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AGENDA ITEM
For Meeting of: 02-18-04

MEMORANDUM

TO: The Commission
FROM: Vice Chair Ellen L. Weintraub *EW*
DATE: 02/17/2004

SUBMITTED LATE

SUBJECT: AO 2003-37(ABC)

Attached is a revised version of Agenda Document 04-11, which incorporates many of OGC's proposed amendments in Agenda Document 04-11-A. The additional proposed changes to Agenda Document 04-11 are largely designed to ensure that this advisory opinion addresses the particular facts before the Commission, and that broader topics are left for the upcoming rulemaking, as appropriate under 11 CFR part 112. Some suggested changes from other Commissioners have been incorporated as well.

1 **ADVISORY OPINION 2003-37**

2

3 **Keith A. Davis**

4 **Treasurer**

5 **Americans for a Better Country**

6 **228 S. Washington Street**

7 **Alexandria, VA 22314**

8

9

10 **Dear Mr. Davis:**

11 **This responds to your letter dated November 18, 2003, requesting an advisory**
12 **opinion on behalf of Americans for a Better Country (“ABC”), concerning the application**
13 **of the Federal Election Campaign Act of 1971, as amended (“the Act” or “FECA”), and**
14 **Commission regulations to a variety of political activities. ABC is an unincorporated, non-**
15 **connected political committee organized under Section 527 of the Internal Revenue Code**
16 **with Federal and non-Federal accounts that registered with the Commission on September**
17 **4, 2003. As always, this Advisory Opinion is premised on the specific facts and**
18 **circumstances posited in your request. See 11 CFR part 112. The fact that ABC is a**
19 **political committee is particularly relevant. This opinion does not set forth general**
20 **standards that might be applicable to other tax-exempt entities.**

21

22

23 ***Background***

24 **Your request concerns the raising and spending of Federal and non-Federal funds**
25 **for a wide range of campaign activities. Some of your proposed activities involve public**
26 **communications regarding specific Federal candidates, or Federal candidates holding**
27 **positions on issues of importance to ABC. The activities proposed in your request appear**

1 to include only one communication that involves a specific non-Federal candidate. Your
2 proposed activities also include voter mobilization programs. In addition, you seek
3 guidance on coordinating these campaign activities with ~~f~~Federal candidates and their
4 agents, and having Federal candidates assist ABC by soliciting funds for ABC's proposed
5 activities.¹

6

7 ***Legal Analysis and Conclusions***8 ***Introduction***

9

10 ~~The Commission concludes that the activities about which you inquire fall into a~~
11 ~~few general categories. Some are generic voter drives and therefore are governed by the~~
12 ~~allocation regulations in 11 CFR 106.6(b)(2)(iii). Some of ABC's communications~~
13 ~~promote, support, attack or oppose one or more clearly identified Federal candidates, and,~~
14 ~~as made by a political committee, these communications are expenditures that must be paid~~
15 ~~for entirely with Federal funds. Other communications by ABC must be treated as a~~
16 ~~combination of expenditures for Federal candidates and disbursements for non-Federal~~
17 ~~candidates. These may be allocated between Federal and non-Federal accounts under 11~~
18 ~~CFR 106.1.~~

19 ~~In *McConnell v. FEC*, 540 U.S. _____, 124 S.Ct. 619 (2003), the Supreme Court~~
20 ~~clarified that the so-called "express advocacy" test is not a constitutional barrier limiting the~~
21 ~~interpretation of what is "for the purpose of influencing any Federal election," which is the~~
22 ~~operative term used in the definition of "expenditure" in 2 U.S.C. 431(9). *McConnell*, 124~~

¹ This advisory opinion reorganizes and combines certain questions, and answers certain other questions as a group. Attached to this advisory opinion as Appendix A is your letter dated November 18, 2003, annotated with bracketed paragraph numbers that will be referred to throughout this opinion.

1 ~~S.Ct. at 688-689. The Court also found constitutional Congress' regulation of two types of~~
2 ~~activities addressed in the Bipartisan Campaign Reform Act of 2002, Pub. L. 107-155 (Mar.~~
3 ~~27, 2002) ("BCRA"): "Federal election activity," as defined in 2 U.S.C. 431(20), which~~
4 ~~includes public communications that promote or support, or attack or oppose a clearly~~
5 ~~identified Federal candidate, 2 U.S.C. 431(20)(A)(iii), and "electioneering communication,"~~
6 ~~as defined in 2 U.S.C. 434(f)(3)(A)(i). *McConnell*, 124 S.Ct. at 670-673, and 686-689.~~

7 ~~The Supreme Court found that public communications that promote, support, attack,~~
8 ~~or oppose a clearly identified Federal candidate "undoubtedly have a dramatic effect on~~
9 ~~Federal elections," *McConnell* at 675, and that the regulation of these communications~~
10 ~~survives constitutional vagueness concerns because the terms "promote," "support,"~~
11 ~~"attack" and "oppose" are explicit standards giving "the person of ordinary intelligence~~
12 ~~reasonable opportunity to know what is prohibited." *McConnell* at 675, n. 64, citing~~
13 ~~*Grayned v. City of Rockford*, 408 U.S. 104, 108-109 (1972). Under BCRA, these public~~
14 ~~communications cannot be paid for with non-Federal funds by Federal, state and local~~
15 ~~officeholders or party committees. 2 U.S.C. 441i(a), (b), (e) and (f).~~

16 The Commission concludes that the activities about which you inquire fall into a
17 few general categories. Many of the activities about which you inquire are covered by the
18 existing allocation regulations in 11 CFR Part 106. Some are generic voter drives governed
19 by 11 CFR 106.6(b)(2)(iii). Other communications by ABC must be treated as a
20 combination of expenditures for Federal candidates and disbursements for non-Federal
21 candidates allocable under 11 CFR 106.1.

22 You also ask about certain communications that refer to a clearly identified Federal
23 candidate, but that do not expressly advocate the election or defeat of that candidate. Prior

1 to the Supreme Court's decision in *McConnell v. FEC*, 540 U.S. _____, 124 S.Ct. 619, 687
2 (2003), many believed that "*Buckley v. Valeo*, 424 U.S. 1 (1976)] drew a constitutionally
3 mandated line between express advocacy and so-called issue advocacy" such that for
4 present purposes only communications that contained express advocacy were considered
5 "expenditures" that had to be paid for with funds subject to the limitations and source
6 prohibitions of the Act. In *McConnell*, the Supreme Court clarified that the express
7 advocacy test is not a constitutional barrier establishing whether communications are "for
8 the purpose of influencing any Federal election," which is the operative term used in the
9 definition of "expenditure" in 2 U.S.C. 431(9). 124 S.Ct. at 688-689. In short, there is no
10 statutory requirement and, in light of *McConnell*, no Constitutional requirement, that
11 express advocacy be the basis for distinguishing which of a Federal political committee's
12 proposed communications may be paid for with Federal funds and which may be paid for
13 with non-Federal funds, i.e., funds that are not subject to the Act's limitations and source
14 prohibitions.

15 The Supreme Court also upheld a key provision of the Bipartisan Campaign Reform
16 Act of 2002, Pub. L. 107-155 (Mar. 27, 2002) ("*BCRA*") regulating public communications
17 by officeholders and party committees that promote, support, attack, or oppose a clearly
18 identified Federal candidate (2 U.S.C. 431(20)(A)(iii)), finding that such communications
19 "undoubtedly have a dramatic effect on Federal elections." *McConnell*, 124 S.Ct at 675.
20 Moreover, the Court found that the regulation of these communications survives
21 constitutional vagueness concerns because the terms "promote," "support," "attack" and
22 "oppose" are explicit standards giving "the person of ordinary intelligence reasonable
23 opportunity to know what is prohibited." *McConnell* at 675, n. 64, citing *Grayned v. City*

1 of Rockford, 408 U.S. 104, 108-109 (1972). Under BCRA, these public communications
2 cannot be paid for with non-Federal funds by Federal, state and local officeholders or party
3 committees. 2 U.S.C. 441i(a), (b), (e) and (f).

4 The Commission recognizes that political party committees have characteristics not
5 shared by all political committees regulated under FECA. Nevertheless, the promote,
6 support, attack, or oppose standard is equally appropriate as the benchmark for determining
7 whether communications made by political committees that refer only to clearly identified
8 Federal candidates are made for the purpose of influencing any Federal election and must
9 be paid for with Federal funds. By their very nature, all Federal political committees, not
10 just political party committees, are focused on the influencing of Federal elections.² As
11 organizations whose "major purpose is the nomination or election of a candidate," political
12 committees do not raise the same concerns about vagueness that may arise in other contexts
13 when interpreting the definition of "expenditure." Expenditures of political committees
14 "can be assumed to fall within the core area sought to be addressed by Congress. Their
15 expenditures are, by definition, campaign related." Buckley v. Valeo, 424 U.S. 1, 79
16 (1976).³ Moreover, communications that promote, support, attack or oppose a clearly
17 identified Federal candidate have no less a "dramatic effect" on Federal elections when
18 aired by other types of political committees, rather than party committees or candidate
19 committees.

² For example, *McConnell* stated "[t]he record shows that many of the targeted tax-exempt organizations engage in sophisticated and effective electioneering activities for the purpose of influencing federal elections, including waging broadcast campaigns promoting or attacking particular candidates and conducting large-scale voter registration and GOTV drives." *McConnell* at 679, n. 68 (emphasis added).

³ See also *McConnell*, 124 S.Ct. at 675 n.64.

1 You have also asked a number of questions about the possible application of
2 BCRA's electioneering communications provisions to ABC's proposed activities (e.g.,
3 paragraphs [6], [7], [8], [64A], and [64B], and Exhibit E). As explained below, it is not
4 necessary to apply the electioneering communications provisions of the Act and
5 Commission regulations to respond to your request. An "electioneering communication" is
6 a "broadcast, cable or satellite" communication that refers to a clearly identified candidate,
7 is publicly distributed for a fee within 60 days of a general election or 30 days of a primary
8 or preference election or nominating convention or caucus, and that is, in the case of a
9 communication that refers to a Congressional candidate, "targeted to the relevant
10 electorate."⁴ 2 U.S.C. 434(f)(3)(A)(i); 11 CFR 100.29.

11 The Act and Commission regulations set forth four exceptions to the definition of
12 "electioneering communication." 2 U.S.C. 434(f)(3)(B); 11 CFR 100.29(c). One of these
13 statutory exceptions covers communications that are expenditures or independent
14 expenditures under the Act. 2 U.S.C. 434(f)(3)(B)(ii). The Commission determined that
15 communications ~~by political committees~~ that would otherwise meet the definition of
16 electioneering communications are, in fact, expenditures when made by a political
17 committee and must be reported as such. "Electioneering Communications; Final Rules,"
18 67 Fed. Reg. 65,190, 65,197 (Oct. 23, 2002); *see also* "Bipartisan Campaign Reform Act of
19 2002; Reporting; Notice of Proposed Rulemaking," 67 Fed. Reg. 64,555, 64,561 (October

⁴ A communication is "targeted to the relevant electorate" if it can be received by 50,000 or more persons in the State an identified candidate for the Senate seeks to represent or the congressional district an identified candidate for the House of Representatives seeks to represent. 2 U.S.C. 434(f)(3)(C); 100.29(a)(5). In the case of a candidate for nomination for President or Vice President, a communication is publicly distributed if it can be received by 50,000 or more persons in a State where a primary election is being held within 30 days, or if it can be received by 50,000 or more persons anywhere in the United States between 30 days before the first day of the nominating convention and its conclusion. 11 CFR 100.29(b)(3).

1 21, 2002).⁵ Accordingly, Federal political committees, by operation of the expenditure and
2 independent expenditure exemption in 2 U.S.C. 434(f)(3)(B)(ii) and 11 CFR 100.29(c)(3),
3 are not subject to BCRA's electioneering communication provisions. Therefore, any
4 communications paid for by ABC that ~~possess the characteristics of otherwise would be~~
5 electioneering communications as defined by the Act, 2 U.S.C. 434(f)(3), and described in
6 the Commission's regulations, 11 CFR 100.29(a), must be reported as expenditures and
7 comply with the requirement that expenditures be Federally funded.

8 Finally, ABC proposes to fund certain activity that may be paid for with a mix of
9 Federal and non-Federal funds. Commission regulations provide that, with respect to a
10 political committee with separate Federal and non-Federal accounts (such as ABC), "[a]ll
11 disbursements, contributions, expenditures, and transfers . . . in connection with any Federal
12 election shall be made from its Federal account" (except as otherwise permitted with
13 respect to State, district, and local party committees under 11 CFR Part 300). 11 CFR
14 102.5(a)(1)(i). The proper allocation of ~~such~~ certain activities by a non-connected
15 political committee such as ABC is set by 11 CFR Part 106. ~~Where a communication~~
16 ~~(including a voter registration or get-out-the-vote communication) constitutes, at least in~~
17 ~~part, an expenditure on behalf of a clearly identified Federal candidate, the provisions at 11~~
18 ~~CFR 106.1 providing for allocation to a specific candidate or candidates will apply. Where~~
19 ~~specific candidates are not clearly identified and the communication is part of a generic~~

⁵ The Court in *McConnell* agreed with the Commission's conclusion. It stated, "issue ads broadcast during the 30- and 60-day periods preceding Federal primary and general elections are the functional equivalent of express advocacy." *McConnell* at 696. The Court also recognized that "corporations can still fund electioneering communications with PAC money," i.e., Federal or "hard" money. *Id.* at 695.

1 ~~voter drive, the provisions of 11 CFR 106.6 will apply as to the allocation of a political~~
2 ~~committee's disbursements between its Federal and non-Federal accounts.~~

3 Under 11 CFR 106.1, expenditures, including in-kind contributions, independent
4 expenditures, and coordinated expenditures made on behalf of more than one clearly
5 identified Federal candidate, shall be allocated to each such candidate according to the
6 benefit reasonably expected to be derived; e.g. by the space and time devoted to each
7 candidate in a printed or broadcast message, or statements in a phone bank message, as
8 compared to the total space or time devoted to all the candidates. This also applies to
9 allocating payments involving both expenditures on behalf of one or more clearly identified
10 Federal candidates and disbursements on behalf of one or more clearly identified non-
11 Federal candidates. 11 CFR 106.1(a).

12 For communications by a non-connected political committee that are for voter
13 identification, voter registration, or get-out-the-vote purposes that are not coordinated with
14 a candidate and that do not refer to any clearly identified Federal candidate, Commission
15 regulations at 11 CFR 106.6 require the use of at least some Federal funds because they are
16 in part for the purpose of influencing a Federal election. Commission regulations provide
17 that such committees shall allocate expenses for:

18 Generic voter drives including voter identification, voter registration, and
19 get-out-the-vote drives, or any other activities that urge the general public to
20 register, vote or support candidates of a particular party or associated with a
21 particular issue, without mentioning a specific candidate.
22

1 11 CFR 106.6(b)(2)(iii).⁶ The expenses for such purposes shall be allocated between the
2 Federal and non-Federal accounts of the non-connected committee based on the ratio of
3 Federal expenditures to total Federal and non-Federal disbursements made by the
4 committee during the two-year Federal election cycle.⁷

5

6

- 7 1. Given that ABC's "express purpose" [2] [20] and "message" [26] is "the election and
8 defeat" [26] [20] of particular Federal candidates,
9 (a) May ABC, or its agents, solicit or direct non-Federal funds [47]?
10 (b) May ABC use non-Federal funds to pay for any of its activities [26] [27]⁸?

11

12

The paragraphs of your request addressed in this question largely present general
13 questions of interpretation, and thus do not qualify as an advisory opinion request. 11 CFR
14 112.1(b). As explained above, political committees may maintain Federal and non-Federal
15 accounts, 11 CFR 102.5, and may allocate certain payments between Federal funds and
16 non-Federal funds, *see, e.g.*, 11 CFR 106.6(b)(2)(iii) (allocation of expenses for generic
17 voter drives by non-connected political committees). Thus, ABC may raise non-Federal

⁶ The same allocation method applies to non-connected committees' "[a]dministrative expenses including rent, utilities, office supplies, and salaries, except for such expenses directly attributable to a clearly identified candidate[.]" See 11 CFR 106.6(b)(2)(j) and (c).

⁷ The ratio shall be estimated and reported at the beginning of each cycle, and subsequent adjustments, accompanied by transfers, are made with respect to each reporting period. 11 CFR 106.6(c)(1) and (2). For the purposes of the ratio, the Federal expenditures shall include only amounts contributed to or otherwise spent on behalf of specific Federal candidates, including independent expenditures, and amounts spent on communications that promote, support, attack, or oppose a clearly identified Federal candidate. The calculation of disbursements for the total Federal and non-Federal disbursements shall also be limited to disbursements for specific candidates, and shall not include overhead or other generic costs. 11 CFR 106.6(c)(1).

⁸ The Commission does not address the questions in paragraph [27] pertaining to the activities of donors of non-Federal funds. These are activities of third parties and not that of the requestor. *See* 11 CFR 112.1(b) (which states that requests regarding the activities of third parties do not qualify as advisory opinion requests). Indeed, your request could implicate many third parties, who may find themselves in a wide variety of circumstances.

1 funds, and spend such funds as permitted by the Act.⁹ More specific guidance is provided
2 below in the context of more specific questions.

3

4 *Coordination with Federal Candidates and Political Party Committees*

5 [9],[11] to [17], [18], [28] to [36], and [62]

6 Several paragraphs of your advisory opinion request directly raise issues as to
7 “coordination” between ABC and candidates for Federal office and/or political party
8 committees. See, e.g., paragraphs [11]-[17], [18] (second question), [28]-[36], and [62] of
9 your request. Under 2 U.S.C. 441a(a)(7) and 11 CFR 109.20(a), “coordinated” means,
10 “made in cooperation, consultation, or concert with, or at the request or suggestion of, a
11 candidate, a candidate’s authorized committee, or their agents” Any expenditure that
12 is coordinated under 11 CFR 100.20(a), but that is not made for a coordinated
13 communication under 11 CFR 100.21 or a coordinated party expenditure under 11 CFR
14 100.37, is an in-kind contribution to the candidate or political party committee with whom
15 it was coordinated, and “must be reported as an expenditure made by that candidate or
16 political party committee,” unless otherwise exempted. 11 CFR 100.20(a).

17 The regulations in 11 CFR 109.21 set forth a three-pronged test for the purpose of
18 determining whether a communication is coordinated with one or more candidates for
19 Federal election, an authorized committee, a political party committee, or an agent of any of
20 the foregoing. If the three-pronged test is satisfied, then the payments for the

⁹ An expenditure is considered to be a contribution to a candidate when it is “made by any person in cooperation, consultation, or concert, with, or at the request or suggestion of,” that candidate, the authorized committee of that candidate, or their agents. 2 U.S.C. 441a(a)(7)(B)(i). Also, an expenditure is not “independent” if it is “made in cooperation, consultation, or concert, with, or at the request or suggestion of,” a candidate, authorized committee, or a political party committee. See 11 CFR 100.16.

1 communication are made for the purpose of influencing a Federal election, and therefore
2 constitute in-kind contributions. First, the communication must be paid for by someone
3 other than that candidate, authorized committee, political party committee, or an agent of
4 any of the foregoing. 11 CFR 109.21(a)(1); *see also* 11 CFR 109.37. The second prong is
5 a "content standard" regarding the subject matter of the communication. 11 CFR
6 109.21(a)(2). Four types of communications satisfy the content standard: (1) a public
7 communication that expressly advocates the election or defeat of a clearly identified
8 Federal candidate (no matter when made); (2) a public communication that disseminates,
9 distributes or republishes campaign materials (no matter when made); (3) electioneering
10 communications; and (4) a public communication directed to voters in a particular area that
11 refers to a political party or a clearly identified Federal candidate and that is disseminated
12 120 days or fewer before a primary, general, special or runoff election. *See* 11 CFR
13 109.21(c). The third prong is a "conduct standard" regarding the interactions between the
14 person paying for the communication and the candidate, an authorized committee, a
15 political party committee, or agents of the foregoing. 11 CFR 109.21(a)(3). These conduct
16 standards include: (1) "requests or suggestions" for communications by candidates or
17 political party committees; (2) substantial discussions regarding candidate or political party
18 campaign plans, projects, activities, or needs; (3) "material involvement" in the making and
19 airing of communications; (4) the involvement of "common vendors;" and (5) the
20 involvement of individuals who were formerly employees or independent contractors of a
21 candidate, an authorized committee, or a political party committee. 11 CFR 109.21(d)(1) –
22 (5).¹⁰

¹⁰ In order to meet this fifth conduct standard, the former employee or independent contractor must use or

1 The Commission cannot resolve, without more specific information, whether the
2 communications you generally describe are coordinated communications. As such, your
3 questions about coordination are hypothetical, presenting general questions of interpretation
4 of the Act, rather than specific transactions or activities, and are thus not proper for an
5 advisory opinion. 2 U.S.C. 437f(a)(1); 11 CFR 112.1(b).¹¹

6 In addition to the paragraphs of your request that directly raise issues about
7 coordination, discussed above, some of your other paragraphs raise the possibility that a
8 number of ABC's planned activities described below might be coordinated with one or
9 more candidates for Federal office, authorized committees of Federal candidates, political
10 party committees, or the agents of any of the foregoing. See, e.g., paragraphs [6]-[8], [24]-
11 [27],¹² [38]-[39], [48]-[49], [52]-[54], [57]-[60], [64], and [67]-[70] of your request. To the
12 extent that the activities you describe in those questions would result in a coordinated
13 communication within the meaning of 11 CFR 109.21, the payment for such
14 communications would constitute an in-kind contribution to a candidate for Federal office

convey information. 11 CFR 109.21(d)(5). Likewise, to meet the fourth conduct standard – which turns on the involvement of common vendors – the common vendor must use or convey information. 11 CFR 109.21(d)(4)(iii). See also 11 CFR 109.21(d)(3) (A discussion is 'substantial' within the meaning of the 'substantial discussion' conduct prong only 'if information about the candidate's or political party committee's campaign plans, projects, activities, or needs is conveyed to a person paying for the communication . . .'). The Commission considered and rejected a standard in which previous employment would, by itself, be sufficient to satisfy this conduct standard. See 68 Fed. Reg. at 438 ("The Commission notes that the final rule focuses only on the use or conveyance of information that is material to a subsequent communication and does not in any way prohibit or discourage the subsequent employment of those who have previously worked for a candidate's campaign or a political party committee.").

¹¹ In paragraph [9] you ask whether an individual contributing non-Federal funds to ABC "for the express purposes of 'reelecting the President' or 'defeating' his Democratic opponent" may also hold a fundraiser for the President. This question relates entirely to the activities of a third-party contributor and you do not supply any indication that you are an agent of that potential contributor or are otherwise authorized to request an advisory opinion on that person's behalf. Under the Act and Commission regulations, a request on behalf of a requesting person must be made by an "authorized agent of such person." 2 U.S.C. 437f(a)(1) and 11 CFR 112.1(a). As your question concerns the activities of a third party, it is not a proper advisory opinion request.

¹² While you state in paragraphs 24 and 25 that the contemplated activities will not be coordinated with a Federal candidate, you do not address whether the activities will be coordinated with a political party committee or its agents.

1 or to a political party committee. Such contributions must be paid for entirely with Federal
2 funds and are subject to ABC's contribution limits under 2 U.S.C. 441a(a)(1) or (2). Thus,
3 the Commission conditions its responses to the questions discussed below on the
4 assumption that these activities are not coordinated with a Federal candidate, authorized
5 committee, political party committee, or agents of any of the foregoing. 2 U.S.C. 441a(a);
6 11 CFR 100.52(d)(1), 11 CFR 109.20 and 109.21.¹³

7

8 *Coordination with non-profit organizations*

9

10 2. *You ask whether ABC may coordinate its activities with entities that are constituted as*
11 *either IRC §527 political organizations or section 501(c)(3) organizations, and that are*
12 *not Federal political committees. [35] and [36]*

13

14 While the Act and Commission regulations at 2 U.S.C. 441a(a)(7)(B) and 11 CFR
15 Part 109 provide specific consequences for coordination with a candidate for Federal office,
16 a candidate's authorized committee, or a political party committee, neither the Act nor
17 Commission regulations expressly address coordination with other political committees
18 and 527 political organizations or section 501(c)(3) organizations. Thus, ABC is not
19 categorically prohibited from consulting with, or acting in concert with these other
20 organizations. However, depending on the particular circumstances, such cooperation
21 could be a factor leading to a conclusion that ABC controls or is otherwise affiliated with

¹³ The Act, as amended by BCRA, and Commission regulations prohibit national committees of political parties, their 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) for any purpose whatsoever. This prohibition is absolute and does not contain any statutory exceptions. 2 U.S.C. 441i(a); 11 CFR 300.10. For the purposes of this opinion, the Commission accepts your representation that ABC is an independent political committee that is not affiliated with any Federal candidate, Federal officeholder or political party.

1 such a group, that the group is acting as ABC's agent, or that the group has made an in-kind
2 contribution to ABC.

3 The Commission expresses no opinion regarding qualification for tax treatment
4 under 26 U.S.C. 527 or any other ramifications of the proposed activities under the Internal
5 Revenue Code because those questions are outside the Commission's jurisdiction.

6 *Agency*

7
8 Your advisory opinion request presents numerous facts and questions that raise
9 issues as to whether an individual is an agent¹⁴ of one or more organizations, including
10 ABC. See, e.g., paragraphs [12], [15], and [29]. The Commission cannot determine
11 whether particular individuals are agents of ABC or other persons without more specific
12 information. As the Commission previously noted in the Explanation and Justification for
13 11 CFR Part 109, it is difficult to determine whether an individual is acting as an "agent" in
14 the abstract because "[t]he grant and scope of the actual authority, whether the person is
15 acting within the scope of his or her actual authority, and whether he or she is acting on
16 behalf of the principal or a different person, are factual determinations that are necessarily
17 evaluated on a case-by-case basis in accordance with traditional agency principles." 68
18 Fed. Reg. 421, 425. Therefore, to the extent your questions require a determination of
19 whether a particular person is an agent of ABC or another organization, the questions are

¹⁴ Although Congress did not define the term "agent" in BCRA, the Commission has promulgated regulations at 11 CFR 300.2(b) that define an "agent" of a Federal candidate or officeholder for purposes of 11 CFR Part 300 (i.e., the "soft-money" rules enacted to implement BCRA) as "any person who has actual authority, either express or implied," "to solicit, receive, direct, transfer or spend funds in connection with any election." The Commission also promulgated a similar definition of "agent" solely for the purposes of 11 CFR Part 109, which primarily addresses coordination between a person paying for a communication and a Federal candidate, authorized committee, or political party committee. 11 CFR 109.3. The Commission explained that this definition of "agent" is "based on the same concept that the Commission used in framing the definition of 'agent'" in part 300, described above. 68 Fed. Reg. 421, 423 (Jan. 3, 2003).

1 hypothetical and present general questions of interpretation of the Act, rather than specific
2 transactions or activities, and are thus not proper for an advisory opinion. 2 U.S.C.
3 437f(a)(1); 11 CFR 112.1(b). Furthermore, in addressing the questions you present in this
4 request, the Commission assumes without deciding that ABC directors and staff are not
5 agents of a candidate for Federal office, an authorized committee of such candidate, a
6 political party committee, or any other individual or entity.

7 *Communications*

8

9 3. *You indicate that ABC may fund a communication that states: "President George W.*
10 *Bush, Senator X and Representative Y have led the fight in Congress for a stronger*
11 *defense and stronger economy. Call them and tell them to keep fighting for you." May*
12 *ABC pay for this communication containing no express advocacy solely with donations*
13 *from individuals that exceed the Act's limitations? [6], [7]*

14

15 No. If the communication meets the criteria of an electioneering communication, it
16 must be treated as an expenditure when made by a political committee. See introduction to
17 the legal analysis.

18 Even if it does not have all the characteristics of an electioneering communication, it
19 still must be treated as an expenditure and paid for entirely from ABC's Federal account for
20 the following reasons. The communication you intend to produce would promote or support
21 candidates for Federal office by proclaiming that those candidates have "led the fight in
22 Congress for a stronger defense and stronger economy." As explained above in the
23 introduction to the legal analysis, a payment ~~by a political committee~~ for a communication
24 that promotes, supports, attacks, or opposes a clearly identified Federal candidate is "for the
25 purpose of influencing a Federal election;" when made by a political committee and is
26 therefore an "expenditure" within the meaning of 2 U.S.C. 431(9) that must be paid for
27 entirely with Federal funds. Moreover, there is no basis under 11 CFR 106.1 for allocating

1 the costs of this communication between ABC's Federal and non-Federal accounts, because
2 the communication refers only to Federal candidates. Nor is allocation between ABC's
3 Federal and non-Federal accounts permissible under 11 CFR 106.6. Those allocation
4 provisions explicitly do not cover candidate-specific communications. See 11 CFR
5 106.6(b)(2)(i) and (iii). Consequently, because the payments for the communications you
6 propose to run will be expenditures regulated under the Act, ABC must pay for these ads
7 entirely with funds that comply with the Act's various limitations, including individual
8 contribution limitations.

9

10 4. *May ABC pay for communications within 60 days of a general election with funds from*
11 *corporations, labor organizations, and trade associations, if the message is "President*
12 *Bush is a strong leader. The War on Terror, cutting taxes, putting families and working*
13 *people first. He has provided strong, common sense leadership for this nation. Call*
14 *President Bush and tell him to keep fighting for a strong America."? [64A]*
15

16 No. Similar to the answer to question 3 above, if the communications meet the
17 criteria of electioneering communications, they must be treated as expenditures when made
18 by a political committee. See introduction to the legal analysis.

19 Even if the communications do not have all the characteristics of an electioneering
20 communication, they still must be treated as expenditures. The messages given as
21 examples of these communications (*see* Exh. E to the request, referred to in paragraph
22 [64]), which you describe as "issue ads," promote, support, attack, or oppose a clearly
23 identified Federal candidate and do not refer to any non-Federal candidates. See the
24 introduction to the legal analysis and the answer to question 3, above. ~~and~~ Therefore, these
25 communications must be paid for by ABC entirely with Federal funds. Because Federal
26 funds cannot include corporate, labor organization, or incorporated trade association funds,

1 ABC cannot pay for communications that promote, support, attack, or oppose a Federal
2 candidate, with corporate, labor organization, or incorporated trade association funds.

3

4 5. *May ABC pay for "issue ads" within 60 days of a general election with corporate,*
5 *labor organization, or trade association funds? [8]*

6

7 In paragraph [8], you ask generally "[s]ince ABC is an unincorporated entity, may it

8 broadcast issue ads within 60 days of a general election paid for with funds that include

9 contributions from corporations, unions and trade associations?" Because you do not

10 provide a script for the "issue ads" referred to in paragraph [8], this is a hypothetical

11 question calling for general interpretation of the Act. Thus, it is not a proper advisory

12 opinion request. 2 U.S.C. 437f(a)(1); 11 CFR 112.1(b).

13

14 6. *ABC wishes to run communications, such as that which is attached to your request at*
15 *Exhibit E, on television and radio within sixty days of a general election mentioning*
16 *President Bush but not expressly advocating his election. May ABC fund these ads with*
17 *donations from individuals in amounts that exceed Federal limits? [64B]*

18

19 No. As explained above in the introduction to the legal analysis, communications
20 that might otherwise meet the definition of "electioneering communication" are treated as
21 expenditures when made by a political committee.

22 Even if the communications do not otherwise meet the definition of "electioneering

23 communication," they must nonetheless be treated as expenditures for the following

24 reasons. The communication you intend to produce would promote or support a candidate

25 for Federal office by proclaiming "President Bush is a strong leader" who "has provided

26 strong, common-sense leadership for this nation." As explained above in the introduction

27 to the legal analysis, a payment ~~by a political committee~~ for a communication that

1 promotes, supports, attacks, or opposes a clearly identified Federal candidate is “for the
2 purpose of influencing a Federal election,” when made by a political committee, and is
3 therefore an “expenditure” within the meaning of 2 U.S.C. 431(9) that must be paid for
4 entirely with Federal funds. Moreover, because the communications refer only to clearly
5 identified Federal candidates, allocation between ABC’s Federal and non-Federal accounts
6 is not permissible under 11 CFR part 106. See the answer to question 3, above.

7 Consequently, because the communications you propose to run will be expenditures, ABC
8 must pay for these ads entirely with funds that comply with the Act’s various limitations,
9 including individual contribution limitations of 2 U.S.C. 441a(a). ~~Whether the ad is run~~
10 ~~less than or more than 60 days before a general election is not relevant.~~

11
12 7. *ABC wishes to run television and radio ads, such as those which are attached to your*
13 *request at Exhibit E, more than sixty days before the general election that state that*
14 *President Bush is a “strong leader” who “has provided strong, common-sense*
15 *leadership for this nation.” May ABC fund these ads with either Federal or non-*
16 *Federal funds? [65]*

17
18 ABC must pay for these ads with Federal funds. Allocation between ABC’s Federal
19 and non-Federal accounts is not permissible under 11 CFR part 106. See the answer to
20 question 3, above. ~~As discussed above, a payment by a political committee for a~~
21 ~~communication that promotes, supports, attacks, or opposes a clearly identified Federal~~
22 ~~candidate is “for the purpose of influencing a Federal election,” and therefore an~~
23 ~~“expenditure” within the meaning of section 431(9), that must be paid for entirely with~~
24 ~~Federal funds. The communications you intend to produce would promote or support a~~
25 ~~candidate for Federal office. The communications about which you inquire in paragraph~~
26 ~~[65] praise President Bush as a “strong leader” who “has provided strong, common-sense~~

1 leadership for this nation," and are therefore expenditures regulated by the Act. ABC must
2 pay for these ads entirely with Federal funds.

3

4 *Voter Registration, GOTV, and Voter Identification Activities*

5 You ask a number of questions about funding for proposed communications tied to
6 what you describe as voter registration and get-out-the vote ("GOTV") activities. These
7 questions are found at paragraphs [5], [6], [18 first question], [19], [26], [48], [52] through
8 [61], [69], and [70]. They present a variety of messages in a variety of media, including
9 direct mail, phone banks, and door-to-door distribution of material. You also ask about a
10 specific voter identification communication [67]. With respect to some paragraphs, you
11 also ask about the implications of BCRA on specific types of Federal election activity, as
12 defined at 2 U.S.C. 431(20)(A)(i) and (ii) and 11 CFR 100.24(b)(1) and (2).¹⁵ However, as
13 noted above, the Commission accepts the representation that ABC is not established,
14 financed, maintained or controlled by a national, State, district or local party committee.
15 Therefore, the provisions of 2 U.S.C. 441i that turn on those types of Federal election
16 activity ~~as applied to~~ by party committees do not apply to ABC as if it were a party
17 committee.

18 ~~As explained above, ABC will fund activity that will be used~~ The Commission
19 concludes that ABC's voter drive activity is, entirely or in part, for the purpose of
20 influencing a Federal election. See 2 U.S.C. 431(9)(A)(i). Commission regulations
21 address: (1) communications by political committees that involve expenditures on behalf of

¹⁵ These include your references in paragraph [51] to voter registration activity that occurs more than 120 days before a Federal election and within the 120-day period and the reference in paragraph [58] to GOTV activity that occurs within 72 hours of a Federal election and before that time period.

1 clearly identified Federal candidates and/or disbursements on behalf of clearly identified
2 non-Federal candidates, at 11 CFR 106.1; and (2) communications by political committees
3 that are for voter identification, voter registration or GOTV purposes that are not
4 coordinated with a candidate and that do not mention a clearly identified candidate, at 11
5 CFR 106.6(b)(2)(iii). Funding for such messages will depend in large measure on the
6 application of the provisions in 11 CFR Part 106.

7

8 *8. May ABC use non-Federal funds to pay for voter registration and get-out-the-vote*
9 *public communications that clearly identify a Federal candidate and that expressly*
10 *advocate his election or defeat or otherwise promote, support, attack, or oppose the*
11 *candidate? This question refers to communications in paragraphs [5], [6], [26], [52],*
12 *[57], and [69]. This question also pertains to questions [54] and [60].*

13

14 No. Some of the messages contain specific phrases such as "vote for George W.
15 Bush for President," " or "It's your duty to register to vote so that you can support George
16 Bush's reelection as President of the United States." These communications constitute
17 express advocacy under 11 CFR 100.22(a).¹⁶ Other messages refer directly to an explicit
18 act of support for a clearly identified candidate, such as "If you care about keeping the
19 strong defense President Bush has put in place, go out and vote November 2." These
20 messages promote, support, attack, or oppose a clearly identified Federal candidate. Other
21 messages promote, support, attack, or oppose a clearly identified Federal candidate in a

¹⁶ Specifically, 11 CFR 100.22(a) provides that "expressly advocating" means any communication that "[u]ses phrases such as 'vote for the President,' 're-elect your Congressman,' 'support the Democratic nominee,' 'cast your ballot for the Republican challenger for U.S. Senate in Georgia,' 'Smith for Congress,' 'Bill McKay in '94,' 'vote Pro-Life' or 'vote pro-Choice' accompanied by a listing of clearly identified candidates described as Pro-Life or Pro-Choice, 'vote against Old Hickory,' 'defeat' accompanied by a picture of one or more candidate(s), 'reject the incumbent,' or communications of campaign slogan(s) or individual word(s), which in context can have no other meaning than to urge the election or defeat of one or more clearly identified candidate(s), such as posters, bumper stickers, advertisements, etc. which say 'Nixon's the One,' 'Carter '76,' 'Reagan/Bush' or 'Mondale!' . . ."

1 different way. These include messages such as "President Bush has led the fight in
2 Congress for a stronger defense and economy. Call him and tell him to keep fighting for
3 you."

4 ~~The communications in paragraphs [26] (first message), [52], [54] (first message),
5 [57], and [60] (first message) present messages that clearly identify only one Federal
6 candidate and expressly advocate his election. 11 CFR 100.22(a). Payment for such a
7 message would be an expenditure allocable entirely to that candidate and must be paid for
8 entirely with Federal funds. 11 CFR 106.1(a). Although the message in paragraph [57]
9 also refers generically to "the entire Republican team," 11 CFR 106.1 requires the
10 apportionment of the entire cost to the only candidate mentioned.¹⁷ This is a
11 communication that is for the purpose of influencing the election of a clearly identified
12 Federal candidate, President Bush, without identifying any other Federal or non-Federal
13 candidate.~~

14 The communications in paragraphs [26], [54-Exhibit A], and [57-Exhibit C] present
15 messages that clearly identify only one Federal candidate and expressly advocate his
16 election while at the same time urging generic support for the entire party ticket. As such,
17 part of the message is attributable to the clearly identified candidate according to the benefit

¹⁷ Recently, the Commission promulgated new regulations carving out an exception for State, district, and local party committee phone banks where the phone script would ask people to show support for a clearly identified Federal candidate and generically refers to other candidates of the Federal candidate's party without identifying them by name. See 11 CFR 106.8; 68 Fed. Reg. 64517 (November 14, 2003). Rather than require the party committee to allocate 100 percent of the cost as an expenditure on behalf of the Federal candidate (or a coordinated expenditure or contribution in the event of coordination), the Commission ~~regulation~~ ~~se~~ ~~to~~ require the allocation of only 50 percent to the Federal candidate, ~~although it still and further~~ required the use of ~~only~~ Federal funds for the entire expense, based on the likelihood that the phone bank message would be a public communication. ~~The Commission explicitly limited this rulemaking to phone banks and only addressed party committees, which are subject to the rule at 11 CFR 300.33(e)(1) that its public communications that promote, support, attack, or oppose a clearly identified Federal candidate must be paid for entirely with Federal funds. See 68 Fed. Reg. at 64518-19.~~

1 reasonably expected to be derived, (See 11 CFR 106.1(a)), with the remaining generic part
2 of the message allocable under 11 CFR 106.6. The communications in paragraphs [54-
3 Exhibit B] and [60-Exhibit D] are generic voter drives that do not mention a specific
4 candidate. As such they must be paid with entirely Federal funds or allocated under 11
5 CFR 106.6.

6 The communication in paragraph [5] expressly advocates the election of three
7 clearly identified candidates, two Federal and one non-Federal. Based on the content of the
8 message, 11 CFR 106.1(a) would require allocation among the three candidates, and a
9 reasonable allocation would require that two-thirds of the cost be paid with funds from the
10 Federal account.

11 The second message in paragraph [26] does not expressly advocate the election of
12 President Bush, but it says that “[t]he economy under President Bush has never been better”
13 and continues with a statement that it is the recipient’s duty to register to vote. Thus, the
14 message promotes or supports his election and, since President Bush is the only candidate
15 clearly identified, the message must be paid for entirely with Federal funds under 11 CFR
16 106.1. Similarly, the message in paragraph [69] promotes President Bush by name, and
17 thus requires the use of only Federal funds.

18 ~~The message described in paragraph [6] promotes or supports the three individuals~~
19 ~~mentioned, all of whom are Federal officeholders. President Bush is a Federal candidate,~~
20 ~~and the Commission assumes that neither Senator X nor Representative Y is a non-Federal~~

1 ~~candidate, and that one or both may be Federal candidates. Only Federal funds may be~~
2 ~~used.~~¹⁸

3

4 **9. May ABC use non-Federal funds to pay for voter registration and GOTV public**
5 **communications that do not mention a clearly identified Federal candidate, and that**
6 **are targeted to geographic areas or demographic voter groups that have been identified**
7 **as Republican based on earlier voter identification efforts? This question refers to**
8 **communications in paragraphs [53], [59], and [70], and pertains also to paragraphs**
9 **[54] and [60].**

10

11 As a non-connected political committee, ABC must allocate payments for these
12 activities between its Federal and non-Federal accounts because they fall within 11 CFR
13 106.6, or it may pay for these communications with entirely Federal funds.

14 Paragraphs [53] and [54] (second message) involve voter registration messages by
15 ABC, a Federal political committee, that do not mention specific candidates but “urge the
16 general public to . . . support candidates . . . associated with [particular positions on
17 issues].” 11 CFR 106.6(b)(2)(iii). Paragraph [53] includes the statement, “From the war on
18 terror, to cutting taxes, to improving education – we all have a duty to elect leaders who put
19 America first and not the liberal special interest groups.” The messages in paragraphs [53]
20 and [54] (second message) would be allocable under 11 CFR 106.6, and may be paid for
21 with non-Federal funds only to the extent permitted under 11 CFR 106.6(c). The same
22 analysis applies to the directed GOTV messages referred to in paragraphs [59] and [60]

¹⁸ In paragraph [5], you ask whether the “prohibition” in 11 CFR 100.26 on “general public political advertising” pertains to materials handed out door to door (and not through mass mailings or public communications) by an “unincorporated non-Federal section 527 committee if those materials expressly advocate the election or defeat of a Federal candidate. The Commission notes that 11 CFR 100.26 contains no prohibition but merely defines the term “public communications.” A communication, such as the one in paragraph 5 that expressly advocates the election or defeat of a Federal candidate, or the one in paragraph 6, that promotes Federal candidates, is an expenditure (in part, as to paragraph 5) regardless of whether it qualifies as a public communication. The characterization as a “public communication” would only be relevant if ABC were a party committee.

1 (second message). Paragraph 69 includes the sentence, "From the war on terror, to cutting
2 taxes, to improving education – we all have a duty to elect leaders who will put America
3 first and not the liberal special interest groups."¹⁹

4 Paragraph [70] merely states that Joe Smith is calling on behalf of ABC and asks the
5 recipient to vote on November 2, without words encouraging support for candidates of any
6 party or associated with any position on any issue. This communication does not mention
7 any clearly identified candidate. Thus, it is a generic GOTV communication that must be
8 either paid for with entirely Federal funds, or allocated under 11 CFR 106.6 between
9 ABC's Federal and non-Federal accounts.

10

11 *10. May ABC use non-Federal funds to pay for voter registration and GOTV public*
12 *communications that do not mention a clearly identified Federal candidate and that are*
13 *not targeted to geographic areas or demographic groups that have been identified as*
14 *Republican based on earlier voter identification efforts? [58]*

15

16 In paragraph [58], you do not refer to any partisan targeting of the audience that will
17 receive this message. Nevertheless, this is a voter registration message distributed by a
18 non-connected political committee that urges support for candidates associated with
19 positions on particular issues. See 11 CFR 106.6(b)(2)(iii) and Exhibit D to the request.
20 The communication does not reference a clearly identified candidate, does not contain
21 express advocacy, and does not promote, support, attack, or oppose a candidate for Federal
22 office. Thus, the communication falls within the definition of "generic voter drive" at 11
23 CFR 106.6(b)(2)(iii) and must be paid for, at least in part, with Federal funds under 11 CFR

¹⁹ Paragraph [59] refers to the message at issue in paragraph [58]. Paragraph [58] does not by itself refer to the targeting of communications presented in paragraph [59] and will be discussed below.

1 106.6(c). As explained above, the portion of this generic voter drive that may be paid for
2 with non-Federal funds is set forth in 11 CFR 106.6(c).

3

4 *11. How would prior contributions by ABC to candidates affect ABC's subsequent voter*
5 *registration and GOTV activities with respect to those candidates? [18], [19].*

6

7 Essentially, you ask whether a prior contribution by ABC to a Federal candidate
8 would lead to a conclusion that subsequent GOTV activities with respect to the candidate
9 would be viewed as coordinated expenditures and constitute in-kind contributions to the
10 candidate subject to the amount limitations and source prohibitions of the Act. The
11 Commission concludes that a prior contribution by ABC to the candidate, in and of itself,
12 does not establish that ABC's GOTV activities are coordinated with the candidate.

13

14 *12. How would ABC's funding of voter registration or GOTV messages be affected by the*
15 *fundraising for such expenses, including the content of the messages used to raise the*
16 *funds? This pertains to paragraphs [55] and [61].*

17

18 Paragraphs [55] and [61] ask if certain types of funds may be used for voter
19 registration or GOTV messages if the solicitation for the funds mentions a specific Federal
20 candidate but the eventual voter registration or GOTV communication does not. An
21 example of such a solicitation is "Give money to an effort [or 'to a GOTV effort'] that will
22 help President Bush and Republican candidates;" an example of the subsequent GOTV
23 communication is, "Go out and vote. The election is important. It's your civic duty." You
24 do not provide an example for a voter registration communication subsequent to the
25 solicitation but, based on your question in paragraph [55], the Commission assumes that the
26 language is similar to the GOTV communication.

1 These two questions implicate two different activities of ABC, its fundraising
2 activities and its generic spending.

3 2 U.S.C. 431(8) provides that a contribution includes “any gift, subscription, loan
4 advance, or deposit of money or anything of value for the purpose of influencing any
5 election for Federal office.” The fundraising messages in paragraphs [55] and [61] indicate
6 that the funds will be used to promote or support a clearly identified Federal candidate and
7 do not identify any other Federal or non-Federal candidates or elections. Based on ~~this~~
8 ~~solicitation~~ these facts, these funds are being raised to influence a Federal election.
9 Therefore, the contributions raised will be subject to the contribution limits and source
10 prohibitions of the Act, and ABC may not raise non-Federal funds using those fundraising
11 messages.²⁰ To avoid the receipt of contributions in violation of the Act, ABC should make
12 clear in its solicitations that it may accept only contributions within the limitations and
13 prohibitions of the Act or provide other information consistent with that. See 11 CFR
14 102.5(a)(2)(ii).

15 As indicated above, the subsequent voter registration or GOTV messages will not
16 refer to a Federal candidate, a political party, or generically to candidates supporting
17 positions on specific issues. They do not have to be funded entirely with Federal funds.
18 However, these subsequent messages must be funded as generic voter drive expenses that
19 are allocable in accordance with 11 CFR 106.6(c).²¹

²⁰ These communications are not a mixed Federal/non-Federal fundraising activity and therefore are not subject to 11 CFR 106.6(d).

²¹ The Commission notes that the definition of “generic voter drives” in 11 CFR 106.6(b)(2)(iii) includes “voter identification, voter registration, and get-out-the-vote-drives, or any other activities that urge the general public to register, vote or support candidates of a particular party or associated with a particular issue, without mentioning a specific candidate.” The plain reading of this language indicates that the phrase

1

2 **13. Do donors violate the Act by donating non-federal funds to the massive voter**
3 **mobilization effort directed at the general public with the stated purpose (i.e., express**
4 **advocacy) of defeating a named Federal candidate? If so, are they subject to criminal**
5 **penalties if they know from fundraising appeals that the purpose of their contribution is**
6 **the defeat of a specific Federal candidate? Does it matter if the stated public purpose is**
7 **the defeat of a specific candidate but all the messages themselves from ABC do not**
8 **contain express advocacy? [48]**
9

10 Requests pertaining to the activities of a third party do not qualify as advisory
11 opinion requests. 11 CFR 112.1(b). Moreover, an advisory opinion request must include a
12 complete description of all facts relevant to the specific transaction. 11 CFR 112.1(c).
13 Paragraph [48] presents questions as to the activities of third parties, including potentially
14 large numbers of donors in a variety of circumstances. ~~Finally, the Commission notes that~~
15 ~~it does not have authority to impose criminal penalties, and thus offers no opinion as to~~
16 ~~whether any conduct would be subject to them.~~

17 **14. May ABC use non-Federal funds to pay for voter identification communications that**
18 **clearly identify a Federal candidate and that ask questions in a manner that promotes**
19 **his candidacy? [67]**
20

21 No. Paragraph [67] refers to mass mailings and telephone banks to identify voters,
22 which candidates they support, and which issues motivate them. The message will contain
23 several questions such as "Do you believe your taxes are too high?" and "Are you in favor
24 of improving education?", along with questions such as "Are you in favor of President
25 Bush's efforts to lower taxes?" or his "efforts to improve education?" or his "efforts for a
26 strong defense?" The communication will finish with a question as to whether the reader or
27 listener intends to vote on November 2. No other candidate is mentioned. This

"candidates of a particular party or associated with a particular issue" applies to the word "support" but does not apply to the other activities mentioned in the regulation.

1 communication promotes and supports President Bush by referencing his “efforts to
2 improve education” and his “efforts for a strong defense.” Consistent with the analysis
3 above, it must be paid for entirely with Federal funds.

4

5 *Fundraising*

6

7 **15. ABC wishes to have Federal officeholders and candidates assist in its fundraising**
8 **activities as permitted by the Act. May Federal officeholders and candidates raise**
9 **funds for ABC's Federal account? [38]**

10

11 Yes, a Federal officeholder or candidate may solicit funds for ABC's Federal
12 account if he or she only asks for Federally permissible funds. See Advisory Opinions
13 2003-36, 2003-5 and 2003-3.²²

14 11 CFR 102.5(a)(2) provides that contributions that were designated for ABC's
15 Federal account, or that result from a solicitation that expressly states that the contribution
16 will be used in connection with a Federal election, or that are from contributors who have
17 been informed that all contributions are subject to the prohibitions and limitations of the
18 Act, may be deposited in ABC's Federal account. See, e.g., Advisory Opinion 2000-25.
19 Because ABC is a political committee, contributions to ABC's Federal account must meet
20 at least one of these criteria.

21

22 **16. ABC wishes to have Federal officeholders and candidates assist in its fundraising**
23 **activities as permitted by the Act. May Federal officeholders and candidates raise**
24 **funds for ABC's non-Federal account? [39]**

²² 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 the 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.

1

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5

Yes, if the Federal officeholders or candidates only ask for funds that are not in excess of the amounts permitted with respect to contributions to candidates under 2 U.S.C. 441a(a), and that are not from sources prohibited by the Act from making contributions in connection with an election for Federal office.

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As amended by BCRA, the Act regulates certain actions of Federal candidates and officeholders,²³ their agents,²⁴ and entities directly or indirectly established, financed, maintained, or controlled by them²⁵ (together, "covered persons") when they raise or spend funds in connection with either Federal or non-Federal elections. 2 U.S.C. 441i(e)(1). Both BCRA and the Commission's rules implementing BCRA prohibit covered persons from soliciting, receiving, directing, transferring, or spending "funds in connection with any election other than an election for Federal office" "unless the funds are not in excess of the amounts permitted with respect to contributions to candidates and political committees" under 2 U.S.C. 441a(a)(1), (2), and (3), and are not from sources prohibited by the Act from making contributions in connection with an election for Federal office. 2 U.S.C. 441i(e)(1)(B); 11 CFR 300.62.²⁶ See Advisory Opinions 2003-36 and 2003-03.

17. May Federal officeholders or candidates attend and/or speak at fundraising events for ABC's non-Federal account that raises funds outside the Act's contribution and source limitations? [40] and [41]

²³ 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.

²⁴ 11 CFR 300.2(b)(3).

²⁵ 11 CFR 300.60.

²⁶ 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) and foreign nationals (2 U.S.C. 441e).

1
2 **Yes, Federal officeholders and candidates may attend and speak at fundraising**
3 **events for ABC's non-Federal account that raise funds outside the Act's contribution limits**
4 **and source prohibitions, but they may not solicit funds that are outside the amount**
5 **limitations and source prohibitions of the Act. Advisory Opinions 2003-36 and 2003-03.**

6 **The scope of a covered person's potential liability under 2 U.S.C. 441i(e)(1)(B) and**
7 **11 CFR 300.62 must be determined by his or her own speech and actions in asking for**
8 **funds or those of his or her agents, but not by the speech or actions of another person**
9 **outside his or her control. Commission regulations establish that a Federal officeholder or**
10 **candidate will not be held liable for soliciting funds in violation of section 441i(e)(1)(B) or**
11 **section 300.62 merely by virtue of attending or participating in any manner in connection**
12 **with a fundraising event at which non-Federal funds are raised. To be liable, the Federal**
13 **candidate must "ask" for non-Federal funds. *Id.*, see also 11 CFR 300.2(m),(n); McConnell,**
14 **124 S.Ct. at 619; ~~see also, and~~ "Prohibited and Excessive Contributions: Non-Federal**
15 **Funds or Soft Money; Final Rule," 67 Fed. Reg. 49,064, 49,086-49,087 (July 29, 2002).**
16 **Thus, the scope of a covered person's potential liability under 2 U.S.C. 441i(e)(1) and 11**
17 **CFR 300.62 will be determined by his or her own speech and actions in asking for funds or**
18 **those of his or her agents, but not by the speech or actions of another person outside his or**
19 **her control. See Advisory Opinions 2003-36, 2003-05 and 2003-03.**

20 **If a covered person makes a solicitation, such solicitation must include or be**
21 **accompanied by a clear and conspicuous message indicating that the covered individual is**
22 **only asking for funds the that comply with the amount limitations and source prohibitions**
23 **of the Act. The following is considered to be an adequate disclaimer:**

1 I am asking for a donation of up to \$5,000 per year. I am not asking for
2 funds from corporations, labor organizations, or other Federally prohibited
3 sources.

4
5 If a covered person gives a speech soliciting funds generally without mentioning specific
6 amounts, sources, or limitations, he may do so if written notices are clearly and
7 conspicuously displayed at the event indicating that the covered person is soliciting only
8 Federally permissible funds;²⁷ or if a public oral disclaimer is made. See Advisory
9 Opinions 2003-36 and 2003-03.

10
11 *18. May Federal officeholders or candidates be named in the invitation as honored guests,*
12 *or as featured speakers, or as hosts, for fundraising events for ABC's non-Federal*
13 *account? [42]*

14
15 Yes, within the limits of 2 U.S.C. 441i(e)(1)(B) and 11 CFR 300.62. Section
16 441i(e)(1)(B) and section 300.62 only apply to an invitation to an event where that
17 invitation constitutes a solicitation for funds, and where the covered person approved,
18 authorized, or agreed or consented to be featured, or named in, the invitation (e.g., through
19 the use of his name or likeness). The mere mention of a covered person in the text of a
20 written invitation does not, without more, constitute a solicitation or direction of non-
21 Federal funds by that covered person. However, a candidate's consent or agreement to be
22 mentioned in an invitation as an honored guest, featured speaker or host, where that
23 invitation is a solicitation, constitutes a solicitation by the candidate. Thus, if a candidate
24 agrees or consents to be named in a fundraising solicitation as an honored guest, featured
25 speaker or host, or if the invitation constitutes a solicitation for any other reason, then the
26 solicitation must contain a clear and conspicuous statement that the entire solicitation is

²⁷ See 11 CFR 110.11(c) for the Commission's interpretation of "clear and conspicuous" in related contexts.

1 limited to funds that comply with the amount limits and source prohibitions of the Act. *See*
2 *generally* Advisory Opinions 2003-36 and 2003-03.

3 Complying with these requirements regarding the written invitation does not relieve
4 the covered person of the requirements as to his or her actual appearance at the subsequent
5 event as an honored guest or featured speaker, as set out in the response to questions 16 and
6 17. The requirements set out in response to question 17 as to the speech and disclaimer by
7 the covered person, clear and conspicuous written notices, and conversations by the covered
8 person are still applicable.

9
10 **19. *May Federal officeholders or candidates sign written solicitations for the non-Federal***
11 ***account that raise funds outside the Act's contribution and source limitations? [43]***

12
13 No. Federal officeholders and candidates may not sign written solicitations for
14 ABC's non-Federal account that raise funds outside the Act's contribution limits and source
15 prohibitions. 2 U.S.C. 441i(e)(1)(B); 11 CFR 300.62; Advisory Opinion 2003-03.

16
17 **20. *If Federal officeholders or candidates cannot speak or participate in a fundraising***
18 ***event for ABC's non-Federal account, may ABC have a fundraiser for its Federal***
19 ***account with the Federal officeholders and candidates present, and then immediately***
20 ***adjourn to an adjacent location for a non-Federal soft dollar fundraising event at which***
21 ***the Federal officeholders and candidates are not present? [44]***

22
23 This question is moot in light of the answer to question 17.

24
25 **21. *May ABC solicit Federal funds by using the names of specific Federal candidates in***
26 ***solicitations that will convey ABC's support for or opposition to specific Federal***
27 ***candidates, assuming no coordination between ABC and any Federal candidates?***
28 ***Solicitations for Federal funds would be through mass mailings and broadcast***
29 ***advertising. For example, could ABC use the following message: "ABC supports***
30 ***President Bush's tax cuts to stimulate the economy. Give to ABC so that we can***

1 *support President Bush's agenda." Or, could ABC use the following message: "ABC*
2 *supports President Bush's tax cuts to stimulate the economy. Give to ABC so that we*
3 *can support President Bush's reelection." [21], [24]*
4

5 Yes. ~~In the situation you describe, a~~Although ABC will use the names of specific
6 Federal candidates in solicitations, ABC will not coordinate with the candidates, and the
7 candidates will not solicit, receive, direct, transfer, spend or disburse funds outside of the
8 amount limitations, source prohibitions or reporting requirements of the Act. Thus, neither
9 2 U.S.C. 441i(e)(1)(A), nor 11 CFR 300.61, nor any other provision of the Act or
10 Commission regulations, would bar ABC's fundraising through the use of the names of
11 specific Federal candidates in a manner that will convey ABC's support for or opposition to
12 specific Federal candidates.²⁸
13

14 22. *May ABC solicit non-Federal funds by using the names of specific Federal candidates*
15 *in solicitations that will convey ABC's support for or opposition to specific Federal*
16 *candidates, assuming no coordination between ABC and any Federal candidates?*
17 *Solicitations for non-Federal funds would be through mass mailings, broadcast*
18 *advertising, and in person solicitations using printed materials and taped messages.*
19 *Could ABC use the messages presented in the immediately preceding question for this*
20 *purpose? [25]*
21

22 No. 2 U.S.C. 431(8) provides that a contribution includes "any gift, subscription,
23 loan, advance, or deposit of money or anything of value made by any person for the
24 purpose of influencing any election for Federal office." If ABC, which is a political
25 committee, solicits funds by using the names of specific Federal candidates in a manner that
26 will convey ABC's plan to use those funds to support for or opposition to specific Federal
27 candidates such as "Give to ABC so we can support President Bush's reelection [25]." the

²⁸ Please see the answer to question 15, above, regarding the conditions for deposit of Federal funds under 11 CFR 102.5.

1 funds raised will be contributions to ABC subject to the Act's contribution limits and
2 source prohibitions.²² Id.; 11 CFR 102.5(a)(2)(ii). ~~Cf. *FEC v. Survival Education Fund, Inc.*, 65 F.3d 285 (1995) (solicitations for funds, styled as contributions, for an incorporated~~
3 ~~issue advocacy group are subject to regulation under the Act). Thus, ABC may not solicit~~
4 ~~non-Federal funds by using the names of specific Federal candidates in a manner that will~~
5 ~~convey ABC's support for or opposition to specific Federal candidates.~~

7
8 **23. May ABC sponsor an issues forum at which Federal officeholders or candidates speak,**
9 **and then adjourn later in the same day to a different location for a non-Federal**
10 **fundraiser that is not attended by Federal officeholders or candidates? The invitation**
11 **to this event would include two separate pieces, each with its own disclaimer. One**
12 **would be for the issues forum alone and would contain no electioneering or fundraising**
13 **message. The second piece would be a fundraising piece for the non-Federal dollar**
14 **fundraising that either did not mention or include Federal officeholders and candidates**
15 **or, in the alternative, included Federal officeholders and candidates only to the extent**
16 **permitted by the Commission. [45]**

17
18 Yes, as a non-connected political committee, ABC may sponsor an issues forum,
19 which the Commission understands you intend to be a forum in which solicitations for
20 funds do not occur. As explained in the answers to question 17, a covered person may be
21 included on the invitations, subject to the limits of section 441i(e)(1)(B) and section 300.62.
22 A Federal officeholder or candidate may speak at ABC's issues forum. However, the
23 invitation to the issues forum and the fundraising solicitation must be in separate mailings,
24 or the entire mailing must satisfy the conditions set out in the answer to question 18, above.

25
26 **24. May ABC raise and spend funds from its non-Federal accounts from foreign nationals**
27 **and from foreign corporations and labor organizations for voter registration and voter**

²⁹ The Commission notes that the joint fundraising rules at 11 CFR 102.17 do not apply to the solicitation about which you inquire.

1 *mobilization activities on behalf of Federal candidates with express advocacy (e.g.,*
2 *"register to help reelect President Bush") or with an issue advocacy message outside*
3 *the 30 or 60 day windows (e.g., "Register. It's your duty.")? [49].*
4

5 No. The Act, as amended by BCRA, prohibits foreign nationals³⁰ from, among
6 other things, directly or indirectly making a contribution or donation of money or other
7 thing of value, or to expressly or impliedly promise to make a contribution or donation, in
8 connection with a Federal, State, or local election (this prohibition includes not only
9 elections for political office, but also ballot measures and other types of elections). 2
10 U.S.C. 441e(a)(1)(A); 11 CFR 110.20. The Act as amended by BCRA also bars foreign
11 nationals from making a contribution or donation of money or other things of value for
12 independent expenditures or disbursements for electioneering communications. 2 U.S.C.
13 441e(a)(1)(C). See also 11 CFR 100.20(e) and (f). Also, it is unlawful for a person to
14 solicit, accept, or receive a contribution or donation from a foreign national. 2 U.S.C.
15 441e(a)(2). 11 CFR 110.20(g) provides that no person shall knowingly solicit, accept or
16 receive a contribution or donation from a foreign national, and 11 CFR 110.20(h) provides
17 that no person shall knowingly provide substantial assistance in the making of an
18 expenditure, independent expenditure or donation by a foreign national. Accordingly, ABC
19 must not deposit such funds into its Federal or non-Federal account. Nothing in the Act or
20 Commission regulations creates an exception on the basis of the political committee's
21 intended use for the foreign national funds.

22 *25. If Federal candidates or officeholders participate in the requestors' fundraising*
23 *activities in any scenario above, would they be "solicit[ing] . . . funds in connection*

³⁰ The following are considered foreign nationals for purposes of the Act: foreign governments; foreign political parties; foreign corporations; foreign associations; foreign partnerships; individuals with foreign citizenship; and United States immigrants who do not have a "green card." 11 CFR 110.20(a)(3).

1 *with an election other than an election for Federal office" under 2 U.S.C.*
2 *441i(e)(1)(B)? [46]*
3

4 The Commission cannot resolve whether any of the fundraising scenarios you
5 generally describe above are in connection with any election other than an election for
6 Federal office without more specific information regarding those communications (e.g.,
7 none of the exhibits to ABC's request for an advisory opinion identify a candidate for State,
8 district or local political office). As such, this question is hypothetical and it presents a
9 general question of interpretation of the Act, rather than a specific transaction or activity,
10 and is thus not proper for an advisory opinion. 2 U.S.C. 437f(a)(1); 11 CFR 112.1(b).

11 The Commission expresses no opinion regarding qualification for tax treatment
12 under 26 U.S.C. 527 or any other ramifications of the proposed activities under the Internal
13 Revenue Code because those questions are outside the Commission's jurisdiction.

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

20
21 Sincerely,
22

23
24
25 Bradley A. Smith
26 Chairman
27

28 Enclosures (AOs 2003-36, 2003-5, 2003-3, and 2000-25)