July 30, 2004

Mr. Lawrence H. Norton
Office of the General Counsel
Federal Election Commission
999 E Street, NW
Washington, DC 20463

Re: MUR 5466 – America Coming Together

Dear Mr. Norton:

On behalf of America Coming Together ("ACT"), this letter is submitted in response to the complaint filed by Democracy 21, the Campaign Legal Center, and the Center for Responsive Politics. We respectfully request that the Office of General Counsel consider this response despite the denial of ACT's request for additional time within which to submit it.

For the reasons set forth below, the Federal Election Commission should find no reason to believe that ACT has violated the Federal Election Campaign Act of 1971, as amended ("FECA"), or the Commission's regulations, and it should dismiss this matter. Complainants focus on two solicitation letters – one mailed in February, 2004, and the other in June, 2004. Complaint, Exh. C, D. Through selective pruning of the letters, complainants allege that ACT intends to influence only federal elections, and that the solicitations must therefore be paid exclusively with federal funds, and must raise exclusively federal funds. In reality, the mentioned solicitations clearly reflect ACT's intent to influence both federal and nonfederal elections. Accordingly, the expenses and receipts associated with these solicitations have been allocated between a federal and a nonfederal account, as permitted under FECA and the Commission's regulations. These solicitations were produced in full compliance with the governing law; complainants have raised no legitimate predicate for a reason-to-believe determination or a consequent investigation.

Introduction

ACT is an unincorporated organization that has established federal and non-federal accounts pursuant to 11 CFR § 102.5. The federal account is registered with the FEC as a non-connected political committee within the meaning of 11 CFR § 106.6(a). The non-federal account, out of which ACT pays for activities that do not constitute "expenditures" or "contributions" under FECA, is registered with the Internal Revenue Service under Sections 527(i) and (j) of the Internal Revenue Code. 26 U.S.C. §§527(i) and (j).

ACT operates both accounts in compliance with 11 CFR §106.6, which provides that non-connected committees active in both federal and non-federal elections "shall allocate" the costs of their activities between federal and nonfederal accounts. Specifically, the allocation of a nonconnected committee's costs for fundraising activities are regulated by Section 106.6(d), which states:

> If federal and non-federal funds are collected by one committee through a joint activity, that committee shall allocate its direct costs of fundraising . . . according to the funds received method. Under this method, the committee shall allocate its fundraising costs based on the ratio of funds received into its federal account to its total receipts from each fundraising program or event. This ratio shall be estimated prior to each such program or event based upon the committee's reasonable prediction of its federal and non-federal revenue from that program or event . . .

Id.

I. ACT is Operating Lawfully Under FECA in Allocating the Costs of Mixed Federal and Non-Federal Solicitations Between Its Federal and Non-Federal Accounts

The crux of the first count of the complaint is that ACT fundraising costs, including the costs of direct mail letters soliciting funds for both federal and nonfederal activities, must be paid not by the allocation method provided by law and described above but, rather, entirely with federal funds. Complaint at 12-13. Complainants describe these solicitations as expenditures which "promote, support, attack, or oppose" a clearly identified federal candidate; then, citing Advisory Opinion 2003-37, they claim that FECA and its implementing regulations require the costs of such solicitations to be paid entirely with federal funds and to be applied toward the allocation ratio for administrative expenses and generic voter drives.

This is a willful mischaracterization of the governing law. Advisory Opinion 2003-37 does not speak on the subject of solicitations for federal and nonfederal activities; moreover, it could not have required such solicitations to be paid entirely with federal funds, given regulations to the contrary. As stated above, federal regulations explicitly govern how the costs of solicitations are to be paid. These regulations provide that a committee collecting both federal and nonfederal funds through a single activity shall allocate the direct costs of fundraising, including "disbursements for solicitation of funds," according to the "funds received method." 11 CFR §§ 106.6(a)(2), 106.6(d). That is, the costs of fundraising, including the costs of a solicitation, must be allocated based on the ratio of federal and nonfederal funds received.

Direct mail letters soliciting funds, like all other solicitations, are governed by the rules above. Section 106.6(d)(2) specifically names direct mail campaigns among those which may serve as the basis for a "funds received" allocation.

Accordingly, ACT has paid for its direct mail solicitations, as the law provides, by estimating the federal and nonfederal revenue that it will receive through the fundraising program. As the complaint states, the costs of the solicitation letters described by the complainants were paid with 98% non-federal and 2% federal funds – reflecting the ratio of non-federal to federal funds that ACT expected its fundraising program to generate.

It is telling that the complainants nowhere allege that ACT has improperly estimated the ratio of federal to non-federal funds to be generated by ACT's fundraising program. Nor does the complaint allege that ACT has violated the provisions of section 106.6(d). Indeed, the complaint nowhere even *mentions* §106.6(d) – the only federal regulation governing allocation of disbursements on fundraising activities. Instead, the complainants fulminate against the particular content of the solicitations. But by so doing, the complainants ignore the fact that disbursements for solicitations are regulated not by the content of the communication but by the funds brought in the door.

Complainants apparently believe that they may evade the plain language of the regulations by referring repeatedly and with great zest to Advisory Opinion 2003-37. However, even if AO 2003-37's "promote, support, attack, or oppose" standard were a valid reflection of existing law, it does not apply, even on its own terms, to the conduct that the complainants question.

AO 2003-37 could not, and did not, change the allocation formula described in the regulations above. Absent a rulemaking proceeding to promulgate new regulations, it remains the case that the costs of any direct mail solicitation designed to raise funds for federal and nonfederal elections shall be allocated based on the ratio of federal funds and nonfederal funds generated by the fundraising program. *See* 11 CFR § 106.6(d). Nothing in AO 2003-37 purported to override that regulatory command. Rather, most of AO 2003-37 concerned voter communications which do not solicit funds, and are not governed by section 106.6(d).

It is true that in response to a particular scenario raised by "Americans for a Better Country" (ABC),[1] AO 2003-37 addressed one type of solicitation: those designed to influence only federal elections, which mention only federal candidates and "do not identify any other Federal or non-Federal candidates or elections." AO 2003-37 at 15. In particular, the example given in the advisory opinion mentioned solicitation letters designed to support "George Bush and Republican candidates," without any indication that contributions would be directed toward any nonfederal race. The FEC ultimately concluded that such solicitations were not eligible for allocation under section 106.6, because they are not "mixed Federal/non-Federal fundraising activity." *Id.* at 15 n.20.

Contrary to the complainant's suggestions, however, each ACT solicitation identified in the complaint is designed to raise funds for both federal and nonfederal activity, and explicitly refers to both federal and nonfederal elections. The February 2004 letter speaks of the race for

[1] It must be noted, however, that the means by which AO 2003-37 was procured cast doubt on the status of the advisory opinion itself. The requestor of AO 2003-37, "Americans for a Better Country" ("ABC"), is a sham organization. Time has confirmed that ABC was established for the sole purpose of requesting an advisory opinion on the activities of other organizations (namely, respondent ACT). As shown on its FEC and IRS reports, including those filed as recently as July 2004, ABC has neither raised nor spent a single penny – either before requesting AO 2003-37 or after. The organization, which asserted a desire to engage in extensive and precisely described political activities, has at no point engaged in any activity mentioned in its request, including activities specifically approved by the FEC. In short, ABC never intended to undertake any of the activities described in its request for an advisory opinion. Because ABC thereby posited general questions of interpretation and purely hypothetical scenarios, and because the request contained only questions regarding the activities of third parties, the request should have been declared invalid under 11 CFR § 112.1(b).

the "White House and . . . other critical key House, Senate and local races"; the "presidential contest and . . . other key federal, state and local races"; electing "progressive candidates all across the nation"; electing "strong progressive candidates across the country"; "defeating George W. Bush and electing strong progressives to replace those politicians who have helped Bush advance his extreme agenda"; "giv[ing] progressive candidates the winning edge in the race for the White House and other closely contested elections"; "find[ing] those voters who will support our candidates"; and "help[ing] propel progressive candidates to victory in vitally important state, local, and federal contests."

Similarly, in the June 2004 letter, ACT speaks of "George W. Bush and his Republican colleagues in Washington as well as the state and local levels going home," the "White House and . . . other critical key House, Senate and local races"; mobilizing in the "presidential contest and in other key federal, state and local races"; electing "progressive candidates all across the nation"; electing "strong progressive candidates across the country"; "defeating George W. Bush and electing strong progressives to replace those politicians who have helped Bush advance his extreme agenda"; "defeating George W. Bush and electing strong progressive candidates at all levels of government – federal, state, and local"; "giv[ing] progressive candidates the winning edge in the race for the White House and other closely contested elections"; "find[ing] those voters who will support our candidates"; "help[ing] propel progressive candidates to victory in vitally important state, local, and federal contests"; and "elect[ing] progressive candidates at all levels."

In these and other fundraising letters, ACT repeats many times that it is organizing around (and soliciting for) *both* federal and nonfederal races. Indeed, as reflected in ACT's July 2004 report to the IRS, disbursements concerning state elections, including contributions to particular state candidate committees, represent a part of ACT's overall strategy.

ACT's intent to influence nonfederal races would have been clear had the complainants not selectively quoted from the solicitations in question. On page 12 of the complaint, for example, the complainants assert that ACT has chosen to focus its efforts in seventeen "battleground" states, allegedly because these states will "determine the presidential election." As evidence, the complainants quote five sentences from the "Action Plan" included with each mentioned solicitation:

> As the 2004 elections approach, Democrats have a firm grasp on 168 electoral votes. They're in states that the Democratic candidate is almost guaranteed to win. President Bush, on the other hand, seems an almost certain winner in states that add up to 190 electoral votes.
>
> That leaves seventeen states with 180 electoral votes as the competitive battleground in this election. . . .
>
> Our America Coming Together Action Plan will focus all of our attention in these key states – the ones that will decide in which direction America goes after the 2004 election.

Complaint at 12.

In the citation above, however, the complainants have disingenuously replaced one excised sentence with an innocuous ellipsis. Had they quoted the six sentences in full, it would be apparent that nonfederal races are also at the heart of ACT's strategy:

> As the 2004 elections approach, Democrats have a firm grasp on 168 electoral votes. They're in states that the Democratic candidate is almost guaranteed to win. President Bush, on the other hand, seems an almost certain winner in states that add up to 190 electoral votes.
>
> That leaves seventeen states with 180 electoral votes as the competitive battleground in this election. Those states will not only determine the outcome of the presidential election, **they will be the home of dozens of key federal, state and local races as well.**
>
> Our America Coming Together Action Plan will focus all of our attention in these key states – the ones that will decide in which direction America goes after the 2004 election.

Complaint Exh. C at 2 (emphasis added).

Despite the complainants' assertions, ACT made clear in each mentioned solicitation that ACT intended to influence both federal and nonfederal elections, and that ACT would be soliciting funds for both purposes. Accordingly, ACT allocated the costs of these solicitation mailings according to the funds received method specified in section 106.6(d).

In sum, the complainants' assertion that this allocation is improper -- and that "under" Advisory Opinion 2003-37, the solicitations must be paid for "entirely with Federal funds" -- is misguided. The majority of AO 2003-37 did not concern solicitation mailings, and nowhere in AO 2003-37 did the FEC speak to solicitations explicitly stating an intent to influence both federal and nonfederal elections.

Even if the AO had addressed the issue at hand, it certainly could not have modified or contradicted the allocation scheme provided by duly enacted regulations. To the extent that AO 2003-37 purported to depart from or offer modifications of the regulatory scheme, it would represent both an invalid and inaccurate reflection of existing law.

Indeed, complainants' flawed interpretation of AO 2003-37, now used to urge a departure from the plain language of the regulations in Part 106, would result in a dramatic mid-cycle adjustment of the existing allocation regime. The adjustment would be procedurally improper, because it cannot be promulgated through the Advisory Opinion process. Instead, to the extent that AO 2003-37 announces any new allocation procedure for the costs of a solicitation, such a

"rule of law" could be adopted "only as a rule or regulation pursuant to procedures established in section 438(d)," 2 U.S.C. § 437f(b), including "submission of the rule or regulation to the Congress" for its review and opportunity to intervene before it becomes effective. *See United States Defense Comm. v. FEC*, 861 F.2d 765, 771 (2d Cir. 1988). "General statements of tests and standards (other than those included in the FECA and our regulations) are inappropriate to the advisory opinion process because (1) this process is limited to specific events or transactions and (2) the Commission may enunciate rules of law which bind the regulated community only through regulations, not through advisory opinions." FEC Advisory Opinion 1999-11 (May 21, 1999) (Concurrence by Vice Chairman Wold and Commissioners Elliott and Mason). "Rulemaking is not simply the preferred method for filling in gaps in the FECA. It is the required method." FEC Audits of Dole for President Committee (June 24, 1999) (Statement of Reasons of Vice Chairman Wold and Commissioners Elliott, Mason and Sandstrom).

Finally, even if the rules could be changed at this point in the cycle through a novel interpretation of an advisory opinion itself offering a novel interpretation of existing regulations, doing so would be fundamentally unfair and disruptive. The regulations governing allocation require that calculations be developed and finalized on an election-cycle basis. 11 CFR § 106.6(c)(1)-(2). Any new interpretation of the allocation regime should, therefore, be implemented only in a new election cycle. Indeed, when Part 106 was last substantially revised, in March 1990, the Commission set its effective date for the following January 1 – and even with that nine-month advance notice, the Commission later issued a series of advisory opinions permitting various exceptions to and corrections under the new rules. These exceptions and corrections were all offered in "recognition that the allocation regulations represent significant revisions to past practice and require a brief period of adjustment, *i.e.*, *the current election cycle*, by political committees acting in good faith." Advisory Opinion No. 1993-3, quoting Advisory Opinion 1992-2 (emphasis added).

II. ACT is Operating Lawfully Under FECA in Dividing the Receipts from Mixed Federal and Non-Federal Solicitations Between Its Federal and Non-Federal Accounts

Complainants' second count echoes the first, but is similarly flawed. Again, the complaint focuses on fundraising activities, including direct mail letters soliciting funds for both federal and nonfederal activities. Just as the complainants mistakenly asserted in count 1 that the costs of such solicitations must be paid entirely with federal funds, they mistakenly assert in count 2 that such solicitations may only raise federal funds.

As long as donors are notified that their donations will be used for both federal and nonfederal activities, a committee with federal and nonfederal accounts pursuant to 11 CFR § 102.5 may raise both federal and nonfederal funds via the same fundraising communication. Funds deposited in the federal account must conform to the contribution limits of 11 CFR § 110.1(d), and the source limitations of 11 CFR § 110.20 and 11 CFR Parts 114 and 115. Such funds must also conform to 11 CFR § 102.5(a)(2), which despite Complainants' assertion to the contrary, is satisfied by a solicitation that "expressly states that the contribution will be used in connection with a Federal election." 11 CFR § 102.5(a)(2)(ii). Other funds may be used for

nonfederal activity or activity allocated pursuant to 11 CFR § 106.6, and may be deposited in a nonfederal account.

Each solicitation identified in the complaint meets the above criteria. Each explains repeatedly, using language quoted at length above, that contributions will be used in "state, local, and federal contests" – that is, in both federal and nonfederal elections. Each notifies the donor that federal law prohibits foreign nationals who are not legal permanent residents from making contributions, and asks donors to certify that they are citizens or legal permanent residents. Each identifies the $5,000 contribution limit of 11 CFR § 110.1(d), and expressly states that "All contributions permissible under federal law (individual contributions of $5,000 or less per calendar year) will be placed in ACT's federal account to be used in connection with federal elections." That is to say, each solicitation meets every regulatory requirement to raise federal and nonfederal funds.

Finding no violation of the regulations, Complainants again turn to AO 2003-37, but as before, AO 2003-37 does not apply to the solicitations at issue. AO 2003-37 did explain that a solicitation intended to raise money to influence only federal elections, and which does not notify donors of nonfederal activity by indicating that some funds will be used to support nonfederal candidates or elections,[2] may raise only federal money to influence those federal elections. The limitation is logical: a solicitation for funds designed to impact only federal elections must raise only federal funds. None of the solicitations identified in the complaint, however, were designed to impact only federal elections. Each states, repeatedly, that ACT intends to influence state, local, and federal elections; donors are clearly put on notice that their contributions will be used for both federal and nonfederal activities.

Conclusion

In sum, the complaint provides no valid basis to assert that ACT is operating in any way unlawfully. ACT has a lawfully established federal account into which federal contributions may be placed, and from which some costs of solicitation materials may be drawn, allocated as provided by federal regulation. And ACT has a lawfully established nonfederal account into which nonfederal contributions may be placed, and from which some costs of solicitation materials may be drawn, also allocated as provided by federal regulation. ACT's solicitations make clear its multiple purposes, both federal and nonfederal, and ACT has, accordingly, allocated the costs and receipts of such solicitations in full compliance with all applicable

[2] Complainants also suggest that Advisory Opinion 2003-37 required solicitations for nonfederal funds to mention specific nonfederal candidates. Complaint at 16. AO 2003-37 states no such requirement, and notes only that ABC's proposed fundraising message "d[id] not identify any other . . . non-Federal candidates or elections." AO 2003-37 at 15 (emphasis added). Moreover, a requirement to identify specific nonfederal candidates would be impractical given the purpose of the qualification: notifying donors that portions of their contributions would be used to influence state elections. At the time of the mailings, many races were still in the primary stage, and although ACT intended to support a local candidate in particular races, it was not yet clear which candidate ACT wished to support. Further, because ACT has active operations in more than a dozen states, it would have been extremely impractical to list each and every candidate whom it intended to support, in a general solicitation of this sort. By carefully explaining that ACT intended to influence nonfederal elections, statewide and local, as well as federal races, ACT practically – and adequately – put potential donors on notice regarding the eventual use of their contributions.

regulations. Complainants plainly do not like those regulations, or their basis in FECA, but their recourse lies with Congress, not by initiating a MUR.

Accordingly, for the reasons set forth above, respondent ACT respectfully requests that the complaint against it be dismissed.

Yours truly,

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