AGENDA DOCUMENT NO. 09-42-B

FEDERAL ELECTION COMMISSION
Washington, DC 20463

RECEIVED
FEDERAL ELECTION
COMMISSION
SECRETARIAT

2009 JUL 22 P 5:40

AGENDA ITEM
For Meeting of: 07-28-09

SUBMITTED LATE

MEMORANDUM

TO: The Commission

FROM: Thomasenia P. Duncan
General Counsel

Rosemary C. Smith
Associate General Counsel

Robert M. Knop
Assistant General Counsel

Neven F. Stipanovic
Attorney

Subject: Draft AO 2009-13 (The Black Rock Group) – Draft C

We have been asked to circulate the attached proposed draft of the subject advisory opinion. We request that this drafts be placed on the agenda for July 28, 2009.

Attachment

ADVISORY OPINION 2009-13

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

DRAFT C

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 or more single member limited liability companies that make independent expenditures concerning Federal elections or candidates without triggering political committee status, and such independent expenditures would not constitute contributions.

Background

The facts presented in this advisory opinion are based on your letter received on May 27, 2009, your supplemental letter dated June 10, 2009, your comments dated July 15, 2009, your responses at the Commissions July 16, 2009 open meeting, and BRG's website.

BRG is a limited liability company ("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. It helps clients build successful 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 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 individual. 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 represents that it will advise the LLCs (based on what it learns from each

LLC client), and facilitate communication between the LLCs, concerning their independent expenditure activities and their plans, needs, and strategies. BRG also may facilitate communication between LLCs by scheduling conference calls or meetings between certain LLCs. BRG represents that it will provide only advice and all final decisions will rest with each LLC.

Questions Presented

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

   (a) the same Federal election or candidates, or

   (b) different Federal elections or candidates without triggering political committee status for one or more of the LLCs for the purposes of the registration and reporting requirements; and

   (c)) notwithstanding any negative answer to 2(a) and 2(b), would BRG's proposed activities cause one or more of the LLCs' independent expenditures to be treated as a contribution to any political committee, subject to the Act's source and amount prohibitions and limitations and reporting requirements?
3. *Do the answers in Question 2 change if none of the LLCs directly communicate with any of the other LLCs, or if BRG does not convey messages between LLCs?*

Legal Analysis and Conclusions

1. May BRG serve as a commercial vendor to one LLC making independent expenditures concerning several 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.

Treatment of an LLC as an Individual

Under the Act and Commission regulations, contributions and independent expenditures made by a single natural member LLC are treated as if they were made by an individual. *See* 2 U.S.C. §§ 431(8) and (9); 11 C.F.R. § 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 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 (TPN) 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 (TPN), 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.

The LLC is a third party and is not the requestor of this advisory opinion. However, as discussed above, BRG represents that: (1) the LLC will have only one individual 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 the 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; and (5) the LLC's sole purpose is to sponsor independent expenditures, and the LLC's sole member will retain ultimate control concerning the timing, content, method of communication, and the candidate referenced in each independent expenditure sponsored by his or her LLC. Given these representations, the Commission determines that the LLC as described has the kind of unity with the sole member of the LLC as was demonstrated in Advisory Opinion 2009-02 (TPN). 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, are 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 C.F.R. § 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 influencing any Federal election. 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. BRG's LLC client will make independent expenditures that expressly advocate the election or defeat of one or more Federal candidates.[1] BRG, however, will work with the LLC as a commercial vendor for 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 C.F.R. § 116.1(c). BRG will provide strategic communication and general consulting services to the LLC consistent with its usual and normal business practice. Specifically, it will advise the LLC on how to develop its messages and how best to communicate its views on Federal candidates. BRG indicates that it offers similar consulting services to its non-political clients.[2] For example, BRG advises clients on media strategy and message campaigning, and helps clients build successful 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.[4] Moreover, BRG itself will not pay for any communication; all communications will be paid for solely by the LLC.

---

[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).

[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.").

Therefore, the consulting services BRG will provide to the LLC here appear to be consistent with the company's usual and normal consulting practice.

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 commercial vendor for several LLCs making independent expenditures concerning (a) the same Federal election or candidates; or (b) different Federal elections or candidates without triggering political committee status for one or more of the LLCs; and (c) notwithstanding any negative answer to 2(a) and 2(b), would BRG's proposed activities cause one or more of the LLCs' independent expenditures to be treated as a contribution to any political committee, subject to the Act's source and amount prohibitions and limitations and reporting requirements?*

The Commission could not approve a complete response by the required four affirmative votes regarding Questions 2(a) and (b). Nevertheless, the Commission concludes that political committee status will not be triggered for the LLCs if BRG, acting as a commercial vendor, shares with the various LLCs best practices and general political and communications advice, such as how to craft and execute an effective message that will resonate with the LLC's target audience; the best types of verbal, audio, and visual components to use for a communication; or the general length and complexity of a communication. The Commission's conclusion with respect to this issue does not depend on whether BRG shares or facilitates communication regarding information of this nature among

its various LLC clients, as such information does not facilitate the various LLCs acting as a group.

Regarding Question 2(c), the Commission concludes the LLCs' independent expenditures will not constitute contributions to any political committee, so long as no individual LLC also coordinates its expenditures with any Federal candidate, authorized committee, or political party committee, or any agent thereof, within the meaning of 11 C.F.R. § 109.21.

Mere coordination between and amongst any of the LLCs, whether done directly or through BRG, does not transform the LLCs' independent expenditures into contributions.

The Act defines a contribution as:

> (i) any gift, subscription, loan, advance, or deposit of money or anything of value made by any person for the purpose of influencing any election for Federal office; or
>
> (ii) the payment by any person of compensation for the personal services of another person which are rendered to a political committee without charge for any purpose.

2 U.S.C. § 431(8)(A); *see also* 11 C.F.R. § 100.52(a).

In *Buckley v. Valeo*, the Supreme Court narrowed the definition of contribution to encompass only (1) donations to candidates, political parties, or campaign committees; (2) expenditures made in coordination with a candidate or campaign committee; and (3) donations given to other persons or organizations but "earmarked for political purposes." 424 U.S. 1, 23 n.4, 24, 78 (1976).

In order to avoid the "hazards of uncertainty" regarding the meaning of "earmarked for political purposes," the United States Court of Appeals for the Second

Circuit interpreted the phrase to include only donations "that will be converted to expenditures [*i.e.*, express advocacy] subject to regulation under FECA." *FEC v. Survival Educ. Fund, Inc.*, 65 F.3d 285,295 (2d Cir. 1995).

Here, each LLC will pay directly all costs of its own independent expenditure communications, and no communication will be funded by more than one LLC. The LLCs will not establish a common bank account or otherwise pool their financial resources with one another or with BRG. Instead, the LLCs' funds would flow directly to their vendors (including BRG and other media vendors) and media outlets disseminating their communications, and no funds would be given to any candidate, political party, or political committee. Moreover, no LLC will pay or compensate for the services rendered to any other LLC or other entity without charge. Accordingly, the LLCs will not be making any contributions under the Act or Commission regulations.[5]

As noted above, this analysis would hold true so long no LLC coordinates its communications with a candidate, authorized committee, or political party committee within the meaning of 11 C.F.R. § 100.21. Because the coordination analysis, under which communications paid by third parties may constitute contributions in certain circumstances, does not apply to coordination between and amongst the third parties themselves, there is no basis for concluding the coordination between the LLCs here, whether done directly or through BRG, will convert their independent expenditures into contributions.

[5] The fact that the LLCs will be making common payments to BRG also does not change the analysis. As noted above, BRG will be acting as a commercial vendor providing consulting services to each LLC, and not for the purposes of influencing any Federal elections. Thus, under no circumstances would BRG become part of any political committee.

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

The answer to Question 1 above does not change if the LLCs refrain from communicating with one another, or if BRG does not convey messages between them, as Question 1 only pertains to BRG's relationship with a single LLC. The Commission cannot provide a response to this question with respect to Questions 2(a) and (b), as such a response is predicated on questions to which the Commission could not approve a response, as noted above.

The answer to Question 2(c) above does not change if the LLCs refrain from communicating with one another, or if BRG does not convey messages between them. As discussed above, coordination is not a factor that is relevant to the definition of contribution when such coordination does not involve a candidate, authorized committee, or political party.

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,

Steven T. Walther
Chairman