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October 8, 2003

AGENDA ITEM

For Meeting of: 10-09-03

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

Jonathan M. Levin
Senior Attorney

Esa Sferra
Law Clerk

Subject: Draft AO 2003-24 – Alternate Draft

Attached is a proposed alternate draft of the subject advisory opinion. We request that this draft be placed on the agenda for October 9, 2003.

Attachment

SUBMITTED LATE

1 ADVISORY OPINION 2003-24 – DRAFT B

2 Michael B. Trister, Esq.
3 Lichtman, Trister & Ross
4 1666 Connecticut Avenue, N.W.
5 Suite 500
6 Washington, DC 20009

DRAFT

7
8 Dear Mr. Trister:

9 This responds to your letters dated June 26 and August 5, 2003, requesting an
10 advisory opinion on behalf of the National Center for Tobacco-Free Kids (“NCTFK”),
11 concerning the application of the Federal Election Campaign Act of 1971, as amended
12 (“the Act”), and Commission regulations to the use of contributor information contained in
13 the disclosure reports that candidate and other political committees file with the
14 Commission.

15 ***Background***

16 You state that NCTFK is a corporation organized under 26 U.S.C. 501(c)(3) that
17 engages in public education and advocacy concerning the effects of smoking, the efforts of
18 the tobacco industry to market tobacco products to young people, and public policies to
19 limit the use of tobacco products. NCTFK is funded by grants from private foundations,
20 corporations, and individuals. You assert that it does not participate or intervene in any
21 political campaign on behalf of, or in opposition to, any political candidate. NCTFK
22 frequently uses direct mail communications to educate members of the public concerning
23 the above-mentioned issues.

24 You state that NCTFK would like to obtain from disclosure reports filed with the
25 Commission the names of those individuals who make contributions to political

1 committees in order to send NCTFK information to them via direct mail. Such
2 communications will discuss the health effects of smoking, and provide information about
3 efforts to control tobacco use, such as higher State tobacco taxes, FDA regulation of
4 marketing, and smoking cessation and prevention programs. You provide examples of
5 your communications in your request. Some of the communications will also include what
6 you describe as a “call-to-action” urging recipients to contact Federal or State legislators
7 and other public officials in support of specific tobacco-control initiatives. Other
8 communications may refer to the Federal candidate to whom the recipient contributed and
9 include a “call-to-action” to contact that officeholder to express an opinion about the need
10 to adopt effective tobacco controls. You state that none of the communications sent to
11 such individuals will expressly advocate the election or defeat of any candidate, nor will
12 such communications constitute electioneering communications as defined in 2 U.S.C.
13 434(f)(3).

14 You state that the communications sent to these individuals are not themselves
15 intended to raise funds for NCTFK or any other organization, and will themselves not
16 contain a solicitation for donations to NCTFK or any other organization.

17 You state that NCTFK does not currently sell, lease or exchange names from its
18 general mailing list to, or with, other organizations, businesses or individuals. You
19 indicate that if this practice should change, NCTFK will ensure that no names initially
20 obtained from FEC records would be sold, leased, or exchanged unless the name has also
21 been added to the general mailing list independently of the direct mail communications to
22 individuals whose names were obtained from the FEC records. The Commission assumes

1 that this means that, if any such name is used, it is because it was obtained from another
2 source and that no information obtained from FEC reports would be used to update or
3 otherwise clarify any information as to the person.

4 You state that NCTFK is planning to allow certain allied organizations to send
5 messages to subsets of NCTFK's general mailing list in furtherance of NCTFK's charitable
6 and educational purposes. All such communications would be done subject to NCTFK's
7 review and approval, and no fee (or exchange) would be charged for such use. Neither
8 NCTFK nor the allied organizations would use any communications to individuals on the
9 NCTFK FEC contributor list to sell literature or other items, or to raise any funds. Further,
10 allied organizations would not use the information for fundraising or membership
11 solicitation purposes.

12 You state that neither NCTFK nor any allied organization would use names
13 obtained from reports filed with the Commission to update or enhance mailing lists used
14 for rental, sales, or exchanges, or for the receipt of sales offers.

15 You ask a series of questions about whether NCTFK may make certain
16 communications to the individuals whose names it would obtain from FEC reports.

17 ***Questions Presented***

18 1. May NCTFK use information from FEC reports to communicate with contributors
19 to candidates and political committees, where such communications are limited to
20 providing information about issues and policies and do not contain any form of call-to-
21 action?

1 2. May NCTFK use information from FEC reports to communicate with contributors
2 to candidates and political committees, where such communications contain both
3 information about issues and policies and a generic call-to-action urging recipients to
4 contact Federal officeholders and other public officials concerning the subject of the
5 communication?

6 3. May NCTFK use information from FEC reports to communicate with contributors
7 to candidates and political committees, where such communications contain both
8 information about issues and policies and a specific call-to-action urging recipients to
9 contact a named Federal officeholder to whom they previously contributed concerning the
10 subject of the communications?

11 4. May any of the communications described in questions 1 through 3 include a pre-
12 addressed postcard through which recipients of the communication may indicate their
13 interest in receiving additional information from NCTFK, which would result in
14 respondents being put on a broader list of people to whom NCTFK periodically sends
15 various educational and advocacy communications that could sometimes include a
16 solicitation for donations (the "general mailing list")?

17 5. May any of the communications described in questions 1 through 3 direct interested
18 persons to NCTFK websites through which they may choose to send messages to their
19 elected representatives or others regarding various tobacco control issues?

20 6. If the answer to question 5 is yes, may NCTFK include the names and contact
21 information of those who take action through an NCTFK website on NCTFK's general

1 mailing list of persons who will receive future communications from NCTFK which could
2 include a solicitation for donations to NCTFK as described above?

3 7. If the answer to question 4 or 6 is no, may persons who return the postcards or take
4 action on NCTFK websites be included in NCTFK's general mailing list of persons who
5 may be solicited for donations by NCTFK after a reasonable period, such as one year?

6 ***Legal Analysis and Conclusions***

7 For the reasons stated below, the Commission finds that the communications
8 proposed in your questions are impermissible under 2 U.S.C. 438(a)(4) and 11 CFR
9 104.15.

10 The Act provides that the Commission shall make reports and statements filed with
11 it available to the public for inspection and copying within 48 hours after receipt. 2 U.S.C.
12 438(a)(4). No information copied from such reports or statements, however, may be sold
13 or used by any person for the purpose of soliciting contributions or for any commercial
14 purpose, other than using the name and address of any political committee to solicit
15 contributions from such committee. 2 U.S.C. 438(a)(4); 11 CFR 104.15(a). Under
16 Commission regulations, "soliciting contributions" includes soliciting any type of
17 contribution or donation, such as political or charitable contributions. 11 CFR 104.15(b).

18 In requiring disclosure of contributor information, Congress provided limitations to
19 ensure that such information was not misused. Congress was concerned that the Act's
20 reporting requirements "open up the citizens who are generous and public spirited enough
21 to support our political activities to all kinds of harassment" 117 Cong. Rec. 30057
22 (1971) (statement of Senator Bellmon). Specifically, Senator Bellmon stated that the

1 purpose of the amendment adding to the Act the prohibition on use of individual
2 contributors' names and address was to "protect the privacy of the generally very public-
3 spirited citizens who may make contributions to a political campaign or a political party."
4 Id.

5 The Commission, in light of this legislative history, reads section 438(a)(4) to be a
6 broad prophylactic measure intended to protect the privacy of the contributors about whom
7 information is disclosed in FEC public records. The communications proposed in your
8 request would target the very persons Congress intended to protect for the very reasons
9 Congress intended to protect them. You stated that NCTFK wants to send the
10 communications to people who have contributed to political campaigns precisely because
11 politically active people are most likely to be responsive. Although not all the proposed
12 communications are for fundraising purposes, all the proposed communications present the
13 possibility of repetitive and intrusive communications to contributors. Such activity would
14 fall within the realm of "harassment" Congress wanted to prevent. 117 Cong. Reg. 30057.
15 The Commission thus concludes that this proposed activity would be antithetical to the
16 very purpose of section 438(a)(4). Therefore, the proposed communications are
17 impermissible.

18 In addition, the Commission recognizes the legitimate interests of the owners of the
19 mailing lists used to solicit the political contributions that resulted in the disclosure of the
20 individuals' information in the FEC reports. *See Federal Election Commission v.*
21 *International Funding Institute, Inc.*, 969 F.2d 1110, 1117-18 (DC Cir. 1992).

1 In two previous Advisory Opinions, the Commission has allowed limited
2 communications to contributors whose names had been obtained from reports of
3 contributions. *See, e.g.*, Advisory Opinions 1984-2 and 1981-5. In Advisory Opinion
4 1984-2, the Commission determined that a communication for the purpose of correcting a
5 misunderstanding caused by the activities of an unauthorized campaign committee was
6 permissible under the Act. The permitted communication informed persons who
7 contributed to the unauthorized campaign committee that such committee was not the
8 authorized campaign committee of the candidate and that the persons could request a
9 refund of their money. The communication did not ask for support of or a donation to the
10 authorized campaign committee. In Advisory Opinion 1981-5, the Commission
11 determined that a communication for the purpose of correcting a misunderstanding caused
12 by defamatory charges made against the requesting candidate was permissible under the
13 Act. The permitted communication “set the record straight on certain defamatory charges”
14 made against the candidate. These Advisory Opinions involved one-time, one-way
15 communications of a corrective nature that did not involve solicitation or commercial
16 purposes or the possibility of either, and are thus distinguishable from the broader, open-
17 ended interaction contemplated by your request.

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

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

3 Sincerely,

4

5 Ellen L. Weintraub
6 Chair

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8 Enclosures (AOs 1984-2 and 1981-5)