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Mary Dove
Commission Secretary
Federal Election Commission
999 E St., N.W.
Washington, D.C. 20463

RE: COMMENTS ON DRAFT ADVISORY OPINION 2003-37
By fax: 202-208-3333 and 202-219-3923

Dear Ms. Dove:

On January 29, 2004, the Commission made available for public comment the draft of Advisory Opinion 2003-37, requested by Keith A. Davis on behalf of Americans for a Better Country. This letter has two comments on the proposed draft – one general, the other specific:

General Observation:

The proposed draft advisory opinion is one of the first to be offered since the Supreme Court's decision in *McConnell v. Federal Election Comm'n*, 540 U.S. ___, 124 S.Ct. 619 (2003). As such, the AO will be carefully scrutinized by the regulated community for indications of the Commission's post-*McConnell* intentions. The draft of AO 2003-37 already drew significant discussion at the January 30, 2004 meeting of the American Bar Association's Political Organization Subcommittee of the Section of Taxation.

From personal observation, much of the discussion concerned perceptions of significant shifts in the Commission's interpretations and enforcement posture toward organizations OTHER than political committees. One of the reasons for these perceptions appeared to be the broad language used in the draft AO, and the absence of limiting language indicating the precise boundaries of the concepts discussed in the draft. A specific example (concerning sweeping language which appears in clear conflict with existing regulations defining "clearly identified candidate") is discussed in more detail below.

Another example is the language of and pertaining to footnote 2 on page 3 of the draft. By equating a sweeping statement such as "By their very nature, all political committees, not just political party committees, are focused on the influencing of Federal elections" with the

footnote's quoting of *McConnell*'s footnote 68 as discussing "many of the targeted tax-exempt organizations," the draft raises the specter that its doctrines and analyses sweep more widely than the requester, or indeed, other political committees.

With a request for an opinion as broad as that requested by Americans for a Better Country, it may be difficult to cabin the language used in the final AO. Yet, in light of the timing and context of this publication, the Commission should be careful to limit its opinion to the facts and precise situation described. For example, if the Commission intends its discussion of the allocation rules of 11 C.F.R. § 106.6 to be applied only to political committees, it should include a statement so indicating. If, on the other hand, the Commission's principles are intended to sweep more broadly, the Commission should so indicate, perhaps by a phrase indicating that the principle has more general application.

In particular, and given the deference Congress gave in BCRA to various types of 501(c) organizations (as with exempting 501(c)(3) organizations from the restrictions on electioneering communications), the Commission should clarify which, if any, of the doctrines and analyses in the draft AO actually apply to 501(c) organizations. This is particularly important, as shown below, to the concept of genuine "issue advertisements" (which are still permitted under both FEC and Internal Revenue Service regulations) and discussions of positions on issues in the material on and surrounding Page 19 of the draft. Otherwise, this AO alone threatens to chill, if not strangle, the running of legitimate issue advertisements against or in favor of any federal legislator who also happens to be a candidate at the time legislation comes up for consideration.

Specific Errors on Page 19 of the Draft:

The analysis on Page 19 and the surrounding material of the draft Advisory Opinion conflict with both Commission regulations and common sense. For example, the material between lines 4 and 15 says, in part, that the proposed communications "do not mention specific candidates but urge the general public to support candidates associated with particular positions on issues." Yet this lack of identification of candidates would appear to conflict with 11 C.F.R. 100.17. The regulations define "clearly identified candidate" as:

> The term clearly identified means the candidate's name, nickname, photograph, or drawing appears, or the identity of the candidate is otherwise apparent through an unambiguous reference such as ``the President,'' ``your Congressman,'' or ``the incumbent,'' or through an unambiguous reference to his or her status as a candidate such as ``the Democratic presidential nominee'' or ``the Republican candidate for Senate in the State of Georgia.''

To suggest that urging "the general public to support candidates associated with particular positions on issues" is the same as saying "the Democratic presidential nominee" is a dramatic expansion of the regulatory definition of "clearly identified." In addition, the expanded definition would conflict with traditional forms of public communication with officeholders,

particularly in an election year. Congress does not stop working during an election year. BCRA's new definition of "electioneering communication" recognizes this governmental reality and draws a temporal balance between speech rights and efforts to combat perceptions of corruption. (In addition, section 501(c)(3) organizations are completely exempted from these restrictions, and section 501(c)(4) organizations are permitted to run such communications.) As proposed, the material on Page 19 draws no such balance and may upset the balance struck by Congress.

Combine the overbroad language on Page 19 with the sweeping language identified above, and the proposed draft can have a dramatic and chilling effect on non-election related speech. Even 501(c)(3) organizations, which might otherwise run perfectly acceptable issue advertisements close to elections, could legitimately question whether they would run afoul of the Commission's expanded definition and analysis.

Apparently Pages 19 and 20 of the draft draw some distinction between "partisan targeting of the audience that will receive this message." Yet "partisan targeting" does not expand the definition of "clearly identified candidate" in 100.17. If the Commission intends some specific expansion beyond the "unambiguous" references used in the definitions, it will be requiring analyses of issue positions in geographic or demographic target choices.

In other words, is the Commission assuming that all Democrats are pro-choice and thus a pro-choice message will be the functional equivalent of saying "the Democratic presidential nominee?" Even if the answer to that question at the moment is "yes," the answer on less obvious issues will not be. Immigration reform, for example, splits both major parties. How would a Republican-targeted message of "no amnesty for illegal aliens" be treated? This is a practical quagmire that lends itself to significant arbitrariness. The end result will be the unnecessary chilling of otherwise protected political speech, simply because the draft AO swept more broadly than the regulations.

The Commission should delete the language on Page 19 and return to the regulatory definition of "clearly identified candidate" in 11 C.F.R. § 100.17.

I would be happy to provide more information on request.

Sincerely,

Barnaby Zall
Of Counsel