



FEDERAL ELECTION COMMISSION
Washington, DC 20463

March 21, 1985

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

ADVISORY OPINION 1984-62

Mr. Daniel H. Lowenstein, Esq.
UCLA Law School
405 Hilgard
Los Angeles, CA 90024

Dear Mr. Lowenstein:

This responds to your letter of December 14, 1984, as supplemented by your letter of February 4, 1985, on behalf of B.A.D. Campaigns, Inc., requesting an advisory opinion concerning application of the Federal Election Campaign Act of 1971, as amended ("the Act"), and Commission regulations to a proposed slate mail program for the 1986 election year.¹

You state that B.A.D. Campaigns, Inc., is a for-profit corporation, incorporated in 1981 under the laws of the state of California. Its principals and major stockholders are Michael Berman and Carl D'Agostino, for whom the corporation is their main source of income. B.A.D. Campaigns engages primarily in the business of managing political campaigns, providing consulting services, and operating a slate mail program on behalf of Federal, state, and local candidates.²

You state that in early 1986 Mr. Berman and Mr. D'Agostino will decide which candidates B.A.D. Campaigns will endorse and include on its slates. They will then negotiate with these endorsees for the purchase of advertising or featuring on the slate mailing pieces to

¹ Although you have referred to activities by B.A.D. Campaigns in the 1982 and 1984 election cycles for purposes of illustration, you have stated that the questions in your advisory opinion request are "purely prospective." Of course, Commission regulations limit advisory opinion requests to "a specific transaction or activity that the requesting person plans to undertake or is presently undertaking and intends to undertake in the future." 11 CFR 112.1(b). Therefore, nothing in this opinion should be construed as reflecting the Commission's opinion or position regarding any past activities of B.A.D. Campaigns or any other entity that might have engaged in a slate mail program.

² For purposes of clarity, this opinion refers only to candidates mentioned in the B.A.D. Campaigns slate mail program, although B.A.D. Campaigns also includes viewpoints on state and local ballot propositions on its slate. The Commission has previously held that contributions or expenditures exclusively to influence ballot referenda issues are not subject to the Act. See Advisory Opinion 1980-95.

determine whether the slate mail program will be a profitable venture for B.A.D. Campaigns. These negotiations cover the type or prominence of advertising, the number of mailings and their geographical coverage, and the fee. You state that the slate includes all endorsed candidates whether or not the endorsee has purchased advertising or featuring. You also state that "[n]o campaign receives advertising beyond what it has paid for, if any." You add that the only funds available for the production of the slate mail program are the proceeds from the sale of advertising or featuring. Thus, a candidate endorsed by B.A.D. Campaigns and listed on the slate, but who does not purchase advertising, would make no payments to B.A.D. Campaigns related to its slate mail program.

In this regard, you state that B.A.D. Campaigns will establish a maximum gross profit it will retain out of receipts from its slate mail program, and will use any additional revenues to produce additional mail. You state that individual fees are "set in advance through normal budgeting techniques, taking into account the estimated revenues and expenses, the scope of the mailing, the probable number of clients, ...including...what the market will bear." As an example, you state that a candidate for the U.S. House of Representatives could have purchased full featuring throughout his or her district for either the primary or general election for \$15,000 in 1982 and for \$17,000 in 1984. You state that a comparable rate will apply for 1986, allowing for inflation, postal rate increases, and the quantity of featuring purchased. These fees will be negotiated at "arm's length" except for those campaigns managed by B.A.D. Campaigns. These campaigns will pay "at the same rate as campaigns managed by outsiders." You have not, however, presented a specific fee arrangement for 1986 involving a Federal candidate.

You have provided samples of the mailing pieces to illustrate the proposed slate mail program. You state that each piece will adopt a "clear overall political position," which, you describe as "moderate-to-liberal Democrat." One sample mailing piece is an oversized postcard. One side of this card is labeled a "Democratic Voter Guide and lists the entire slate of candidates endorsed by B.A.D. Campaigns and advertising messages for campaigns that have paid for such services. The other side contains further paid advertising messages and voting information. The second sample mailing piece is a "Mail-o-gram" consisting of advertising messages on behalf of candidates that have paid for such services and a "Democratic Voter Guide" that lists all endorsed candidates and also includes additional advertising messages.

In both samples the recipient is urged to take the voter guide to the polls and to support the candidates listed on the card. Also on both samples, campaigns that have authorized and paid for the mailing are indicated with an asterisk. In these samples, the candidates listed for the U.S. House of Representatives are not marked with an asterisk. Such a nonpaying Federal candidate will be listed on any mail that may be sent to his or her district. You note, however, that all mail sent out will list a nonpaying U.S. Senate candidate since the entire state is part of such a candidate's "district."

You further state that in order for the slate mail program to be effective and profitable, it must "endorse positions on all or virtually all candidates and propositions appearing on a particular voter's ballot." You add that it must publish "its endorsement in each piece of mail, whether or not the endorsee has purchased advertising." You state that in "general elections, virtually all Democratic candidates in an area to which mail is sent are endorsed." You explain

that the mailing pieces will be sent out for delivery between one and four days before the election.

In this context, you ask: (1) does the slate mail program as outlined violate the Act; (2) if so, how can it be structured to comply with the Act; and (3) is B.A.D. Campaigns required to file disclosure reports under the Act in connection with its slate mail program?

As a corporation, B.A.D. Campaigns is subject to the provisions of the Act and regulations that prohibit a corporation from making contributions or expenditures in connection with a Federal election.³ See 2 U.S.C. 441b(a); 11 CFR 114.2(b). Commission regulations specifically prohibit a corporation from making "contributions or expenditures for partisan communications to the general public in connection with a federal election... ." 11 CFR 114.3(a)(1).⁴ The Act and regulations define contribution or expenditure to include "any direct or indirect...gift of... any services, or anything of value...to any candidate, campaign committee, or political party or organization, in connection with" a Federal election. 2 U.S.C. 441b(b)(2); see 11 CFR 114.1(a)(1). Commission regulations define "anything of value" as the "provision of any goods or services without charge or at a charge which is less than the usual and normal charge for such goods or services." 11 CFR 100.7(a)(1)(iii) and 100.8(a)(1)(iv).

According to the facts presented in your request, the slate mail program may include two categories of Federal candidates: (1) those who will pay for advertising or featuring on the mailing pieces; and (2) those who will make no payments to B.A.D. Campaigns for the slate mail program but who will still be listed as part of its endorsed slate.

With regard to those Federal candidates who will pay for advertising or featuring in the slate mail program, B.A.D. Campaigns would make a prohibited contribution or expenditure if it provides the advertising services at less than the usual and normal charge. See 11 CFR 100.7(a)(1)(iii)(B) and 100.8(a)(1)(iv)(B). The facts you have presented in this respect do not include a specific proposed fee arrangement for 1986 involving a Federal candidate, and this part of your request is thus somewhat hypothetical and incomplete. See 11 CFR 112.1(b) and (c). However, for the reasons explained below with respect to nonpaying Federal candidates, the Commission believes that a prohibited corporate contribution or expenditure would result where a paying Federal candidate pays less than the normal and usual charge for advertising and mailing services.

With regard to endorsed and listed but nonpaying Federal candidates, the question is whether B.A.D. Campaigns will make a gift of something of value to such Federal candidates. The Commission has recently stated that a corporation may endorse a candidate and announce its endorsement through a press release so long as the expenditures in making its announcement are de minimis and are not made a pretext for general electioneering. Advisory Opinion 1984-23. Such endorsements of candidates however, do not include listing them on a slate of candidates

³ The Commission notes that the B.A.D. Campaigns slate mail program, as you have presented it, implicates the Act and Commission regulations only to the extent that it relates to Federal candidates and elections for Federal offices.

⁴ Commission regulations permit corporations to make certain nonpartisan communications to the general public. See 11 CFR 114.4(b) and (c). The slate mail program as you have described it would not meet the requirements for a nonpartisan communication.

that is distributed to the general public. See 11 CFR 114.3(a). According to the sample mailing pieces you submitted, the B.A.D. Campaigns slate mail program will carry a message "designed to urge the, public to elect a certain candidate or party," United States v. United Auto Workers, 352 U.S. 567, 587 (1957). The messages will be mailed for delivery between one and four days before the election. Therefore, the inclusion of nonpaying Federal candidates as part of a general election electioneering message represents campaign advertising on behalf of such candidates and will be a gift of something of value to them. Thus, under the Act and Commission regulations, the inclusion of such nonpaying Federal candidates will constitute a prohibited contribution or expenditure by B.A.D. Campaigns.⁵ 2 U.S.C. 441b, 11 CFR 114.2(b).

The Commission notes that the Act does provide an exception to the definition of contribution and expenditure for the costs of preparing and mailing printed slate cards or sample ballots. This exception is, however, limited to "a State or local committee of a political party." See 2 U.S.C. 431(8)(B)(v) and (9)(B)(iv). Since B.A.D. Campaigns is a corporation and is not a political party committee, this exception does not apply here.

With respect to the second question, the only appropriate response is that the slate mail program must be structured to avoid the problems discussed above and to otherwise comply with the Act. As noted earlier, the advisory opinion procedure may only be used with respect to a specific transaction or activity as set forth by the requestor. 2 U.S.C. 437f; 11 CFR 112.1(b). The third question--whether B.A.D. Campaigns must file disclosure reports under the Act--is not reached in view of the answer to the first question.

This response constitutes an advisory opinion concerning application of the Act, or regulations prescribed by the Commission, to the specific transaction or activity set forth in your request. See 2 U.S.C. 437f.

Sincerely yours,

(signed)

John Warren McGarry
Chairman for the
Federal Election Commission

Enclosures (AO 1984-23 and 1980-95)

⁵ Although you state that the inclusion of such Federal candidates may be necessary for business reasons to make the slate mail program profitable, the Commission does not consider such a reason or purpose as sufficient to permit B.A.D. Campaigns to circumvent the clear prohibition of the Act and Commission regulations.