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February 19, 2009

Thomasenia Duncan, Esq.
Federal Election Commission
999 E Street, N.W.
Washington, D.C. 20463

AOR 2010-03

Re: National Democratic Redistricting Trust Advisory Opinion Request

Dear Ms. Duncan:

Pursuant to 2 U.S.C. § 437f, we seek an advisory opinion on behalf of the National Democratic Redistricting Trust (the "Trust"). The Trust seeks to confirm that Members of Congress may solicit funds for the Trust outside the limits and source restrictions prescribed by the Federal Election Campaign Act (the "Act").

FACTUAL DISCUSSION

Members of Congress have traditionally attempted to influence congressional reapportionment decisions and have become involved in litigation concerning the redistricting process. Toward this end, in previous years, they have formed organizations not registered with the Commission and exempt from taxation under the Internal Revenue Code.

This year, individuals who are not Members of Congress have established the Trust for the purpose of raising funds to spend on legal fees associated with the legislative redistricting process that follows the 2010 census. Subject to approval by the Commission as well as the House and Senate Ethics Committees, Members of Congress seek to solicit funds on behalf of the Trust. Such solicitations are not intended to influence any federal or nonfederal election and will not advocate the election or defeat of any candidate for office.

LEGAL DISCUSSION

As amended by the Bipartisan Campaign Reform Act of 2002 ("BCRA"), the Act prohibits federal candidates from soliciting, receiving, directing, transferring, or spending any "funds in connection with an election for Federal office" or any "funds in connection with an election

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other than an election for Federal office” unless such funds are “subject to the limitations, prohibitions, and reporting requirements of this Act” or are consistent with the Act’s contribution limits and source restrictions, respectively. *See* 2 U.S.C. § 441i(e)(1)(A) and (B); 11 C.F.R. §§ 300.61, 300.62.

When analyzing the application of 2 U.S.C. § 441i(e), “the threshold question is whether the funds involved are in connection with a Federal or non-Federal election under subsection (e)(1).” *See* FEC Adv. Op. 2003-20. If the funds are not raised or spent in connection with an election, then the funds do not fall within the scope of section 441i(e) – and therefore are not subject to the Act’s limits and source restrictions.

In advisory opinions issued prior to the enactment of BCRA, the Commission held that the “influencing of the reapportionment decisions of a state legislature, although a political process, is not considered election-influencing activity subject to the requirements of the Act.” FEC Adv. Op. 1981-35. Similarly, the Commission found that “the financing of litigation which relates to reapportionment decisions made by the state legislation is not viewed as election-influencing under the Act and Commission regulations.” FEC Adv. Op. 1982-37. Accordingly, prior to the enactment of BCRA, the Commission consistently allowed Members of Congress to raise and receive unrestricted funds for redistricting expenses. *See id.*

When Congress passed BCRA, it showed no clear intent to disturb this practice. While the Commission had consistently held redistricting and reapportionment activity not to be in connection with *any* election, BCRA limited Federal candidate and officeholder fundraising *only* in connection with elections. Section 441i(e)(1)(A) limits activity “in connection with an election for Federal office,” and section 441i(e)(1)(B) limits activity “in connection with any election other than an election for Federal office.”

Relying on the fact that BCRA’s restrictions on officeholder and candidate fundraising apply only in connection with elections, the Commission has allowed Federal officeholders to establish, maintain and raise funds for legal defense trusts, even when the funds exceed the Act’s source restrictions and contribution limits. *See* FEC Adv. Op. 2003-15. The Commission cited the clear line of pre-BCRA advisory opinions that had allowed such fundraising, and concluded that BCRA “does not change this result.” *Id.* at 4. It held that there had been “no indication in the legislative history of BCRA that Congress intended section 441i(e)(1)(A) to change an area that is both well-familiar to members of Congress and subject of longstanding interpretation through statements of Congressional policy and Commission advisory opinions.” *Id.*

The Commission also has allowed Federal officeholders to raise soft money in connection with an initiative’s pre-ballot qualification activities, on the theory that it was not yet “in connection with” an election. *See* FEC Adv. Op. 2003-12. In reaching its decision, the Commission noted “a clear delineation between pre-ballot qualification activities, such as petition and signature

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gathering, which do not occur within close proximity to an election, and post-ballot qualification activities, that occur in closer proximity to elections.” *Id.*

The redistricting activities proposed by the Trust are comparable to an initiative’s pre-ballot qualification activities. Like the petition and signature gathering referenced in Advisory Opinion 2003-12, attempts to influence the legislative redistricting process and the financing of litigation relating to reapportionment decisions do not occur within close proximity to any specific election and are not “in connection with” any election for purposes of section 441i(e)(1).

Section 441i(e)(1) restricts officeholder activity only in connection with elections. Prior to the enactment of BCRA, the Commission has consistently held officeholder legal defense funds, pre-ballot qualification activities, and redistricting activities not to be in connection with any election. In opinions issued after the enactment of BCRA, it has allowed officeholders to continue raising and spending funds on an unrestricted basis for officeholder legal defense funds and pre-ballot qualification activities.¹ It should do the same for redistricting activities.

Donations to, and disbursements by, the Trust for the sole purpose of defraying legal expenses associated with the legislative redistricting process that follows the 2010 census are neither “in connection with an election for Federal office” nor “in connection with any election other than an election for Federal office” for purposes of 2 U.S.C. § 441i(e)(1)(A) and (B). Accordingly, Members should be allowed to solicit funds for the Trust that are not subject to the limitations and prohibitions of the Act.

In the event that the Commission determines that Members may not solicit unlimited funds for the Trust, we request the Commission’s guidance as to which of the Act’s limitations and prohibitions are applicable to a Member’s solicitation of funds on the Trust’s behalf.

Please do not hesitate to call us should you have any questions about this request.

Very truly yours,



Marc Erik Elias
Kate Sawyer Keane

¹ In 2004, the Commission considered the question of whether Members may raise “soft money” for independent redistricting committees, but failed to approve an opinion. See FEC Adv. Op. 2003-38.



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03/02/2010 04:12 PM

To <DAdkins@fec.gov>
cc
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Subject Re: Supplemental Facts - Advisory Opinion Request
(National Democratic Redistricting Trust)

History: This message has been forwarded.

Correct.

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From: <DAdkins@fec.gov>
Date: Tue, 2 Mar 2010 16:11:02 -0500
To: Marc Elias <melias@perkinscoie.com>
Cc: <DAdkins@fec.gov>
Subject: Supplemental Facts - Advisory Opinion Request (National Democratic Redistricting Trust)

In our telephone conversation on Wednesday, February 24, 2010, you provided me with additional and clarifying information regarding the request for an advisory opinion submitted on behalf of the National Democratic Redistricting Trust ("NDRT"). I have set out below my understanding of certain points that you made during this conversation. Please review the statements below and either confirm their accuracy or correct any misperceptions.

1. NDRT is a trust - not a corporation. It has a trustee who is a private citizen that is not a Member of Congress, and it has an executive director who is also a private citizen that is not a Member of Congress. NDRT is not established, financed, maintained or controlled by any Member of Congress, any authorized candidate committee, or any national, state, district or local party committee.

2. Funds raised by NDRT will be spent only on the pre-litigation and litigation costs that arise out of the redistricting processes following the 2010 census as well as on the costs associated with administering NDRT (e.g. , the executive director's salary). NDRT may work in concert with like-minded individuals, organizations and committees that will act for the purpose of influencing the redistricting process or elections, but will not itself fund such activities.

3. Funds received by NDRT in response to solicitations made by Federal candidates and officeholders will not be used for the purpose of influencing any Federal or non-Federal election and will not be used for communications that expressly advocate the election or defeat of any clearly identified candidate for office.

4. Persons other than Federal candidates and officeholders will also solicit funds on behalf of NDRT.

These solicitations will not be intended to influence any Federal or non-Federal election and will not expressly advocate the election or defeat of any clearly identified candidate for office. Additionally, funds received by NDRT in response to such solicitations will not be used for the purpose of influencing any Federal or non-Federal election and will not be used for communications that expressly advocate the election or defeat of any clearly identified candidate for office.

Please reply by return email to confirm my accurate understanding of these additional facts. Once my understanding is confirmed, these facts will become part of the advisory opinion request and will be placed on the public record.

Thank you.

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