AGENDA DOCUMENT NO. 04-11

APPENDIX A

AMERICANS FOR A BETTER COUNTRY

228 S. Washington Street
Alexandria, VA. 22314

November 18, 2003

Keith A. Davis
Treasurer

AOR 2003-37

2003 NOV 19 P 5:03

Federal Election Commission
Office of the General Counsel
999 E Street, N.W.
Washington, D.C. 20463

Re: Advisory Opinion Request

Dear Commissioners:

Attached please find our amended Request for an Advisory Opinion. We believe this letter raises extremely series issues that are, as is obvious from the recent extensive media coverage, most timely. We very much appreciate the extensive meetings the staff of the Office of General Counsel has had with us so that we might understand their concerns over answering these questions.

We thank you for your attention to this extremely important set of activities Americans for a Better Country plan on undertaking.

Respectfully submitted,

Keith A. Davis

Keith A. Davis
Treasurer

cc: Commissioner Ellen L. Weintraub
Commissioner Bradley A. Smith
Commissioner David M. Mason
Commissioner Scott E. Thomas
Commissioner Michael E. Toner
Rosemary C. Smith, Esq.
John C. Vergelli, Esquire
Johnny Levin, Esquire

Not authorized by any candidate, candidate's committee or political party committee.

AMERICANS FOR A BETTER COUNTRY

November 18, 2003

Federal Election Commission
Office of the General Counsel
999 E Street, N.W.
Washington, D.C. 20463

Re: Advisory Opinion Request

Dear Commissioners:

We request this Advisory Opinion pursuant to 2 U.S.C. 437f on behalf of Americans for a Better Country ("ABC"), an unincorporated, independent political committee organized under
[1] Section 527 of the Internal Revenue Code. ABC, which is not affiliated with any federal

confirmation that its activities comply with the BCRA amendments and the Act. The Commission has a legal responsibility and an obligation to answer these questions now, rather than trying to put the genie back in the bottle after the activity has taken place through "gottcha" enforcement actions.

Structure

ABC maintains a federal account and several non-federal accounts, as permitted by 11 C.F.R. 106.6. Its federal account raises funds permissible under the Act (also known as "federal" or "hard" dollars). It is not known yet whether the federal account will contribute directly to
[4] federal candidates, but ABC wishes to know whether this decision impacts any of the activities it asks about here. Its non-federal accounts allow ABC to raise the various funds permitted by the laws of the different states, including unlimited non-federal "soft dollars" from individuals, corporations, unions and trade associations. ABC wishes to undertake voter registration and GOTV activities in certain states, and wishes to use the names of specific federal candidates in some of its communications paid for with non-federal dollars.

Question:

- Does the prohibition in 11 C.F.R. 100.26 on "general public political advertising" pertain to materials handed out door to door (and not through mass mailings or public communications) by an unincorporated non-federal section 527 committee if those
[5] materials advocate the election or defeat of a federal candidate(s)? These materials, paid for with funds raised outside the Act's limits and prohibitions, would contain messages such as the following: "George Bush and the Republican team have made the United States safer. On November 2, vote for George W. Bush for President; X for U.S. Senate, and Y for Governor."

- Suppose the materials do not use express advocacy, but state: "President George W. Bush, Senator X and Representative Y have led the fight in Congress for a stronger
[6] defense and stronger economy. Call them and tell them to keep fighting for you."

- In terms of non-express advocacy messages such as the one above within 60 days of
[7] the general election distributed to the general public within the meaning of "electioneering communications", may ABC pay for them solely with donations from individuals that exceed the Act's limitations (i.e. individual soft dollars)?

[8] • Since ABC is an unincorporated entity, may it broadcast issue ads within 60 days of a general election paid for with funds that include contributions from corporations, unions and trade associations?

[9] • If an individual gives $10 million (or any size soft money contribution) to ABC for the express purpose of "reelecting the President" or "defeating" his Democratic opponent, may that same individual in this election cycle also hold a fundraiser for the President at his home and discuss issues with the President and not violate the Act or the Commission's coordination regulations? The individual's stated purpose in giving the soft money contribution to ABC is to fund voter registration and get-out-the-vote programs and issue ads benefiting the President and aimed specifically at defeating the President's Democratic opponent.

[10] ABC wishes to have among its officers and decision-making staff individuals who formerly served as consultants to or on the official and campaign staffs of federal officeholders and candidates, including individuals who are now candidates for President, the United States Senate and United States House of Representatives. It also wishes to hire as consultants and employees, individuals who are former staffers and consultants for current federal candidates who will be on the ballot in 2004. Some have not worked with their principals since the end of the 2002 elections; others have worked with either their official offices or campaigns during 2003 and may up through April 2004.

Specifically, ABC wishes to know the ramifications if it has in its leadership or on staff:

[11] • The former chief of staff to a member of the congressional leadership. Does it make a difference if the person resigned her position prior to November 5, 2002 or in January 2003? This individual would be employed by a non-federal section 527 committee whose mission would be to coordinate the activities of a number of non-profit groups whose voter mobilization activities would mention individual candidates for the House and Senate for which she worked. May that person tell her former boss of her groups current plans? Would it matter if the messages did not name specific candidates but urged votes "for the Republican candidate?" Suppose the messages were generic "Go out and vote" messages?

[12] • The head of a 501(c)(4) which has a connected PAC of which he is also the director. In the role as head of the 501(c)(4), the individual lobbies Members of Congress who are also federal candidates, and in the role as head of the PAC, the individual interviews and makes contributions to those same federal candidates. May the

individual serve as a director of ABC and make recommendations as to targets and messages for its voter mobilization activities that will include some of the individuals he lobbies and to whom the PAC he heads makes contributions?

- May the director of a nationwide non-connected membership organization whose PAC conducts a large bundling operation that benefits selected federal candidates serve on
[13] ABC's board of directors and help select targets for its voter mobilization efforts? The bundling operation includes having the director talk to federal candidates about how to maximize support from the organization's members. If not permissible, may the individual provide advice to ABC as to which candidates to mention its literature?

- May ABC's senior staff include (without legally jeopardizing its planned activities as stated in this letter) an individual who through the November 5, 2002 election directed a nationwide membership organization's voter mobilization and membership recruitment efforts? In that capacity, the individual directed a $30 million operation
[14] among the organization's members that included (as permissible under the statute at the time) coordinating voter mobilization with the national party committees and selected candidates? In 2004, the individual would head up ABC's large-scale targeting operation to develop turnout operations designed to boost the conservative vote in those 15 to 20 states expected to be the Presidential battleground states.

- May ABC's board of directors or advisors include an individual who in 2003 and/or

[18] • Does whether ABC makes contributions to a federal candidate(s) from its federal PAC impact whether it may undertake any of the voter registration or GOTV activities described below? Does asking the federal candidates to whom it wishes to make direct donations about the status and future plans for their campaigns taint ABC's ability to do soft money GOTV activity on their behalf?

[19] • May ABC undertake GOTV activities on behalf of a candidate to whom it has made a federal contribution? If permitted to undertake the activities, may it use non-federal funds for those activities?

Purpose

[20] The purpose of ABC is to bring together major supporters of conservative and pro-business issues, including trade associations, membership organizations, corporations and individuals to form a group that will mobilize voters through voter registration and GOTV efforts to aid Republican candidates. Aimed at the general public, ABC will conduct an independent massive get-out-the-vote operation with non-federal "soft" dollars that it wishes to aid President Bush's re-election, the defeat of the eventual Democratic Presidential nominee, and the election of Republican candidates to the United States Senate and House.

[21] ABC wishes to know if it is able to use the names of specific federal candidates and officeholders because the use of certain names will generate the most fervent feelings which, ABC believes, will in turn generate stronger fundraising and more support for its political activities. ABC does not plan to ask permission from these federal candidates or coordinate its use of their names in any way. An example of the message ABC plans to use is: "Give to ABC PAC so we can continue our fight for the Bush tax cuts." Or, "Give to ABC PAC so we can help get Bush supporters to the polls on Election Day."

[22] ABC plans to concentrate its activities in 17 or 18 states which are likely to be battleground states in the 2004 presidential election as well as a number of states and congressional districts to be determined as they become battlegrounds for control of the U.S. Senate and House. The states in which large scale efforts to register voters and mobilize them to go to the polls will be decided closer to the November 2004 election.

[23] ABC is also considering affiliating with a variety outside groups which have a strong preference for Republican candidates or which strongly disagree with Democratic candidates' approach to problems because they believe the Democratic approach would take the nation in a false and dangerous direction. While its activities will concentrate on a message about the

Presidency, ABC also wishes to mention candidates for the United States Senate and House of Representatives.

Questions

[24] • Without coordinating with any federal candidate, may ABC's fundraising use the names of specific federal candidates for office in a manner that will convey ABC's support or opposition so that ABC may maximize its fundraising of federal dollars? The fundraising would be through mass mailings and broadcast advertising.

[25] • Without coordinating with any federal candidate, may ABC's fundraising use the names of specific federal candidates for office in a manner that will convey support or opposition so that ABC may maximize its fundraising of non-federal soft dollars? For example, ABC wishes to use a fundraising pitch that states: "ABC supports President Bush's tax cuts to stimulate the economy. Give to ABC so we can support President Bush's agenda." Another example would be the same message, but with the tag line, "so we can support President Bush's reelection." The fundraising for individual contributions of more than $5,000, corporate, union treasury and trade association dollars would take place through mass mailings, broadcast advertising and in person solicitations using printed materials and taped messages?

[26] • May ABC's message be the election or defeat of specific federal candidates in its voter registration and GOTV activities using non-federal dollars? For example, "[The Democratic nominee for President] says tax cuts are a mistake. Defeat that message of despair. It's your duty to register to vote so that you can support George W. Bush's reelection as President of the United States." May the message state: "The economy under President Bush has never been better. Register to vote. It's your duty as an American citizen."?

[27] • If ABC's message for the voter registration and GOTV activity it actually undertakes is non-partisan ("Register to vote. It's your civic duty.") and complies with 11 C.F.R. 114.4(d), is its ability to undertake the activities tainted if its press announcement or fundraising materials predicts that its activities "will elect George W. Bush" or "defeat the eventual Democratic nominee"? Is this activity tainted if a major soft money donor to ABC has publicly stated that he is giving his money to ABC to help defeat the President's Democratic opponent? Or is it tainted if major donors to ABC have held fundraisers in their home for the President?

- [28] ABC wishes to confer to the extent permissible with the Chair of the Republican National Committee about its voter registration and GOTV activities which are funded with non-federal soft dollars. May ABC officials inform the RNC Chair of its formation? May ABC inform the RNC Chair of its plans and goals (to register as many pro-business, pro-conservative voters as possible)? May ABC discuss its 15-20 target states with the RNC Chair? Its budget? Its planned activities?

- [29] Does it matter if the ABC official who transmits the information to the RNC Chair is the head of a special interest group that includes a federal PAC and engages in soft money "federal election activities" among its members and participates in soft dollar issue advertisements, or may such an individual wear two hats? Suppose the ABC official was an employee or consultant of the RNC through the 2002 election? Suppose his relationship lasted until February 2003? Suppose his relationship with the RNC ended on October 31, 2002 (before the effective date of the Bipartisan Campaign Reform Act amendments)?

- [30] Are the activities that ABC may carry out affected if, during the course of the conversation with the national party committee chair, the ABC official asks for advice or suggested areas to target? Would the law treat such a conversation differently if it occurred more than 120 days before an election or within 120 days of an election?

- [31] Would the conversation be tainted if the RNC Chair provided polling data to ABC or ABC provided its polling data to the RNC? Can ABC consult with the RNC chair about its accomplishments and seek advice on what it should do up until the election?

- [32] ABC wishes to retain an individual providing polling services to the RNC to serve also as the pollster to ABC for purposes of its non-federal activities in voter

states in which it is providing services, but not other states. May the vendor provide services to ABC in states different from those in which it is working for the RNC?

[43] • May federal officeholders or candidates sign written solicitations for the non-federal account that raises funds outside's the Act's contribution and source limitations?

[44] • If the federal officeholders or candidates cannot speak or participate in a fundraising event for ABC's non-federal account, may ABC have a fundraiser for its federal account with the federal officeholders and candidates present, and then immediately adjourn to an adjacent location for a non-federal soft dollar fundraising event at which the federal officeholders and candidates are not present?

[45] • May ABC sponsor an issues forum at which federal officeholders or candidates speak on non-political subjects, and then adjourn later in the same day to a different location for a non-federal soft dollar fundraiser that is not attended by federal officeholders or candidates? The invitation to this event would include two separate pieces, each with its own disclaimer. One would be for the issues forum alone and would contain no electioneering or fundraising message. The second piece would be a fundraising piece for the non-federal dollar fundraiser that either did not mention or include federal officeholders and candidates or, in the alternative, included federal officeholders and candidates only to the extent permitted by the Commission elsewhere in this opinion.

[46] • If federal candidates or officeholders participate in the requestors' fundraising activities in any scenario above, would they be "solicit[ing] . . . funds in connection with an [ ] election other than an election for federal office," 2 U.S.C. § 411i(e)(1)(B)?

  • If the answer is "yes" to any scenario above, what limits would apply when Federal candidates and officeholder solicit funds on behalf of the requestor?

[47] • Is it a violation of the Act if an official of ABC states publicly that the purpose of ABC's voter mobilization efforts is "to defeat the Democratic nominee for President" and then solicits and directs the spending of soft dollars for that purpose? Would the official be potentially subject to criminal penalties?

[48] • Are non-federal soft dollar donors to the massive voter mobilization effort directed at the general public with the stated purpose (i.e. express advocacy) of defeating a named federal candidate in violation of the Act? If so, are they subject to criminal penalties if they know from fundraising appeals that the purpose of their contribution is the defeat a specific federal candidate?

  • Does it matter if the stated public purpose is the defeat of a specific candidate but all the messages themselves from ABC do not contain express advocacy?

- May ABC raise and spend funds from its non-federal accounts from foreign nationals and from foreign corporations and unions for:

[49]

  - Voter registration and voter mobilization activities on behalf of federal (not state or local) candidates:

    - with express advocacy ("register to help reelect President Bush")?

    - with an issue advocacy message outside the 60/30 day window ("Register. It's your duty.")?

Political Activity

[50] As an unincorporated Section 527 political organization, ABC plans to conduct a massive voter mobilization effort concentrating on voter registration and then get-out-the-vote activity to the general public using non-federal "soft" money in unlimited amounts from corporations, unions, trade associations and individuals.

Questions:

[51] **Voter Registration Activity**: Please answer the following questions for activity occurring: (1) more than 120 days before a federal election, and (2) within 120 of a federal election. Each communication described below will be sent to more than 500 voters and none of the communications will constitute the republication of campaign or political party committee materials. Each communication will be paid for with non-federal "soft" money.

[52]
- May written materials and telephone scripts include the names of federal candidates? A sample script is attached at Exhibit A.

[53]
- ABC plans to target certain neighborhoods and demographic groups that are known to be favorable to Republicans with its voter registration and turnout programs. This information will be gleaned through candidate specific identification efforts paid for by ABC with non-federal "soft" dollars more than 120 days before the election. Using this partisan targeting information, ABC will then use generic, issue based written communications and telephone scripts not listing any candidate or party (see Exhibit B) within 120 days of the election to (1) motivate and educate and (2) turn out to vote these individuals. Does the earlier, partisan candidate-specific targeting impact the

ability of ABC to conduct these activities? Or, can ABC only engage in its GOTV activities if they are not based on the earlier identification efforts?

[54] • Does it matter for either candidate-specific or generic communications if the communications are paid for with contributions from individuals that exceed federal limits, as opposed to funds from corporations, trade associations and unions? Since ABC itself is unincorporated, may it use unlimited funds from corporations, trade associations and unions to conduct these activities?

[55] • Would any of the answers change if only the solicitations for funds mentioned a specific federal candidate (e.g., "Give money to an effort that will help President Bush and Republican candidates"), but the actual voter registration communications do not mention a federal candidate?

[56] **Get-out-the-vote activity:** This activity will occur within 60 days of a general election and will be directed to the general public. ABC wishes to send out public communications to more than 500 individual voters, and none of the communications will constitute the republication of campaign or political party committee materials or communications. Each communication will be paid for with non-federal "soft" money. ABC itself in not incorporated.

[57] • May its GOTV materials include the names of specific federal candidates and mention them in telephone bank scripts? (See Exhibit C.)

[58] • May written communications and telephone scripts distributed within 72 hours of the election be generic and not list any federal candidates or party? ("Go out to vote on November 2. This election is important. Do your civic duty.") (See Exhibit D.) May ABC distribute such generic communications more than 72 hours before the election?

[59] • Some of these generic activities will be targeted to certain neighborhoods and demographic groups that are known to be favorable to Republicans. This information will be gleaned through earlier, candidate specific identification efforts paid for by ABC with non-federal "soft" dollars. Does this impact the ability of ABC to conduct these activities? Or, can it only engage in such activities if they are not conducted in conjunction with the earlier identification efforts?

[60] • Does it matter for either candidate-specific or generic communications if the funds ABC uses come from contributions by individuals that exceed the federal limits as opposed to funds from corporations, unions or trade associations?

[61] • Would any of the answers change if only the solicitations for funds to finance these activities mentioned a specific federal candidate(s) ("Give money to a GOTV effort that will help President Bush and Republican candidates") but the actual GOTV communications did not ("Go out and vote. The election is important. It's your civic duty.")?

[62] • If ABC conducts any of these activities, may ABC officials discuss its plans, needs (including help with fundraising) and goals with either: (1) the campaigns of federal candidates or their agents? or (2) either national or state party committee officials or their agents? May such contacts take place more than 120 days before the election, within 120 days of an election, both, or neither? These contacts would consist of ABC informing the party committees of ABC's plans to engage in GOTV activities, where ABC will target such activities, and when the activities will occur. The contacts will take the form of telephone conversations, in-person meetings, and emails.

[63] **Issue Ad Activity:** ABC wishes to conduct issue ad activity on television and radio, through mass mailings to more than 500 individual voters and through telephone banks to more than 500 individual voters. None of the communications will constitute a republication of campaign or political party committee materials. All activities would be paid for with non-federal "soft" dollars from its non-federal account.

Television and Radio:

[64] • ABC wishes to run issue ads within 60 days of the general election mentioning a specific federal candidate. These ads will not expressly advocate the election or defeat of the federal candidate mentioned in the advertisement. (See Exhibit E.) Since ABC is not incorporated, may it pay for these ads with funds donated by corporations, unions and trade associations?

  • May ABC pay for such advertisements with funds donated by individuals in amounts in excess of the federal limits?

[65] • May ABC run the scripts attached at Exhibit E, using either federal or non-federal funds, more than 60 days before an election?

Mail and Telephone Banks – Voter Identification

[66] ABC wishes to use its non-federal soft dollar to pay for mass mailings and telephone banks to identify voters, which candidates they support, and which issues motivate them. None of the communications discussed below will constitute the republication of any campaign or political party committee materials.

[67]

- More than 60 days before the election, can ABC identify, using soft dollars, potential voters who support President Bush? Within 60 days of an election? ("Are you in favor of President Bush's stands on strong defense and lower taxes?") or ("Are you in favor of President Bush's stands on strong defense and lower taxes? Do you plan to vote on November 2?") (See Exhibit F.) Since it is not incorporated, can ABC pay for such efforts with funds donated by corporations, unions and trade associations?

  - Is the Commission's answer different if the activity is paid for with funds raised from individuals in amounts in excess of the Act's limits as opposed to funds from corporations, unions and trade associations?

Mail and Telephone Banks – GOTV

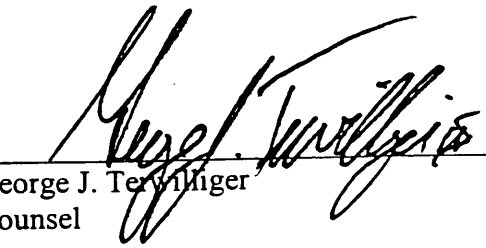
ABC wishes to use non-federal funds for mass mailings and telephone banks to turn out

[70] (cont.)

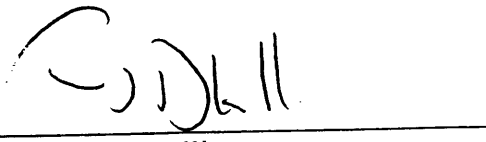
- Is the Commission's answer different if the activity is paid for with funds raised from contributions from individuals in excess of the Act's limits as opposed to funds from corporations, unions and trade associations?

We appreciate the Commission's attention to these crucial questions.

Respectfully submitted,



George J. Terwilliger
Counsel



Frank J. Donatelli
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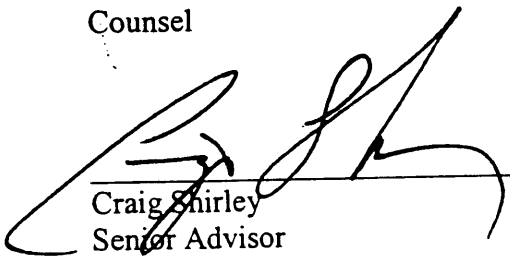

Craig Shirley
Senior Advisor

Exhibit A

Hello, this is _____ calling from ABC PAC. We want to send a message to the Democratic Party and liberal special interest groups that their negative ads, blame-America-first foreign policies, and tax and spend programs are not what's right for America. President George W. Bush and the great Republican team has changed the tone of politics and brought a new common-sense, get-things-done leadership for our nation.

Please ask your family and friends to register to vote so they can support President George W. Bush and the entire Republican team.

Thank you very much.

Exhibit B

Hello, this is _____ calling from ABC PAC. Our nation faces many challenges and the decisions we make today will effect our lives and those of our children for years to come. From the war on terror, to cutting taxes, to improving education – we all have a duty to elect leaders who put America first and not the liberal special interest groups.

Please ask your family and friends to register to vote so they can choose the leaders making these important decisions. Its good for you, your family and America.

Thank you very much.

Exhibit C

Hello, this is _____ calling from ABC PAC. We want to send a message to the Democratic Party and liberal special interest groups that their negative ads, blame-America-first foreign policies, and tax and spend programs are not what's right for America. President George W. Bush and the great Republican team has changed the tone of politics and brought a new sense of common-sense, get-things-done leadership for our nation.

Please get your family and friends and get them to vote November 2nd for President George W. Bush and the entire Republican team.

Thank you very much.

Exhibit D

Hello, this is _____ calling from ABC PAC. Our nation faces
[redacted]

Exhibit E

Television Script

President Bush is a strong leader.

The War on Terror, cutting taxes, putting families and working people first.

He has provided strong, common-sense leadership for this nation.

Call President Bush and tell him to keep fighting for a strong America.

Radio Script

President Bush is a strong leader.

The War on Terror, cutting taxes, putting families and working people first.

He has provided strong, common-sense leadership for this nation.

President Bush has been a strong steward of this country's defenses. Vote November 2. It's important to your future.

Exhibit F

Hello. This is _____ from ABC PAC and I would like to ask you a few questions.

1. Do you believe your taxes are too high?

2. Are you in favor of President Bush's efforts for lower taxes?

3. Are you in favor of President Bush's efforts for a strong defense?

4. Are you in favor of improving education?

5. Are you in favor of President Bush's efforts to improve education?

6. Do you plan to vote on November 2?

Thank you very much.