RECEIVED
FEDERAL ELECTION
COMMISSION
SECRETARIAT

2003 DEC 18 A 9:04

December 17, 2003

Comments on AOR 2003-37

VIA E-MAIL

Lawrence H. Norton
General Counsel
Federal Election Commission
999 E Street NW
Washington, DC 20463

Re: AOR 2003-37 Americans For A Better Country

Dear Mr. Norton:

We are writing on behalf of the Center for Responsive Politics (CRP) and its campaign finance law project FEC Watch to comment on AOR 2003-37, an advisory opinion request (AOR) submitted by Americans for a Better Country (ABC) regarding the applicability of the Federal Election Campaign Act (FECA), 2 U.S.C. § 431 *et seq.*, to various activities to be conducted in connection with the 2004 election.

At the outset, we would like to thank the Commission for agreeing to extend the comment period on this important request. We have the following comments.

Procedural comments

The AOR contains a long list of proposed activities, and asks numerous questions about multiple variations on these activities. Some of these questions appear to be more "what if" hypothetic questions than inquiries about actual planned activity. The Commission may be entitled to disregard some of the questions asked for that reason. 11 CFR 112.1(b).

We also note the similarity between ABC's planned activities and the reported plans of America Coming Together ("ACT"), an organization whose electoral goals are directly opposite those of ABC. The Commission's response to ABC will inevitably have some impact on ACT, and on other section 527 organizations. For this reason, we urge the Commission to be particularly cautious in responding to ABC's request. As the Supreme Court recently recognized, Commission advisory opinions have, in the past, played a role in the development of methods used to circumvent the prohibitions and limitations in the

1101 14th Street N.W., Suite 1030, Washington, D.C. 20005-5635
tel: (202) 857-0044 fax: (202) 857-7809 www.fecwatch.org

FECA. *McConnell v. FEC*, 540 U.S. ___ (2003) (*slip op. at 12*). The Commission should make every effort to ensure that its response to AOR 2003-37 does not have this effect.

Applicability of 2 U.S.C. § 441b

We believe 2 U.S.C. § 441b prohibits corporations and labor organizations from making contributions to ABC for the purpose of financing targeted voter drive activities directed at the general public. In this regard, we fully share the views expressed in the comments submitted by the Campaign Legal Center and Democracy 21.

Section 441b prohibits corporations and labor organizations from making contributions or expenditures "in connection with any election" for federal office, and defines "contribution or expenditure" as any direct **or indirect** payment, distribution, loan, advance, deposit, or gift of money, or any services, or anything of value...to any candidate, campaign committee, or political party or organization, in connection with any [federal] election..." 2 U.S.C. § 441b(b)(2) (emphasis added).

ABC plans to raise funds from corporations and labor organizations to conduct voter drives that will be directed at the general public, and will be targeted at likely Republican voters. Voter drives conducted in this manner do not satisfy the 11 CFR 114.4(d) standard for permissible corporate/labor organization registration and GOTV activity. *See* 11 CFR 114.4(d)(3) and (4). As a result, they fall outside the statutory exemptions for nonpartisan voter drive activity in 2 U.S.C. §§ 431(9)(B)(ii) and 441b(b)(2)(B).

Corporate and labor organization donations to ABC to be used for non-exempt voter drive activities violate section 441b's prohibition on indirect payments in connection with a federal election. The Commission should not allow ABC to be used as a vehicle for circumventing section 441b's prohibitions. The Commission's response to ABC's AOR should either require the organization to limit its fundraising to permissible sources, or to conduct its voter drive activities so that they are exempt under 11 CFR 114.4(d).

The Allocation Rules

If the Commission wrongly decides not to limit ABC's use of corporate and labor organization donations for non-exempt voter drive activity, then it should treat ABC as a nonconnected political committee that is subject to the allocation rules in 11 CFR 106.1 and 106.6. According to the AOR, ABC maintains a federal account and several nonfederal accounts, and plans to be active in federal elections. Section 106.6(a) states "[f]or purposes of this section, 'nonconnected committee' includes any committee which conducts activities in connection with an election, but which is not a party committee, an authorized committee of any candidate for federal election, or a separate segregated fund." Thus, whether or not ABC is currently registered with the FEC, the allocation rules apply to its activities.

In responding to the AOR, the Commission should carefully examine ABC's activities and rigorously apply the allocation rules to those activities. Among the activities described in the request, those most relevant to, or impacted by, the allocation rules can be placed into three general categories. First, ABC plans to distribute fundraising solicitations that refer to a specific federal candidate. Second, ABC plans to engage in voter identification, voter registration and GOTV activities, some of which will use messages that urge voters to elect or defeat a specific federal candidate, and others that will refer to candidates of a political party without referring to a specific federal candidate. Third, ABC plans to distribute

electioneering communications within the statutory 30-day and 60-day time periods in 2 U.S.C. § 434(f)(3).

The allocation rules applicable to nonconnected committees make a threshold distinction between candidate-specific activities and generic activities. Candidate-specific activities are those conducted on behalf of one or more clearly identified candidates. These activities must be allocated to each identified candidate "according to the benefit reasonably expected to be derived." 11 CFR 106.1(a). Broadcast communications must be allocated based on a ratio of the time and space devoted to each candidate. Fundraising activities must be allocated based on the amount of contributions or donations received by each of the named candidates. Phone banks must be allocated based on a ratio of the number of questions or statements devoted to each candidate. *Id.*

In contrast, generic activities and expenses are those that are not attributable to a specific candidate. 11 CFR 106.6(b). They include administrative expenses, fundraising expenses, and generic voter drive activity, *i.e.*, voter drives that urge support for candidates associated with a specific political party or issue but do not refer to a specific candidate by name. *Id.* Administrative expenses and generic voter drives are allocated using the "funds expended" allocation method in section 106.6(c). Under this method, the committee determines the ratio of its federal expenditures to its total federal and non-federal disbursements during a two-year election cycle. 11 CFR 106.6(c)(1).[1] However, in constructing this ratio, the committee includes only candidate-specific expenditures and disbursements. Generic expenses, such as the administrative and generic voter drive activities to which the funds-expenses ratio applies, are excluded in calculating the ratio. *Id.* Thus, the funds expended ratio looks like this:

$$\frac{\text{federal candidate-specific expenditures}}{\text{total federal and nonfederal candidate-specific disbursements}}$$

As explained above, many of the activities described in ABC's AOR will involve references to a clearly identified federal candidate. These include: (1) fundraising solicitations that refer to presidential candidates; (2) voter identification, registration and GOTV activities that involve references to federal candidates; and (3) electioneering communications. The Commission should recognize at the outset that all three types of activities are candidate-specific activities. They are not generic activities.

Making this threshold determination has several consequences. First, when ABC conducts an activity in which the only candidate mentioned is a federal candidate, the full cost of the activity must be paid for with federal funds. If specific nonfederal candidates are also mentioned, then the costs may be allocated among the named candidates.

Second, and of equal importance, the federal portion of the cost of an activity allocated under section 106.1 must be treated as a federal candidate-specific expenditure for purposes of the funds expended ratio used to allocate administrative expenses and generic voter drives. Thus, if ABC conducts an activity that refers to one federal and one nonfederal candidate, fifty percent of the cost of the activity must be treated as a federal expenditure for

[1] The rules require committees to estimate this ratio at the start of a two-year election cycle, adjust the ratio at the end of each reporting period based on the actual expenditures to date, and make transfers between their federal and nonfederal accounts consistent with the adjusted ratio. 11 CFR 106.6(c)(2).

purposes of the numerator of the ratio. Because the activity also refers to a specific nonfederal candidate, the full cost of the activity would be a candidate-specific disbursement that counts towards the denominator of the ratio.

The AOR suggests that ABC may engage in some activity involving a specific reference to a federal candidate and a generic reference to other candidates associated with a political party. One example would be a fundraising solicitation that seeks funds to "help re-elect Presidential Bush and our great Republican team." Another example would be a broadcast ad that urges viewers to vote for President Bush and our great Republican team.

These activities are candidate-specific activities that must be allocated under section 106.1, notwithstanding the generic reference to other candidates. Under section 106.1, the costs must be paid for entirely with federal funds, because there is no specific nonfederal candidate to whom a portion of the costs can be attributed.[2] Furthermore, the full costs of the activity would be included in both the numerator and the denominator of the funds expended ratio.

Even if the Commission were to allow ABC to divide out the candidate-specific and generic portions of these types of activities and allocate them separately under 106.1 and 106.6, ABC would not be allowed to pay for the entire generic portion with nonfederal funds. Instead, ABC would be required to allocate the generic portion in the same manner as any other generic expense under 106.6(c). As such, it would be required to pay for part of the generic portion with federal funds.[3] In addition, while the candidate-specific portion of this activity would count towards the numerator of the funds expended ratio, the generic portion would NOT count towards the denominator of the ratio. Only activities involving specific references to nonfederal candidates will increase the portion of ABC's administrative expenses and generic voter drives that may be paid for with nonfederal funds.

Third, we emphasize that electioneering communications are candidate-specific activities. As such, amounts spent on electioneering communications should be included in the federal portion of the funds-expended ratio.[4] Broadcast ads referring to a federal candidate are significant federal activities, and should be reflected in the ratio used to allocate ABC's administrative and generic voter drive expenses.

Finally, ABC plans to engage in a significant amount of generic activity. The Commission's response to ABC's AOR should emphasize that none of ABC's generic activity counts towards the nonfederal portion of its funds expended ratio. The ratio only takes into account candidate-specific disbursements.

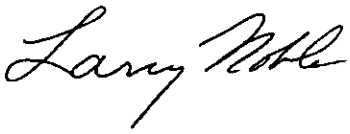
---

[2] The Commission's rules for allocating phone banks at 11 CFR 106.8 do not require a different result here, since those rules apply only to phone banks conducted by political party committees. Furthermore, the phone banks subject to section 106.8 are federal election activities under 2 U.S.C. § 431(20), and therefore must be paid for entirely with federal funds. Thus, section 106.8 governs attribution between multiple candidates, rather than allocation between federal and nonfederal accounts. The Commission should not allow an activity that refers specifically to a federal candidate to be partially financed with nonfederal funds unless it also refers to specific nonfederal candidates.
[3] ABC would be required to pay for the entire federal candidate-specific portion with federal funds.
[4] Under 2 U.S.C. § 441b(c)(1), ABC is prohibited from using funds received from a corporation or labor organization to pay for an electioneering communication.

Thus, if ABC makes contributions or expenditures on behalf of a federal candidate, but does not make any contributions or expenditures on behalf of nonfederal candidates, its allocation ratio for administrative expenses and generic voter drives is 100% federal.

We appreciate the opportunity to comment on Advisory Opinion Request 2003-37.

Respectfully submitted,



Lawrence Noble
Executive Director
Center for Responsive Politics

Paul Sanford
General Counsel
Center for Responsive Politics