



FEDERAL ELECTION COMMISSION  
Washington, DC 20463

**MEMORANDUM**

**TO: THE COMMISSION  
STAFF DIRECTOR  
GENERAL COUNSEL  
CHIEF COMMUNICATIONS OFFICER  
FEC PRESS OFFICE  
FEC PUBLIC DISCLOSURE**

**FROM: COMMISSION SECRETARY** *MWD*

**DATE: JULY 15, 2009**

**SUBJECT: COMMENTS ON DRAFT AO 2009-13  
The Black Rock Group**

**Transmitted herewith are timely submitted comments from Mr. Fred Wertheimer, on behalf of Democracy 21, and Mr. J. Gerald Hebert, on behalf of Campaign Legal Center, regarding the above-captioned matter.**

**Proposed Advisory Opinion 2009-13 is on the agenda for Thursday, July 16, 2009.**

**Attachment**

2009 JUL 15 A 9:34

July 15, 2009

**By Electronic Mail**

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

**Re: Comments on Draft Advisory Opinion 2009-13 (Black Rock Group)**

Dear Ms. Dove:

These comments are filed on behalf of Democracy 21 and the Campaign Legal Center with regard to Draft Advisory Opinions 2009-13 (Agenda Doc. No. 09-42), in response to a request filed by the Black Rock Group (BRG) concerning its plan to act as a commercial vendor to one or more single member limited liability companies (LLCs) that intend to make independent expenditures in federal elections.

The nub of the issue is whether BRG's role in coordinating and facilitating the independent expenditures to be made by the various LLCs will mean that the LLCs are operating as a "group of persons" under 2 U.S.C. § 431(4), so that their expenditures will thus trigger political committee status.

The Office of General Counsel prepared two draft answers to the question. Draft A concludes that political committee status is not triggered by the proposed scheme; Draft B concludes that it is.

We strongly urge the Commission to adopt Draft B, which more accurately and realistically assesses the practical consequences of the facts presented by the request, and correctly concludes that the highly organized and centralized nature of the scheme proposed by BRG will result in a de facto "pooling of funds" by a "group of persons," and thus will trigger political committee status.

Draft B notes that BRG, as a vendor, will "facilitate communication between LLCs by scheduling conference calls or meetings between certain LLCs, or conveying messages between them." Draft B at 3.

But importantly, as Draft B also correctly notes, “BRG does not propose any limits on the nature or amount of the information that the LLCs may share at the meetings arranged by BRG, or the information that BRG may convey between the LLCs.” Draft B at 9.

Indeed, Draft B states that the facts here “contemplate that BRG will facilitate collaboration between two or more LLCs, each making independent expenditures, about when communications are made, which media outlets will be used, what the communications will say, and which candidates and elections they will target.” Draft B at 10. The Draft notes that under this proposed scheme, “the LLCs . . . may act in concert with respect to their expenditures to support or oppose the election or defeat of one or more Federal candidates.” *Id.*

Not only will BRG facilitate communications among the LLCs, it will in fact “manage” other consultants serving the same set of LLCs, “such as pollsters, media production, media placement, direct mail, and phone vendors . . .” Draft B at 3. This indicates that BRG will be very much more than a secretary passing notes back and forth, but rather will be an active political consultant coordinating and synchronizing the spending by a group of LLCs (*i.e.*, persons).

This highlights the danger posed by the scheme presented by BRG, which is that the political committee requirements will be evaded through the *de facto* pooling of money by the participating individual LLC spenders.

Such a pooling of funds, where the individual spender gives up control of his or her money by making a contribution to the group, is the hallmark of political committee status. *See* Draft A at 10 n.5.

Here, the facts indicate that a *de facto* pooling of money will occur. BRG states that each individual LLC will, as a formal matter, maintain control of its funds. But the nature of the proposed arrangement suggests that each LLC will abide by the collective decisions which are facilitated, coordinated and communicated by BRG, as to where and how to spend its money.

As Draft B recognizes, the participating LLCs will engage in spending that is “closely synchronized” and involves “close collaboration of multiple LLCs,” each of which is operating “jointly and in concert to achieve a common goal.” Draft B at 9. Indeed, this may go so far as having the multiple LLCs share in the “creation, development, or consulting costs” for the production of advertisements. Draft B at 10 n.5. Draft B correctly recognizes that “[s]haring the private plans, strategies, activities, and needs of the LLCs, even if only internally within BRG, would aid and actualize the LLCs efforts to act as a group.” Draft B at 10.

This will happen – or, at least, in the absence of safeguards, may happen – to the extent that the LLCs all agree to operate pursuant to a central plan coordinated by BRG. And to that extent, the LLCs will in practice be functioning as a single entity – as a “group of persons.”

In other words, it is not sufficient for each LLC to nominally retain its own funds in its own bank account, if the LLC has agreed, either explicitly or implicitly, to spend its funds

pursuant to a central coordinated plan. Such spending is then being done not by each LLC, but rather by a “group of persons” operating pursuant to a central, coordinated decision-making process. As a practical matter, this would then constitute a “pooling” of funds that gives rise to political committee status.

Draft B recognizes this reality and, accordingly, correctly “concludes that the LLCs acting together through BRG as their common vendor would constitute a ‘group of persons,’” Draft B at 10, and in so doing, would trigger political committee status.

By contrast, Draft A concludes that the proposed group of LLCs, whose activities will be coordinated by BRG, will not become a “group of persons” for purposes of political committee status. It reaches this conclusion by minimizing the degree of coordination that will take place: “Merely arranging conference calls, scheduling meetings, or conveying messages between two or more clients is insufficient to conclude that those clients become a ‘group of persons’ for purposes of the definition of ‘political committee.’” Draft A at 9.

This describes BRG’s role as limited to merely ministerial or administrative tasks. But BRG’s letter does not limit its role to only such ministerial tasks, and neither does Draft A.

In particular, the fact that BRG will “facilitate communications” among the LLCs by “passing along messages” opens the door to BRG undertaking a range of activities that will, in practice, amount to BRG coordinating and controlling the spending by the LLCs, including, for instance, actively directing the expenditures to be made by the LLCs.

Draft A pretends otherwise, by noting that “BRG does not indicate that there is any agreement between the LLCs themselves,” and by accepting at face value BRG’s representation that it is not “aware of any possible collaboration between the LLCs themselves at this point,” or that BRG “does not know . . . whether there will be any collaboration between the LLCs beyond the meetings arranged by BRG.” Draft A at 9.

The fact that BRG does not “indicate” or is “not aware” or “does not know” of agreement or collaboration among the LLCs “at this point” is not, however, an adequate safeguard against the LLC participants operating as the functional equivalent of a political committee, by collaborating or synchronizing their spending under the aegis of BRG’s efforts to coordinate and facilitate that spending.

In short, Draft B more accurately and realistically assesses the practical consequences of the facts presented by the request, and correctly concludes that the highly organized and centralized nature of this scheme indicates a de facto “pooling of funds” by a “group of persons.”

**We strongly urge the Commission to reject Draft A and adopt Draft B.**

Sincerely,

*/s/ Fred Wertheimer*

Fred Wertheimer  
Democracy 21

*/s/ J. Gerald Hebert*

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Each Commissioner