

July 9, 2003

NOTICE AO DRAFT COMMENT PROCEDURES

The Commission has approved a revision in its advisory opinion procedures that permits the submission of written public comments on draft advisory opinions when proposed by the Office of General Counsel and scheduled for a future Commission agenda.

Today, DRAFT ADVISORY OPINION 2003-12 is available for public comments under this procedure. It was requested by Benjamin L. Ginsberg, counsel on behalf of Stop Taxpayer Money for Politicians ("STMP") and Representative Jeff Flake. The draft may be obtained from the Public Disclosure Division of the Commission.

Proposed Advisory Opinion 2003-12 will be on the Commission's agenda for its public meeting of Thursday July 10, 2003.

Please note the following requirements for submitting comments:

1) Comments must be submitted in writing to the Commission Secretary with a duplicate copy to the Office of General Counsel. Comments in legible and complete form may be submitted by fax machine to the Secretary at (202) 208-3333 and to OGC at (202) 219-3923.

2) The deadline for the submission of comments is at the close of business on July 9, 2003.

3) No comments will be accepted or considered if received after the deadline. Late comments will be rejected and returned to the commenter. Requests to extend the comment period are discouraged and unwelcome. An extension request will be considered only if received before the comment deadline and then only on a case by case basis in special circumstances.

4) All comments timely received will be distributed to the Commission and the Office of General Counsel. They will also be made available to the public at the Commission's Public Disclosure Division.

CONTACTS

Press inquiries: Ron Harris (202) 694-1220

Acting Commission Secretary: Mary Dove (202) 694-1040

Other inquiries:

To obtain copy of draft AO 2003-12 contact Public Records Office-
Public Disclosure Division (202) 694-1120, or 800-424-9530.

For questions about comment submission procedure contact
Rosemary C. Smith, Acting Associate General Counsel, (202) 694-1650.

ADDRESSES

Submit single copy of written comments to:

Commission Secretary
Federal Election Commission
999 E Street NW
Washington, DC 20463

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FEDERAL ELECTION COMMISSION
Washington, DC 20463

2003 JUL -9 A 10:05

July 9, 2003

MEMORANDUM

TO: The Commission

THROUGH: James A. Pehrkon
Staff Director

FROM: Lawrence H. Norton
General Counsel

Rosemary C. Smith
Acting Associate General Counsel

John C. Vergelli
Acting Assistant General Counsel

Albert J. Kiss
Attorney

SUBJECT: Draft AO 2003-12 -- Alternate Drafts

AGENDA ITEM
For Meeting of: 7-10-03

SUBMITTED LATE

Attached are two proposed drafts of the subject advisory opinion. The Office of General Counsel (OGC) requests that both drafts be placed on the agenda for July 10, 2003.

These drafts address the implications of interactions between Representative Jeff Flake and the Stop Taxpayer Money for Politicians Committee ("STMP"), an Arizona ballot referendum committee.

Draft A concludes that Representative Flake established STMP and that 2 U.S.C. 441i(e) applies to Representative Flake and STMP because this ballot measure committee's activities are in connection with an election within the meaning of that section. Draft A also concludes that his principal campaign committee is affiliated with STMP, and that this means, among other things, that coordination will not result from Representative Flake's interactions with STMP.

Draft B concludes that Representative Flake established STMP, but that this ballot measure committee's activities are not within the scope of section 441i(e)(1), except for Federal election activities and certain communications referring to state candidates. Draft B also concludes that his principal campaign committee is not affiliated with STMP. Draft B advises that there are insufficient facts to draw definitive conclusions about coordination. Both drafts also address a wide range of related questions posed by the requestor.

OGC respectfully recommends that the Commission adopt Draft A.

1 ADVISORY OPINION 2003-12

2
3 Benjamin L. Ginsberg, Esq.
4 Patton Boggs L.L.P.
5 2550 M Street, N.W.
6 Washington, D.C. 20037-1350

DRAFT

7
8 Dear Mr. Ginsberg:

9 This responds to your letters dated March 3, March 24, and April 7, 2003,
10 requesting an advisory opinion on behalf of the Stop Taxpayer Money for Politicians
11 Committee ("STMP") and United States Representative Jeff Flake concerning the
12 application of the Federal Election Campaign Act of 1971 ("the Act"), and Commission
13 regulations, to a ballot measure campaign that STMP and Representative Flake plan to
14 undertake for the November 2, 2004, election in Arizona.

15 ***Background***

16 Representative Flake is a candidate for re-election to the House of Representatives
17 in 2004. Jeff Flake for Congress ("the PCC" or "his PCC") is his principal campaign
18 committee.

19 STMP is an unincorporated, section 527 political organization that wishes to
20 qualify a state referendum to repeal portions of Arizona's campaign finance statute. STMP
21 is not a Federal political committee. You state that STMP and Representative Flake plan
22 to qualify the ballot measure for the November 2, 2004, election and campaign for its
23 passage, if it qualifies.

24 STMP was established on January 17, 2003. Representative Flake signed the
25 documents filed with the Arizona Secretary of State that formed STMP, and he was
26 STMP's first Chairman. You state that an individual who served as Representative Flake's

1 part-time campaign consultant aided STMP with its State filings and with establishing its
2 bank account.

3 On March 21, 2003, Representative Flake resigned from STMP, and he has not
4 held any other office in STMP since then. All funds raised while Representative Flake was
5 associated with STMP have been returned.

6 You represent that Representative Flake wishes to resume his role as Chairman of
7 STMP, and that he and/or agents of his authorized committee wish to provide significant
8 support to STMP. You state that Representative Flake plans to assist STMP to the extent
9 permitted under the law as interpreted by the Commission, and that Representative Flake,
10 and his agents and employees of his authorized campaign committee, have been asked to
11 be involved in all aspects of STMP, including its governance. STMP also wishes to
12 employ both current and former employees of Representative Flake's PCC and
13 congressional office, and STMP contemplates hiring individuals who are, or have been,
14 consultants to Mr. Flake's PCC, some in this election cycle and some in previous election
15 cycles. You expect that such individuals would engage in a variety of STMP's activities,
16 and that, if permitted, such individuals would also perform similar activities for
17 Representative Flake's PCC, with each committee paying a proportionate share of the
18 individual's costs. Representative Flake and his agents would like to be able to direct and
19 participate in the governance of STMP, as well as to formulate its strategy and tactics for
20 the ballot referendum.

21 You tell us that neither Representative Flake's PCC, nor any employee or agent of
22 that committee, has provided financial support for STMP.

1 **You state that STMP wishes Representative Flake and his agents to bring their**
2 **expertise to bear on all STMP's planned public communications. STMP would like**
3 **Representative Flake to play a role in selecting the media firm used for STMP's public**
4 **communications, and STMP wishes to receive his and his agents' ideas for specific scripts**
5 **and copy.**

6 **In the signature gathering and ballot qualification stage, STMP will hire full-time**
7 **employees and part-time consultants; their duties will be fundraising or political**
8 **organizing. STMP plans to hire consultants to draft the ballot measure. The political**
9 **organizing will involve hiring staff and recruiting volunteers, who will gather signatures**
10 **through June 2004 and maintain a web site. These personnel will also be responsible for**
11 **satisfying the administrative requirements of qualifying the ballot measure. You state that**
12 **STMP plans to raise funds permitted by State law to qualify for the State ballot, and that**
13 **this will include raising funds outside of the Act's amount limitations and source**
14 **prohibitions. You state that, in the signature gathering and ballot qualification phase**
15 **through June 2004, STMP will not engage in any Federal election activity ("FEA") as**
16 **defined in 11 CFR 100.24, nor make any electioneering communications as defined in 11**
17 **CFR 100.29. You state that STMP anticipates engaging in voter registration and voter**
18 **identification programs from the beginning of its activities.**

19 **In the campaign stage, once the ballot measure has qualified, STMP plans to**
20 **engage in activities designed to win passage for the measure. First, STMP will conduct**
21 **voter registration programs designed to identify voters who agree with the initiative and to**
22 **register them to vote if they are not already registered. This will include contacting voters**

1 by telephone, in-person, by mail, or over the Internet to assist them in registering to vote
2 for the November 2004 general election. Second, STMP will engage in a broad-based
3 advertising campaign regarding the State campaign finance statute through public
4 broadcast communications, and mail, phone and Internet messages. Third, STMP will
5 engage in get-out-the-vote programs ("GOTV") designed to get the measure's supporters
6 to the polls in November 2004 by means of telephone, in person door-to-door activity, and
7 other individualized means. This will include providing voters in the three days before the
8 election with information about when and where polling places are open and offering
9 transportation to the polls. You state that STMP anticipates engaging in GOTV activities
10 beginning about 30 days before the November 2004 election and continuing through
11 election day. Fourth, STMP will engage in an "aggressive" program to raise the funds
12 permitted by Arizona law to fund these activities, including funds not permitted by the Act.

13 STMP intends to clearly identify a Federal officeholder or candidate in its broad-
14 based advertising campaign promoting the Arizona ballot measure, and you state that such
15 messages will likely meet the definition of "public communication" in 11 CFR 100.26.
16 You state that the statute that STMP wishes to repeal is closely identified with Senator
17 McCain among Arizona residents and that Representative Flake is one of the statute's most
18 visible and vocal critics. None of the communications will refer to anyone "in his or her
19 role as a Federal candidate" or advocate the election or defeat of a Federal candidate. You
20 expect that these communications will be distributed from the beginning of STMP's
21 activities, which will be more than 120 days before the election, through November 2,
22 2004. You state that any communications by STMP will be directed to all voters in

1 Arizona, including those in Representative Flake's district, but that there will not be
2 special messages directed to voters in Representative Flake's district. STMP anticipates
3 that any broadcast communications will be receivable by more than 50,000 people in the
4 state as a whole and in Representative Flake's district in particular.

5 ***Legal Analysis and Conclusions***

6 A written advisory opinion request must "set forth a *specific* transaction or activity
7 that the requesting person plans to undertake or is presently undertaking and intends to
8 undertake in the future. *Requests presenting a general question of interpretation, or*
9 *posing a hypothetical situation . . . do not qualify as advisory opinion requests."* 11 CFR
10 112.1(b) (emphasis added).

11 The Commission concludes that several of your questions are "general question[s]
12 of interpretation," within the meaning of 11 CFR 112.1(b), rather than questions regarding
13 "a specific transaction or activity" as required by 2 U.S.C. 437f(a). Other questions,
14 however, do relate to specific activities that STMP and Representative Flake intend to
15 undertake, and are therefore appropriately addressed in an advisory opinion. Many of your
16 questions are posed in the alternative, asking for answers assuming that STMP is organized
17 as a section 501(c)(4) organization and as a section 527 organization.¹ The answers to
18 these questions turn on the following threshold issues: 1.a. Are STMP's activities in
19 connection with an election, within the meaning of 2 U.S.C. 441i(e)(1)(A) and (B)? 1.b.
20 Did Representative Flake directly or indirectly establish, finance, maintain, or control
21 STMP? 2. Is STMP affiliated with Representative Flake's PCC?

¹ 26 U.S.C. 501(c)(4) and 26 U.S.C. 527. Except as noted in the answer to question 9, the answers to the questions below do not depend on STMP's form of organization under the Internal Revenue Code.

1 *1.a. Are STMP's Activities in Connection with an Election, Within the Meaning of 2 U.S.C.*
2 *4411(e)(1)(A) and (B)?*

3 On November 6, 2002, the Bipartisan Campaign Reform Act of 2002 (Pub. L. 107-
4 155 (Mar. 27, 2002)) ("BCRA") took effect. As amended by BCRA, the Act regulates
5 certain actions of Federal candidates and officeholders², their agents,³ and entities directly
6 or indirectly established, financed, maintained, or controlled by them (collectively,
7 "covered persons")⁴ when they raise or spend funds in connection with either Federal or
8 non-Federal elections. 2 U.S.C. 4411(e)(1). Both BCRA and the Commission's rules
9 implementing BCRA prohibit covered persons from soliciting, receiving, directing,
10 transferring, or spending: (A) funds in connection with an election for Federal office,
11 including funds for any Federal election activity⁵, unless the funds are subject to the
12 limitations, prohibitions, and reporting requirements of the Act, and (B) funds in
13 connection with any election other than an election for Federal office unless the funds are
14 not in excess of the amounts permitted with respect to contributions to candidates and

² Under 2 U.S.C. 431(3), "Federal office" means "the office of President or Vice President, or of Senator or Representative in, or Delegate or Resident Commissioner to, the Congress." See also 11 CFR 100.4.

³ 11 CFR 300.2(b)(3).

⁴ 11 CFR 300.60.

⁵ Federal election activity ("FEA") means any of the following activities: (1) voter registration activity during the 120 days before a regularly scheduled Federal election and ending on the day of the election; (2) voter identification activity, GOTV activity, and generic campaign activity that is conducted in connection with an election in which one or more candidates for Federal office appear on the ballot; (3) a public communication that refers to a clearly identified Federal candidate and that promotes, supports, attacks or opposes a candidate for that office; and (4) services provided during any month by an employee of a state, district or local party committee who spends more than 25 percent of the employee's compensated time during that month on activities in connection with a Federal election. "In connection with an election in which a candidate for Federal office appears on the ballot" means, in even numbered years, the period beginning on the day of the earliest filing deadline for primary election ballot access under State law (or on January 1st in states that do not hold primaries), and ending on the day of the general election (or the general election runoff if a runoff is held), and in odd numbered years, the period beginning on the day that a date is set for a special election in which a Federal candidate appears on the ballot, and ending on the date of the election. 11 CFR 100.24(a)(1).

1 political committees under 2 U.S.C. 441a(a)(1), (2), and (3), and are not from sources
2 prohibited by this Act from making contributions in connection with an election for
3 Federal office. 2 U.S.C. 441i(e)(1)(A) and (B); 11 CFR 300.61 and 300.62.⁶

4 Given that STMP's activities, other than its Federal election activities, are not "in
5 connection with an election for Federal office," the issue is whether these activities are "in
6 connection with *any election other than* an election for Federal office." 2 U.S.C.
7 441i(e)(1)(A), (B) (emphasis added). Neither the Act nor Commission regulations define
8 this precise term as used in subparagraph (B).

9 The Act's general definition of "election,"⁷ which includes a "general, special,
10 primary, or runoff election," does not resolve the question. Nor should the interpretation
11 of the scope of section 441i(e)(1)(B) depend on one word in isolation.⁸

12 As used in subparagraph (B) of section 441i(e)(1), the term, "in connection with
13 *any election other than* an election for Federal office" is, on its face, clearly intended to
14 apply to a different category of elections than those covered by subparagraph (A), which
15 refers to "an election for Federal office." Thus, 11 CFR 100.2(a), which defines "election
16 ... to Federal office," does not explain the meaning of subparagraph (B), which, by its own
17 terms, applies to elections *other than* elections to Federal office.

⁶ Under the Act, the following persons may not contribute in connection with a Federal election: National banks, corporations, and labor organizations (2 U.S.C. 441b); Federal government contractors (2 U.S.C. 441c); foreign nationals (2 U.S.C. 441e); and minors, although a minor may contribute to a Federal separate segregated fund or nonconnected committee (2 U.S.C. 441k). It is unlawful for the following persons to contribute or donate in connection with *any* election: National banks and corporations organized by authority of Congress (2 U.S.C. 441b); Federal government contractors (2 U.S.C. 441c); and foreign nationals (2 U.S.C. 441e).

⁷ 2 U.S.C. 431(1)(A).

⁸ *Davis v. Mich. Dep't of Treas.*, 489 U.S. 803, 809, 109 S.Ct. 1500, 1504, 103 L.Ed.2d 891 (1989) ("It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.")

1 This phrasing, "in connection with any election other than an election for Federal
2 office" also differs significantly from the wording of other provisions of the Act that reach
3 beyond Federal elections. Particularly relevant is the prohibition on contributions or
4 expenditures by national banks and corporations organized by authority of Congress,
5 which applies "in connection with any election to *any political office*." 2 U.S.C. 441b(a).⁹
6 Where Congress uses different terms, it must be presumed that it means different things.¹⁰
7 Congress expressly chose to limit the reach of section 441b(a) to those non-Federal
8 elections for a "political office," while intending a broader sweep for section 441i(e)(1)(B),
9 which applies to "any election" (with only the exclusion of elections to Federal office).
10 Therefore, the Commission concludes that the scope of section 441i(e)(1)(B) is not limited
11 to elections for a political office.

12 With this in mind, and given that Arizona law provides that a ballot referendum or
13 initiative election is included in the State's definition of "election" (A.R.S. § 16-901(7)),
14 the Commission concludes that the activities of STMP as described in your request, other
15 than its Federal election activities, are in connection with an election other than an election
16 for Federal office, and thus within the scope of 2 U.S.C. 441i(e)(1)(B).

17 The Commission's previous advisory opinions, stating or otherwise indicating that
18 "contributions or expenditures" relating exclusively to ballot referenda measures are not in
19 connection with an election, are not to the contrary. Advisory Opinions 1989-32, 1984-62,
20 n.2, 1982-10, 1980-95. BCRA and the implementing regulations not only regulate certain

⁹ Before BCRA, the prohibition on contributions by foreign national similarly applied "in connection with an election to any political office. As amended by BCRA, this prohibition now applies "in connection with a Federal, State, or local election." 2 U.S.C. 441e(a)(1)(A).

¹⁰ There is a presumption in statutory construction that the use of different language indicated a legislative invention to mean different things. See, e.g., *E.E.O.C. v. Gilbarco, Inc.*, 615 F.2d 985, 999 (4th Cir. 1980).

1 activity by Federal candidates and officeholders more broadly than before, they also
2 explicitly reach fundraising and spending by entities established, financed, maintained, or
3 controlled by such candidates or officeholders. In this respect, the Act, as amended by
4 BCRA, is now materially different than it was when those advisory opinions were issued.
5 Thus, those previous advisory opinions are not applicable to your request to the extent that
6 they would suggest that donations to, or disbursements on behalf of, an entity that was
7 established for the purpose of campaigning for a ballot measure, and not for any Federal
8 candidacy, would presumptively not be subject to the provisions of the Act and
9 Commission regulations.¹¹

10 *1.b. Did Representative Flake Directly or Indirectly Establish, Finance, Maintain, or*
11 *Control STMP?*

12 The affiliation factors (11 CFR 100.5(g) and 110.3) are used to determine whether
13 a person or entity ("sponsor") "directly or indirectly established, financed, maintained or
14 controlled" another person or entity under BCRA. "Prohibited and Excessive
15 Contributions: Non-Federal Funds or Soft Money; Final Rules," 67 *Fed. Reg.* 49,064,
16 49,084 (July 29, 2002). The ten factors set out at 11 CFR 300.2(c)(2)(i) through (x) must
17 be examined in the context of the overall relationship between the sponsor and the entity to
18 determine whether the presence of any factor or factors is evidence that the sponsor
19 directly or indirectly established, financed, maintained, or controlled the entity. 11 CFR
20 300.2(c).

¹¹ In contrast, in Advisory Opinion 1989-32, the Commission determined that foreign national donations to a ballot measure committee controlled by a State candidate are prohibited under the Act. 2 U.S.C. 441e.

1 Representative Flake is among the individuals who formed STMP, and he signed
2 the documents with the Arizona Secretary of State's office creating STMP. He was
3 STMP's Chairman from its establishment on January 17, 2003, to March 21, 2003, when
4 he resigned. You state that an individual who also served as Representative Flake's part-
5 time campaign consultant aided the referendum Committee with its State filings and
6 opened its bank account. Representative Flake had an active and significant role in the
7 formation of STMP. 11 CFR 300.2(c)(2)(ix). Thus, the Commission concludes that
8 Representative Flake established STMP.

9 Looking beyond the establishment of STMP, Representative Flake was the
10 Chairman of STMP during its early operations, and he had the authority and ability to
11 direct and participate in the governance of STMP. He also had the authority and ability to
12 hire, appoint, demote, or otherwise control the decision-making employees of STMP
13 (including presumably the Treasurer). 11 CFR 300.2(c)(2)(ii), (iii). Therefore, he also
14 controlled STMP.

15 You indicate that Representative Flake plans to assist STMP to the extent permitted
16 under the law, and that he, his agents, and employees of his PCC have been asked to be
17 involved in all aspects of STMP, including its governance, if permitted by the
18 Commission. 11 CFR 300.2(c)(2)(ii), (iii), and (vi). In the future, Representative Flake,
19 his agents, and the employees of his PCC would like to be able to direct and participate in
20 the governance of STMP, and to formulate its strategy and tactics for the ballot
21 referendum. 11 CFR 300.2(c)(2)(ii), (iii) and (vi). Representative Flake would like to
22 resume his role as Chairman if permitted to do so by the Commission. 11 CFR

1 300.2(c)(2)(ii), (iii). If permitted by the Commission, STMP wishes to employ both
2 present and former employees of Representative Flake's PCC and congressional office. 11
3 CFR 300.2(c)(2)(v), (vi). If permitted, STMP wishes Representative Flake and his agents
4 to bring their expertise to bear on all STMP's public communications. 11 CFR
5 300.2(c)(2)(v), (vi).

6 In light of these facts, the Commission concludes that Representative Flake will be
7 financing, maintaining and controlling STMP pursuant to 11 CFR 300.2(c).¹²

8 The answer to this question 1 should not be read to imply that all ballot measure
9 committees are subject to the provisions of the Act, as amended by BCRA. Many of the
10 conclusions reached in this advisory opinion would be different if STMP's activity were
11 limited to financing only ballot measure activities and if it were not established, financed,
12 maintained or controlled by a Federal officeholder or candidate.

13 *2. Is STMP Affiliated with Representative Flake's PCC?*

14 Affiliated committees include those committees established, financed, maintained
15 or controlled by the same person. 11 CFR 110.3(a)(1)(ii), 110.3(a)(2)(v). Where two
16 committees are controlled "by the same person for campaign-related purposes," the
17 Commission has concluded in several advisory opinions that those committees are
18 affiliated. See Advisory Opinions 1991-12, 1990-16, 1987-12, 1984-46, and 1984-3. A

¹² Note that the safe harbor provided for in 11 CFR 300.2(c)(3) does not apply to STMP. This safe harbor provides that, on or after November 6, 2002, an entity (the sponsor) shall not be deemed to have directly or indirectly established, maintained, or controlled by another entity unless, based on the sponsor's actions and activities solely after November 6, 2002, they satisfy the requirements of section 300.2(c). Since STMP was formed after November 6, 2002, and all relevant events took place after November 6, 2002, this safe harbor does not apply. Note also that because of the short period of time that has elapsed since Representative Flake severed his connections with STMP, a determination that Representative Flake is no longer deemed to finance, maintain, or control the entity, pursuant to the mechanism provided in 11 CFR 300.2(c)(4), even if it were requested (which it was not) could not be made under these facts.

1 political committee may be affiliated with a political organization that is not a political
2 committee under the Act. 11 CFR 110.3(a)(1).

3 11 CFR 110.3(a)(3)(ii) provides that the Commission will examine a number of
4 factors in the context of the overall relationships between a person that sponsors
5 committees and the committees themselves, to determine whether the committees are
6 commonly established, financed, maintained, or controlled, and therefore are affiliated.

7 A Federal candidate establishes, maintains, and controls his or her own authorized
8 committees.¹³ Representative Flake established the PCC as his principal campaign
9 committee for re-election. As explained above, Representative Flake had a significant role
10 in the formation of STMP. 11 CFR 110.3(a)(3)(ii)(I).

11 From the formation of STMP on January 17, 2003 until his resignation on March
12 21, 2003, Representative Flake was the Chairman of STMP, and he had broad authority
13 and ability to direct or participate in the governance of STMP. Representative Flake, and
14 those who are his agents and employees of his PCC, have been asked to be involved with
15 all aspects of STMP, including its governance, and Representative Flake would like to
16 resume his role as Chairman of STMP. Representative Flake and/or agents of his
17 authorized committee wish to provide significant support to STMP. Representative Flake
18 and/or his agents have had and apparently will have the ability and authority to direct or
19 participate in the governance of STMP. 11 CFR 110.3(a)(3)(ii)(B).

20 Until his resignation, Representative Flake had the authority to hire, appoint,
21 demote or otherwise control the decisionmaking employees of STMP. Representative
22 Flake, and those who are his agents and employees of his PCC, have been asked to be

¹³ See, e.g., Advisory Opinion 1991-12.

1 involved with all aspects of STMP, including its governance, and Representative Flake
2 seeks to resumes his role as Chairman of STMP. If these actions are taken, then
3 Representative Flake and his agents will again have the authority or ability to hire, appoint,
4 demote or otherwise control the decisionmaking employees of both his PCC and STMP.
5 11 CFR 110.3(a)(3)(ii)(C).

6 Representative Flake and his agents (including officers and employees of his PCC)
7 would like to be able to direct and participate in the governance of STMP. STMP wishes
8 to employ both current and former employees of Representative Flake's PCC, and STMP
9 also contemplates hiring individuals who are, or have been, consultants to his PCC, some
10 in this election cycle and some in previous election cycles. An individual who served as
11 Representative Flake's part-time campaign consultant aided STMP with its Arizona filings
12 and with establishing its bank account. Further, STMP wishes Representative Flake and
13 his agents (possibly including officers and employees of his PCC) to bring their expertise
14 to bear on STMP's public communications. These facts provide evidence that either a
15 formal or ongoing relationship exists (or did exist, and very likely will soon exist again)
16 between his PCC and STMP. 11 CFR 110.3(a)(3)(ii)(E).

17 Although Representative Flake raised funds for STMP, you state that all such funds
18 have been returned to the contributors. Representative Flake plans to actively participate
19 in the fundraising program for STMP in the future. Representative Flake has caused or
20 will have caused or arranged for funds in a significant amount or on an ongoing basis to be
21 provided to both his PCC and STMP. 11 CFR 110.3(a)(3)(ii)(H).

1 Based on the overall relationship among Representative Flake (who sponsors both
2 STMP and the PCC) and STMP and the PCC, STMP is affiliated with the PCC. 2 U.S.C.
3 441a(a)(5); 11 CFR 100.5(g) and 110.3(a).

4 For purposes of the Act's contribution limitations, all contributions made or
5 received by more than one affiliated committee, regardless of whether they are Federal
6 political committees, shall be considered to be made or received by a single political
7 committee. 2 U.S.C. 441a(a)(5); 11 CFR 110.3(a). Affiliated committees under 11 CFR
8 110.3, such as STMP and the PCC, are considered to be one political committee for
9 purposes of the Act's contribution limits, and generally may make unlimited transfers of
10 funds to each other. 11 CFR 110.3(a)(1) and 102.6(a)(1). A committee must report
11 transfers of funds or assets received from an affiliated committee. 2 U.S.C. 434(b)(2)(F).

12 Your advisory opinion request presents the following specific questions:

13 *3. May Representative Flake serve as Chair, Officer, or Director of STMP? If so, will this*
14 *result in "coordination" between STMP and his PCC? Does STMP's form of organization*
15 *as a section 527 political organization, or as a section 501(c)(4) organization affect the*
16 *answer to this question?*

17 Yes, Representative Flake may serve as Chair, Officer, or Director of STMP,
18 subject to the restrictions explained in the answer to question 9 below, with regard to
19 fundraising.

20 Your advisory opinion request presents numerous facts and questions that raise
21 issues as to "coordination" between STMP and Representative Flake. See 11 CFR Part

1 109, Subpart C. Under 11 CFR 109.20(a), "coordinated" means, "made in cooperation,
2 consultation, or concert with, or at the request or suggestion of, a candidate, a candidate's
3 authorized committee, or their agents"¹⁴

4 The regulations in 11 CFR 109.21 address coordination in the context of
5 communications. Section 109.21 sets forth a three-pronged test. All three elements must
6 be satisfied to conclude that payments for a coordinated communication are made for the
7 purpose of influencing a Federal election, and therefore constitute in-kind contributions.
8 First, the communication must be paid for by someone other than a candidate, an
9 authorized committee, a political party committee, or an agent of any of the foregoing. 11
10 CFR 109.21(a)(1). The second prong is a "content standard" regarding the subject matter
11 of the communication. 11 CFR 109.21(a)(2). The third prong is a "conduct standard"
12 regarding the interactions between the person paying for the communication and the
13 candidate or the candidate's agents. 11 CFR 109.21(a)(3). These conduct standards
14 include "requests or suggestions" for communications by candidates and "material
15 involvement" in the making and airing of communications. 11 CFR 109.21(d)(1), (2).

16 One or more of the public communications planned by STMP (see questions 16 and
17 17, below), appear likely to satisfy at least one of the content standards. *See, e.g.*, 11 CFR
18 109.21(c)(4). It also appears likely that the conduct standard will be satisfied.

19 Representative Flake wishes to serve as STMP's chair, to be involved in all aspects of
20 STMP's governance, and to bring his expertise to bear on all of STMP's public

¹⁴ An expenditure is considered to be a contribution to a candidate when it is "made by any person in cooperation, consultation, or concert, with, or at the request or suggestion of," that candidate, the authorized committee of that candidate, or their agents. 2 U.S.C. 441a(a)(7)(B)(i). Also, an expenditure is not "independent" if it is "made in cooperation, consultation, or concert, with, or at the request or suggestion of," a candidate, authorized committee, or a political party committee. *See* 11 CFR 100.16.

1 communications. Given the active role Representative Flake intends to serve, it appears
2 likely that he will be "materially involved" in STMP's communications and may well
3 "request or suggest" them. See 11 CFR 109.21(d)(1), (2).

4 Even if a public communication paid for by STMP satisfies the content and conduct
5 standards of the coordination test, the communication will not be considered "coordinated"
6 because STMP is affiliated with Representative Flake's PCC, and thus the "payment test"
7 would not be satisfied. To satisfy the "payment test", a public communication must be
8 "paid for by a person other than that candidate, authorized committee, ... or agent" 11
9 CFR 109.21(a)(1). For coordination purposes, a political organization affiliated with a
10 candidate's principal campaign committee stands in the same relation to that candidate as
11 stands an authorized committee of the candidate because the affiliated committee shares a
12 common contribution limit with the principal campaign committee, just as all the
13 candidate's authorized committees share a contribution limit.¹⁵ Where an entity shares a
14 contribution limit with an authorized committee of a Federal candidate because they are
15 affiliated, it does not further the purposes of the coordination statute to treat public
16 communications paid for by the affiliated entity separately from public communications
17 paid for by the authorized committee. Thus, a communication paid for by STMP, which is
18 affiliated with Representative Flake's PCC, would fail the "payment test" prong of the
19 coordination analysis because the candidate, the authorized committee, and its affiliated
20 committee are grouped together for purposes of the "payment test." Under section

¹⁵ Affiliation with a candidate's PCC does not necessarily make a political organization an "authorized committee" of the candidate, nor does it necessarily make the organization a political committee under the Act. By virtue of affiliation with a candidate's PCC, a political organization stands in the same relation to the candidate as stands one of the candidate's authorized committees for the purposes of applying the "payment test" in 11 CFR 109.21(a)(1).

1 109.21(a), the communication must be paid for by a person "other than" that candidate or
2 those committees grouped with that candidate.

3 The Commission emphasizes that this does not mean that a candidate may raise or
4 spend funds that do not comply with the restrictions of 2 U.S.C. 441i(e)(1) by affiliating
5 himself or herself with a pre-existing political organization that had already raised funds
6 that do not comply with section 441i(e)(1)(B). A Federal candidate or officeholder, or an
7 entity directly or indirectly established, financed, maintained, or controlled by a Federal
8 candidate or officeholder, must not become affiliated with an entity that has raised funds
9 that do not comply with the requirements of 2 U.S.C. 441i(e)(1). To do so would place the
10 covered person in violation of 2 U.S.C. 441i(e)(1) upon any attempt to spend or disburse
11 the funds that do not comply with that section.

12 For the same reason as with communications, coordination of other activities
13 subject to 11 CFR 109.20(a) will generally not occur where the entity making a
14 disbursement is affiliated with the candidate's principal campaign committee or other
15 authorized committee. Again, this conclusion should not be construed to allow the
16 candidate to receive, direct, transfer or spend funds that do not comply with the
17 requirements of section 441i(e)(1) and 11 CFR 300.61 or 300.62.

18 Therefore, under these facts, especially the fact that STMP and Representative
19 Flake's PCC are affiliated, Representative Flake may serve as STMP's Chairman and may
20 interact fully with STMP without that interaction resulting in "coordination," within the
21 meaning of 11 CFR Part 109, Subpart C. This interaction must be limited, however, to
22 soliciting, receiving, directing, transferring and spending funds that comply with the

1 requirements of section 441i(e)(1)(A) and (B). See the answer to question 9, below, with
2 regard to fundraising.

3 *4. May Representative Flake serve as Honorary Chair of STMP if he has no legal*
4 *responsibilities? Does STMP's form of organization as a section 527 political*
5 *organization, or as a section 501(c)(4) organization affect the answer to this question?*

6 Given the Commission's response to question 3 that Representative Flake can serve
7 as the actual Chair, he may also serve as the honorary Chair of STMP.

8 *5. May agents and employees of Representative Flake's authorized committee be involved*
9 *in all aspects of STMP, including directing and participating in its governance, and*
10 *formulating strategy and tactics for the ballot referendum?*

11 Yes, subject to the restrictions explained in the answer to question 9, below, with
12 regard to fundraising.

13 The issue of coordination is addressed above in the context of the actions of
14 Representative Flake himself in the answer to question 3, where the Commission advises
15 that "coordination," within the meaning of 11 CFR Part 109, Subpart C, will not result
16 from Representative Flake's conduct with regard to STMP communications. For the same
17 reasons, the Commission advises that "coordination" will not result from the conduct of
18 Representative Flake's agents and the employees of his authorized committee with regard
19 to STMP communications, even if the content and conduct standards (11 CFR 109.21(c),
20 (d), respectively) are satisfied. As explained in the answer to question 3, this conclusion
21 also applies to STMP activities other than those related to communications. Again, this
22 conclusion should not be construed to allow the candidate to solicit, receive, direct, transfer

1 or spend funds that do not comply with the requirements of 2 U.S.C. 441i(e)(1) and 11
2 CFR 300.61 or 300.62.

3 *6. May STMP employ both current and former employees of Representative Flake's PCC
4 and congressional office?*

5 Yes, the ramifications of doing so are discussed in questions 3 and 5, above.

6 *7. May STMP hire individuals who are, or have been, consultants to Representative
7 Flake's authorized committee, some in this election cycle and some in previous election
8 cycles?*

9 Yes, the ramifications of doing so are discussed in questions 3 and 5, above.

10 *8. During the signature gathering and ballot qualification phase, may Representative
11 Flake publicly urge Arizona voters to sign the petition?*

12 Yes, merely encouraging voters to sign a petition does not trigger the applicability
13 of 2 U.S.C. 441i(e). However, Representative Flake's communications must not extend
14 beyond this to become solicitations that do not comply with section 441i(e).

15 *9. May Representative Flake raise money for STMP generally? May he raise money for
16 STMP specifically for the purpose of signature gathering and ballot qualification
17 activities? Does STMP's form of organization as a section 527 political organization, or
18 as a section 501(c)(4) organization affect the answer to this question? Specifically, may he
19 do so:*

20 (a) *By attending fundraising events for STMP?*

21 (b) *By appearing as a featured guest at a STMP fundraiser?*

22 (c) *By speaking at STMP fundraising events?*

1 (d) *By making telephone calls to raise money for STMP?*

2 (e) *By signing fundraising letters for STMP?*

3 (f) *By hosting fundraising events for STMP?*

4 You have indicated that STMP will be registering voters as part of its signature-
5 gathering and ballot qualification activities. Accordingly, the answer to this question must
6 take into account the likelihood that some of this voter registration activity will constitute
7 FEA, which must be paid for with Federal funds, while some of this voter registration
8 activity will not constitute FEA and may be paid for with funds that comply with the
9 amount limitations and source prohibitions of the Act (i.e., that comply with the
10 requirements of 2 U.S.C. 441i(e)(1)(B)).

11 Representative Flake may raise funds for STMP, but he must comply with the
12 Act's restrictions on fundraising by Federal candidates and officeholders.¹⁶ 2 U.S.C.
13 441i(e); 11 CFR Part 300, Subpart D. Because STMP is established by Representative
14 Flake, it, too, is subject to these restrictions. Representative Flake and STMP "must not
15 solicit, receive, direct, transfer, or spend funds in connection with an election for Federal
16 office, including funds for any Federal election activity," unless the funds are subject to the
17 limitations, prohibitions, and reporting requirements of the Act. 2 U.S.C. 441i(e)(1)(A);
18 11 CFR 300.61.

19 Also applicable is section 441i(e)(1)(B), which applies to soliciting funds "in
20 connection with any election other than an election for Federal office." As noted

¹⁶ AO 2003-3 addressed a Federal officeholder's request to raise funds for State candidates in Virginia. The conclusions in AO 2003-3 are not applicable in this advisory opinion because none of the requestors in AO 2003-3 were established, financed, maintained or controlled by a Federal candidate or officeholder, as STMP is here.

1 previously, the Arizona ballot referendum is an "election" under Arizona law.¹⁷ A.R.S.
2 §16-901(7). Therefore, the solicitation restrictions of the Act regarding non-Federal
3 elections are applicable to solicitations by Representative Flake and STMP.¹⁸ Under
4 section 441i(e)(4)(B), a person subject to 2 U.S.C. 441i(e) must not solicit, receive, direct,
5 transfer, spend, or disburse funds in excess of the amounts permitted with respect to
6 contributions to candidates and political committees¹⁹ or from prohibited sources under the
7 Act. 2 U.S.C. 441i(e)(1)(B); 11 CFR 300.60(d); 11 CFR 300.62.

8 Specifically, Representative Flake may attend fundraising events for STMP
9 (question 9(a)), may appear as a featured guest at a STMP fundraiser (question 9(b)), may
10 speak at STMP fundraising events (question 9(c)), may make fundraising telephone calls
11 (question 9(d)), may sign fundraising letters for STMP (question 9(e)), and may host
12 fundraising events for STMP (question 9(f)). The costs of the fundraising event may be

¹⁷ See the discussion of the definition of "election" in question 1.

¹⁸ IRS guidance regarding ballot initiative activities indicates that while in general such activities are viewed as lobbying activities, a different result obtains when there is sufficient involvement of a holder of a political office. For example, in PLR 199925051 (June 25, 1999), a nonprofit corporation, organized and operating under section 527, requested tax guidance on a broad range of activities, including contributions, political advertising, mass media campaigns, initiative campaigns, issue advocacy, distribution of voting records, voter guides, voter education, etc. The IRS found that preparation and distribution of voter education materials, including voter guides and voting records, are exempt function activities under section 527(e)(2), and opined that generally, expenditures made in connection with ballot measures, referenda, or initiatives are not section 527 exempt function expenditures [emphasis added], stating "[E]xpenditures [to support or oppose ballot measures] will be considered for an exempt function where it can be demonstrated that such expenditures were part of a deliberate and integrated political campaign strategy to influence the election for state and local officials by making active use of ballot measures, referenda, and initiative campaigns." In brief, IRS pronouncements regarding ballot initiatives where a candidate for political office is involved have been facts and circumstances determinations and as such do not provide definitive guidance as to whether the ballot initiative activity will be treated as lobbying expenditures for Federal tax law purposes or as a 26 U.S.C. 527 exempt function expenditure (that is, something in the nature of a campaign expenditure).

¹⁹ Specifically for House of Representatives candidates, such Federally permissible funds include contributions by individuals and non-multicandidate committees to candidates of up to \$2,000 per election, by multicandidate committees of up to \$5,000 per election, and by national, state, and local party committees of up to \$5,000 per election. 2 U.S.C. 441a.

1 paid from either Federal funds or from funds that are subject to the amount limitations and
2 source prohibitions of the Act. 2 U.S.C. 441i(e)(1)(B) and 11 CFR 300.62.

3 *Fundraising if STMP Becomes a Tax-Exempt Organization*

4 If STMP becomes a section 501(c)(4) organization, the general rules about
5 fundraising are the same as explained above. In addition, the Act, as amended by BCRA,
6 includes exceptions for fundraising by Federal candidates, officeholders, entities directly or
7 indirectly established, financed, maintained, or controlled by them, and their agents, on
8 behalf of certain 501(c) organizations. 2 U.S.C. 441i(e)(4); 11 CFR 300.65.

9 If the 501(c) organization satisfies certain conditions, a covered person may make
10 "general solicitations" or "specific solicitations" for the 501(c) organization. A "general
11 solicitation" is made without regard to amount limitation or source. 2 U.S.C.
12 441i(e)(4)(A), 11 CFR 300.65(a); cf. 2 U.S.C. 441i(e)(1). Such a "general solicitation"
13 may be made on behalf of a 501(c) organization if two conditions are met: (1) the 501(c)
14 organization does not have as its "principal purpose" engaging in FEA described in 2
15 U.S.C. 431(20)(A)(i) to (ii), and (2) the solicitation does not specify how the funds will or
16 should be spent. 11 CFR 300.65(a)(1). These two types of FEA are (i) voter registration
17 within 120 days of a regularly scheduled Federal election, and (ii) voter identification,
18 generic campaign activity, and GOTV "in connection with an election in which a candidate

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1 for Federal office appears on the ballot.”²⁰ 11 CFR 100.24(b)(1) and (2).

2 A “specific solicitation” is one made only to individuals for amounts up to \$20,000
3 during any calendar year. 2 U.S.C. 441i(e)(4)(B); 11 CFR 300.65(b). Such “specific
4 solicitations” may be made explicitly to obtain funds for carrying out the types of FEA
5 described above, or may be made for a section 501(c) organization whose principal
6 purpose is to conduct these types of FEA. 2 U.S.C. 441i(e)(4)(B).

7 The Commission does not have sufficient information to answer your question in
8 regards to whether STMP’s “principal purpose” is to engage in FEA as described in 2
9 U.S.C. 431(20)(A)(i) or (ii). As such, this question is hypothetical, and presents a general
10 question of interpretation of the Act, rather than a specific transaction or activity, and is
11 thus not proper for an advisory opinion. 2 U.S.C. 437f(a)(1); 11 CFR 112.1(b).

12 Representative Flake may not make “specific solicitations” under 2 U.S.C.
13 441i(e)(4)(B) for STMP. STMP is affiliated with Representative Flake’s PCC (see the
14 answer to question 2, above), and, as a result, the two entities share the 2 U.S.C.
15 441a(a)(1)(A) contribution limit. 2 U.S.C. 441a(a)(5). The statutory exception allowing
16 for “specific solicitations,” by its own terms, applies “[n]otwithstanding any provision of
17 *this subsection.*” 2 U.S.C. 441i(e)(4) (emphasis added). The subsection in which this

²⁰ Commission regulations define “voter registration activity,” voter identification,” “generic campaign activity,” and “get-out-the-vote activity”. “Voter registration activity” means contacting individuals by telephone, in person, or by other individualized means to assist them in registering to vote. 11 CFR 100.24(a)(2). “Voter identification” means creating or enhancing voter lists by verifying or adding information about the voters’ likelihood of voting in an upcoming election or their likelihood of voting for specific candidates. 11 CFR 100.24(a)(4). “Generic campaign activity” means a public communication [defined in 11 CFR 100.26 and discussed below] that promotes or opposes a political party and does not promote or oppose a clearly identified Federal or non-Federal candidate. 11 CFR 100.25. “Get-out-the-vote activity means contacting registered voters by telephone, in person, or by other individualized means to assist them in engaging in the act of voting, such as providing individual voters, within 72 hours of an election, information such as the election date, and the location and operating hours of polling places, and offering to transport, or actually transporting, voters to the polls. 11 CFR 100.24(a)(3).

1 exception appears is subsection (e) of section 441i. Thus, the exception for "specific
2 solicitations" is an exception only to the provisions of section 441i(e), not an exception to
3 the Act generally. The contribution limitation that STMP shares with Representative
4 Flake's PCC, found in section 441a, is outside the scope of the "specific solicitation"
5 exception. Because a "specific solicitation" for as much as \$20,000 per calendar year per
6 individual would exceed the \$2,000 per election per individual limit shared by STMP and
7 the PCC, Representative Flake may not make "specific solicitations" for STMP.

8 There is one other potential application of the Commission's regulations that must
9 be addressed with respect to this question. The Commission's regulations provide that a
10 covered person must not make "any solicitation on behalf of any [section 501(c)
11 organization]" for "any election activity" other than the FEA of voter registration within
12 120 days of a regularly scheduled Federal election, and of voter identification, generic
13 campaign activity, and get-out-the-vote activity in connection with an election in which a
14 candidate for Federal office appears on the ballot. 11 CFR 300.65(d). Literal application
15 of the phrase "any election activity," as it appears in section 300.65(d), would lead to the
16 conclusion that activities of STMP such as signature gathering and voter registration more
17 than 120 days before a regularly scheduled Federal election, which are not among the FEA
18 to which section 300.65(d) refers but which would fall within a reasonable reading of "any
19 election activity," would preclude any fundraising by Representative Flake on behalf of
20 STMP. Such an interpretation of section 300.65 would arguably conflict with 2 U.S.C.
21 441i(e)(1) and sections 300.61 and 300.62. Seeking to interpret the provisions of Subpart
22 D of Part 300 as a harmonious whole, and recognizing that section 300.65(d) is in the

1 nature of an exception to exceptions²¹, and therefore must be construed very narrowly,
2 section 300.65(d) must not be interpreted to override the general rules with regard to
3 fundraising by covered persons. Therefore, although Representative Flake must not make
4 "general solicitations" and "specific solicitations," as explained above, he is not precluded
5 by 11 CFR 300.65(d) from raising funds for STMP in accordance with 2 U.S.C. 441i(e)(1)
6 and 11 CFR 300.61 and 300.62 merely because STMP conducts election activities other
7 than the FEA defined in 2 U.S.C. 431(20)(A)(iii).

8 *10. May STMP engage in ballot qualification activities, such as hiring consultants to draft*
9 *the ballot measure, gathering signatures, maintaining a website, performing*
10 *administrative tasks, and raising funds? Are there any restrictions imposed by the Act on*
11 *STMP in engaging these ballot qualification activities? Does STMP's form of organization*
12 *as a section 527 political organization, or as a section 501(c)(4) organization affect the*
13 *answer to this question?*

14 As to fundraising, see question 9, above.

15 To the extent that the "signature gathering and ballot qualification activities" about
16 which you inquire are voter drive-type activities, see question 11, below.

17 *11. May staff hired by STMP and paid for with money legal under Arizona ballot initiative*
18 *law, but not the Act,*

19 (a) *Engage in voter registration activities for STMP paid for with non-federal*
20 *funds for the November 2004 election where federal candidates will be on the ballot?*

²¹ Paragraph (a) of section 300.65 (allowing "general solicitations") and paragraph (b) of section 300.65 (allowing "specific solicitations") are exceptions to the general rules in sections 300.61 and 300.62, which generally pertains to fundraising by covered persons (see 11 CFR 300.60). Paragraph (d) of section 300.65 is an exception to the exceptions in paragraphs (a) and (b), in that it would preclude any fundraising for a tax-exempt organization, if triggered.

1 *Does STMP's form of organization as a section 527 political organization, or as a section*
2 *501(c)(4) organization affect the answer to this question?*

3 Under the Act, as amended by BCRA, "voter registration activity" is FEA if it is
4 conducted within 120 days of a regularly scheduled Federal election. 2 U.S.C.
5 431(20)(A)(i); 11 CFR 100.24(b)(1). Both the November 2, 2004, general election and the
6 September 7, 2004, primary election are regularly scheduled Federal elections, and
7 therefore result in two overlapping 120-day periods. FEA conducted by a Federal
8 candidate or officeholder, or an entity directly or indirectly established, financed,
9 maintained, or controlled by a Federal candidate or officeholder, or an agent of a Federal
10 candidate or officeholder, must be paid for entirely with funds subject to the limitations,
11 prohibitions, and reporting requirements of the Act. 2 U.S.C. 441i(e)(1)(A); 11 CFR
12 300.61.

13 STMP is established, financed, maintained, or controlled by Representative Flake,
14 a Federal candidate and officeholder. See the answer to question 1, above. Accordingly,
15 STMP must comply with 2 U.S.C. 441i(e)(1)(A) and 11 CFR 300.61, which means that it
16 must pay for all activity that constitutes FEA with funds subject to the limitations,
17 prohibitions and reporting requirements of the Act. Therefore, the answer to this question
18 is "no" when the voter registration activities are conducted between May 10, 2004 and
19 November 2, 2004, which is within 120 days of a regularly scheduled Federal election in
20 Arizona in 2004 (i.e., the September 7, 2004 primary election).

21 Before May 10, 2004, voter registration activity by STMP does not constitute FEA,
22 but because STMP will be raising and spending funds in connection with a non-Federal

1 election, the voter registration activities must be paid for with funds that are raised and
2 spent in compliance with the Act's amount limitations and source prohibitions. 2 U.S.C.
3 441i(e)(1)(B) and 11 CFR 300.62

4 (b) *Engage in GOTV activities paid for with non-federal funds for that election?*
5 *Does STMP's form of organization as a section 527 political organization, or as a section*
6 *501(c)(4) organization affect the answer to this question?*

7 Under the Act, as amended by BCRA, GOTV is a FEA when it is "conducted in
8 connection with an election in which a candidate for Federal office appears on the ballot
9 (regardless of whether a candidate for State or local office also appears on the ballot)." 2
10 U.S.C. 431(20)(A)(ii). The term "in connection with an election in which a candidate for
11 Federal office appears on the ballot" means "the period of time beginning on the date of
12 the earliest filing deadline for access to the primary election ballot for Federal candidates
13 as determined by State law," or January 1 of even-numbered years in States that do not
14 conduct primaries. 11 CFR 100.24(a)(1).

15 The answer to this question is "no" beginning on May 10, 2004, which is the
16 earliest filing deadline for primary election ballot access under Arizona law, and thus
17 which is when the GOTV qualifies as a FEA. The reason for this answer is the same as
18 the reasons explained in the answer to question 11(a), which advises that voter registration
19 activities must be paid for with Federal funds when they qualify as FEA. Prior to May 10,
20 2004, when the GOTV activity is not in connection with an election in which a candidate
21 for Federal office appears on the ballot, STMP may use funds raised in accordance with 11
22 CFR 300.62 for its GOTV activity. See, generally, the answer to question 11(a) above.

1 *12. During the ballot initiative campaign phase, may Representative Flake publicly*
2 *advocate his support for the ballot repeal measure?*

3 Yes, merely advocating support of the measure does not trigger 2 U.S.C 441i(e).
4 However, Representative Flake's advocacy must not extend beyond this to become
5 solicitations that do not comply with section 441i(e)(1).

6 *13. May Representative Flake raise funds for STMP for the ballot initiative campaign?*
7 *Does STMP's form of organization as a section 527 political organization, or as a section*
8 *501(c)(4) organization affect the answer to this question?*

9 Yes. See question 9, above.

10 *14. During the ballot initiative campaign phase, may Representative Flake appear at*
11 *fundraising events paid for by STMP with non-federal funds as a speaker or honored*
12 *guest?*

13 STMP must raise and spend only Federal funds for Federal election activities, and
14 may raise funds subject to the limitations and prohibitions of the Act (but not the reporting
15 requirements) for the remainder of its activities in connection with the ballot measure
16 campaign. 2 U.S.C. 441i(e)(1)(A), (B); see question 9, above. Therefore, to the extent that
17 the reference to "non-federal funds" in this question means funds not subject to the amount
18 limitations and source prohibitions of the Act, the answer is *no*.

19 *15. With regard to the fundraising events referenced in question 14, are the following*
20 *activities permissible:*

21 *(a) May Representative Flake attend such events if he is not on the invitation and is not*
22 *introduced?*

1 Yes; see generally Advisory Opinion 2003-3.

2 15. (b) *May he be introduced at the event if he is not on the invitation?*

3 Yes; see generally Advisory Opinion 2003-3.

4 15. (c) *Is there any effect if the fact that he is a candidate on the ballot is or is not*
5 *mentioned?*

6 No.

7 15. (d) *Does STMP's form of organization as a section 527 political organization, or as a*
8 *section 501(c)(4) organization affect the answer to questions 15(a) – (c)?*

9 No; see the answer to question 9, above.

10 16. *May STMP conduct a "broad-based advertising campaign" in support of the ballot*
11 *measure, which will include public communications that clearly identify a Federal*
12 *candidate, and which will be distributed from the beginning of STMP's activities (which*
13 *will be more than 120 days before the election) through election day?*

14 Under the Act, as amended by BCRA, a public communication²² that clearly
15 identifies a Federal candidate, and that "promotes, supports, attacks, or opposes" a Federal
16 candidate, constitutes FEA, whether or not the communication expressly advocates a vote
17 for or against a Federal candidate, and regardless of when the public communication is
18 broadcast, distributed, or otherwise publicly disseminated. 2 U.S.C. 431(20)(A)(iii); 11
19 CFR 100.24(b)(3). Therefore, if one of STMP's public communications promotes,
20 supports, attacks, or opposes one or more of the Federal candidates clearly identified in it,

²² "Public communication" is defined in 11 CFR 100.26 as "a communication by means of any broadcast, cable, or satellite communication, newspaper, magazine, outdoor advertising facility, mass mailing or telephone bank to the general public or any other form of general public political advertising. The term public communication shall not include communications over the Internet."

1 it will constitute FEA, and therefore will have to be paid for entirely with Federal funds. 2
2 U.S.C. 441i(e)(1)(A); 11 CFR 300.61.

3 It is not possible to address whether any of the planned public communications
4 promotes, supports, attacks, or opposes a clearly identified Federal candidate because you
5 have not supplied any further information about the content of the planned
6 communications.

7 Even if the planned public communications do not promote, support, attack, or
8 oppose a clearly identified Federal candidate, the communications will be FEA if the
9 communications qualify as voter registration activity within 120 days of a regularly
10 scheduled Federal election (11 CFR 100.24(b)(1)) or as voter identification or GOTV
11 activity in connection with an election in which a Federal candidate appears on the ballot
12 (11 CFR 100.24(b)(2)). In either of these cases, the public communications will have to be
13 paid for entirely with Federal funds. 2 U.S.C. 441i(e)(4)(A); 11 CFR 300.61. Again, it is
14 not possible to address this question further because you have not supplied any further
15 information about the content or timing of the planned communications.

16 *17. May STMP conduct "a broad-based advertising campaign" in support of the ballot*
17 *measure that will include public communications that clearly identify a Federal candidate,*
18 *and that will be broadcast to 50,000 or more people in either Representative Flake's*
19 *congressional district, or Arizona voters in general?*

20 This question turns on the status of STMP's communications as "electioneering
21 communications" under 2 U.S.C. 434(f). Subject to certain exceptions, an "electioneering
22 communication" is any broadcast, cable or satellite communication that refers to a clearly

1 identified candidate for Federal office, and is publicly distributed for a fee within 60 days
2 of a general, special or runoff election for the office sought by the candidate, or within 30
3 days of a primary or preference election for the office sought by the candidate, and, in the
4 case of a communication which refers to a candidate for office other than President or Vice
5 President, is targeted to the relevant electorate. 2 U.S.C. 434(f)(3)(A)(i); 11 CFR
6 100.29(a) and (b). "Targeted to the relevant electorate" means that the communication can
7 be received by 50,000 or more persons in the district the candidate seeks to represent, in
8 the case of a candidate for the House of Representatives, or in the State the candidate seeks
9 to represent, in the case of a candidate for Senate. 11 CFR 100.29(b)(5). The legislative
10 history indicates that the electioneering communications provisions, set out at 2 U.S.C.
11 434(f) and 441b(b)(2), are designed to ensure that such communications are not paid for by
12 corporations and labor organizations²³ and are reported by persons who make them.
13 "Electioneering Communications; Final Rules," 67 Fed. Reg. 65,190 (October 23, 2002).

14 You state that STMP will engage in a "broad-based advertising campaign" through
15 broadcast communications to the general public. You have not inquired about advertising
16 in other media. These communications will clearly identify a Federal officeholder and/or
17 candidate for Federal office, likely to be Senator McCain or Representative Flake, or both.
18 You state that the communications will be publicly distributed within 60 days of the
19 November 2, 2004 general election, and 30 days before the September 7, 2004 Arizona
20 primary election, and will be "targeted to the relevant electorate" within the meaning of 11
21 CFR 100.29(b)(5) because they can be received by 50,000 or more persons in

²³ Foreign nationals are also prohibited from making electioneering communications. 2 U.S.C. 441c(a)(1)(C); 11 CFR 110.20(e).

1 Representative Flake's congressional district or throughout the State. Accordingly, these
2 STMP communications will be electioneering communications, as defined in 11 CFR
3 100.29(a).

4 Funds from national banks, corporations, labor organizations or foreign nationals
5 must not be used to pay for electioneering communications under BCRA's amendments to
6 2 U.S.C. 441b. 2 U.S.C. 441b(b)(2); 441e(a)(2); 11 CFR 114.2. *See also* "Electioneering
7 Communications; Final Rules," 67 *Fed. Reg.* 65,190, 65,203 (October 23, 2002).

8 The Commission concludes that STMP may broadcast the communications
9 described in this question. Assuming STMP follows Commission guidance in response to
10 question 9, it will have only permissible funds to pay for these communications. *See* 2
11 U.S.C. 441b and 441e, and 11 CFR 114.14. STMP's form of organization as an
12 unincorporated section 527 organization or as an unincorporated section 501(c)
13 organization does not affect the answer to this question. *See* 2 U.S.C. 441b(c)(2) to (4).²⁴

14 STMP must disclose, among other things, persons sharing or exercising direction or
15 control over STMP, as well as certain payments for electioneering communications and
16 certain donors to STMP. *See* 2 U.S.C. 434(f); 11 CFR 104.20.

17 *18. May Representative Flake and his agents be involved in the creation, production, and*
18 *distribution of the public communications that STMP intends to include in its broad-based*
19 *advertising campaign supporting the ballot measure? This would include involvement in*
20 *decisions regarding: the contents, means, or mode of the communications, the specific*
21 *media outlets used, the timing or frequency of the communications, the size or prominence*

²⁴ You state that STMP is unincorporated. If STMP were to incorporate (e.g., become an incorporated section 501(c)(4) organization), then it could not make electioneering communications unless it were a qualified non-profit corporation ("QNC"). 11 CFR 114.2(b)(2)(iii) and 114.10.

1 *of a printed communication, and the duration of a broadcast, cablecast, or satellite-*
2 *delivered communication.*

3 Yes, as explained in the responses to questions 3 and 5, above.

4 *19. May Representative Flake play a role in selecting the media firm used to create*
5 *STMP's public communications and to receive his and his agents ideas for specific scripts*
6 *and copy?*

7 Yes, as explained in the responses to questions 3 and 5, above.

8 *20. May an independent consultant hired by STMP for its referendum ads also assist in*
9 *making ads advocating Representative Flake's election for his authorized committee where*
10 *each committee would independently pay the consultant the fair market value of his*
11 *services?*

12 Yes, as explained in the responses to questions 3 and 5, above.

13 *21. May an independent consultant who has been hired by Rep. Flake's authorized*
14 *committee also assist STMP with its public communications?*

15 Yes, as explained in the responses to questions 3 and 5, above.

16 *22. May an independent consultant to STMP discuss STMP's public communications with*
17 *any consultant in Arizona who is working for any Federal candidate's authorized*
18 *committee?*

19 The Commission cannot address this question without further information
20 regarding the discussions. This question is hypothetical, and presents a general question of
21 interpretation of the Act, rather than a specific transaction or activity, and is thus not
22 proper for an advisory opinion. 2 U.S.C. 437f(a)(1); 11 CFR 112.1(b).

1 23. *May an independent consultant to STMP discuss STMP's communications and plans*
2 *with another independent consultant whose clients include a 2004 presidential campaign*
3 *or the Arizona or Republican or Democratic Party?*

4 The Commission cannot address this question without further information
5 regarding the discussions. This question is hypothetical, and presents a general question of
6 interpretation of the Act, rather than a specific transaction or activity, and is thus not
7 proper for an advisory opinion. 2 U.S.C. 437f(a)(1); 11 CFR 112.1(b).

8 24. *May any of the following messages be paid for by STMP exclusively with funds legal*
9 *under Arizona law but not permissible under the Act? Does STMP's form of organization*
10 *as a section 527 political organization, or as a section 501(c)(4) organization affect the*
11 *answer to this question?*

12 (a) *A message that says, "Support Ballot Measure X."*

13 (b) *A message that says, "Support Ballot Measure X. Go vote on November 2."*

14 (c) *A message that says, "Support Ballot Measure X and State Senator Jones and State*
15 *Representative Smith by voting on November 2."*

16 Because STMP is established, financed, maintained, or controlled by
17 Representative Flake (see the response to question 1, above), it is precluded from raising or
18 spending funds in excess of the amount limitations of, or from prohibited sources under,
19 the Act. See 2 U.S.C. 441i(e)(1)(B); see also the responses to questions 9 and 14, above.
20 Given that STMP is precluded from raising or spending funds in excess of the amount
21 limitations or from prohibited sources under the Act, it will have no such funds in its

1 accounts. Accordingly, the Commission does not address this question as to the content of
2 the specific messages STMP wishes to broadcast.

3 *25. May a combination of State funds and Levin Account funds pay for public*
4 *communications by STMP?*

5 No. Only State, district, and local political parties committees may raise and spend
6 Levin funds. 2 U.S.C. 441i(b)(2); 11 CFR 300.2(h) and (i); 11 CFR 300.30-300.36.

7 *26. May STMP's staff communicate about STMP's activities and plans with the*
8 *Republican and Democratic state parties, county parties, or local parties?*

9 It is not possible to answer this question without further information about the
10 subject, timing, and actions taken as a result of the "communications." As presented, this
11 question is hypothetical, and calls for general interpretation of the Act, and is thus not
12 proper for an advisory opinion. 11 CFR 112.1(b).

13 The Commission expresses no opinion regarding qualifications for tax-exempt
14 status under 26 U.S.C. 501(c)(4) or any other ramifications of the proposed activities under
15 the Internal Revenue Code because those questions are outside the Commission's
16 jurisdiction.

17 This response constitutes an advisory opinion concerning the application of the Act
18 and Commission regulations to the specific transaction or activity set forth in your request.
19 See 2 U.S.C. 437f. The Commission emphasizes that, if there is a change in any of the
20 facts or assumptions presented, and such facts or assumptions are material to a conclusion
21 presented in this opinion, then the requestor may not rely on that conclusion as support for
22 its proposed activity. The Commission notes that this advisory opinion analyzes the Act,

1 as amended by BCRA, and Commission regulations, including those promulgated to
2 implement the BCRA amendments, as they pertain to your proposed activities. On May 1,
3 2003, a three-judge panel of the United States District Court for the District of Columbia
4 ruled that a number of BCRA provisions are unconstitutional and issued an order enjoining
5 the enforcement, execution, or other application of those provisions. *McConnell v. FEC*,
6 251 F.Supp. 2d 176 (D.D.C. May 1, 2003), *probable jurisdiction noted*, 123 S.Ct. 2268
7 (U.S. June 5, 2003). Subsequently, the District Court stayed its order and injunction in
8 *McConnell v. FEC*, 253 F.Supp. 2d 18 (D.D.C. May 19, 2003). The Commission cautions
9 that the legal analysis in this advisory opinion may be affected by the eventual decision of
10 the Supreme Court.

11

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Sincerely,

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Ellen L. Weintraub
Chair

18

19

20 Enclosures (AOs 2003-3, 1991-12, 1990-16, 1989-32, 1987-12, 1984-62, 1984-46, 1984-3,
21 1982-10, 1980-95, and 1978-12)

1 ADVISORY OPINION 2003-12

2

3 Benjamin L. Ginsberg, Esq.

4 Patton Boggs L.L.P.

5 2550 M Street, N.W.

6 Washington, D.C. 20037-1350

7

8 Dear Mr. Ginsberg:

DRAFT

9 This responds to your letters dated March 3, March 24, and April 7, 2003,

10 requesting an advisory opinion on behalf of the Stop Taxpayer Money for Politicians

11 Committee ("STMP") and United States Representative Jeff Flake concerning the

12 application of the Federal Election Campaign Act of 1971 ("the Act"), and Commission

13 regulations, to a ballot measure campaign that STMP and Representative Flake plan to

14 undertake for the November 2, 2004, election in Arizona.

15 ***Background***

16 Representative Flake is a candidate for re-election to the House of Representatives

17 in 2004. Jeff Flake for Congress ("the PCC" or "his PCC") is his principal campaign

18 committee.

19 STMP is an unincorporated, section 527 political organization that wishes to

20 qualify a state referendum to repeal portions of Arizona's campaign finance statute. STMP

21 is not a federal political committee. You state that STMP and Representative Flake plan to

22 qualify the ballot measure for the November 2, 2004 election and campaign for its passage,

23 if it qualifies.

24 STMP was established on January 17, 2003. Representative Flake signed the

25 documents filed with the Arizona Secretary of State that formed STMP, and he was

26 STMP's first Chairman. You state that an individual who served as Representative Flake's

1 part-time campaign consultant aided STMP with its State filings and with establishing its
2 bank account.

3 On March 21, 2003, Representative Flake resigned as Chairman of STMP, and he
4 has not held any other office in STMP. You indicate that all funds raised while
5 Representative Flake was associated with STMP have been returned.

6 You represent that Representative Flake wishes to resume his role as Chairman of
7 STMP, and that he and/or agents of his authorized committee wish to provide significant
8 support to STMP. You state that Representative Flake plans to assist STMP to the extent
9 permitted under the law as interpreted by the Commission, and that Representative Flake,
10 and his agents and employees of his authorized campaign committee, have been asked to
11 be involved in all aspects of STMP, including its governance. STMP also wishes to
12 employ both current and former employees of Representative Flake's PCC and
13 congressional office, and STMP contemplates hiring individuals who are, or have been,
14 consultants to Representative Flake's PCC, some in this election cycle and some in
15 previous election cycles. You expect that such individuals would engage in a variety of
16 STMP's activities, and that, if permitted, such individuals would also perform similar
17 activities for Representative Flake's PCC, with each committee paying a proportionate
18 share of the individual's costs. Representative Flake and his agents would like to be able
19 to direct and participate in the governance of STMP, as well as to formulate its strategy
20 and tactics for the ballot referendum.

21 You tell us that neither Representative Flake's PCC, nor any employee or agent of
22 that committee, has provided financial support for STMP.

1 You state that STMP wishes Representative Flake and his agents to bring their
2 expertise to bear on all STMP's planned public communications. STMP would like
3 Representative Flake to play a role in selecting the media firm used for STMP's public
4 communications, and STMP wishes to receive his and his agents' ideas for specific scripts
5 and copy.

6 In the signature gathering and ballot qualification stage, STMP will hire full-time
7 employees and part-time consultants; their duties will be fundraising or political
8 organizing. STMP plans to hire consultants to draft the ballot measure. The political
9 organizing will involve hiring staff and recruiting volunteers, who will gather signatures
10 through June 2004 and maintain a web site. These personnel will also be responsible for
11 satisfying the administrative requirements of qualifying the ballot measure. You state that
12 STMP plans to raise funds permitted by State law to qualify for the State ballot, and that
13 this will include raising funds outside of the Federal amount limitations and source
14 restrictions, which funds are not permitted by the Act. You state that, in the signature
15 gathering phase through June 2004, STMP will not engage in any Federal election activity
16 ("FEA") as defined in 2 U.S.C. 431(20) and 11 CFR 100.24, nor make any electioneering
17 communications as defined in 11 CFR 100.29. You state that STMP anticipates engaging
18 in voter registration and voter identification programs from the beginning of its activities.

19 In the campaign stage, once the ballot measure has qualified, STMP plans to
20 engage in activities designed to win passage for the measure. First, STMP will conduct
21 voter registration programs designed to identify voters who agree with the initiative and to
22 register them to vote if they are not already registered. This will include contacting voters

1 by telephone, in-person, by mail, or over the Internet to assist them in registering to vote
2 for the November 2004 general election. Second, STMP will engage in a broad-based
3 advertising campaign regarding the State campaign finance statute through public
4 broadcast communications, and mail, phone and Internet messages. Third, STMP will
5 engage in get-out-the-vote programs ("GOTV") designed to get the measure's supporters
6 to the polls in November 2004 by means of telephone, in person door-to-door activity, and
7 other individualized means. This will include providing voters in the three days before the
8 election with information about when and where polling places are open and offering
9 transportation to the polls. You indicate that STMP anticipates engaging in GOTV
10 activities beginning about 30 days before the November 2, 2004 election and continuing
11 through election day. Fourth, STMP will engage in an "aggressive" program to raise the
12 funds permitted by Arizona law to fund these activities, including funds not permitted by
13 the Act.

14 STMP intends to clearly identify a Federal officeholder or candidate in its broad-
15 based advertising campaign promoting the Arizona ballot measure, and you state that such
16 messages will likely meet the definition of "public communication" in 11 CFR 100.26.
17 You state that the statute that STMP wishes to repeal is closely identified with Senator
18 McCain among Arizona residents and that Representative Flake is one of the statute's most
19 visible and vocal critics. None of the communications will refer to anyone "in his or her
20 role as a Federal candidate" or advocate the election or defeat of a Federal candidate. You
21 expect that these communications will be distributed from the beginning of STMP's
22 activities, which will be more than 120 days before the election, through November 2,

1 2004. You state that any communications by STMP will be directed to all voters in
2 Arizona, including those in Representative Flake's district, but that there will not be
3 special messages directed to voters in Representative Flake's district. STMP anticipates
4 that any broadcast communications will be receivable by more than 50,000 people in the
5 state as a whole and in Representative Flake's district in particular.

6 ***Legal Analysis and Conclusions***

7 A written advisory opinion request must "set forth a *specific* transaction or activity
8 that the requesting person plans to undertake or is presently undertaking and intends to
9 undertake in the future. *Requests presenting a general question of interpretation, or*
10 *posing a hypothetical situation . . . do not qualify as advisory opinion requests.*" 11 CFR
11 112.1(b) (emphasis added).

12 The Commission concludes that several of your questions are "general question[s]
13 of interpretation," within the meaning of 11 CFR 112.1(b), rather than questions regarding
14 "a specific transaction or activity" as required by 2 U.S.C. 437f(a). Other questions,
15 however, do relate to specific activities that STMP and Representative Flake intend to
16 undertake, and are therefore appropriately addressed in an advisory opinion. Many of your
17 questions are posed in the alternative, asking for answers assuming that STMP is organized
18 as a section 501(c)(4) organization and as a section 527 organization.¹ Except as noted in
19 the answer to question 9, the answers to the questions below do not depend on STMP's
20 form of organization under the Internal Revenue Code. The answers to your questions turn
21 on the following threshold issues: 1.a. Did Representative Flake directly or indirectly
22 establish, finance, maintain, or control STMP? 1.b. Are STMP's activities in connection

¹ 26 U.S.C. 501(c)(4) and 26 U.S.C. 527.

1 with an election, within the meaning of 2 U.S.C. 441i(e)(1)(A) and (B)? 2. Is STMP
2 affiliated with Representative Flake's PCC?

3 *1. a. Did Representative Flake Directly or Indirectly Establish, Finance, Maintain or*
4 *Control STMP?*

5 On November 6, 2002, the Bipartisan Campaign Reform Act of 2002 (Pub. L. 107-
6 155 (Mar. 27, 2002)) ("BCRA") took effect. As amended by BCRA, the Act regulates
7 certain actions of Federal candidates² and officeholders³, their agents,⁴ and entities directly
8 or indirectly established, financed, maintained, or controlled by them (collectively,
9 "covered persons")⁵ when they raise or spend funds in connection with either Federal or
10 non-Federal elections. 2 U.S.C. 441i(e)(1). Specifically, BCRA prohibits covered persons
11 from soliciting, receiving, directing, transferring, or spending: (A) "funds in connection
12 with an election for Federal office, including funds for any Federal election activity, unless
13 the funds are subject to the limitations, prohibitions, and reporting requirements of this
14 Act;" and (B) "funds in connection with any election other than an election for Federal
15 office" . . . unless the funds "are not in excess of the amounts permitted with respect to
16 contributions to candidates and political committees under [2 U.S.C. 441a(a)(1), (2), and
17 (3)]" and "are not from sources prohibited by this Act from making contributions in
18 connection with an election for Federal office." 2 U.S.C. 441i(e)(1)(A) and (B).

19 The Commission's regulations at 11 CFR 300.60 to 300.65, which took effect on
20 November 6, 2002, implement these statutory provisions. Section 300.61 provides that no

² 2 U.S.C. 431(2).

³ Under 2 U.S.C. 431(3), "Federal office" means "the office of President or Vice President, or of Senator or Representative in, or Delegate or Resident Commissioner to, the Congress." See also 11 CFR 100.4.

⁴ 11 CFR 300.2(b)(3).

⁵ 11 CFR 300.60.

1 covered person "shall solicit, receive, direct, transfer, spend, or disburse funds in
2 connection with an election for Federal office, *including funds for any Federal election*
3 *activity*⁶ as defined in 11 CFR 100.24, unless the amounts consist of Federal funds that
4 are subject to the limitations, prohibitions, and reporting requirements of the Act"
5 (emphasis added).

6 Section 300.62 provides that covered persons "may solicit, receive, direct, transfer,
7 spend, or disburse funds in connection with any non-Federal election, only in amounts and
8 from sources that are consistent with State law, and that do not exceed the Act's
9 contribution limits or come from prohibited sources under the Act."⁷

10 The Commission's regulations at 11 CFR 300.60 to 300.65, like 2 U.S.C. 441i(e),
11 apply to Representative Flake as a covered person, and also apply to STMP if it is a
12 covered person in its own right.

⁶ Federal election activity ("FEA") means any of the following activities: (1) voter registration activity during the 120 days before a regularly scheduled Federal election and ending on the day of the election; (2) voter identification activity, GOTV activity, and generic campaign activity that is conducted in connection with an election in which one or more candidates for Federal office appear on the vote; (3) a public communication that refers to a clearly identified Federal candidate and that promotes, supports, attacks or opposes a candidate for that office; and (4) services provided during any month by an employee of a state, district or local party committee who spends more than 25 percent of the employee's compensated time during that month on activities in connection with a Federal election. "In connection with an election in which a candidate for Federal office appears on the ballot" means, in even numbered years, the period beginning on the day of the earliest filing deadline for primary election ballot access under State law (or on January 1st in states that do not hold primaries), and ending on the day of the general election (or the general election runoff if a runoff is held), and in odd numbered years, the period beginning on the day that a date is set for a special election in which a Federal candidate appears on the ballot, and ending on the date of the election. 11 CFR 100.24(a)(1).

⁷ Under the Act, the following persons may not contribute in connection with a Federal election: National banks, corporations, and labor organizations (2 U.S.C. 441b); Federal government contractors (2 U.S.C. 441c); foreign nationals (2 U.S.C. 441e); and minors, although a minor may contribute to a Federal separate segregated fund or nonconnected committee (2 U.S.C. 441k). It is unlawful for the following persons to contribute or donate in connection with any election: National banks and corporations organized by authority of Congress (2 U.S.C. 441b); Federal government contractors (2 U.S.C. 441c); and foreign nationals (2 U.S.C. 441e).

1 The affiliation factors in 11 CFR 100.5(g) and 110.3 are used to determine whether
2 a person or entity ("sponsor") "directly or indirectly established, financed, maintained or
3 controlled" another person or entity for purposes of BCRA. "Prohibited and Excessive
4 Contributions: Non-Federal Funds or Soft Money, Final Rules," 67 *Fed. Reg.* 49,064,
5 49,084 (July 29, 2002). The ten factors set out at 11 CFR 300.2(c)(2)(i) through (x) must
6 be examined in the context of the overall relationship between the sponsor and the entity to
7 determine whether the presence of any factor or factors is evidence that the sponsor
8 directly or indirectly established, financed, maintained, or controlled the entity. 11 CFR
9 300.2(c).

10 Representative Flake is among the individuals who formed STMP, and he signed
11 the documents with the Arizona Secretary of State's office that formed STMP. He was
12 STMP's chairman from the establishment of STMP on January 17, 2003, to March 21,
13 2003, when he resigned from STMP. You state that an individual who also served as
14 Representative Flake's part-time campaign consultant aided STMP with its State filings
15 and opened its bank account. One factor considered in determining whether a sponsor
16 directly or indirectly established, finances, maintains or controls an entity is whether the
17 sponsor had an active or significant role in the formation of the entity. 11 CFR
18 300.2(c)(2)(ix). In this case, the Commission finds that Representative Flake had an active
19 and significant role in the formation of STMP. Therefore, Representative Flake
20 "established" STMP and 2 U.S.C. 441i(e)(1) governs STMP's actions. *See also* 11 CFR
21 300.61 to 300.65. Because Representative Flake established STMP, and in light of the
22 requirement that all material connections between a sponsor and an entity be severed for

1 two years before the Commission will determine that the sponsor is not directly or
2 indirectly financed, maintained or controlled by the sponsor,⁸ the Commission finds that
3 there is no need to analyze whether or not Representative Flake will finance, maintain or
4 control STMP.

5 *1.b. Are STMP's Activities In Connection with an Election within the Meaning of 2 U.S.C.*
6 *441i(e)(1)(A) and (B)?*

7 The Commission concludes that, except in regards to FEA and in regards to certain
8 communications mentioning Federal or state candidates as discussed in questions 17 and
9 24, the ballot measure activities⁹ at issue here are not in connection with an election, within
10 the meaning of BCRA's prohibitions and restrictions on Federal candidates and
11 officeholders raising and spending funds at 2 U.S.C. 441i(e)(1). For purposes of the Act,
12 the term "election" includes "a general, special, primary or runoff election." 2 U.S.C.
13 431(1)(A). Commission regulations define the term "election" as the process by which
14 individuals, whether opposed or unopposed, seek nomination for election, or election, to
15 Federal office. 11 CFR 100.2. The Commission concludes that this candidate-focused
16 interpretation is well-founded for several reasons. First, the Commission has not, in the
17 past, treated expenses related solely to ballot referenda as being "in connection with an
18 election to any political office" under 2 U.S.C. 441b and former 2 U.S.C. 441e.¹⁰
19 Advisory Opinions 1989-32, 1984-62, n.2, 1982-10, 1980-95.¹¹ Second, the Commission

⁸ 11 CFR 300.2(e)(4)(ii).

⁹ Both in (1) the signature gathering and ballot qualification stage, and (2) in the campaign stage.

¹⁰ 2 U.S.C. 441e was amended, effective November 6, 2002, by section 303 of BCRA.

¹¹ However, note that these advisory opinions were written in the context of construing 2 U.S.C. 441b, which uses slightly different language than 2 U.S.C. 441i(e)(1), referring to "in connection with any election to any political office . . ."

1 has held that donations to a statewide petition drive were not contributions, even though
2 the name of a congressional candidate who was concurrently Chairman of the petition
3 drive was used "on all mailings, in newsletters, and in news stories and advertisements."
4 Advisory Opinion 1977-54.¹² Third, the Commission notes that construing 2 U.S.C.
5 441i(e)(1)(B) to only cover elections for non-Federal political office is consistent with 2
6 U.S.C. 441b, as well as the Commission's interpretation of the term "election" in 11 CFR
7 100.2(a). Fourth, the Commission notes that speech that does not specifically mention
8 candidates has always enjoyed the highest level of constitutional protection.¹³ Therefore,
9 the Commission construes 2 U.S.C. 441i(e)(1)(A) and (B) narrowly to cover only elections
10 for political office, and to cover FEA under subparagraph (A) of section 441i(e)(1).¹⁴

11 Since STMP, like Representative Flake, is a "covered person" under 2 U.S.C.
12 441i(e), the prohibition in section 441i(e)(1)(A) and 11 CFR 300.61 will apply to the
13 soliciting, receiving, directing, transferring and spending of funds that STMP plans to
14 undertake for FEA. STMP must use solely Federal funds to pay for FEA.

15 However, except as noted in the answer to question 24, the prohibition in 2 U.S.C.
16 441i(e)(1)(B) and 11 CFR 300.62 will not apply to the solicitation, receipt, directing,
17 transferring or spending of funds that STMP plans to undertake during either the signature
18 gathering and ballot qualification stage, or the campaign stage, since the definition of

¹² However, note that this advisory opinion was written in the context of construing 2 U.S.C. 431, which uses slightly different language than 2 U.S.C. 441i(e)(1), referring to "for the purpose of influencing any election for Federal office . . ."

¹³ See, e.g., *McIntyre v. Ohio Elections Comm.*, 514 U.S. 334 (1995); *Citizens Against Rent Control / Coalition for Fair Housing v. City of Berkeley, Cal.*, 454 U.S. 290 (1981); and *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978).

¹⁴ See 2 U.S.C. 431(20)(A)(iii) and 431(20)(B)(i) (limiting definition of FEA to public communications that identify a Federal candidate), and 2 U.S.C. 434(f)(3) (defining "electioneering communication" in terms of reference to Federal candidates).

1 "election," as interpreted above, includes only elections for political office (and certain
2 FEA), and a ballot measure is not an election for a political office. Thus, STMP and
3 Representative Flake may solicit, receive, direct, transfer or spend funds from sources that
4 would otherwise be prohibited under the Act, and in amounts that would otherwise violate
5 the Act's amount limits, unless these funds are used for FEA, or for electioneering
6 communications, or for certain communications mentioning state candidates.

7 *2. Is STMP Affiliated with Representative Flake's PCC?*

8 In general, affiliated committees include those committees established, financed,
9 maintained or controlled by the same person. 11 CFR 110.3(a)(1)(ii) and 110.3(a)(2)(v).
10 Where two committees are controlled "by the same person for campaign-related purposes,"
11 the Commission has concluded in several advisory opinions that those committees are
12 affiliated. See Advisory Opinions 1991-12, 1990-16, 1987-12, 1984-46, and 1984-3. In
13 several advisory opinions and Matters Under Review (MURs), the Commission has
14 addressed "leadership PACs." These are political committees formed by or associated
15 with Federal officeholders or candidates, and which contribute to other Federal candidates,
16 or donate to political party organizations or non-Federal candidates, or subsidize the
17 officeholder's travel. "Leadership PACs; Notice of Proposed Rulemaking," 67 Fed. Reg.
18 78,753, 78,754 (December 6, 2002).

19 Although the relationship between Representative Flake and STMP differs
20 somewhat from the usual relationship between a Federal officeholder or candidate and a
21 leadership PAC, the Commission finds that the relationship is sufficiently similar to the
22 traditional leadership PAC scenario to warrant treating Representative Flake and STMP as

1 it has historically treated leadership PACs for affiliation purposes. See "Leadership PACs;
2 Notice of Proposed Rulemaking," 67 Fed. Reg. 78,753, 78,754-78,755 (December 6,
3 2002). Therefore, the Commission concludes that STMP is not affiliated with the PCC.
4 Advisory Opinion 1978-12; MURs 1870, 2897 and 3740. Also, the Commission
5 concludes that STMP will not be subject to the contribution limits that leadership PACs are
6 generally subject to, since ballot referenda activities other than FEA, electioneering
7 communications, and certain communications mentioning state candidates, are neither "in
8 connection with an election for Federal office" nor "in connection with an election other
9 than an election for Federal office." 2 U.S.C. 441i(e)(1)(A), (B).

10 Your advisory opinion request presents the following specific questions:

11 *3. May Representative Flake serve as Chair, Officer, or Director of STMP? If so, will this*
12 *result in "coordination" between STMP and his PCC? Does STMP's form of organization*
13 *as a section 527 political organization, or as a section 501(c)(4) organization affect the*
14 *answer to this question?*

15 Yes, Representative Flake may serve as Chair, Officer, or Director of STMP,
16 subject to the restrictions explained in the answer to question 9 below, with regard to
17 fundraising.

18 Your advisory opinion request presents numerous facts and questions that raise
19 issues as to "coordination" between STMP and Representative Flake. See generally 11
20 CFR Part 109, Subpart C. Under 11 CFR 109.20(a), "coordinated" means, "made in
21 cooperation, consultation, or concert with, or at the request or suggestion of, a candidate, a

1 candidate's authorized committee, or their agents¹⁵

2 The Commission cannot answer your question in regards to particular
3 communications without particular information regarding those communications. As such,
4 this question is hypothetical, and presents a general question of interpretation of the Act,
5 rather than a specific transaction or activity, and is thus not proper for an advisory opinion.
6 2 U.S.C. 437f(a)(1); 11 CFR 112.1(b).

7 *4. May Representative Flake serve as Honorary Chair of STMP if he has no legal*
8 *responsibilities? Does STMP's form of organization as a section 527 political*
9 *organization, or as a section 501(c)(4) organization affect the answer to this question?*

10 Given the Commission's response to question 3 that Representative Flake may
11 serve as the actual Chair, he may also serve as the honorary Chair of STMP.

12 *5. May agents and employees of Representative Flake's authorized committee be involved*
13 *in all aspects of STMP, including directing and participating in its governance, and*
14 *formulating strategy and tactics for the ballot referendum?*

15 Yes, subject to the restrictions explained in the answer to questions 9 and 10,
16 below, with regard to fundraising, and subject to the limits on coordinated activity included
17 in the Act and Commission regulations. 2 U.S.C. 441a(a); 11 CFR 100.52(d)(1); 11 CFR
18 109.20 to 109.21. Note that 11 CFR 300.2(b) defines "agent" as any person who has
19 actual authority, either express or implied, to solicit, receive, direct, transfer, or spend
20 funds in connection with any election on behalf of a Federal candidate or officeholder.

¹⁵ An expenditure is considered to be a contribution to a candidate when it is "made by any person in cooperation, consultation, or concert, with, or at the request or suggestion of," that candidate, the authorized committee of that candidate, or their agents. 2 U.S.C. 441a(a)(7)(B)(i). Also, an expenditure is not "independent" if it is "made in cooperation, consultation, or concert, with, or at the request or suggestion of," a candidate, authorized committee, or a political party committee. See 11 CFR 100.16.

1 **6. May STMP employ both current and former employees of Representative Flake's PCC**
2 **and congressional office?**

3 **Yes. The potential ramifications of doing so are discussed in questions 3 and 5,**
4 **above.**

5 **7. May STMP hire individuals who are, or have been, consultants to Representative**
6 **Flake's authorized committee, some in this election cycle and some in previous election**
7 **cycles?**

8 **Yes. The potential ramifications of doing so are discussed in questions 3 and 5,**
9 **above.**

10 **8. During the ballot qualification phase, may Representative Flake publicly urge Arizona**
11 **voters to sign the petition?**

12 **Yes, merely encouraging voters to sign a petition does not trigger the applicability**
13 **of 2 U.S.C. 441i(e). However, Representative Flake's communications must not extend**
14 **beyond this to become solicitations that do not comply with 2 U.S.C. 441i(e).**

15 **9. May Representative Flake raise money for STMP generally? May he raise money for**
16 **STMP specifically for the purpose of signature gathering and ballot qualification**
17 **activities? Does STMP's form of organization as a section 527 political organization, or**
18 **as a section 501(c)(4) organization affect the answer to this question? Specifically, may he**
19 **do so:**

20 **(a) By attending fundraising events for STMP?**

21 **(b) By appearing as a featured guest at a STMP fundraiser?**

22 **(c) By speaking at STMP fundraising events?**

1 (d) *By making telephone calls to raise money for STMP?*

2 (e) *By signing fundraising letters for STMP?*

3 (f) *By hosting fundraising events for STMP?*

4 For purposes of questions 9(a), 9(b), and 9(c), the Commission assumes that
5 Representative Flake is not asking for money as part of his attendance, appearance or
6 speech. Therefore, the answers to questions 9(a), 9(b), and 9(c) are "yes."

7 With regard to questions 9(d) and 9(e), the Commission notes that STMP will
8 conduct a broad-based advertising campaign that will likely include "public
9 communications" that will clearly identify a Federal candidate or officeholder. If such
10 public communications promote or support or attack or oppose a candidate for Federal
11 office, then they would constitute FEA under 2 U.S.C. 431(20)(A)(iii) and must be paid for
12 with Federal funds. Also, you have indicated that STMP will be registering voters as part
13 of its signature-gathering and ballot-qualification activities. Accordingly, the answers to
14 questions 9(d) and 9(e) must also take into account the likelihood that some of this voter
15 registration activity will constitute FEA, which also must be paid for with Federal funds
16 (see the answer to question 11). Where voter registration activity will not constitute FEA,
17 it may be paid for with funds that do not comply with the Act.

18 With regard to the questions 9(d), 9(e), and 9(f), Representative Flake may raise
19 funds for STMP to be used for signature gathering and ballot qualification activities, but he
20 must comply with the Act's restrictions on fundraising by Federal candidates and
21 officeholders. 2 U.S.C. 441i(e); 11 CFR Part 300, Subpart D. As explained in the
22 answers to questions 1 and 2, above, STMP is established by Representative Flake, who is

1 a Federal candidate and officeholder. Therefore, both Representative Flake and STMP are
2 subject to the fundraising prohibitions and restrictions in 2 U.S.C. 441i(e) and 11 CFR
3 300.60-300.65. Thus, when raising funds in connection with an election for Federal office,
4 *including any Federal election activity*, both Representative Flake and STMP must solicit,
5 receive, direct, transfer, or spend only Federal funds. 2 U.S.C. 441i(e)(1)(A); 11 CFR
6 300.60(d); 11 CFR 300.61.¹⁶

7 *Fundraising if STMP Becomes a Tax-Exempt Organization*

8 If STMP were organized under section 501(c)(4) of the Internal Revenue Code
9 rather than section 527, the general rules about fundraising by Representative Flake and by
10 STMP would be the same as explained in the preceding paragraphs. In addition to these
11 general rules, the Act, as amended by BCRA, also includes exceptions for fundraising by
12 Federal candidates, Federal officeholders, and their agents, on behalf of certain tax-exempt
13 organizations (commonly called "501(c) organizations"). 2 U.S.C. 441i(e)(4); 11 CFR
14 300.65.

15 If the 501(c) organization satisfies certain conditions, a covered person may make
16 "general solicitations" or "specific solicitations" for the 501(c) organization. A "general
17 solicitation" is made without regard to amount limitations or source prohibitions. 2 U.S.C.
18 441i(e)(4)(A); 11 CFR 300.65(a); *cf.* 2 U.S.C. 441i(e)(1). Such a "general solicitation"
19 may be made on behalf of a 501(c) organization if two conditions are met: (1) the 501(c)
20 organization does not have as its "principal purpose" engaging in FEA described in 2

¹⁶ AO 2003-3 addressed a Federal officeholder's request to raise funds for state candidates in Virginia. The conclusions in AO 2003-3 are not directly applicable in this advisory opinion because none of the requestors in AO 2003-3 were established, financed, maintained or controlled by a Federal candidate or officeholder, as STMP is here. However, the answers in this advisory opinion are consistent with the answers and reasoning in AO 2003-3.

1 U.S.C. 431(20)(A)(i) or (ii), and (2) the solicitation does not specify how the funds will or
2 should be spent. 2 U.S.C. 441i(e)(4)(A). These two types of FEA are (i) voter registration
3 within 120 days of a regularly scheduled Federal election, and (ii) voter identification,
4 generic campaign activity, and GOTV "in connection with an election in which a candidate
5 for Federal office appears on the ballot."¹⁷ 11 CFR 100.24(b)(1) and (2).

6 The Commission does not have sufficient information to address whether STMP's
7 "principal purpose" is to engage in FEA as described in 2 U.S.C. 431(20)(A)(i) or (ii). As
8 such, this question is hypothetical, and presents a general question of interpretation of the
9 Act, rather than a specific transaction or activity, and is thus not proper for an advisory
10 opinion. 2 U.S.C. 437f(a)(1); 11 CFR 112.1(b).

11 A "specific solicitation" is one made only to individuals for amounts up to \$20,000
12 during any calendar year. 2 U.S.C. 441i(e)(4)(B); 11 CFR 300.65(b). Such "specific
13 solicitations" may be made explicitly for the purpose of obtaining funds for the types of
14 FEA described above, that is, voter registration within 120 days of a regularly scheduled
15 Federal election, and voter identification, generic campaign activity, and GOTV "in
16 connection with an election in which a candidate for Federal office appears on the ballot."

17 A "specific solicitation" may also be made for a 501(c) organization whose principal

¹⁷ Commission regulations define "voter registration activity," voter identification," "generic campaign activity," and "get-out-the-vote activity". "Voter registration activity" means contacting individuals by telephone, in person, or by other individualized means to assist them in registering to vote. 11 CFR 100.24(a)(2). "Voter identification" means creating or enhancing voter lists by verifying or adding information about the voters' likelihood of voting in an upcoming election or their likelihood of voting for specific candidates. 11 CFR 100.24(a)(4). "Generic campaign activity" means a public communication [defined in 11 CFR 100.26 and discussed below] that promotes or opposes a political party and does not promote or oppose a clearly identified Federal or non-Federal candidate. 11 CFR 100.25. GOTV activity means contacting registered voters by telephone, in person, or by other individualized means to assist them in engaging in the act of voting, such as providing individual voters, within 72 hours of an election, information such as the election date, and the location and operating hours of polling places, and offering to transport, or actually transporting, voters to the polls. 11 CFR 100.24(a)(3).

1 purpose is to conduct these specific types of FEA. 2 U.S.C. 441i(e)(4)(B); 11 CFR
2 300.65(b).

3 As to whether Representative Flake may make "specific solicitations" as that term
4 is used in 2 U.S.C. 441i(e)(4)(B) on behalf of STMP, the Commission concludes that he
5 may, provided that he solicit only individuals for no more than \$20,000 per calendar
6 year.¹⁸

7 *10. May STMP engage in ballot qualification activities, such as hiring consultants to draft*
8 *the ballot measure, gathering signatures, maintaining a website, performing*
9 *administrative tasks, and raising funds? Are there any restrictions imposed by the Act on*
10 *STMP in engaging these ballot qualification activities? Does STMP's form of organization*
11 *as a section 527 political organization, or as a section 501(c)(4) organization affect the*
12 *answer to this question?*

13 To the extent this question focuses on *fundraising*, see the answer to question 9,
14 above.

15 To the extent that the "ballot qualification activities" about which you inquire are
16 voter drive-type activities, see the answer to question 11, below.

17 *11. May staff hired by STMP and paid for with money legal under Arizona ballot initiative*
18 *law, but not the Act -*

¹⁸ One reading of the new rules at 11 CFR 300.52 and 300.65 could lead to a conclusion that the regulations apply to a broader range of election activities than are covered by the statute in 2 U.S.C. 441i(e)(4)(A). This is because the rules appear to cover activities in connection with an election, including certain types of FEA, while this portion of the statute only appears to apply to those specific types of Federal election activity but not to other activities that are in connection with an election. The activities covered by the regulation should be read as limited to those covered by the statute.

1 ***(a) Engage in voter registration activities for STMP paid for with non-federal***
2 ***funds for the November 2004 election where federal candidates will be on the ballot?***
3 ***Does STMP's form of organization as a section 527 political organization, or as a section***
4 ***501(c)(4) organization affect the answer to this question?***

5 **Under the Act, as amended by BCRA, "voter registration activity" is FEA if it is**
6 **conducted within 120 days of a regularly scheduled Federal election, which may be either**
7 **a primary or general election. 2 U.S.C. 431(20)(A)(i); 11 CFR 100.24(b)(1). FEA**
8 **conducted by a Federal candidate or officeholder, or an entity directly or indirectly**
9 **established, financed, maintained, or controlled by a Federal candidate or officeholder, or**
10 **an agent of a Federal candidate or officeholder, must be paid for entirely with funds subject**
11 **to the limitations, prohibitions, and reporting requirements of the Act. 2 U.S.C.**
12 **441i(e)(1)(A); 11 CFR 300.61.**

13 **Given that STMP is established by Representative Flake, who is a Federal**
14 **candidate and officeholder, STMP must comply with 2 U.S.C. 441i(e)(1)(A) and 11 CFR**
15 **300.61. Thus, STMP must pay for all activity that constitutes FEA with funds subject to**
16 **the limitations, prohibitions and reporting requirements of the Act. November 2, 2004 is**
17 **the date of the general election and September 7, 2004 is the date of the primary election.**
18 **Therefore, the answer to this question is "no" as to the voter registration activities**
19 **conducted on or after May 10, 2004. As to voter registration activity conducted before**
20 **May 10, 2004, which is outside the 120-day periods, the answer to this question is "yes."**

- 1 ***(b) Engage in GOTV activities paid for with non-federal funds for that election?***
2 ***Does STMP's form of organization as a section 527 political organization, or as a section***
3 ***501(c)(4) organization affect the answer to this question?***

4 Under the Act, as amended by BCRA, GOTV is a FEA when it is "conducted in
5 connection with an election in which a candidate for Federal office appears on the ballot
6 (regardless of whether a candidate for State or local office also appears on the ballot)." 2
7 U.S.C. 431(20)(A)(ii). The term "in connection with an election in which a candidate for
8 Federal office appears on the ballot" means "the period of time beginning on the date of
9 the earliest filing deadline for access to the primary election ballot for Federal candidates
10 as determined by State law," or January 1 of even-numbered years in States that do not
11 conduct primaries. 11 CFR 100.24(a)(1).

12 The answer to this question is "no" on or after May 10, 2004, which is the earliest
13 filing deadline for access to the 2004 Arizona primary ballot, and thus is the earliest date at
14 which the GOTV qualifies as FEA. The reason for this answer is the same as the reasons
15 explained in the answer to question 11(a), regarding voter registration activities. Prior to
16 May 10, 2004, when GOTV activity is not in connection with an election in which a
17 candidate for Federal office appears on the ballot, STMP may use non-Federal funds for its
18 GOTV activity. See, generally, the answer to question 11(a) above.

- 19 ***12. During the ballot initiative campaign phase, may Representative Flake publicly***
20 ***advocate his support for the ballot repeal measure?***

1 Yes, merely advocating support of the measure does not trigger the applicability of
2 2 U.S.C 441i(e). However, Representative Flake's advocacy must not extend beyond this
3 to become solicitations that do not comply with section 441i(e)(1)(A) or (B).

4 *13. May Representative Flake raise funds for STMP for the ballot initiative campaign?*
5 *Does STMP's form of organization as a section 527 political organization, or as a section*
6 *501(c)(4) organization affect the answer to this question?*

7 Yes, as explained in the answer to question 9, above.

8 *14. During the ballot initiative campaign phase, may Representative Flake appear as a*
9 *speaker or honored guest at fundraising events paid for by STMP with non-Federal funds?*

10 If the fundraising event raises solely non-Federal funds that are not used for FEA or
11 electioneering communications, then the answer to this question is "yes."

12 If the fundraiser raises Federal funds, in whole or part, then the direct costs of the
13 fundraiser must be either paid for solely with Federal funds, or allocated between Federal
14 and non-Federal funds under the funds received method described in 11 CFR 106.6. The
15 Commission concludes that it would inappropriate for STMP to pay the direct costs of
16 raising Federal funds with funds that are not subject to the Act's amount limitations and
17 source prohibitions. Cf. 2 U.S.C. 441i(e)(1)(B) and 11 CFR 300.62.

18 *15. With regard to the fundraising events paid for by STMP with non-Federal funds*
19 *referenced in question 14, are the following activities permissible*

20 The answers to questions 15(a) and 15(b) assume that Representative Flake will not
21 raise non-Federal funds for FEA. 2 U.S.C. 441i(e)(1)(A); 11 CFR 300.61.

1 (a) *May he attend events paid for by STMP with non-Federal funds if he is not on*
2 *the invitation and is not introduced?*

3 Yes; see generally Advisory Opinion 2003-3.

4 (b) *May he be introduced at such events if he is not on the invitation?*

5 Yes; see generally Advisory Opinion 2003-3.

6 (c) *Is there any effect if the fact that he is a candidate on the ballot is or is not*
7 *mentioned?*

8 No.

9 (d) *Does STMP's form of organization as a section 527 political organization, or*
10 *as a section 501(c)(4) organization affect the answer to questions 15(a) – (c)?*

11 No; please see the answer to question 9, above.

12 *16. May STMP conduct a "broad-based advertising campaign" in support of the ballot*
13 *measure, which will include public communications that clearly identify a Federal*
14 *candidate, and which will be distributed from the beginning of STMP's activities (which*
15 *will be more than 120 days before the election) through election day?*

16 This question refers to public communications that will clearly identify a Federal
17 candidate. Under the Act, as amended by BCRA, a public communication¹⁹ that clearly
18 identifies a Federal candidate, and that "promotes, supports, attacks, or opposes" a Federal
19 candidate, constitutes FEA, whether or not the communication expressly advocates a vote
20 for or against a Federal candidate, and regardless of when the public communication is

¹⁹ "Public communication" is defined in 11 CFR 100.26 as "a communication by means of any broadcast, cable, or satellite communication, newspaper, magazine, outdoor advertising facility, mass mailing or telephone bank to the general public or any other form of general public political advertising. The term public communication shall not include communications over the Internet."

1 broadcast, distributed, or otherwise publicly disseminated. 11 CFR 100.24(b)(3).
2 Therefore, as noted, if one of STMP's public communications promotes, supports, attacks,
3 or opposes one or more of the Federal candidates clearly identified in it, it will constitute
4 FEA (2 U.S.C. 431(20)(A)(iii)), and therefore will have to be paid for entirely with Federal
5 funds. 2 U.S.C. 441i(e)(1)(A); 11 CFR 300.61.

6 It is not possible to address whether any of the planned public communications
7 promotes, supports, attacks, or opposes a clearly identified Federal candidate because you
8 have not supplied any further information about the content of the planned
9 communications.

10 Even if the planned public communications do not promote, support, attack, or
11 oppose a clearly identified Federal candidate, the communications will be FEA if the
12 communications qualify as voter registration activity within 120 days of a regularly
13 scheduled Federal election (11 CFR 100.24(b)(1)) or as voter identification or GOTV
14 activity in connection with an election in which a Federal candidate appears on the ballot
15 (11 CFR 100.24(b)(2)). In either of these cases, the public communications will have to be
16 paid for entirely with Federal funds. 2 U.S.C. 441i(e)(4)(A); 11 CFR 300.61. Again, it is
17 not possible to address this question further because you have not supplied any further
18 information about the content or timing of the planned communications.

1 *17. May STMP conduct "a broad-based advertising campaign" in support of the ballot*
2 *measure that will include public communications that clearly identify a Federal candidate,*
3 *and that will be broadcast to 50,000 or more people in either Representative Flake's*
4 *congressional district, or Arizona voters in general?*

5 This question turns on the status of STMP's communications as "electioneering
6 communications" under 2 U.S.C. 434(f). Subject to certain exceptions, an "electioneering
7 communication" is any broadcast, cable or satellite communication that refers to a clearly
8 identified candidate for Federal office, and is publicly distributed for a fee within 60 days
9 of a general, special or runoff election for the office sought by the candidate, or within 30
10 days of a primary or preference election for the office sought by the candidate, and, in the
11 case of a communication which refers to a candidate for office other than President or Vice
12 President, is targeted to the relevant electorate. 2 U.S.C. 434(f)(3)(A)(i); 11 CFR
13 100.29(a) and (b). "Targeted to the relevant electorate" means that the communication can
14 be received by 50,000 or more persons in the district the candidate seeks to represent, in
15 the case of a candidate for the House of Representatives, or in the State the candidate seeks
16 to represent, in the case of a candidate for Senate. 11 CFR 100.29(b)(5). The
17 electioneering communications provisions, set out at 2 U.S.C. 434(f) and 441b(b)(2), are
18 designed to ensure that such communications are not paid for by corporations and labor
19 organizations²⁰ and are reported by persons who make them.²¹

²⁰ Foreign nationals are also prohibited from making electioneering communications. 2 U.S.C. 441e(a)(1)(C); 11 CFR 110.20(e).

²¹ You state that STMP is unincorporated. If STMP were to incorporate (e.g., become an incorporated section 501(c)(4) organization), then it could not make electioneering communications unless it were a qualified non-profit corporation ("QNC"). 11 CFR 114.2(b)(2)(iii) and i 14.10.

1 You state that STMP will engage in a "broad-based advertising campaign" through
2 broadcast communications to the general public. You have not inquired about advertising
3 in other media. These communications will clearly identify a Federal officeholder and/or
4 candidate for Federal office, likely to be Senator McCain or Representative Flake, or both.
5 You state that the communications will be publicly distributed within 60 days of the
6 November 2, 2004 general election, and 30 days before the September 7, 2004 Arizona
7 primary election, and will be "targeted to the relevant electorate" within the meaning of 11
8 CFR 100.29(b)(5) because they can be received by 50,000 or more persons in
9 Representative Flake's congressional district or throughout the State. Accordingly, these
10 STMP communications will be electioneering communications, as defined in 11 CFR
11 100.29(a).

12 Funds from national banks, corporations, labor organizations or foreign nationals
13 must not be used to pay for electioneering communications under BCRA's amendments to
14 2 U.S.C. 441b. 2 U.S.C. 441b(b)(2); 441c(a)(2); 11 CFR 114.2. *See also* "Electioneering
15 Communications; Final Rules," 67 *Fed. Reg.* 65,190, 65,203 (October 23, 2002).

16 Within the parameters described above, the Commission concludes that STMP may
17 broadcast the communications described in this question.

18 STMP must disclose, among other things, persons sharing or exercising direction or
19 control over STMP, as well as certain payments for electioneering communications and
20 certain donors to STMP. *See* 2 U.S.C. 434(f); 11 CFR 104.20.

21 18. *May Representative Flake and his agents be involved in the creation, production, and*
22 *distribution of the public communications that STMP intends to include in its broad-based*

1 *advertising campaign supporting the ballot measure? This would include involvement in*
2 *decisions regarding: the contents, means, or mode of the communications, the specific*
3 *media outlets used, the timing or frequency of the communications, the size or prominence*
4 *of a printed communication, and the duration of a broadcast, cablecast, or satellite-*
5 *delivered communication.*

6 **Yes.** The possible ramifications are explained in the responses to questions 3, 5,
7 and 17, above.

8 *19. May Representative Flake play a role in selecting the media firm used to create*
9 *STMP's public communications and to receive his and his agents ideas for specific scripts*
10 *and copy?*

11 **Yes.** The possible ramifications are explained in the responses to questions 3, 5,
12 and 17, above.

13 *20. May an independent consultant hired by STMP for its referendum ads also assist in*
14 *making ads advocating Representative Flake's election for his authorized committee where*
15 *each committee would independently pay the consultant the fair market value of his*
16 *services?*

17 **Yes.** The possible ramifications are explained in the responses to questions 3 and
18 5, above.

19 *21. May an independent consultant who has been hired by Rep. Flake's authorized*
20 *committee also assist STMP with its public communications?*

21 **Yes.** The possible ramifications are explained in the responses to questions 3 and
22 5, above.

1 22. *May an independent consultant to STMP discuss STMP's public communications with*
2 *any consultant in Arizona who is working for any Federal candidate's authorized*
3 *committee?*

4 The Commission cannot address this question without further information
5 regarding the discussions. This question is hypothetical, and presents a general question of
6 interpretation of the Act, rather than a specific transaction or activity, and is thus not
7 proper for an advisory opinion. 2 U.S.C. 437f(a)(1); 11 CFR 112.1(b).

8 23. *May an independent consultant to STMP discuss STMP's communications and plans*
9 *with another independent consultant whose clients include a 2004 presidential campaign*
10 *or the Arizona or Republican or Democratic Party?*

11 The Commission cannot address this question without further information
12 regarding the discussions. This question is hypothetical, and presents a general question of
13 interpretation of the Act, rather than a specific transaction or activity, and is thus not
14 proper for an advisory opinion. 2 U.S.C. 437f(a)(1); 11 CFR 112.1(b).

15 24. *May any of the following messages be paid for by STMP exclusively with funds legal*
16 *under Arizona law but not permissible under the Act? Does STMP's form of organization*
17 *as a section 527 political organization, or as a section 501(c)(4) organization affect the*
18 *answer to this question?*

19 (a) *A message that says, "Support Ballot Measure X."*

20 (b) *A message that says, "Support Ballot Measure X. Go vote on November 2."*

21 (c) *A message that says, "Support Ballot Measure X and State Senator Jones and State*
22 *Representative Smith by voting on November 2."*

1 The Commission assumes that the proposed messages will be public
2 communications as defined in 2 U.S.C. 431(22) and 11 CFR 100.26.

3 The Commission concludes that the phrases, 'Support Ballot Measure X' and
4 'Support Ballot Measure X. Go vote on November 2,' are not, by themselves, phrases that
5 make a message "in connection with an election for Federal office," nor messages made,
6 "in connection with any election other than an election for Federal office," as those terms
7 are used in 2 U.S.C. 441i(e)(1)(A) and (B). See the discussion of the interpretation of the
8 term 'election' under the Act in question 1. Further, these messages do not, by themselves,
9 constitute FEA. 2 U.S.C. 431(20)(A); 11 CFR 100.24. As such, these messages, if
10 unaccompanied by other words or phrases that would constitute FEA or that mention a
11 candidate for either Federal or non-Federal office, may be paid for by STMP exclusively
12 with funds legal under Arizona law but not permissible under the Act.

13 However, the phrase, "Support Ballot Measure X and State Senator Jones and State
14 Representative Smith by voting on November 2," would constitute a communication "in
15 connection with any election other than an election for Federal offices," because it refers to
16 a specific non-Federal candidate election. 2 U.S.C. 441i(e)(1)(B); 11 CFR 300.62; see the
17 discussion of the interpretation of the term 'election' under the Act in question 1. Thus,
18 such communication must be paid for with funds subject to the limitations and prohibitions
19 of the Act. 2 U.S.C. 441i(e)(1)(B); 11 CFR 300.62.

1 *25. May a combination of State funds and Levin Account funds pay for public*
2 *communications by STMP?*

3 **No. Only State, district, and local political parties committees may raise and spend**
4 **Levin funds. 2 U.S.C. 441i(b)(2); 11 CFR 300.2(h) and (i); 11 CFR 300.30-300.36.**

5 *26. May STMP's staff communicate about STMP's activities and plans with the*
6 *Republican and Democratic state parties, county parties, or local parties?*

7 **It is not possible to answer this question without further information about the**
8 **subject, timing, and actions taken as a result of the "communications." As presented, this**
9 **question is hypothetical, and calls for a general interpretation of the Act, rather than a**
10 **specific transaction or activity, and is thus not proper for an advisory opinion. 2 U.S.C.**
11 **437f(a)(1); 11 CFR 112.1(b).**

12 **The Commission expresses no opinion regarding qualifications for tax-exempt**
13 **status under 26 U.S.C. 501(c)(4) or any other ramifications of the proposed activities under**
14 **the Internal Revenue Code because those questions are outside the Commission's**
15 **jurisdiction.**

16 **This response constitutes an advisory opinion concerning the application of the Act**
17 **and Commission regulations to the specific transaction or activity set forth in your request.**
18 **See 2 U.S.C. 437f. The Commission emphasizes that, if there is a change in any of the**
19 **facts or assumptions presented, and such facts or assumptions are material to a conclusion**
20 **presented in this opinion, then the requestor may not rely on that conclusion as support for**
21 **its proposed activity. The Commission notes that this advisory opinion analyzes the Act,**
22 **as amended by BCRA, and Commission regulations, including those promulgated to**

1 implement the BCRA amendments, as they pertain to your proposed activities. On May 1,
2 2003, a three-judge panel of the United States District Court for the District of Columbia
3 ruled that a number of BCRA provisions are unconstitutional and issued an order enjoining
4 the enforcement, execution, or other application of those provisions. *McConnell v. FEC*,
5 251 F.Supp. 2d 176 (D.D.C. May 1, 2003), *probable jurisdiction noted*, 123 S.Ct. 2268
6 (U.S. June 5, 2003). Subsequently, the District Court stayed its order and injunction in
7 *McConnell v. FEC*, 253 F.Supp. 2d 18 (D.D.C. May 19, 2003). The Commission cautions
8 that the legal analysis in this advisory opinion may be affected by the eventual decision of
9 the Supreme Court.

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Sincerely,

Ellen L. Weintraub
Chair

18 Enclosures (AOs 2003-3, 1991-12, 1990-16, 1989-32, 1987-12, 1984-62, 1984-46, 1984-3,
19 1982-10, 1980-95, 1978-12 and 1977-54)