

SEP 4 3 40 PM '97



FEDERAL ELECTION COMMISSION
Washington, DC 20463

AGENDA ITEM
For Meeting of: 9-11-97

September 4, 1997

MEMORANDUM

TO: The Commission

THROUGH: John C. Surina
Staff Director

FROM: Lawrence M. Noble
General Counsel

N. Bradley Litchfield
Associate General Counsel

Jonathan M. Levin
Senior Attorney

Subject: Draft AO 1997-15

Attached is a proposed draft of the subject advisory opinion. We request that this draft be placed on the agenda for September 11, 1997.

Attachment

P 7 8 9 (2)

1 ADVISORY OPINION 1997-15

2
3 Jennifer L. Blum
4 Arter & Hadden
5 1801 K Street, N.W.
6 Suite 400K
7 Washington, D.C. 20006-1301

DRAFT

8
9 Dear Ms. Blum:

10
11 This responds to your letters dated March 24, May 2, and July 11, 1997, as
12 supplemented by letters dated August 4, 21, and 22, 1997, on behalf of Kenneth Nickalo,
13 requesting an advisory opinion concerning the application of the Federal Election
14 Campaign Act of 1971, as amended ("the Act"), and Commission regulations to the
15 formation of a non-connected political committee.

16 In general, your proposal entails the question of whether a political action
17 committee established by Mr. Nickalo would be a separate segregated fund ("SSF") of an
18 incorporated issue advocacy group headed by Mr. Nickalo, or whether such a committee
19 could be a non-connected committee. You describe the anticipated relationship between
20 the committee and the corporation, addressing financial and organizational aspects, and
21 propose that the committee be considered non-connected.

22 ***I. Factual Background***

23 Kenneth Nickalo currently serves as president and chief executive officer of
24 Better Government Bureau, Inc. ("BGB"). You state that BGB is a "membership
25 organization which takes and attempts to resolve complaints from members regarding
26 government services."¹ You also state that BGB's membership includes individuals and

¹ BGB's Articles of Incorporation state that BGB is formed:

 To promote and protect the interests of the citizenry, businesses, institutions and
 other entities in the United States of America by investigating and reporting on
 government concerning waste and inefficiency, being unresponsive, poorly managed or
 corrupt and collecting excessive taxes. The corporation shall further endeavor to
 promote capitalism and free enterprise through education, member advocacy and
 influencing legislative action.

You state that recent activities of BGB include meetings and letter writing campaigns regarding the hazards of railroad crossings in West Virginia, the need for a comp-time bill pending in Congress, and the establishment of a "23-point action program" to create a more efficient government. A Federal court stated that BGB described itself as a "watchdog" of government activities with a membership of 47 businesses

1 corporations, and that the corporations often appoint an individual to serve as "the BGB
2 contact." Mr. Nickalo controls the day-to-day operations of BGB, and his wife (who is
3 his assistant) and he are its only employees, but BGB's Board of Trustees is responsible
4 for approving major policy decisions. According to BGB's Articles of Incorporation,
5 BGB is organized as a nonprofit organization under the laws of the State of Ohio. It has
6 not applied for tax exempt status under 26 U.S.C. §501(c).

7 While retaining his position at BGB, Mr. Nickalo intends to establish a non-
8 connected PAC named Americans for Better Government PAC ("ABG PAC") and serve
9 as its treasurer. You state that ABG PAC is intended to be independent of BGB. The
10 PAC's Board will include contributors to the PAC, and the only person connected with
11 BGB (i.e., the only officer, director, or employee of BGB) serving on the Board will be
12 Mr. Nickalo. Moreover, with the exception of Mr. Nickalo, none of the nine BGB Board
13 members intend to participate in the PAC's operations, although they may make
14 contributions to the PAC.

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15 BGB formerly sponsored a state PAC in West Virginia which was terminated in
16 January 1997. Currently, it has no SSF and does not intend to form one in the future,
17 regardless of the result of this opinion. Mr. Nickalo does not hold a position with any
18 other PAC (whether an SSF or non-connected), party committee, or candidate-authorized
19 committee, and he is not an officer or key person in any organization that has a PAC.

20 Mr. Nickalo intends to operate the PAC from a room in his home, which he owns.
21 BGB currently operates outside Mr. Nickalo's home but Mr. Nickalo may open an office,
22 separate and apart from the PAC, for BGB operations in his home. You state that the
23 PAC does not intend to pay rent to Mr. Nickalo unless the Commission requires such
24 payment.

25 Mr. Nickalo will perform his ABG PAC activities during off-hours from his
26 employment with BGB, and he will not draw a salary from the PAC. In order to operate
27 the PAC, he intends to expend only his personal funds, within the Act's contribution
28 limits, or funds from other contributions to the PAC. You state that, "[i]n the event that

and 304 individuals from various states. *Better Government Bureau, Inc. v. McGraw*, 904 F.Supp. 540 (S.D.W.Va. 1995).

1 BGB provides any operating or administrative services or makes any other expenditures
2 for the PAC, the PAC will pay BGB at commercially reasonable or market rates.”²

3 ABG PAC plans to accept legal and accounting services from BGB or from the
4 law firm of Arter & Hadden, which currently provides litigation, corporate, and election
5 law services to BGB, and will continue to do so. You state that the legal and accounting
6 services for the PAC would be performed by persons employed by BGB or the law firm
7 and would include only activity to ensure compliance with the FEC law. Such services
8 “would be paid for by BGB” and reported by the PAC to the Commission.

9 The PAC intends to solicit contributions from the general public and from the
10 non-corporate members of BGB. If the PAC uses BGB’s mailing list, it will pay a
11 commercially reasonable amount to purchase or rent the list. The PAC will not use
12 BGB’s letterhead or name when soliciting contributions, and the PAC will not hold any
13 fundraisers in conjunction with a BGB event.

14 You also provide additional information as to BGB and its relationship to a
15 particular business corporation, Suarez Corporation Industries (“SCI”). Benjamin Suarez,
16 the founder and president of SCI, provides approximately 95 percent of the funding of
17 BGB. SCI does not have an SSF and neither SCI nor Mr. Suarez otherwise sponsor a
18 PAC. Mr. Nickalo himself is not associated with SCI. The BGB Board currently has
19 nine members and three of them, including Mr. Suarez, hold management positions in
20 SCI. You state, however, that no SCI personnel will sit on the PAC’s Board or
21 participate in the PAC’s administration.

22 **II. Questions Presented**

23 You ask four questions which are re-ordered as follows:

24 (1) May an individual who is the president and CEO of an incorporated
25 membership organization (BGB) establish an independent, non-connected PAC or would
26 such a committee be an SSF of the corporation?

27
28 (2) If ABG PAC is non-connected, may BGB or Arter & Hadden provide legal
29 and accounting compliance services to the PAC without reimbursement?
30

² You indicate that the term “expenditures” refers to operating expenditures and not in-kind contributions to, or expenditures on behalf of, candidates.

1 (3) If ABG PAC is a non-connected PAC, may it solicit contributions from
2 individual members of BGB as part of the general public?

3
4 (4) If the PAC is an SSF of BGB, may it solicit contributions from the individual
5 representatives of BGB's corporate members?

6 **III. Legal Analysis**

7 **A. Response to Questions 1 and 2**

8 The Act and Commission regulations provide that a corporation, including a non-
9 stock corporation, may make payments to establish, administer, or solicit contributions
10 to, a separate segregated fund to be utilized for political purposes without a resultant
11 contribution or expenditure. 2 U.S.C. §441b(b)(2)(C); 11 CFR 114.1(a)(2)(iii). A
12 corporation that directly or indirectly establishes, administers, or financially supports a
13 political committee is the connected organization of that committee. 2 U.S.C. §431(7);
14 11 CFR 100.6(a). The connected organization and its SSF are subject to restrictions as to
15 the category of persons who may be solicited for contributions to the committee. 2
16 U.S.C. §§441b(b)(4)(A) and (C); 11 CFR 114.5(g)(1) and 114.7(a). By contrast, a
17 political committee without a connected organization may solicit any individual or person
18 for otherwise lawful contributions. All payments to it for establishment, administration,
19 and solicitation costs, however, are contributions subject to the limits of the Act unless
20 another exception applies.

21 The Act and Commission regulations "do not prescribe qualifications on the
22 individuals who may establish, organize, and direct a non-connected political committee;
23 nor do they necessarily prohibit individuals who have some association with a
24 corporation, labor organization, or trade association from such activity." Advisory
25 Opinion 1984-12. The Commission has permitted the formation of a non-connected
26 political committee that is organized by individuals associated with one entity and that
27 receives and pays for services furnished by that entity, or by the same company that
28 provides services to that entity. Advisory Opinions 1995-38, 1991-37 and 1984-12. See
29 also Advisory Opinion 1982-63. Compare Advisory Opinion 1996-38. In permitting the
30 formation of such committees, the Commission has sought to ensure that certain
31 conditions are met with respect to the financial and organizational relationship between

1 the committee and the corporation. The Commission concludes that Mr. Nickalo may
2 establish a non-connected committee based on conditions you describe and assuming
3 certain other conditions.

4 ***Lack of Financial Support***

5 In confirming non-connected committee status in past opinions, the Commission
6 has sought to assure that, even with some overlap with a corporation as to personnel or
7 facilities, the committee is not financially supported by that corporation. In the past, the
8 Commission has concluded that a corporation in a similar situation was not providing
9 financial support to a committee when services or the use of facilities were provided in
10 return for payment by the committee of the usual and normal charge within a
11 commercially reasonable time. For example, the Commission has found nonconnected
12 status in an arrangement wherein a committee shares space and office facilities with an
13 incorporated accounting and financial firm headed by the committee treasurer (who was
14 also one of the committee's founders) if the committee pays for services and for the
15 allocable portion of the expenses for rent and the use of such facilities (including the
16 allocation based on staff time of base charges for telephones) within a commercially
17 reasonable period of time. Advisory Opinion 1991-37. In addition, the Commission has
18 conditionally found non-connected status where a committee formed by directors of a
19 membership organization (acting in their individual capacity) uses office space, facilities,
20 and services of the management firm that provides the same support to the organization
21 as long as the committee's use is consistent with the firm's provision to entities other
22 than the membership organization (including payment of the usual and normal charge).
23 Advisory Opinion 1984-12. See also Advisory Opinion 1995-38. The Commission's
24 analysis of what constitutes financial support turns upon one of the definitions of a
25 "contribution," i.e. the provision of goods or services at less than the usual and normal
26 charge and/or beyond a commercially reasonable period of time. 11 CFR 100.7(a)(1)(ii)
27 and 114.9(c) and (d).

28 In one respect, BGB is differently situated from the providers of services in the
29 above-cited opinions. In those opinions, the providers were commercial entities with an
30 ordinary course of business of providing services and/or facilities to customers.

Conclusion

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1 Commission regulations provide that a corporation, in its capacity as a commercial
 2 vendor, may extend credit to a political committee, provided that the credit is extended in
 3 the corporation's ordinary course of business and the terms are substantially similar to
 4 extensions of credit to nonpolitical debtors that are of similar risk and size of obligation.
 5 Otherwise, the extension of credit is a contribution. 11 CFR 116.3(b) and 100.7(a)(4). It
 6 does not appear that BGB is in the business of providing goods or services to other
 7 entities for the purpose of administration or fundraising assistance. Thus, it would not
 8 qualify as a commercial vendor that could extend credit to the PAC in the ordinary course
 9 of business. See 11 CFR 116.3(c).³

10 Consequently, although ABG PAC may pay for some support within a
 11 commercially reasonable period of time, some types of support must be paid for in
 12 advance. Under 11 CFR 114.9(c) and (d), ABG PAC may ^{pay} the usual and normal rental
 13 charge for the use of BGB office facilities, e.g., telephones, word processors, copying
 14 machines, and facilities to produce materials, within a commercially reasonable time.
 15 The usual and normal charge for PAC services performed by BGB employees while they
 16 are working on BGB time, e.g., the hourly rate, must be paid by the PAC in advance of
 17 the services since there is no applicable provision allowing the extension of credit by
 18 BGB. See 11 CFR 100.7(a)(4); 116.3(b) and (c).⁴ If the PAC uses BGB's mailing list, it
 19 must pay the fair market value for the rental or purchase of the list (whichever transaction
 20 is applicable) in advance. 11 CFR 114.2(f)(2)(i)(C). Since it does not appear that BGB
 21 has established an ordinary course of business of providing other ^{services} facilities, such as
 22 meeting rooms or catering services, ABG PAC must pay for such services in advance.
 23 See 11 CFR 114.2(f)(1) and (2) ~~(D)~~ (E).

*11/2/97
[Handwritten notes]*

³ Section 116.3(c) states that, in determining whether credit was extended in the ordinary course of business, the Commission will consider (1) whether the commercial vendor followed its established procedures and its past practice in approving the extension of credit; (2) whether the commercial vendor received prompt payment in full if it previously extended credit to the same candidate or political committee; and (3) whether the extension of credit conformed to the usual and normal practice in the commercial vendor's trade or industry.

⁴ The PAC will not have to pay for the value of the services provided by BGB employees during off hours from BGB. Commission regulations provide that the value of services provided without compensation by an individual who volunteers on behalf of a political committee is not a contribution. 11 CFR 100.7(b)(3).

1 In addition, if BGB is purchasing items or services for the PAC from a third party
2 vendor, the PAC must either pay BGB in advance or pay the vendor directly.⁵ In
3 purchasing goods or services from third parties, ABG PAC must ensure that the charges it
4 pays to third party vendors, or extensions of credit from such vendors, conform to the
5 ordinary course of business standard. This means that any vendors to the PAC that are
6 also vendors to BGB must extend credit and determine their charges to the PAC without
7 reference to their business relationships with BGB. See Advisory Opinion 1984-12.⁶

8 If BGB and ABG PAC do not meet the above-described conditions, the
9 noncompliance would constitute financially supporting the PAC. As such, it would
10 either: (1) compromise the PAC's ability to be a non-connected committee that is not an
11 SSF of BGB; or (2) constitute an impermissible in-kind corporate contribution from BGB
12 if the PAC retains its non-connected status. 2 U.S.C. §441b(a) and 441b(b)(2); 11 CFR
13 114.1(a)(1).

14 BGB may provide legal and accounting services to the PAC without charge so
15 long as such services are rendered by a regular employee of BGB and are provided solely
16 to ensure compliance with the Act. Since such services are exempt from the definition of
17 "contribution" under the Act regardless of whether they are provided by a connected
18 organization or another entity, such services would not constitute financial support by
19 BGB for the PAC. 2 U.S.C. §431(8)(B)(ix); 11 CFR 100.7(b)(14) and 114.1(a)(2)((vii)).⁷

⁵ The Commission notes, however, that the purchase by BGB of items that are connected with the PACs - use of BGB facilities permitted by 11 CFR 114.9(c) and (d) will not require advance payment by the PAC. Thus, for example, purchases of paper or ink by BGB from an outside vendor will not require advance payment.

⁶ You also state that, unless the Commission says otherwise, the PAC does not intend to pay rent to Mr. Nickalo for the room from which Mr. Nickalo intends to operate the PAC. You state that Mr. Nickalo will perform his PAC activities during his off-hours from BGB as a volunteer. Thus, the value of those services would not be a contribution. 11 CFR 100.7(b)(3); see footnote 4. In view of the fact that Mr. Nickalo would perform such services in his home, and in view of the fact that the space is a necessity incident to his performance of the volunteer services, the Commission concludes that a rental payment by the PAC is not required. The Commission cautions that the use by Mr. Nickalo of BGB equipment and facilities for services to the PAC during his hours off from BGB will not be viewed similarly. With the exception of the use of equipment and facilities for legal and accounting compliance services, the PAC must make payment in accordance with the requirements set out in this opinion. See Advisory Opinion 1980-137.

⁷ Although the value of the services are not contributions, the amounts are reportable on Schedule A of ABG PAC's reports as memo entries. Such entries shall include the amounts paid by BGB, the date the services were performed, and the name of each person performing such services. 11 CFR 104.3(h).

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must not be in footnote

note

1 To the extent that BGB provides legal and accounting services (via its employees) that
2 are not for the PAC's compliance with the Act, the PAC must pay the usual and normal
3 charge for such services in advance. Otherwise, BGB would be providing financial
4 support that would either compromise nonconnected status or result in a corporate
5 contribution. The Commission also notes your statement that BGB will pay for legal and
6 accounting services provided to the PAC by Arter & Hadden. Such a payment does not
7 fall within the exemption provided above. The PAC should either pay the firm directly
8 for such services or pay BGB immediately upon billing by the firm. ①

Can they
provide
these
services?

9 You also state that Mr. Nickalo may open an office, separate and apart from the
10 PAC, for BGB operations in his home. The Commission cautions that, if BGB pays rent
11 to Mr. Nickalo, that rent cannot subsidize the operations of the PAC. 2 U.S.C. §441b(a)
12 and §431(7). In other words, the rent payments cannot become the proximate cause of
13 any reduction in the amount of BGB's charges to the PAC.

What
does this
mean?

14 **Involvement of Persons not Associated with BGB**

15 In concluding that a corporation is not connected to a particular committee, the
16 Commission has also looked at the persons involved in the committee's activities. For
17 example, the Commission has noted that the persons establishing the committee included
18 a number of persons not associated with a corporation which was headed by the
19 committee treasurer and which would be providing administrative services or facilities, or
20 sharing such facilities. Advisory Opinions 1995-38 and 1991-37. In a situation where
21 the Board members of a medical association proposed to establish a non-connected
22 committee, the Commission noted the assertion that, as the PAC developed support from
23 physicians, scientists, and others who were not members of the association, the PAC's
24 Board would reflect that diversity, and stated that, if this diversity did not materialize, the
25 issue of non-connected status would be re-examined. Advisory Opinion 1984-12.

26 You note that the PAC Board will include contributors to the PAC and that, even
27 though other persons on the BGB Board may contribute to the PAC, Mr. Nickalo will be
28 the only person connected with BGB on the PAC Board. You also note that none of the
29 other BGB Board members intend to participate in the operations of the PAC. The
30 participation of non-BGB persons, along with the fact that BGB personnel (other than

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1 Mr. Nickalo) will not play a dominant role, is consistent with the PAC's status as a non-
2 connected committee. If this situation changes, and if persons outside BGB (or its
3 membership, including member corporations) are not involved in the conduct and control
4 of the PAC, the issue of non-connected status would need to be re-examined. Moreover,
5 in view of the fact that BGB is almost completely funded by Benjamin Suarez, the issue
6 of connected status with SCI might require examination under such changed
7 circumstances.

8 Two other factors mentioned by you, not directly related to the personnel overlap,
9 also pertain to the need for organizational separation. These are: (1) that the PAC will
10 not use BGB's name or letterhead in soliciting contributions; and (2) that the PAC will
11 not hold fundraisers in conjunction with a BGB event. A change in either of these factors
12 would necessitate a re-examination of ABG PAC's non-connected status. See Advisory
13 Opinion 1984-12.

14 ***B. Response to Questions 3 and 4***

15 As indicated above, a non-connected PAC is not limited to a solicitable class in
16 the way that connected organizations and their SSFs are. See 11 CFR 114.5(g)(1) and
17 114.7(a). Assuming ABG PAC complies with the conditions set out above, it may solicit
18 the general public for contributions, with the exception of those persons described in
19 2 U.S.C. §§441b(a), 441c, and 441e. This would include any individual who is a
20 representative of a corporate member of BGB and is not a foreign national or a Federal
21 contractor. In view of the conclusion as to the nonconnected status of the PAC, the
22 Commission need not reach other issues presented in the fourth question. See 11 CFR
23 112.1(b).

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

27 Sincerely,

28
29 John Warren McGarry
30 Chairman
31

32 Enclosures (AOs 1996-38, 1995-38, 1991-37, 1984-12, 1982-63, and 1980-137)