



FEDERAL ELECTION COMMISSION
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AGENDA ITEM
For Meeting of: 07-17-03

SUBMITTED LATE

MEMORANDUM

TO: The Commission

THROUGH: James A. Pehrkon *JAP*
Staff Director

FROM: Lawrence H. Norton *LHN*
General Counsel

Rosemary C. Smith *RCS*
Acting Associate General Counsel

Albert J. Kiss *AK*
Staff Attorney

Subject: Draft AO 2003-12

Attached is a proposed draft of the subject advisory opinion. Based on the Commission's discussion of this advisory opinion in the open session on July 10, 2003, and on subsequent discussions of Drafts A and B that OGC has participated in with various Commissioners, we have prepared the attached Draft C.

We request that this draft be placed on the agenda for July 17, 2003.

Attachment

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:

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.

21 STMP is not a Federal political committee. You state that STMP and Representative Flake
22 plan 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 state that STMP wishes Representative Flake and his agents to bring their
22 expertise to bear on all STMP's planned public communications. STMP would like

1 Representative Flake to play a role in selecting the media firm used for STMP's public
2 communications, and STMP wishes to receive his and his agents' ideas for specific scripts
3 and copy.

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

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

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

20 *I.a. Are STMP's Activities in Connection with an Election, Within the Meaning of 2 U.S.C.*
21 *441i(e)(1)(A) and (B)?*

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

1 On November 6, 2002, the Bipartisan Campaign Reform Act of 2002 (Pub. L. 107-
2 155 (Mar. 27, 2002)) ("BCRA") took effect. As amended by BCRA, the Act regulates
3 certain actions of Federal candidates and officeholders², their agents,³ and entities directly
4 or indirectly established, financed, maintained, or controlled by them (collectively,
5 "covered persons")⁴ when they raise or spend funds in connection with either Federal or
6 non-Federal elections. 2 U.S.C. 441i(e)(1). Both BCRA and the Commission's rules
7 implementing BCRA prohibit covered persons from soliciting, receiving, directing,
8 transferring, or spending: (A) funds in connection with an election for Federal office,
9 including funds for any Federal election activity⁵, unless the funds are subject to the
10 limitations, prohibitions, and reporting requirements of the Act, and (B) funds in
11 connection with any election other than an election for Federal office unless the funds are
12 not in excess of the amounts permitted with respect to contributions to candidates and
13 political committees under 2 U.S.C. 441a(a)(1), (2), and (3), and are not from sources

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 prohibited by this Act from making contributions in connection with an election for
2 Federal office. 2 U.S.C. 441i(e)(1)(A) and (B); 11 CFR 300.61 and 300.62.⁶

3 Given that STMP's activities, other than its Federal election activities, are not "in
4 connection with an election for Federal office," a threshold issue is whether these activities
5 are "in connection with *any election other than* an election for Federal office." 2 U.S.C.
6 441i(e)(1)(A), (B) (emphasis added). Neither the Act nor Commission regulations define
7 which elections are covered by this provision. The Act's general definition of "election,"⁷
8 which includes a "general, special, primary, or runoff election," does not resolve the
9 question as to whether a state ballot measure is an election other than an election for
10 Federal office for purposes of subparagraph (B). Indeed, the interpretation of the scope of
11 section 441i(e)(1)(B) should not depend on one word in isolation.⁸ Likewise, 11 CFR
12 100.2(a), which defines "election ... to Federal office," does not explain the meaning of
13 subparagraph (B), which, by its own terms, applies to elections *other than* elections to
14 Federal office.

15 As used in subparagraph (B) of section 441i(e)(1), the term, "in connection with
16 *any election other than* an election for Federal office" is, on its face, clearly intended to
17 apply to a different category of elections than those covered by subparagraph (A), which

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

15 The Commission's previous advisory opinions, stating or otherwise indicating that
16 "contributions or expenditures" relating exclusively to ballot referenda measures are not in
17 connection with an election, are not to the contrary. Advisory Opinions 1989-32, 1984-62,

⁹ Before BCRA, the prohibition on contributions by foreign nationals 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 intention to mean different things. See, e.g., *E.E.O.C. v. Gilbarco, Inc.*, 615 F.2d 985, 999 (4th Cir. 1980).

¹¹ This statutory construction of 2 U.S.C. 441i(e) is also consistent with the Commission's decision not to create an exception to the definition of electioneering communications for ballot initiatives or referenda because ballot initiatives are becoming "increasingly linked with the public officials who support or oppose them . . . [and] the initiative or referenda . . . [can be] a proxy for the candidate . . ." "Electioneering Communications; Final Rules." 67 *Fed. Reg.* 65,190, 65,202 (October 23, 2002).

1 n.2, 1982-10, 1980-95. BCRA and the implementing regulations not only regulate certain
2 activity by Federal candidates and officeholders more broadly than before, they also
3 explicitly reach fundraising and spending by entities established, financed, maintained, or
4 controlled by such candidates or officeholders. In this respect, the Act, as amended by
5 BCRA, is now materially different than it was when those advisory opinions were issued.
6 Thus, those previous advisory opinions are not applicable to your request to the extent that
7 they could be read to mean that donations to, or disbursements on behalf of, an entity that
8 was established for the purpose of campaigning for a ballot measure, and not for any
9 Federal candidacy, are presumptively outside to the provisions of the Act and Commission
10 regulations.¹²

11 The Commission finds that all activities of a ballot measure committee
12 "established, financed, maintained or controlled" by a Federal candidate, as is the case here
13 (see the response to question 1.b., below), are "in connection with an election other than an
14 election for Federal office." This includes activity in the signature-gathering and ballot
15 qualification stage, as well as activity to win passage of the measure after it qualifies for
16 the ballot. On the other hand, activities of a ballot measure committee that is not
17 "established, financed, maintained or controlled" by a Federal candidate, officeholder, or
18 agent of either, would not be "in connection with any election other than an election for
19 Federal office" before the last day to file a ballot initiative petition under applicable State
20 law, but would be "in connection with any election other than an election for Federal
21 office" on and after that date. 2 U.S.C. 441i(e)(1)(A), (B).

¹² Advisory Opinion 1989-32 holds that foreign national donations to a ballot measure committee controlled by a State candidate are prohibited under the Act. 2 U.S.C. 441e. This holding does apply to your request.

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

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

11 The Commission concludes that Representative Flake established STMP.
12 Representative Flake is among the individuals who formed STMP, and he signed the
13 documents with the Arizona Secretary of State's office creating STMP. He was STMP's
14 Chairman from its establishment on January 17, 2003, to March 21, 2003, when he
15 resigned. An individual who also served as Representative Flake's part-time campaign
16 consultant aided the referendum Committee with its State filings and opened its bank
17 account. Representative Flake had an active and significant role in the formation of
18 STMP. 11 CFR 300.2(c)(2)(ix). Having concluded that Representative Flake established
19 STMP, it is not necessary to determine whether he will finance, maintain or control STMP.
20 As such, the Commission concludes that STMP is an entity "established, financed,
21 maintained or controlled by" Representative Flake. 2 U.S.C. 441i(e)(1); 11 CFR 300.2(c).

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

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

6 In several advisory opinions and Matters Under Review (MURs), the Commission
7 has addressed "leadership PACs." Though not defined in the Act and Commission
8 regulations, in common usage these are political committees formed by or associated with
9 Federal officeholders or candidates, and which contribute to other Federal candidates, or
10 donate to political party organizations or non-Federal candidates, or subsidize the
11 officeholder's travel. "Leadership PACs; Notice of Proposed Rulemaking," *67 Fed. Reg.*
12 *78,753, 78,754* (December 6, 2002).

13 Although the relationship between Representative Flake and STMP differs
14 somewhat from the usual relationship between a Federal officeholder or candidate and a
15 leadership PAC, the Commission finds that the relationship is sufficiently similar to
16 traditional leadership PACs to warrant treating Representative Flake and STMP as it has
17 historically treated leadership PACs for affiliation purposes. *See* "Leadership PACs;
18 Notice of Proposed Rulemaking," *67 Fed. Reg. 78,753, 78,754-78,755* (December 6,
19 2002). Therefore, the Commission concludes that STMP is not affiliated with the PCC.
20 Advisory Opinion 1978-12; MURs 1870, 2897 and 3740.

21 The Commission further concludes that under 2 U.S.C. 441a(a)(1)(C) and
22 441i(e)(1)(B), STMP and Representative Flake may raise up to a *total* of \$5,000 per

1 calendar year from any particular permissible source, without regard to the amounts
2 contributed by that source to Representative Flake's PCC.

3 Your advisory opinion request presents the following specific questions:

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

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

11 Your advisory opinion request presents numerous facts and questions that raise
12 issues as to "coordination" between STMP and Representative Flake. *See generally* 11
13 CFR Part 109, Subpart C. Under 11 CFR 109.20(a), "coordinated" means, "made in
14 cooperation, consultation, or concert with, or at the request or suggestion of, a candidate, a
15 candidate's authorized committee, or their agents"¹³ The regulations in 11 CFR
16 109.21 set forth a three-pronged test that must be satisfied to conclude that payments for a
17 coordinated communication are made for the purpose of influencing a Federal election, and
18 therefore constitute in-kind contributions. First, the communication must be paid for by
19 someone other than a candidate, an authorized committee, a political party committee, or
20 an agent of any of the foregoing. 11 CFR 109.21(a)(1). The second prong is a "content

¹³ 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. 441(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 standard” regarding the subject matter of the communication. 11 CFR 109.21(a)(2). The
2 third prong is a “conduct standard” regarding the interactions between the person paying
3 for the communication and the candidate or the candidate’s agents. 11 CFR 109.21(a)(3).
4 These conduct standards include “requests or suggestions” for communications by
5 candidates and “material involvement” in the making and airing of communications. 11
6 CFR 109.21(d)(1), (2).

7 The Commission cannot resolve whether particular communications are
8 coordinated communications without more specific information regarding those
9 communications. As such, this question is hypothetical, and presents a general question of
10 interpretation of the Act, rather than a specific transaction or activity, and is thus not
11 proper for an advisory opinion. 2 U.S.C. 437f(a)(1); 11 CFR 112.1(b).

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

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

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

20 Yes, subject to the restrictions explained in the answers to questions 9 and 10,
21 below, with regard to fundraising, and subject to the consequences resulting from
22 coordinated activity included in the Act and Commission regulations. 2 U.S.C. 441a(a); 11

1 CFR 100.52(d)(1); 11 CFR 109.20 to 109.21. Note that 11 CFR 300.2(b) defines "agent"
2 as any person who has actual authority, either express or implied, to solicit, receive, direct,
3 transfer, or spend funds in connection with any election on behalf of a Federal candidate or
4 officeholder.

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

7 Yes; the consequences of doing are based on the legal principles discussed in the
8 responses to questions 3 and 5, above.

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

12 Yes; the consequences of doing are based on the legal principles discussed in the
13 responses to questions 3 and 5, above.

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

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

19 *9. May Representative Flake raise money for STMP generally? May he raise money for*
20 *STMP specifically for the purpose of signature-gathering and ballot qualification*
21 *activities? Does STMP's form of organization as a section 527 political organization, or*

1 *as a section 501(c)(4) organization affect the answer to this question? Specifically, may he*
2 *do so:*

- 3 (a) *By attending fundraising events for STMP?*
4 (b) *By appearing as a featured guest at a STMP fundraiser?*
5 (c) *By speaking at STMP fundraising events?*
6 (d) *By making telephone calls to raise money for STMP?*
7 (e) *By signing fundraising letters for STMP?*
8 (f) *By hosting fundraising events for STMP?*

9 *Fundraising if STMP is a 527 Organization or a Tax-Exempt Organization*

10 You have indicated that STMP will be registering voters as part of its signature-
11 gathering and ballot qualification activities. Some of the voter registration activity planned
12 by STMP will likely constitute FEA, which must be paid for with Federal funds, while
13 some of this voter registration activity will not constitute FEA, and may be paid for with
14 funds that comply with the amount limitations and source prohibitions, but not the
15 reporting requirements, of the Act (i.e., that comply with the requirements of 2 U.S.C.
16 441i(e)(1)(B)).

17 Representative Flake may raise funds for STMP, but he must comply with the
18 Act's restrictions on fundraising by Federal candidates and officeholders.¹⁴ 2 U.S.C.
19 441i(e); 11 CFR Part 300, Subpart D. Because STMP is "established, financed,
20 maintained or controlled" by Representative Flake, it, too, is subject to these restrictions.

¹⁴ AO 2003-03 addressed a Federal officeholder's request to raise funds for State candidates in Virginia. The conclusions in AO 2003-03 are not applicable in this advisory opinion because none of the requestors in AO 2003-03 were "established, financed, maintained or controlled by" a Federal candidate or officeholder, as STMP is here.

1 Representative Flake and STMP "must not solicit, receive, direct, transfer, or spend funds
2 in connection with an election for Federal office, including funds for any Federal election
3 activity," unless the funds are subject to the limitations, prohibitions, and reporting
4 requirements of the Act. 2 U.S.C. 441i(e)(1)(A); 11 CFR 300.61.

5 Also, because STMP is an entity "established, financed, maintained or controlled"
6 by Representative Flake, the activities of STMP as described in your request (other than its
7 Federal election activities and electioneering communications) are in connection with an
8 election other than an election for Federal office, and thus within the scope of 2 U.S.C.
9 441i(e)(1)(B). Therefore, the solicitation restrictions of the Act regarding non-Federal
10 elections are applicable to solicitations by Representative Flake and STMP. Under section
11 441i(e)(1)(B), a person subject to 2 U.S.C. 441i(e) must not solicit, receive, direct, transfer,
12 spend, or disburse funds in excess of the amounts permitted with respect to contributions to
13 candidates and political committees or from prohibited sources under the Act. 2 U.S.C.
14 441i(e)(1)(B); 11 CFR 300.60(d); 11 CFR 300.62.

15 Specifically, Representative Flake may attend fundraising events for STMP
16 (question 9(a)), may appear as a featured guest at a STMP fundraiser (question 9(b)), may
17 speak at STMP fundraising events (question 9(c)), may make fundraising telephone calls
18 (question 9(d)), may sign fundraising letters for STMP (question 9(e)), and may host
19 fundraising events for STMP (question 9(f)).

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

21 2 U.S.C. 441i(e)(4)(A) provides that, if a 501(c) organization satisfies certain
22 conditions, a candidate for Federal office, an individual holding Federal office, or an agent

1 of either (a "covered individual"), may make "general solicitations" or "specific
2 solicitations" for the 501(c) organization.

3 A "general solicitation" is made without regard to the Act's amount limitations or
4 source prohibitions. 2 U.S.C. 441i(e)(4)(A), 11 CFR 300.65(a); cf. 2 U.S.C. 441i(e)(1).
5 Such a "general solicitation" may be made on behalf of a 501(c) organization if two
6 conditions are met: (1) the 501(c) organization does not have as its "principal purpose"
7 engaging in FEA described in 2 U.S.C. 431(20)(A)(i) to (ii), and (2) the solicitation does
8 not specify how the funds will or should be spent. 2 U.S.C. 441i(e)(4)(A). These two
9 types of FEA are (i) voter registration within 120 days of a regularly scheduled Federal
10 election, and (ii) voter identification, generic campaign activity, and GOTV "in connection
11 with an election in which a candidate for Federal office appears on the ballot."¹⁵ 11 CFR
12 100.24(b)(1) and (2):

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

¹⁵ 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 The Commission concludes that a covered individual may not make a “general
2 solicitation” or a “specific solicitation” for a 501(c) organization under 2 U.S.C. 441i(e)(4)
3 where the covered individual has “established, financed, maintained or controlled” the
4 501(c) organization under 2 U.S.C. 441i(e)(1). 2 U.S.C. 441i(e)(1)(A), (B). The
5 provisions of 2 U.S.C. 441i(e)(4) only apply to those 501(c) organizations that are not
6 “established, financed, maintained or controlled” by a covered individual. Given that
7 Representative Flake established STMP, he and STMP may only solicit up to \$5,000 per
8 calendar year for STMP. The Commission notes, however, that a 501(c) organization will
9 be not be treated as an entity “established, financed, maintained or controlled by” a
10 covered individual solely because the covered individual attends fundraising events, and /
11 or participates in, fundraising activities to some extent.¹⁶ 2 U.S.C. 441i(e)(1); 11 CFR
12 300.2(c).

13 *10. May STMP engage in ballot qualification activities, such as hiring consultants to draft*
14 *the ballot measure, gathering signatures, maintaining a website, performing*
15 *administrative tasks, and raising funds? Are there any restrictions imposed by the Act on*
16 *STMP in engaging these ballot qualification activities? 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 As to *fundraising*, see the response to question 9, above.

20 To the extent that the “signature-gathering and ballot qualification activities” about
21 which you inquire are voter drive-type activities, see the response to question 11, below.

¹⁶ A different result may occur if the covered individual is the source of a such a significant amount of funds for the 501(c) organization that the covered individual is effectively financing the organization. See generally 11 CFR 300.2(c)(2).

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

3 *(a) Engage in voter registration activities for STMP paid for with non-federal*
4 *funds for the November 2004 election where federal candidates will be on the ballot?*
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, "voter registration activity" is FEA if it is
8 conducted within 120 days of a regularly scheduled Federal election. 2 U.S.C.
9 431(20)(A)(i); 11 CFR 100.24(b)(1). Both the November 2, 2004, general election and the
10 September 7, 2004, primary election are regularly scheduled Federal elections, and
11 therefore result in two overlapping 120-day periods. FEA conducted by a Federal
12 candidate or officeholder, or an entity directly or indirectly established, financed,
13 maintained, or controlled by a Federal candidate or officeholder, or an agent of a Federal
14 candidate or officeholder, must be paid for entirely with funds subject to the limitations,
15 prohibitions, and reporting requirements of the Act. 2 U.S.C. 441i(e)(1)(A); 11 CFR
16 300.61.

17 Because STMP is "established, financed, maintained, or controlled" by
18 Representative Flake, a Federal candidate and officeholder, STMP must comply with 2
19 U.S.C. 441i(e)(1)(A) and 11 CFR 300.61. This means that it must pay for all activity that
20 constitutes FEA with funds subject to the limitations, prohibitions and reporting
21 requirements of the Act. Therefore, the answer to this question is "no" when the voter
22 registration activities are conducted between May 10, 2004 and November 2, 2004, which

1 is within 120 days of a regularly scheduled Federal election in Arizona in 2004 (i.e., the
2 September 7, 2004 primary election and the November 2, 2004 general election).

3 Before May 10, 2004, voter registration activity by STMP does not constitute FEA,
4 but because STMP will be raising and spending funds in connection with an election other
5 than an election for Federal office, the voter registration activities must be paid for with
6 funds that are raised and spent in compliance with the Act's amount limitations and source
7 prohibitions. 2 U.S.C. 441i(e)(1)(B) and 11 CFR 300.62.

8 (b) *Engage in GOTV activities paid for with non-federal funds for that election?*
9 *Does STMP's form of organization as a section 527 political organization, or as a section*
10 *501(c)(4) organization affect the answer to this question?*

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

19 The answer to this question is "no" beginning on May 10, 2004, which is the
20 earliest filing deadline for primary election ballot access under Arizona law, and thus
21 which is when the GOTV qualifies as a FEA. The reason for this answer is the same as
22 the reason explained in the answer to question 11(a), which advises that voter registration

1 activities must be paid for with Federal funds when they qualify as FEA. Prior to May 10,
2 2004, when the GOTV activity is not in connection with an election in which a candidate
3 for Federal office appears on the ballot, STMP may use funds raised in accordance with 11
4 CFR 300.62 for its GOTV activity. See, generally, the answer to question 11(a) above.

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

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

10 *13. May Representative Flake raise funds for STMP for the ballot initiative campaign?*
11 *Does STMP's form of organization as a section 527 political organization, or as a section*
12 *501(c)(4) organization affect the answer to this question?*

13 Yes. See the response to question 9, above.

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

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

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

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

5 *Yes; see generally Advisory Opinion 2003-03.*

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

7 *Yes; see generally Advisory Opinion 2003-03.*

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

10 *No.*

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

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

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

18 *Under the Act, as amended by BCRA, a public communication¹⁷ that clearly*
19 *identifies a Federal candidate, and that "promotes, supports, attacks, or opposes" a Federal*
20 *candidate, constitutes FEA, whether or not the communication expressly advocates a vote*

¹⁷ "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 for or against a Federal candidate, and regardless of when the public communication is
2 broadcast, distributed, or otherwise publicly disseminated. 2 U.S.C. 431(20)(A)(iii); 11
3 CFR 100.24(b)(3). Therefore, if one of STMP's public communications promotes,
4 supports, attacks, or opposes one or more of the Federal candidates clearly identified in it,
5 it will constitute FEA, and therefore will have to be paid for entirely with Federal funds. 2
6 U.S.C. 441i(e)(1)(A); 11 CFR 300.61.

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

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

20 *17. May STMP conduct "a broad-based advertising campaign" in support of the ballot*
21 *measure that will include public communications that clearly identify a Federal candidate,*

1 *and that will be broadcast to 50,000 or more people in either Representative Flake's*
2 *congressional district, or Arizona voters in general?*

3 This question turns on the status of STMP's communications as "electioneering
4 communications" under 2 U.S.C. 434(f). Subject to certain exceptions, an "electioneering
5 communication" is any broadcast, cable or satellite communication that refers to a clearly
6 identified candidate for Federal office, and is publicly distributed for a fee within 60 days
7 of a general, special or runoff election for the office sought by the candidate, or within 30
8 days of a primary or preference election for the office sought by the candidate, and, in the
9 case of a communication which refers to a candidate for office other than President or Vice
10 President, is targeted to the relevant electorate. 2 U.S.C. 434(f)(3)(A)(i); 11 CFR
11 100.29(a) and (b). "Targeted to the relevant electorate" means that the communication can
12 be received by 50,000 or more persons in the district the candidate seeks to represent, in
13 the case of a candidate for the House of Representatives, or in the State the candidate seeks
14 to represent, in the case of a candidate for Senate. 11 CFR 100.29(b)(5). The legislative
15 history indicates that the electioneering communications provisions, set out at 2 U.S.C.
16 434(f) and 441b(b)(2), are designed to ensure that such communications are not paid for by
17 corporations and labor organizations and are reported by persons who make them.
18 "Electioneering Communications; Final Rules," 67 Fed. Reg. 65,190 (October 23, 2002).

19 You state that STMP will engage in a "broad-based advertising campaign" through
20 broadcast communications to the general public. You have not inquired about advertising
21 in other media. These communications will clearly identify a Federal officeholder and/or
22 candidate for Federal office, likely to be Senator McCain or Representative Flake, or both.

1 You state that the communications will be publicly distributed within 60 days of the
2 November 2, 2004 general election, and 30 days before the September 7, 2004 Arizona
3 primary election, and will be "targeted to the relevant electorate" within the meaning of 11
4 CFR 100.29(b)(5) because they can be received by 50,000 or more persons in
5 Representative Flake's congressional district or throughout the State. Accordingly, these
6 STMP communications will be electioneering communications, as defined in 11 CFR
7 100.29(a).

8 Funds from national banks, corporations, labor organizations or foreign nationals
9 must not be used to pay for electioneering communications under BCRA's amendments to
10 2 U.S.C. 441b. 2 U.S.C. 441b(b)(2); 441e(a)(2); 11 CFR 114.2. *See also* "Electioneering
11 Communications; Final Rules," 67 *Fed. Reg.* 65,190, 65,203 (October 23, 2002).

12 The Commission concludes that STMP may broadcast the communications
13 described in this question. Assuming STMP follows Commission guidance in response to
14 question 9, it will have only permissible funds to pay for these communications. *See* 2
15 U.S.C. 441b and 441e, and 11 CFR 114.14. STMP's form of organization as an
16 unincorporated section 527 organization or as an unincorporated section 501(c)
17 organization does not affect the answer to this question. *See* 2 U.S.C. 441b(c)(2) to (4).¹⁸

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

¹⁸ 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 *18. May Representative Flake and his agents be involved in the creation, production, and*
2 *distribution of the public communications that STMP intends to include in its broad-based*
3 *advertising campaign supporting the ballot measure? This would include involvement in*
4 *decisions regarding: the contents, means, or mode of the communications, the specific*
5 *media outlets used, the timing or frequency of the communications, the size or prominence*
6 *of a printed communication, and the duration of a broadcast, cablecast, or satellite-*
7 *delivered communication.*

8 Yes; the consequences of doing are based on the legal principles discussed in the
9 responses to questions 3 and 5, above.

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

13 Yes; the consequences of doing are based on the legal principles discussed in the
14 responses to questions 3 and 5, above.

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

19 Yes; the consequences of doing are based on the legal principles discussed in the
20 responses to questions 3 and 5, above.

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

1 Yes; the consequences of doing are based on the legal principles discussed in the
2 responses to questions 3 and 5, above.

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

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

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

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

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

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

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

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

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

5 Because STMP is "established, financed, maintained, or controlled" by
6 Representative Flake (see the response to question 1.b., above), it is precluded from raising
7 or spending funds in excess of the amount limitations of, or from prohibited sources under,
8 the Act. See 2 U.S.C. 441i(e)(1)(B). Given that STMP is precluded from raising or
9 spending funds in excess of the amount limitations or from prohibited sources under the
10 Act, it will have no such funds in its accounts. Accordingly, the Commission does not
11 address this question as to the content of the specific messages STMP wishes to broadcast.

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

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

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

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

22 The Commission expresses no opinion regarding qualification for tax-exempt status

1 under 26 U.S.C. 501(c)(4) or any other ramifications of the proposed activities under the
2 Internal Revenue Code because those questions are outside the Commission's jurisdiction.

3 This response constitutes an advisory opinion concerning the application of the Act
4 and Commission regulations to the specific transaction or activity set forth in your request.
5 See 2 U.S.C. 437f. The Commission emphasizes that, if there is a change in any of the
6 facts or assumptions presented, and such facts or assumptions are material to a conclusion
7 presented in this opinion, then the requestor may not rely on that conclusion as support for
8 its proposed activity. The Commission notes that this advisory opinion analyzes the Act,
9 as amended by BCRA, and Commission regulations, including those promulgated to
10 implement the BCRA amendments, as they pertain to your proposed activities. On May 1,
11 2003, a three-judge panel of the United States District Court for the District of Columbia
12 ruled that a number of BCRA provisions are unconstitutional and issued an order enjoining
13 the enforcement, execution, or other application of those provisions. *McConnell v. FEC*,
14 251 F.Supp. 2d 176 (D.D.C. May 1, 2003), *probable jurisdiction noted*, 123 S.Ct. 2268
15 (U.S. June 5, 2003). Subsequently, the District Court stayed its order and injunction in
16 *McConnell v. FEC*, 253 F.Supp. 2d 18 (D.D.C. May 19, 2003). The Commission cautions
17 that the legal analysis in this advisory opinion may be affected by the eventual decision of
18 the Supreme Court.

19 Sincerely,
20
21
22

23 Ellen L. Weintraub
24 Chair
25
26

- 1 Enclosures (AOs 2003-3, 1991-12, 1990-16, 1989-32, 1987-12, 1984-62, 1984-46, 1984-3,
- 2 1982-10, 1980-95 and 1978-12)