



FEDERAL ELECTION COMMISSION  
Washington, DC 20463

May 7, 2010

CERTIFIED MAIL  
RETURN RECEIPT REQUESTED

ADVISORY OPINION 2010-03

Marc E. Elias, Esq.  
Kate S. Keane, Esq.  
Perkins Coie LLP  
607 Fourteenth Street, N.W.  
Washington, D.C. 20005-2003

Dear Mr. Elias and Ms. Keane:

We are responding to your advisory opinion request on behalf of the National Democratic Redistricting Trust (“the Trust”), concerning the application of the Federal Election Campaign Act of 1971, as amended (“the Act”), and Commission regulations to the solicitation of funds by Members of Congress on behalf of the Trust. The Commission concludes that the Trust’s proposed activities are not in connection with an election and therefore Members of Congress may solicit funds on behalf of the Trust that do not comply with the Act’s amount limitations and source prohibitions.

***Background***

The facts presented in this advisory opinion are based on your letter dated February 19, 2010, your email dated March 2, 2010, your comment submitted on April 28, 2010 and your representations at the Commission’s Open Meeting on April 29, 2010.

The Trust was established by individuals, but not Members of Congress, to raise funds to pay for the pre-litigation and litigation costs that arise following the next legislative redistricting process.<sup>1</sup> The Trust is run by a trustee and an executive director, both of whom are private citizens and neither of whom are Members of Congress. The Trust is not directly or indirectly established, financed, maintained, or controlled by any Member of Congress, any authorized candidate committee, or any national, State, district, or local party committee.

---

<sup>1</sup> The Trust will also spend some of its funds on administrative costs (*e.g.*, to pay the executive director’s salary).

Though the Trust may work in concert with like-minded individuals, organizations, and political committees that will attempt to influence elections directly, the Trust itself will not fund direct attempts to influence elections. Indeed, the Trust will not use its funds to pay for communications that expressly advocate the election or defeat of any clearly identified candidate for office, nor will any of its solicitations of funds expressly advocate the election or defeat of any clearly identified candidate for office.

The Trust would like Members of Congress to solicit funds on its behalf. Such solicitations would seek funds that do not comply with the Act's amount limitations or source prohibitions, and also would not advocate the election or defeat of any candidate for office.

### ***Question Presented***

*May Members of Congress solicit on behalf of the Trust funds that do not comply with the Act's amount limitations and source prohibitions?*

### ***Legal Analysis and Conclusions***

Yes, Members of Congress may solicit funds on behalf of the Trust that do not comply with the Act's amount limitations and source prohibitions because the Trust's proposed activities are not in connection with a Federal or non-Federal election.

On November 6, 2002, the Bipartisan Campaign Reform Act of 2002, Pub. L. 107-155, 116 Stat. 81 (2002) ("BCRA") took effect. As amended by BCRA, the Act regulates certain actions of Federal candidates and officeholders ("covered persons") when they raise or spend funds "in connection with" either Federal or non-Federal elections. 2 U.S.C. 441i(e)(1). Both BCRA and the Commission's regulations implementing BCRA prohibit covered persons from soliciting, receiving, directing, transferring, or spending any "funds in connection with an election for Federal office" unless such funds are "subject to the limitations, prohibitions, and reporting requirements of this Act." 2 U.S.C. 441i(e)(1)(A); 11 CFR 300.61. BCRA and the Commission's regulations also prohibit covered persons from soliciting, receiving, directing, transferring or spending any "funds in connection with an election other than an election for Federal office" unless the funds are consistent with the Act's amount limitations and source prohibitions. 2 U.S.C. 441i(e)(1)(A); 11 CFR 300.62.

In analyzing the application of 2 U.S.C. 441i(e), the threshold question is whether the Federal candidate or officeholder is soliciting funds in connection with a Federal or non-Federal election under subsection (e)(1). If so, then the analysis proceeds to whether the exceptions to subsection (e)(1) in subsections (e)(2) or (e)(4) apply. If the funds are not raised or spent in connection with an election, then the funds do not fall within the scope of section 441i(e).

The Commission has issued several advisory opinions concerning whether certain activities are in connection with an election since the passage of BCRA that provide guidance in this matter.<sup>2</sup> For example:

- In Advisory Opinion 2003-12 (Flake), the Commission concluded that the activities of a ballot measure committee that is not ‘established, financed, maintained or controlled’ by a Federal candidate . . . are not ‘in connection with an[] election . . . prior to the committee qualifying an initiative or ballot measure for the ballot, but are ‘in connection with an[] election . . .’ after the committee qualifies an initiative or ballot measure for the ballot.”
- In Advisory Opinion 2003-15 (Majette), the Commission concluded that Representative Majette’s costs of defending against a lawsuit seeking a special primary and special general election—which, if successful, would have essentially overturned the primary and general elections that Representative Majette had won—were not “in connection with” any election.<sup>3</sup>
- In Advisory Opinion 2005-10 (Berman-Doolittle), the Commission concluded that section 441i(e) does not prohibit Federal candidates and officeholders from raising funds for committees that have been formed solely to support or oppose ballot measures (including a ballot measure specifically related to redistricting). Under the facts presented by the requester, the committees were not established, financed, maintained or controlled by a Federal candidate, officeholder, or anyone acting on their behalf, or by any party committee and there were no Federal candidates appearing on the same ballot.

The Commission’s regulation regarding fundraising for convention host committees also provides useful context for applying the “in connection with” an election standard. 11 CFR 9008.55(d). In that rulemaking, the Commission considered whether a statutory exemption to BCRA’s fundraising limitations applied to candidate solicitations for convention host committees and municipal funds. *See* 2 U.S.C. 441i(e)(4)(A); Public Financing of Presidential Candidates and Nominating Conventions, 68 Fed. Reg. 47386, 47404-05 (Aug. 8, 2003). As part of its analysis, the Commission found that the principal purpose of the host committees and municipal funds was to promote and

---

<sup>2</sup> Before 2 U.S.C. 441i(e) became law, the Commission approved proposals by Federal candidates or officeholders to establish and to solicit funds for entities that were engaged exclusively in activities related to redistricting, including the defrayal of reapportionment-related legal expenses. The issue raised by these requests was whether the funds solicited or spent for such activities were “for the purpose of influencing any election to Federal office” and therefore contributions or expenditures under 2 U.S.C. 431(8) and (9). The Commission concluded that activity related to redistricting, although a political process, does not fall within those definitions. *See* Advisory Opinions 1990-23 (Frost), 1982-37 (Edwards) and 1981-35 (Thomas). Accordingly, the Commission determined that the redistricting-related entities described in the requests were permitted to receive and spend funds that were not subject to the limitations and prohibitions of the Act.

<sup>3</sup> As this advisory opinion demonstrates, not all activities that may have some indirect effect on elections are encompassed by the “in connection with” standard of BCRA. *But see* Advisory Opinion 2006-24 (NRSC/DSCC) (concluding that “any recount fund established by a Federal officeholder or candidate is subject to 2 U.S.C. 441i(e)(1)(A)”).

generate commerce in the host cities. The convention itself clearly has some impact on an election - it is, after all, where the party chooses its nominee. However, the Commission determined that the specific purpose of host committees and municipal funds (namely, to promote commerce in the host cities) was not principally for the purpose of conducting federal election activity “in connection” with a Federal election. *Id.*

Here, the Trust’s proposed activities are most closely in line with those approved by the Commission in Advisory Opinion 2003-15 (Majette) and Advisory Opinion 2005-10 (Berman-Doolittle).<sup>4</sup> The regulation regarding candidate solicitations for convention host committees also provides support for the Request. The Trust seeks to engage in litigation over the electoral process that will govern how future elections are conducted, but its activities will not be a means to participate in those elections. BCRA does not explicitly address whether redistricting activities are “in connection with” elections. Although the outcome of redistricting litigation often has political consequences,<sup>5</sup> the Commission concludes that spending on such activity is sufficiently removed that it is not “in connection with” the elections themselves.

The Commission concludes, in light of the Commission’s recent decisions on this question, that donations to the Trust for the sole purpose of paying the pre-litigation and litigation costs associated with reapportionment and redistricting legal matters are neither “in connection with an election for Federal office” nor “in connection with any election other than an election for Federal office” for purposes of 2 U.S.C. 441i(e)(1)(A) and (B). As such, the funds are not subject to the limitations and prohibitions of the Act. Accordingly, a Member of Congress may solicit unlimited funds on behalf of the Trust to defray the legal expenses associated with the Trust’s redistricting efforts.

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

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 requester 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

---

<sup>4</sup> In response to Advisory Opinion Request 2003-38 (Engel), the Commission failed to reach a conclusion with respect to the proposed redistricting related activity. In that request, Congressman Engel sought to establish a redistricting committee for the purpose of paying the costs of redistricting litigation. Here, in contrast, the Trust will not be directly or indirectly established, financed, maintained, or controlled by any Member of Congress, any authorized candidate committee, or any national party committee.

<sup>5</sup> *See, e.g., Gaffney v. Cummings*, 412 U.S. 735, 753 (1973) (“The reality is that districting inevitably has and is intended to have substantial political consequences.”).

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 that 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 website at <http://saos.nictusa.com/saos/searchao>.

On behalf of the Commission,

(signed)  
Cynthia L. Bauerly  
Vice Chair