



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 William J. McGinley, Esquire, on behalf of The Black Rock Group.

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

Attachment

**PATTON BOGGS LLP**  
ATTORNEYS AT LAW

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July 15, 2009

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**VIA FACSIMILE: (202) 208-3333**

Ms. Mary W. Dove  
Commission Secretary  
Federal Election Commission  
999 F. Street, NW  
Washington, DC 20463

Re: AOR 2009-13  
Black Rock Group Comments

Dear Ms. Dove:

These comments are submitted on behalf of our client, Black Rock Group ("BRG"), to the two draft Advisory Opinions released by the Office of General Counsel ("OGC") in response to Advisory Opinion Request 2009-13 ("AOR"). Initially, we wish to thank the OGC staff for their work in producing the two draft Advisory Opinions for consideration by the Federal Election Commission ("Commission"). BRG respectfully requests that the Commission adopt Draft A and provide answers to certain questions contained in BRG's AOR.

Draft A should be clarified to reflect that the BRG AOR indicated that BRG personnel will discuss information about one LLC client with its other LLC clients. As stated in the AOR, BRG intends to offer communication consulting services to its LLC clients, such as "how to best communicate his or her view on federal candidates, including best practices and messages gleaned from the other LLCs." BRG AOR at 2. Moreover, "the same BRG personnel will service all of the LLC clients, and BRG will not establish any firewalls that will prevent the BRG staff working for each LLC from discussing the private plans, strategies, activities and needs with the personnel working for other LLCs." *Id.* Therefore, as stated in the AOR, BRG will undoubtedly communicate the information it learns from one LLC client to its other LLC clients. The background section and answer to Question 2 in Draft A do not now reflect this factual predicate.

There is no legal basis for holding that a common vendor to multiple LLCs sponsoring independent expenditures ("IEs"), or the sharing of information between such LLCs, triggers political committee status for the LLCs under the Federal Election Campaign Act of 1971, as amended (the "Act"), or Commission regulations. The draft advisory opinions do not cite to any statute, regulation or court case supporting the proposition that such arrangements trigger political committee status. The LLCs will not pool their resources which means that any

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discussions, collaboration, or agreements between the LLCs, whether BRG facilitates these activities or not, cannot trigger political committee status under the statute, regulations or Commission precedent. In addition, all decisions will rest with the LLCs, not their BRG consultants.

Even more telling, the comments submitted by the Campaign Legal Center and Democracy 21 ("CLC D21") – two organizations that advocate for greater regulation of political speech – do not cite any legal authority for their argument that the facts set forth in BRG's AOR will trigger political committee status. The absence of legal authority for their arguments is the most profound statement contained in their comments. The Commission cannot adopt an Advisory Opinion based upon what some wish the law required. Such a decision must be based upon the current law. Current law does not support the argument that the facts set forth in BRG's AOR trigger political committee status. *See Federal Election Comm'n v. Wisconsin Right to Life, Inc.*, 127 S.Ct. 2652, 2669 (2007) ("Where the First Amendment is implicated, the tie goes to the speaker, not the censor."). Moreover, CLC and D21 mischaracterize BRG's AOR by misstating that the request is about the pooling of funds. BRG previously corrected this false characterization of its AOR in the comments filed with the Commission on June 10, 2009. The Commission must look past these groups' attempt to recast the AOR and consider BRG's actual AOR.

In order to aid the Commission's consideration of this request, we believe the two draft Advisory Opinions say the following.

- With respect to Draft A, the answer to Question 1 states that BRG may serve as a vendor to one LLC client making IEs without triggering political committee status.
  - The answer to Question 2 provides that BRG may serve as a vendor to multiple LLC clients making IEs without triggering political committee status as well.<sup>1</sup> This answer permits BRG to advise the LLCs, and facilitate communications between the LLCs, concerning their IE activities such as which LLC will sponsor IEs in specific media markets (e.g., Los Angeles vs. San Francisco), which LLC will sponsor ads on certain topics (e.g., taxes vs. national security), and which LLC will sponsor television advertisements and which ones should use other media (e.g., radio, direct mail, etc.) to communicate their messages. In addition, BRG is permitted to communicate to its LLC clients information concerning the plans, needs, strategies and activities of its other LLC clients. As stated in the AOR, BRG will provide only advice and all final decisions will rest with each LLC.

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<sup>1</sup> The answer to Draft A, Question 2 needs to be amended to reflect that BRG indicated in its AOR that it will share information from one LLC client with its other LLC clients as discussed above, and that such activities and communications are permissible.

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- o Since the answer to Question 2 permits BRG to keep all of its LLC clients informed about each other's strategic and tactical plans, the answer to Question 3 does not change if the LLCs are not in communication with each other.
- We believe that Draft B has significant flaws that make its adoption inconsistent with existing law. In Draft B, the answer to Question 1 also states that BRG may serve as a vendor to one LLC client making independent expenditures without triggering political committee status.
  - o The answer to Question 2 provides that the LLCs will trigger political committee status if BRG's services include the facilitation of communications between the LLCs and the sharing of information between the BRG staff working for each LLC. This draft concludes that the sharing of information between the LLCs - which would enable them to act in concert with each other - "will likely" trigger political committee status. The drafts cite no legal authority for these conclusions, because no legal authority exists. As such, this must be corrected by the Commission. In the same vein, this draft also erroneously states in footnote 5 that the airing of substantially similar advertisements by the LLCs may be evidence of cost-sharing between the LLCs which may trigger political committee status. This is simply not the case.
  - o We believe the following in Draft B is consistent with current law and wish to confirm the following: The answer to Question 3 provides that the answer to Question 2 will change if none of the LLCs are in direct communication with each other and if BRG does not facilitate communication between the LLCs. Under these circumstances, BRG is permitted to service multiple LLC clients without triggering political committee status. This means that BRG may advise its LLC clients concerning the specific media markets to target (e.g., Los Angeles vs. San Francisco), suggest the topics that should be discussed in the advertisements (e.g., taxes vs. national security), and which media each LLC should use to communicate his or her messages (e.g., radio, direct mail, etc.). The only caveat is that BRG may not convey specific messages from one LLC client to any other LLC client. In addition, BRG is permitted to use the information it receives from one LLC client to influence the advice it provides to the other LLC clients in an attempt to prevent the LLCs from duplicating messages or participating on the same media markets.

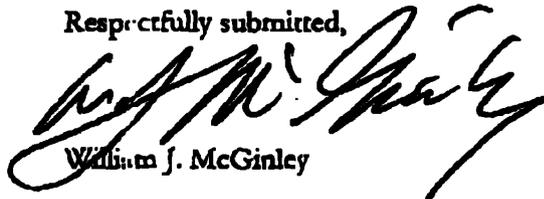
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In conclusion, we urge the Commission to adopt Draft A with the amendments discussed above.

Please do not hesitate to contact me with any questions.

Respectfully submitted,



William J. McGinley

cc: Rosemary C. Smith, Esquire  
Associate General Counsel