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OFFICE OF THE CHAIRMAN

MEMORANDUM

**AGENDA ITEM**

For Meeting of: 2-18-04

To: The Commission  
Fr: Chairman Bradley A. Smith *BAS*  
Date: February 18, 2004  
Subject: Second Alternative Draft, Advisory Opinion 2003-37 (ABC)

**SUBMITTED LATE**

Attached is a revised version of the Advisory Opinion, Agenda Document 04-11, incorporating the OGC's suggested amendments in 04-11A where appropriate, as well as comments and suggestions from my colleagues.

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

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 organized under Section 527 of the Internal Revenue Code**  
15 **with Federal and non-Federal accounts that registered with the Commission on September**  
16 **4, 2003. As always, this Advisory Opinion is premised on the specific facts and**  
17 **circumstances posited in your request. See 11 CFR part 112. The fact that ABC is a**  
18 **political committee is particularly relevant. This opinion does not set forth general**  
19 **standards that might be applicable to other types of tax-exempt entities.**

20 ***Background***

21 **Your request concerns the raising and spending of Federal and non-Federal funds**  
22 **for a wide range of campaign activities. Some of your proposed activities involve public**  
23 **communications regarding specific candidates, or candidates holding positions on issues of**  
24 **importance to ABC. Your proposed activities also include voter mobilization programs. In**  
25 **addition, you seek guidance on coordinating these campaign activities with Federal**

1 candidates and their agents, and having Federal candidates assist ABC by soliciting funds  
2 for ABC's proposed activities.<sup>1</sup>

3 ***Legal Analysis and Conclusions***

4 ***Introduction***

5       You present your request at a time when there is much debate over the extent to  
6 which the Commission's previous regulations and administrative interpretations require  
7 revision. The passage of the Bipartisan Campaign Reform Act (BCRA) and the Supreme  
8 Court's decision upholding it in *McConnell v. FEC*, 124 S. Ct. 619 (2003) changed the  
9 regulatory landscape for many political actors, in particular party committees, Federal  
10 candidates and officeholders, and corporations and labor organizations. With BCRA, rather  
11 than attempting to address every perceived problem in the realm of campaign finance,  
12 Congress successfully adopted an incremental approach, calculated to maximize the bill's  
13 chances of withstanding Constitutional scrutiny. While the law is complex, BCRA focused  
14 on the raising and spending of "soft money" by officeholders and political parties (in Title  
15 I) and addressed concerns about issue advertising through the electioneering  
16 communications provisions (of Title II). Congress did not revise the manner in which  
17 entities already registering and reporting under the Act manage their mixed Federal and  
18 non-Federal activities. The Commission has in place a pre-BCRA framework to allocate  
19 mixed activities of non-party federal committees with non-Federal accounts, and this  
20 general framework was not changed by the passage of BCRA.

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

7           FEA is applied in two parts of the Act as amended by BCRA. It first appears in the  
8 section devoted to “state, district and local committees” of political parties, requiring that  
9 “an amount that is expended or disbursed for Federal election activity” by these groups  
10 “shall be made from funds subject to the limits, prohibitions, and reporting requirements of  
11 this Act.” 441i(b).<sup>2</sup> FEA also appears in the act in relation to solicitation restrictions on  
12 parties and Federal candidates and officeholders. 441i(d) & 441i(e). Parties are prohibited  
13 from soliciting or directing funds to a 501(c) organization that makes expenditures or  
14 disbursements in connection with an election for Federal office (including expenditures or  
15 disbursements for FEA). 441i(d)(1). Federal candidates and officeholders are prohibited  
16 from soliciting or directing funds in connection with an election for Federal office,  
17 including funds for any Federal election activity, unless the funds are subject to the Act.<sup>3</sup>

18           On their face, the FEA provisions do not regulate political entities outside those  
19 specifically named in their provisions. Accordingly, there is no clear statutory mandate to  
20 import terms contains in 431(20) to other parts of the Act, in particular to the definition of

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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 "expenditure" at 431(9). A plain reading of the Act suggests that FEA can be interpreted as  
2 something different from "expenditure." For instance, the "specific solicitation" exception  
3 in 441i(e)(4)(B) permits candidate solicitation of funds in excess of the Federal limit for  
4 "contributions" for particular types of FEA, and in amounts up to \$20,000 -- well over the  
5 \$1,000 trigger for political committee status or the \$5,000 contribution limit applicable to  
6 political committees. If disbursements for FEA were expenditures, they would trigger  
7 committee status and the committee could not receive contributions in excess of \$5,000,  
8 rendering section 441i(e)(4)(B) nonsensical. Likewise, if FEA were "expenditures," it  
9 would seem unnecessary to state that party committees need to use hard dollars to pay for  
10 them (*see* 441i(b)(1)) since that is already required under the Act.

11 Similarly, there is no clear statutory command to apply restrictions for  
12 "electioneering communications" more broadly. BCRA defines "electioneering  
13 communications" at section 434(f)(3) as any broadcast, cable, or satellite communication  
14 which refers to a clearly identified candidate, is made within 60 days of a general election  
15 or 30 days before a primary election, convention, or caucus, and is targeted to the relevant  
16 electorate. Section 434 sets forth reporting requirements for electioneering  
17 communications, and specifically exempts from those requirements a communication that  
18 constitutes an expenditure or independent expenditure. 2 U.S.C. 434(f)(3)(B). Moreover,  
19 section 441b(b)(2) of BCRA added language to prohibit corporations and labor  
20 organizations from making any "direct or indirect payment . . . to any candidate, campaign  
21 committee, or political party organization, in connection with any election to any of the  
22 offices referred to in this section or for any applicable electioneering communication."

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

14           BCRA’s sponsors had reasons for selecting party committees for special treatment.  
15 As explained in the Brief of Intervenors before the District Court, “[u]nlike interest groups,  
16 which pursue an issue-based agenda that transcends the election of candidates, parties are  
17 primarily and continuously concerned with acquiring power through electoral victory.  
18 Parties never engage in public communication without regard to electoral consequences.”  
19 Brief of Defendant-Intervenors (Excerpts-Redacted) at I-58 (quoting Green Expert Report  
20 at 17 n. 19). Accordingly, BCRA’s sponsors selected party committees for special

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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 regulation: “BCRA’s state party provisions are carefully tailored to strike a balance  
2 between Congress’s anti-corruption and anti-circumvention interests and the states’ interest  
3 in controlling their own elections. That balance is reflected in the definition of “federal  
4 election activity” which confines the effect of BCRA to those state party activities that most  
5 clearly affect federal elections . . . .” *Id.* at I-54, *see also id.* at I-59 (discussing application  
6 of “promote, support, attack, or oppose” standard to party committees).

7           These goals were re-affirmed in the following comments submitted to the  
8 Commission by eight Members of the Senate:

9           We are writing to say for the record that, whatever decisions the  
10 Commission chooses to make, BCRA reflects in very clear and specific terms the  
11 choices that Congress made in reforming our federal campaign finance laws. Our  
12 principal concern was the soft money solicited, received, directed and spent by  
13 parties and federal elected officials – money that presents the clearest danger of  
14 conflict of interest, in fact or appearance. With the exception of “electioneering  
15 communications,” the law did not aim similar restrictions at political organizations  
16 or tax-exempt groups that are neither controlled by, nor coordinated with, parties or  
17 candidates.<sup>5</sup>  
18

19 Similar comments were received from 58 Members of the House, who added: “In fact, it  
20 was our hope that BCRA would reinvigorate grassroots organizations to participate in the  
21 political process.”<sup>6</sup>

22           The Supreme Court in *McConnell v. FEC* also explicitly recognized that Congress  
23 could treat some groups differently from others without running afoul of constitutional  
24 equal protection guarantees. The Court stated:

25           BCRA imposes numerous restrictions on the fundraising abilities of  
26 political parties, of which the soft money ban is only the most prominent.  
27 Interest groups, however, remain free to raise money to fund voter

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<sup>5</sup> Letter dated Feb. 12, 2004, from Senator Daschle, *et al.*, to Commissioners.

<sup>6</sup> Letter dated Feb. 10, 2004, from Representative Pelosi, *et al.*, to Commissioners.

1 registration, GOTV activities, mailings, and broadcast advertising (other  
2 than electioneering communications).  
3

4 124 S. Ct. at 686. The Court continued:

5 Congress is fully entitled to consider the real-world differences between political  
6 parties and interest groups when crafting a system of campaign finance regulation. .  
7 . . . Interest groups do not select slates of candidates for elections. Interest groups do  
8 not determine who will serve on legislative committees, elect congressional  
9 leadership, or organize legislative caucuses. Political parties have influence and  
10 power in the legislature that vastly exceeds that of any interest group.  
11

12 *Id.* (citation omitted).

13 Moreover, the evidence produced in *McConnell* shows that during that litigation it  
14 was expected that BCRA imposed regulations upon political parties that would not be  
15 imposed upon “interest groups.” See *McConnell v. FEC*, 251 F. Supp.2d 176, 520-22  
16 (Kollar-Kotelly) (summarizing evidence about effect of BCRA on interest group activity).

17 In *McConnell*, the Supreme Court held that the express advocacy test is not a  
18 constitutional standard that defines whether communications are “for the purpose of  
19 influencing any Federal election” which is the operative term used in the definition of  
20 “expenditure” in 2 U.S.C. 431(9). 124 S.Ct. at 688-689. The decision may present an  
21 opportunity for further statutory or regulatory action to refine the scope of the term  
22 “expenditure.” That action would have wide-ranging ramifications and could result in new  
23 groups being required to register and report under FECA and adapt their fundraising to  
24 FECA’s strictures. The Commission believes that a change of such wide-ranging impact  
25 can only be considered through the regulatory process. We do not have the authority to  
26 adopt a change of this magnitude through an Advisory Opinion.



1           Neither BCRA nor *McConnell* mandates a change in the Commission's rules  
2 governing the non-Federal accounts of Federal committees. If the Commission were to find  
3 such a change to be warranted, that decision is properly made in the context of a  
4 rulemaking, not an Advisory Opinion. Advisory Opinions are not final decisions, and apply  
5 only to the parties that request them in the specific transaction the Opinion has considered,  
6 or those involved in a transaction "indistinguishable in all its material aspects" from such a  
7 transaction. 2 U.S.C. 437f(c)(1). "Any rule of law . . . may be initially proposed by the  
8 Commission only as a rule or regulation pursuant to procedures established in section  
9 438(d) " of the Act, i.e. through formal rulemaking. 2 U.S.C. 437f(b). Similarly, were the  
10 Commission to decide that its longstanding treatment of non-Federal activities by Federal  
11 committees violated pre-BCRA FECA, such a dramatic reevaluation of our long-standing  
12 approach must also be justified in a rulemaking.<sup>7</sup> 2 U.S.C. 437f(b).

13           Moreover, the rulemaking process is better suited for consideration of such  
14 fundamental questions. The public may submit comments on pending advisory opinions, as  
15 provided in 2 U.S.C. 437f(d), yet statutory time constraints mean these comments, and the  
16 Commission's consideration of them, may be rushed. Unlike a rulemaking, the draft of an  
17 Advisory Opinion is not published in the *Federal Register* so interested individuals or  
18 groups may not know to comment. In a rulemaking, the Commission may consider the  
19 universe of available options for policy-making, unrestricted by the limited facts raised by  
20 the requester of a particular advisory opinion. Rulemakings also afford the Commission the  
21 opportunity to hold hearings to take oral testimony and probe the views of witnesses. A

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<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 rulemaking will be forthcoming in a matter of weeks, and that process will permit the  
2 Commission to consider the ramifications of a change in its approach, and review and  
3 revise thoroughly our other regulations to conform to that reevaluation.

4       Until we do so, we will continue to apply our existing regulations.

5 ***Application to Request***

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

14       The proper allocation of such activity by a non-connected political committee such  
15 as ABC is set by 11 CFR Part 106. Where a communication (including a voter registration  
16 or get-out-the-vote communication) constitutes an expenditure on behalf of a clearly  
17 identified Federal candidate, the provisions at 11 CFR 106.1 providing for allocation to a  
18 candidate or candidates will apply. Where candidates are not identified and the  
19 communication is part of a generic voter drive, the provisions of 11 CFR 106.6 will apply  
20 as to the allocation of a political committee’s disbursements between its Federal and non-  
21 Federal accounts.

22       Under 11 CFR 106.1, expenditures, including in-kind contributions, independent  
23 expenditures, and coordinated expenditures made on behalf of more than one Federal

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

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

14 Generic voter drives including voter identification, voter registration, and  
15 get-out-the-vote drives, or any other activities that urge the general public to  
16 register, vote or support candidates of a particular party or associated with a  
17 particular issue, without mentioning a specific candidate.  
18

19 11 CFR 106.6(b)(2)(iii). The expenses for such purposes shall be allocated between the  
20 Federal and non-Federal accounts of the committee based on the ratio of Federal  
21 expenditures to total Federal and non-Federal disbursements made by the committee during  
22 the two-year Federal election cycle.<sup>8</sup> Other disbursements that are not coordinated with a

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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

1 candidate, refer to a clearly identified candidate, but do not contain express advocacy, are  
2 allocable under the ratio for administrative expenditures at 11 CFR 106.6(c). *See, e.g.*  
3 Advisory Opinion 1995-25.

4 Nevertheless, "allocating a portion of certain costs to a committee's non-Federal  
5 account is a permissive, rather than mandated procedure." Advisory Opinion 2000-24  
6 (quoting *Methods of Allocation Between Federal and Non-Federal Accounts: Payments;*  
7 *Reporting*, 55 Fed. Reg. 26,058, 26,063 (June 26, 1990)). Allocation is a "floor" for the use  
8 of Federal funds and a "ceiling" for the use of non-Federal funds, and a political committee  
9 may pay for allocable expenses with a higher percentage of Federal funds, or with only  
10 Federal funds. Advisory Opinion 2000-24, *see also* Statement for the Record in Advisory  
11 Opinion 2000-24 (Vice-Chairman McDonald and Commissioner Thomas ("[T]he  
12 Commission's allocation regulations were clearly designed to allow affected committees  
13 the flexibility to pay for more than the minimum Federal share of allocable expenses with  
14 funds raised under the Federal restrictions"). The Commission's advice regarding  
15 allocation should be read with the understanding that ABC may allocate a higher  
16 percentage of Federal funds than permitted by the allocation formula.

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

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

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

21

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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).

<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.

1           The paragraphs of your request addressed in this question largely present general  
2 questions of interpretation, and thus do not qualify as an advisory opinion request. 11 CFR  
3 112.1(b). As explained above, political committees may maintain Federal and non-Federal  
4 accounts, 11 CFR 102.5, and may allocate certain payments between Federal funds and  
5 non-Federal funds, *see, e.g.*, 11 CFR 106.6(b)(2)(iii) (allocation of expenses for generic  
6 voter drives by non-connected political committees). Thus, ABC may raise non-Federal  
7 funds, and spend such funds as permitted by the Act.<sup>10</sup> More specific guidance is provided  
8 below in the context of more specific questions.

9

10 *(c) Coordination with Federal Candidates and Political Party Committees*  
11 *[9],[11] to [17], [18], [28] to [36], and [62]*  
12

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

19           The regulations in 11 CFR 109.21 set forth a three-pronged test for the purpose of  
20 determining whether a communication is coordinated with one or more candidates for  
21 Federal election, an authorized committee, a political party committee, or an agent of any of

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<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 the foregoing. If the three-pronged test is satisfied, then the payments for the  
2 communication are made for the purpose of influencing a Federal election, and therefore  
3 constitute in-kind contributions. First, the communication must be paid for by someone  
4 other than that candidate, authorized committee, political party committee, or an agent of  
5 any of the foregoing. 11 CFR 109.21(a)(1); *see also* 11 CFR 109.37. The second prong is  
6 a "content standard" regarding the subject matter of the communication. 11 CFR  
7 109.21(a)(2). Four types of communications satisfy the content standard: (1) a public  
8 communication that expressly advocates the election or defeat of a clearly identified  
9 Federal candidate (no matter when made); (2) a public communication that disseminates,  
10 distributes or republishes campaign materials (no matter when made); (3) electioneering  
11 communications; and (4) a public communication directed to voters in a particular area that  
12 refers to a political party or a clearly identified Federal candidate and that is disseminated  
13 120 days or fewer before a primary, general, special or runoff election. *See* 11 CFR  
14 109.21(c). The third prong is a "conduct standard" regarding the interactions between the  
15 person paying for the communication and the candidate, an authorized committee, a  
16 political party committee, or agents of the foregoing. 11 CFR 109.21(a)(3). These conduct  
17 standards include: (1) "requests or suggestions" for communications by candidates or  
18 political party committees; (2) substantial discussions regarding candidate or political party  
19 campaign plans, projects, activities, or needs; (3) "material involvement" in the making and  
20 airing of communications; (4) the involvement of "common vendors;" and (5) the  
21 involvement of individuals who were formerly employees or independent contractors of a

1 candidate, an authorized committee, or a political party committee. 11 CFR 109.21(d)(1) –  
2 (5).<sup>11</sup>

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

8 In addition to the paragraphs of your request that directly raise issues about  
9 coordination, some of your other paragraphs raise the possibility that a number of ABC's  
10 planned activities described below might be coordinated with one or more candidates for  
11 Federal office, authorized committees of Federal candidates, political party committees, or  
12 the agents of any of the foregoing. *See, e.g.*, paragraphs [6]-[8], [24]-[27],<sup>13</sup> [38]-[39],  
13 [48]-[49], [52]-[54], [57]-[60], [64], and [67]-[70] of your request. To the extent that the  
14 activities you describe in those questions would result in a coordinated communication  
15 within the meaning the meaning of 11 CFR 109.21, the payment for such communications

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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.

<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.

1 would constitute an in-kind contribution to a candidate for Federal office or to a political  
2 party committee. Such contributions must be paid for entirely with Federal funds and are  
3 subject to ABC's contribution limits under 2 U.S.C. 441a(a)(1) or (2). Thus, the  
4 Commission conditions its responses to the questions discussed below on the assumption  
5 that these activities are not coordinated with a Federal candidate, authorized committee,  
6 political party committee, or agents of any of the foregoing. 2 U.S.C. 441a(a); 11 CFR  
7 100.52(d)(1), 11 CFR 109.20 and 109.21.<sup>14</sup>

8

9 *Coordination with non-profit organizations*

10

11 2. *You ask whether ABC may coordinate its activities with entities that are constituted as*  
12 *either IRC §527 political organizations or section 501(c)(3) organizations, and that are*  
13 *not Federal political committees. [35] and [36]*  
14

15 The Act and Commission regulations at 2 U.S.C. 441a(a)(7)(B) and 11 CFR Part  
16 109 set forth consequences from coordination with a candidate for Federal office, a  
17 candidate's authorized committee, or a political party committee. Neither the Act nor  
18 Commission regulations address coordination with other political committees and 527  
19 political organizations or section 501(c)(3) organizations. Thus, ABC is not prohibited  
20 from consulting with, or acting in concert with these other organizations.<sup>15</sup>

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<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.

<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.



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

4

5 *Agency*

6

7           Your advisory opinion request raises issues as to whether an individual is an agent<sup>16</sup>  
8 of one or more organizations, including ABC. *See, e.g.*, paragraphs [12], [15], and [29].  
9 The Commission cannot determine whether particular individuals are agents of ABC or  
10 other persons without more specific information. As the Commission previously noted in  
11 the Explanation and Justification for 11 CFR Part 109, it is difficult to determine whether  
12 an individual is acting as an "agent" in the abstract because "[t]he grant and scope of the  
13 actual authority, whether the person is acting within the scope of his or her actual authority,  
14 and whether he or she is acting on behalf of the principal or a different person, are factual  
15 determinations that are necessarily evaluated on a case-by-case basis in accordance with  
16 traditional agency principles." 68 Fed. Reg. 421, 425. Therefore, to the extent your  
17 questions require a determination of whether a particular person is an agent of ABC or  
18 another organization, the Commission has insufficient information to answer those

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<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 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 questions. 2 U.S.C. 437f(a)(1); 11 CFR 112.1(b). In addressing the questions you present  
2 in this request, the Commission assumes that ABC directors and staff are not agents of a  
3 candidate for Federal office, an authorized committee of such candidate, a political party  
4 committee, or any other individual or entity.

5

6 *Communications*

7

8 3. *You indicate that ABC may fund a communication that states: "President George W.*  
9 *Bush, Senator X and Representative Y have led the fight in Congress for a stronger*  
10 *defense and stronger economy. Call them and tell them to keep fighting for you." May*  
11 *ABC pay for this communication containing no express advocacy solely with donations*  
12 *from individuals that exceed the Act's limitations? [6], [7]*  
13

14 No. As explained above, although this is not an "express advocacy"  
15 communication, ABC must either use Federal funds or allocate its payment for these  
16 communications under the allocation rules for administrative expenses at 11 CFR 106.6(c).  
17 To the extent the communication is also an "electioneering communication" as defined at  
18 11 CFR 100.29(a), please see the answer to 4 below.

19

20 4. *May ABC pay for communications within 60 days of a general election with funds from*  
21 *corporations, labor organizations, and trade associations, if the message is "President*  
22 *Bush is a strong leader. The War on Terror, cutting taxes, putting families and working*  
23 *people first. He has provided strong, common sense leadership for this nation. Call*  
24 *President Bush and tell him to keep fighting for a strong America."? [64A]*  
25

26 No, to the extent this communication is an electioneering communication. See 11  
27 CFR 100.29(a). Under section 114.14(b), ABC may not use funds from a corporation,  
28 labor organization, or trade association to pay for any electioneering communication or

1 provide those funds to any person for the purpose of defraying any of the costs of an  
2 electioneering communication. Moreover, ABC must be able to demonstrate through a  
3 reasonable accounting method that no such funds were used for any portion of an  
4 electioneering communication. 11 CFR 114.14(d). ABC may wish to establish a  
5 segregated bank account into which it deposits funds donated by individuals, and fund  
6 electioneering communications from that account. *See* 11 CFR 114.14(d)(2).

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

9

10 5. *May ABC pay for "issue ads" within 60 days of a general election with corporate,*  
11 *labor organization, or trade association funds? [8]*  
12

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

21

22 6. *ABC wishes to run television and radio communications, such as that attached to your*  
23 *request at Exhibit E, on television and radio within sixty days of a general election*  
24 *mentioning President Bush but not expressly advocating his election. May ABC fund*  
25 *these ads with donations from individuals in amounts that exceed Federal limits? [64B]*  
26

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], [18 first question], [19], [26], [48], [52] through [61],**  
22 **[69], and [70]. They present a variety of messages in a variety of media, including direct**  
23 **mail, phone banks, and door-to-door distribution of material. You also ask about a specific**  
24 **voter identification communication [67]. With respect to some paragraphs, you also ask**  
25 **about the implications of BCRA on specific types of FEA, as defined at 2 U.S.C.**

1 431(20)(A)(i) and (ii) and 11 CFR 100.24(b)(1) and (2).<sup>17</sup> However, as noted above, ABC  
2 is not established, financed, maintained or controlled by a national, State, district or local  
3 party committee. Therefore, the provisions of 2 U.S.C. 441i that turn on those types of  
4 FEA do not apply to ABC.

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

12  
13 *8. May ABC use non-Federal funds to pay for voter registration and get-out-the-vote*  
14 *public communications that clearly identify a Federal candidate and that expressly*  
15 *advocate his election or defeat or promote, support, attack, or oppose the candidate?*  
16 *This question refers to communications in paragraphs [5], [26], [52], [57], and [69].*  
17 *This question also pertains to questions [54] and [60].*  
18

19 No. The communications in paragraphs [26] (first message), [52], [54] (first  
20 message), [57], [60] (first message), and [69] present messages that clearly identify a  
21 Federal candidate and expressly advocate his election. 11 CFR 100.22(a).<sup>18</sup> Payment for

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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.

<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

1 such a message would be an expenditure that must be paid for entirely with Federal funds.  
2 Communications that refer to more than one Federal candidate may be allocated among  
3 those candidates. 11 CFR 106.1.

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

9 The second message in paragraph [26] does not expressly advocate the election of a  
10 clearly identified Federal candidate. Thus the disbursement may be paid from the Federal  
11 and non-Federal accounts as specified in 106.6(c), see generally the answer to question 3  
12 above.

13

14 *9. May ABC use non-Federal funds to pay for voter registration and GOTV public*  
15 *communications that do not mention a clearly identified Federal candidate, and that*  
16 *are targeted to geographic areas or demographic voter groups that have been identified*  
17 *as Republican based on earlier voter identification efforts? This question refers to*  
18 *communications in paragraphs [53], [59], and [70], and pertains also to paragraphs*  
19 *[54] and [60].*  
20

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

23 Paragraphs [53] and [54] (second message) involve voter registration messages by  
24 ABC that do not mention specific candidates but urge the general public to support

---

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!' . . ."

1 candidates associated with particular positions on issues. Paragraph [53] includes the  
2 statement, "From the war on terror, to cutting taxes, to improving education – we all have a  
3 duty to elect leaders who put America first and not the liberal special interest groups." The  
4 messages in paragraphs [53] and [54] (second message) would be allocable under 11 CFR  
5 106.6, and may be paid for with non-Federal funds only to the extent permitted under 11  
6 CFR 106.6(c). The same analysis applies to the directed GOTV messages referred to in  
7 paragraphs [59] and [60] (second message). Paragraph 69 includes the sentence, "From the  
8 war on terror, to cutting taxes, to improving education – we all have a duty to elect leaders  
9 who will put America first and not the liberal special interest groups."<sup>19</sup>

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

16  
17 *10. May ABC use non-Federal funds to pay for voter registration and GOTV public*  
18 *communications that do not mention a clearly identified Federal candidate and that are*  
19 *not targeted to geographic areas or demographic groups that have been identified as*  
20 *Republican based on earlier voter identification efforts? [58]*  
21

22 In paragraph [58], you do not refer to any partisan targeting of the audience that will  
23 receive this message. Nevertheless, this is a voter registration message distributed by a  
24 non-connected political committee that urges support for candidates associated with

---

<sup>19</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 positions on particular issues. *See* Exhibit D to the request. Thus, the communication falls  
2 within the definition of “generic voter drive” at 11 CFR 106.6(b)(2)(iii) and must be funded  
3 in part, with Federal funds under 11 CFR 106.6(c).

4  
5 *11. How would prior contributions by ABC to candidates affect ABC's subsequent voter*  
6 *registration and GOTV activities with respect to those candidates? [18], [19].*  
7

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

14  
15 *12. How would ABC's funding of voter registration or GOTV messages be affected by the*  
16 *fundraising for such expenses, including the content of the messages used to raise the*  
17 *funds? This pertains to paragraphs [55] and [61].*  
18

19       Paragraphs [55] and [61] ask if certain types of funds may be used for voter  
20 registration or GOTV messages, if the solicitation for the funds mentions a specific Federal  
21 candidate but the eventual voter registration or GOTV communication does not. An  
22 example of such a solicitation is “Give money to an effort [or ‘to a GOTV effort’] that will  
23 help President Bush and Republican candidates;” an example of the subsequent GOTV  
24 communication is, “Go out and vote. The election is important. It's your civic duty.” You  
25 do not provide an example for a voter registration communication subsequent to the



1 solicitation but, based on your question in paragraph [55], the Commission assumes that the  
2 language is similar to the GOTV communication.

3 These two questions implicate two different activities of ABC, its fundraising  
4 activities and its generic spending.

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

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

18  
19 ***13. Do donors violate the Act by donating non-Federal funds to the voter mobilization***  
20 ***effort directed at the general public with the stated purpose (i.e., express advocacy) of***  
21 ***defeating a named Federal candidate? If so, are they subject to criminal penalties if***  
22 ***they know from fundraising appeals that the purpose of their contribution is the defeat***  
23 ***of a specific Federal candidate? Does it matter if the stated public purpose is the defeat***  
24 ***of a specific candidate but all the messages themselves from ABC do not contain***  
25 ***express advocacy? [48]***  
26

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

6  
7           ***14. May ABC use non-Federal funds to pay for voter identification communications that***  
8           ***clearly identify a Federal candidate and that ask questions in a manner that promotes***  
9           ***his candidacy? [67]***  
10

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

20           ***Fundraising***

21  
22           ***15. ABC wishes to have Federal officeholders and candidates assist in its fundraising***  
23           ***activities as permitted by the Act. May Federal officeholders and candidates raise***  
24           ***funds for ABC’s Federal account? [38]***  
25

1           **Yes, a Federal officeholder or candidate may solicit funds for ABC's Federal**  
2 **account if he or she only asks for Federally permissible funds. See Advisory Opinions**  
3 **2003-36, 2003-5 and 2003-3.<sup>20</sup>**

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

9  
10 ***16. ABC wishes to have Federal officeholders and candidates assist in its fundraising***  
11 ***activities as permitted by the Act. May Federal officeholders and candidates raise***  
12 ***funds for ABC's non-Federal account? [39]***  
13

14           **Yes, if the Federal officeholders or candidates only ask for funds that are not in**  
15 **excess of the Act's contribution limits, and that are not from sources prohibited by the Act**  
16 **from making contributions. 2 U.S.C. 441i(e)(1)(B); 11 CFR 300.62. See Advisory**  
17 **Opinions 2003-36 and 2003-03.**

18  
19 ***17. May ABC have Federal officeholders or candidates attend and/or speak at fundraising***  
20 ***events for ABC's non-Federal account that raise funds outside the Act's contribution***  
21 ***and source limitations? [40] and [41]***  
22

23           **Yes, Federal officeholders and candidates may attend and speak at fundraising**  
24 **events for ABC's non-Federal account that raise funds outside the Act's contribution limits**

---

<sup>20</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 and source prohibitions, but they may not solicit funds that are outside the amount  
2 limitations and source prohibitions of the Act. Advisory Opinions 2003-36 and 2003-03.

3 Commission regulations establish that a Federal officeholder or candidate will not  
4 be held liable for soliciting funds in violation of section 441i(e)(1)(B) or section 300.62  
5 merely by virtue of attending or participating in any manner in connection with a  
6 fundraising event at which non-Federal funds are raised. To be liable, the Federal candidate  
7 must "ask" for non-Federal funds. *Id.*; see 11 CFR 300.2(m), (n).<sup>21</sup> The scope of a covered  
8 person's potential liability under 2 U.S.C. 441i(e)(1) and 11 CFR 300.62 will be determined  
9 by his or her own speech and actions or those of his or her agents in asking for funds, but  
10 not by the speech or actions of another person outside his or her control. See Advisory  
11 Opinions 2003-36, 2003-05 and 2003-03.

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

17  
18 I am asking for a donation of up to \$5,000 per year. I am not asking for  
19 funds from corporations, labor organizations, or other Federally prohibited  
20 sources.  
21

22 A covered person may give a speech soliciting funds generally without mentioning specific  
23 amounts, sources, or limitations, if written notices are clearly and conspicuously displayed

---

<sup>21</sup> In *McConnell v. FEC*, the Court concluded that the Commission's interpretation of the statute was consistent with the construction offered by Intervenor McCain et al. in their Brief. 124 S. Ct. at 670.

1 at the event indicating that the covered person is soliciting only Federally permissible  
2 funds;<sup>22</sup> or if a public oral disclaimer is made. *See* Advisory Opinions 2003-36 and 2003-  
3 03.

4  
5 **18. May Federal officeholders or candidates be named in the invitation as honored guests,**  
6 **or as featured speakers, or as hosts, for fundraising events for ABC's non-Federal**  
7 **account? [42]**  
8

9 Yes, within the limits of 2 U.S.C. 441i(e)(1)(B) and 11 CFR 300.62. Section  
10 441i(e)(1)(B) and section 300.62 only apply to an invitation to an event where that  
11 invitation constitutes a solicitation for funds, and where the covered person approved,  
12 authorized, or agreed or consented to be featured, or named in, the invitation (e.g., through  
13 the use of his name or likeness). Mentioning a covered person in the text of a written  
14 invitation does not, without more, constitute a solicitation or direction of non-Federal funds  
15 by that covered person. However, a candidate's consent or agreement to be mentioned in  
16 an invitation as an honored guest, featured speaker or host, where that invitation is a  
17 solicitation, constitutes a solicitation by the candidate. Thus, if a candidate agrees or  
18 consents to be named in a fundraising solicitation as an honored guest, featured speaker or  
19 host, or if the invitation constitutes a solicitation for any other reason, then the solicitation  
20 must contain a clear and conspicuous statement that the entire solicitation is limited to  
21 funds that comply with the amount limits and source prohibitions of the Act. *See generally*  
22 *Advisory Opinions 2003-36 and 2003-03.*

23 Complying with these requirements regarding the written invitation does not relieve  
24 the covered person of the requirements as to his or her actual appearance at the subsequent

---

<sup>22</sup> *See* 11 CFR 110.11(c) for the Commission's interpretation of "clear and conspicuous" in related contexts.

1 event as an honored guest or featured speaker, as set out in the response to questions 16 and  
2 17. The requirements set out in response to question 17 as to the speech and disclaimer by  
3 the covered person, clear and conspicuous written notices, and conversations by the covered  
4 person are still applicable.

5

6 **19. *May Federal officeholders or candidates sign written solicitations for the non-Federal***  
7 ***account that raise funds outside the Act's contribution and source limitations? [43]***  
8

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

12

13 **20. *If Federal officeholders or candidates cannot speak or participate in a fundraising***  
14 ***event for ABC's non-Federal account, may ABC have a fundraiser for its Federal***  
15 ***account with the Federal officeholders and candidates present, and then immediately***  
16 ***adjourn to an adjacent location for a non-Federal soft dollar fundraising event at which***  
17 ***the Federal officeholders and candidates are not present? [44]***  
18

19 See the answer to question 17.

20

21 **21. *May ABC solicit Federal funds by using the names of specific Federal candidates in***  
22 ***solicitations that will convey ABC's support for or opposition to specific Federal***  
23 ***candidates, assuming no coordination between ABC and any Federal candidates?***  
24 ***Solicitations for Federal funds would be through mass mailings and broadcast***  
25 ***advertising. For example, could ABC use the following message: "ABC supports***  
26 ***President Bush's tax cuts to stimulate the economy. Give to ABC so that we can***  
27 ***support President Bush's agenda." Or, could ABC use the following message: "ABC***  
28 ***supports President Bush's tax cuts to stimulate the economy. Give to ABC so that we***  
29 ***can support President Bush's reelection." [21], [24]***  
30

31 Yes. Although ABC will use the names of specific Federal candidates in  
32 solicitations, ABC will not coordinate with the candidates, and the candidates will not

1 solicit, receive, direct, transfer, spend or disburse funds outside of the amount limitations,  
2 source prohibitions or reporting requirements of the Act. Thus, neither  
3 2 U.S.C. 441i(e)(1)(A), nor 11 CFR 300.61, nor any other provision of the Act or  
4 Commission regulations, would bar ABC's fundraising through the use of the names of  
5 specific Federal candidates in a manner that will convey ABC's support for or opposition to  
6 specific Federal candidates.<sup>23</sup>

7  
8 **22. *May ABC solicit non-Federal funds by using the names of specific Federal candidates***  
9 ***in solicitations that will convey ABC's support for or opposition to specific Federal***  
10 ***candidates, assuming no coordination between ABC and any Federal candidates?***  
11 ***Solicitations for non-Federal funds would be through mass mailings, broadcast***  
12 ***advertising, and in person solicitations using printed materials and taped messages.***  
13 ***Could ABC use the messages presented in the immediately preceding question for this***  
14 ***purpose? [25]***  
15

16 Yes, provided that donors are informed that the funds contributed are for non-  
17 Federal purposes. To the extent the message contains only express advocacy of the federal  
18 candidate, the costs for the solicitation must be paid entirely from the Federal account.  
19 Otherwise, the solicitation costs are allocable as a direct cost of the fundraising program,  
20 under 11 CFR 106.6(d). If the broadcast solicitations qualify as an electioneering  
21 communication, no corporate or labor organization funding would be permissible. 11 CFR  
22 114.14(b).

23

24 **23. *May ABC sponsor an issues forum at which Federal officeholders or candidates speak,***  
25 ***and then adjourn later in the same day to a different location for a non-Federal***  
26 ***fundraiser that is not attended by Federal officeholders or candidates? The invitation***  
27 ***to this event would include two separate pieces, each with its own disclaimer. One***

---

<sup>23</sup> Please see the answer to question 15, above, regarding the conditions for deposit of Federal funds. 11 CFR 102.5.

1 *would be for the issues forum alone and would contain no electioneering or fundraising*  
2 *message. The second piece would be a fundraising piece for the non-Federal dollar*  
3 *fundraising that either did not mention or include Federal officeholders and candidates*  
4 *or, in the alternative, included Federal officeholders and candidates only to the extent*  
5 *permitted by the Commission. [45]*  
6

7 Yes, as a non-connected political committee, ABC may sponsor an issues forum.<sup>24</sup>

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

13  
14 *24. May ABC raise and spend funds from its non-Federal accounts from foreign nationals*  
15 *and from foreign corporations and labor organizations for voter registration and voter*  
16 *mobilization activities on behalf of Federal candidates with express advocacy (e.g.,*  
17 *"register to help reelect President Bush") or with an issue advocacy message outside*  
18 *the 30 or 60 day windows (e.g., "Register. It's your duty.")? [49]*  
19

20 No. The Act, as amended by BCRA, prohibits foreign nationals<sup>25</sup> from, among  
21 other things, directly or indirectly making a contribution or donation of money or other  
22 thing of value, or to expressly or impliedly promise to make a contribution or donation, in  
23 connection with a Federal, State, or local election. 2 U.S.C. 441e(a)(1)(A); 11 CFR 110.20.  
24 Nor may foreign nationals make expenditures or disbursements for an electioneering  
25 communication. 2 U.S.C. 441e(a)(1)(C). Also, no person, including ABC, may solicit,

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<sup>24</sup> The Commission understands this is an event at which solicitations for Federal or non-Federal funds do not occur.

<sup>25</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).



1 accept, or receive a contribution or donation from a foreign national. 2 U.S.C. 441e(a)(2).  
2 Section 110.20(g) provides that no person shall knowingly solicit, accept or receive any  
3 contribution or donation from a foreign national, and 11 CFR 110.20(h) provides that no  
4 person shall knowingly provide substantial assistance in the making of an expenditure,  
5 independent expenditure or donation by a foreign national, nor provide substantial  
6 assistance in making disbursements in connection with any Federal, State or local election.  
7 11 CFR 110.20(h)(2). As a political committee, ABC must not solicit such funds, deposit  
8 such funds into its Federal or non-Federal account, or use such funds for the purposes  
9 indicated in your question.

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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]*

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

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

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

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**Sincerely,**

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

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