 facts or assumptions presented, and such facts or assumptions are material to a conclusion
6 presented in this opinion, then the requestor may not rely on that conclusion as support for
7 its proposed activity. The Commission notes that this advisory opinion analyzes the Act,
8 as amended by BCRA, and Commission regulations, including those promulgated to
9 implement the BCRA amendments, as they pertain to your proposed activities. On May 1,
10 2003, a three-judge panel of the United States District Court for the District of Columbia
11 ruled that a number of BCRA provisions are unconstitutional and issued an order enjoining
12 the enforcement, execution, or other application of those provisions. *McConnell v. FEC*,
13 251 F.Supp. 2d 176 (D.D.C. May 1, 2003), *probable jurisdiction noted*, 123 S.Ct. 2268
14 (U.S. June 5, 2003). Subsequently, the District Court stayed its order and injunction in
15 *McConnell v. FEC*, 253 F.Supp. 2d 18 (D.D.C. May 19, 2003). The Commission cautions
16 that the legal analysis in this advisory opinion may be affected by the eventual decision of
17 the Supreme Court.

18 Sincerely,
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23

24 Ellen L. Weintraub
25 Chair

26 Enclosures (AOs 2003-3, 1991-12, 1990-16, 1989-32, 1987-12, 1984-62, 1984-46, 1984-3,
27 1982-10, 1980-95 and 1978-12)