



**THE FEDERAL ELECTION COMMISSION**  
Washington, DC 20463

**AGENDA ITEM**

For Meeting of: 2-18-04

**MEMORANDUM FOR THE COMMISSION**

**FROM:** COMMISSIONER DAVID MASON *Dm*

**SUBJECT:** ADVISORY OPINION 2003-37 (ABC)

**DATE:** FEBRUARY 18, 2004

**SUBMITTED LATE**

Attached is a draft I will propose using the "clearly identified candidate" language directly from the Regulations. The draft comes to the same conclusions as the Counsel and Weintraub drafts using this different approach.

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 with Federal and non-Federal accounts that registered with  
16           the Commission on September 4, 2003.

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18   ***Background***

19           Your request concerns the raising and spending of Federal and non-Federal funds  
20           for a wide range of campaign activities. Some of your proposed activities involve public  
21           communications regarding specific candidates, or candidates holding positions on issues of  
22           importance to ABC. Your proposed activities also include voter mobilization programs. In  
23           addition, you seek guidance on coordinating these campaign activities with federal  
24           candidates and their agents, and having Federal candidates assist ABC by soliciting funds  
25           for ABC's proposed activities.<sup>1</sup>

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<sup>1</sup> 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    ***Legal Analysis and Conclusions***

2    ***Introduction***

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

10             You also ask about certain communications that refer to a clearly identified Federal  
11   candidate, but that do not expressly advocate the election or defeat of that candidate. Prior  
12   to the Supreme Court's decision in *McConnell v. FEC*, 540 U.S. \_\_\_, 124 S.Ct. 619, 687  
13   (2003), many believed that "*Buckley [v. Valeo*, 424 U.S. 1 (1976)] drew a constitutionally  
14   mandated line between express advocacy and so-called issue advocacy" such that for  
15   present purposes only communications that contained express advocacy were considered  
16   "expenditures" that had to be paid for with funds subject to the limitations and source  
17   prohibitions of the Act. However, In *Buckley*, the Supreme Court noted that the major  
18   purpose of political committees is the nomination or election of candidates, so their  
19   expenditures are, by definition, campaign related. 424 U.S. 1, 79 (1976). Thus, the express  
20   advocacy test was never required to be applied to communications by political committees  
21   of any type. The Commission did, however, employ the express advocacy test in certain  
22   situations in which it was not constitutionally required,<sup>2</sup> particularly to determine what

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<sup>2</sup> *Orlowski v. FEC* 795 F.2d 156 (DC Cir. 1986)

1 disbursements by political party committees had to be paid for entirely from a Federal  
2 account and what disbursements could be allocated between Federal and non-Federal  
3 accounts.<sup>3</sup> In addition, the Commission also at points referred to an "electioneering  
4 message" standard for distinguishing wholly Federal from allocable expenses.<sup>4</sup> However,  
5 the Commission never incorporated the electioneering message concept into its regulations,  
6 did not provide applied guidance,<sup>5</sup> and ultimately a majority of Commissioners rejected the  
7 standard as inappropriate.<sup>6</sup> BCRA revised allocation rules for political party committees,  
8 making these audit and advisory opinion precedents inapplicable to party committees. In  
9 *McConnell*, the Supreme Court clarified that the express advocacy test is not a  
10 constitutional barrier establishing whether communications are "for the purpose of  
11 influencing any Federal election," which is the operative term used in the definition of  
12 "expenditure" in 2 U.S.C. 431(9). 124 S.Ct. at 688-689. In short, there is no statutory  
13 requirement and, in light of *Buckley* and *McConnell*, no Constitutional requirement, that  
14 express advocacy be the basis for distinguishing which of ABC's proposed communications  
15 may be paid for with Federal funds and which can be paid for with non-Federal funds, i.e.,  
16 funds that are not subject to the Act's limitations and source prohibitions.

17 Political committees are required to register and report with the Commission and  
18 comply with the limitations and prohibitions of the Act. *See, e.g.*, 2 U.S.C. 431(4); 434(a),  
19 441a, 441b, 441c, 441e, 441f, 441g. Furthermore, although the Bipartisan Campaign

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<sup>3</sup> See, generally audits of the 1996 Clinton and Dole presidential campaigns, audits of State Party Committees from the 1998, 2000 and 2002 election cycles, SOR in MUR 5369, Rhode Island Republican Party.

<sup>4</sup> Advisory Opinions 1985-14 and 1995-25.

<sup>5</sup> Advisory Opinion 95-25 accepted the characterization of the requestor that the communications at issue did not constitute electioneering communications, but expressly noted that the Commission was not making its own judgment on that question.

<sup>6</sup> Statement or Reasons of Vice Chairman Wold and Commissioners Elliott, Mason and Sandstrom in Dole and Clinton audits, June 24, 1999.

1      Reform Act of 2002, Pub. L. 107-155 (Mar. 27, 2002) ("BCRA") and *McConnell* now  
2      inform the Commission's analysis of which non-connected political committee activity  
3      must be paid for with Federal funds, requiring that activity referencing a clearly identified  
4      Federal candidate be paid for with Federal funds was as permissible an approach available  
5      to the Commission before BCRA as it is now.

6            Because previous advisory opinions incorporated a "clearly identified" standard, *see*  
7      2 U.S.C. 431(18)(statutory definition of "clearly identified"); 11 C.F.R. 100.17(regulation's  
8      definition of "clearly identified"),<sup>7</sup> and "[t]he Commission has the authority to revise or  
9      supersede policies articulated in past advisory opinions, if it determines that those policies  
10     no longer adequately ensure that soft money is not used to influence federal elections[,]"<sup>8</sup>  
11     the Commission now concludes that non-connected political committee activity referencing  
12     clearly identified Federal candidates must be paid for with Federal funds.

13        In a number of advisory opinions issued before BCRA, the Commission had  
14     incorporated the Act's long-standing definition of "clearly identified" as a condition  
15     precedent for when activity must be paid for by Federal or non-Federal funds, or some  
16     combination of both. *See, e.g.*, Advisory Opinions 1984-15, 1985-14, 1995-25. These  
17     advisory opinions read the Act and Commission regulations to require an examination to  
18     what extent certain political committee activity referencing a "clearly identified" Federal  
19     candidate..and meeting other factors; amounted to an expenditure. A number of the  
20     Commission's regulations also have incorporated the clearly identified standard. *See, e.g.*

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<sup>7</sup> "The term 'clearly identified' means that (A) the name of the candidate involved appears; (B) a photograph or drawing of the candidate appears; or (C) the identity of the candidate is apparent by unambiguous reference." 2 U.S.C. 431(18).

<sup>8</sup> Memorandum from Lawrence M. Noble, General Counsel to the Commission, Soft Money Rulemaking; Recommendations and Draft Final Rule, Agenda Doc. 00-95 at 15. Minutes of an Open Meeting, Sept. 28, 2000 at 6.

1    11 C.F.R. 100.22(incorporating clearly identified candidate standard into the express  
2    advocacy test); 11 C.F.R. 109.21(c)(3)(incorporating clearly identified candidate standard  
3    into the content prong of the coordination test); 11 C.F.R. 106.1(a)(incorporating the clearly  
4    identified standard into the allocation of expenses between candidates).

5                 In *McConnell*, the Supreme Court characterized BCRA as a culmination of reform  
6    efforts in reaction to an “explosion in soft-money spending on federal electioneering...”  
7    124 S.Ct. at 660 n.44. The Commission’s previous advisory opinions addressing political  
8    party committee activity have thus been overtaken by BCRA and Court’s holdings in  
9    *McConnell*. In light of our earlier abandonment of the electioneering message standard, the  
10   Commission, because of this advisory opinion request, is now obliged to reassess its policy  
11   response to issues related to when certain non-connected political committee activity must  
12   be paid for with Federal funds. The “clearly identified” standard presents a straightforward  
13   approach, given its long-standing presence in the Act and Commission regulations and  
14   subsequent reforms.

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

1     *Grayned v. City of Rockford*, 408 U.S. 104, 108-109 (1972). Under BCRA, these public  
2     communications cannot be paid for with non-Federal funds by Federal, state and local  
3     officeholders or party committees. 2 U.S.C. 441i(a), (b), (e) and (f). The Act's clearly  
4     identified standard plainly surpasses "promote," "support," "attack" and "oppose" in the  
5     notice and clarity provided to non-connected political committees.

6                 In summary, the clearly identified candidate standard is an appropriate benchmark  
7     for determining whether communications made by political committees must be paid for  
8     with Federal funds because by their very nature, all political committees, not just political  
9     party committees, are focused on the influencing of Federal elections. Indeed, the  
10   Commission's allocation regulations at 11 CFR 106.1(a)(1), 106.1(a)(2), 106.1(d), and  
11   106.6(b)(1)(i) explicitly incorporate the clearly identified candidate standard.

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

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<sup>9</sup> 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

1           The Act and Commission regulations set forth four exceptions to the definition of  
2    “electioneering communication.” 2 U.S.C. 434(f)(3)(B); 11 CFR 100.29(c). One of these  
3    statutory exceptions covers communications that are expenditures or independent  
4    expenditures under the Act. 2 U.S.C. 434(f)(3)(B)(ii). The Commission determined that  
5    communications by political committees that would otherwise meet the definition of  
6    electioneering communications are, in fact, expenditures and must be reported as such.  
7    “Electioneering Communications; Final Rules,” 67 Fed. Reg. 65,190, 65,197 (Oct. 23,  
8    2002); *see also* “Bipartisan Campaign Reform Act of 2002; Reporting; Notice of Proposed  
9    Rulemaking,” 67 Fed. Reg. 64,555, 64,561 (October 21, 2002).<sup>10</sup> Accordingly, Federal  
10   political committees, by operation of the expenditure and independent expenditure  
11   exemption in 2 U.S.C. 434(f)(3)(B)(ii) and 11 CFR 100.29(c)(3), are not subject to BCRA’s  
12   electioneering communication provisions. Therefore, any communications paid for by  
13   ABC referencing a clearly identified Federal candidate must be reported as expenditures  
14   and comply with the requirement that expenditures be Federally funded.

15           Finally, ABC proposes to fund certain activity that may be paid for with a mix of  
16    Federal and non-Federal funds. Commission regulations provide that, with respect to a  
17    political committee with separate Federal and non-Federal accounts (such as ABC), “[a]ll  
18    disbursements, contributions, expenditures, and transfers . . . in connection with any Federal

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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).

<sup>10</sup> 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 election shall be made from its Federal account" (except as otherwise permitted with  
2 respect to State, district, and local party committees under 11 CFR Part 300). 11 CFR  
3 102.5(a)(1)(i). The proper allocation of such activity by a non-connected political  
4 committee such as ABC is set by 11 CFR Part 106. Where a communication (including a  
5 voter registration or get-out-the-vote communication) constitutes, at least in part, an  
6 expenditure on behalf of a clearly identified Federal candidate, the provisions at 11 CFR  
7 106.1 providing for allocation to a specific candidate or candidates will apply. Where  
8 specific candidates are not clearly identified and the communication is part of a generic  
9 voter drive, the provisions of 11 CFR 106.6 will apply as to the allocation of a political  
10 committee's disbursements between its Federal and non-Federal accounts.

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

20           For communications by a non-connected political committee that are for voter  
21 identification, voter registration, or get-out-the-vote purposes that are not coordinated with  
22 a candidate and that do not refer to any clearly identified Federal candidate, Commission  
23 regulations at 11 CFR 106.6 require the use of at least some Federal funds because they are

1      in part for the purpose of influencing a Federal election. Commission regulations provide  
2      that such committees shall allocate expenses for:

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

7  
8      11 CFR 106.6(b)(2)(iii). The expenses for such purposes shall be allocated between the  
9      Federal and non-Federal accounts of the non-connected committee based on the ratio of  
10     Federal expenditures to total Federal and non-Federal disbursements made by the  
11     committee during the two-year Federal election cycle.<sup>11</sup>

12

13     1. *Given that ABC's "express purpose" [2] [20] and "message" [26] is "the election and*  
14     *defeat" [26] [20] of particular Federal candidates,*  
15        *(a) May ABC, or its agents, solicit or direct non-Federal funds [47]?*  
16        *(b) May ABC use non-Federal funds to pay for any of its activities [26] [27]<sup>12</sup>?*

17  
18        The paragraphs of your request addressed in this question largely present general  
19        questions of interpretation, and thus do not qualify as an advisory opinion request. 11 CFR  
20        112.1(b). As explained above, political committees may maintain Federal and non-Federal  
21        accounts, 11 CFR 102.5, and may allocate certain payments between Federal funds and

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<sup>11</sup> 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 refer to 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).

<sup>12</sup> 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 non-Federal funds, *see, e.g.*, 11 CFR 106.6(b)(2)(iii) (allocation of expenses for generic  
2 voter drives by non-connected political committees). Thus, ABC may raise non-Federal  
3 funds, and spend such funds as permitted by the Act.<sup>13</sup> More specific guidance is provided  
4 below in the context of more specific questions.

5

6 ***Coordination with Federal Candidates and Political Party Committees***

7 [9]. [11] to [17]. [18]. [28] to [36], and [62]

8 Several paragraphs of your advisory opinion request directly raise issues as to  
9 “coordination” between ABC and candidates for Federal office and/or political party  
10 committees. *See, e.g.*, paragraphs [11]-[17], [18] (second question), [28]-[36], and [62] of  
11 your request. Under 2 U.S.C. 441a(a)(7) and 11 CFR 109.20(a), “coordinated” means,  
12 “made in cooperation, consultation, or concert with, or at the request or suggestion of, a  
13 candidate, a candidate’s authorized committee, or their agents . . . .” The regulations in 11  
14 CFR 109.21 set forth a three-pronged test for the purpose of determining whether a  
15 communication is coordinated with one or more candidates for Federal election, an  
16 authorized committee, a political party committee, or an agent of any of the foregoing. If  
17 the three-pronged test is satisfied, then the payments for the communication are made for  
18 the purpose of influencing a Federal election, and therefore constitute in-kind contributions.  
19 First, the communication must be paid for by someone other than that candidate, authorized  
20 committee, political party committee, or an agent of any of the foregoing. 11 CFR

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

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<sup>14</sup> In order to meet this fifth conduct standard, the former employee or independent contractor must use or convey information. 11 CFR 109.21(d)(5). 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.”)

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).<sup>15</sup>

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],<sup>16</sup> [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 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  
15      or to a political party committee. Such contributions must be paid for entirely with Federal  
16      funds and are subject to ABC's contribution limits under 2 U.S.C. 441a(a)(1) or (2). Thus,  
17      the Commission conditions its responses to the questions discussed below on the  
18      assumption that these activities are not coordinated with a Federal candidate, authorized

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<sup>15</sup> 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.

<sup>16</sup> 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 committee, political party committee, or agents of any of the foregoing. 2 U.S.C. 441a(a);  
2 11 CFR 100.52(d)(1), 11 CFR 109.20 and 109.21.<sup>17</sup>

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4 *Coordination with non-profit organizations*

- 5
- 6 2. *You ask whether ABC may coordinate its activities with entities that are constituted as*  
7 *either IRC §527 political organizations or section 501(c)(3) organizations, and that are*  
8 *not Federal political committees. [35] and [36]*

9

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

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

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<sup>17</sup> 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). 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       *Agency*

2

3           Your advisory opinion request presents numerous facts and questions that raise

4       issues as to whether an individual is an agent<sup>18</sup> of one or more organizations, including

5       ABC. *See, e.g.*, paragraphs [12], [15], and [29]. The Commission cannot determine

6       whether particular individuals are agents of ABC or other persons without more specific

7       information. As the Commission previously noted in the Explanation and Justification for

8       11 CFR Part 109, it is difficult to determine whether an individual is acting as an "agent" in

9       the abstract because "[t]he grant and scope of the actual authority, whether the person is

10      acting within the scope of his or her actual authority, and whether he or she is acting on

11      behalf of the principal or a different person, are factual determinations that are necessarily

12      evaluated on a case-by-case basis in accordance with traditional agency principles." 68

13      Fed. Reg. 421, 425. Therefore, to the extent your questions require a determination of

14      whether a particular person is an agent of ABC or another organization, the questions are

15      hypothetical and present general questions of interpretation of the Act, rather than specific

16      transactions or activities, and are thus not proper for an advisory opinion. 2 U.S.C.

17      437f(a)(1); 11 CFR 112.1(b). Furthermore, in addressing the questions you present in this

18      request, the Commission assumes without deciding that ABC directors and staff are not

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<sup>18</sup> 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 agents of a candidate for Federal office, an authorized committee of such candidate, a  
2 political party committee, or any other individual or entity.

3     *Communications*

- 4
- 5     3. *You indicate that ABC may fund a communication that states: "President George W.*  
6     *Bush, Senator X and Representative Y have led the fight in Congress for a stronger*  
7     *defense and stronger economy. Call them and tell them to keep fighting for you." May*  
8     *ABC pay for this communication containing no express advocacy solely with donations*  
9     *from individuals that exceed the Act's limitations? [6], [7]*

10

11       No. The communication you intend to produce would refer to clearly identified  
12       Federal candidates. As explained in the introduction to the legal analysis above, a payment  
13       by a political committee for a communication that references a clearly identified Federal  
14       candidate is "for the purpose of influencing a Federal election," and therefore an  
15       "expenditure" within the meaning of 2 U.S.C. 431(9) that must be paid for entirely with  
16       Federal funds. Consequently, because the payments for the communications you propose to  
17       run will be expenditures regulated under the Act, ABC must pay for these ads entirely with  
18       funds that comply with the Act's various limitations, including individual contribution  
19       limitations.

20

- 21
- 22     4. *May ABC pay for communications within 60 days of a general election with funds from*  
23     *corporations, labor organizations, and trade associations, if the message is "President*  
24     *Bush is a strong leader. The War on Terror, cutting taxes, putting families and working*  
25     *people first. He has provided strong, common sense leadership for this nation. Call*  
26     *President Bush and tell him to keep fighting for a strong America."? [64A]*

27       The messages given as examples of these communications (see Exh. E to the  
28       request, referred to in paragraph [64]), which you describe as "issue ads," refer to a clearly  
29       identified Federal candidate. These communications are for the purpose of influencing a  
30       Federal election and therefore are an expenditure with the meaning of 2 U.S.C. 431(9), and

1 must be paid for by ABC entirely with Federal funds. See the introduction to the legal  
2 analysis, above. Because corporate, labor organization, or incorporated trade association  
3 funds cannot be used for expenditures (2 U.S.C. 441b), ABC cannot pay for  
4 communications that refer to a clearly identified Federal candidate, with corporate, labor  
5 organization, or incorporated trade association funds.

6

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

9

10       In paragraph [8], you ask generally "[s]ince ABC is an unincorporated entity, may it  
11 broadcast issue ads within 60 days of a general election paid for with funds that include  
12 contributions from corporations, unions and trade associations?" Because you do not  
13 provide a script for the "issue ads" referred to in paragraph [8], this is a hypothetical  
14 question calling for general interpretation of the Act. Thus, it is not a proper advisory  
15 opinion request. 2 U.S.C. 437f(a)(1); 11 CFR 112.1(b).

16

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

21

22       No. The communication you intend to produce would refer to a clearly identified  
23 candidate for Federal office. As explained in the introduction to the legal analysis above, a  
24 payment by a political committee for a communication that refers to a clearly identified  
25 Federal candidate is "for the purpose of influencing a Federal election," and therefore an  
26 "expenditure" within the meaning of 2 U.S.C. 431(9) that must be paid for entirely with  
27 Federal funds. Consequently, because the communications you propose to run will be

1 expenditures, ABC must pay for these ads entirely with funds that comply with the Act's  
2 various limitations, including individual contribution limitations of 2 U.S.C. 441a(a).  
3 Whether the ad is run less than or more than 60 days before a general election is not  
4 relevant.

5  
6 7. *ABC wishes to run television and radio ads, such as those which are attached to your*  
7 *request at Exhibit E, more than sixty days before the general election that state that*  
8 *President Bush is a "strong leader" who "has provided strong, common-sense*  
9 *leadership for this nation." May ABC fund these ads with either Federal or non-*  
10 *Federal funds? [65]*

11  
12 As discussed in the introduction to the legal analysis above, a payment by a political  
13 committee for a communication that refers to a clearly identified Federal candidate is "for  
14 the purpose of influencing a Federal election," and therefore an "expenditure" within the  
15 meaning of section 431(9), that must be paid for entirely with Federal funds. The  
16 communications you intend to produce would reference a candidate for Federal office. The  
17 communications about which you inquire in paragraph [65] mention President Bush, and  
18 are therefore expenditures regulated by the Act. ABC must pay for these ads entirely with  
19 Federal funds.

20

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

22 You ask a number of questions about funding for proposed communications tied to  
23 what you describe as voter registration and get-out-the vote ("GOTV") activities. These  
24 questions are found at paragraphs [5], [6], [18 first question], [19], [26], [48], [52] through  
25 [61], [69], and [70]. They present a variety of messages in a variety of media, including  
26 direct mail, phone banks, and door-to-door distribution of material. You also ask about a

1 specific voter identification communication [67]. With respect to some paragraphs, you  
2 also ask about the implications of BCRA on specific types of Federal election activity, as  
3 defined at 2 U.S.C. 431(20)(A)(i) and (ii) and 11 CFR 100.24(b)(1) and (2).<sup>19</sup> However, as  
4 noted above, the Commission accepts the representation that ABC is not established,  
5 financed, maintained or controlled by a national, State, district or local party committee.  
6 Therefore, the provisions of 2 U.S.C. 441i that turn on those types of Federal election  
7 activity *as applied to party committees* do not apply to ABC as if it were a party committee.

8 The Commission concludes that ABC's voter drive activity is entirely or in part, for  
9 the purpose of influencing a Federal election. See 2 U.S.C. 431(9)(A)(i). Commission  
10 regulations address: (1) communications by political committees that involve expenditures  
11 on behalf of clearly identified Federal candidates and/or disbursements on behalf of clearly  
12 identified non-Federal candidates, at 11 CFR 106.1; and (2) communications by political  
13 committees that are for voter identification, voter registration or GOTV purposes that are  
14 not coordinated with a candidate and that do not mention a clearly identified candidate, at  
15 11 CFR 106.6(b)(2)(iii). Funding for such messages will depend in large measure on the  
16 application of the provisions in 11 CFR Part 106.

17

18 8. *May ABC use non-Federal funds to pay for voter registration and get-out-the-vote*  
19 *public communications that clearly identify a Federal candidate and that expressly*  
20 *advocate his election or defeat or otherwise promote, support, attack, or oppose the*  
21 *candidate? This question refers to communications in paragraphs [5], [6], [26], [52],*  
22 *[57], and [69]. This question also pertains to questions [54] and [60].*

23

---

<sup>19</sup> 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           No. Some of the messages contain specific phrases such as "vote for George W.  
2       Bush for President," or "It's your duty to register to vote so that you can support George  
3       Bush's reelection as President of the United States." These communications constitute  
4       express advocacy under 11 CFR 100.22(a).<sup>20</sup> Other messages refer directly to an explicit  
5       act of support for a clearly identified candidate, such as "If you care about keeping the  
6       strong defense President Bush has put in place, go out and vote November 2." These  
7       messages refer to a clearly identified Federal candidate. Other messages mention a clearly  
8       identified Federal candidates. These include messages such as "President Bush has led the  
9       fight in Congress for a stronger defense and economy. Call him and tell him to keep  
10      fighting for you."

11           The communications in paragraphs [26] (first message), [52], [54] (first message),  
12       [57], and [60] (first message) present messages that clearly identify only one Federal  
13       candidate and expressly advocate his election. 11 CFR 100.22(a). Payment for such a  
14       message would be an expenditure allocable entirely to that candidate and must be paid for  
15       entirely with Federal funds. 11 CFR 106.1(a). Although the message in paragraph [57]  
16       also refers generically to "the entire Republican team," 11 CFR 106.1 requires the  
17       apportionment of the entire cost to the only candidate mentioned.<sup>21</sup> This is a

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<sup>20</sup> 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!' . . . ."

<sup>21</sup> 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

1 communication that is for the purpose of influencing the election of a clearly identified  
2 Federal candidate, President Bush, without identifying any other Federal or non-Federal  
3 candidate.

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

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

15 The message described in paragraph [6] names the three individuals mentioned, all  
16 of whom are Federal officeholders. President Bush is a Federal candidate, and the  
17 Commission assumes that neither Senator X nor Representative Y is a non-Federal

---

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 chose to require the allocation of only 50 percent to the Federal candidate, although it still 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(c)(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 candidate, and that one or both may be Federal candidates. Thus, only Federal funds may  
2 be used.<sup>22</sup>

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 issues.

17 Paragraph [53] includes the statement, "From the war on terror, to cutting taxes, to  
18 improving education – we all have a duty to elect leaders who put America first and not the  
19 liberal special interest groups." The messages in paragraphs [53] and [54] (second  
20 message) would be allocable under 11 CFR 106.6, and may be paid for with non-Federal  
21 funds only to the extent permitted under 11 CFR 106.6(c). The same analysis applies to the  
22 directed GOTV messages referred to in paragraphs [59] and [60] (second message).

---

<sup>22</sup> 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 refers to clearly identified 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 Paragraph 69 includes the sentence, “From the war on terror, to cutting taxes, to improving  
2 education – we all have a duty to elect leaders who will put America first and not the liberal  
3 special interest groups.”<sup>23</sup>

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 Exhibit D to the request. Thus, the communication falls  
20 within the definition of “generic voter drive” at 11 CFR 106.6(b)(2)(iii) and must be paid  
21 for, at least in part, with Federal funds under 11 CFR 106.6(c). As explained above, the  
22 portion of this generic voter drive that may be paid for with non-Federal funds is set forth in  
23 11 CFR 106.6(c).

24

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<sup>23</sup> 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     *11. How would prior contributions by ABC to candidates affect ABC's subsequent voter  
2         registration and GOTV activities with respect to those candidates? [18]. [19].*

3  
4             Essentially, you ask whether a prior contribution by ABC to a Federal candidate  
5         would lead to a conclusion that subsequent GOTV activities with respect to the candidate  
6         would be viewed as coordinated expenditures and constitute in-kind contributions to the  
7         candidate subject to the amount limitations and source prohibitions of the Act. The  
8         Commission concludes that a prior contribution by ABC to the candidate, in and of itself,  
9         does not establish that ABC's GOTV activities are coordinated with the candidate.

10

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

14  
15             Paragraphs [55] and [61] ask if certain types of funds may be used for voter  
16         registration or GOTV messages if the solicitation for the funds mentions a specific Federal  
17         candidate but the eventual voter registration or GOTV communication does not. An  
18         example of such a solicitation is "Give money to an effort [or 'to a GOTV effort'] that will  
19         help President Bush and Republican candidates;" an example of the subsequent GOTV  
20         communication is, "Go out and vote. The election is important. It's your civic duty." You  
21         do not provide an example for a voter registration communication subsequent to the  
22         solicitation but, based on your question in paragraph [55], the Commission assumes that the  
23         language is similar to the GOTV communication.

24  
25             These two questions implicate two different activities of ABC, its fundraising  
activities and its generic spending.

1           2 U.S.C. 431(8) provides that a contribution includes “any gift, subscription, loan  
2 advance, or deposit of money or anything of value for the purpose of influencing any  
3 election for Federal office.” The fundraising messages in paragraphs [55] and [61] refer to  
4 a clearly identified Federal candidate and do not identify any other Federal or non-Federal  
5 candidates or elections. Based on these facts, these funds are being raised to influence a  
6 Federal election. Therefore, the contributions raised will be subject to the contribution  
7 limits and source prohibitions of the Act, and ABC may not raise non-Federal funds using  
8 those fundraising messages.<sup>24</sup> The fact that ABC intends to spend the funds raised through  
9 this solicitation for generic activity does not alter the conclusion that the solicitation is for  
10 Federal funds. To avoid the receipt of contributions in violation of the Act, ABC should  
11 make clear in its solicitations that it may accept only contributions within the limitations  
12 and prohibitions of the Act or provide other information consistent with that. *See* 11 CFR  
13 102.5(a)(2)(ii).

14           As indicated above, the subsequent voter registration or GOTV messages will not  
15 refer to a Federal candidate, a political party, or generically to candidates supporting  
16 positions on specific issues. They do not have to be funded entirely with Federal funds.  
17 However, these subsequent messages must be funded as generic voter drive expenses that  
18 are allocable in accordance with 11 CFR 106.6(c).<sup>25</sup>

19

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<sup>24</sup> These communications are not a mixed Federal/non-Federal fundraising activity and therefore are not subject to 11 CFR 106.6(d).

<sup>25</sup> 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 “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     13. *Do donors violate the Act by donating non-federal funds to the massive voter  
2       mobilization effort directed at the general public with the stated purpose (i.e., express  
3       advocacy) of defeating a named Federal candidate? If so, are they subject to criminal  
4       penalties if they know from fundraising appeals that the purpose of their contribution is  
5       the defeat of a specific Federal candidate? Does it matter if the stated public purpose is  
6       the defeat of a specific candidate but all the messages themselves from ABC do not  
7       contain express advocacy? [48]*

8  
9       Requests pertaining to the activities of a third party do not qualify as advisory  
10      opinion requests. 11 CFR 112.1(b). Moreover, an advisory opinion request must include a  
11      complete description of all facts relevant to the specific transaction. 11 CFR 112.1(c).  
12      Paragraph [48] presents questions as to the activities of third parties, including potentially  
13      large numbers of donors in a variety of circumstances. Finally, the Commission notes that  
14      it does not have authority to impose criminal penalties, and thus offers no opinion as to  
15      whether any conduct would be subject to them.

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

19  
20       No. Paragraph [67] refers to mass mailings and telephone banks to identify voters,  
21      which candidates they support, and which issues motivate them. The message will contain  
22      several questions such as "Do you believe your taxes are too high?" and "Are you in favor  
23      of improving education?", along with questions such as "Are you in favor of President  
24      Bush's efforts to lower taxes?" or his "efforts to improve education?" or his "efforts for a  
25      strong defense?" The communication will finish with a question as to whether the reader or  
26      listener intends to vote on November 2. No other candidate is mentioned. This  
27      communication refers to a clearly identified Federal candidate and consistent with the  
28      analysis above, it must be paid for entirely with Federal funds.

29

1      ***Fundraising***

2  
3      ***15. ABC wishes to have Federal officeholders and candidates assist in its fundraising***  
4      ***activities as permitted by the Act. May Federal officeholders and candidates raise***  
5      ***funds for ABC's Federal account? [38]***

6  
7      Yes, a Federal officeholder or candidate may solicit funds for ABC's Federal  
8      account if he or she only asks for Federally permissible funds. See Advisory Opinions  
9      2003-36, 2003-5 and 2003-3.<sup>26</sup>

10        11 CFR 102.5(a)(2) provides that contributions that were designated for ABC's  
11      Federal account, or that result from a solicitation that expressly states that the contribution  
12      will be used in connection with a Federal election, or that are from contributors who have  
13      been informed that all contributions are subject to the prohibitions and limitations of the  
14      Act, may be deposited in ABC's Federal account. See, e.g., Advisory Opinion 2000-25.  
15      Because ABC is a political committee, contributions to ABC's Federal account must meet  
16      at least one of these criteria.

17

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

21  
22      Yes, if the Federal officeholders or candidates only ask for funds that are not in  
23      excess of the amounts permitted with respect to contributions to candidates under 2 U.S.C.  
24      441a(a), and that are not from sources prohibited by the Act from making contributions in  
25      connection with an election for Federal office.

---

<sup>26</sup> 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.

1        As amended by BCRA, the Act regulates certain actions of Federal candidates and  
2 officeholders,<sup>27</sup> their agents,<sup>28</sup> and entities directly or indirectly established, financed,  
3 maintained, or controlled by them<sup>29</sup> (together, “covered persons”) when they raise or spend  
4 funds in connection with either Federal or non-Federal elections. 2 U.S.C. 441i(e)(1). Both  
5 BCRA and the Commission’s rules implementing BCRA prohibit covered persons from  
6 soliciting, receiving, directing, transferring, or spending “funds in connection with any  
7 election other than an election for Federal office” “unless the funds are not in excess of the  
8 amounts permitted with respect to contributions to candidates and political committees”  
9 under 2 U.S.C. 441a(a)(1), (2), and (3), and are not from sources prohibited by the Act from  
10 making contributions in connection with an election for Federal office. 2 U.S.C.  
11 441i(e)(1)(B); 11 CFR 300.62.<sup>30</sup> See Advisory Opinions 2003-36 and 2003-03.

12

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

16

17      Yes, Federal officeholders and candidates may attend and speak at fundraising  
18 events for ABC’s non-Federal account that raise funds outside the Act’s contribution limits  
19 and source prohibitions, but they may not solicit funds that are outside the amount  
20 limitations and source prohibitions of the Act. Advisory Opinions 2003-36 and 2003-03.

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<sup>27</sup> 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.

<sup>28</sup> 11 CFR 300.2(b)(3).

<sup>29</sup> 11 CFR 300.60.

<sup>30</sup> 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           The scope of a covered person's potential liability under 2 U.S.C. 441i(e)(1)(B) and  
2        11 CFR 300.62 must be determined by his or her own speech and actions in asking for  
3        funds or those of his or her agents, but not by the speech or actions of another person  
4        outside his or her control. Commission regulations establish that a Federal officeholder or  
5        candidate will not be held liable for soliciting funds in violation of section 441i(e)(1)(B) or  
6        section 300.62 merely by virtue of attending or participating in any manner in connection  
7        with a fundraising event at which non-Federal funds are raised. To be liable, the Federal  
8        candidate must "ask" for non-Federal funds. *Id.*; see 11 CFR 300.2(m), (n). In *McConnell*,  
9       the Court found the regulatory definitions of the terms "to solicit" and "to direct,"  
10      interpreted in the context of the larger statutory scheme of section 441i, "permit[s] a wide  
11      range of joint planning and electioneering activity." 124 S.Ct. at 670. *See also*, "Prohibited  
12      and Excessive Contributions: Non-Federal Funds or Soft Money; Final Rule," 67 Fed. Reg.  
13      49,064, 49,086-49,087 (July 29, 2002). Thus, the scope of a covered person's potential  
14      liability under 2 U.S.C. 441i(e)(1) and 11 CFR 300.62 will be determined by his or her own  
15      speech and actions in asking for funds or those of his or her agents, but not by the speech or  
16      actions of another person outside his or her control. *See Advisory Opinions 2003-36, 2003-*  
17      05 and 2003-03.

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

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

1  
2     If a covered person gives a speech soliciting funds generally without mentioning specific  
3     amounts, sources, or limitations, he may do so if written notices are clearly and  
4     conspicuously displayed at the event indicating that the covered person is soliciting only  
5     Federally permissible funds;<sup>31</sup> or if a public oral disclaimer is made. *See Advisory*  
6     Opinions 2003-36 and 2003-03.

7

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

11

12         Yes, within the limits of 2 U.S.C. 441i(e)(1)(B) and 11 CFR 300.62. Section  
13         441i(e)(1)(B) and section 300.62 only apply to an invitation to an event where that  
14         invitation constitutes a solicitation for funds, and where the covered person approved,  
15         authorized, or agreed or consented to be featured, or named in, the invitation (e.g., through  
16         the use of his name or likeness). The mere mention of a covered person in the text of a  
17         written invitation does not, without more, constitute a solicitation or direction of non-  
18         Federal funds by that covered person. However, a candidate's consent or agreement to be  
19         mentioned in an invitation as an honored guest, featured speaker or host, where that  
20         invitation is a solicitation, constitutes a solicitation by the candidate. Thus, if a candidate  
21         agrees or consents to be named in a fundraising solicitation as an honored guest, featured  
22         speaker or host, or if the invitation constitutes a solicitation for any other reason, then the  
23         solicitation must contain a clear and conspicuous statement that the entire solicitation is  
24         limited to funds that comply with the amount limits and source prohibitions of the Act. *See*

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<sup>31</sup> *See* 11 CFR 110.11(c) for the Commission's interpretation of "clear and conspicuous" in related contexts.

1     *generally* Advisory Opinions 2003-36 and 2003-03. Complying with these requirements  
2     regarding the written invitation does not relieve the covered person of the requirements as  
3     to his or her actual appearance at the subsequent event as an honored guest or featured  
4     speaker, as set out in the response to questions 16 and 17. The requirements set out in  
5     response to question 17 as to the speech and disclaimer by the covered person, clear and  
6     conspicuous written notices, and conversations by the covered person are still applicable.

7

8     *19. May Federal officeholders or candidates sign written solicitations for the non-Federal*  
9     *account that raise funds outside the Act's contribution and source limitations? [43]*  
10    No. Federal officeholders and candidates may not sign written solicitations for  
11    ABC's non-Federal account that raise funds outside the Act's contribution limits and source  
12    prohibitions. 2 U.S.C. 441i(e)(1)(B); 11 CFR 300.62; Advisory Opinion 2003-03.

13

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

19

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

21

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

31

1        Yes. In the situation you describe, although ABC will use the names of specific  
2        Federal candidates in solicitations, ABC will not coordinate with the candidates, and the  
3        candidates will not solicit, receive, direct, transfer, spend or disburse funds outside of the  
4        amount limitations, source prohibitions or reporting requirements of the Act. Thus, neither  
5        2 U.S.C. 441i(e)(1)(A), nor 11 CFR 300.61, nor any other provision of the Act or  
6        Commission regulations, would bar ABC's fundraising through the use of the names of  
7        specific Federal candidates in a manner that will convey ABC's support for or opposition to  
8        specific Federal candidates.<sup>32</sup>

9

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

17

18        No. 2 U.S.C. 431(8) provides that a contribution includes "any gift, subscription,  
19        loan, advance, or deposit of money or anything of value made by any person for the  
20        purpose of influencing any election for Federal office." If ABC solicits funds by using the  
21        names of specific Federal candidates in a manner that will convey ABC's support for or  
22        opposition to specific Federal candidates, such as "Give to ABC so we can support  
23        President Bush's reelection" [25], the funds raised will be contributions to ABC subject to  
24        the Act's contribution limits and source prohibitions.<sup>33</sup> *Id.*; 11 CFR 102.5(a)(2)(ii). Cf.

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<sup>32</sup> Please see the answer to question 15, above, regarding the conditions for deposit of Federal funds under 11 CFR 102.5.

<sup>33</sup> The Commission notes that the joint fundraising rules at 11 CFR 102.17 do not apply to the solicitation about which you inquire.

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

6

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

16

17    Yes, as a non-connected political committee, ABC may sponsor an issues forum, which the Commission understands you intend to be a forum in which solicitations for funds do not occur. As explained in the answers to question 17, a covered person may be included on the invitations, subject to the limits of section 441i(e)(1)(B) and section 300.62. A Federal officeholder or candidate may speak at ABC's issues forum. 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.

24

25    24. *May ABC raise and spend funds from its non-Federal accounts from foreign nationals and from foreign corporations and labor organizations for voter registration and voter mobilization activities on behalf of Federal candidates with express advocacy (e.g., "register to help reelect President Bush") or with an issue advocacy message outside the 30 or 60 day windows (e.g., "Register. It's your duty.")?* [49]

30

1       No. The Act, as amended by BCRA, prohibits foreign nationals<sup>34</sup> from, among  
2 other things, directly or indirectly making a contribution or donation of money or other  
3 thing of value, or to expressly or impliedly promise to make a contribution or donation, in  
4 connection with a Federal, State, or local election (this prohibition includes not only  
5 elections for political office, but also ballot measures and other types of elections). 2  
6 U.S.C. 441e(a)(1)(A); 11 CFR 110.20. Also, it is unlawful for a person to solicit, accept, or  
7 receive a contribution or donation from a foreign national. 2 U.S.C. 441e(a)(2). 11 CFR  
8 110.20(g) provides that no person shall knowingly solicit, accept or receive a contribution  
9 or donation from a foreign national, and 11 CFR 110.20(h) provides that no person shall  
10 knowingly provide substantial assistance in the making of an expenditure, independent  
11 expenditure or donation by a foreign national. Accordingly, ABC must not deposit such  
12 funds into its Federal or non-Federal account. Nothing in the Act or Commission  
13 regulations creates an exception on the basis of the political committee's intended use for  
14 the foreign national funds.

15     25. *If Federal candidates or officeholders participate in the requestors' fundraising*  
16 *activities in any scenario above, would they be "solicit[ing] . . . funds in connection*  
17 *with an election other than an election for Federal office" under 2 U.S.C.*  
18 *441e(e)(1)(B)? [46]*

19  
20     The Commission cannot resolve whether any of the fundraising scenarios you  
21 generally describe above are in connection with any election other than an election for  
22 Federal office without more specific information regarding those communications (e.g.,  
23 none of the exhibits to ABC's request for an advisory opinion identify a candidate for State,

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<sup>34</sup> 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).

district or local political office). As such, this question is hypothetical and it presents a general question of interpretation of the Act, rather than a specific transaction or activity, and is thus not proper for an advisory opinion. 2 U.S.C. 437f(a)(1); 11 CFR 112.1(b).

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

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

**13**  
**14** Sincerely,

**Bradley A. Smith**  
**Chairman**

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