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FEDERAL ELECTION COMMISSION
Washington, DC 20463

AGENDA ITEM
For Meeting of: JUN 13

June 6, 1996

MEMORANDUM

TO: The Commission

THROUGH: John C. Surina
Staff Director

FROM: Lawrence M. Noble
General Counsel

N. Bradley Litchfield
Associate General Counsel

Michael G. Marinelli
Staff Attorney

SUBJECT: Draft AO 1996-21

Attached is a proposed draft of the subject advisory opinion. We request that this draft be placed on the agenda for June 13, 1996.

Attachment

DRAFT

1
2 ADVISORY OPINION 1996-21

3
4 E. Clark Richardson, President
5 Business Council of Alabama
6 P.O. Box 76
7 Montgomery, AL 36101-0076

8
9 Dear Mr. Richardson:

10
11 This refers to your letters dated May 2 and April 22, 1996, which request advice
12 concerning application of the Federal Election Campaign Act of 1971, as amended ("the Act"),
13 and Commission regulations to a proposal by the Business Council of Alabama ("BCA") to send
14 communications to its members. These communications would endorse and solicit contributions
15 for the campaigns of BCA endorsed Federal candidates.

16 You state that BCA is a nonprofit corporation organized under the Alabama Nonprofit
17 Corporation Act, and is designated a Section 501(c)(6) organization under Title 26 of the U.S.
18 Code.¹ Your request includes BCA's By-laws, its governing document.

19 BCA MEMBERSHIP STRUCTURE

20 The membership of BCA consists of individuals, firms, partnerships, organizations, and
21 corporations. Your request states that BCA has approximately 5,200 members at the present

¹ You state that BCA was established in 1985 with the consolidation of the Alabama Chamber of Commerce and Associated Industries of Alabama, to represent Alabama business and industries at the State and Federal levels. The purpose of BCA, according to its bylaws, is to promote the general welfare of Alabama and its citizens by advancing the educational, civic, social, commercial and economic interests of the State. Its efforts involve encouraging the development and retention of industry, agriculture, commerce and recreational activities; promotion of good employer-employee relations, and closer relationships among agriculture, education, business and industry. See BCA Bylaws, Article II, Section 2.1.

1 time. BCA's membership includes 4,671 corporations, 304 professional organizations, 73
2 chambers of commerce, 36 business or trade associations and 21 individuals.²

3 Membership in BCA is open to individuals, firms, organizations, and corporations
4 interested in the objectives of the Association. BCA Bylaws, Article III, Section 3.1. Applicants
5 for membership must be recommended by a member of good standing. BCA Bylaws, Article III,
6 Section 3.2. All applications must be approved by the Board of Directors which also has the
7 power to suspend a member. BCA Bylaws, Article III, Sections 3.1 and 3.3. Each member of
8 BCA is required to pay annual dues, the amount of which varies according to the number of
9 individuals employed by the member organization. BCA Bylaws, Article III, Sections 3.4.³

10 Under its bylaws, BCA's Board of Directors oversees the general management of the
11 Association. BCA Bylaws, Article V, Section 5.1. This Board is elected at the annual meeting
12 of the members. Each member is entitled to one vote and additional votes (up to a total five
13 votes per member) for each increment of \$500 in dues. BCA Bylaws, Article III, Sections 3.5.
14 The Board consists of 104 members, who are divided into district representatives, and there are
15 not less than five at-large members of the Board who are voted upon by all the members of the
16 Association. BCA Bylaws, Article V, Sections 5.2.

17 The Board selects from its membership all of the officers of the Association, including its
18 chief executive officers, the Chairman of the Board and the President. These officers, with the

² You state that BCA's membership records do not provide information on whether members such as professional organizations, chambers of commerce, and business and trade associations are incorporated.

³ The range is from \$150 for member organizations with 10 employees or less, to \$850 for organizations with over 400 employees. Organizations also pay \$1.00 for each additional employee over 500.

1 district chairmen, form the Executive Committee. This body exercises all the powers of the
2 Board in the management of the property and business of BCA when the Board is not in session.
3 All decisions of the Executive Committee are subject to ratification by the Board. BCA Bylaws,
4 Article V, Section 5.4.

5 BCA'S PROPOSED COMMUNICATIONS

6 You state that BCA proposes to engage in a program whereby it would evaluate Federal
7 candidates and their positions regarding matters of concern to BCA members. After selecting
8 Federal candidates to endorse or oppose, BCA would communicate with all of its membership to
9 express its support or opposition to these candidates and urge members to do likewise. In
10 addition, BCA would request its members to make contributions directly to the campaigns of
11 certain candidates. You state that, in the case of corporate members, BCA would contact the
12 individual persons through whom BCA normally communicates with the corporate member.⁴

13 BCA would provide information regarding how to make contributions to candidates.
14 This would include providing the names and addresses of the candidate's principal campaign
15 committee. You affirm that BCA would not provide the means to actually make such
16 contributions (such as the envelopes addressed to candidates) or otherwise facilitate the making
17 of contributions. BCA would also not receive or forward contributions to the candidates.
18 However, BCA would ask its members to inform it of the amount contributed and the candidates
19 to whom contributions were made. The communications containing its candidate endorsements

⁴ You further explain that BCA members normally designate one or several "contact persons" to receive BCA communications, attend meetings, serve on committees, and so forth. You state that BCA communicates with its 5,200 members through 6,300 such "contact persons."

1 would be produced at BCA expense, and would constitute the views of BCA, rather than a
2 distribution or reproduction of materials prepared by any candidate or other entity.⁵

3 THE ACT AND COMMISSION REGULATIONS

4 The Act prohibits corporations from making any contribution or expenditure in
5 connection with Federal elections. 2 U.S.C. §441b. Contributions include direct or indirect
6 payments or gifts of money or any services, or anything of value, to any candidate for Federal
7 office. 2 U.S.C. §441b(b)(2); 11 CFR 114.1(a)(1).⁶ This general prohibition also has an
8 exception that allows a corporation, including an incorporated membership organization to
9 communicate with its "restricted class," its stockholders, executive and administrative personnel
10 and their families on "any subject" including messages containing express advocacy of the
11 election or defeat of Federal candidates. 2 U.S.C. § 441b(b)(2)(A) and 11 CFR 114.1(j). For
12 purposes of these communications, the restricted class of an incorporated membership
13 organization also includes its membership. *Id.*

14 Corporations, including incorporated membership organizations, may not facilitate the
15 making of contributions to Federal candidates or political committees. 11 CFR 114.2(f).
16 Corporate communications under section 114.3 may solicit or suggest that the individual member
17 make a contribution to a particular candidate so long as the corporation limits its activity to

⁵ You explain that BCA maintains a non-Federal political committee ("ProgressPAC") which makes campaign contributions to State and local candidates. ProgressPAC has never made contributions to Federal candidates, nor has it endorsed any Federal candidates. You affirm that, at the present time, BCA has no connection with any Federal separate segregated fund.

⁶ The discussion that follows takes as its basis the newly revised Commission regulations found at 11 CFR 114.1, 114.2, 114.3 and 114.4. The regulations were published in the *Federal Register* on December 14, 1995 (60 *Fed. Reg.* 64260). They became effective March 13, 1996. See 61 *Fed. Reg.* 10269 (March 13, 1996).

1 communication only and does not actually facilitate the making of the member's contribution to
2 the candidate nor act as a conduit. Examples of prohibited facilitation include providing
3 materials for the purpose of transmitting or delivering contributions, such as stamps, envelopes
4 addressed to a candidate or political committee (other than the corporation's own separate
5 segregated fund), or providing similar items which would assist in transmitting or delivering
6 contributions. 11 CFR 114.2(f)(2)(ii). Facilitation does not include providing the address of the
7 candidate or political committee. *Id.* It also does not include soliciting contributions to be sent
8 directly to candidates, if the solicitation is directed only to the restricted class. 11 CFR
9 114.2(f)(4)(ii). See Advisory Opinions 1996-1 and 1987-29.

10 All contributions by a person that are made on behalf of or to a candidate, including
11 contributions which are in any way earmarked or otherwise directed to the candidate through an
12 intermediary or conduit, are contributions from the person to the candidate. The intermediary or
13 conduit shall report the original source and the intended recipient of such contribution to the
14 Commission and to the intended recipient. 2 U.S.C. §441a(a)(8) and 11 CFR 110.6. A person,
15 such as a corporation, that is prohibited from making contributions or expenditures in connection
16 with a Federal election is prohibited from acting as a conduit for contributions earmarked to
17 candidates or their authorized committees. 11 CFR 110.6(b)(2)(ii).

18 Under Commission regulations, a membership organization must possess certain
19 attributes. It must (i) expressly provide for "members" in its articles and bylaws; (ii) expressly
20 solicit members; and (iii) expressly acknowledge the acceptance of membership, such as by

1 sending a membership card or inclusion on a membership newsletter list. 11 CFR

2 100.8(b)(4)(iv)(A), 114.1(e)(1).

3 Commission regulations define the term "members." See 11 CFR 100.8(b)(4) and
4 114.1(e)(2).⁷ Under the regulations, "members" means all persons who are currently satisfying
5 the requirements for membership in a membership association, who affirmatively accept the
6 membership association's invitation to become a member, and who meet one of the following
7 requirements:

8 (i) Have some significant financial attachment to the membership association, such as a
9 significant investment or ownership stake (but not merely the payment of dues);

10 (ii) Are required to pay on a regular basis a specific amount of dues that is predetermined
11 by the association and are entitled to vote directly either for at least one member who has full
12 participatory and voting rights on the highest governing body of the membership association, or
13 for those who select at least one member of those on the highest governing body of the
14 membership association; or

15 (iii) Are entitled to vote directly for all of those on the highest governing body of the
16 membership association.

17 The regulations also provide that the Commission "may determine, on a case by case
18 basis, that persons seeking to be considered members of a membership association for purposes
19 of this section have a significant organizational and financial attachment to the association under

⁷ See discussion below regarding the effect of a recent court decision on these regulations.

1 circumstances that do not precisely meet the requirements of the general rule." See 11 CFR
2 100.8(b)(4)(iv)(C) and 114.1(e)(2).

3 DETERMINING THE MEMBERSHIP OF BCA

4 BCA as Membership Association

5 The facts and background to this request indicate that BCA is a membership association
6 for purposes of the Act. For example, Article III of BCA's Bylaws meets the requirements of the
7 regulations 11 CFR 100.8(b)(4)(iv)(A)(i) and 114.1(e)(1) by expressly providing for
8 membership. You state in your request that BCA solicits members. See 11 CFR
9 100.8(b)(4)(iv)(A)(ii) and 114.1(e)(1). Your request also states that members receive a monthly
10 newsletter, and that members are listed in a special section of the newsletter. Therefore, the
11 requirement that membership be expressly acknowledged is also met. See 11 CFR
12 100.8(b)(4)(iv)(A)(iii) and 114.1(e)(1).

13 BCA highest governing body

14 Both the Board and the Executive Committee have significant roles regarding the
15 governance of BCA. However, the power of the Executive Committee is delegated by the Board.
16 The Executive Committee must maintain minutes and report to the Board all its decisions and the
17 decisions are subject to ratification by the Board. After considering these and the other powers
18 enjoyed by the Board over the Executive Committee, the Commission concludes that the BCA
19 Board of Directors, rather than the Executive Committee, is the highest governing body of BCA
20 for purposes of the Commission regulations.

21 Status of BCA Members

1 The Commission based its regulations defining membership for purposes of the Act on its
2 interpretation of the Supreme Court opinion in *Federal Election Commission v. National Right to*
3 *Work* (“*NRWC*”), 459 U.S. 197 (1982). The Commission notes, however, that the U.S. Court of
4 Appeals for the D.C. Circuit has determined that the 1993 regulations defining membership are
5 too restrictive when measured against the membership standard set out by the Supreme Court in
6 *NRWC. Chamber of Commerce of the United States v. Federal Election Commission*, 69 F.3d
7 600 (D.C. Cir. 1995), *on denial of petition for rehearing*, 76 F.3d 1234 (D.C. Cir. 1996). In
8 pertinent part, the Court in *NRWC* stated that “some relatively enduring and independently
9 significant financial or organizational attachment is required.” *Chamber of Commerce*, 69 F.3rd
10 at 605 citing *NRWC*. The portion of the regulation struck down by the court concerned the
11 requirement found in sections 100.8(b)(4)(iv)(B) and 114.1(e)(2) that a member must have the
12 right to vote for at least one person who has full participatory and voting rights in the highest
13 governing body. While the Commission did not seek further judicial review of this decision, a
14 revised regulatory framework defining membership and reflecting the result in *Chamber* has not
15 yet been developed by the Commission.

16 Notwithstanding the above, the Commission concludes in the situation presented here
17 that the membership of BCA would be considered “members” for purposes of the Act and
18 Commission regulations. The Commission bases this decision on the fact that all members of
19 BCA pay dues and all have the right to vote for the highest governing body, or for those who
20 choose the members of that body. Thus, BCA members would have satisfied the more restrictive
21 standard struck down in *Chamber*.

1 APPLICATION TO BCA COMMUNICATIONS

2 The Commission notes that your proposal closely tracks the regulations at sections 114.2
3 and 114.3. Two prior opinions are also relevant to BCA's request. In those opinions, the
4 Commission considered proposals similar, in many respects, to your proposal. In both opinions,
5 incorporated membership associations, which also qualified as federations of trade associations,
6 wished to send campaign communications to their members. The programs included sending five
7 or more letters, or making phone calls encouraging participation.⁸ The organizations also stated
8 that no penalty would accrue to members who declined participation. They also would not
9 provide any envelopes or stamps or facilitate the transmittal of any contribution to an endorsed
10 candidate. The Commission found that these proposals fell within the parameters of a
11 permissible election advocacy communication. See Advisory Opinions 1996-1 and 1987-29.
12 While BCA is not a federation of trade associations, these opinions are still applicable to your
13 situation.⁹

14 Section 114.7(h) expressly permits BCA, as an incorporated membership organization, to
15 communicate with its members as otherwise permitted by section 114.3. The Commission notes
16 that in sending these communications to the corporate members of BCA, you intend to send them
17 specifically to the individuals who represent the corporation to the organization and through
18 whom the corporate member and BCA would presumably conduct the organization's business.

⁸ In both opinions, the communications also offered members honorific designations for pledges of contributions made either to the organization's endorsed list of Federal candidates or to its separate segregated fund. This permissible detail is not presented in your proposal.

⁹ In Advisory Opinion 1985-37, the Commission determined that a state chamber of commerce did not qualify as a federation of trade associations, in part, because the organization represented all lines of commerce, rather than a similar or allied line of commerce as required by 11 CFR 114.8(g)(1).

1 This is analogous to the situation permitted in a trade association's communications with its
2 corporate membership. See 11 CFR 114.8(h). The Commission notes that the number of total
3 representatives from both corporate and non-corporate members indicates that, on the average,
4 there are less than two representatives per member. The numbers of employees of BCA's
5 corporate members who would receive the corporate communication from BCA would therefore
6 be reasonable and consistent with the purposes of section 114.8(h).

7 The Commission therefore concludes that BCA's proposal is permitted by 2 U.S.C.
8 §441b(b)(2)(A) and 11 CFR 114.3. Furthermore, BCA's proposed communications do not
9 represent corporate facilitation of contributions that is prohibited by 2 U.S.C. §441b(b) and 11
10 CFR 114.2(f).¹⁰ The Commission notes, however, the importance of ensuring that any
11 contributions solicited for BCA's endorsed candidates would be voluntary and no penalty would
12 attach to any member who decides not to participate. See 2 U.S.C. §441b(b)(3)(A) and Advisory
13 Opinions 1996-1 and 1987-29. See also 11 CFR 114.5(a) and 114.8(e)(4). In addition, the
14 Commission emphasizes that any contribution to a Federal candidate that results from this
15 program is limited by the Act, and may only be made by an individual from his or her personal
16 funds, or by another person who is a lawful source of contributions under the Act. See generally,
17 2 U.S.C. §441a, 441b, 441c, 441e, 441f, and 441g.

18

¹⁰ The Commission notes that, in your proposal, contributions would be sent directly to the various campaigns and endorsed candidates. Your proposal thus also avoids raising any possible conduit and earmarking situations. Under the Act and Commission regulations, BCA, as an incorporated membership organization, is prohibited from serving as a conduit for contributions to candidates and is also prohibited from facilitating contributions to candidates by its membership. 11 CFR 110.6(b)(2)(ii), 114.2(f)(1), and 114.2(f)(2). See also Advisory Opinion 1996-1.

