January 7, 2004

Mary Dove
Commission Secretary
Federal Election Commission
999 E Street, NW
Washington, D.C. 20463

Re: Draft Advisory Opinion 2003-36

Dear Ms. Dove:

I am writing on behalf of the Campaign Legal Center to provide comments on the issues in dispute between the two alternative drafts of Advisory Opinion 2003-36:

- whether 2 U.S.C. § 441i(e)(1) applies to solicitations by federal officeholders and candidates for a "Conference Account" maintained by the Republican Governors Association (RGA) – a registered 527 organization; and

- whether corporations organized by authority of Congress may make donations to this Conference Account.

We believe that solicitations of funds for the RGA's Conference Account are covered by 2 U.S.C. § 441i(e)(1) when made by federal officeholders and candidates. Solicitations of funds for Section 527 tax-exempt organizations by federal officeholders and candidates, including for all accounts maintained by these organizations, are in connection with elections and accordingly fall under 2 U.S.C. § 441i(e)(1). The factors highlighted by Draft B in support of its conclusion that solicitations by covered individuals for the RGA's Conference Account are in connection with elections – the Internal Revenue Code's definition of 527 organizations, the U.S. Supreme Court's observation in *McConnell v. FEC* that these organizations "by definition engage in partisan political activity" (540 U.S. [ ] (2003), slip. op. at 69), the practical understanding of how expenditures of political organizations can be integrated to partisan campaign purposes even if not made in a typical campaign setting, and the fungible nature of organizational funds – are persuasive.

Indeed, we note that the Commission has previously pointed to an organization's tax-exempt status under Section 527 of the Internal Revenue Code in support of the conclusion that its activities were in connection with elections. *See* FEC Advisory Opinion 1995-25 (finding legislative advocacy media advertisements financed by the

Republican National Committee to be in connection with both federal and non-federal elections, even though the advertisements were assumed to lack express advocacy or an electioneering message). Likewise, in BCRA, Congress prohibited federal officeholders and candidates from soliciting unlimited funds for Section 501(c) tax-exempt organizations whose principal purpose is to engage in certain "Federal election activity." *See* 2 U.S.C. § 441i(e)(4). This reinforces the notion that solicitations by federal officeholders and candidates for Section 527 organizations (which are avowedly political in nature) should be considered in connection with elections and subject to the limitations of 2 U.S.C. § 441i(e)(1).

We also agree with Draft B's conclusion that the RGA's Conference Account may not accept donations from corporations organized by the authority of Congress. 2 U.S.C. § 441b prohibits such corporations from making contributions in connection with any election to political office (*i.e.*, not merely federal elections). For the reasons expressed above, contributions or donations to Section 527 organizations such as the RGA (including all accounts it maintains) are properly considered to be in connection with elections.

We are concerned about the prospect of the Commission's adopting the approach embodied by Draft A – which would leave federal candidates and officeholders free to ask corporations, unions and wealthy individuals to make unlimited donations to the RGA's Conference Account. Such a decision would invite federal officeholders and candidates to solicit soft money for other 527 organizations under an argument that the particular funds raised would not be used to influence any election. Among other things, it should be evident that this will include attempts to solicit soft money for 527 organizations which take advantage of any latitude provided by the Commission for them to spend soft money on federal election activity. Accounting devices would surely be touted, but the truth of the matter is that federal officeholders and candidates would be back in the business of importuning unions, corporations and wealthy individuals for unlimited donations in order to equip partisan political organizations with soft money resources for federal campaigns. This is manifestly contrary to BCRA and the accompanying legislative intent to keep federal officeholders and candidates "out of the soft money fundraising business." *See* 148 Cong. Rec. S2116 (daily ed. Mar. 20, 2002) (statement of Sen. Levin).

Indeed, the problem could extend to solicitations of soft money for 527 organizations set up and controlled by federal officeholders and candidates. The Commission has repeatedly proclaimed that its final soft money rules ban soft money leadership PACs. In the final Leadership PAC regulations recently adopted, it stated:

> The Commission determined in the Soft Money rulemaking that BCRA does not allow a Federal candidate or officeholder to raise up to $5,000 separately for the Federal and non-Federal accounts of leadership PACs directly or indirectly established, financed, maintained or controlled by that Federal candidate or officeholder. Rather, for their leadership PACs, they are limited to raising a total of $5,000 from any one source, per

> election cycle . . . Therefore, Federal candidates will not violate BCRA merely by establishing and raising money for their leadership PACs within the amount limitations and source prohibitions of FECA and BCRA.
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> 68 Fed. Reg. 67,015-16 (Dec. 1, 2003).

However, the analysis of Draft A at least raises the specter of federal officeholders' appending 527 accounts to hard money leadership PACs registered with the FEC, with the 527 account (not registered with the FEC) collecting unlimited funds from any source (including foreign nationals) for isolated activities represented to the Commission not to be in connection with any election (*e.g.*, officeholder travel characterized to the Commission as relating to public policy advocacy as opposed to electioneering). The Commission should refrain from opening the door to any such possibility, which would again contradict BCRA and legislative intent.

As such, we urge the Commission to reject Draft A's analysis pertaining to federal officeholder and candidate solicitations for, and donations by corporations organized by authority of Congress to, the RGA's Conference Account. Draft B is correct in considering such solicitations and donations to be in connection with elections and thus subject to 2 U.S.C. § 441i(e)(1) and 2 U.S.C. § 441b respectively.

Thank you for your consideration of these comments.

Sincerely,

Glen Shor
FEC Program Director