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AGENDA ITEM
For Meeting of: 2-18-04

MEMORANDUM

DATE: February 18, 2004

TO: The Commission

FROM: Commissioner Michael E. Toner *MT*

RE: Advisory Opinion 2003-37 (Americans for a Better Country)

SUBMITTED LATE

Attached please find amendments that I am considering offering to Agenda Document 04-11-D concerning Advisory Opinion 2003-37.

Page 4, line 19 after "elections." Insert "Such ads were a prime motivating force behind BCRA's passage... [A]ny public communication that promotes or attacks a clearly identified Federal candidate directly affects the election in which he is participating."

Page 5, line 7 strike "only"

Page 5, line 19 after "committees." Insert "Accordingly, in light of BCRA and the McConnell ruling, it is appropriate for the Commission to require as a matter of law that all communications made by political committees that "promote, support, attack, or oppose" a Federal candidate be paid for entirely with funds subject to the limits, prohibitions, and reporting requirements of FECA." Also, after "FECA." Insert footnote "In making this determination, the Commission is in no way addressing the legal status of organizations that are not political committees under the Act, including organizations operating under Section 501(c)(3) and Section 501(c)(4) of the Internal Revenue Code. The Commission will address the legal status of such organizations in a rulemaking this spring."

Page 5, footnote 3 strike "675 n.64" and replace with "678 n.67 (stressing that "[s]ection 527 political organizations are, unlike 501(c) groups, organized for the express purpose of engaging in partisan political activity.)."

Page 12, continuation of footnote 10, line 1 move sentences beginning with "Likewise, to meet" through "communication. . .)." to the end of the paragraph.

Page 15, line 27 through page 16, lines 1-5 strike

Page 16, line 23 strike "and do not refer to any non-Federal candidates."

Page 17, lines 9-12 strike beginning with "Because you do not" and replace with " The Commission interprets your question as asking whether ABC, as an unincorporated entity, may pay for electioneering communications under the Act and Commission regulations with funds from corporations, unions, or trade associations. The answer is no. Under 11 CFR 114.14(a) & (b), no entity or person may use general treasury funds from corporations, unions, or trade associations to pay for electioneering communications, regardless of whether the entity is incorporated or not." After "not." Insert footnote "11 CFR 114.14(c) provides exceptions to this prohibition for corporate or labor organization funds that constitute salary, royalties or other earned income, interest earnings, stock dividends, and other unearned income, and receipt of payments representing fair market value for services rendered. None of the exceptions contained in 11 CFR 114.14(c) are applicable here."

Page 17, lines 23-24 strike "for the following reasons."

Page 17, line 24 change "communication" to "communications"

Page 17, line 27 after "communication" insert "aired at any time"

Page 18, lines 4-6 strike beginning with "Moreover" through the end of line 6

Page 18, lines 9-10 restore deleted text

Page 18, lines 18-20 strike beginning with "Allocation" through "above."

Page 18, line 20 through page 19, line 2 restore deleted text

Page 19, line 20 after "431(9)(A)(i)" insert "This conclusion is buttressed by the Supreme Court's finding in McConnell that "voter registration, voter identification, GOTV, and generic campaign activity all confer substantial benefits on Federal candidates. . ." Id. at 675. The Court emphasized that "generic campaign activity has a direct effect on Federal elections." Id. at 674 (internal quotations omitted).

Page 21, line 16 after "ticket" insert "(referred to in Exhibits A and C as "the entire Republican team")."

Page 22, line 2 after "allocable" insert "between ABC's Federal and non-Federal accounts"

Page 22, line 5 after "CFR 106.6" insert footnote "This analysis is consistent with the regulations the Commission recently adopted regarding state, district, and local party committee phone banks when the phone script asks 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)."

Page 22, line 18 through page 23, line 2 restore deleted text.

Page 30, line 15 after "(July 29, 2002)" insert footnote "In McConnell, the Court made clear that Section 441i as enacted by Congress "permit[s] a wide range of joint planning and electioneering activity." 124 S.Ct. at 670. See also Id. ("BCRA leaves parties and candidates free to coordinate campaign plans and activities, political messages, and fundraising goals with one another.") (Quoting Senator John McCain). The Supreme Court concluded that the Commission's interpretation of the statute was consistent with the construction offered by Intervenors McCain, et al in their brief. 129 S.Ct. at 670."