



FEDERAL ELECTION COMMISSION
Washington, DC 20463

September 28, 2009

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

ADVISORY OPINION 2009-13

William J. McGinley, Esq.
Patton Boggs LLP
2550 M Street, NW
Washington, D.C. 20037

Dear Mr. McGinley:

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

The Commission concludes that BRG may serve as a commercial vendor to one single-member natural-person limited liability company (“LLC”) that makes independent expenditures concerning Federal elections or candidates without triggering political committee status. BRG also may serve as a commercial vendor to two or more single-member natural-person LLCs without triggering political status assuming that, as discussed below, BRG does not facilitate communications between the LLCs and does not convey information from one LLC to another.

Background

The facts presented in this advisory opinion are based on your letters received on May 27, June 10, July 15, and July 28, 2009, and publicly available materials.

BRG is itself an LLC established in 2009 under the laws of the State of Delaware. BRG was established to provide clients, including CEOs, elected officials, and Fortune 500 companies, with communication, “earned media,” and grassroots messaging services. BRG helps clients build public policy campaigns by making sure that they are “asking the right questions, framing the debate in the appropriate manner and are delivering messages

so they are heard and [their] objectives achieved.” *See* http://www.blackrockgrp.com/services_publicpolicy.php. It advises companies on media strategy and message campaigning.

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

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

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

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

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

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

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

The same BRG personnel will service all of the LLCs. BRG also will manage other consultants such as pollsters, media production, media placement, direct mail, and phone vendors, who will also provide services to each LLC. BRG will not have firewalls preventing BRG personnel advising one LLC from discussing that LLC's private plans, projects, strategies, activities, and needs with the BRG personnel advising any other LLCs. BRG also anticipates that it will facilitate communication between LLCs by scheduling conference calls or meetings between certain LLCs, or conveying messages between them.

Questions Presented

- 1. May BRG serve as a vendor to one LLC sponsoring independent expenditures concerning different Federal candidates and elections without triggering political committee status?*
- 2. May BRG serve as a common vendor among various LLCs sponsoring independent expenditures concerning the same Federal candidates or the same elections without triggering political committee status for one or more of the LLCs.*
- 3. May BRG serve as a common vendor among various LLCs sponsoring independent expenditures concerning different Federal candidates and different elections without triggering political committee status for one or more of the LLCs?*
- 4. Do the answers in Questions 2 and 3 change if none of the LLCs is in direct communications with any of the other LLCs, or if BRG does not pass messages between various LLCs?*

Legal Analysis and Conclusions¹

- 1. May BRG serve as a vendor to one LLC sponsoring independent expenditures concerning different Federal candidates and elections without triggering political committee status?*

Yes, BRG may serve as a commercial vendor to one LLC making independent expenditures concerning several Federal candidates and elections without triggering political committee status for BRG, or for BRG and the LLC together.

¹ The requestor and some commenters have suggested that the Court of Appeals decision in *EMILY's List*, No. 08-5422 (D.C. Cir. Sep. 18, 2009) should inform the Commission's analysis here. Because the court's mandate has not yet issued and the Commission has not yet decided whether to seek further judicial review, however, the Commission could not reach consensus on whether that decision applies to the questions raised by the requestor at this time.

Treatment of an LLC as an Individual

Under the Act and Commission regulations, contributions and independent expenditures made by a single-member natural-person LLC are treated as if they were made by an individual. *See* 2 U.S.C. 431(8) and (9); 11 CFR 110.1(g); Advisory Opinion 2009-02 (True Patriot Network); *see also*, Explanation and Justification for the Treatment of Limited Liability Companies Under the Federal Election Campaign Act, 64 FR 37397, 37399 (July 12, 1999). In Advisory Opinion 2009-02, the Commission concluded that independent expenditures made by Mr. Hanauer, the sole natural-person member of True Patriot Network LLC (“TPN”), were treated as if they were made by Mr. Hanauer. The Commission explained that, “[b]ecause of the unity between Mr. Hanauer and TPN, it is appropriate for attribution of expenditures to pass through the LLC and attach to Mr. Hanauer.” *See* Advisory Opinion 2009-02 (True Patriot Network) at 3. Here, BRG asks whether it can serve as a commercial vendor to an LLC that appears to have a similar degree of unity between the individual member and the LLC. As in Advisory Opinion 2009-02 (True Patriot Network), the LLC will have one individual who serves as the LLC’s sole member and manager; for Federal income tax purposes, each LLC will be treated as a disregarded entity and not a corporation; and the LLC’s capital contributions will come solely from the personal funds of the LLC’s only member.

Because the LLC is a third party and is not the requestor of this advisory opinion, the Commission cannot determine conclusively that the LLC at issue has the kind of unity with the sole member of the LLC as was demonstrated in Advisory Opinion 2009-02 (True Patriot Network). For purposes of this advisory opinion, however, the Commission assumes that the LLC to which BRG is providing service will be similar in all material respects to the single-member LLC in Advisory Opinion 2009-02 (True Patriot Network). Accordingly, the single-member LLC here is treated as an individual.

Political Committee Status

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

Status of BRG

The Act and Commission regulations define a “political committee” as “any committee, club, association, or other group of persons which receives contributions aggregating in excess of \$1,000 during a calendar year or which makes expenditures aggregating in excess of \$1,000 during a calendar year.” 2 U.S.C. 431(4)(A);

11 CFR 100.5(a). The Supreme Court construed the term “political committee” to encompass only organizations that are under the control of a candidate or whose major purpose is the nomination or election of a candidate. *See Buckley v. Valeo*, 424 U.S. 1, 79 (1976); *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 262 (1986).

The facts presented in the request, and the information available on BRG’s website, indicate that BRG is organized and operated for commercial purposes, and not for purposes of nominating or electing a candidate. BRG is in the business of providing consulting services to a variety of clients, including Fortune 500 companies and corporate executives. Moreover, BRG does not indicate that it has ever advocated the election of any Federal candidate, or has ever supported any political party, or has expressed any political goal, or stated any political purpose, or intends to do so in the future. *Cf. FEC v. Malenick*, 310 F. Supp. 2d 230 (D.D.C. 2004) (the organization’s public statements demonstrated that the organization’s major purpose was to elect specific Federal candidates and to encourage major donors to consider supporting Federal candidates); Advisory Opinion 1994-25 (Libertarian National Committee) (corporation not a true vendor because its sole purpose was to organize a political convention and several principals were members of the National Committee). Nor is BRG owned or controlled by any Federal candidate. Accordingly, the Commission concludes that BRG by itself is not a “political committee” under the Act.

Group of Persons

Under the facts presented here, BRG and a single LLC will not act together to form a “group of persons,” and therefore will not be a political committee.² BRG’s LLC client will make independent expenditures that expressly advocate the election or defeat of one or more Federal candidates. BRG, however, will work with the LLC as a commercial vendor for exclusively and genuinely commercial purposes. Commission regulations define a “commercial vendor,” for the purposes of permissible extensions of credit to political committees, as “any persons providing goods or services to a candidate or political committee whose usual and normal business involves the sale, rental, lease or provision of those goods or services.” 11 CFR 116.1(c). BRG will provide strategic communication and general consulting services to the LLC consistent with BRG’s usual and normal business practice. Specifically, BRG will advise the LLC on how to develop the LLC’s messages and how best to communicate its views on Federal candidates. BRG indicates that it offers similar consulting services to its non-political clients. For example, BRG advises clients on media strategy and message campaigning, and helps clients build public policy campaigns.³ The LLC also will retain ultimate control over the timing, content, method of communication, and the candidate referenced in each communication constituting an independent expenditure. Moreover, BRG itself will not pay for any communication; all communications will be paid for solely by the LLC. Therefore, the consulting services BRG will provide to the LLC here appear to be consistent with the company’s usual and normal consulting practice.

² The single-member LLC also is not a “political committee” because it is treated as an individual under the Act. Advisory Opinion 2009-02 (True Patriot Network).

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

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

2. *May BRG serve as a common vendor among various LLCs sponsoring independent expenditures concerning the same Federal candidates or the same elections without triggering political committee status for the LLCs?*

The Commission could not approve a response by the required four affirmative votes regarding Question 2.

3. *May BRG serve as a common vendor among various LLCs sponsoring independent expenditures concerning different Federal candidates and different elections without triggering political committee status for one or more of the LLCs?*

The Commission could not approve a response by the required four affirmative votes regarding Question 3.

4. *Do the answers in Questions 2 and 3 change if none of the LLCs directly communicates with any of the other LLCs, or if BRG does not pass messages between various LLCs?*

Assuming that none of the LLCs directly communicate with one another and that BRG does not facilitate communication between them, there is nothing to suggest that either the LLCs or the LLCs together with BRG would be a political committee.

The Commission previously concluded that individuals using a common commercial vendor did not constitute a “group of persons” and, hence, were not a “political committee.” *See* Advisory Opinion 2008-10 (VoterVoter.com). In Advisory Opinion 2008-10, VoterVoter.com sought to operate a website that would allow individuals to create political advertisements and to purchase advertisements created by others. The Commission concluded that VoterVoter.com, the creators of the advertisements, and the purchasers of the advertisements did not constitute a “group of persons.” VoterVoter.com represented that, as a commercial vendor, it did not facilitate communications or arrangements between any of the purchasers and any of the creators of advertisements, and that VoterVoter.com did not convey information about any creator to any purchaser or *vice versa*. Assuming that BRG does not facilitate any communications between the LLCs or otherwise convey any information about one LLC to any other LLC, BRG, like VoterVoter.com, would simply be establishing a separate commercial relationship with each individual LLC.

The Commission does not address whether any agreements or collaboration between the LLCs but not involving BRG would result in the formation of a “group of persons” that would be considered a political committee, because in light of the information provided by BRG, that question is hypothetical and pertains only to third

parties that have not joined in this request. Accordingly, this Advisory Opinion may not be relied upon to approve the specific actions of any individual LLC.

This response constitutes an advisory opinion concerning the application of the Act and Commission regulations to the specific transaction or activity set forth in your request. *See* 2 U.S.C. 437f. The Commission emphasizes that, if there is a change in any of the facts or assumptions presented, and such facts or assumptions are material to a conclusion presented in this advisory opinion, then the requestor may not rely on that conclusion as support for its proposed activity. Any person involved in any specific transaction or activity which is indistinguishable in all its material aspects from the transaction or activity with respect to which this advisory opinion is rendered may rely on this advisory opinion. *See* 2 U.S.C. 437f(c)(1)(B). Please note the analysis or conclusions in this advisory opinion may be affected by subsequent developments in the law including, but not limited to, statutes, regulations, advisory opinions, and case law. The cited advisory opinions are available on the Commission's Web site at <http://saos.nictusa.com/saos/searchao>.

On behalf of the Commission,

(signed)
Matthew S. Petersen
Vice Chairman