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MEMORANDUM

**AGENDA ITEM**  
For Meeting of: 02-18-04

**SUBMITTED LATE**

DATE: February 13, 2004  
TO: The Commission  
FR: Chairman Bradley A. Smith *BAS*  
RE: Alternative Draft Advisory Opinion 2003-37

Attached for your consideration please find an alternative draft Advisory Opinion in response to the request made by Americans for a Better Country, which will be before the Commission February 18, 2004.

1    **ADVISORY OPINION 2003-37 – ALTERNATIVE DRAFT**

2

3    **Keith A. Davis**

4    **Treasurer**

5    **Americans for a Better Country**

6    **228 S. Washington Street**

7    **Alexandria, VA 22314**

8

9    **Dear Mr. Davis:**

10           **This responds to your letter dated November 18, 2003, requesting an advisory**  
11    **opinion on behalf of Americans for a Better Country (“ABC”), concerning the application**  
12    **of the Federal Election Campaign Act of 1971, as amended (“the Act” or “FECA”), and**  
13    **Commission regulations to a variety of political activities. ABC is an unincorporated, non-**  
14    **connected political committee with Federal and non-Federal accounts that registered with**  
15    **the Commission on September 4, 2003.**

16    ***Background***

17           **Your request concerns the raising and spending of Federal and non-Federal funds**  
18    **for a wide range of campaign activities. Some of your proposed activities involve public**  
19    **communications regarding specific candidates, or candidates holding positions on issues of**  
20    **importance to ABC. Your proposed activities also include voter mobilization programs. In**  
21    **addition, you seek guidance on coordinating these campaign activities with Federal**  
22    **candidates and their agents, and having Federal candidates assist ABC by soliciting funds**  
23    **for ABC's proposed activities.<sup>1</sup>**

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<sup>1</sup> This advisory opinion reorganizes and combines certain questions, and answers certain other questions as a group. Attached to this advisory opinion as Appendix A is your letter dated November 18, 2003, annotated with bracketed paragraph numbers that will be referred to throughout this opinion.

1 ***Legal Analysis and Conclusions***

2 ***Introduction***

3           You present your request at a time when there is much debate over the extent to  
4 which the Commission's previous regulations and administrative interpretations require  
5 revision. The passage of the Bipartisan Campaign Reform Act (BCRA) and the Supreme  
6 Court's decision upholding it in *McConnell v. FEC*, 124 S. Ct. 619 (2003) changed the  
7 regulatory landscape for many political actors, in particular party committees, Federal  
8 candidates and officeholders, and corporations and labor organizations. The Commission  
9 does not believe, however, that Congress intended to revise the manner in which entities  
10 already registered and reporting under the Act manage their mixed Federal and non-Federal  
11 activities. The Commission has in place a pre-BCRA framework to allocate mixed  
12 activities of non-party federal committees with non-Federal accounts, and this general  
13 framework was not changed by the passage of BCRA.

14           For instance, BCRA defined a new term "Federal Election Activity" (FEA) as voter  
15 registration within 120 days of a Federal election, voter identification, get-out-the-vote or  
16 generic activity in connection with an election with a Federal candidate on the ballot, public  
17 communications referring to a clearly identified candidate that promote, support, attack or  
18 oppose a candidate, and the salaries of employees of parties that spend over 25% of their  
19 time on activity in connection with a Federal election. 2 U.S.C. 431(20).

20           FEA is applied in two parts of the Act as amended by BCRA. It first appears in the  
21 section devoted to "state, district and local committees" of political parties, requiring that  
22 "an amount that is expended or disbursed for Federal election activity" by these groups/  
23 "shall be made from funds subject to the limits, prohibitions, and reporting requirements of

1 this Act.” 441i(b).<sup>2</sup> FEA also appears in the act in relation to solicitation restrictions on  
2 parties and Federal candidates and officeholders. 441i(d) & 441i(e). Parties are prohibited  
3 from soliciting or directing funds to a 501(c) organization that makes expenditures or  
4 disbursements in connection with an election for Federal office (including expenditures or  
5 disbursements for FEA). 441i(d)(1). Federal candidates and officeholders are prohibited  
6 from soliciting or directing funds in connection with an election for Federal office,  
7 including funds for any Federal election activity, unless the funds are subject to the Act.<sup>3</sup>

8 BCRA’s sponsors had reasons for selecting party committees for special treatment.  
9 As explained in the Brief of Intervenors before the District Court, “[u]nlike interest groups,  
10 which pursue an issue-based agenda that transcends the election of candidates, parties are  
11 primarily and continuously concerned with acquiring power through electoral victory.  
12 Parties never engage in public communication without regard to electoral consequences.”  
13 Brief of Defendant-Intervenors (Excerpts-Redacted) at I-58 (quoting Green Expert Report  
14 at 17 n. 19). Accordingly, BCRA’s sponsors selected party committees for special  
15 regulation: “BCRA’s state party provisions are carefully tailored to strike a balance  
16 between Congress’s anti-corruption and anti-circumvention interests and the states’ interest  
17 in controlling their own elections. That balance is reflected in the definition of “federal  
18 election activity” which confines the effect of BCRA to those state party activities that most  
19 clearly affect federal elections . . . .” *Id.* at I-54, *see also id.* at I-59 (discussing application  
20 of “promote, support, attack, or oppose” standard to party committees).

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<sup>2</sup> This section then provides a limited exception for parties to use so-called Levin funds (up to \$10,000 raised in accord with State law) for certain FEA that are not broadcasting communications or do not reference a clearly identified Federal candidate. 2 U.S.C. 441i(b)(2)(B).

<sup>3</sup> BCRA permits these individuals to make specific solicitations for voter registration, voter identification and get out the vote, as defined in the first two prongs of the FEA definition, if the solicitations are made only to individuals and do not exceed \$20,000 in a calendar year. 2 U.S.C. 441i(e)(4)(B).

1           FEA does not apply to the regulation of political entities outside these specific  
2 provisions. Accordingly, terms contained in 431(20) should not be imported to other parts of  
3 the Act, in particular the definition of “expenditure” at 431(9). A careful reading of the Act  
4 demonstrates that FEA is something different from the “in connection with an election”  
5 standard for “expenditure.” For instance, the “specific solicitation” exception in  
6 441i(e)(4)(B) permits candidate solicitation of funds in excess of the Federal limit for  
7 “contributions” for particular types of FEA, and in amounts up to \$20,000 -- well over the  
8 \$1,000 trigger for political committee status or the \$5,000 contribution limit applicable to  
9 political committees. If disbursements for FEA were expenditures, they would trigger  
10 committee status and the committee could not receive contributions in excess of \$5,000,  
11 rendering section 441i(e)(4)(B) nonsensical. Likewise, if FEA were “expenditures,” it  
12 would be unnecessary to state that party committees need to use hard dollars to pay for  
13 them, *see* 441i(b)(1) since that is already required under the Act.

14           Similarly, the Commission sees no statutory justification for applying restrictions  
15 for “electioneering communications” more broadly than the Act specifies. BCRA defines  
16 “electioneering communications” at section 434(f)(3) as any broadcast, cable, or satellite  
17 communication which refers to a clearly identified candidate, is made within 60 days of a  
18 general election or 30 days before a primary election, convention, or caucus, and is targeted  
19 to the relevant electorate. Section 434 sets forth reporting requirements for electioneering  
20 communications, and specifically exempts from those requirements a communication that  
21 constitutes an expenditure or independent expenditure. 2 U.S.C. 434(f)(3)(B). Moreover,  
22 section 441b(b)(2) of BCRA added language to prohibit corporations and labor  
23 organizations from making any “direct or indirect payment . . . to any candidate, campaign

1 committee, or political party organization, in connection with any election to any of the  
2 offices referred to in this section or for any applicable electioneering communication.”

3 If electioneering communications were to be generally restricted as “expenditures”  
4 then the construction in section 441b(b)(2) is incoherent, as the statute would not need to  
5 specify a separate rule for electioneering communications. Also, these expenditures would  
6 be reportable anyway, and the separate reporting regime at 434f would be unnecessary.  
7 Any such expenditures would trigger political committee status and those reporting  
8 requirements, and would be reportable as an independent expenditure if not coordinated and  
9 as an in-kind contribution if coordinated.<sup>4</sup> Finally, if electioneering communications are  
10 “expenditures” then corporations and labor organizations are already barred from using  
11 general treasury funds to pay for them. Like FEA, “electioneering communication” is a  
12 term applied to discrete entities – corporations and labor organizations at section  
13 441b(b)(2), or in a particular context – disclosure in section 434f. The Commission does  
14 not believe the statute permits it to bootstrap that term into the definition of “expenditure.”

15 Nor does the Supreme Court’s recent decision in *McConnell v. FEC* require that the  
16 Commission revise its treatment of Federal political committees with non-Federal accounts.  
17 Courts have defined “expenditures” to including communications containing “express  
18 advocacy”, see *FEC v. Massachusetts Citizens For Life*, 479 U.S. 238, 248-49 (1986);  
19 *Buckley v. Valeo*, 424 U.S. 1, 80 (1976), see also *McConnell v. FEC*, 124 S. Ct. at 688  
20 (quoting *Massachusetts Citizens For Life* as limited the scope of 441b to express advocacy).

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<sup>4</sup> Notably, BCRA also amended the definition of “independent expenditures” at 2 USC 431(17), retaining the “express advocacy” requirement but adding coordination with party committees as a factor. This section as amended is difficult to square with the argument that electioneering communications (or FEA) are expenditures, because conceivably some of those “expenditures” made independently would not qualify as “independent expenditures” due to the absence of express advocacy.

1 The Court in *McConnell v. FEC* left this reasoning undisturbed as to entities not  
2 specifically covered by the FEA and electioneering restrictions. The *McConnell* decision  
3 applied FEA and electioneering communications only in the specific circumstances  
4 addressed in the statute. The Court discussed FEA as applying only to state and local party  
5 committees to prevent them from becoming “conduit[s] for soft money donations . . . to  
6 influence Federal elections” 124 S. Ct. at 671. It also noted that FEA restrictions on state  
7 and local parties were “reasonably tailored” to apply to parties and “designed to focus the  
8 regulations on the important anti-corruption interests to be served.” *Id.* at 674.

9 The Court’s discussion of coordinated electioneering similarly demonstrates that it  
10 understood electioneering to be something apart from the statutory term-of-art  
11 “expenditure.” *See id.* at 694 (“Accordingly there is no reason why Congress may not treat  
12 coordinated disbursements for electioneering communications in the same way it treats all  
13 other coordinated expenditures.”). Moreover, it describes the “Court’s unanimous view”  
14 that expenditures must be paid for through a PAC, that this view is not challenged in this  
15 litigation, then reasons by analogy to defend a similar requirements for electioneering  
16 communications. *Id.* (“The ability to form and administer separate segregated funds  
17 [citations] has provided corporations and unions with a constitutionally sufficient  
18 opportunity to engage in express advocacy. That has been this Court’s unanimous view [fn]  
19 and it is not challenged in this litigation.”) If electioneering spending were “expenditures”  
20 under BCRA this line of reasoning would not make sense. Similarly, the Court determines  
21 that the ban on use of general treasury funds for electioneering communications would not  
22 apply to entities that qualified for the “*MCFL* exemption” – not because electioneering  
23 communications are “expenditures” – but because a similar limiting construction is required

1 here for electioneering “to avoid constitutional concerns.” *Id.* at 699. If electioneering  
2 communications were expenditures then the *MCFL* exception would squarely apply and  
3 this additional analysis would be unnecessary.

4 The Court also explicitly recognized that Congress could treat some groups  
5 differently from others without running afoul of constitutional equal protection guarantees.

6 In doing so, the Court stated:

7 BCRA imposes numerous restrictions on the fundraising abilities of  
8 political parties, of which the soft money ban is only the most prominent.  
9 *Interest groups, however, remain free to raise money to fund voter*  
10 *registration, GOTV activities, mailings, and broadcast advertising (other*  
11 *than electioneering communications).*  
12

13 124 S. Ct. at 686 (emphasis added). The Court continued: “Congress is fully entitled to  
14 consider the real-world differences between political parties and interest groups when  
15 crafting a system of campaign finance regulation.” *Id.* For the Commission to conclude  
16 that voter registration, get-out-the-vote, and broadcast advertising other than electioneering  
17 communications must be paid for with Federal dollars, we would need to come to a  
18 conclusion diametrically opposed to that of the *McConnell* majority.

19 Moreover, the evidence produced in *McConnell* shows that during that litigation it  
20 was expected that BCRA imposed regulations upon political parties that would not be  
21 imposed upon “interest groups.” See *McConnell v. FEC*, 251 F. Supp.2d 176, 520-22  
22 (Kollar-Kotelly) (summarizing evidence about effect of BCRA on interest group activity).  
23 While there may be no constitutional bar to Congress’s amending the Act to define



1 "expenditure" differently, it has not done so in BCRA, and the proper scope of  
2 Congressional power in this area remains a topic for another day.<sup>5</sup>

3 If the Commission were instead to find that BCRA, *McConnell v. FEC* or a  
4 combination of the two required revising the rules governing the non-Federal accounts of  
5 Federal committees, that decision is properly made in the context of a rulemaking, not in an  
6 Advisory Opinion. Similarly, the Commission is aware that some commenters argue that  
7 our allocation rules are contrary as it stood prior to BCRA<sup>6</sup>. However, Congress in passing  
8 BCRA did not repeal or amend these rules. Our allocation rules must not be repealed  
9 absent a rulemaking. Advisory Opinions are not final decisions, and apply only to the  
10 parties that request them in the specific transaction the Opinion has considered, or those  
11 involved in a transaction "indistinguishable in all its material aspects" from such a  
12 transaction. 2 U.S.C. 437f(c)(1). "Any rule of law . . . may be initially proposed by the  
13 Commission only as a rule or regulation pursuant to procedures established in section  
14 438(d) " of the Act, i.e. through formal rulemaking. 2 U.S.C. 437f(b). Similarly, were the  
15 Commission to decide that its longstanding treatment of non-Federal activities by Federal  
16 committees violated pre-BCRA FECA, such a dramatic reevaluation of our long-standing  
17 approach must also be justified in a rulemaking.<sup>7</sup> 2 U.S.C. 437f(b).

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<sup>5</sup> As the Commission discussed in its brief before the District Court in *McConnell v. FEC*, an earlier version of McCain-Feingold would have redefined "expenditures" to include public communications at any time of the year, and in any medium, that a reasonable person would understand as advocating the election or defeat of a candidate for Federal office, but this approach was abandoned in the version we now know as BCRA. See Government Defendant's Brief at 50.

<sup>6</sup> See Campaign Legal Center & Democracy 21 Comment on Advisory Opinion 2003-37 (Dec. 17, 2003) at 6.

<sup>7</sup> In the context of whether another Commission rule insulated *McConnell* plaintiffs from liability so as to deny them standing, Intervenor-Appellees observed that the Commission "could not change its mind without notice and comment rulemaking." Intervenor-Appellees' Response to Jurisdictional Statements at 4.

1           Moreover, the rulemaking process is better suited for consideration of such  
2 fundamental questions. The public may submit comments on pending advisory opinions, as  
3 provided in 2 U.S.C. 437f(d), yet statutory time constraints mean these comments, and the  
4 Commission's consideration of them, may be rushed. Unlike a rulemaking, the draft of an  
5 Advisory Opinion is not published in the *Federal Register* so interested individuals or  
6 groups may not know to comment. A rulemaking will be forthcoming in a matter of weeks,  
7 and that process will permit the Commission to consider the ramifications of a change in its  
8 approach, and review and revise thoroughly our other regulations to conform with that  
9 reevaluation.

#### 10 ***Application to Request***

11           ABC proposes to fund certain activity that may be paid for with a mix of Federal  
12 and non-Federal funds. As noted above, the Commission has in place a pre-BCRA  
13 framework to govern the mixed activities of Federal committees with non-Federal accounts.  
14 Commission regulations provide that, with respect to a political committee with separate  
15 Federal and non-Federal accounts (such as ABC), "[a]ll disbursements, contributions,  
16 expenditures, and transfers . . . in connection with any Federal election shall be made from  
17 its Federal account" (except as otherwise permitted with respect to State, district, and local  
18 party committees under 11 CFR Part 300). 11 CFR 102.5(a)(1)(i).

19           The proper allocation of such activity by a non-connected political committee such  
20 as ABC is set by 11 CFR Part 106. Where a communication (including a voter registration  
21 or get-out-the-vote communication) constitutes an expenditure on behalf of a clearly  
22 identified Federal candidate, the provisions at 11 CFR 106.1 providing for allocation to a  
23 candidate or candidates will apply. Where candidates are not identified and the

1 communication is part of a generic voter drive, the provisions of 11 CFR 106.6 will apply  
2 as to the allocation of a political committee's disbursements between its Federal and non-  
3 Federal accounts.

4 Under 11 CFR 106.1, expenditures, including in-kind contributions, independent  
5 expenditures, and coordinated expenditures made on behalf of more than one Federal  
6 candidate, are allocated to each such candidate according to the benefit reasonably expected  
7 to be derived; e.g. by the space and time devoted to each candidate in a printed or broadcast  
8 message, or statements in a phone bank message, as compared to the total space or time  
9 devoted to all the candidates. This also applies to allocating payments involving both  
10 expenditures on behalf of one or more clearly identified Federal candidates and  
11 disbursements on behalf of one or more clearly identified non-Federal candidates. 11 CFR  
12 106.1(a).

13 For communications by a non-connected political committee for voter identification,  
14 voter registration, or get-out-the-vote that are not coordinated with a candidate and that do  
15 not refer to any clearly identified Federal candidate, Commission regulations at 11 CFR  
16 106.6 require the use of at least some Federal funds because they are in part for the purpose  
17 of influencing a Federal election. Commission regulations provide that such committees  
18 shall allocate expenses for:

19 Generic voter drives including voter identification, voter registration, and  
20 get-out-the-vote drives, or any other activities that urge the general public to  
21 register, vote or support candidates of a particular party or associated with a  
22 particular issue, without mentioning a specific candidate.  
23

24 11 CFR 106.6(b)(2)(iii). The expenses for such purposes shall be allocated between the  
25 Federal and non-Federal accounts of the committee based on the ratio of Federal

1 expenditures to total Federal and non-Federal disbursements made by the committee during  
2 the two-year Federal election cycle.<sup>8</sup> Other disbursements that are not coordinated with a  
3 candidate, refer to a clearly identified candidate, but do not contain express advocacy, are  
4 allocable under the ratio for administrative expenditures at 11 CFR 106.6(c). *See, e.g.*  
5 Advisory Opinion 1995-25.

6 Nevertheless, “allocating a portion of certain costs to a committee’s non-Federal  
7 account is a permissive, rather than mandated procedure.” Advisory Opinion 2000-24  
8 (quoting *Methods of Allocation Between Federal and Non-Federal Accounts: Payments;*  
9 *Reporting*, 55 Fed. Reg. 26058, 26063 (June 26, 1990)). Allocation is a “floor” for the use  
10 of Federal funds and a “ceiling” for the use of non-Federal funds, and a political committee  
11 may pay for allocable expenses with a higher percentage of Federal funds, or with only  
12 Federal funds. Advisory Opinion 2000-24, *see also* Statement for the Record in Advisory  
13 Opinion 2000-24 (Vice-Chairman McDonald and Commissioner Thomas (“[T]he  
14 Commission’s allocation regulations were clearly designed to allow affected committees  
15 the flexibility to pay for more than the minimum Federal share of allocable expenses with  
16 funds raised under the Federal restrictions”). The Commission’s advice regarding  
17 allocation should be read with the understanding that ABC may allocate a higher  
18 percentage of Federal funds than permitted by the allocation formula.

19

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<sup>8</sup> The ratio shall be estimated and reported at the beginning of each cycle, and subsequent adjustments, accompanied by transfers, are made with respect to each reporting period. 11 CFR 106.6(c)(1) and (2). For the purposes of the ratio, the Federal expenditures shall include only amounts contributed to or otherwise spent on behalf of specific Federal candidates, including independent expenditures. The calculation of disbursements for the total Federal and non-Federal disbursements shall also be limited to disbursements for specific candidates, and shall not include overhead or other generic costs. 11 CFR 106.6(c)(1).

1 *1. Given that ABC's "express purpose" [2] [20] and "message" [26] is "the election and*  
2 *defeat" [26] [20] of particular Federal candidates,*

3 *(a) May ABC, or its agents, solicit or direct non-Federal funds [47]?*

4 *(b) May ABC use non-Federal funds to pay for any of its activities [26] [27]<sup>9</sup>?*

5

6 The paragraphs of your request addressed in this question largely present general  
7 questions of interpretation, and thus do not qualify as an advisory opinion request. 11 CFR  
8 112.1(b). As explained above, political committees may maintain Federal and non-Federal  
9 accounts, 11 CFR 102.5, and may allocate certain payments between Federal funds and  
10 non-Federal funds, *see, e.g.*, 11 CFR 106.6(b)(2)(iii) (allocation of expenses for generic  
11 voter drives by non-connected political committees). Thus, ABC may raise non-Federal  
12 funds, and spend such funds as permitted by the Act.<sup>10</sup> More specific guidance is provided  
13 below in the context of more specific questions.

14

15 *(c) Coordination with Federal Candidates and Political Party Committees*

16 *[9],[11] to [17], [18], [28] to [36], and [62]*

17

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<sup>9</sup> The questions in paragraph [27] pertaining to the activities of donors of non-Federal funds ask about activities of third parties and not that of the requestor. *See* 11 CFR 112.1(b) (which states that requests regarding the activities of third parties do not qualify as advisory opinion requests). However, to the extent your question inquires about ABC's liability for activities performed by third party donors who are not agents of ABC, their acts as you describe them, without more, would not affect ABC's ability to engage in the voter registration and get-out-the-vote activities referenced in the question.

<sup>10</sup> An expenditure is considered to be a contribution to a candidate when it is "made by any person in cooperation, consultation, or concert, with, or at the request or suggestion of," that candidate, the authorized committee of that candidate, or their agents. 2 U.S.C. 441a(a)(7)(B)(i). Also, an expenditure is not "independent" if it is "made in cooperation, consultation, or concert, with, or at the request or suggestion of," a candidate, authorized committee, or a political party committee. *See* 11 CFR 100.16.

1           Several paragraphs of your advisory opinion request directly raise issues as to  
2 “coordination” between ABC and candidates for Federal office and/or political party  
3 committees. *See, e.g.*, paragraphs [11]-[17], [18] (second question), [28]-[36], and [62] of  
4 your request. Under 2 U.S.C. 441a(a)(7) and 11 CFR 109.20(a), “coordinated” means,  
5 “made in cooperation, consultation, or concert with, or at the request or suggestion of, a  
6 candidate, a candidate’s authorized committee, or their agents . . . .”

7           The regulations in 11 CFR 109.21 set forth a three-pronged test for the purpose of  
8 determining whether a communication is coordinated with one or more candidates for  
9 Federal election, an authorized committee, a political party committee, or an agent of any of  
10 the foregoing. If the three-pronged test is satisfied, then the payments for the  
11 communication are made for the purpose of influencing a Federal election, and therefore  
12 constitute in-kind contributions. First, the communication must be paid for by someone  
13 other than that candidate, authorized committee, political party committee, or an agent of  
14 any of the foregoing. 11 CFR 109.21(a)(1); *see also* 11 CFR 109.37. The second prong is  
15 a “content standard” regarding the subject matter of the communication. 11 CFR  
16 109.21(a)(2). Four types of communications satisfy the content standard: (1) a public  
17 communication that expressly advocates the election or defeat of a clearly identified  
18 Federal candidate (no matter when made); (2) a public communication that disseminates,  
19 distributes or republishes campaign materials (no matter when made); (3) electioneering  
20 communications; and (4) a public communication directed to voters in a particular area that  
21 refers to a political party or a clearly identified Federal candidate and that is disseminated  
22 120 days or fewer before a primary, general, special or runoff election. *See* 11 CFR  
23 109.21(c). The third prong is a “conduct standard” regarding the interactions between the

1 person paying for the communication and the candidate, an authorized committee, a  
2 political party committee, or agents of the foregoing. 11 CFR 109.21(a)(3). These conduct  
3 standards include: (1) "requests or suggestions" for communications by candidates or  
4 political party committees; (2) substantial discussions regarding candidate or political party  
5 campaign plans, projects, activities, or needs; (3) "material involvement" in the making and  
6 airing of communications; (4) the involvement of "common vendors;" and (5) the  
7 involvement of individuals who were formerly employees or independent contractors of a  
8 candidate, an authorized committee, or a political party committee. 11 CFR 109.21(d)(1) –  
9 (5).<sup>11</sup>

10 The Commission cannot resolve, without more specific information, whether the  
11 communications you generally describe are coordinated communications. As such, your  
12 questions about coordination are hypothetical, presenting general questions of interpretation  
13 of the Act, rather than specific transactions or activities, and are thus not proper for an  
14 advisory opinion. 2 U.S.C. 437f(a)(1); 11 CFR 112.1(b).<sup>12</sup>

15 In addition to the paragraphs of your request that directly raise issues about  
16 coordination, some of your other paragraphs raise the possibility that a number of ABC's

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<sup>11</sup> In order to meet this fifth conduct standard, the former employee or independent contractor must use or convey information. 11 CFR 109.21(d)(5). The Commission considered and rejected a standard in which previous employment would, by itself, be sufficient to satisfy this conduct standard. See 68 Fed. Reg. at 438 ("The Commission notes that the final rule focuses only on the use or conveyance of information that is material to a subsequent communication and does not in any way prohibit or discourage the subsequent employment of those who have previously worked for a candidate's campaign or a political party committee.") Moreover, merely conveying publicly available information would not meet the standard for the rule.

<sup>12</sup> In paragraph [9] you ask whether an individual contributing non-Federal funds to ABC "for the express purposes of 'reelecting the President' or 'defeating' his Democratic opponent" may also hold a fundraiser for the President. This question relates to the activities of a third-party contributor. Under the Act and Commission regulations, a request on behalf of a requesting person must be made by an "authorized agent of such person." 2 U.S.C. 437f(a)(1) and 11 CFR 112.1(a). Such activity on the part of a contributor would not, without more, implicate ABC or result in an excessive contribution to ABC.

1 planned activities described below might be coordinated with one or more candidates for  
2 Federal office, authorized committees of Federal candidates, political party committees, or  
3 the agents of any of the foregoing. See, e.g., paragraphs [6]-[8], [24]-[27],<sup>13</sup> [38]-[39],  
4 [48]-[49], [52]-[54], [57]-[60], [64], and [67]-[70] of your request. To the extent that the  
5 activities you describe in those questions would result in a coordinated communication  
6 within the meaning the meaning of 11 CFR 109.21, the payment for such communications  
7 would constitute an in-kind contribution to a candidate for Federal office or to a political  
8 party committee. Such contributions must be paid for entirely with Federal funds and are  
9 subject to ABC's contribution limits under 2 U.S.C. 441a(a)(1) or (2). Thus, the  
10 Commission conditions its responses to the questions discussed below on the assumption  
11 that these activities are not coordinated with a Federal candidate, authorized committee,  
12 political party committee, or agents of any of the foregoing. 2 U.S.C. 441a(a); 11 CFR  
13 100.52(d)(1), 11 CFR 109.20 and 109.21.<sup>14</sup>

14

15 *Coordination with non-profit organizations*

16

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<sup>13</sup> While you state in paragraphs 24 and 25 that the contemplated activities will not be coordinated with a Federal candidate, you do not address whether the activities will be coordinated with a political party committee or its agents.

<sup>14</sup> The Act, as amended by BCRA, and Commission regulations prohibit national committees of political parties, their officers and agents, and any entities established, financed, maintained or controlled by such committees from soliciting, receiving, spending, or directing to another person, non-Federal funds (i.e., funds that are not subject to the limitations, prohibitions, or reporting requirements of the Act). 2 U.S.C. 441i(a); 11 CFR 300.10. For the purposes of this opinion, the Commission accepts your representation that ABC is an independent political committee that is not affiliated with any Federal candidate, Federal officeholder or political party.



1 2. *You ask whether ABC may coordinate its activities with entities that are constituted as*  
2 *either IRC §527 political organizations or section 501(c)(3) organizations, and that are*  
3 *not Federal political committees. [35] and [36]*

4

5 The Act and Commission regulations at 2 U.S.C. 441a(a)(7)(B) and 11 CFR Part  
6 109 set forth consequences from coordination with a candidate for Federal office, a  
7 candidate's authorized committee, or a political party committee. Neither the Act nor  
8 Commission regulations address coordination with other political committees and 527  
9 political organizations or section 501(c)(3) organizations. Thus, ABC is not prohibited  
10 from consulting with, or acting in concert with these other organizations.<sup>15</sup>

11 The Commission expresses no opinion regarding qualification for tax treatment  
12 under 26 U.S.C. 527 or any other ramifications of the proposed activities under the Internal  
13 Revenue Code because those questions are outside the Commission's jurisdiction.

14

15 *Agency*

16

17 Your advisory opinion request raises issues as to whether an individual is an agent<sup>16</sup>  
18 of one or more organizations, including ABC. *See, e.g.,* paragraphs [12], [15], and [29].

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<sup>15</sup> Depending on the particular circumstances, such cooperation could be a factor leading to a conclusion that ABC controls or is otherwise affiliated with such a group, that the group is acting as ABC's agent, or that the group has made an in-kind contribution to ABC.

<sup>16</sup> Although Congress did not define the term "agent" in BCRA, the Commission has promulgated regulations at 11 CFR 300.2(b) that define an "agent" of a Federal candidate or officeholder for purposes of 11 CFR Part 300 (*i.e.*, the "soft-money" rules enacted to implement BCRA) as "any person who has actual authority, either express or implied," "to solicit, receive, direct, transfer or spend funds in connection with any election." The Commission also promulgated a similar definition of "agent" solely for the purposes of 11 CFR Part 109, which primarily addresses coordination between a person paying for a communication and a Federal

1 The Commission cannot determine whether particular individuals are agents of ABC or  
2 other persons without more specific information. As the Commission previously noted in  
3 the Explanation and Justification for 11 CFR Part 109, it is difficult to determine whether  
4 an individual is acting as an "agent" in the abstract because "[t]he grant and scope of the  
5 actual authority, whether the person is acting within the scope of his or her actual authority,  
6 and whether he or she is acting on behalf of the principal or a different person, are factual  
7 determinations that are necessarily evaluated on a case-by-case basis in accordance with  
8 traditional agency principles." 68 Fed. Reg. 421, 425. Therefore, to the extent your  
9 questions require a determination of whether a particular person is an agent of ABC or  
10 another organization, the Commission has insufficient information to answer those  
11 questions. 2 U.S.C. 437f(a)(1); 11 CFR 112.1(b). In addressing the questions you present  
12 in this request, the Commission assumes that ABC directors and staff are not agents of a  
13 candidate for Federal office, an authorized committee of such candidate, a political party  
14 committee, or any other individual or entity.

15

16 *Communications*

17

18 3. *You indicate that ABC may fund a communication that states: "President George W.*  
19 *Bush, Senator X and Representative Y have led the fight in Congress for a stronger*  
20 *defense and stronger economy. Call them and tell them to keep fighting for you." May*

---

candidate, authorized committee, or political party committee. 11 CFR 109.3. The Commission explained that this definition of "agent" is "based on the same concept that the Commission used in framing the definition of 'agent'" in part 300, described above. 68 Fed. Reg. 421, 423 (Jan. 3, 2003).

1        *ABC pay for this communication containing no express advocacy solely with donations*  
2        *from individuals that exceed the Act's limitations? [6], [7]*

3

4            No. As explained above, although this is not an "express advocacy"  
5        communication, ABC must either use Federal funds or allocate its payment for these  
6        communications under the allocation rules for administrative expenses at 11 CFR 106.6(c).  
7        To the extent the communication is also an "electioneering communication" as defined at  
8        11 CFR 100.29(a), please see the answer to 4 below.

9

10        4. *May ABC pay for communications within 60 days of a general election with funds from*  
11        *corporations, labor organizations, and trade associations, if the message is "President*  
12        *Bush is a strong leader. The War on Terror, cutting taxes, putting families and working*  
13        *people first. He has provided strong, common sense leadership for this nation. Call*  
14        *President Bush and tell him to keep fighting for a strong America."? [64A]*

15

16            No, to the extent this communication is an electioneering communication. See 11  
17        CFR 100.29(a). Under section 114.14(b), ABC may not use funds from a corporation,  
18        labor organization, or trade association to pay for any electioneering communication or  
19        provide those funds to any person for the purpose of defraying any of the costs of an  
20        electioneering communication. Moreover, ABC must be able to demonstrate through a  
21        reasonable accounting method that no such funds were used for any portion of an  
22        electioneering communication. 11 CFR 114.14(d). ABC may wish to establish a

1 segregated bank account into which it deposits funds donated by individuals, and fund  
2 electioneering communications from that account. See 11 CFR 114.14(d)(2).

3 If the communication does not meet the definition of an electioneering  
4 communication at 11 CFR 100.29(a), please see the answer to question 3 above.

5

6 5. *May ABC pay for "issue ads" within 60 days of a general election with corporate,  
7 labor organization, or trade association funds? [8]*

8

9 In paragraph [8], you ask generally "[s]ince ABC is an unincorporated entity, may it  
10 broadcast issue ads within 60 days of a general election paid for with funds that include  
11 contributions from corporations, unions and trade associations?" Because you do not  
12 provide a script for the "issue ads" referred to in paragraph [8], this is a hypothetical  
13 question calling for general interpretation of the Act. Thus, it is not a proper advisory  
14 opinion request. 2 U.S.C. 437f(a)(1); 11 CFR 112.1(b). To the extent you plan to  
15 broadcast advertisements that meet the definition of electioneering communications, please  
16 see the answer to question 4.

17

18 6. *ABC wishes to run television and radio communications, such as that attached to your  
19 request at Exhibit E, on television and radio within sixty days of a general election  
20 mentioning President Bush but not expressly advocating his election. May ABC fund  
21 these ads with donations from individuals in amounts that exceed Federal limits? [64B]*

22

1           **Yes, ABC may fund these electioneering communications from funds donated by**  
2 **individuals, provided those individuals did not receive the funds from impermissible**  
3 **sources for use in funding electioneering communications, *see* 11 CFR 114.14(b), or the**  
4 **funds meet the requirements for the exception at 11 CFR 114.14(c) for salary, royalties, and**  
5 **other bona fide income, interest earnings, or receipts for goods provided or services**  
6 **rendered. Again, ABC must demonstrate that no impermissible corporate or labor funds**  
7 **were used for the communication, and may establish a separate account for that purpose.**  
8 **11 CFR 114.14(d).**

9

10 ***7. ABC wishes to run television and radio ads, such as those which are attached to your***  
11 ***request at Exhibit E, more than sixty days before the general election that state that***  
12 ***President Bush is a "strong leader" who "has provided strong, common-sense***  
13 ***leadership for this nation." May ABC fund these ads with either Federal or non-***  
14 ***Federal funds? [65]***

15

16           **Please see the answer to Question 3.**

17

18 ***Voter Registration, GOTV, and Voter Identification Activities***

19           **You ask a number of questions about funding for proposed communications tied to**  
20 **what you describe as voter registration and get-out-the vote ("GOTV") activities. These**  
21 **questions are found at paragraphs [5], [6], [18 first question], [19], [26], [48], [52] through**  
22 **[61], [69], and [70]. They present a variety of messages in a variety of media, including**  
23 **direct mail, phone banks, and door-to-door distribution of material. You also ask about a**

1 specific voter identification communication [67]. With respect to some paragraphs, you  
2 also ask about the implications of BCRA on specific types of FEA, as defined at 2 U.S.C.  
3 431(20)(A)(i) and (ii) and 11 CFR 100.24(b)(1) and (2).<sup>17</sup> However, as noted above, ABC  
4 is not established, financed, maintained or controlled by a national, State, district or local  
5 party committee. Therefore, the provisions of 2 U.S.C. 441i that turn on those types of  
6 FEA do not apply to ABC.

7 Commission regulations address: (1) communications by political committees that  
8 involve expenditures on behalf of clearly identified Federal candidates and/or  
9 disbursements on behalf of clearly identified non-Federal candidates, at 11 CFR 106.1; and  
10 (2) communications by political committees for voter identification, voter registration or  
11 get-out-the-vote that are not coordinated with a candidate and that do not mention a clearly  
12 identified candidate, at 11 CFR 106.6(b)(2)(iii). Funding for such communications will  
13 depend in large measure on the application of 11 CFR Part 106.

14

15 *8. May ABC use non-Federal funds to pay for voter registration and get-out-the-vote*  
16 *public communications that clearly identify a Federal candidate and that expressly*  
17 *advocate his election or defeat or promote, support, attack, or oppose the candidate?*  
18 *This question refers to communications in paragraphs [5], [6], [26], [52], [57], and*  
19 *[69]. This question also pertains to questions [54] and [60].*

20

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<sup>17</sup> These include your references in paragraph [51] to voter registration activity that occurs more than 120 days before a Federal election and within the 120-day period and the reference in paragraph [58] to GOTV activity that occurs within 72 hours of a Federal election and before that time period.

1           No. The communications in paragraphs [26] (first message), [52], [54] (first  
2 message), [57], [60] (first message), and [69] present messages that clearly identify a  
3 Federal candidate and expressly advocate his election. 11 CFR 100.22(a) .<sup>18</sup> Payment for  
4 such a message would be an expenditure that must be paid for entirely with Federal funds.  
5 The message in paragraph [57] also refers generically to “the entire Republican team,” and  
6 under 11 CFR 106.1 a reasonable apportionment of the cost would attribute 50% to that  
7 candidate mentioned.<sup>19</sup>

8           The communication in paragraph [5] expressly advocates the election of three  
9 clearly identified candidates, two Federal and one non-Federal. Based on the content of the  
10 message, 11 CFR 106.1(a) would require allocation among the three candidates, and a  
11 reasonable allocation would require that two-thirds of the cost be paid with funds from the  
12 Federal account.

13           The message in [6] and the second message in paragraph [26] do not expressly  
14 advocate the election of a clearly identified Federal candidate. Thus the disbursement may

---

<sup>18</sup> Specifically, 11 CFR 100.22(a) provides that “expressly advocating” means any communication that “[u]ses phrases such as ‘vote for the President,’ ‘re-elect your Congressman,’ ‘support the Democratic nominee,’ ‘cast your ballot for the Republican challenger for U.S. Senate in Georgia,’ ‘Smith for Congress,’ ‘Bill McKay in ‘94,’ ‘vote Pro-Life’ or ‘vote pro-Choice’ accompanied by a listing of clearly identified candidates described as Pro-Life or Pro-Choice, ‘vote against Old Hickory,’ ‘defeat’ accompanied by a picture of one or more candidate(s), ‘reject the incumbent,’ or communications of campaign slogan(s) or individual word(s), which in context can have no other meaning than to urge the election or defeat of one or more clearly identified candidate(s), such as posters, bumper stickers, advertisements, etc. which say ‘Nixon’s the One,’ ‘Carter ‘76,’ ‘Reagan/Bush’ or ‘Mondale!’ . . .”

<sup>19</sup> Recently, the Commission promulgated new regulations carving out an exception for State, district, and local party committee phone banks where the phone script would ask people to show support for a clearly identified Federal candidate and generically refers to other candidates of the Federal candidate’s party without identifying them by name. *See* 11 CFR 106.8; 68 Fed. Reg. 64517 (November 14, 2003). Rather than require the party committee to allocate 100 percent of the cost as an expenditure on behalf of the Federal candidate (or a coordinated expenditure or contribution in the event of coordination), the Commission chose to require the allocation of only 50 percent to the Federal candidate, although it still required the use of only Federal funds for the entire expense. The Commission concludes that this would be a reasonable allocation in this context as well. *See* Final Audit Report for Bush-Cheney 2000, December 4, 2002 at 5.

1 be paid from the Federal and non-Federal accounts as specified in 106.6(c), see generally  
2 the answer to question 3 above.

3

4 9. *May ABC use non-Federal funds to pay for voter registration and GOTV public*  
5 *communications that do not mention a clearly identified Federal candidate, and that*  
6 *are targeted to geographic areas or demographic voter groups that have been identified*  
7 *as Republican based on earlier voter identification efforts? This question refers to*  
8 *communications in paragraphs [53], [59], and [70], and pertains also to paragraphs*  
9 *[54] and [60].*

10

11 ABC may use Federal funds or an allocation of Federal and non-Federal funds as set  
12 forth in 11 CFR 106.6.

13 Paragraphs [53] and [54] (second message) involve voter registration messages by  
14 ABC that do not mention specific candidates but urge the general public to support  
15 candidates associated with particular positions on issues. Paragraph [53] includes the  
16 statement, "From the war on terror, to cutting taxes, to improving education – we all have a  
17 duty to elect leaders who put America first and not the liberal special interest groups." The  
18 messages in paragraphs [53] and [54] (second message) would be allocable under 11 CFR  
19 106.6, and may be paid for with non-Federal funds only to the extent permitted under 11  
20 CFR 106.6(c). The same analysis applies to the directed GOTV messages referred to in  
21 paragraphs [59] and [60] (second message). Paragraph 69 includes the sentence, "From the



1 war on terror, to cutting taxes, to improving education – we all have a duty to elect leaders  
2 who will put America first and not the liberal special interest groups.”<sup>20</sup>

3 Paragraph [70] merely states that Joe Smith is calling on behalf of ABC and asks the  
4 recipient to vote on November 2, without words encouraging support for candidates of any  
5 party or associated with any position on any issue. This communication does not mention  
6 any clearly identified candidate. Thus, it is a generic GOTV communication that may be  
7 paid for with Federal funds, or allocated under 11 CFR 106.6 between ABC’s Federal and  
8 non-Federal accounts.

9

10 *10. May ABC use non-Federal funds to pay for voter registration and GOTV public*  
11 *communications that do not mention a clearly identified Federal candidate and that are*  
12 *not targeted to geographic areas or demographic groups that have been identified as*  
13 *Republican based on earlier voter identification efforts? [58]*

14

15 In paragraph [58], you do not refer to any partisan targeting of the audience that will  
16 receive this message. Nevertheless, this is a voter registration message distributed by a  
17 non-connected political committee that urges support for candidates associated with  
18 positions on particular issues. See Exhibit D to the request. Thus, the communication falls  
19 within the definition of “generic voter drive” at 11 CFR 106.6(b)(2)(iii) and must be funded  
20 in part, with Federal funds under 11 CFR 106.6(c).

21

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<sup>20</sup> Paragraph [59] refers to the message at issue in paragraph [58]. Paragraph [58] does not by itself refer to the targeting of communications presented in paragraph [59] and will be discussed below.

1 *11. How would prior contributions by ABC to candidates affect ABC's subsequent voter*  
2 *registration and GOTV activities with respect to those candidates? [18], [19].*

3

4 You ask whether a prior contribution by ABC to a Federal candidate would lead the  
5 Commission to conclude that subsequent GOTV activities with respect to the candidate are  
6 coordinated expenditures and constitute in-kind contributions to the candidate subject to the  
7 amount limitations and source prohibitions of the Act. The Commission concludes that a  
8 prior contribution by ABC to the candidate, in and of itself, does not establish that ABC's  
9 GOTV activities are coordinated with the candidate.

10

11 *12. How would ABC's funding of voter registration or GOTV messages be affected by the*  
12 *fundraising for such expenses, including the content of the messages used to raise the*  
13 *funds? This pertains to paragraphs [55] and [61].*

14

15 Paragraphs [55] and [61] ask if certain types of funds may be used for voter  
16 registration or GOTV messages, if the solicitation for the funds mentions a specific Federal  
17 candidate but the eventual voter registration or GOTV communication does not. An  
18 example of such a solicitation is "Give money to an effort [or 'to a GOTV effort'] that will  
19 help President Bush and Republican candidates;" an example of the subsequent GOTV  
20 communication is, "Go out and vote. The election is important. It's your civic duty." You  
21 do not provide an example for a voter registration communication subsequent to the  
22 solicitation but, based on your question in paragraph [55], the Commission assumes that the  
23 language is similar to the GOTV communication.

1           **These two questions implicate two different activities of ABC, its fundraising**  
2 **activities and its generic spending.**

3           **The fundraising messages in paragraphs [55] and [61] clearly identify a Federal**  
4 **candidate and refer generally to other candidates of the same party. Some of these funds**  
5 **are being raised to influence a Federal election subject to the contribution limits and source**  
6 **prohibitions of the Act and others are raised for more generic purposes, accordingly it is**  
7 **appropriate to treat the solicitation expense as a mixed Federal/non-Federal fundraising**  
8 **activity subject to 11 CFR 106.6(d). ABC should make clear in its solicitations that it may**  
9 **accept Federal contributions for its political committee only within the limitations and**  
10 **prohibitions of the Act, and that funds not complying with those restrictions will be**  
11 **deposited in the non-Federal account. See 11 CFR 102.5(a)(2)(ii).**

12           **The subsequent voter registration or GOTV messages will not refer to a Federal**  
13 **candidate, a political party, or generically to candidates supporting positions on specific**  
14 **issues. These subsequent messages may be funded as generic voter drive expenses that are**  
15 **allocable in accordance with 11 CFR 106.6(c).**

16

17 ***13. Do donors violate the Act by donating non-Federal funds to the voter mobilization***  
18 ***effort directed at the general public with the stated purpose (i.e., express advocacy) of***  
19 ***defeating a named Federal candidate? If so, are they subject to criminal penalties if***  
20 ***they know from fundraising appeals that the purpose of their contribution is the defeat***  
21 ***of a specific Federal candidate? Does it matter if the stated public purpose is the defeat***  
22 ***of a specific candidate but all the messages themselves from ABC do not contain***  
23 ***express advocacy? [48]***

1

2           Requests pertaining to the activities of a third party do not qualify as advisory  
3 opinion requests. 11 CFR 112.1(b). Moreover, an Advisory Opinion request must include  
4 a complete description of all facts relevant to the specific transaction. 11 CFR 112.1(c).  
5 Paragraph [48] presents questions as to the activities of third parties, including potentially  
6 large numbers of donors in a variety of circumstances.

7

8       ***14. May ABC use non-Federal funds to pay for voter identification communications that***  
9       ***clearly identify a Federal candidate and that ask questions in a manner that promotes***  
10       ***his candidacy? [67]***

11

12           Non-Federal funds may only be used for the allocable share of the cost of the  
13 proposed voter identification communications. Paragraph [67] refers to mass mailings and  
14 telephone banks to identify voters, which candidates they support, and which issues  
15 motivate them. The message will contain several questions such as “Do you believe your  
16 taxes are too high?” and “Are you in favor of improving education?”, along with questions  
17 such as “Are you in favor of President Bush’s efforts to lower taxes?” or his “efforts to  
18 improve education?” or his “efforts for a strong defense?” The communication will finish  
19 with a question as to whether the reader or listener intends to vote on November 2. The  
20 disbursements for this communication should be allocated under 106.6(c).

21       ***Fundraising***

22

1 *15. ABC wishes to have Federal officeholders and candidates assist in its fundraising*  
2 *activities as permitted by the Act. May Federal officeholders and candidates raise*  
3 *funds for ABC's Federal account? [38]*

4

5 Yes, a Federal officeholder or candidate may solicit funds for ABC's Federal  
6 account if he or she only asks for Federally permissible funds. See Advisory Opinions  
7 2003-36, 2003-5 and 2003-3.<sup>21</sup>

8 Contributions that were designated for ABC's Federal account, or that result from a  
9 solicitation that expressly states that the contribution will be used in connection with a  
10 Federal election, or that are from contributors who have been informed that all  
11 contributions are subject to the prohibitions and limitations of the Act, may be deposited in  
12 ABC's Federal account. 11 CFR 102.5(a)(2).

13

14 *16. ABC wishes to have Federal officeholders and candidates assist in its fundraising*  
15 *activities as permitted by the Act. May Federal officeholders and candidates raise*  
16 *funds for ABC's non-Federal account? [39]*

17

18 Yes, if the Federal officeholders or candidates only ask for funds that are not in  
19 excess of the Act's contribution limits, and that are not from sources prohibited by the Act

---

<sup>21</sup> The answers to questions 15 and 16 collectively mean that a Federal candidate or officeholder may only solicit funds for ABC's Federal and non-Federal accounts to the extent that the combined amounts solicited for Federal and non-Federal accounts do not exceed the amounts permitted under the Act's contribution limits. 11 CFR 300.62; see Explanation and Justification to Prohibited and Excessive Contributions: Non-Federal Funds or Soft Money, 67 Fed. Reg. 49,107.

1 from making contributions. 2 U.S.C. 441i(e)(1)(B); 11 CFR 300.62.<sup>22</sup> See Advisory  
2 Opinions 2003-36 and 2003-03.

3

4 *17. May ABC have Federal officeholders or candidates attend and/or speak at fundraising*  
5 *events for ABC's non-Federal account that raise funds outside the Act's contribution*  
6 *and source limitations? [40] and [41]*

7

8 Yes, Federal officeholders and candidates may attend and speak at fundraising  
9 events for ABC's non-Federal account that raise funds outside the Act's contribution limits  
10 and source prohibitions, but they may not solicit funds that are outside the amount  
11 limitations and source prohibitions of the Act. Advisory Opinions 2003-36 and 2003-03.

12 Commission regulations establish that a Federal officeholder or candidate will not  
13 be held liable for soliciting funds in violation of section 441i(e)(1)(B) or section 300.62  
14 merely by virtue of attending or participating in any manner in connection with a  
15 fundraising event at which non-Federal funds are raised. To be liable, the Federal candidate  
16 must "ask" for non-Federal funds. *Id.*; see 11 CFR 300.2(m), (n).<sup>23</sup> The scope of a covered  
17 person's potential liability under 2 U.S.C. 441i(e)(1) and 11 CFR 300.62 will be determined  
18 by his or her own speech and actions or those of his or her agents in asking for funds, but

---

<sup>22</sup> Under the Act, the following persons may not contribute in connection with a Federal election: National banks, corporations, and labor organizations (2 U.S.C. 441b); Federal government contractors (2 U.S.C. 441c); and foreign nationals (2 U.S.C. 441e). It is unlawful for the following persons to contribute or donate in connection with *any* election: National banks and corporations organized by authority of Congress (2 U.S.C. 441b) and foreign nationals (2 U.S.C. 441e).

<sup>23</sup> In *McConnell v. FEC*, the Court concluded that the Commission's interpretation of the statute was consistent with the construction offered by Intervenors McCain et al. in their Brief. 124 S. Ct. at 670.

1 not by the speech or actions of another person outside his or her control. *See Advisory*  
2 *Opinions 2003-36, 2003-05 and 2003-03.*

3 If a covered person makes a solicitation, such solicitation must include or be  
4 accompanied by a clear and conspicuous message indicating that the covered individual is  
5 only asking for funds that comply with the amount limitations and source prohibitions  
6 of the Act. In the context of a solicitation for ABC, the following is considered to be an  
7 adequate disclaimer:

8  
9 I am asking for a donation of up to \$5,000 per year. I am not asking for  
10 funds from corporations, labor organizations, or other Federally prohibited  
11 sources.  
12

13 A covered person may give a speech soliciting funds generally without mentioning specific  
14 amounts, sources, or limitations, if written notices are clearly and conspicuously displayed  
15 at the event indicating that the covered person is soliciting only Federally permissible  
16 funds;<sup>24</sup> or if a public oral disclaimer is made. *See Advisory Opinions 2003-36 and 2003-*  
17 *03.*

18  
19 *18. May Federal officeholders or candidates be named in the invitation as honored guests,*  
20 *or as featured speakers, or as hosts, for fundraising events for ABC's non-Federal*  
21 *account? [42]*  
22

23 Yes, within the limits of 2 U.S.C. 441i(e)(1)(B) and 11 CFR 300.62. Section  
24 441i(e)(1)(B) and section 300.62 only apply to an invitation to an event where that

---

<sup>24</sup> See 11 CFR 110.11(c) for the Commission's interpretation of "clear and conspicuous" in related contexts.

1 invitation constitutes a solicitation for funds, and where the covered person approved,  
2 authorized, or agreed or consented to be featured, or named in, the invitation (e.g., through  
3 the use of his name or likeness). Mentioning a covered person in the text of a written  
4 invitation does not, without more, constitute a solicitation or direction of non-Federal funds  
5 by that covered person. However, a candidate's consent or agreement to be mentioned in  
6 an invitation as an honored guest, featured speaker or host, where that invitation is a  
7 solicitation, constitutes a solicitation by the candidate. Thus, if a candidate agrees or  
8 consents to be named in a fundraising solicitation as an honored guest, featured speaker or  
9 host, or if the invitation constitutes a solicitation for any other reason, then the solicitation  
10 must contain a clear and conspicuous statement that the entire solicitation is limited to  
11 funds that comply with the amount limits and source prohibitions of the Act. *See generally*  
12 *Advisory Opinions 2003-36 and 2003-03.*

13       Complying with these requirements regarding the written invitation does not relieve  
14 the covered person of the requirements as to his or her actual appearance at the subsequent  
15 event as an honored guest or featured speaker, as set out in the response to questions 16 and  
16 17. The requirements set out in response to question 17 as to the speech and disclaimer by  
17 the covered person, clear and conspicuous written notices, and conversations by the covered  
18 person are still applicable.

19

20 *19. May Federal officeholders or candidates sign written solicitations for the non-Federal*  
21 *account that raise funds outside the Act's contribution and source limitations? [43]*



1           **No. Federal officeholders and candidates may not sign written solicitations for**  
2 **ABC's non-Federal account that raise funds outside the Act's contribution limits and source**  
3 **prohibitions. 2 U.S.C. 441i(e)(1)(B); 11 CFR 300.62; Advisory Opinion 2003-03.**

4

5 ***20. If Federal officeholders or candidates cannot speak or participate in a fundraising***  
6 ***event for ABC's non-Federal account, may ABC have a fundraiser for its Federal***  
7 ***account with the Federal officeholders and candidates present, and then immediately***  
8 ***adjourn to an adjacent location for a non-Federal soft dollar fundraising event at which***  
9 ***the Federal officeholders and candidates are not present? [44]***

10

11           **See the answer to question 17.**

12

13 ***21. May ABC solicit Federal funds by using the names of specific Federal candidates in***  
14 ***solicitations that will convey ABC's support for or opposition to specific Federal***  
15 ***candidates, assuming no coordination between ABC and any Federal candidates?***  
16 ***Solicitations for Federal funds would be through mass mailings and broadcast***  
17 ***advertising. For example, could ABC use the following message: "ABC supports***  
18 ***President Bush's tax cuts to stimulate the economy. Give to ABC so that we can***  
19 ***support President Bush's agenda." Or, could ABC use the following message: "ABC***  
20 ***supports President Bush's tax cuts to stimulate the economy. Give to ABC so that we***  
21 ***can support President Bush's reelection." [21], [24]***

22

1           **Yes. Although ABC will use the names of specific Federal candidates in**  
2 **solicitations, ABC will not coordinate with the candidates, and the candidates will not**  
3 **solicit, receive, direct, transfer, spend or disburse funds outside of the amount limitations,**  
4 **source prohibitions or reporting requirements of the Act. Thus, neither**  
5 **2 U.S.C. 441i(e)(1)(A), nor 11 CFR 300.61, nor any other provision of the Act or**  
6 **Commission regulations, would bar ABC's fundraising through the use of the names of**  
7 **specific Federal candidates in a manner that will convey ABC's support for or opposition to**  
8 **specific Federal candidates.**<sup>25</sup>

9

10 ***22. May ABC solicit non-Federal funds by using the names of specific Federal candidates***  
11 ***in solicitations that will convey ABC's support for or opposition to specific Federal***  
12 ***candidates, assuming no coordination between ABC and any Federal candidates?***  
13 ***Solicitations for non-Federal funds would be through mass mailings, broadcast***  
14 ***advertising, and in person solicitations using printed materials and taped messages.***  
15 ***Could ABC use the messages presented in the immediately preceding question for this***  
16 ***purpose? [25]***

17

18           **Yes, provided that donors are informed that the funds contributed are for non-**  
19 **Federal purposes. To the extent the message contains only express advocacy of the federal**  
20 **candidate, the costs for the solicitation must be paid entirely from the Federal account.**  
21 **Otherwise, the solicitation costs are allocable as a direct cost of the fundraising program,**

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<sup>25</sup> Please see the answer to question 15, above, regarding the conditions for deposit of Federal funds. 11 CFR 102.5.

1 under 11 CFR 106.6(d). If the broadcast solicitations qualify as an electioneering  
2 communication, no corporate or labor organization funding would be permissible. 11 CFR  
3 114.14(b).

4

5 *23. May ABC sponsor an issues forum at which Federal officeholders or candidates speak,*  
6 *and then adjourn later in the same day to a different location for a non-Federal*  
7 *fundraiser that is not attended by Federal officeholders or candidates? The invitation*  
8 *to this event would include two separate pieces, each with its own disclaimer. One*  
9 *would be for the issues forum alone and would contain no electioneering or fundraising*  
10 *message. The second piece would be a fundraising piece for the non-Federal dollar*  
11 *fundraising that either did not mention or include Federal officeholders and candidates*  
12 *or, in the alternative, included Federal officeholders and candidates only to the extent*  
13 *permitted by the Commission. [45]*

14

15 Yes, as a non-connected political committee, ABC may sponsor an issues forum.<sup>26</sup>

16 As explained in the answers to question 17, a covered person may be included on the  
17 invitations, subject to the limits of 2 U.S.C. 441i(e)(1)(B) and 11 CFR 300.62. A Federal  
18 officeholder or candidate may speak at ABC's issues forum. The invitation to the issues  
19 forum and the fundraising solicitation should either be in separate mailings, or the entire  
20 mailing should satisfy the conditions set out in the answer to question 18, above.

21

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<sup>26</sup> The Commission understands this is an event at which solicitations for Federal or non-Federal funds do not occur.

1    **24. May ABC raise and spend funds from its non-Federal accounts from foreign nationals**  
2       **and from foreign corporations and labor organizations for voter registration and voter**  
3       **mobilization activities on behalf of Federal candidates with express advocacy (e.g.,**  
4       **"register to help reelect President Bush") or with an issue advocacy message outside**  
5       **the 30 or 60 day windows (e.g., "Register. It's your duty.")? [49]**

6  
7       **No. The Act, as amended by BCRA, prohibits foreign nationals<sup>27</sup> from, among**  
8       **other things, directly or indirectly making a contribution or donation of money or other**  
9       **thing of value, or to expressly or impliedly promise to make a contribution or donation, in**  
10      **connection with a Federal, State, or local election. 2 U.S.C. 441e(a)(1)(A); 11 CFR 110.20.**  
11      **Nor may foreign nationals make expenditures or disbursements for an electioneering**  
12      **communication. 2 U.S.C. 441e(a)(1)(C). Also, no person, including ABC, may solicit,**  
13      **accept, or receive a contribution or donation from a foreign national. 2 U.S.C. 441e(a)(2).**  
14      **Section 110.20(g) provides that no person shall knowingly solicit, accept or receive any**  
15      **contribution or donation from a foreign national, and 11 CFR 110.20(h) provides that no**  
16      **person shall knowingly provide substantial assistance in the making of an expenditure,**  
17      **independent expenditure or donation by a foreign national, nor provide substantial**  
18      **assistance in making disbursements in connection with any Federal, State or local election.**  
19      **11 CFR 110.20(h)(2). As a political committee, ABC must not solicit such funds, deposit**  
20      **such funds into its Federal or non-Federal account, or use such funds for the purposes**  
21      **indicated in your question.**

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<sup>27</sup> The following are considered foreign nationals for purposes of the Act: foreign governments; foreign political parties; foreign corporations; foreign associations; foreign partnerships; individuals with foreign citizenship; and United States immigrants who do not have a "green card." 11 CFR 110.20(a)(3).

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*25. If Federal candidates or officeholders participate in the requestors' fundraising activities in any scenario above, would they be "solicit[ing] . . . funds in connection with an election other than an election for Federal office" under 2 U.S.C. 441i(e)(1)(B)? [46]*

The Commission cannot resolve whether any of the fundraising scenarios you generally describe above are in connection with any election other than an election for Federal office without more specific information regarding those communications (e.g., none of the exhibits to ABC's request for an advisory opinion identify a candidate for State, district or local political office). As such, this question is hypothetical and it presents a general question of interpretation of the Act, rather than a specific transaction or activity, and is thus not proper for an advisory opinion. 2 U.S.C. 437f(a)(1); 11 CFR 112.1(b).

The Commission expresses no opinion regarding qualification for tax treatment under 26 U.S.C. 527 or any other ramifications of the proposed activities under the Internal Revenue Code because those questions are outside the Commission's 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 requestor may not rely on that conclusion as support for its proposed activity.

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**Sincerely,**

**Bradley A. Smith**  
**Chairman**

**8 Enclosures (AOs 1995-25, 2000-25, 2003-3, 2003-5 and 2003-36)**

**9**