



FEDERAL ELECTION COMMISSION
Washington, DC 20463

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AGENDA ITEM
For Meeting of: 08-28-03

August 21, 2003

MEMORANDUM

TO: The Commission

THROUGH: James A. Pehrkon *JAP*
Staff Director

FROM: Lawrence H. Norton *LHN*
General Counsel

James A. Kahl *JA*
Deputy General Counsel

Rosemary C. Smith *RCS*
Acting Associate General Counsel

Mai T. Dinh *MTD*
Acting Assistant General Counsel

Robert Knop *RMK*
Staff Attorney

Subject: Draft AO 2003-20

Attached is a proposed draft of the subject advisory opinion. We request that this draft be placed on the agenda for August 28, 2003.

Attachment

1 ADVISORY OPINION 2003-20

2
3 Mr. J. Fernando Barrueta
4 President and CEO
5 Hispanic College Fund, Inc.
6 1717 Pennsylvania Avenue, N.W.
7 Suite 460
8 Washington, DC 20006
9

DRAFT

10 Dear Mr. Barrueta:

11
12 This responds to your letter of July 7, 2003, requesting an advisory opinion on
13 behalf of United States Representative Silvestre Reyes, concerning the application of the
14 Federal Election Campaign Act of 1971, as amended ("the Act"), and Commission
15 regulations, to the written solicitation of donations by Representative Reyes to a
16 scholarship fund that the Hispanic College Fund, Inc. ("HCF"), seeks to establish in the
17 name of Representative Reyes.

18 ***Background***

19 You state that HCF is a non-profit corporation organized under section 501(c)(3)
20 of the Internal Revenue Code that raises money from corporate, private, foundation, and
21 government sources.¹ You state that these funds are used for the purpose of providing
22 scholarships to Hispanic students living in El Paso, Texas and pursuing undergraduate
23 degrees. You further state that these scholarships are need- and merit-based and that
24 recipients will be selected based on "criteria established by the HCF with input from
25 [Representative] Reyes." You also note that the scholarship will be promoted in El Paso
26 "by various means," but, according to a phone conversation with your staff, not including
27 by any television, radio, or satellite broadcast.

¹ You do not ask if, and the facts do not indicate that, HCF is established, financed, maintained, or controlled by Representative Reyes.

1 You indicate that the scholarship would initially be at least \$5,000, but would be
2 increased as more funds are solicited and donated. You plan to name this scholarship the
3 “Silvestre Reyes HCF Scholarship” in honor of United States Representative Silvestre
4 Reyes, whose Congressional district includes most of the city of El Paso. You state that
5 funds for this scholarship will be solicited, *inter alia*, by direct mail, on HCF stationery
6 bearing Congressman Reyes’s signature.

7 ***Question Presented***

8 *Are the amounts raised by Representative Reyes on behalf of a scholarship fund*
9 *established by the Hispanic College Fund, Inc. in his name subject to the provisions of*
10 *the Act?*

11 ***Legal Analysis and Conclusions***

12 They are not, for the reasons discussed below. On November 6, 2002, the
13 Bipartisan Campaign Reform Act of 2002, Pub. L. 107-155, 116 Stat. 81 (2002)
14 (“BCRA”) took effect. As amended by BCRA, the Act regulates certain actions of
15 Federal candidates and officeholders, their agents, and entities directly or indirectly
16 established, financed, maintained, or controlled by them, (collectively, “covered
17 persons”) when they raise or spend funds in connection with either Federal or non-
18 Federal elections. 2 U.S.C. § 441i(e)(1). Both BCRA and the Commission’s rules
19 implementing BCRA prohibit covered persons from soliciting, receiving, directing,
20 transferring, or spending any “funds in connection with an election for Federal office” or
21 any “funds in connection with an election other than an election for Federal office” unless
22 such funds are “subject to the limitations, prohibitions, and reporting requirements of this

Act” or consistent with FECA’s amount limitations and source prohibitions, respectively.
2 U.S.C. § 441i(e)(1)(A) and (B); 11 CFR 300.61 and 300.62.

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

As the Commission stated in the Explanation and Justification for the Final Rules on Non-Federal Funds, Congress did not intend to prohibit fundraising by Federal officeholders on behalf of charitable organizations like the American Red Cross, which “engages in no electoral activities whatsoever.” *See Prohibited and Excessive Contributions: Non-Federal Funds or Soft Money Final Rules*, 67 FR 49064, 49108 (July 29, 2002) (*quoting* comments of BCRA’s principal sponsors and a public interest group). All available evidence indicates that HCF does not spend funds in connection with any elections, either Federal or non-Federal. Your description of HCF’s mission as well as the HCF website makes clear that the principal purpose of HCF is to award college scholarships to deserving Hispanic students based on individual need and merit, and is not to conduct any election activities. In a telephone conversation, you confirmed that the scholarship recipients would not be expected to engage in any election activities as part of, or in exchange for, the scholarship.

Prior advisory opinions addressed whether funds raised and spent for scholarship programs were “contributions” or “expenditures” as defined in 2 U.S.C. §§ 431 or 441b.

1 In both Advisory Opinions 1985-17 and 1979-67, the Commission concluded that
2 donations to these scholarship funds were not contributions under 2 U.S.C. §§ 431(8) or
3 441b(b)(2), provided that the recipients of the scholarships do not engage in activities
4 relating to Federal elections as part of the scholarship programs. Implicit in the
5 conclusion that these donations are not contributions under 2 U.S.C. § 441b(b)(2) is that
6 they are also not in connection with a Federal election. *Cf. Explanation and Justification*
7 *for Public Financing of Presidential Candidates and Nominating Conventions Final*
8 *Rules*, 68 FR 47386, 47403-04 (Aug. 8, 2003).

9 Because the funds described in your request are wholly used for scholarships
10 awarded to Hispanic students, the Commission concludes that the funds raised and spent
11 by HCF are not in connection with a Federal or non-Federal election, within the meaning
12 of 2 U.S.C. §§ 441i(c)(1)(A) or (B), provided that the recipients of the scholarships do
13 not engage in any activity in connection with a Federal or non-Federal election as part of,
14 or in exchange for, the scholarship. Representative Reyes is not prohibited from signing
15 written solicitation letters on HCF stationery, nor is the amount he can solicit for the HCF
16 scholarship limited by or subject to reporting requirements of the Act. The Commission
17 expresses no opinion regarding the possible applicability of any other Federal or State tax
18 laws or other laws, or the rules of the House of Representatives, to the matters presented
19 in your request, since these issues are not within its jurisdiction.

20 This response constitutes an advisory opinion concerning the application of the
21 Act and Commission regulations to the specific transaction or activity set forth in your
22 request. *See* 2 U.S.C. § 437f. The Commission emphasizes that, if there is a change in
23 any of the facts or assumptions presented, and such facts or assumptions are material to a

1 conclusion presented in this opinion, then the requestor may not rely on that conclusion as
2 support for its proposed activity.

3 The Commission notes that this advisory opinion analyzes the Act, as amended by
4 BCRA, and Commission regulations, including those promulgated to implement the
5 BCRA amendments, as they pertain to your proposed activities. On May 2, 2003, a three-
6 judge panel of the United States District Court for the District of Columbia ruled that a
7 number of BCRA provisions are unconstitutional and issued an order enjoining the
8 enforcement, execution, or other application of those provisions. *McConnell v. FEC*, 251
9 F.Supp. 2d 176 (D.D.C. 2003); *prob. juris. noted*, 123 S.Ct. 2268 (U.S. 2003).
10 Subsequently, the district court stayed its order and injunction in *McConnell v. FEC*, 253
11 F. Supp. 2d 18 (D.D.C. 2003). The Commission cautions that the legal analysis in this
12 advisory opinion may be affected by the eventual decision of the Supreme Court.

13
14 Sincerely,
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16
17
18 Ellen L. Weintraub
19 Chair
20

21
22 Enclosures (AOs 2003-12, 1985-17 and 1979-67)