



April 21, 2003

VIA E-MAIL

Lawrence H. Norton
General Counsel
Federal Election Commission
999 E Street NW
Washington, DC 20463

Comment on
AOR 2003-12

Re: AOR 2003-12 Stop Taxpayer Money for Politicians Committee & Rep. Jeff Flake.

Dear Mr. Norton:

We are writing on behalf of the Center for Responsive Politics and its campaign finance law project FEC Watch to comment on AOR 2003-12, an advisory opinion request submitted by Stop Taxpayer Money for Politicians Committee ("the Committee") and Representative Jeff Flake.

The Committee is a ballot initiative committee set up by Representative Flake and others for the purpose of promoting a referendum that would repeal portions of Arizona's campaign finance statute. Representative Flake is a Member of Congress and former (and possibly future) Chairman of the committee. He wishes to be involved in many, if not all, of the committee's efforts to promote adoption of the referendum. The request asks numerous questions about the permissibility of Representative Flake's involvement with the Committee, and seeks guidance on how the activities of Flake and the Committee should be conducted to ensure compliance with the Federal Election Campaign Act, 2 U.S.C. § 431 *et seq.* (FECA or the Act) and the Bipartisan Campaign Reform Act of 2002 (BCRA).

Procedural Comments

As a threshold matter, some of the questions asked in the request are open-ended inquiries about the proper way to conduct activities that comply with the law. The Commission should decline to answer these questions and instead direct the requester to the Commission's regulations, which provide this type of guidance. The Commission should limit its response to those aspects of the request that meet the standard set out in 11 CFR 112.1(b), *i.e.*, the portions that describe a specific activity that the requester plans to undertake and ask whether that activity would be permissible.

Substantive Comments

Introduction

Turning to the specifics of the request, we first emphasize two things that the FECA and BCRA do not regulate. First, these statutes do not limit Representative Flake's ability to publicly express his support for the ballot referendum, which he has the right to do without limitation. Second, FECA and BCRA generally do not impact the activities of a ballot initiative and ballot referenda committee, so long as the committee is not established, financed, maintained or controlled by a federal candidate or officeholder. Thus, ballot initiative committees and federal officeholders retain a broad zone within which they are free to independently promote ballot issues however they see fit.

The activities described in this advisory opinion request venture far beyond the outer limits of this zone and into territory directly impacted by FECA and BCRA. For the reasons set forth below, we believe many of the proposed activities described in the request are prohibited by BCRA and by the FEC's regulations implementing BCRA.¹ We urge the Commission to issue an opinion that gives full force and effect to BCRA and the BCRA regulations, consistent with the principles outlined below.

Analysis

Our comments focus on the central issue raised in the request, which is the Committee's plan to raise and spend nonfederal funds. FECA and BCRA prohibit the Committee from raising and spending nonfederal funds under these circumstances for three reasons: (A) The Committee is directly or indirectly established, financed, maintained or controlled by a Federal officeholder and plans to conduct federal election activity; (B) The Committee is planning to make prohibited electioneering communications; and (C) The Committee is planning to make prohibited coordinated communications

A. The Committee is directly or indirectly established, financed, maintained or controlled by a Federal officeholder and plans to conduct federal election activity

BCRA prohibits federal officeholders and entities directly or indirectly established, financed, maintained or controlled by a federal officeholder from soliciting, receiving, directing, transferring, or spending funds in connection with an election for Federal office, including funds for any Federal election activity, unless the funds are subject to the limitations, prohibitions, and reporting requirements of the FECA. 2 U.S.C. § 441i(e)(1)(A).

1. Directly or indirectly established, financed, maintained or controlled

Under the FEC's rules, the Committee is an entity directly or indirectly established, financed, maintained or controlled by Representative Flake. 11 CFR 300.2(c). The rules examine ten factors in the context of the overall relationship between the officeholder and the entity to determine whether the entity is directly or indirectly established, financed, maintained or controlled by the officeholder. Of the ten factors, five are relevant to the facts set forth in the request:

¹ We continue to believe that the FEC's regulations implementing BCRA are too narrow, so we make no implicit endorsement of those regulations here. In our view, the request describes activities that would violate even the FEC's narrow interpretation of BCRA.

- Whether the officeholder, directly or through an agent, has the authority or ability to direct or participate in the governance of the entity through provisions of constitutions, bylaws, contracts, or other rules, or through formal or informal practices or procedures; 11 CFR 300.2(c)(2)(ii).
- Whether the officeholder, directly or through an agent, has the authority to hire, appoint, demote or otherwise control the committee's officers, decisionmakers or members; 11 CFR 300.2(c)(2)(iii).
- Whether the officeholder and the entity have common or overlapping officers or employees indicating a formal or ongoing relationship between the officeholder and the entity; 11 CFR 300.2(c)(2)(v).
- Whether the officeholder, directly or through an agent, causes or arranges for funds in a significant amount or ongoing basis to be provided to the committee. 11 CFR 300.2(c)(2)(viii).
- Whether the officeholder had an active or significant role in the formation of the committee. 11 CFR 300.2(c)(2)(ix).

Based on these five factors, it is difficult to conceive of a clearer example of an entity that is directly or indirectly established, financed, maintained or controlled by a federal officeholder than the referendum committee that submitted this advisory opinion request.

a. Committee formation

Representative Flake formed the Committee, was its original chairman,² and signed its initial filing with the Arizona Secretary of State. Thus, it is clear Representative Flake had a very significant role in the formation of the committee within the meaning of section 300.2(c)(2)(ix).

In our view, Representative Flake's dominant role in the formation of the referendum committee is enough to make the committee an entity directly or indirectly established, financed, maintained or controlled by him. His subsequent resignation from the position of Chairman is not sufficient to negate this important factor. Thus, even if he were to remain uninvolved in the activities of the Committee in the future, the Committee would continue to be an entity established by Representative Flake.

The FEC's rules provide a mechanism through which an entity may sever its relationship with a federal officeholder that establishes, finances, maintains or controls the entity. However, in order to "disaffiliate," the entity must demonstrate "that all material connections between the [officeholder] and the entity have been severed for two years." 11 CFR 300.2(c)(4)(ii) (emphasis added). According to the request, Representative Flake resigned as Chairman on March 21, 2003. Thus, the Committee has not yet qualified for disaffiliation.

b. Other factors

Even if Representative Flake's involvement in the formation of the Committee is not enough to make the entity *per se* affiliated, the request details the presence of at least four other factors.

² Although Representative Flake later resigned as chairman, he did so only after the FEC raised questions about it. Furthermore, he would like to resume his role as chairman.

Regarding operational control of the Committee, Representative Flake seeks to reassume his position as Chairman. He and his agents seek to be "involved in all aspects of the Committee, including its governance . . . [They] would like to be able to direct and participate in the governance of the Committee, as well as formulating its strategy and tactics for the ballot referendum." Employees of his Congressional office would also participate. Furthermore, as part of his involvement, Representative Flake seeks to participate in decisions regarding the content of the Committee's communications, the specific media outlet used, and the timing, frequency, size, prominence, and duration of its communications. Since the goal of the Committee is to build public support for a ballot referendum, involvement in decisions regarding the organization's communications is tantamount to involvement in the governance of the organization. Indeed, there appears to be very little about Committee governance that Representative Flake and his agents would not be involved in. Thus, the factor described in section 300.2(c)(2)(ii) exists in this situation.

The request also indicates that the Committee plans to hire staff members to promote the referendum. If Representative Flake were to resume his role as chairman, he would undoubtedly be involved in the process of hiring staff for the Committee. This would satisfy section 300.2(c)(iii). This seems particularly likely in light of the Committee's plans to employ both present and former employees of Representative Flake's authorized committee and his Congressional office. The Committee also plans to hire present and former consultants to his campaign, with the result being that the Committee and Representative Flake's authorized committee will have common or overlapping officers or employees. This indicates that section 300.2(c)(2)(v) is satisfied.

The request also indicates that Flake and his agents will provide significant financial support to the Committee, and will also raise funds for the Committee. Thus, section 300.2(c)(viii) is satisfied.

Because the Committee would satisfy five of the ten factors for affiliation with a federal officeholder listed in 11 CFR 300.2(c)(2), the Committee is an entity directly or indirectly established, financed, maintained or controlled by Representative Flake.

2. Federal Election Activities

The request indicates that the Committee plans to engage in federal election activities.

For example, the Committee will conduct get-out-the-vote activity in November of 2004 by telephone, door-to-door and other individualized means. The request indicates these activities will take place within 3 days of the election.

The Committee will also conduct voter registration activities that include identifying supporters of the referendum and assisting them with registering to vote. Although the request does specifically indicate that these activities will be conducted within 120 days of the election, the scope of the Committee's planned activities suggests this is likely. If the Committee conducts these activities within the 120-day period, they are federal election activities.

Finally, the Committee will conduct a broad-based advertising campaign through public broadcast communications and mail, phone and Internet messages. Some of these communications will be "public communications" within the meaning of 11 CFR 100.26.

Although these communications will not contain express advocacy, they will clearly identify Senator John McCain, who will be a candidate in the 2004 Republican primary election. McCain is known to be a supporter of the Arizona Clean Elections statute that the Committee is seeking to repeal. Thus, these communications may attack or oppose him in a manner that falls within 11 CFR 100.24(b)(3).

In light of the foregoing, the Commission should treat the Committee as an entity that engages in federal election activity.

3. Exceptions

BCRA contains an exception that allows federal officeholders to solicit funds for section 501(c) tax-exempt organizations in certain situations. 2 U.S.C. § 441i(e)(4), 11 CFR 300.52 and 300.65. However, these provisions do not allow the Committee to raise nonfederal funds in the circumstances described in the request, for two reasons.

First, the exception only allows individual federal officeholders and their individual agents to solicit funds for section 501(c) organizations that are not entities directly or indirectly established, financed, maintained or controlled by the officeholder. It does not allow a section 501(c) entity that is directly or indirectly established, financed, maintained or controlled by a federal officeholder to raise nonfederal funds. The Committee is such an organization.

Second, even if the Commission were to conclude that the Committee is not such an organization, solicitations by Representative Flake on the Committee's behalf would be subject to the limits in 2 U.S.C. § 441i(e)(4). As explained above, the Committee engages in federal election activity, including some of the activities described in section 300.52(c) and 300.65(c). If these activities are the Committee's primary purpose, Representative Flake's solicitations may be directed only to individuals, and may seek no more than \$20,000 per year. Similarly, regardless of the organization's primary purpose, if Representative Flake's solicitations seek to raise funds for the activities described in sections 300.52(c) and 300.65(c), his solicitations are subject to these same limits.

Finally, the request asks whether Representative Flake may appear or be a featured guest at a fundraising event for the Committee. This question may be an attempt to invoke the exception for state, district and local party fundraising events in 2 U.S.C. § 441i(e)(3) and 11 CFR 300.64. However, this exception is inapplicable, because the Committee is not a party committee.

4. Conclusion

Because the Committee is an entity directly or indirectly established, financed, maintained or controlled by a federal officeholder and plans to engage in federal election activity, it is prohibited from raising nonfederal funds by 2 U.S.C. § 441i(e)(1).

B. The Committee is planning to make prohibited electioneering communications

The request indicates that the Committee's advertising campaign will include broadcast communications that refer to a clearly identified federal candidate. Some of these communications will mention Senator McCain and will be distributed throughout Arizona. Thus, they refer to a clearly identified candidate for Federal office and are targeted to 50,000

people in that candidate's electorate. The request also indicates that these communications will be publicly distributed during the 120 days before the election.

If the Committee disseminates any of these communications within the 30 days before the primary election or the 60 days before the general election, these communications will be electioneering communications subject to 2 U.S.C. § 441b(c). Section 441b(c) prohibits incorporated entities from making electioneering communications. Thus, if the Committee is incorporated, it is prohibited from making these communications.

Furthermore, even if the Committee is not incorporated, section 441b(c)(1) prohibits unincorporated entities from using funds received from corporations and labor organizations to pay for electioneering communications. The request indicates that the Committee intends to raise funds under Arizona law, which permits donations from corporations and labor organizations. Consequently, unless the Committee forms a federal PAC, it is prohibited from making electioneering communications.

C. The Committee is planning to make prohibited coordinated communications

Under 11 CFR 109.21, payments for coordinated communications must be treated as an in-kind contribution to the candidate with whom they are coordinated. The rule contains a set of content standards and a set of conduct standards. Communications that satisfy at least one content standard and at least one conduct standard and are paid for by someone other than the candidate are coordinated communications.

The committee's advertising campaign will include various public communications that refer to Senator John McCain, a candidate in the 2004 election. These communications will be distributed within 120 days of the election, and will be directed to Senator McCain's electorate. Consequently, they will satisfy the content standard in 11 CFR 109.21(c)(4).

The request also indicates that Representative Flake intends to be "involved in all aspects of the Committee, including its governance . . . as well as formulating its strategy and tactics for the ballot referendum." Individuals from his Congressional office would also participate. If Representative Flake is involved in the Committee in this way, any communication paid for by the Committee must be treated as though it is made at his request or suggestion. As such, these communications will satisfy the conduct standard in 11 CFR 109.21(d)(1).

In addition, Representative Flake also intends to be involved in decisions regarding the content of the Committee's communications, the specific media outlet used, and the timing, frequency, size, prominence, and duration of its communications. This will satisfy the conduct standard in 11 CFR 109.21(d)(2).

With regard to other conduct standards, Representative Flake and his agents appear likely to engage in the types of "substantial discussions" described in section 109.21(d)(3). Consequently, if Representative Flake challenges Senator McCain in the 2004 Republican Senatorial primary, his involvement with the committee will satisfy the conduct standard in paragraph (d)(3). Finally, the request indicates that the Committee may use an independent contractor for its advertising campaign, and may also hire present or former members of Flake's office staff. These factors raise the possibility that the conduct standards in sections 109.21(d)(4) and (d)(5) will also be satisfied.

Section 441b prohibits incorporated entities from making contributions to federal candidates. If the Committee is incorporated, it will violate this prohibition by making coordinated communications with Representative Flake. Alternatively, if the committee is not incorporated, its coordinated communications will count towards the \$2000 per election contribution limit in 2 U.S.C. § 441a. In addition, these communications will also count towards the threshold for political committee status in 2 U.S.C. § 431(4). Section 431(4) requires entities that make more than \$1000 in contributions to a federal candidate to register and report as a political committee.

Conclusion

The request seeks guidance on how the committee may conduct its activities so that they comply with the requirements of FECA and BCRA. The Committee would resolve most, if not all, its compliance issues by soliciting, receiving and spending only federal funds. We urge the Commission to issue an opinion that requires the Committee to limit itself to federal funds if it plans to engage in the activities described in the request.

Thank you for the opportunity to comment.

Respectfully submitted,



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