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MEMORANDUM

AGENDA ITEM
For Meeting of: 07-16-09

SUBMITTED LATE

TO: The Commission

FROM: Vice Chairman Matthew S. Petersen *MS*

Commissioner Caroline C. Hunter *CC*

Commissioner Donald F. McGahn II *DFM*

SUBJECT: Amendment to Draft Advisory Opinion 2009-13 (Black Rock Group)

DATE: July 15, 2009

We intend to offer the attached amended Draft A response for Advisory Opinion 2009-13 (Black Rock Group).

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1 ADVISORY OPINION 2009-13

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3
4 William J. McGinley
5 Patton Boggs LLP
6 2550 M Street, NW
7 Washington, D.C. 20037
8

DRAFT A - Revised

9 Dear Mr. McGinley:

10 We are responding to your advisory opinion request on behalf of The Black Rock
11 Group ("BRG"), concerning the application of the Federal Election Campaign Act of
12 1971, as amended (the "Act"), and Commission regulations to activities of BRG, a newly
13 formed consulting company.

14 The Commission concludes that BRG may serve as a commercial vendor to one
15 or more single member limited liability companies that make independent expenditures
16 concerning Federal elections or candidates without triggering political committee status.

17 ***Background***

18 The facts presented in this advisory opinion are based on your letter received on
19 May 27, 2009, your supplemental letter dated June 10, 2009, your comments dated July
20 15, 2009, and BRG's website.

21 BRG is a limited liability company ("LLC") established in 2009 under the laws of
22 the State of Delaware. BRG was established to provide clients, including CEOs, elected
23 officials, and Fortune 500 companies, with communication, "earned media," and
24 grassroots messaging services. It helps clients build successful public policy campaigns
25 by making sure that they are "asking the right questions, framing the debate in the
26 appropriate manner and are delivering messages so they are heard and [their] objectives

1 achieved.” See http://www.blackrockgrp.com/services_publicpolicy.php. It advises
2 companies on media strategy and message campaigning.

3 See http://www.blackrockgrp.com/services_mediastrategy.php. It advises clients on how
4 to manage their reputations in the media, and offers training on how to improve their
5 media skills. *Id.* It also advises clients on how to manage and avoid crisis.

6 See http://www.blackrockgrp.com/services_crisismgt.php.

7 BRG proposes to offer strategic communication and general consulting services to
8 single member natural-person LLCs. These LLCs will be established for the sole purpose
9 of making independent expenditures that expressly advocate the election or defeat of one
10 or more Federal candidates. Each LLC client will be a separate and distinct entity, and
11 each will have the following characteristics:

- 12 (1) One individual will serve as the LLC’s only member and manager;
- 13 (2) For Federal income tax purposes, the LLC will be treated as a
14 disregarded entity and not a corporation;
- 15 (3) All capital contributions for each LLC will come solely from the
16 personal funds of the LLC’s only member;
- 17 (4) The LLC will not engage in any for-profit business activities, receive
18 income from any other types of activities, or accept donations from any
19 other individual or entity.

20 BRG may encourage its individual clients to establish LLCs with the above
21 characteristics. BRG also may be approached by clients who have already established, or
22 are contemplating establishing, an LLC with the above characteristics.

1 BRG will advise these LLCs on the development of messages that expressly
2 advocate the election or defeat of the Federal candidates chosen by the client. BRG's
3 role will be to advise each LLC concerning how best to communicate its sole member's
4 views on these Federal candidates. The individual member of each LLC will retain
5 ultimate control over the timing, content, method of communication, and the candidate
6 referenced in each communication constituting an independent expenditure.

7 Each LLC will spend more than \$1,000 per calendar year on independent
8 expenditures for television, radio, direct mail, phone bank, and print advertisements. In
9 no case, however, will any communication be funded by more than one individual. Each
10 LLC may make independent expenditures for or against one or more Federal candidates.
11 In some cases more than one LLC may make independent expenditures for or against the
12 same Federal candidate. BRG, its LLC clients, and any other vendor providing services
13 to each LLC will not coordinate any communications with any Federal candidate or
14 political party committee.

15 The same BRG personnel will service all of the LLCs. BRG also will manage
16 other consultants such as pollsters, media production, media placement, direct mail, and
17 phone vendors, who will also provide services to each LLC. BRG will not have firewalls
18 preventing BRG personnel advising one LLC from discussing that LLC's private plans,
19 projects, strategies, activities, and needs with the BRG personnel advising any other
20 LLCs. BRG represents that it will advise the LLCs (based on what it learns from each
21 LLC client), and facilitate communications between the LLCs, concerning their
22 independent expenditure activities and their plans, needs, and strategies. BRG also may
23 facilitate communication between LLCs by scheduling conference calls or meetings

1 between certain LLCs. BRG represents that it will provide only advice and all final
2 decisions will rest with each LLC.

3 ***Questions Presented***

4 1. *May BRG serve as a commercial vendor to one LLC making independent*
5 *expenditures concerning several Federal candidates and elections without*
6 *triggering political committee status?*

7 2. *May BRG serve as a commercial vendor for several LLCs making independent*
8 *expenditures concerning Federal candidates or elections without triggering*
9 *political committee status for one or more of the LLCs?*

10 3. *Do the answers in Questions 1 and 2 change if none of the LLCs directly*
11 *communicate with any of the other LLCs, or if BRG does not convey messages*
12 *between LLCs?*

13 ***Legal Analysis and Conclusions***

14 1. *May BRG serve as a commercial vendor to one LLC making independent*
15 *expenditures concerning several Federal candidates and elections without*
16 *triggering political committee status?*

17 Yes, BRG may serve as a commercial vendor to one LLC making independent
18 expenditures concerning several Federal candidates and elections without triggering
19 political committee status.

20 **Treatment of an LLC as an Individual**

21 Under the Act and Commission regulations, contributions and independent
22 expenditures made by a single natural member LLC are treated as if they were made by
23 an individual. See 2 U.S.C. 431(8) and (9); 11 CFR 110.1(g); Advisory Opinion 2009-02

1 (True Patriot Network); *see also*, Explanation and Justification for the Treatment of
2 Limited Liability Companies Under the Federal Election Campaign Act, 64 FR 37397,
3 37399 (July 12, 1999). In Advisory Opinion 2009-02, the Commission concluded that
4 independent expenditures made by Mr. Hanauer, the sole member of True Patriot
5 Network LLC (“TPN”), were treated as if they were made by Mr. Hanauer. The
6 Commission explained that, “[b]ecause of the unity between Mr. Hanauer and TPN, it is
7 appropriate for attribution of expenditures to pass through the LLC and attach to Mr.
8 Hanauer.” *See* Advisory Opinion 2009-02 (TPN) at 3. Here, BRG asks whether it can
9 serve as a commercial vendor to an LLC that appears to have a similar degree of unity
10 between the individual member and the LLC. As in Advisory Opinion 2009-02 (TPN),
11 the LLC will have one individual who serves as the LLC’s sole member and manager; for
12 Federal income tax purposes, each LLC will be treated as a disregarded entity and not a
13 corporation; and the LLC’s capital contributions will come solely from the personal funds
14 of the LLC’s only member.

15 The LLC is a third party and is not the requestor of this advisory opinion.
16 However, as discussed above, BRG represents that: (1) the LLC will have only one
17 individual member and manager; (2) for Federal income tax purposes, the LLC will be
18 treated as a disregarded entity and not a corporation; (3) all capital contributions for the
19 LLC will come solely from the personal funds of the LLC’s only member; and (4) the
20 LLC will not engage in any for-profit business activities, receive income from any other
21 types of activities, or accept donations from any other individual or entity. Given these
22 representations, the Commission determines that the LLC as described has the kind of

1 unity with the sole member of the LLC as was demonstrated in Advisory Opinion 2009-
2 02 (TPN). Accordingly, the single member LLC here is treated as an individual.

3 Political Committee Status

4 This advisory opinion request raises two “political committee” status issues.
5 First, is BRG itself a “political committee” under the Act? Second, do BRG and the LLC
6 constitute a “group of persons” so that together they are a “political committee”? The
7 Commission concludes that neither BRG by itself, nor BRG and its LLC client, are a
8 “political committee.”

9 Status of BRG

10 The Act and Commission regulations define a “political committee” as “any
11 committee, club, association, or other group of persons which receives contributions
12 aggregating in excess of \$1,000 during a calendar year or which makes expenditures
13 aggregating in excess of \$1,000 during a calendar year.” 2 U.S.C. 431(4)(A);
14 11 CFR 100.5(a). The Supreme Court construed the term “political committee” to
15 encompass only organizations that are under the control of a candidate or whose major
16 purpose is the nomination or election of a candidate. *See Buckley v. Valeo*, 424 U.S. 1,
17 79 (1976); *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 262 (1986).

18 The facts presented in the request, and the information available on BRG’s
19 website, indicate that BRG is organized and operated for commercial purposes, and not
20 for purposes of influencing any Federal election. BRG is in the business of providing
21 consulting services to a variety of clients, including Fortune 500 companies and corporate
22 executives. Moreover, BRG does not indicate that it has ever advocated the election of
23 any Federal candidate, or has ever supported any political party, or has expressed any

1 political goal, or stated any political purpose, or intends to do so in the future. *Cf. FEC v.*
2 *Malenick*, 310 F. Supp. 2d 230 (D.D.C. 2004) (the organization's public statements
3 demonstrated that the organization's major purpose was to elect specific Federal
4 candidates and to encourage major donors to consider supporting Federal candidates);
5 Advisory Opinion 1994-25 (Libertarian National Committee) (corporation not a true
6 vendor because its sole purpose was to organize a political convention and several
7 principals were members of the National Committee). Nor is BRG owned or controlled
8 by any Federal candidate. Accordingly, the Commission concludes that BRG by itself is
9 not a "political committee" under the Act.

10 "Group of Persons"

11 Under the facts presented here, BRG and a single LLC will not act together to
12 form a "group of persons," and therefore will not be a political committee. BRG's LLC
13 client will make independent expenditures that expressly advocate the election or defeat
14 of one or more Federal candidates.¹ BRG, however, will work with the LLC as a
15 commercial vendor for genuinely commercial purposes. Commission regulations define
16 a "commercial vendor," for the purposes of permissible extensions of credit to political
17 committees, as "any persons providing goods or services to a candidate or political
18 committee whose usual and normal business involves the sale, rental, lease or provision
19 of those goods or services." 11 CFR 116.1(c). BRG will provide strategic
20 communication and general consulting services to the LLC consistent with its usual and
21 normal business practice. Specifically, it will advise the LLC on how to develop its

¹ The single-member LLC also is not a "political committee" because it is treated as an individual under the Act. Advisory Opinion 2009-02 (TPN).

1 messages and how best to communicate its views on Federal candidates. BRG indicates
2 that it offers similar consulting services to its non-political clients.² For example, BRG
3 advises clients on media strategy and message campaigning, and helps clients build
4 successful public policy campaigns.³ The LLC also will retain ultimate control over the
5 timing, content, method of communication, and the candidate referenced in each
6 communication constituting an independent expenditure.⁴ Moreover, BRG itself will not
7 pay for any communication; all communications will be paid for solely by the LLC.
8 Therefore, the consulting services BRG will provide to the LLC here appear to be
9 consistent with the company's usual and normal consulting practice.

10 Accordingly, the Commission concludes that BRG and its LLC client will not
11 constitute a "group of persons," and no "political committee" will be created when BRG
12 serves as its commercial vendor.

13

14 2. *May BRG serve as a commercial vendor for several LLCs making independent*
15 *expenditures concerning Federal candidates or elections without triggering*
16 *political committee status for one or more of the LLCs?*

17 Yes, BRG may serve as a commercial vendor for several LLCs making
18 independent expenditures concerning Federal candidates or elections without triggering
19 political committee status.

² Cf., *FEC v. Malenick*, 310 F. Supp. 2d 230, 236 (D.D.C. 2004) (Triad Inc.'s primary source of funding was one donor and the company's client billing was "basically nonexistent").

³ See http://www.blackrockgrp.com/services_publicpolicy.php

⁴ *Compare* Advisory Opinion 2009-02 (TPN) ("Mr. Hanauer will be the final decision-maker on all TPN actions, although TPN's employees and consultants might advise TPN in the making of these communications.").

1 The Commission concluded in Question 1 that political committee status is not
2 triggered when BRG serves as a commercial vendor to only one LLC making
3 independent expenditures. The question here is whether serving as a commercial vendor
4 to two or more LLCs will cause BRG and the LLCs to become a “group of persons” and,
5 hence, trigger political committee status under the Act. 2 U.S.C. 431(4)(A). The
6 Commission concludes neither BRG nor the LLCs will be a political committee.

7 BRG is a commercial vendor operating for commercial purposes, and not for
8 purposes of influencing any Federal elections. Merely arranging conference calls,
9 scheduling meetings, or conveying messages between two or more clients is insufficient
10 to conclude that those clients become a “group of persons” for purposes of the definition
11 of “political committee.” BRG does not indicate that there is any agreement between the
12 LLCs themselves. Nor is BRG aware of any possible collaboration between the LLCs
13 themselves at this point. For example, despite the fact that BRG may facilitate meetings
14 between its LLC clients, BRG does not know what will be discussed at those meetings,
15 how many meetings will be arranged, or whether there will be any collaboration between
16 the LLCs beyond the meetings arranged by BRG. It also is possible that some LLCs may
17 urge the election of candidates running against each other in the same election.

18 Each LLC is a separate and distinct person, treated as an individual under the Act
19 and Commission regulations. *See* 2 U.S.C. 431(11); 11 CFR 100.10; *see also* 11 CFR
20 110.1(g)(4). Each LLC will pay all costs of its own communications, and no
21 communication will be funded by more than one LLC. The LLCs will not establish a
22 common bank account or otherwise pool their financial resources with one another or

1 with BRG.⁵ Each LLC will have ultimate control over when its communications are
2 made, how they are made, what the communications will say, and which candidates and
3 elections they will discuss. Without any additional information to indicate concerted
4 activity by the LLCs, the Commission concludes that the arrangements by BRG – a *bona*
5 *fide* commercial vendor – do not trigger political committee status for the LLCs.

6 BRG also plans to use the same personnel to service all of its LLCs, without any
7 firewalls, and will advise the LLCs (based on what it learns from each LLC client) and
8 facilitate communications between the LLCs concerning their independent expenditure
9 activities and their plans, needs, and strategies. There is no indication, however, that any
10 individual LLC will abdicate or delegate its final decision-making with respect its own
11 independent expenditures to BRG or any other entity.

12 The Commission notes that the requestor presents a fundamentally different
13 situation than the situation in *FEC v. Malenick*, 310 F. Supp. 2d 230 (D.D.C. 2004). In
14 *Malenick*, Triad Inc. represented itself as a marketing company that advised clients and
15 donors prior to making contributions to charitable and political causes. *Malenick*, at 234.
16 The court, however, found that Triad Inc.’s major purpose was the nomination or election
17 of specific candidates in 1996. *Id.* at 237. Public statements showed that Triad Inc.
18 advocated the election of specific candidates, and that the entire purpose of the

⁵ Pooling of resources has commonly been viewed as relevant in determining political committee status. *See, e.g., McConnell v. FEC*, 540 U.S. 93, 135 (2003) (noting that “contributions serve ‘to affiliate a person with a candidate’ and ‘enabl[e] like-minded persons to pool their resources,’” quoting *Buckley v. Valeo*, 424 U.S. 1, 22 (1976)) (emphasis added); *Calif. Med. Assoc. v. FEC*, 453 U.S. 182, 203 (1981) (“By pooling their resources, adherents of an association amplify their own voices . . . Accordingly, I believe that contributions to political committees can be limited only if those contributions implicate the governmental interest in preventing actual or potential corruption . . .”) (Blackmun, J., concurring in part and dissenting in part) (emphasis added); *Buckley*, 424 U.S. at 246, (“Finally, it seems clear to me that in approving these limitations on contributions the Court must rest upon the proposition that “pooling” money is fundamentally different from other forms of associational or joint activity.”) (Burger, C.J., concurring in part and dissenting in part) (emphasis added).

1 corporation was to get major donors involved to elect specific candidates. Unlike in
2 *Malenick*, the facts presented here indicate that BRG operates for commercial purposes,
3 and not for purposes of influencing Federal elections. BRG expressly states that it will
4 not solicit or accept contributions for the purpose of making independent expenditures.
5 Thus, BRG will not pool contributions to make independent expenditures.

6 Accordingly, the Commission concludes that BRG may serve as a commercial
7 vendor for several LLCs under the facts presented here without triggering political
8 committee status for itself or the LLCs.

9

10 3. *Do the answers in Questions 1 and 2 change if none of the LLCs directly*
11 *communicate with any of the other LLCs, or if BRG does not pass messages*
12 *between LLCs?*

13 No, the answers to Questions 1 and 2 above do not change if the LLCs refrain
14 from communicating with one another, or if BRG does not convey messages between
15 them.

16 This response constitutes an advisory opinion concerning the application of the
17 Act and Commission regulations to the specific transaction or activity set forth in your
18 request. *See* 2 U.S.C. 437f. The Commission emphasizes that, if there is a change in any
19 of the facts or assumptions presented, and such facts or assumptions are material to a
20 conclusion presented in this advisory opinion, then the requestor may not rely on that
21 conclusion as support for its proposed activity. Any person involved in any specific
22 transaction or activity which is indistinguishable in all its material aspects from the
23 transaction or activity with respect to which this advisory opinion is rendered may rely on

1 this advisory opinion. *See* 2 U.S.C. 437f(c)(1)(B). Please note the analysis or
2 conclusions in this advisory opinion may be affected by subsequent developments in the
3 law including, but not limited to, statutes, regulations, advisory opinions, and case law.
4 The cited advisory opinions are available on the Commission's Web site at
5 <http://saos.nictusa.com/saos/searchao>.

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On behalf of the Commission,

Steven T. Walther
Chairman