



FEDERAL ELECTION COMMISSION
Washington, DC 20463

MEMORANDUM

TO: THE COMMISSION
STAFF DIRECTOR
GENERAL COUNSEL
CHIEF COMMUNICATIONS OFFICER
FEC PRESS OFFICE
FEC PUBLIC DISCLOSURE

FROM: COMMISSION SECRETARY *MWD*

DATE: JULY 27, 2009

SUBJECT: COMMENT ON DRAFT AO 2009-13
The Black Rock Group

Transmitted herewith is a timely submitted comment from Fred Wertheimer, Democracy 21, and J. Gerald Hebert and Paul S. Ryan, Campaign Legal Center, regarding the above-captioned matter.

Proposed Advisory Opinion 2009-13 is on the agenda for Tuesday, July 28, 2009.

Attachment

July 27, 2009

By Electronic Mail

Mary Dove
Commission Secretary
Federal Election Commission
999 E Street, NW
Washington, DC 20463

Re: Comments on "Draft C" of Advisory Opinion 2009-13 (Black Rock Group)

Dear Ms. Dove:

These comments are filed on behalf of Democracy 21 and the Campaign Legal Center with regard to "Draft C" of Advisory Opinion 2009-13 (Agenda Doc. No. 09-42-B), in response to a request filed by the Black Rock Group (BRG) concerning its plan to act as a commercial vendor to one or more single member limited liability companies (LLCs) that intend to make independent expenditures in federal elections.

The nub of the issue is whether BRG's role in coordinating and facilitating the independent expenditures to be made by the various LLCs will mean that the LLCs are operating as a "group of persons" under 2 U.S.C. § 431(4), so that their expenditures will thus trigger political committee status.

The Office of General Counsel prepared two draft advisory opinions for consideration at the Commission's July 16 meeting, addressing the multiple LLC political committee status issue in its answers to Question 2. Draft A concluded that political committee status is not triggered by the proposed scheme; Draft B concluded that it is.

Though the two drafts reached different conclusions with respect to Question 2, the drafts provided the same answers to two other questions posed in AOR 2009-13. Both drafts answered Question 1, whether BRG could serve a single LLC without triggering political committee status, in the affirmative. Both drafts answered Question 3, whether the answer to Question 2 changes if BRG does not convey messages between LLCs, in the negative.

We filed written comments with the Commission on July 15, opposing Draft A and urging the Commission to adopt Draft B, which more accurately and realistically assessed the practical consequences of the facts presented by the request, and correctly concluded that the highly organized and centralized nature of the scheme proposed by BRG will result in a de facto "pooling of funds" by a "group of persons," and thus will trigger political committee status. Our July 15 comments are attached for your convenience.

At the July 16 meeting, the Commission could not approve either draft by the required four affirmative votes. Vice Chairman Peterson, Commissioner Hunter and Commissioner McGahn supported Draft A. Chairman Walther and Commissioner Bauerly supported Draft B. Commissioner Weintraub recused herself from the matter. Nevertheless, all Commissioners acknowledged their agreement regarding the answers to Questions 1 and 3. Consequently, the Commissioners decided to hold the matter over, in an effort to craft a draft advisory opinion that *would* be approved by the requisite four affirmative votes: answering Questions 1 and 3, while acknowledging that the Commission can not approve an answer to Question 2 due to a lack of the requisite four affirmative votes.

The Commission has now published Draft C. However, Draft C does not simply answer Questions 1 and 3 and acknowledge that the Commission is unable to answer Question 2. Instead, Draft C reframes and expands Question 2 and then provides a confusing, partial answer.

Drafts A and B presented Question 2 as follows:

- May BRG serve as a commercial vendor for several LLCs making independent expenditures concerning Federal candidates or elections without triggering political committee status for one or more of the LLCs?

Ad. Op. 2009-13 Draft A at 4; Draft B at 4.

Draft C presents Question 2 as follows:

- May BRG serve as a commercial vendor for several LLCs making independent expenditures concerning (a) the same Federal election or candidates; or (b) different Federal elections or candidates without triggering political committee status for one or more of the LLCs; and (c) notwithstanding any negative answer to 2(a) and 2(b), would BRG's proposed activities cause one or more of the LLCs' independent expenditures to be treated as a contribution to any political committee, subject to the Act's source and amount prohibitions and limitations and reporting requirements?

Ad. Op. 2009-13 Draft C at 9.

The paragraph immediately following Question 2 in Draft C begins: "The Commission could not approve a complete response by the required four affirmative votes regarding Questions 2(a) and (b)." *Id.* Yet Draft C then goes on to provide a response to Questions 2(a) and (b), as well as a two-page response to Question 2(c). *Id.* at 9-11.

This "non-answer" does in fact answer Question 2 in a manner consistent with Draft A. Draft C concludes that BRG can share information with and facilitate communication between multiple LLCs regarding political advertising strategy and content because "such information does not facilitate the various LLCs acting as a group. *Id.* at 9-10. This is a pig in a poke and the Commission should not buy it. Moreover, the cryptic answer to question 2 in Draft C does not clarify its basis in any way that would guide the requestor or anyone similarly situated. For the same reasons we opposed Draft A, we likewise oppose Draft C.

If the Commission does vote on Draft C, we strongly urge the Commission to first amend the draft so the sentence following Question 2 reads: "The Commission could not approve a ~~complete~~ response by the required four affirmative votes ~~regarding Questions 2(a) and (b).~~" *Id.* at 9. The Commission should then strike all of the language following this amended sentence through the bottom of page 11, leaving only the answers to Questions 1 and 3.

Sincerely,

/s/ Fred Wertheimer

/s/ J. Gerald Hebert

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