

AGENDA DOCUMENT NO. 97-75

REC'D
FEDERAL ELECTION
COMMISSION
CENTRAL OFFICE

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FEDERAL ELECTION COMMISSION
Washington, DC 20463

November 4, 1997

MEMORANDUM

TO: The Commission

THROUGH: John C. Surina
Staff Director

FROM: Lawrence M. Noble
General Counsel

N. Bradley Litchfield
Associate General Counsel

Michael G. Marinelli
Staff Attorney

SUBJECT: Draft AO 1997-22

OK

*John may write
a concurring
opinion.*

Attached is a proposed draft of the subject advisory opinion. We request that this draft be placed on the agenda for November 13, 1997.

AGENDA ITEM

For Meeting of: 11-13-97

Attachment

DRAFT

1
2 **ADVISORY OPINION 1997-22**

3
4 **William F. O'Connor, Jr., President**
5 **Business Council of Alabama**
6 **PO Box 76**
7 **Montgomery, AL 36101-0076**

8
9 **Dear Mr. O'Connor:**

10
11 **This refers to your letter dated September 25, 1997 which requests advice concerning**
12 **application of the Federal Election Campaign Act of 1971, as amended ("the Act"), and**
13 **Commission regulations to a proposal by the Business Council of Alabama ("BCA") to send**
14 **communications and endorsement materials to its members. These BCA communications would**
15 **endorse Federal candidates and solicit contributions for their campaigns.**

16 **You state that BCA is a nonprofit corporation organized under the Alabama Nonprofit**
17 **Corporation Act, and is designated a section 501(c)(6) organization under Title 26 of the U.S.**
18 **Code.¹ Your request includes BCA's By-laws, its governing document.**

19 **BCA MEMBERSHIP STRUCTURE**

20 **The membership of BCA consists of individuals, firms, partnerships, organizations, and**
21 **corporations. Your request states that BCA has approximately 5,200 members at the present**

¹ You state that BCA was established in 1985 with the consolidation of the Alabama Chamber of Commerce and Associated Industries of Alabama, to represent Alabama business and industries at the State and Federal levels. The purpose of BCA, according to its bylaws, is to promote the general welfare of Alabama and its citizens by advancing the educational, civic, social, commercial and economic interests of the State. Its efforts involve encouraging the development and retention of industry, agriculture, commerce and recreational activities; promotion of good employer-employee relations, and closer relationships among agriculture, education, business and industry. See BCA Bylaws, Article II, Section 2.1.

1 time. BCA's membership includes more than 4,000 corporations, 300 professional
2 organizations, 70 chambers of commerce, 30 business or trade associations and 20 individuals.²
3 Membership in BCA is open to individuals, firms, organizations, and corporations interested in
4 the objectives of the Association. BCA Bylaws, Article III, Section 3.1.

5 **BCA's PROPOSED COMMUNICATIONS**

6 You state that BCA proposes to engage in a program whereby it would evaluate Federal
7 candidates and their positions regarding matters of concern to BCA members. After selecting
8 Federal candidates to endorse or oppose, BCA would communicate with all of its membership to
9 express its support or opposition to these candidates and urge members to do likewise. In
10 addition, BCA would request that its non-corporate members, or the separate segregated funds of
11 its corporate members, make contributions directly to the campaigns of certain candidates.³ You
12 state that, for both corporate and non-corporate members, BCA would contact the individual
13 persons through whom BCA normally communicates with the corporate member or non-
14 corporate member. You further explain that BCA members normally designate one or several
15 "contact persons" to receive BCA communications, attend meetings, serve on committees, and so

² You state that BCA's membership records do not provide information on whether members such as professional organizations, chambers of commerce, and business and trade associations are incorporated.

³ You explain that BCA maintains a non-Federal political committee ("ProgressPAC") which makes campaign contributions to State and local candidates. ProgressPAC has never made contributions to Federal candidates, nor has it endorsed any Federal candidates. You affirm that, at the present time, BCA has no connection with any Federal separate segregated fund.

BCA would provide information regarding how to make contributions to candidates. This would include providing the names and addresses of the candidates' principal campaign committees. You affirm that BCA would not provide the means to actually make such contributions (such as the envelopes addressed to candidates) or otherwise facilitate the making of contributions. BCA would also not receive or forward contributions to the candidates. The communications containing its candidate endorsements would be produced at BCA expense, and would constitute the views of BCA, rather than a distribution or reproduction of materials prepared by any candidate or other entity.

1 forth. You state that BCA communicates with its 5,200 members through 6,300 such "contact
2 persons."

3 In addition, BCA would request that its corporate members forward these
4 communications to their respective restricted classes. You explain that, while members would
5 not be obligated to comply with BCA's request, BCA anticipates many members will cooperate.
6 Thus, for example, BCA's corporate members would provide BCA's candidate endorsements to
7 their stockholders, many of whom may be employees of such corporations. Similarly, BCA's
8 organization and association members would provide BCA's candidate endorsements to their
9 own members.

10 You state that your question is twofold: First, may BCA communicate its candidate
11 endorsements and encourage individual contributions to the endorsed candidate by means of
12 communications with the "contact person" of its association and organization members through
13 whom BCA normally communicates? Second, may BCA request that its members, particularly
14 corporations and associations, forward the foregoing BCA communications to their restricted
15 classes?

16 **ACT AND COMMISSION REGULATIONS**

17 The Act prohibits corporations from making any contribution or expenditure in
18 connection with Federal elections. 2 U.S.C. §441b. Contributions include direct or indirect
19 payments or gifts of money or any services, or anything of value, to any candidate for Federal
20 office. 2 U.S.C. §441b(b)(2); 11 CFR 114.1(a)(1). This general prohibition also has an
21 exception that allows a corporation, including an incorporated membership organization, to

1 communicate with its "restricted class," its stockholders, executive and administrative personnel
2 and their families on "any subject," including messages containing express advocacy of the
3 election or defeat of Federal candidates. 2 U.S.C. § 441b(b)(2)(A) and 11 CFR 114.1(j). For
4 purposes of these communications, the restricted class of an incorporated membership
5 organization also includes its membership. *Id.*

6 Corporations, including incorporated membership organizations, may not facilitate the
7 making of contributions to Federal candidates or political committees. 11 CFR 114.2(f).
8 Corporate communications under section 114.3 may solicit or suggest that the individual member
9 make a contribution to a particular candidate so long as the corporation limits its activity to
10 communication only and does not actually facilitate the making of the member's contribution to
11 the candidate nor act as a conduit. Examples of prohibited facilitation include providing
12 materials for the purpose of transmitting or delivering contributions, such as stamps, envelopes
13 addressed to a candidate or political committee (other than the corporation's own separate
14 segregated fund), or providing similar items which would assist in transmitting or delivering
15 contributions. 11 CFR 114.2(f)(2)(ii). Facilitation does not include providing the address of the
16 candidate or political committee. *Id.* It also does not include soliciting contributions to be sent
17 directly to candidates, if the solicitation is directed only to the restricted class. 11 CFR
18 114.2(f)(4)(ii). See Advisory Opinions 1996-1 and 1987-29.

19 Under Commission regulations, a membership organization must possess certain
20 attributes. It must (i) expressly provide for "members" in its articles and bylaws; (ii) expressly
21 solicit members; and (iii) expressly acknowledge the acceptance of membership, such as by

1 sending a membership card or inclusion on a membership newsletter list. 11 CFR

2 100.8(b)(4)(iv)(A), 114.1(e)(1).

3 On the question of what constitutes membership for purposes of the Act, the Supreme
4 Court has suggested that members of non-stock corporations are to be defined, at least in part, by
5 analogy to stockholders of business corporations and members of labor unions. See *FEC v.*
6 *National Right to Work Committee*, 459 U.S. 197, 202 (1982), see also *Chamber of Commerce v.*
7 *FEC*, 69 F. 3rd 600 (D.C. Cir. 1995); *petition for rehearing denied*, 76 F. 3d 1234 (1996).⁴

8 DETERMINING MEMBERSHIP OF BCA

9 In Advisory Opinion 1996-21, the Commission, after examining BCA's bylaws,
10 concluded that BCA is a membership association for purposes of the Act. Furthermore, the
11 Commission concluded that the entire membership of BCA would be considered "members" for
12 purposes of the Act and Commission regulations. A review of BCA's most recent submission

⁴ In 1993, the Commission revised its membership regulations to further define the term "members." However, the court in *Chamber* determined that portions of those regulations were invalid, concluding that they defined the term "member" in an unduly restrictive fashion. See *Chamber* at 604. (There were not four votes at the Commission to seek further judicial review of this decision.) The regulation at 11 CFR 114.1(e)(2), now invalid in the District of Columbia Circuit, had defined "member" to mean:

all persons who are currently satisfying the requirements for membership in a membership association, who affirmatively accept the membership association's invitation to become a member, and who:

- (i) Have some significant financial attachment to the membership association, such as a significant investment or ownership stake (but not merely the payment of dues);
- (ii) Are required to pay on a regular basis a specific amount of dues that is predetermined by the association and are entitled to vote directly either for at least one member who has full participatory and voting rights on the highest governing body of the membership association, or for those who select at least one member of those on the highest governing body of the membership association; or
- (iii) Are entitled to vote directly for all of those on the highest governing body of the membership association.

1 indicates that the membership structure and organization of the association are unchanged since
2 Advisory Opinion 1996-21. Therefore, these conclusions retain their validity.

3 **APPLICATION TO BCA COMMUNICATIONS**

4 The Commission notes that your proposal is nearly identical to BCA's prior candidate
5 endorsement and contribution solicitation program approved by the Commission in Advisory
6 Opinion 1996-21.⁵ The prior opinion addressed how a membership association that was not a
7 trade association communicated its candidate endorsements to its corporate membership. The
8 Commission, drawing an analogy to a trade association's communications to its corporate
9 members, concluded that corporate members could receive BCA's endorsements through the
10 individuals who would normally represent the corporation to the association and receive its other
11 communications. As noted in Advisory Opinion 1996-21, section 114.7(h) expressly permits
12 BCA, as an incorporated membership organization, to communicate with its members as
13 otherwise permitted by section 114.3. However, the Commission has not identified the
14 personnel of a non-corporate member to whom a covered communication by an incorporated
15 membership association may be directed

16 Relevant to your situation are two past opinions dealing with the solicitation of non-
17 corporate members by trade associations for contributions to their separate segregated funds. See
18 Advisory Opinions 1995-27 and 1988-3. While BCA is not a trade association, these opinions

⁵ The Commission concluded that the 1996 proposal, because of the safeguards also present in your current proposal, would not represent a prohibited corporate facilitation of contributions or any conduit or earmarking activity which is prohibited by 2 U.S.C. §441b and 11 CFR 114.2(f). See Advisory Opinion 1996-21.

1 still offer guidance for your situation.⁶ In the most recent of these opinions, Advisory Opinion
2 1995-27 which considered contribution solicitations by a trade association of real estate trusts,
3 the Commission concluded that solicitations could be directed to the representatives of the
4 member real estate trusts with whom the trade association normally conducts its activities.⁷
5 Therefore, the Commission concludes here that BCA may communicate its candidate
6 endorsements to its non-corporate members by directing those messages to the one or two
7 individuals who normally represent that member to the association. The Commission again
8 notes that, as in Advisory Opinion 1996-21, the number of total representatives from both
9 corporate and non-corporate members indicates that, on the average, there are less than two
10 representatives per member. The numbers of employees of BCA's non-corporate members who
11 would receive the corporate communication from BCA would therefore be reasonable and
12 consistent with the purposes of section 114.7(h).

13 The second aspect in your proposal, which differs from that discussed in Advisory
14 Opinion 1996-21, is BCA's plan to have its organizational members disseminate the BCA
15 endorsements and the related written candidate advocacy materials to the executive and
16 administrative personnel and stockholders (and their families) of both BCA's corporate members

⁶ In Advisory Opinion 1985-37, the Commission determined that a state chamber of commerce did not qualify as a federation of trade associations, in part, because the organization represented all lines of commerce, rather than a similar or allied lines of commerce, as required by 11 CFR 114.8(g)(1). See also Advisory Opinion 1996-21.

⁷ In that opinion, the Commission also concluded that the trade association could not solicit the beneficial owners and stockholders of the individual non-corporate member trusts or their families, unless these individuals or business entities were themselves members of the trade association. In addition, the trade association could not solicit the executive and administrative classes of the member non-corporate trusts or their families. *Id.* In Advisory Opinion 1988-3, the Commission concluded that the individual marine pilot members of a non-corporate regional association, which belonged to an incorporated national association, could not be solicited by the national association for contributions to its PAC. The individual pilots were not members of the national association.

1 and its other entity members. Again, a prior opinion Advisory Opinion 1991-24, although it
2 concerned a federation of trade associations, is relevant to your proposal. In that opinion, a
3 federation of trade associations wished to have its member organizations communicate to their
4 own memberships the candidate endorsements made by the federation, and it proposed to use, as
5 its contact personnel, the individuals who represented the individual trade association members
6 to the federation. The Commission noted that this was permissible. However, one aspect of the
7 Commission's conclusion was that the federation could "not subsidize the subsequent
8 communications made [by its members] on the basis of the recommendations" See Advisory
9 Opinion 1991-24.

10 Therefore, BCA may communicate its endorsements to its corporate members and its
11 other organizational members, and it may further request that these endorsements be passed
12 along to the qualified members or other (restricted class) personnel of those entities. However,
13 BCA may not provide the materials for redistribution by its members, that is bulk copies of its
14 campaign and candidate related endorsement materials. This would be a form of subsidy which
15 would transform BCA's activity into an unlawful distribution of election advocacy
16 communications to the restricted classes of its corporate members and the personnel of its non-
17 corporate members. Instead, as in Advisory Opinion 1991-24, BCA may communicate its
18 candidate endorsements only to its own restricted class and must leave the further distribution of
19 its election advocacy viewpoints (and the related costs) to the member organizations themselves.⁸

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9 This is a trade association AO

⁸ The Commission notes that BCA may provide its election advocacy materials at a charge to its members which may not, however, be so low as to constitute a subsidization of the redistribution by those members to their own restricted classes. See Advisory Opinion 1997-9 (allowing membership corporation to pay costs of contribution collection process administered by its membership for the corporate PAC).

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