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FEDERAL ELECTION COMMISSION
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MEMORANDUM

TO: The Commission

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AGENDA ITEM
For Meeting of: 02-05-04

SUBMITTED LATE

SUBJECT: Amendments to Agenda Doc. 04-11
(Draft AO 2003-37)

The Office of General Counsel proposes the following changes:

Page 2, Line 3 to Page 3, Line 7: Strike and replace with the following:

The Commission concludes that the activities about which you inquire fall into a few general categories. Many of the activities about which you inquire are covered by the existing allocation regulations in 11 CFR Part 106. Some are generic voter drives

governed by 11 CFR 106.6(b)(2)(iii). Other communications by ABC must be treated as a combination of expenditures for Federal candidates and disbursements for non-Federal candidates allocable under 11 CFR 106.1.

You also ask about certain communications that refer to a clearly identified Federal candidate, but that do not expressly advocate the election or defeat of that candidate. Prior to the Supreme Court's decision in *McConnell v. FEC*, 540 U.S. ____, 124 S.Ct. 619, 687 (2003), many believed that "*Buckley v. Valeo*, 424 U.S. 1 (1975)] drew a constitutionally mandated line between express advocacy and so-called issue advocacy" such that for present purposes only communications that contained express advocacy were considered "expenditures" that had to be paid for with funds subject to the limitations and source prohibitions of the Act. In *McConnell*, the Supreme Court clarified that the express advocacy test is not a constitutional barrier establishing whether communications are "for the purpose of influencing any Federal election," which is the operative term used in the definition of "expenditure" in 2 U.S.C. 431(9). 124 S.Ct. at 688-689. *In short, there is no statutory requirement and, in light of McConnell, no Constitutional requirement, that express advocacy be the basis for distinguishing which of ABC's proposed communications may be paid for with Federal funds and which can be paid for with non-Federal funds, i.e., funds that are not subject to the Act's limitations and source prohibitions.*

The Supreme Court also upheld a key provision of the Bipartisan Campaign Reform Act of 2002, Pub. L. 107-155 (Mar. 27, 2002) ("BCRA") regulating public communications by officeholders and party committees that promote, support, attack, or oppose a clearly identified Federal candidate (2 U.S.C. 431(20)(A)(iii)), finding that such communications "undoubtedly have a dramatic effect on Federal elections." *McConnell*, 124 S.Ct. at 675. Moreover, the Court found that the regulation of these communications survives constitutional vagueness concerns because the terms "promote," "support," "attack" and "oppose" are explicit standards giving "the person of ordinary intelligence reasonable opportunity to know what is prohibited." *McConnell* at 675, n. 64, citing *Grayned v. City of Rockford*, 408 U.S. 104, 108-109 (1972). Under BCRA, these public communications cannot be paid for with non-Federal funds by Federal, state and local officeholders or party committees. 2 U.S.C. 441i(a), (b), (e) and (f).

Page 10, line 21: Replace "a" with "other", and make "committee" plural.

Page 12, line 21: Insert "in the introduction to the legal analysis" after "explained".

Page 13, line 12: Replace the comma with a period, and insert after the period the following: "These communications are for the purpose of influencing a Federal election and therefore are an expenditure with the meaning of 2 U.S.C. 431(9)."

Page 13, line 13: Insert "See the introduction to the legal analysis, above." after the sentence that ends on line 13.

Page 13, line 13: Strike "Federal funds cannot include" after "Because".

Page 13, line 14: Insert "cannot be used for expenditures (2 U.S.C. 441b)" after "funds".

Page 14, line 8: Insert "in the introduction to the legal analysis" after "As explained".

Page 14, line 24: Insert "in the introduction to the legal analysis" after "As discussed".

Page 15, line 18: Replace "As explained above, ABC will fund activity that will be used" with "The Commission concludes that ABC's voter drive activity is".

Page 21, line 16: Insert "Federal or non-Federal" after "other".

Page 21, line 16: Insert "or elections" after "candidates".

Page 21, line 17: Replace "this solicitation" with "these facts".

Page 21, line 20: Insert "The fact that ABC intends to spend the funds raised through this solicitation for generic activity does not alter the conclusion that the solicitation is for Federal funds." after "messages."

Page 23, line 24: Insert as a new footnote following "2003-3." the following: "The answers to questions 15 and 16 collectively mean that a Federal candidate or officeholder may only solicit funds for ABC's Federal and non-Federal accounts to the extent that the combined amounts solicited for Federal and non-Federal accounts do not exceed the amounts permitted under the Act's contribution limits. 11 CFR 300.62; see Explanation and Justification to Prohibited and Excessive Contributions: Non-Federal Funds or Soft Money, 67 Fed. Reg. 49,107."

Page 25, line 19: Insert "; see 11 CFR 300.2(m), (n). In *McConnell*, the Court found the regulatory definitions of the terms "to solicit" and "to direct," interpreted in the context of the larger statutory scheme of section 441i, "permit[s] a wide range of joint planning and electioneering activity." 124 S.Ct. at 670." after "*Id.*".

Page 25, line 19: Make the first letter of "see" uppercase.

Page 27, line 7: Replace "it" with "the entire solicitation".

Page 27, line 9: Insert two spaces after "2003-3."

Page 28, line 21: Insert as a new footnote after "candidates." the following: "Please see the answer to question 15, above, regarding the conditions for deposit of Federal funds under 11 CFR 102.5."

Page 29, line 3: Insert "such as "Give to ABC so we can support President Bush's reelection" [25]," after "candidates,".

Page 29, line 4: Insert “*Id.*; 11 CFR 102.5(a)(2)(ii).” after “prohibitions.”

Page 29, line 4: Insert as a new footnote after “prohibitions.” the following: “The Commission notes that the joint fundraising rules at 11 CFR 102.17 do not apply to the solicitation about which you inquire.”

Page 29, line 25: Insert “However, the invitation to the issues forum and the fundraising solicitation must be in separate mailings, or the entire mailing must satisfy the conditions set out in the answer to question 18, above.” after “forum.”