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FEDERAL ELECTION COMMISSION  
Washington, DC 20463

December 31, 2003

MEMORANDUM

AGENDA ITEM

For Meeting of: 01-07-04

TO: The Commission

THROUGH: James A. Pehrkon  
Staff Director

*John for Jim R*

FROM: Lawrence H. Norton  
General Counsel

*LHN (by name)*

Rosemary C. Smith  
Acting Associate General Counsel

*RCS*  
*[Signature]*

John C. Vergelli  
Acting Assistant General Counsel

Jonathan M. Levin  
Senior Attorney

*JL*

SUBJECT: Draft AO 2003-36 – Alternative Drafts

Attached are two proposed drafts of Advisory Opinion 2003-36, which responds to a request from the Republican Governors Association (“RGA”), a 527 organization participating only in non-Federal elections, with respect to the participation of Federal candidates and officeholders (“covered individuals”) in fundraising activities on behalf of the RGA. The drafts are similar in permitting participation by covered individuals in fundraising for most of RGA’s accounts under specified conditions, pursuant to 2 U.S.C. 441i(e)(1)(B).

However, the drafts differ with respect to fundraising by covered individuals on behalf of RGA’s Conference Account, which, according to the RGA, is segregated from the rest of RGA’s funds, is used principally for expenses in connection with policy conferences, and is not directly used for any Federal or non-Federal campaign activities. The drafts also differ as to whether the Conference Account may accept donations from corporations established by Congressional authority.

Draft A emphasizes the segregated nature of the Conference Account and the nature of the activities funded by the Conference Account, and concludes that its

activities are not in connection with a non-Federal election. The draft thus provides that covered individuals may raise non-Federal funds for the Conference Account, that is, 2 U.S.C. 441i(e)(1)(B) does not apply; and that the account may accept donations from corporations established by Congressional authority. Draft B emphasizes the nature of a 527 organization as an entity organized for the express purpose of influencing elections, that RGA is a 527 organization, and that the Conference Account is a part of RGA and performs functions that are an integral part of the activities of RGA as a 527 organization. The draft thus provides that solicitations by covered individuals for the Conference Account must comply with the restrictions that are applicable with respect to RGA's other accounts, and that the Conference Account may not accept donations from corporations established by Congressional authority.

Attachments

Drafts A and B

2  
3 Edward T. Tobin, III  
4 Executive Director  
5 Republican Governors Association  
6 555 11<sup>th</sup> Street, N.W.,  
7 Suite 700  
8 Washington, D.C. 20004

**DRAFT**

9  
10 Dear Mr. Tobin:

11 This responds to your letters dated October 16 and November 12, 2003, on behalf of the  
12 Republican Governors Association (“RGA”), requesting an advisory opinion concerning the  
13 application of the Federal Election Campaign Act of 1971, as amended (“the Act”), and  
14 Commission regulations to the participation of Federal candidates and officeholders in  
15 fundraising activities on behalf of RGA.

16 ***Background***

17 You state that RGA is an independent, unincorporated association that is the official  
18 political and public policy organization of the Republican State Governors. It was established in  
19 1963 and was an “auxiliary” organization of the Republican National Committee. You assert  
20 that, prior to November 6, 2002, the effective date of the Bipartisan Campaign Reform Act of  
21 2002 (“BCRA”), RGA severed its ties to the RNC. In October 2002, RGA established itself as a  
22 “political organization” under 26 U.S.C. 527. You assert that RGA is not affiliated with a  
23 national, State, or local political party committee, is not a Federal political committee, “does not  
24 raise funds pursuant to [the Act],” does not participate in Federal elections, and is operated and  
25 governed independently of any Federal political committee, candidate, or officeholder. You state  
26 that RGA has not engaged, and does not anticipate engaging, in “Federal election activity”  
27 (“FEA”) as defined in 2 U.S.C. 431(20) and 11 CFR 100.24.

1 RGA’s mission is to aid Republican Governors, gubernatorial candidates, and other State  
2 candidates by: (1) assisting in their elections as permitted by the laws of the different States  
3 through direct contributions and participation in the discussion of State and local issues; (2)  
4 providing policy assistance through conferences, debates, and public messages, and (3) providing  
5 a platform for the Governors to express, develop, and promote their governing philosophies.

6 You state that RGA raises “exclusively non-federal funds” through a series of fundraising  
7 events. It deposits these funds into several accounts that allow it to participate in elections under  
8 the laws of the 50 States.

9 RGA also maintains a segregated Conference Account. You state that funds in the  
10 Conference Account are not used to influence any election but rather to pay for the administrative  
11 and event costs associated with the RGA’s Annual Conference and its series of Governors  
12 Forums that are conducted throughout the country. The large majority of Conference Account  
13 expenses pay for hotel fees, catering, and meeting space usage. You state that the events funded  
14 by the Conference Account are policy discussions and not political events, and do not include  
15 planning for campaigning or fundraising, or the solicitation of funds for Federal or non-Federal  
16 candidates or political committees. Conference speeches and presentations are not made by RGA  
17 staff. They center on State and local public policy issues, and not elections, and do not include  
18 advocacy of the election or defeat of Federal candidates. You state that, if any speaker includes  
19 advocacy of the election or defeat of State candidates, such advocacy is beyond the purpose for  
20 which the speaker is invited. Funds received and disbursed by the Conference Account are  
21 included in RGA’s filings with the IRS and are not separated out from the other activities of  
22 RGA. Funds received and disbursed by the Conference Account, however, are not incorporated  
23 into the RGA’s reports filed with the States in which it conducts its activities.

1           Your request presents questions about fundraising for both RGA and for RGA’s  
2 Conference Account by Federal candidates, Federal officeholders, and their agents (“covered  
3 individuals”) in a variety of activities. In addition to the facts presented above, you have  
4 indicated that the following predicate assumptions apply with respect to the first question (1.a,  
5 1.b, and 1.c).

- 6           • First, the funds raised will be either explicitly solicited for the purpose of assisting  
7           only in the election of State candidates or in messages on State issues mentioning  
8           only State officials; or solicited only for RGA and not to support any specific  
9           State candidates.
- 10          • Second, donations that exceed the Federal contribution limits or come from  
11          prohibited sources will be solicited, but notice will be given to the solicitees that  
12          the covered individual is not raising funds outside the Act’s amount limits or from  
13          sources prohibited by the Act.
- 14          • Third, the solicitations by the covered individuals, whether oral or in writing, will  
15          refer to non-Federal candidates (particularly the candidates in the States where the  
16          solicitation is sent or aired) but will not refer to any Federal candidates.
- 17          • Fourth, funds solicited “only for the RGA and not to support any specific State  
18          candidates” will be used for RGA’s administrative and overhead expenses. They  
19          may also be used to pay for public communications that would include a mass  
20          mailing fundraising letter not mentioning any Federal candidate and signed by the  
21          RGA Chair, or an issue message concerning a State issue.

1           With respect to your second question, pertaining to proposed solicitations by Federal  
2 candidates, officeholders, or their agents specifically for the Conference Account, you state that  
3 neither Federal nor non-Federal candidates will be mentioned.

4 *Legal Analysis and Conclusions*

5 *1. May a covered individual participate (a) as a featured guest at an RGA fundraising event; (b)*  
6 *by having his name appear on a written solicitation for an RGA fundraising event as the featured*  
7 *guest or speaker; or (c) by signing a written fundraising solicitation for RGA?*

8           On November 6, 2002, BCRA took effect. As amended by BCRA, the Act regulates  
9 certain actions of Federal candidates and officeholders,<sup>1</sup> their agents,<sup>2</sup> and entities directly or  
10 indirectly established, financed, maintained, or controlled by them<sup>3</sup> when they raise or spend  
11 funds in connection with either Federal or non-Federal elections. 2 U.S.C. 441i(e)(1).<sup>4</sup> Both  
12 BCRA and the Commission's rules implementing BCRA prohibit covered individuals from  
13 soliciting, receiving, directing, transferring, or spending: (A) funds in connection with an election  
14 for Federal office, including funds for any Federal election activity,<sup>5</sup> unless the funds are subject  
15 to the limitations, prohibitions, and reporting requirements of the Act, and (B) funds in  
16 connection with any election other than an election for Federal office unless the funds are not in  
17 excess of the amounts permitted with respect to contributions to candidates and political

18

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<sup>1</sup> Under 2 U.S.C. 431(3), "Federal office" means "the office of President or Vice President, or of Senator or Representative in, or Delegate or Resident Commissioner to, the Congress." See also 11 CFR 100.4.

<sup>2</sup> 11 CFR 300.2(b)(3).

<sup>3</sup> 11 CFR 300.60.

<sup>4</sup> The Act, as amended by BCRA, and Commission regulations also prohibit national committees of political parties, its 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 RGA has severed its ties to the RNC and is not an entity that is established, financed, maintained, or controlled by the RNC, but does not make a determination as to this issue.

<sup>5</sup> 2 U.S.C. 431(20); 11 CFR 100.24.

1 committees under 2 U.S.C. 441a(a)(1), (2), and (3), and are not from sources prohibited by the  
2 Act from making contributions in connection with an election for Federal office. 2 U.S.C.  
3 441i(e)(1)(A) and (B); 11 CFR 300.61 and 300.62.<sup>6</sup>

4 Commission regulations state that to “solicit” means “*to ask* that another person make a  
5 contribution, donation, transfer of funds, or otherwise provide anything of value,” whether done  
6 so directly or through a conduit or intermediary. 11 CFR 300.2(m) (emphasis added). Similarly,  
7 “to direct means *to ask* a person who has expressed an intent to make a contribution, donation, or  
8 transfer of funds, or to provide anything of value, to make that contribution, donation, or transfer  
9 of funds, or to provide that thing of value . . . .” 11 CFR 300.2(n) (emphasis added). *See also*  
10 *McConnell v. Federal Election Commission*, \_ U.S., 124 S. Ct. 619, 670 (2003). Neither “to  
11 solicit” nor “to direct” includes merely providing guidance or information about the law. 11  
12 CFR 300.2(m) and (n). *See* Advisory Opinion 2003-03.

13 By defining “to solicit” and “to direct” as “to ask,” the regulations establish that a Federal  
14 candidate will not be held liable for soliciting funds in violation of 2 U.S.C. 441i(e) or 11 CFR  
15 300.62 merely by virtue of attending or participating in any manner in connection with a  
16 fundraising event at which non-Federal funds are raised. Nor will a Federal candidate or  
17 officeholder be held liable based on private conversations that would require an examination to  
18 infer the Federal candidate’s or officeholder’s intent. The Commission was concerned that  
19 imputing intent when a private conversation is not clear on its face could lead to finding a

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<sup>6</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); Federal government contractors (2 U.S.C. 441c); and foreign nationals (2 U.S.C. 441e).

1 violation when the candidate involved had no intention of soliciting contributions. “Such a result  
2 is not dictated by BCRA’s statutory language and would raise constitutional concerns.”

3 “Prohibited and Excessive Contributions: Non-Federal Funds or Soft Money; Final Rule,” 67  
4 Fed. Reg. 49064, 49086-87 (July 29, 2002). To be liable, the Federal candidate must “ask” for  
5 non-Federal funds. *Id.*, *see also*, “Prohibited and Excessive Contributions: Non-Federal Funds  
6 or Soft Money; Proposed Rule,” 67 Fed. Reg. 35654, 35660, 35681 (May 20, 2002). Thus, the  
7 scope of a covered individual’s potential liability under 2 U.S.C. 441i(e)(1) and 11 CFR 300.62  
8 must be determined by his or her own speech and actions in asking for funds or those of his or  
9 her agents, but not by the speech or actions of another person outside his or her control. *See*  
10 Advisory Opinions 2003-03 and 2003-05.

11 One of the factual predicates of questions 1.a., 1.b., and 1.c. is that explicit notice will be  
12 given that the covered individual is *not* soliciting funds outside the limits and prohibitions of the  
13 Act. In Advisory Opinion 2003-03, the Commission addressed appearances, speeches, and  
14 solicitations by a Federal candidate or officeholder at fundraising events for non-Federal  
15 candidates where Federally impermissible funds were being raised. The Commission interpreted  
16 the Act and regulations to permit oral solicitations, and signatures on written solicitations, by a  
17 covered individual, so long as the solicitations included or were accompanied by a message  
18 adequately indicating that the covered individual is only asking for Federally permissible funds.  
19 *See* 2 U.S.C. 441i(e)(1)(B); 11 CFR 300.62. The following is considered to be an adequate  
20 disclaimer:

21 I am asking for a donation of up to \$2000 per election from an individual’s own  
22 funds [or up to \$5,000 per election from a multi-candidate political committee or  
23



1 a political party committee]. I am not asking for funds from corporations or labor  
2 organizations.

3 *1.a. May a covered individual participate as a featured guest at an RGA fundraising*  
4 *event?*

5 Your description of RGA’s activities (other than those of the Conference  
6 Account) indicates that they are in connection with the election of gubernatorial and other  
7 State candidates. Hence, 2 U.S.C. 441i(e)(1)(B) applies to the proposed activities  
8 described in questions 1.a, 1.b, and 1.c.

9 A covered individual may, subject to certain conditions, appear as a featured guest or  
10 speaker at the events you describe. The mere attendance of the covered individual at a  
11 fundraiser where non-Federal funds are raised does not, in and of itself, give rise to a violation of  
12 2 U.S.C. 441i(e)(1) or 11 CFR 300.62, and the covered individual may participate in any  
13 activities at such an event provided that he or she does not solicit, direct, receive, transfer, or  
14 spend funds outside the Act’s limits and prohibitions.

15 If the covered individual makes a speech without asking for donations to RGA, he does  
16 not need to issue a disclaimer stating that he is not raising funds outside the limitations or  
17 prohibitions of the Act, even though speeches by others solicit such funds. If the covered  
18 individual gives a speech soliciting funds generally without mentioning specific amounts,  
19 sources, or limitations, he may do so if written notices are clearly and conspicuously displayed at  
20 the event indicating that the covered individual is soliciting only Federally permissible funds.<sup>7</sup>  
21 Alternatively, if no written notices are so displayed, the covered individual must make an oral  
22 disclaimer similar to the one described above and referred to in your request. If such a public

23 \_\_\_\_\_  
<sup>7</sup> See 11 CFR 110.11(c) for the Commission’s interpretation of “clear and conspicuous” in related contexts.

1 oral disclaimer is made, it need only be made once, and it is not required that it be made during a  
2 covered individual’s one-on-one discussions with donors or other people at the event. This  
3 should not, however, be construed to permit a covered individual to inoculate a solicitation of  
4 non-Federal funds by reciting a rote limitation, but then encouraging the potential donor to  
5 disregard the limitation. *See generally* Advisory Opinion 2003-03.

6 The requirements of 2 U.S.C. 441i(e)(1), as interpreted in Advisory Opinion 2003-03,  
7 apply regardless of whether funds are solicited for the purposes of assisting only in the election  
8 of State candidates or in messages on State issues mentioning only State officials; or solicited  
9 only for the RGA and not to support any specific State candidates.

10 *1.b. May a covered individual participate by having his name appear on written*  
11 *solicitations for an RGA fundraising event as the featured guest or speaker?*

12 Yes, he may so participate under certain conditions.

13 Section 441i(e)(1) and section 300.62 do *not* apply to publicity for an event where that  
14 publicity does not constitute a solicitation or direction of non-Federal funds by a covered  
15 individual, nor to a Federal candidate or officeholder merely because he or she is a featured guest  
16 at a non-Federal fundraiser. Whether characterized as “publicity” or as a solicitation, the  
17 applicable analysis as to the covered individual is two-fold: (1) whether the writing or publicity  
18 constitutes a solicitation for funds; and (2) whether the covered individual approved, authorized,  
19 or agreed or consented to be featured, or named in, the writing or publicity (e.g., through the use  
20 of his name or likeness).

21 A Federal candidate may not consent to appear in any capacity in a solicitation that  
22 requests funds in excess of the amount limitations or in violation of the source prohibitions of the  
23 Act. If the covered individual approves, authorizes, or agrees or consents to be named or

1 featured in a solicitation, the solicitation must contain a clear and conspicuous express statement  
2 that it is limited to funds that comply with the amount limits and source prohibitions of the Act.  
3 *See generally* Advisory Opinion 2003-03.<sup>8</sup>

4 Complying with these requirements regarding the written solicitation or publicity does  
5 not relieve the covered individual of the requirements as to his or her actual appearance at the  
6 subsequent event as a featured guest or speaker, set out in the response to question 1.a. The  
7 requirements set out in that response as to the speech and disclaimer by the covered individual,  
8 clear and conspicuous written notices, and conversations by the covered individual are still  
9 applicable.

10 For the reasons stated above in response to question 1.a., the requirements apply  
11 regardless of whether the funds are solicited for the purposes of assisting only in the election of  
12 State candidates or in messages on State issues mentioning only State officials; or solicited only  
13 for the RGA and not to support any specific State candidates.

14 *I.c. May a covered individual participate by signing a written fundraising solicitation for*  
15 *RGA?*

16 Yes, a covered individual may sign a written fundraising solicitation for RGA provided  
17 that the covered individual complies with the requirements stated in response to questions 1.a  
18 and 1.b.

19 *2. With respect to the RGA Conference Account, may a covered individual sign or appear on*  
20 *written solicitations, such as signing invitation letters, or appear as a featured guest or speaker*  
21 *at a fundraising event, where the donations solicited exceed the Act's amount limits or are from*

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<sup>8</sup> Although Advisory Opinion 2003-03 might be read to mean that a disclaimer is required in publicity or other written solicitations that explicitly ask for donations “in amounts exceeding the Act’s limitations and from sources prohibited from contributing under the Act,” that was not the Commission’s meaning. The Commission wishes to make clear that the covered individual may not approve, authorize, agree, or consent to appear in publicity that explicitly solicits funds that are in excess of the limits or prohibitions of the Act, regardless of the appearance of such a disclaimer.

1 *prohibited sources but the solicitation does not include a notice that the covered individual is not*  
2 *raising funds outside the amount limits and source prohibitions of the Act?*

3

4 Yes, these actions by covered individuals are permissible because the Commission

5 concludes that the activities of the Conference Account, as you describe them, are not in

6 connection with an election for either Federal or non-Federal office. Hence, the requirements of

7 2 U.S.C. 441i(e)(1)(A) and (B) would not be applicable to solicitations solely for the Conference

8 Account.

9 The funds in the Conference Account are not, and will not be, used to influence any

10 election, but rather to pay for administrative and event costs associated with RGA's Annual

11 Conference and its Governors Conferences. The activities at these conferences do not include

12 planning for campaigning or fundraising, or other campaign activities, but are, instead, policy

13 discussions. You describe the expenses incurred by the Conference Account as administrative

14 expenses such as hotel fees, catering costs, and meeting space rental related to conducting the

15 Conferences. The funds in this account are segregated from the rest of RGA's funds, which the

16 Commission assumes to mean that no funds are, or will be, transferred to or from the Conference

17 Account, and that no Conference Account funds are, or will be, used to support any other RGA

18 activities. Moreover, as you have described the Conference Account, the administrative

19 expenses are not used, directly or indirectly, to equip, facilitate, or otherwise enable the conduct

20 of any candidate support activities. Conference account funds are used exclusively for

21 conferences on issues and are useful to the Governors in their State officeholding functions. In

22 reaching this conclusion, the Commission also takes note of the fact that the disbursements and

23 receipts of the Conference Account are not included in reports filed by the RGA with the States,

1 which pertain to support of non-Federal candidates and activities in connection with non-Federal  
2 elections.

3 *3. May RGA's Conference Account accept donations from corporations organized by authority*  
4 *of Congress, such as the Federal Home Loan Mortgage Corporation and the Federal National*  
5 *Mortgage Association?*

6  
7 As noted in response to question 2, the activities funded by the Conference Account are  
8 not in connection with an election for either Federal or non-Federal office. Hence, the  
9 prohibition in 2 U.S.C. 441b(a) against contributions in connection with any election to any  
10 political office by "any corporation organized by authority of any law of Congress" would not  
11 apply. Thus, the Conference Account may accept donations from the Federal Home Loan  
12 Mortgage Corporation and the Federal National Mortgage Association that are specifically  
13 designated for, and used exclusively by, the Conference Account.

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

20 Sincerely,

21  
22  
23  
24 Bradley A. Smith  
25 Chairman  
26

27 Enclosures (AOs 2003-05 and 2003-03)  
28  
29

2  
3 Edward T. Tobin, III  
4 Executive Director  
5 Republican Governors Association  
6 555 11<sup>th</sup> Street, N.W.,  
7 Suite 700  
8 Washington, D.C. 20004  
9

**DRAFT**

10 Dear Mr. Tobin:

11 This responds to your letters dated October 16 and November 12, 2003, on behalf of the  
12 Republican Governors Association (“RGA”), requesting an advisory opinion concerning the  
13 application of the Federal Election Campaign Act of 1971, as amended (“the Act”), and  
14 Commission regulations to the participation of Federal candidates and officeholders in  
15 fundraising activities on behalf of RGA.

16 ***Background***

17 You state that RGA is an independent, unincorporated association that is the official  
18 political and public policy organization of the Republican State Governors. It was established in  
19 1963 and was an “auxiliary” organization of the Republican National Committee. You assert  
20 that, prior to November 6, 2002, the effective date of the Bipartisan Campaign Reform Act of  
21 2002 (“BCRA”), RGA severed its ties to the RNC. In October 2002, RGA established itself as a  
22 “political organization” under 26 U.S.C. 527. You assert that RGA is not affiliated with a  
23 national, State, or local political party committee, is not a Federal political committee, “does not  
24 raise funds pursuant to [the Act],” does not participate in Federal elections, and is operated and  
25 governed independently of any Federal political committee, candidate, or officeholder. You state  
26 that RGA has not engaged, and does not anticipate engaging, in “Federal election activity”  
27 (“FEA”) as defined in 2 U.S.C. 431(20) and 11 CFR 100.24.

1 RGA’s mission is to aid Republican Governors, gubernatorial candidates, and other State  
2 candidates by: (1) assisting in their elections as permitted by the laws of the different States  
3 through direct contributions and participation in the discussion of State and local issues; (2)  
4 providing policy assistance through conferences, debates, and public messages, and (3) providing  
5 a platform for the Governors to express, develop, and promote their governing philosophies.

6 You state that RGA raises “exclusively non-federal funds” through a series of fundraising  
7 events. It deposits these funds into several accounts that allow it to participate in elections under  
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9 RGA also maintains a segregated Conference Account. You state that funds in the  
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12 Forums that are conducted throughout the country. The large majority of Conference Account  
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16 candidates or political committees. Conference speeches and presentations are not made by RGA  
17 staff. They center on State and local public policy issues, and not elections, and do not include  
18 advocacy of the election or defeat of Federal candidates. You state that, if any speaker includes  
19 advocacy of the election or defeat of State candidates, such advocacy is beyond the purpose for  
20 which the speaker is invited. Funds received and disbursed by the Conference Account are not  
21 incorporated into RGA’s reports filed with the States in which it conducts its activities.  
22 However, funds received and disbursed by the Conference Account are included in RGA’s filings  
23 with the IRS and are not separated out from the other activities of RGA.

1           Your request presents questions about fundraising for both RGA and for RGA’s  
2 Conference Account by Federal candidates, Federal officeholders, and their agents (“covered  
3 individuals”) in a variety of activities. In addition to the facts presented above, you have  
4 indicated that the following predicate assumptions apply with respect to the first question (1.a,  
5 1.b, and 1.c).

- 6           • First, the funds raised will be either explicitly solicited for the purpose of assisting  
7           only in the election of State candidates or in messages on State issues mentioning  
8           only State officials; or solicited only for RGA and not to support any specific  
9           State candidates.
- 10          • Second, donations that exceed the Federal contribution limits or come from  
11          prohibited sources will be solicited, but notice will be given to the solicitees that  
12          the covered individual is not raising funds outside the Act’s amount limits or from  
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16          solicitation is sent or aired) but will not refer to any Federal candidates.
- 17          • Fourth, funds solicited “only for the RGA and not to support any specific State  
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19          may also be used to pay for public communications that would include a mass  
20          mailing fundraising letter not mentioning any Federal candidate and signed by the  
21          RGA Chair, or an issue message concerning a State issue.



1 With respect to your second question, pertaining to proposed solicitations by Federal  
2 candidates, officeholders, or their agents specifically for the Conference Account, you state that  
3 neither Federal nor non-Federal candidates will be mentioned.

4 ***Legal Analysis and Conclusions***

5 *1. May a covered individual participate (a) as a featured guest at an RGA fundraising event; (b)*  
6 *by having his name appear on a written solicitation for an RGA fundraising event as the featured*  
7 *guest or speaker; or (c) by signing a written fundraising solicitation for RGA?*

8 On November 6, 2002, BCRA took effect. As amended by BCRA, the Act regulates  
9 certain actions of Federal candidates and officeholders,<sup>1</sup> their agents,<sup>2</sup> and entities directly or  
10 indirectly established, financed, maintained, or controlled by them<sup>3</sup> when they raise or spend  
11 funds in connection with either Federal or non-Federal elections. 2 U.S.C. 441i(e)(1).<sup>4</sup> Both  
12 BCRA and the Commission's rules implementing BCRA prohibit covered individuals from  
13 soliciting, receiving, directing, transferring, or spending: (A) funds in connection with an election  
14 for Federal office, including funds for any Federal election activity,<sup>5</sup> unless the funds are subject  
15 to the limitations, prohibitions, and reporting requirements of the Act, and (B) funds in  
16 connection with any election other than an election for Federal office unless the funds are not in  
17 excess of the amounts permitted with respect to contributions to candidates and political

18 \_\_\_\_\_  
<sup>1</sup> Under 2 U.S.C. 431(3), "Federal office" means "the office of President or Vice President, or of Senator or Representative in, or Delegate or Resident Commissioner to, the Congress." See also 11 CFR 100.4.

<sup>2</sup> 11 CFR 300.2(b)(3).

<sup>3</sup> 11 CFR 300.60.

<sup>4</sup> The Act, as amended by BCRA, and Commission regulations also prohibit national committees of political parties, its 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 RGA has severed its ties to the RNC and is not an entity that is established, financed, maintained, or controlled by the RNC, but does not make a determination as to this issue.

<sup>5</sup> 2 U.S.C. 431(20); 11 CFR 100.24.

1 committees under 2 U.S.C. 441a(a)(1), (2), and (3), and are not from sources prohibited by the  
2 Act from making contributions in connection with an election for Federal office. 2 U.S.C.  
3 441i(e)(1)(A) and (B); 11 CFR 300.61 and 300.62.<sup>6</sup>

4 Commission regulations state that to “solicit” means “to ask that another person make a  
5 contribution, donation, transfer of funds, or otherwise provide anything of value,” whether done  
6 so directly or through a conduit or intermediary. 11 CFR 300.2(m) (emphasis added). Similarly,  
7 “to direct means to ask a person who has expressed an intent to make a contribution, donation, or  
8 transfer of funds, or to provide anything of value, to make that contribution, donation, or transfer  
9 of funds, or to provide that thing of value . . . .” 11 CFR 300.2(n) (emphasis added). *See also*  
10 *McConnell v. Federal Election Commission*, \_ U.S., 124 S. Ct. 619, 670 (2003). Neither “to  
11 solicit” nor “to direct” includes merely providing guidance or information about the law. 11  
12 CFR 300.2(m) and (n). *See* Advisory Opinion 2003-03.

13 By defining “to solicit” and “to direct” as “to ask,” the regulations establish that a Federal  
14 candidate will not be held liable for soliciting funds in violation of 2 U.S.C. 441i(e) or 11 CFR  
15 300.62 merely by virtue of attending or participating in any manner in connection with a  
16 fundraising event at which non-Federal funds are raised. Nor will a Federal candidate or  
17 officeholder be held liable based on private conversations that would require an examination to  
18 infer the Federal candidate’s or officeholder’s intent. The Commission was concerned that  
19 imputing intent when a private conversation is not clear on its face could lead to finding a

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<sup>6</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); Federal government contractors (2 U.S.C. 441c); and foreign nationals (2 U.S.C. 441e).

1 violation when the candidate involved had no intention of soliciting contributions. “Such a result  
2 is not dictated by BCRA’s statutory language and would raise constitutional concerns.”  
3 “Prohibited and Excessive Contributions: Non-Federal Funds or Soft Money; Final Rule,” 67  
4 Fed. Reg. 49064, 49086-87 (July 29, 2002). To be liable, the Federal candidate must “ask” for  
5 non-Federal funds. *Id.*, *see also*, “Prohibited and Excessive Contributions: Non-Federal Funds  
6 or Soft Money; Proposed Rule,” 67 Fed. Reg. 35654, 35660, 35681 (May 20, 2002). Thus, the  
7 scope of a covered individual’s potential liability under 2 U.S.C. 441i(e)(1) and 11 CFR 300.62  
8 must be determined by his or her own speech and actions in asking for funds or those of his or  
9 her agents, but not by the speech or actions of another person outside his or her control. *See*  
10 Advisory Opinions 2003-03 and 2003-05.

11 One of the factual predicates of questions 1.a., 1.b., and 1.c. is that explicit notice will be  
12 given that the covered individual is *not* soliciting funds outside the limits and prohibitions of the  
13 Act. In Advisory Opinion 2003-03, the Commission addressed appearances, speeches, and  
14 solicitations by a Federal candidate or officeholder at fundraising events for non-Federal  
15 candidates where Federally impermissible funds were being raised. The Commission interpreted  
16 the Act and regulations to permit oral solicitations, and signatures on written solicitations, by a  
17 covered individual, so long as the solicitations included or were accompanied by a message  
18 adequately indicating that the covered individual is only asking for Federally permissible funds.  
19 *See* 2 U.S.C. 441i(e)(1)(B); 11 CFR 300.62. The following is considered to be an adequate  
20 disclaimer:

21 I am asking for a donation of up to \$2000 per election from an individual’s own  
22 funds [or up to \$5,000 per election from a multi-candidate political committee or  
23

1 a political party committee]. I am not asking for funds from corporations or labor  
2 organizations.

3 *1.a. May a covered individual participate as a featured guest at an RGA fundraising*  
4 *event?*

5 Your description of RGA's activities (other than those of the Conference  
6 Account) indicates that they are in connection with the election of gubernatorial and other  
7 State candidates. Hence, 2 U.S.C. 441i(e)(1)(B) applies to the proposed activities  
8 described in questions 1.a, 1.b, and 1.c.

9 A covered individual may, subject to certain conditions, appear as a featured guest or  
10 speaker at the events you describe. The mere attendance of the covered individual at a  
11 fundraiser where non-Federal funds are raised does not, in and of itself, give rise to a violation of  
12 2 U.S.C. 441i(e)(1) or 11 CFR 300.62, and the covered individual may participate in any  
13 activities at such an event provided that he or she does not solicit, direct, receive, transfer, or  
14 spend funds outside the Act's limits and prohibitions.

15 If the covered individual makes a speech without asking for donations to RGA, he does  
16 not need to issue a disclaimer stating that he is not raising funds outside the limitations or  
17 prohibitions of the Act, even though speeches by others solicit such funds. If the covered  
18 individual gives a speech soliciting funds generally without mentioning specific amounts,  
19 sources, or limitations, he may do so if written notices are clearly and conspicuously displayed at  
20 the event indicating that the covered individual is soliciting only Federally permissible funds.<sup>7</sup>  
21 Alternatively, if no written notices are so displayed, the covered individual must make an oral  
22 disclaimer similar to the one described above and referred to in your request. If such a public

23 \_\_\_\_\_  
<sup>7</sup> See 11 CFR 110.11(c) for the Commission's interpretation of "clear and conspicuous" in related contexts.

1 oral disclaimer is made, it need only be made once, and it is not required that it be made during a  
2 covered individual’s one-on-one discussions with donors or other people at the event. This  
3 should not, however, be construed to permit a covered individual to inoculate a solicitation of  
4 non-Federal funds by reciting a rote limitation, but then encouraging the potential donor to  
5 disregard the limitation. *See generally* Advisory Opinion 2003-03.

6 The requirements of 2 U.S.C. 441i(e)(1), as interpreted in Advisory Opinion 2003-03,  
7 apply regardless of whether funds are solicited for the purposes of assisting only in the election  
8 of State candidates or in messages on State issues mentioning only State officials; or solicited  
9 only for the RGA and not to support any specific State candidates.

10 *1.b. May a covered individual participate by having his name appear on written*  
11 *solicitations for an RGA fundraising event as the featured guest or speaker?*

12 Yes, he may so participate under certain conditions.

13 Section 441i(e)(1) and section 300.62 do *not* apply to publicity for an event where that  
14 publicity does not constitute a solicitation or direction of non-Federal funds by a covered  
15 individual, nor to a Federal candidate or officeholder merely because he or she is a featured guest  
16 at a non-Federal fundraiser. Whether characterized as “publicity” or as a solicitation, the  
17 applicable analysis as to the covered individual is two-fold: (1) whether the writing or publicity  
18 constitutes a solicitation for funds; and (2) whether the covered individual approved, authorized,  
19 or agreed or consented to be featured, or named in, the writing or publicity (e.g., through the use  
20 of his name or likeness).

21 A Federal candidate may not consent to appear in any capacity in a solicitation that  
22 requests funds in excess of the amount limitations or in violation of the source prohibitions of the  
23 Act. If the covered individual approves, authorizes, or agrees or consents to be named or

1 featured in a solicitation, the solicitation must contain a clear and conspicuous express statement  
2 that it is limited to funds that comply with the amount limits and source prohibitions of the Act.

3 *See generally* Advisory Opinion 2003-03.<sup>8</sup>

4 Complying with these requirements regarding the written solicitation or publicity does  
5 not relieve the covered individual of the requirements as to his or her actual appearance at the  
6 subsequent event as a featured guest or speaker, set out in the response to question 1.a. The  
7 requirements set out in that response as to the speech and disclaimer by the covered individual,  
8 clear and conspicuous written notices, and conversations by the covered individual are still  
9 applicable.

10 For the reasons stated above in response to question 1.a., the requirements apply  
11 regardless of whether the funds are solicited for the purposes of assisting only in the election of  
12 State candidates or in messages on State issues mentioning only State officials; or solicited only  
13 for the RGA and not to support any specific State candidates.

14 *1.c. May a covered individual participate by signing a written fundraising solicitation for*  
15 *RGA?*

16 Yes, a covered individual may sign a written fundraising solicitation for RGA provided  
17 that the covered individual complies with the requirements stated in response to questions 1.a  
18 and 1.b.

19 *2. With respect to the RGA Conference Account, may a covered individual sign or appear on*  
20 *written solicitations, such as signing invitation letters, or appear as a featured guest or speaker*  
21 *at a fundraising event, where the donations solicited exceed the Act's amount limits or are from*

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<sup>8</sup> Although Advisory Opinion 2003-03 might be read to mean that a disclaimer is required in publicity or other written solicitations that explicitly ask for donations “in amounts exceeding the Act’s limitations and from sources prohibited from contributing under the Act,” that was not the Commission’s meaning. The Commission wishes to make clear that the covered individual may not approve, authorize, agree, or consent to appear in publicity that explicitly solicits funds that are in excess of the limits or prohibitions of the Act, regardless of the appearance of such a disclaimer.

1 *prohibited sources but the solicitation does not include a notice that the covered individual is not*  
2 *raising funds outside the amount limits and source prohibitions of the Act?*

3  
4 No, the covered individual may not so participate under those circumstances. The  
5 requirements described above in response to questions 1.a, 1.b, and 1.c are applicable to the  
6 situations described in question 2, including the need for the notice that the covered individual is  
7 asking for funds only up to the applicable limits of the Act, and is not asking for funds outside  
8 the limitations or prohibitions of the Act.

9 As recognized by the Supreme Court in *McConnell v. Federal Election Commission*,

10 [s]ection 527 political organizations are, unlike 501(c) groups, organized  
11 for the express purpose of engaging in partisan political activity. They include  
12 any “party committee, association, fund, or other organization (whether or not  
13 incorporated) organized and operated primarily for the purpose or directly or  
14 indirectly accepting contributions or making expenditures” for the purpose of  
15 “influencing or attempting to influence the selection, nomination, or appointment  
16 of any individual for Federal, State, or local public office. 26 U.S.C. 527(e).

17  
18 *McConnell*, 124 S.Ct., at 678, n.67. In contrasting 527 organizations with 501(c) organizations,  
19 the Court, in *McConnell*, further noted that the former are organizations “which by definition  
20 engage in partisan political activity.” *Id.*, at 679.

21 In October 2002, the RGA filed a Form 8871 with the Internal Revenue Service by which  
22 it registered as a section 527 organization. On the form, RGA states its purpose as follows: “The  
23 Republican Governors Association supports the election of Republican Governors and other  
24 nonfederal candidates, promotes Republican policies, and engages in other state and local  
25 election activities.” This statement reflects the partisan political nature of this and other 527  
26 organizations, whether they are Federal political committees or committees supporting only non-  
27 Federal candidates. Not every dollar raised by such a committee is used directly for contributions  
28 or donations to, or expenditures or disbursements on behalf of, specific candidates. A portion of

1 the funds raised by such committees are used for administrative support and for fundraising, and  
2 also for public issue discussion or communications that further the purposes of the committee,  
3 including the purpose of providing informational support or guidance to and for candidates and  
4 officeholders of a specific political party, philosophy, or issue orientation that may aid them in  
5 their campaigns, as well as their officeholding capacities. Moreover, when such committees  
6 raise funds specifically for activities that do not entail the direct support of specific candidates,  
7 such activity has the effect of freeing up the other funds on hand for support of specific  
8 candidates or groups of candidates. Thus, even though the activities of the Conference Account  
9 might be the kinds of activities that, in isolation, could be performed by a 501(c) organization,  
10 they appear to be an integral part of the activities of RGA as a 527 organization, an organization  
11 attempting to influence the election or defeat of candidates.<sup>9</sup> As such, donations or  
12 “contributions” to the Conference Account must be treated in the same manner as donations for  
13 other purposes of RGA. Therefore, the solicitation of funds for the Conference Account  
14 constitutes fundraising in connection with an election other than an election for Federal office  
15 under 2 U.S.C. 441i(e)(1)(B) and 11 CFR 300.62.

16 *3. May RGA’s Conference Account accept donations from corporations organized by authority*  
17 *of Congress, such as the Federal Home Loan Mortgage Corporation and the Federal National*  
18 *Mortgage Association?*

19  
20 The Act, at 2 U.S.C. 441b(a) prohibits “any corporation established by authority of any  
21 law of Congress” from making a contribution in connection with any election to any political  
22 office. As indicated above, contributions or donations to RGA’s Conference Account would be

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<sup>9</sup> The Commission also notes your statement that the funds received and disbursed by the Conference Account are included in the RGA’s regularly filed reports with the IRS. A review of several Form 8872s filed with the IRS indicates that this is the case. Thus, RGA treats the contributions received by the Conference Account as receipts of RGA and not of a separate organization. In the absence of a Form 990 or a Form 1120-POL, however, the Commission does not know whether RGA is reporting the receipts of the Conference Account as non-exempt



1 in connection with an election other than an election to Federal office. Therefore, the Conference  
2 Account may not accept contributions or donations from the Federal Home Loan Mortgage  
3 Corporation and the Federal National Mortgage Association.

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

10 Sincerely,

11  
12  
13  
14 Bradley A. Smith  
15 Chairman  
16

17 Enclosures (AOs 2003-05 and 2003-03)  
18  
19

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function income, i.e., the income that does not fit within the functions of attempting to influence the appointment or election of persons to public office or to an office in a political organization. *See* 26 U.S.C. 527(e)(2).