

January 30, 2004

**NOTICE: AO DRAFT COMMENT PROCEDURES**

The Commission has approved a revision in its advisory opinion procedures that permits the submission of written public comments on draft advisory opinions when proposed by the Office of General Counsel and scheduled for a future Commission agenda.

Today, DRAFT ADVISORY OPINION 2003-38 is available for public comments under this procedure. It was requested by Cassandra Lentcher on behalf of United States Representative Engel. The draft may be obtained from the Public Disclosure Division of the Commission.

Proposed Advisory Opinion 2003-38 will be on the Commission's agenda for its public meeting of Thursday, February 5, 2004.

Please note the following requirements for submitting comments:

1) Comments must be submitted in writing to the Commission Secretary with a duplicate copy to the Office of General Counsel. Comments in legible and complete form may be submitted by fax machine to the Secretary at (202) 208-3333 and to OGC at (202) 219-3923.

2) The deadline for the submission of comments is 12:00 noon (EDT) on February 4, 2004.

3) No comments will be accepted or considered if received after the deadline. Late comments will be rejected and returned to the commenter. Requests to extend the comment period are discouraged and unwelcome. An extension request will be considered only if received before the comment deadline and then only on a case-by-case basis in special circumstances.

4) All comments timely received will be distributed to the Commission and the Office of General Counsel. They will also be made available to the public at the Commission's Public Disclosure Division.

**CONTACTS**

**Press inquiries:                      Robert Biersack (202) 694-1220**

**Commission Secretary:              Mary Dove (202) 694-1040**

**Other inquiries:**

**To obtain a copy of draft AO 2003-37, contact the Public Records Office -  
Public Disclosure Division at (202) 694-1120 or 800-424-9530.**

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

**ADDRESSES**

**Submit a single copy of written comments to:**

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

RECEIVED  
FEDERAL ELECTION  
COMMISSION  
SECRETARIAT



FEDERAL ELECTION COMMISSION  
Washington, DC 20463

2004 JAN 30 A 9 50

January 30, 2004

**MEMORANDUM**

**TO:** The Commission

**THROUGH:** James A. Pehrkon  
Staff Director *JAP*

**FROM:** Lawrence H. Norton  
General Counsel *LHN*

Rosemary C. Smith *RCS*  
Acting Associate General Counsel

Mai T. Dinh *MTD*  
Acting Assistant General Counsel

Robert M. Knop *RMK*  
Attorney

**AGENDA ITEM**  
For Meeting of: 02-05-04  
**SUBMITTED LATE**

**SUBJECT:** Draft AO 2003-38- Alternative Drafts

Attached are two proposed drafts of Advisory Opinion 2003-38, which responds to a request from United States Representative Eliot Engel, submitted by Cassandra Lentchner of Perkins Coie, LLP. Representative Engel seeks the Commission's determination whether funds he plans to raise and spend on behalf of a redistricting committee to defray legal expenses incurred in redistricting litigation are in connection with a Federal or non-Federal election within the meaning of 2 U.S.C. 441i(e)(1)(A) or (B).

Draft A concludes that such funds are not in connection with a Federal or non-Federal election and, therefore, Representative Engel may raise and spend non-Federal funds on behalf of the proposed committee. Draft B reaches the opposite conclusion. On balance, the Office of the General Counsel believes that Draft B is the preferred approach. We request that these drafts be placed on the agenda for February 5, 2004.

Attachments  
Drafts A and B

1 ADVISORY OPINION 2003-38

2  
3 Cassandra F. Lentchner, Esq.  
4 Perkins Coie, LLP  
5 607 Fourteenth St., N.W.  
6 Washington, D.C. 20005

7  
8 Dear Ms. Lentchner:

9 This responds to your letter dated December 5, 2003, requesting an advisory  
10 opinion on behalf of United States Representative Eliot Engel, concerning the application  
11 of the Federal Election Campaign Act of 1971, as amended ("the Act"), and Commission  
12 regulations to the raising and spending of funds for reapportionment-related activities in  
13 his home state of New York.

14 ***Background***

15 Representative Engel, a Member of the United States House of Representatives  
16 from the Seventeenth Congressional District of New York, is a candidate for re-election  
17 to that seat in 2004.<sup>1</sup> You state that Democratic leaders in New York, including  
18 Democratic Members of Congress such as Representative Engel, have traditionally  
19 attempted to influence the State legislature's Congressional reapportionment decisions  
20 and have become involved in litigation concerning the redistricting process. You state  
21 that, in previous years, they have formed organizations not registered with the  
22 Commission and exempt from taxation under the Internal Revenue Code.

23 There were lengthy court proceedings involving the New York Congressional map  
24 last year. *See Rodriguez v. Pataki*, No. 02 Civ. 618, 2003 U.S. Dist. LEXIS 15934  
25 (S.D.N.Y., Sept. 10, 2003). Representative Engel participated in this lawsuit and incurred  
26

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<sup>1</sup> Representative Engel's principal campaign committee is "Engel for Congress."

1 legal fees. You state that his involvement in redistricting proposals was not intended to  
2 influence any election and did not involve any advocacy of any candidate for office. You  
3 state that Representative Engel would like to participate in the formation and operation of  
4 a redistricting committee ("the Committee") to pay for the legal fees incurred in  
5 connection with the redistricting litigation and you wish to know whether he may do so  
6 consistent with the Act's restrictions on the solicitation, receipt, direction, transfer, or  
7 spending of non-Federal funds in connection with Federal and non-Federal elections by  
8 Federal candidates and officeholders. See 2 U.S.C. 441i(e)(1)(A) and (B). In a  
9 subsequent conversation, you state that prior to soliciting funds on behalf of the  
10 Committee, Representative Engel intends to obtain the approval of the Committee on  
11 Standards of Official Conduct of the U.S. House of Representatives, as required by House  
12 ethics rules. In another subsequent communication, you confirm that the Committee  
13 would be an entity completely separate from Engel for Congress or any other authorized  
14 committee of Representative Engel.

15 ***Question Presented***

16 *Are the amounts raised and spent by Representative Engel on behalf of a*  
17 *redistricting committee subject to the provisions of the Act?*

18 ***Legal Analysis and Conclusions***

19 They are not, for the reasons discussed below. On November 6, 2002, the  
20 Bipartisan Campaign Reform Act of 2002, Pub. L. 107-155, 116 Stat. 81 (2002)  
21 ("BCRA") took effect. As amended by BCRA, the Act regulates certain actions of  
22 Federal candidates and officeholders, their agents, and entities directly or indirectly

1 established, financed, maintained, or controlled by them (collectively, “covered  
2 persons”), when they raise or spend funds in connection with either Federal or non-  
3 Federal elections. 2 U.S.C. 441i(e)(1). Both BCRA and the Commission’s regulations  
4 implementing BCRA prohibit covered persons from soliciting, receiving, directing,  
5 transferring, or spending any “funds in connection with an election for Federal office” or  
6 any “funds in connection with an election other than an election for Federal office” unless  
7 such funds are “subject to the limitations, prohibitions, and reporting requirements of this  
8 Act” or are consistent with FECA’s amount limitations and source prohibitions,  
9 respectively. 2 U.S.C. 441i(e)(1)(A) and (B); 11 CFR 300.61 and 300.62.

10 In analyzing the application of 2 U.S.C. 441i(e), the threshold question is whether  
11 the funds involved are in connection with a Federal or non-Federal election under  
12 subsection (e)(1). *See* Advisory Opinion 2003-20. If they are, then the analysis proceeds  
13 to whether the exceptions to subsection (e)(1) in subsections (e)(2) through (e)(4) apply.  
14 If the funds are not raised or spent in connection with an election, then the funds do not  
15 fall within the scope of section 441i(e).

16 In advisory opinions issued prior to the enactment of BCRA, the Commission has  
17 approved proposals for the establishment by candidates or officeholders of separate  
18 entities that are established exclusively for activity related to redistricting, including the  
19 defrayal of reapportionment-related legal expenses. Such entities were permitted to  
20 receive and spend funds that were not subject to the limitations and prohibitions of the  
21 Act. In approving such proposals, the Commission has stated that the influencing of  
22 reapportionment decisions, although a political process, is not considered election-

1 influencing activity subject to the requirements of the Act. Advisory Opinions 1982-37  
2 and 1981-35. Because they were not considered made “for the purpose of influencing any  
3 election for Federal office,” the Commission determined that funds received and spent  
4 solely for reapportionment-related activities were not contributions or expenditures under  
5 the Act. *Id.* The Commission has stated, however, that any accounts and entities  
6 established for the purpose of receiving and disbursing funds for reapportionment-related  
7 activities must be separate and independent from a candidate’s principal (or any  
8 authorized) campaign committee. Advisory Opinion 1990-23; *see also* Advisory Opinion  
9 1996-39 (stating that account established for purpose of receiving and disbursing funds to  
10 pay legal expenses incurred in relation to challenge of sufficiency of candidate’s  
11 nominating petitions must be completely separate and independent from candidate’s  
12 principal (or any authorized) committee).

13       The Commission concludes that 2 U.S.C. 441i(e)(1)(A) and (B) do not change  
14 this result. There is no indication in the legislative history of BCRA that Congress  
15 intended sections 441i(e)(1)(A) or (B) to change an area that is both well-familiar to  
16 Members of Congress and the subject of longstanding interpretation through Commission  
17 advisory opinions. Therefore, donations to, and disbursements by, the Committee for the  
18 sole purpose of defraying legal expenses incurred in the reapportionment lawsuit are  
19 neither “in connection with an election for Federal office” nor “in connection with any  
20 election other than an election for Federal office” for purposes of 2 U.S.C. 441i(e)(1)(A)  
21 and (B). As such, the funds are not subject to the limitations and prohibitions of the Act.  
22 Accordingly, Representative Engel and any agents he authorizes, may solicit funds on

1    **behalf of the Committee to defray the legal expenses incurred in the reapportionment**  
2    **lawsuit, provided that the funds received in response to such solicitations are deposited**  
3    **solely in an account of the Committee which, as you describe, is an entity that is**  
4    **completely separate and independent of Engel for Congress and any other authorized**  
5    **committees of Representative Engel.**

6            **Solicitations for the Committee may be made in person or by mail and should be**  
7    **accompanied by a letter stating the purpose of the Committee and noting that no**  
8    **donations to the Committee would be used for the purpose of influencing any Federal or**  
9    **non-Federal election. See Advisory Opinion 1996-39 (prescribing manner in which**  
10   **solicitations to fund to pay legal expenses incurred in relation to challenge of sufficiency**  
11   **of candidate's nominating petitions should be made); see also Advisory Opinions 2003-**  
12   **15 (approving solicitation method for donations to legal expense fund related to challenge**  
13   **of legality of Federal election ballot) and 1983-30 (approving solicitation method for**  
14   **donations to legal expense fund related to challenge of State constitutional provisions).**  
15   **Solicitations on behalf of the Committee should be completely separate from any**  
16   **solicitations on behalf of Engel for Congress or any authorized committee of any**  
17   **candidate. See id.**

18            **The Commission expresses no opinion regarding the possible applicability of any**  
19   **Federal or State tax laws or other laws, or the rules of the House of Representatives, to**  
20   **the matters presented in your request, as those issues are outside its jurisdiction.**

21            **This response constitutes an advisory opinion concerning the application of the**  
22   **Act and Commission regulations to the specific transaction or activity set forth in your**



1 request. *See* 2 U.S.C. 437f. The Commission emphasizes that, if there is a change in any  
2 of the facts or assumptions presented, and such facts or assumptions are material to a  
3 conclusion presented in this advisory opinion, then the requestor may not rely on that  
4 conclusion as support for its proposed activity.

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**Sincerely,**

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**Bradley A. Smith  
Chairman**

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17 Enclosures (AOs 2003-20, 2003-15, 1996-39, 1990-23, 1983-30, 1982-37, and 1981-35)

1 ADVISORY OPINION 2003-38

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3 Cassandra F. Lentchner, Esq.  
4 Perkins Coie, LLP  
5 607 Fourteenth St., N.W.  
6 Washington, D.C. 20005

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14 ***Background***

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16 from the Seventeenth Congressional District of New York, is a candidate for re-election  
17 to that seat in 2004.<sup>1</sup> You state that Democratic leaders in New York, including  
18 Democratic Members of Congress such as Representative Engel, have traditionally  
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20 and have become involved in litigation concerning the redistricting process. You state  
21 that, in previous years, they have formed organizations not registered with the  
22 Commission and exempt from taxation under the Internal Revenue Code.

23 There were lengthy court proceedings involving the New York Congressional map  
24 last year. See *Rodriguez v. Pataki*, No. 02 Civ. 618, 2003 U.S. Dist. LEXIS 15934  
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3 state that Representative Engel would like to participate in the formation and operation of  
4 a redistricting committee ("the Committee") to pay for the legal fees incurred in  
5 connection with the redistricting litigation and you wish to know whether he may do so  
6 consistent with the Act's restrictions on the solicitation, receipt, direction, transfer, or  
7 spending of non-Federal funds in connection with Federal and non-Federal elections by  
8 Federal candidates and officeholders. *See* 2 U.S.C. 441i(e)(1)(A) and (B). In a  
9 subsequent conversation, you stated that prior to soliciting funds on behalf of the  
10 Committee, Representative Engel intends to obtain the approval of the Committee on  
11 Standards of Official Conduct of the U.S. House of Representatives, as required by House  
12 ethics rules. In another subsequent communication, you confirmed that the Committee  
13 would be an entity completely separate from Engel for Congress or any other authorized  
14 committee of Representative Engel.

15 ***Question Presented***

16 *Are the amounts raised and spent by Representative Engel on behalf of a*  
17 *redistricting committee subject to the provisions of the Act?*

18 ***Legal Analysis and Conclusions***

19 They are, for the reasons discussed below. On November 6, 2002, the Bipartisan  
20 Campaign Reform Act of 2002, Pub. L. 107-155, 116 Stat. 81 (2002) ("BCRA") took  
21 effect. As amended by BCRA, the Act regulates certain actions of Federal candidates and  
22 officeholders, their agents, and entities directly or indirectly established, financed,

1 maintained, or controlled by them (collectively, “covered persons”), when they raise or  
2 spend funds in connection with either Federal or non-Federal elections. 2 U.S.C.  
3 441i(e)(1). Both BCRA and the Commission’s regulations implementing BCRA prohibit  
4 covered persons from soliciting, receiving, directing, transferring, or spending any “funds  
5 in connection with an election for Federal office” or any “funds in connection with an  
6 election other than an election for Federal office” unless such funds are “subject to the  
7 limitations, prohibitions, and reporting requirements of this Act” or are consistent with  
8 FECA’s amount limitations and source prohibitions, respectively. 2 U.S.C. 441i(e)(1)(A)  
9 and (B); 11 CFR 300.61 and 300.62.

10 In analyzing the application of 2 U.S.C. 441i(e), the threshold question is whether  
11 the funds involved are in connection with a Federal or non-Federal election under  
12 subsection (e)(1). *See* Advisory Opinion 2003-20. If they are, then the analysis proceeds  
13 to whether the exceptions to subsection (e)(1) in subsections (e)(2) through (e)(4) apply.  
14 If the funds are not raised or spent in connection with an election, then the funds do not  
15 fall within the scope of section 441i(e).

16 In upholding section 441i(e)’s solicitation restrictions, the Supreme Court stated  
17 that “[l]arge soft-money donations at a candidate’s or officeholder’s behest give rise to all  
18 of the same corruption concerns posed by contributions made directly to the candidate or  
19 officeholder.” *McConnell v. FEC*, 124 S. Ct. 619, 683 (2003). The Court went on to  
20 state that the donation’s value to the candidate or officeholder “is evident from the fact of  
21 the solicitation itself” regardless of whether the candidate or officeholder ultimately  
22 controls how the funds are spent. *Id.* Elsewhere in its opinion, the Court stressed that

1 “Congress’ legitimate interest extends beyond preventing simple cash-for-votes  
2 corruption to curbing ‘undue influence on an officeholder’s judgment, and the appearance  
3 of such influence.’” *Id.* at 664 (quoting *FEC v. Colorado Republican Fed. Campaign*  
4 *Comm.*, 533 U.S. 431, 441 (2001)).

5       The Court recognized that the purpose of 2 U.S.C. 441i(e) is to prevent the flow  
6 of non-Federal funds to or through organizations controlled by Federal candidates or  
7 officeholders if those funds are used to affect any Federal, State, or local election. The  
8 outcome of the redistricting litigation will directly and significantly affect subsequent  
9 elections including decisions by individuals as to whether to become candidates.

10 Therefore, donations to the Committee are in connection with an election for Federal or  
11 non-Federal office under 2 U.S.C. 441i(e)(1)(A) or (B). The Commission also concludes  
12 that none of the exceptions to section 441i(e)(1)’s solicitation restrictions, in subsections  
13 (e)(2) through (e)(4), apply. Accordingly, Representative Engel may only raise and spend  
14 funds that are subject to the limitations, prohibitions, and reporting requirements of the  
15 Act on behalf of the Committee. In addition, as an entity directly established by a Federal  
16 candidate and officeholder, the Committee is subject to the same requirements.

17 Consequently, the Commission concludes that under 2 U.S.C. 441a(a)(1)(C) and  
18 441i(e)(1), Representative Engel and the Committee may raise up to a total of \$5,000 per  
19 calendar year from any particular permissible source, without regard to the amounts  
20 contributed by that source to Engel for Congress. *See* Advisory Opinions 2003-36 and  
21 2003-12. Once the Committee receives contributions or makes expenditures in excess of  
22 \$1,000 during a calendar year, it will become a political committee under 2 U.S.C.

1 431(4)(A) and 11 CFR 100.5(a).<sup>2</sup> Upon becoming a political committee, it must register  
2 with the Commission and comply with the reporting requirements of 11 CFR part 104.

3 In advisory opinions issued prior to the enactment of BCRA, the Commission had  
4 approved proposals for the establishment by candidates or officeholders of separate  
5 entities that were established exclusively for activity related to redistricting, including the  
6 defrayal of reapportionment-related legal expenses. Advisory Opinions 1982-37 and  
7 1981-35; *see also* Advisory Opinion 1990-23 (rejecting proposed establishment of  
8 separate segregated reapportionment account by Federal candidate's authorized  
9 committee but stating that candidate may establish independent reapportionment entity).  
10 Such entities were permitted to receive and spend funds that were not subject to the  
11 limitations and prohibitions of the Act. In approving such proposals, the Commission  
12 had stated that the influencing of reapportionment decisions, although a political process,  
13 was not considered election-influencing activity subject to the requirements of the Act.  
14 Given the broad language of 2 U.S.C. 441i(e) and the Court's interpretation of that  
15 language, it is inappropriate to maintain the proposition that funds raised and spent on  
16 reapportionment-related activities are not subject to the limitations and prohibitions of the  
17 Act. Consequently, prior advisory opinions that stand for this proposition are superseded.

18 The Commission expresses no opinion regarding the possible applicability of any  
19 Federal or State tax laws or other laws, or the rules of the House of Representatives, to  
20 the matters presented in your request, as those issues are outside its jurisdiction.

21 This response constitutes an advisory opinion concerning the application of the

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<sup>2</sup> Because Representative Engel controls the Committee, the major purpose analysis is not applicable in determining whether the Committee is a political committee. *Buckley v. Valeo*, 424 U.S. 1, 79 (1976).

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

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**Sincerely,**

**Bradley A. Smith  
Chairman**

**Enclosures (AOs 2003-36, 2003-20, 2003-12, 1990-23, 1982-37, and 1981-35)**