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FEDERAL ELECTION COMMISSION  
Washington, DC 20463

March 24, 2006

**AGENDA ITEM**  
For Meeting of: 03-29-06

**SUBMITTED LATE**

MEMORANDUM

TO: The Commission

THROUGH: Robert J. Costa *RJC*  
Acting Staff Director

FROM: Lawrence H. Norton *LHN*  
General Counsel

Rosemary C. Smith *RCS*  
Associate General Counsel

Mai T. Dinh *MTD*  
Assistant General Counsel

Daniel K. Abramson *DKA*  
Attorney

Subject: Draft AO 2006-04

Attached is a proposed draft of the subject advisory opinion. We request that this draft be placed on the agenda for March 29, 2006.

Attachment

1 ADVISORY OPINION 2006-04

2  
3 Mr. Jon Ponder

4 Treasurer

5 Tancredo for Congress Committee, Inc.

6 P.O. Box 3756

7 Littleton, CO 80121-3756

8  
9 Dear Mr. Ponder:

**DRAFT**

10 We are responding to your advisory opinion request on behalf of Tancredo for  
11 Congress Committee, Inc. ("TFC"), the principal campaign committee for Representative  
12 Thomas Tancredo, concerning the application of the Federal Election Campaign Act of  
13 1971, as amended (the "Act"), and Commission regulations to certain activities by  
14 Representative Tancredo and TFC on behalf of Defend Colorado Now ("DCN"), a State  
15 ballot initiative committee. The Commission concludes that while donations from TFC  
16 to DCN are generally permissible, donations in the proposed amounts would constitute  
17 "financing" of DCN by TFC for the purposes of 2 U.S.C. 441i(e)(1) and 11 CFR  
18 300.2(c). TFC may produce and disseminate communications in which Representative  
19 Tancredo endorses the ballot initiative supported by DCN. Any polling data DCN gives  
20 to TFC would be an in-kind contribution and would be subject to the limitations and  
21 prohibitions of the Act.

22 ***Background***

23 The facts presented in this advisory opinion are based on your letters received on  
24 November 21, 2005 and January 31, 2006, and a phone conversation on February 6,  
25 2006.

26 Representative Tancredo is a member of Congress representing the Sixth  
27 Congressional District of Colorado and is a candidate for reelection in 2006. He is

1 closely identified with the issue of immigration reform and is the Chairman of the  
2 Congressional Immigration Reform Caucus in the U.S. House of Representatives.

3 DCN is a registered State committee established on February 12, 2004 for the  
4 purpose of qualifying and advocating for a Colorado ballot initiative that would restrict  
5 certain State services to persons lawfully present in the United States. DCN intends to  
6 collect sufficient signatures to qualify the initiative for the November 7, 2006 election. It  
7 will solicit and accept funds that are permitted under Colorado law, but that are in excess  
8 of the amounts permitted and from sources prohibited by the Act. Should the initiative  
9 successfully qualify for the ballot, DCN will spend funds to advocate for the passage of  
10 the initiative, including paying for mail and media advertising in Representative  
11 Tancredo's district. DCN does not intend to support or oppose Federal or non-Federal  
12 candidates on the November 7, 2006 ballot.

13 Representative Tancredo intends to endorse the ballot initiative and use campaign  
14 funds from TFC to run newspaper, radio, and television advertisements in his  
15 Congressional District publicizing his endorsement. No other entity, including DCN, will  
16 pay for these advertisements. Representative Tancredo and TFC anticipate receiving  
17 polling data from DCN, and plan to use the polling data to craft these endorsement  
18 messages. Representative Tancredo will not solicit funds on behalf of DCN in these  
19 endorsements or in any other manner.

20 TFC would like to make a donation to DCN. Your request presents three possible  
21 scenarios. In the first alternative, TFC would donate either \$50,000 or 50% of the total  
22 receipts of DCN at the time of the contribution, whichever is less. The second alternative  
23 would limit the donation to \$50,000 or 25% of total receipts of DCN at the time of the

1 donation, whichever is less. Finally, under the third alternative, TFC would not donate  
2 any funds directly to DCN, but would instead pay up to \$50,000 directly to signature  
3 vendors for their services in providing signatures to DCN to qualify the initiative.

4 ***Questions Presented***

5 1. *May TFC donate campaign funds to DCN?*

6 2. *Would Representative Tancredo directly or indirectly establish, finance, maintain, or*  
7 *control DCN if:*

8 (a) *TFC donates to DCN the lesser of \$50,000 or 50% of DCN's total donations?*

9 (b) *TFC donates to DCN the lesser of \$50,000 or 25% of DCN's total donations?*

10 (c) *TFC pays vendors up to \$50,000 for providing signatures to DCN to qualify*  
11 *its initiative for the ballot?*

12 3. *May TFC pay for communications in which Representative Tancredo endorses the*  
13 *ballot initiative supported by DCN?*

14 4. *May TFC accept opinion polling data from DCN?*

15 ***Legal Analysis and Conclusions***

16 *Question 1. May TFC donate campaign funds to DCN?*

17 Yes, TFC may donate campaign funds to DCN. The Act lists six categories of  
18 permissible uses of contributions received by a Federal candidate, including “otherwise  
19 authorized expenditures in connection with the campaign for Federal office of the  
20 candidate.” 2 U.S.C. 439a(a)(1); *see also* 11 CFR 113.2(a). Representative Tancredo’s  
21 support for immigration reform is a part of his reelection campaign and is an issue with  
22 which he is closely identified. His donation of campaign funds to a ballot initiative  
23 committee that shares his policy goals regarding this issue is considered “in connection

1 with [his] campaign for Federal office.” Thus, these donations are permissible under 2  
2 U.S.C. 439a(a)(1). *See* Advisory Opinion 2004-29 (Akin).

3 *Question 2. Would Representative Tancredo directly or indirectly establish, finance,*  
4 *maintain, or control DCN if (a) TFC donates to DCN the lesser of \$50,000 or 50% of*  
5 *DCN’s total donations; or (b) TFC donates to DCN the lesser of \$50,000 or 25% of*  
6 *DCN’s total donations; or (c) TFC pays vendors up to \$50,000 for providing signatures*  
7 *to DCN to qualify its initiative for the ballot?*

8 The Act states that any entity “directly or indirectly established, financed,  
9 maintained, or controlled” by a Federal candidate or officeholder shall not solicit,  
10 receive, direct, transfer, or spend funds in connection with an election for Federal office  
11 or any election other than an election for Federal office, unless those funds comply with  
12 the contribution limits and source prohibitions of the Act. 2 U.S.C. 441i(e)(1). To  
13 determine whether a Federal candidate or officeholder directly or indirectly established,  
14 financed, maintained, or controlled another entity the Commission applies the factors set  
15 forth in 11 CFR 300.2(c)(2). Specifically, the Commission examines the ten factors  
16 identified in 11 CFR 300.2(c)(2)(i) through (x), as well as any other relevant factors. The  
17 Commission also examines the relevant factors in the context of the overall relationship  
18 between the Federal candidate or officeholder and the entity. *See* 11 CFR 300.2(c)(2).

19 I. Analysis of the factors in 11 CFR 300.2(c)(2)(i) through (x).

20 Under the facts presented, the key factor is whether TFC will provide funds “in a  
21 significant amount” to DCN.<sup>1</sup> 11 CFR 300.2(c)(2)(vii). The Commission has  
22 approached the question of what constitutes a significant amount on a case-by-case basis

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<sup>1</sup> The Commission notes that while other factors may also indicate that DCN is directly or indirectly established, financed, maintained, or controlled by Representative Tancredo, your request does not provide sufficient information for the Commission to apply these factors in the context of this Advisory Opinion.

1 in view of all the relevant circumstances. It has stated that “amounts that are so large  
2 or... that comprise such a substantial percentage of the organization’s receipts” would be  
3 considered “financing” a committee under 11 CFR 300.2. Advisory Opinions 2004-29,  
4 n. 4 (Akin), 2004-25 (Corzine).

5 You have not proposed the donation of a specific dollar amount to DCN. Instead,  
6 your proposal is that TFC will donate a specific percentage of DCN’s total receipts  
7 (either 25% or 50%), up to \$50,000. Therefore, the only inquiry the Commission can  
8 perform is to determine whether the proposed percentage is “a significant amount” under  
9 11 CFR 300.2(c)(2)(vii).

10 The IRS has addressed an analogous question concerning tax-exempt public  
11 charities. Under section 509(a)(1) of the Internal Revenue Code, an organization  
12 qualifies as a “public” charity based upon the character of the donations received by the  
13 group. A public foundation is defined as “an organization which normally receives a  
14 *substantial part* of its support” from government or general public sources. *See* 26  
15 U.S.C. 170(b)(1)(A)(iv) (emphasis added). The IRS regulations explain that an  
16 organization will be treated as receiving a “substantial” part of its donations from  
17 government or public sources so long as such donations “equal[] at least 10 percent of the  
18 total support.” *See* 26 CFR 1.170A-9(e)(3)(i).

19 The Commission will examine the percentage of TFC’s donation compared to the  
20 total donations received by DCN under each of the three alternatives proposed in your  
21 request to determine whether TFC’s proposed donation to DCN is “in a significant  
22 amount” under 11 CFR 300.2(c)(2)(vii).

1 A. Alternative One - TFC donates to DCN the lesser of \$50,000 or 50% of DCN's total  
2 donations.

3       Alternative One proposes a donation from TFC to DCN in an amount up to 50%  
4 of the total receipts of DCN at the time of the donation. A donation of 50% of an  
5 organization's total receipts must be considered a "significant amount." For the  
6 Commission to find otherwise would essentially rewrite the regulation to require that a  
7 "majority" of an entity's funds come from a single source before that source would be  
8 deemed to have financed the entity. Accordingly, a donation by TFC that represents  
9 50% of DCN's total funds is a "significant amount" under 11 CFR 300.2(c)(2)(vii).

10 B. Alternative Two - TFC donates to DCN the lesser of \$50,000 or 25% of DCN's total  
11 donations

12       Alternative Two proposes a donation from TFC to DCN in an amount up to 25%  
13 of the total receipts of DCN at the time of the donation. The proposal to donate 25% of  
14 all receipts of DCN is more than double the level that the Commission previously  
15 identified as a "significant percentage."<sup>2</sup> A donation of 25% of DCN's total receipts is  
16 also considerably larger than the 10% threshold used by the IRS to determine significant  
17 donation amounts for tax-exempt public charities. Thus, the Commission concludes that  
18 a donation by TFC that represents 25% of DCN's total funds is a "significant amount"  
19 under 11 CFR 300.2(c)(2)(vii).

20 C. Alternative Three - TFC pays vendors up to \$50,000 for providing signatures to DCN  
21 to qualify its initiative for the ballot.

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<sup>2</sup> The Commission has previously stated that the term "significant percentage" in the context of affiliation is analogous to the term "significant percentage" in the context of communications that reach beyond a solicitable class. The Commission concluded that in both cases 10% may be considered a "significant percentage." Advisory Opinion 1982-36, n. 2 (National Audio-Visual Association, Inc.).

1           You propose that TFC pay an amount up to \$50,000 directly to signature vendors  
2   for their services in providing signatures to DCN to qualify the initiative for the  
3   November 7, 2006 ballot. Section 300.2(c)(2)(vii) states that the provision of funds in a  
4   significant amount “*through direct or indirect payments* for administrative, fundraising,  
5   or other costs” is relevant for determining whether committees are directly or indirectly  
6   established, financed, maintained, or controlled by a Federal candidate or officeholder.  
7   Paying vendors who gather signatures for DCN would constitute providing funds through  
8   “indirect payments” for the “other costs” of DCN. Therefore, the legal effect of paying  
9   up to \$50,000 to these vendors on behalf of DCN is identical to donating up to \$50,000 to  
10   DCN. As discussed above, such a donation is a permissible use of campaign funds, but  
11   the donation may result in TFC financing DCN if that donation is a “significant amount”  
12   of DCN’s total receipts. The determination of whether the amount is significant may be  
13   dependent to some extent on what percentage of DCN’s total receipts the donation by  
14   TFC represents. *See* analysis of questions 2(a) and 2(b), above.

15   II. Examination of the overall relationship between TFC and DCN.

16           As stated above, the factors set forth at 11 CFR 300.2(c)(2)(i) through (x) must be  
17   examined in the context of the relationship between the sponsor and the entity to  
18   determine whether the presence of that factor or factors is evidence that the sponsor has  
19   directly or indirectly established, financed, maintained, or controlled the other entity.

20           In this case, the proposed donations, which satisfy 11 CFR 300.2(c)(2)(vii) (a  
21   donation in a significant amount), must be examined in the context of the overall,  
22   ongoing relationship between TFC and DCN. DCN was established on February 12,  
23   2004 and has not been active on any issue other than advocating for the proposed ballot



1 initiative. TFC seeks to donate a substantial amount of money to support DCN's sole  
2 mission of placing this initiative on the 2006 ballot and urging voters to support it.  
3 Through the fourth quarter of 2005 DCN received donations of \$9,285.40. DCN also  
4 received pledges for an additional \$45,500 but these funds have not yet been received as  
5 of the date of your request. TFC has indicated that it would like to donate up to \$50,000.  
6 This amount of money would represent substantial "seed money" for DCN and would  
7 result in DCN depending in large part on TFC for its initial existence.

8 DCN will also share with TFC both its polling data and general "campaign  
9 strategy." Representative Tancredo also intends to use his own campaign funds to create  
10 and distribute advertisements to endorse the initiative. He supported an identical  
11 initiative in the past and is closely identified with this issue on a State-wide and national  
12 basis.

13 After examining the context of the overall relationship between TFC and DCN,  
14 the Commission concludes that the donation of a significant amount of funds by TFC to  
15 DCN would result in TFC "financing" DCN for the purpose of 11 CFR 300.2(c).

16 *Question 3. May TFC pay for communications in which Representative Tancredo*  
17 *endorses the ballot initiative supported by DCN?*

18 Yes, TFC may use campaign contributions to pay for communications in which  
19 Representative Tancredo endorses the ballot initiative supported by DCN. As stated  
20 above, contributions may be used by candidates "for otherwise authorized expenditures in  
21 connection with the campaign for Federal office" of that candidate. 2 U.S.C. 439a(a)(1).  
22 The Commission has previously determined that an advertisement in which a candidate  
23 endorses a ballot initiative on an issue with which he is associated is an expenditure in

1 connection with a campaign for Federal office. *See* Advisory Opinion 2004-29 (Akin).

2 In this case, Representative Tancredo is closely identified with the issue of immigration  
3 reform. Therefore, communications in which he endorses a ballot initiative addressing  
4 this issue would be permissible uses of campaign contributions under 2 U.S.C.

5 439a(a)(1). *See also* 11 CFR 113.2(a).

6 *Question 4. May TFC accept opinion polling data from DCN?*

7 Yes, TFC may accept opinion polling data from DCN subject to the prohibitions  
8 and limitations of the Act and Commission regulations.

9 A contribution includes “anything of value” given by any person for the purpose  
10 of influencing a Federal election. 2 U.S.C. 431(8)(A)(i); 11 CFR 100.52(a). Specifically,  
11 11 CFR 106.4(b) states that the purchase of opinion poll results by a person not  
12 authorized by a candidate to make expenditures and the subsequent acceptance of the  
13 poll’s results by a candidate or a candidate’s authorized committee is an in-kind  
14 contribution by the purchaser to the candidate, and an expenditure by the candidate.

15 Because Representative Tancredo and TFC will “have access” to DCN’s polling data,  
16 and because TFC will use this data in creating advertisements it will run, TFC’s  
17 acceptance of DCN’s poll results is an in-kind contribution from DCN to TFC. However,  
18 if the poll results were to be made public prior to receipt by TFC, and were made public  
19 without any request, authorization, prearrangement, or coordination between TFC and  
20 DCN, then there would not be an in-kind contribution. *See* 11 CFR 106.4(c).

21 This in-kind contribution is subject to the source prohibitions and amount  
22 limitations of the Act. You indicate that to the best of your knowledge, DCN is not a  
23 prohibited source under the Act, such as a corporation. Therefore, TFC may receive an

1 in-kind contribution from DCN subject to the limitations of 2 U.S.C. 441a(a)(1)(A) and  
2 11 CFR 110.1(b)(1). The amount of the contribution is the amount that would be  
3 attributed to TFC under 11 CFR 106.4(e). The precise amount of the in-kind contribution  
4 must also take into account the length of time between DCN's receipt of the poll results  
5 and TFC's receipt of those results, pursuant to 11 CFR 106.4(g).<sup>3</sup> See Advisory Opinion  
6 1990-12 (Strub).

7 The Commission expresses no opinion regarding whether the activities you  
8 propose are permissible under Colorado law.

9 This response constitutes an advisory opinion concerning the application of the  
10 Act and Commission regulations to the specific transaction or activity set forth in your  
11 request. See 2 U.S.C. 437f. The Commission emphasizes that, if there is a change in any  
12 of the facts or assumptions presented, and such facts or assumptions are material to a  
13 conclusion presented in this advisory opinion, then the requestor may not rely on that  
14 conclusion as support for its proposed activity.

15  
16 Sincerely,

17  
18  
19  
20 Michael E. Toner  
21 Chairman  
22  
23

24 Enclosures (AOs 2004-29, 2004-25, 1990-12, 1982-36)

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<sup>3</sup> The amount of a contribution received and expenditure made by a candidate or committee receiving poll results would be 50 percent of the original amount if received during a period of 16 to 60 days after the initial recipient obtained the results, five percent of the original amount during a period 61 to 180 days after the initial receipt, and zero if after 180 days. See 11 CFR 106.4(g).