FEDERAL ELECTION COMMISSION
Washington, DC 20463

May 16, 2003

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

ADVISORY OPINION 2003-7

Ms. Regina Cordle
Treasurer
Virginia Highlands Advancement Fund
Post Office Box 1176
Damascus, VA 242236

Dear Ms. Cordle:

This responds to your letter dated December 19, 2002, as supplemented by your letters of January 21, 2003, and March 11, 2003, requesting an advisory opinion concerning the application of the Federal Election Campaign Act of 1971, as amended ("the Act"), and Commission regulations, to the accounting method Virginia Highlands Advancement Fund ("VHAF") seeks to use when returning non-Federal funds to its donors.

Background

VHAF is a political organization qualified under 26 U.S.C 527. VHAF's registration statement with the IRS sets forth its purpose as being "to support state and local Democratic political candidates." VHAF is a state political organization registered in Virginia. It is not a Federal political committee and is not registered with the Commission.

You state that VHAF is "administered" and "supervised" by a Member of the U.S. House of Representatives. You also state that VHAF has never raised funds for the purpose of influencing a Federal election, and is not affiliated with or otherwise connected with a Federal political committee or political party. VHAF raised funds outside the limits and prohibitions of the Act, but in compliance with Virginia state law ("non-Federal funds"). You state that VHAF spent all of its funds prior to the November 6, 2002, effective date of the Bipartisan Campaign Reform Act of 2002 ("BCRA").[1] VHAF intends to close its account and terminate as a political organization.

[1] Public Law 107-155, 116 Stat. 81 (Mar. 27, 2002).

In 2002, VHAF paid a late filing penalty to the IRS. The IRS, however, unexpectedly abated this penalty, and issued a refund check for $690.10 in December of 2002, after VHAF had already disposed of all of its funds but before it terminated as a political organization.

In 2002, VHAF had two donors, one major donor that was a corporation, and one minor donor who was an individual. You state that VHAF would like to use a *pro rata* accounting method to return to the two donors proportionate amounts of the $690.10 refund.

Question Presented

May VHAF dispose of the IRS refund it involuntarily received by making *pro rata* refunds to its donors based on the ratio of their donations to total donations in 2002?

Legal Analysis and Conclusions

Your request states that a Member of Congress "administered" and "supervised" VHAF. The Commission understands this to mean that you have concluded that the Member of Congress either (a) "directly or indirectly established, financed, maintained, or controlled" VHAF; or (b) that the Member received, directed, spent, or disbursed the refunded tax penalty. For purposes of this opinion only, the Commission accepts one or both of these conclusions, and thus concludes that 2 U.S.C. 441i(e)(1)(B) applies to the *pro rata* refunds to VHAF donors. Similarly, your request considers all donations received by VHAF to be non-Federal funds. For the purposes of this opinion, the Commission accepts this assumption as well. Thus, any refunds from the IRS derived from penalties paid with non-Federal funds from non-Federal donations received must also be considered non-Federal funds.

Under the Act as amended by BCRA, an entity directly or indirectly established, financed, maintained, or controlled by a Federal officeholder may raise and spend funds in connection with State and local elections, but only in amounts and from sources that are consistent with State law, and that do not exceed the Act's contribution limits and that do not come from prohibited sources under the Act. 2 U.S.C. 441i(e)(1)(B); 11 CFR 300.60(d); 11 CFR 300.62. Similarly, Federal officeholders may not receive, direct, spend, or disburse funds in connection with a State or local election if the funds are in excess of the Act's contribution limits or from sources prohibited by the Act. 2 U.S.C. 441i(e)(1)(B); 11 CFR 300.62. The Commission understands that VHAF attempted to dispose of all funds by BCRA's November 6, 2002, effective date in order to terminate as a State political organization.

The Act, as amended by BCRA, does not expressly address VHAF's situation of having disposed of non-Federal funds prior to November 6, 2002, only to receive an unexpected and unsolicited refund of some of those funds after that date. In responding to your question, the Commission draws an analogy to the transition period during which national committees of political parties were required to disgorge all non-Federal funds (November 6 to December 31, 2002), and to the particular methods of disgorgement required for national political party committees. 11 CFR 300.12(c). Since refunding monies to donors was one of the permitted

means of disgorgement for national party committees, the Commission concludes that in VHAF's unusual situation that is described above, it may dispose of the non-Federal funds involuntarily received by making refunds to VHAF donors.[2]

With regard to whether *pro rata* refunds to donors are appropriate under these unusual circumstances, the Commission notes that in the past it recognized a *pro rata* refund of contributions by a federal political committee as a lawful use of excess funds. *See*, e.g., AO 1980-30. Thus, VHAF may return *pro rata* portions of its unexpected non-Federal funds to its two donors from 2002.

This response constitutes an advisory opinion concerning the application of the Act and Commission regulations to the specific transaction or activity set forth in your request. *See* 2 U.S.C. 437f. The Commission emphasizes that, if there is a change in any of the facts or assumptions presented, and such facts or assumptions are material to a conclusion presented in this opinion, then the requestor may not rely on that conclusion as support for its proposed activity. The Commission notes that this advisory opinion analyzes the Act, as amended by BCRA, and Commission regulations, including those promulgated to implement the BCRA amendments, as they pertain to your proposed activities. On May 2, 2003, a three-judge panel of the United States District Court for the District of Columbia ruled that a number of BCRA provisions are unconstitutional and issued an order enjoining the enforcement, execution, or other application of those provisions. McConnell v. FEC, Civ. No. 02-582, 2003 WL 21003144 (D.D.C. May 2, 2003), notice of appeal filed (U.S. May 2, 2003). The District Court ruling has been appealed to the United States Supreme Court. The Commission has determined that your request for advice is not affected by the District Court's ruling. The Commission cautions that the legal analysis in this advisory opinion may be affected by the eventual decision of the Supreme Court.

Sincerely,

(signed)

Ellen L. Weintraub
Chair

Enclosure: (AO 1980-30)

[2] You do not inquire into, and the Commission does not address, other possible uses for the IRS refund.