

December 30, 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 2003-36 is available for public comments under this procedure. It was requested by Edward T. Tobin III, Executive Director, on behalf of the Republican Governors Association. The draft may be obtained from the Public Disclosure Division of the Commission.

Proposed Advisory Opinion 2003-36 will be on the Commission's agenda for its public meeting of Wednesday, January 7, 2004.

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 12:00 noon (EST) on January 6, 2004.
- 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: Robert Biersack (202) 694-1220

Commission Secretary: Mary Dove (202) 694-1040

Other inquiries:

To obtain a copy of draft AO 2003-36, contact the Public Records Office - Public Disclosure Division at (202) 694-1120 or 800-424-9530.

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

ADDRESSES

Submit a single copy of written comments to:

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

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COMMISSION
SECRETARIAT

2003 DEC 30 10 3 17



FEDERAL ELECTION COMMISSION
Washington, DC 20463

December 31, 2003

MEMORANDUM

AGENDA ITEM

For Meeting of: 01-07-04

TO: The Commission

THROUGH: James A. Pehrkon
Staff Director

JAP for JLR

FROM: Lawrence H. Norton
General Counsel

LHN (by name)

Rosemary C. Smith
Acting Associate General Counsel

RCS
[Signature]

John C. Vergelli
Acting Assistant General Counsel

Jonathan M. Levin
Senior Attorney

JL

SUBJECT: Draft AO 2003-36 – Alternative Drafts

Attached are two proposed drafts of Advisory Opinion 2003-36, which responds to a request from the Republican Governors Association ("RGA"), a 527 organization participating only in non-Federal elections, with respect to the participation of Federal candidates and officeholders ("covered individuals") in fundraising activities on behalf of the RGA. The drafts are similar in permitting participation by covered individuals in fundraising for most of RGA's accounts under specified conditions, pursuant to 2 U.S.C. 441i(e)(1)(B).

However, the drafts differ with respect to fundraising by covered individuals on behalf of RGA's Conference Account, which, according to the RGA, is segregated from the rest of RGA's funds, is used principally for expenses in connection with policy conferences, and is not directly used for any Federal or non-Federal campaign activities. The drafts also differ as to whether the Conference Account may accept donations from corporations established by Congressional authority.

Draft A emphasizes the segregated nature of the Conference Account and the nature of the activities funded by the Conference Account, and concludes that its

activities are not in connection with a non-Federal election. The draft thus provides that covered individuals may raise non-Federal funds for the Conference Account, that is, 2 U.S.C. 441i(e)(1)(B) does not apply; and that the account may accept donations from corporations established by Congressional authority. Draft B emphasizes the nature of a 527 organization as an entity organized for the express purpose of influencing elections, that RGA is a 527 organization, and that the Conference Account is a part of RGA and performs functions that are an integral part of the activities of RGA as a 527 organization. The draft thus provides that solicitations by covered individuals for the Conference Account must comply with the restrictions that are applicable with respect to RGA's other accounts, and that the Conference Account may not accept donations from corporations established by Congressional authority.

Attachments

Drafts A and B

2
3 **Edward T. Tobin, III**
4 **Executive Director**
5 **Republican Governors Association**
6 **555 11th Street, N.W,**
7 **Suite 700**
8 **Washington, D.C. 20004**

DRAFT

9
10 **Dear Mr. Tobin:**

11 **This responds to your letters dated October 16 and November 12, 2003, on behalf of the**
12 **Republican Governors Association ("RGA"), requesting an advisory opinion concerning the**
13 **application of the Federal Election Campaign Act of 1971, as amended ("the Act"), and**
14 **Commission regulations to the participation of Federal candidates and officeholders in**
15 **fundraising activities on behalf of RGA.**

16 ***Background***

17 **You state that RGA is an independent, unincorporated association that is the official**
18 **political and public policy organization of the Republican State Governors. It was established in**
19 **1963 and was an "auxiliary" organization of the Republican National Committee. You assert**
20 **that, prior to November 6, 2002, the effective date of the Bipartisan Campaign Reform Act of**
21 **2002 ("BCRA"), RGA severed its ties to the RNC. In October 2002, RGA established itself as a**
22 **"political organization" under 26 U.S.C. 527. You assert that RGA is not affiliated with a**
23 **national, State, or local political party committee, is not a Federal political committee, "does not**
24 **raise funds pursuant to [the Act]," does not participate in Federal elections, and is operated and**
25 **governed independently of any Federal political committee, candidate, or officeholder. You state**
26 **that RGA has not engaged, and does not anticipate engaging, in "Federal election activity"**
27 **("FEA") as defined in 2 U.S.C. 431(20) and 11 CFR 100.24.**

1 **RGA's mission is to aid Republican Governors, gubernatorial candidates, and other State**
2 **candidates by: (1) assisting in their elections as permitted by the laws of the different States**
3 **through direct contributions and participation in the discussion of State and local issues; (2)**
4 **providing policy assistance through conferences, debates, and public messages, and (3) providing**
5 **a platform for the Governors to express, develop, and promote their governing philosophies.**

6 **You state that RGA raises “exclusively non-federal funds” through a series of fundraising**
7 **events. It deposits these funds into several accounts that allow it to participate in elections under**
8 **the laws of the 50 States.**

9 **RGA also maintains a segregated Conference Account. You state that funds in the**
10 **Conference Account are not used to influence any election but rather to pay for the administrative**
11 **and event costs associated with the RGA's Annual Conference and its series of Governors**
12 **Forums that are conducted throughout the country. The large majority of Conference Account**
13 **expenses pay for hotel fees, catering, and meeting space usage. You state that the events funded**
14 **by the Conference Account are policy discussions and not political events, and do not include**
15 **planning for campaigning or fundraising, or the solicitation of funds for Federal or non-Federal**
16 **candidates or political committees. Conference speeches and presentations are not made by RGA**
17 **staff. They center on State and local public policy issues, and not elections, and do not include**
18 **advocacy of the election or defeat of Federal candidates. You state that, if any speaker includes**
19 **advocacy of the election or defeat of State candidates, such advocacy is beyond the purpose for**
20 **which the speaker is invited. Funds received and disbursed by the Conference Account are**
21 **included in RGA's filings with the IRS and are not separated out from the other activities of**
22 **RGA. Funds received and disbursed by the Conference Account, however, are not incorporated**
23 **into the RGA's reports filed with the States in which it conducts its activities.**

1 **Your request presents questions about fundraising for both RGA and for RGA’s**
2 **Conference Account by Federal candidates, Federal officeholders, and their agents (“covered**
3 **individuals”) in a variety of activities. In addition to the facts presented above, you have**
4 **indicated that the following predicate assumptions apply with respect to the first question (1.a,**
5 **1.b, and 1.c).**

- 6 • **First, the funds raised will be either explicitly solicited for the purpose of assisting**
7 **only in the election of State candidates or in messages on State issues mentioning**
8 **only State officials; or solicited only for RGA and not to support any specific**
9 **State candidates.**
- 10 • **Second, donations that exceed the Federal contribution limits or come from**
11 **prohibited sources will be solicited, but notice will be given to the solicitees that**
12 **the covered individual is not raising funds outside the Act’s amount limits or from**
13 **sources prohibited by the Act.**
- 14 • **Third, the solicitations by the covered individuals, whether oral or in writing, will**
15 **refer to non-Federal candidates (particularly the candidates in the States where the**
16 **solicitation is sent or aired) but will not refer to any Federal candidates.**
- 17 • **Fourth, funds solicited “only for the RGA and not to support any specific State**
18 **candidates” will be used for RGA’s administrative and overhead expenses. They**
19 **may also be used to pay for public communications that would include a mass**
20 **mailing fundraising letter not mentioning any Federal candidate and signed by the**
21 **RGA Chair, or an issue message concerning a State issue.**

1 With respect to your second question, pertaining to proposed solicitations by Federal
2 candidates, officeholders, or their agents specifically for the Conference Account, you state that
3 neither Federal nor non-Federal candidates will be mentioned.

4 ***Legal Analysis and Conclusions***

5 ***1. May a covered individual participate (a) as a featured guest at an RGA fundraising event; (b)***
6 ***by having his name appear on a written solicitation for an RGA fundraising event as the featured***
7 ***guest or speaker; or (c) by signing a written fundraising solicitation for RGA?***

8 On November 6, 2002, BCRA took effect. As amended by BCRA, the Act regulates
9 certain actions of Federal candidates and officeholders,¹ their agents,² and entities directly or
10 indirectly established, financed, maintained, or controlled by them³ when they raise or spend
11 funds in connection with either Federal or non-Federal elections. 2 U.S.C. 441i(e)(1).⁴ Both
12 BCRA and the Commission's rules implementing BCRA prohibit covered individuals from
13 soliciting, receiving, directing, transferring, or spending: (A) funds in connection with an election
14 for Federal office, including funds for any Federal election activity,⁵ unless the funds are subject
15 to the limitations, prohibitions, and reporting requirements of the Act, and (B) funds in
16 connection with any election other than an election for Federal office unless the funds are not in
17 excess of the amounts permitted with respect to contributions to candidates and political

18 _____
¹ 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.

² 11 CFR 300.2(b)(3).

³ 11 CFR 300.60.

⁴ The Act, as amended by BCRA, and Commission regulations also prohibit national committees of political parties, its officers and agents, and any entities established, financed, maintained or controlled by such committees from soliciting, receiving, spending, or directing to another person, non-Federal funds (i.e., funds that are not subject to the limitations, prohibitions, or reporting requirements of the Act. 2 U.S.C. 441i(e); 11 CFR 300.10. For the purposes of this opinion, the Commission accepts your representation that RGA has severed its ties to the RNC and is not an entity that is established, financed, maintained, or controlled by the RNC, but does not make a determination as to this issue.

⁵ 2 U.S.C. 431(20); 11 CFR 100.24.

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

4 Commission regulations state that to “solicit” means “to ask that another person make a
5 contribution, donation, transfer of funds, or otherwise provide anything of value,” whether done
6 so directly or through a conduit or intermediary. 11 CFR 300.2(m) (emphasis added). Similarly,
7 “to direct means to ask a person who has expressed an intent to make a contribution, donation, or
8 transfer of funds, or to provide anything of value, to make that contribution, donation, or transfer
9 of funds, or to provide that thing of value” 11 CFR 300.2(n) (emphasis added). *See also*
10 *McConnell v. Federal Election Commission*, _ U.S., 124 S. Ct. 619, 670 (2003). Neither “to
11 solicit” nor “to direct” includes merely providing guidance or information about the law. 11
12 CFR 300.2(m) and (n). *See Advisory Opinion 2003-03.*

13 By defining “to solicit” and “to direct” as “to ask,” the regulations establish that a Federal
14 candidate will not be held liable for soliciting funds in violation of 2 U.S.C. 441i(e) or 11 CFR
15 300.62 merely by virtue of attending or participating in any manner in connection with a
16 fundraising event at which non-Federal funds are raised. Nor will a Federal candidate or
17 officeholder be held liable based on private conversations that would require an examination to
18 infer the Federal candidate’s or officeholder’s intent. The Commission was concerned that
19 imputing intent when a private conversation is not clear on its face could lead to finding a

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); and foreign nationals (2 U.S.C. 441e). 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 violation when the candidate involved had no intention of soliciting contributions. “Such a result
2 is not dictated by BCRA’s statutory language and would raise constitutional concerns.”

3 “Prohibited and Excessive Contributions: Non-Federal Funds or Soft Money; Final Rule,” 67
4 Fed. Reg. 49064, 49086-87 (July 29, 2002). To be liable, the Federal candidate must “ask” for
5 non-Federal funds. *Id.*, see also, “Prohibited and Excessive Contributions: Non-Federal Funds
6 or Soft Money; Proposed Rule,” 67 Fed. Reg. 35654, 35660, 35681 (May 20, 2002). Thus, the
7 scope of a covered individual’s potential liability under 2 U.S.C. 441i(e)(1) and 11 CFR 300.62
8 must be determined by his or her own speech and actions in asking for funds or those of his or
9 her agents, but not by the speech or actions of another person outside his or her control. See
10 Advisory Opinions 2003-03 and 2003-05.

11 One of the factual predicates of questions 1.a., 1.b., and 1.c. is that explicit notice will be
12 given that the covered individual is *not* soliciting funds outside the limits and prohibitions of the
13 Act. In Advisory Opinion 2003-03, the Commission addressed appearances, speeches, and
14 solicitations by a Federal candidate or officeholder at fundraising events for non-Federal
15 candidates where Federally impermissible funds were being raised. The Commission interpreted
16 the Act and regulations to permit oral solicitations, and signatures on written solicitations, by a
17 covered individual, so long as the solicitations included or were accompanied by a message
18 adequately indicating that the covered individual is only asking for Federally permissible funds.
19 See 2 U.S.C. 441i(e)(1)(B); 11 CFR 300.62. The following is considered to be an adequate
20 disclaimer:

21 I am asking for a donation of up to \$2000 per election from an individual’s own
22 funds [or up to \$5,000 per election from a multi-candidate political committee or
23

1 a political party committee]. I am not asking for funds from corporations or labor
2 organizations.

3 *1.a. May a covered individual participate as a featured guest at an RGA fundraising*
4 *event?*

5 Your description of RGA's activities (other than those of the Conference
6 Account) indicates that they are in connection with the election of gubernatorial and other
7 State candidates. Hence, 2 U.S.C. 441i(e)(1)(B) applies to the proposed activities
8 described in questions 1.a, 1.b, and 1.c.

9 A covered individual may, subject to certain conditions, appear as a featured guest or
10 speaker at the events you describe. The mere attendance of the covered individual at a
11 fundraiser where non-Federal funds are raised does not, in and of itself, give rise to a violation of
12 2 U.S.C. 441i(e)(1) or 11 CFR 300.62, and the covered individual may participate in any
13 activities at such an event provided that he or she does not solicit, direct, receive, transfer, or
14 spend funds outside the Act's limits and prohibitions.

15 If the covered individual makes a speech without asking for donations to RGA, he does
16 not need to issue a disclaimer stating that he is not raising funds outside the limitations or
17 prohibitions of the Act, even though speeches by others solicit such funds. If the covered
18 individual gives a speech soliciting funds generally without mentioning specific amounts,
19 sources, or limitations, he may do so if written notices are clearly and conspicuously displayed at
20 the event indicating that the covered individual is soliciting only Federally permissible funds.⁷
21 Alternatively, if no written notices are so displayed, the covered individual must make an oral
22 disclaimer similar to the one described above and referred to in your request. If such a public

23 ⁷ See 11 CFR 110.11(c) for the Commission's interpretation of "clear and conspicuous" in related contexts.

1 oral disclaimer is made, it need only be made once, and it is not required that it be made during a
2 covered individual's one-on-one discussions with donors or other people at the event. This
3 should not, however, be construed to permit a covered individual to inoculate a solicitation of
4 non-Federal funds by reciting a rote limitation, but then encouraging the potential donor to
5 disregard the limitation. *See generally* Advisory Opinion 2003-03.

6 The requirements of 2 U.S.C. 441i(e)(1), as interpreted in Advisory Opinion 2003-03,
7 apply regardless of whether funds are solicited for the purposes of assisting only in the election
8 of State candidates or in messages on State issues mentioning only State officials; or solicited
9 only for the RGA and not to support any specific State candidates.

10 *I.b. May a covered individual participate by having his name appear on written*
11 *solicitations for an RGA fundraising event as the featured guest or speaker?*

12 Yes, he may so participate under certain conditions.

13 Section 441i(e)(1) and section 300.62 do *not* apply to publicity for an event where that
14 publicity does not constitute a solicitation or direction of non-Federal funds by a covered
15 individual, nor to a Federal candidate or officeholder merely because he or she is a featured guest
16 at a non-Federal fundraiser. Whether characterized as "publicity" or as a solicitation, the
17 applicable analysis as to the covered individual is two-fold: (1) whether the writing or publicity
18 constitutes a solicitation for funds; and (2) whether the covered individual approved, authorized,
19 or agreed or consented to be featured, or named in, the writing or publicity (e.g., through the use
20 of his name or likeness).

21 A Federal candidate may not consent to appear in any capacity in a solicitation that
22 requests funds in excess of the amount limitations or in violation of the source prohibitions of the
23 Act. If the covered individual approves, authorizes, or agrees or consents to be named or

1 featured in a solicitation, the solicitation must contain a clear and conspicuous express statement
2 that it is limited to funds that comply with the amount limits and source prohibitions of the Act.
3 *See generally* Advisory Opinion 2003-03.⁸

4 Complying with these requirements regarding the written solicitation or publicity does
5 not relieve the covered individual of the requirements as to his or her actual appearance at the
6 subsequent event as a featured guest or speaker, set out in the response to question 1.a. The
7 requirements set out in that response as to the speech and disclaimer by the covered individual,
8 clear and conspicuous written notices, and conversations by the covered individual are still
9 applicable.

10 For the reasons stated above in response to question 1.a., the requirements apply
11 regardless of whether the funds are solicited for the purposes of assisting only in the election of
12 State candidates or in messages on State issues mentioning only State officials; or solicited only
13 for the RGA and not to support any specific State candidates.

14 *I.c. May a covered individual participate by signing a written fundraising solicitation for*
15 *RGA?*

16 Yes, a covered individual may sign a written fundraising solicitation for RGA provided
17 that the covered individual complies with the requirements stated in response to questions 1.a
18 and 1.b.

19 *2. With respect to the RGA Conference Account, may a covered individual sign or appear on*
20 *written solicitations, such as signing invitation letters, or appear as a featured guest or speaker*
21 *at a fundraising event, where the donations solicited exceed the Act's amount limits or are from*

⁸ Although Advisory Opinion 2003-03 might be read to mean that a disclaimer is required in publicity or other written solicitations that explicitly ask for donations "in amounts exceeding the Act's limitations and from sources prohibited from contributing under the Act," that was not the Commission's meaning. The Commission wishes to make clear that the covered individual may not approve, authorize, agree, or consent to appear in publicity that explicitly solicits funds that are in excess of the limits or prohibitions of the Act, regardless of the appearance of such a disclaimer.

1 *prohibited sources but the solicitation does not include a notice that the covered individual is not*
2 *raising funds outside the amount limits and source prohibitions of the Act?*

3

4 Yes, these actions by covered individuals are permissible because the Commission
5 concludes that the activities of the Conference Account, as you describe them, are not in
6 connection with an election for either Federal or non-Federal office. Hence, the requirements of
7 2 U.S.C. 441i(e)(1)(A) and (B) would not be applicable to solicitations solely for the Conference
8 Account.

9 The funds in the Conference Account are not, and will not be, used to influence any
10 election, but rather to pay for administrative and event costs associated with RGA's Annual
11 Conference and its Governors Conferences. The activities at these conferences do not include
12 planning for campaigning or fundraising, or other campaign activities, but are, instead, policy
13 discussions. You describe the expenses incurred by the Conference Account as administrative
14 expenses such as hotel fees, catering costs, and meeting space rental related to conducting the
15 Conferences. The funds in this account are segregated from the rest of RGA's funds, which the
16 Commission assumes to mean that no funds are, or will be, transferred to or from the Conference
17 Account, and that no Conference Account funds are, or will be, used to support any other RGA
18 activities. Moreover, as you have described the Conference Account, the administrative
19 expenses are not used, directly or indirectly, to equip, facilitate, or otherwise enable the conduct
20 of any candidate support activities. Conference account funds are used exclusively for
21 conferences on issues and are useful to the Governors in their State officeholding functions. In
22 reaching this conclusion, the Commission also takes note of the fact that the disbursements and
23 receipts of the Conference Account are not included in reports filed by the RGA with the States,

1 which pertain to support of non-Federal candidates and activities in connection with non-Federal
2 elections.

3 *3. May RGA's Conference Account accept donations from corporations organized by authority*
4 *of Congress, such as the Federal Home Loan Mortgage Corporation and the Federal National*
5 *Mortgage Association?*

6
7 As noted in response to question 2, the activities funded by the Conference Account are
8 not in connection with an election for either Federal or non-Federal office. Hence, the
9 prohibition in 2 U.S.C. 441b(a) against contributions in connection with any election to any
10 political office by "any corporation organized by authority of any law of Congress" would not
11 apply. Thus, the Conference Account may accept donations from the Federal Home Loan
12 Mortgage Corporation and the Federal National Mortgage Association that are specifically
13 designated for, and used exclusively by, the Conference Account.

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

20 Sincerely,

21
22
23
24 Bradley A. Smith
25 Chairman
26

27 Enclosures (AOs 2003-05 and 2003-03)
28
29

2
3 Edward T. Tobin, III
4 Executive Director
5 Republican Governors Association
6 555 11th Street, N.W.,
7 Suite 700
8 Washington, D.C. 20004

DRAFT

9
10 Dear Mr. Tobin:

11 This responds to your letters dated October 16 and November 12, 2003, on behalf of the
12 Republican Governors Association ("RGA"), requesting an advisory opinion concerning the
13 application of the Federal Election Campaign Act of 1971, as amended ("the Act"), and
14 Commission regulations to the participation of Federal candidates and officeholders in
15 fundraising activities on behalf of RGA.

16 ***Background***

17 You state that RGA is an independent, unincorporated association that is the official
18 political and public policy organization of the Republican State Governors. It was established in
19 1963 and was an "auxiliary" organization of the Republican National Committee. You assert
20 that, prior to November 6, 2002, the effective date of the Bipartisan Campaign Reform Act of
21 2002 ("BCRA"), RGA severed its ties to the RNC. In October 2002, RGA established itself as a
22 "political organization" under 26 U.S.C. 527. You assert that RGA is not affiliated with a
23 national, State, or local political party committee, is not a Federal political committee, "does not
24 raise funds pursuant to [the Act]," does not participate in Federal elections, and is operated and
25 governed independently of any Federal political committee, candidate, or officeholder. You state
26 that RGA has not engaged, and does not anticipate engaging, in "Federal election activity"
27 ("FEA") as defined in 2 U.S.C. 431(20) and 11 CFR 100.24.

1 **RGA’s mission is to aid Republican Governors, gubernatorial candidates, and other State**
2 **candidates by: (1) assisting in their elections as permitted by the laws of the different States**
3 **through direct contributions and participation in the discussion of State and local issues; (2)**
4 **providing policy assistance through conferences, debates, and public messages, and (3) providing**
5 **a platform for the Governors to express, develop, and promote their governing philosophies.**

6 **You state that RGA raises “exclusively non-federal funds” through a series of fundraising**
7 **events. It deposits these funds into several accounts that allow it to participate in elections under**
8 **the laws of the 50 States.**

9 **RGA also maintains a segregated Conference Account. You state that funds in the**
10 **Conference Account are not used to influence any election but rather to pay for the administrative**
11 **and event costs associated with the RGA’s Annual Conference and its series of Governors**
12 **Forums that are conducted throughout the country. The large majority of Conference Account**
13 **expenses pay for hotel fees, catering, and meeting space usage. You state that the events funded**
14 **by the Conference Account are policy discussions and not political events, and do not include**
15 **planning for campaigning or fundraising, or the solicitation of funds for Federal or non-Federal**
16 **candidates or political committees. Conference speeches and presentations are not made by RGA**
17 **staff. They center on State and local public policy issues, and not elections, and do not include**
18 **advocacy of the election or defeat of Federal candidates. You state that, if any speaker includes**
19 **advocacy of the election or defeat of State candidates, such advocacy is beyond the purpose for**
20 **which the speaker is invited. Funds received and disbursed by the Conference Account are not**
21 **incorporated into RGA’s reports filed with the States in which it conducts its activities.**
22 **However, funds received and disbursed by the Conference Account are included in RGA’s filings**
23 **with the IRS and are not separated out from the other activities of RGA.**

1 **Your request presents questions about fundraising for both RGA and for RGA’s**
2 **Conference Account by Federal candidates, Federal officeholders, and their agents (“covered**
3 **individuals”)** in a variety of activities. In addition to the facts presented above, you have
4 indicated that the following predicate assumptions apply with respect to the first question (1.a,
5 1.b, and 1.c).

- 6 • **First, the funds raised will be either explicitly solicited for the purpose of assisting**
7 **only in the election of State candidates or in messages on State issues mentioning**
8 **only State officials; or solicited only for RGA and not to support any specific**
9 **State candidates.**
- 10 • **Second, donations that exceed the Federal contribution limits or come from**
11 **prohibited sources will be solicited, but notice will be given to the solicitees that**
12 **the covered individual is not raising funds outside the Act’s amount limits or from**
13 **sources prohibited by the Act.**
- 14 • **Third, the solicitations by the covered individuals, whether oral or in writing, will**
15 **refer to non-Federal candidates (particularly the candidates in the States where the**
16 **solicitation is sent or aired) but will not refer to any Federal candidates.**
- 17 • **Fourth, funds solicited “only for the RGA and not to support any specific State**
18 **candidates” will be used for RGA’s administrative and overhead expenses. They**
19 **may also be used to pay for public communications that would include a mass**
20 **mailing fundraising letter not mentioning any Federal candidate and signed by the**
21 **RGA Chair, or an issue message concerning a State issue.**

1 With respect to your second question, pertaining to proposed solicitations by Federal
2 candidates, officeholders, or their agents specifically for the Conference Account, you state that
3 neither Federal nor non-Federal candidates will be mentioned.

4 ***Legal Analysis and Conclusions***

5 ***1. May a covered individual participate (a) as a featured guest at an RGA fundraising event; (b)***
6 ***by having his name appear on a written solicitation for an RGA fundraising event as the featured***
7 ***guest or speaker; or (c) by signing a written fundraising solicitation for RGA?***

8 On November 6, 2002, BCRA took effect. As amended by BCRA, the Act regulates
9 certain actions of Federal candidates and officeholders,¹ their agents,² and entities directly or
10 indirectly established, financed, maintained, or controlled by them³ when they raise or spend
11 funds in connection with either Federal or non-Federal elections. 2 U.S.C. 441i(e)(1).⁴ Both
12 BCRA and the Commission's rules implementing BCRA prohibit covered individuals from
13 soliciting, receiving, directing, transferring, or spending: (A) funds in connection with an election
14 for Federal office, including funds for any Federal election activity,⁵ unless the funds are subject
15 to the limitations, prohibitions, and reporting requirements of the Act, and (B) funds in
16 connection with any election other than an election for Federal office unless the funds are not in
17 excess of the amounts permitted with respect to contributions to candidates and political

18

¹ 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.

² 11 CFR 300.2(b)(3).

³ 11 CFR 300.60.

⁴ The Act, as amended by BCRA, and Commission regulations also prohibit national committees of political parties, its officers and agents, and any entities established, financed, maintained or controlled by such committees from soliciting, receiving, spending, or directing to another person, non-Federal funds (i.e., funds that are not subject to the limitations, prohibitions, or reporting requirements of the Act. 2 U.S.C. 441i(a); 11 CFR 300.10. For the purposes of this opinion, the Commission accepts your representation that RGA has severed its ties to the RNC and is not an entity that is established, financed, maintained, or controlled by the RNC, but does not make a determination as to this issue.

⁵ 2 U.S.C. 431(20); 11 CFR 100.24.

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

4 Commission regulations state that to “solicit” means “to ask that another person make a
5 contribution, donation, transfer of funds, or otherwise provide anything of value,” whether done
6 so directly or through a conduit or intermediary. 11 CFR 300.2(m) (emphasis added). Similarly,
7 “to direct means to ask a person who has expressed an intent to make a contribution, donation, or
8 transfer of funds, or to provide anything of value, to make that contribution, donation, or transfer
9 of funds, or to provide that thing of value” 11 CFR 300.2(n) (emphasis added). *See also*
10 *McConnell v. Federal Election Commission*, _ U.S., 124 S. Ct. 619, 670 (2003). Neither “to
11 solicit” nor “to direct” includes merely providing guidance or information about the law. 11
12 CFR 300.2(m) and (n). *See Advisory Opinion 2003-03.*

13 By defining “to solicit” and “to direct” as “to ask,” the regulations establish that a Federal
14 candidate will not be held liable for soliciting funds in violation of 2 U.S.C. 441i(e) or 11 CFR
15 300.62 merely by virtue of attending or participating in any manner in connection with a
16 fundraising event at which non-Federal funds are raised. Nor will a Federal candidate or
17 officeholder be held liable based on private conversations that would require an examination to
18 infer the Federal candidate’s or officeholder’s intent. The Commission was concerned that
19 imputing intent when a private conversation is not clear on its face could lead to finding a

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); and foreign nationals (2 U.S.C. 441e). 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 violation when the candidate involved had no intention of soliciting contributions. “Such a result
2 is not dictated by BCRA’s statutory language and would raise constitutional concerns.”

3 “Prohibited and Excessive Contributions: Non-Federal Funds or Soft Money; Final Rule,” 67
4 Fed. Reg. 49064, 49086-87 (July 29, 2002). To be liable, the Federal candidate must “ask” for
5 non-Federal funds. *Id.*, see also, “Prohibited and Excessive Contributions: Non-Federal Funds
6 or Soft Money; Proposed Rule,” 67 Fed. Reg. 35654, 35660, 35681 (May 20, 2002). Thus, the
7 scope of a covered individual’s potential liability under 2 U.S.C. 441i(e)(1) and 11 CFR 300.62
8 must be determined by his or her own speech and actions in asking for funds or those of his or
9 her agents, but not by the speech or actions of another person outside his or her control. See
10 Advisory Opinions 2003-03 and 2003-05.

11 One of the factual predicates of questions 1.a., 1.b., and 1.c. is that explicit notice will be
12 given that the covered individual is *not* soliciting funds outside the limits and prohibitions of the
13 Act. In Advisory Opinion 2003-03, the Commission addressed appearances, speeches, and
14 solicitations by a Federal candidate or officeholder at fundraising events for non-Federal
15 candidates where Federally impermissible funds were being raised. The Commission interpreted
16 the Act and regulations to permit oral solicitations, and signatures on written solicitations, by a
17 covered individual, so long as the solicitations included or were accompanied by a message
18 adequately indicating that the covered individual is only asking for Federally permissible funds.
19 See 2 U.S.C. 441i(e)(1)(B); 11 CFR 300.62. The following is considered to be an adequate
20 disclaimer:

21 I am asking for a donation of up to \$2000 per election from an individual’s own
22 funds [or up to \$5,000 per election from a multi-candidate political committee or
23

1 a political party committee]. I am not asking for funds from corporations or labor
2 organizations.

3 *1.a. May a covered individual participate as a featured guest at an RGA fundraising*
4 *event?*

5 Your description of RGA's activities (other than those of the Conference
6 Account) indicates that they are in connection with the election of gubernatorial and other
7 State candidates. Hence, 2 U.S.C. 441i(e)(1)(B) applies to the proposed activities
8 described in questions 1.a, 1.b, and 1.c.

9 A covered individual may, subject to certain conditions, appear as a featured guest or
10 speaker at the events you describe. The mere attendance of the covered individual at a
11 fundraiser where non-Federal funds are raised does not, in and of itself, give rise to a violation of
12 2 U.S.C. 441i(e)(1) or 11 CFR 300.62, and the covered individual may participate in any
13 activities at such an event provided that he or she does not solicit, direct, receive, transfer, or
14 spend funds outside the Act's limits and prohibitions.

15 If the covered individual makes a speech without asking for donations to RGA, he does
16 not need to issue a disclaimer stating that he is not raising funds outside the limitations or
17 prohibitions of the Act, even though speeches by others solicit such funds. If the covered
18 individual gives a speech soliciting funds generally without mentioning specific amounts,
19 sources, or limitations, he may do so if written notices are clearly and conspicuously displayed at
20 the event indicating that the covered individual is soliciting only Federally permissible funds.⁷
21 Alternatively, if no written notices are so displayed, the covered individual must make an oral
22 disclaimer similar to the one described above and referred to in your request. If such a public

23

⁷ See 11 CFR 110.11(c) for the Commission's interpretation of "clear and conspicuous" in related contexts.

1 oral disclaimer is made, it need only be made once, and it is not required that it be made during a
2 covered individual's one-on-one discussions with donors or other people at the event. This
3 should not, however, be construed to permit a covered individual to inoculate a solicitation of
4 non-Federal funds by reciting a rote limitation, but then encouraging the potential donor to
5 disregard the limitation. *See generally* Advisory Opinion 2003-03.

6 The requirements of 2 U.S.C. 441i(e)(1), as interpreted in Advisory Opinion 2003-03,
7 apply regardless of whether funds are solicited for the purposes of assisting only in the election
8 of State candidates or in messages on State issues mentioning only State officials; or solicited
9 only for the RGA and not to support any specific State candidates.

10 *I.b. May a covered individual participate by having his name appear on written*
11 *solicitations for an RGA fundraising event as the featured guest or speaker?*

12 Yes, he may so participate under certain conditions.

13 Section 441i(e)(1) and section 300.62 do *not* apply to publicity for an event where that
14 publicity does not constitute a solicitation or direction of non-Federal funds by a covered
15 individual, nor to a Federal candidate or officeholder merely because he or she is a featured guest
16 at a non-Federal fundraiser. Whether characterized as "publicity" or as a solicitation, the
17 applicable analysis as to the covered individual is two-fold: (1) whether the writing or publicity
18 constitutes a solicitation for funds; and (2) whether the covered individual approved, authorized,
19 or agreed or consented to be featured, or named in, the writing or publicity (e.g., through the use
20 of his name or likeness).

21 A Federal candidate may not consent to appear in any capacity in a solicitation that
22 requests funds in excess of the amount limitations or in violation of the source prohibitions of the
23 Act. If the covered individual approves, authorizes, or agrees or consents to be named or

1 featured in a solicitation, the solicitation must contain a clear and conspicuous express statement
2 that it is limited to funds that comply with the amount limits and source prohibitions of the Act.
3 *See generally* Advisory Opinion 2003-03.⁸

4 Complying with these requirements regarding the written solicitation or publicity does
5 not relieve the covered individual of the requirements as to his or her actual appearance at the
6 subsequent event as a featured guest or speaker, set out in the response to question 1.a. The
7 requirements set out in that response as to the speech and disclaimer by the covered individual,
8 clear and conspicuous written notices, and conversations by the covered individual are still
9 applicable.

10 For the reasons stated above in response to question 1.a., the requirements apply
11 regardless of whether the funds are solicited for the purposes of assisting only in the election of
12 State candidates or in messages on State issues mentioning only State officials; or solicited only
13 for the RGA and not to support any specific State candidates.

14 *I.c. May a covered individual participate by signing a written fundraising solicitation for*
15 *RGA?*

16 Yes, a covered individual may sign a written fundraising solicitation for RGA provided
17 that the covered individual complies with the requirements stated in response to questions 1.a
18 and 1.b.

19 *2. With respect to the RGA Conference Account, may a covered individual sign or appear on*
20 *written solicitations, such as signing invitation letters, or appear as a featured guest or speaker*
21 *at a fundraising event, where the donations solicited exceed the Act's amount limits or are from*

⁸ Although Advisory Opinion 2003-03 might be read to mean that a disclaimer is required in publicity or other written solicitations that explicitly ask for donations "in amounts exceeding the Act's limitations and from sources prohibited from contributing under the Act," that was not the Commission's meaning. The Commission wishes to make clear that the covered individual may not approve, authorize, agree, or consent to appear in publicity that explicitly solicits funds that are in excess of the limits or prohibitions of the Act, regardless of the appearance of such a disclaimer.

1 *prohibited sources but the solicitation does not include a notice that the covered individual is not*
2 *raising funds outside the amount limits and source prohibitions of the Act?*

3
4 **No, the covered individual may not so participate under those circumstances. The**
5 **requirements described above in response to questions 1.a, 1.b, and 1.c are applicable to the**
6 **situations described in question 2, including the need for the notice that the covered individual is**
7 **asking for funds only up to the applicable limits of the Act, and is not asking for funds outside**
8 **the limitations or prohibitions of the Act.**

9 **As recognized by the Supreme Court in *McConnell v. Federal Election Commission*,**

10 **[s]ection 527 political organizations are, unlike 501(c) groups, organized**
11 **for the express purpose of engaging in partisan political activity. They include**
12 **any “party committee, association, fund, or other organization (whether or not**
13 **incorporated) organized and operated primarily for the purpose or directly or**
14 **indirectly accepting contributions or making expenditures” for the purpose of**
15 **“influencing or attempting to influence the selection, nomination, or appointment**
16 **of any individual for Federal, State, or local public office. 26 U.S.C. 527(e).**

17
18 ***McConnell*, 124 S.Ct., at 678, n.67. In contrasting 527 organizations with 501(c) organizations,**
19 **the Court, in *McConnell*, further noted that the former are organizations “which by definition**
20 **engage in partisan political activity.” *Id.*, at 679.**

21 **In October 2002, the RGA filed a Form 8871 with the Internal Revenue Service by which**
22 **it registered as a section 527 organization. On the form, RGA states its purpose as follows: “The**
23 **Republican Governors Association supports the election of Republican Governors and other**
24 **nonfederal candidates, promotes Republican policies, and engages in other state and local**
25 **election activities.” This statement reflects the partisan political nature of this and other 527**
26 **organizations, whether they are Federal political committees or committees supporting only non-**
27 **Federal candidates. Not every dollar raised by such a committee is used directly for contributions**
28 **or donations to, or expenditures or disbursements on behalf of, specific candidates. A portion of**

1 the funds raised by such committees are used for administrative support and for fundraising, and
2 also for public issue discussion or communications that further the purposes of the committee,
3 including the purpose of providing informational support or guidance to and for candidates and
4 officeholders of a specific political party, philosophy, or issue orientation that may aid them in
5 their campaigns, as well as their officeholding capacities. Moreover, when such committees
6 raise funds specifically for activities that do not entail the direct support of specific candidates,
7 such activity has the effect of freeing up the other funds on hand for support of specific
8 candidates or groups of candidates. Thus, even though the activities of the Conference Account
9 might be the kinds of activities that, in isolation, could be performed by a 501(c) organization,
10 they appear to be an integral part of the activities of RGA as a 527 organization, an organization
11 attempting to influence the election or defeat of candidates.⁹ As such, donations or
12 “contributions” to the Conference Account must be treated in the same manner as donations for
13 other purposes of RGA. Therefore, the solicitation of funds for the Conference Account
14 constitutes fundraising in connection with an election other than an election for Federal office
15 under 2 U.S.C. 441i(e)(1)(B) and 11 CFR 300.62.

16 *3. May RGA's Conference Account accept donations from corporations organized by authority*
17 *of Congress, such as the Federal Home Loan Mortgage Corporation and the Federal National*
18 *Mortgage Association?*

19
20 The Act, at 2 U.S.C. 441b(a) prohibits “any corporation established by authority of any
21 law of Congress” from making a contribution in connection with any election to any political
22 office. As indicated above, contributions or donations to RGA's Conference Account would be

⁹ The Commission also notes your statement that the funds received and disbursed by the Conference Account are included in the RGA's regularly filed reports with the IRS. A review of several Form 8872s filed with the IRS indicates that this is the case. Thus, RGA treats the contributions received by the Conference Account as receipts of RGA and not of a separate organization. In the absence of a Form 990 or a Form 1120-POL, however, the Commission does not know whether RGA is reporting the receipts of the Conference Account as non-exempt

1 in connection with an election other than an election to Federal office. Therefore, the Conference
2 Account may not accept contributions or donations from the Federal Home Loan Mortgage
3 Corporation and the Federal National Mortgage Association.

4 This response constitutes an advisory opinion concerning the application of the Act and
5 Commission regulations to the specific transaction or activity set forth in your request. *See* 2
6 U.S.C. 437f. The Commission emphasizes that, if there is a change in any of the facts or
7 assumptions presented and such facts or assumptions are material to a conclusion presented in
8 this advisory opinion, then the requester may not rely on that conclusion as support for its
9 proposed activity.

10 Sincerely,

11
12
13
14 Bradley A. Smith
15 Chairman

16
17 Enclosures (AOs 2003-05 and 2003-03)
18
19

function income, i.e., the income that does not fit within the functions of attempting to influence the appointment or election of persons to public office or to an office in a political organization. *See* 26 U.S.C. 527(e)(2).