

Federal Election Commission Advisory Opinion Number 2004-33

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September 10, 2004

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

ADVISORY OPINION 2004-33

Jan Witold Baran, Esq.
Lee E. Goodman, Esq.
Wiley Rein & Fielding, LLP
1776 K Street, NW
Washington, DC 20006

Dear Messrs. Baran and Goodman:

This responds to your letter dated August 16, 2004, as supplemented by your letter dated August 24, 2004, on behalf of The Ripon Society ("Ripon") and Representative Sue Kelly, concerning the application of the Federal Election Campaign Act of 1971, as amended (the "Act"), and Commission regulations to proposed cable television advertisements featuring Representative Kelly and paid for by Ripon.

Background

Ripon is an incorporated non-profit social welfare organization founded in 1962 and exempt from Federal taxes under section 501(c)(4) of the Internal Revenue Code. Representative Kelly represents the 19th Congressional District of New York and is a candidate in the New York Republican primary election scheduled for September 14, 2004. If Representative Kelly wins the primary election, she will be the Republican candidate in the general election, which is scheduled for November 2, 2004. Representative Kelly and a number of other Members of Congress serve on Ripon's Advisory Board, which you describe as an honorary board consisting of Members of Congress who participate in Ripon's policy forums, research, development, and advocacy. However, you state that Representative Kelly

Exhibit A

and the other Members of Congress on the Advisory Board "do not engage in active governance or similar control over Ripon activities."

You indicate that Ripon intends to fund the production and dissemination of a cable television advertisement featuring Representative Kelly. You have provided the script of the audio portion and a summary of the video portion of the advertisement, entitled "A Little Safer Now," which are included in Attachment A to this advisory opinion. You note that Representative Kelly will appear in and narrate the advertisement, but you state that the video portion of the advertisement, including the "supporting headlines" and background images presented on screen, will not include any images of, or references to, any other candidates for Federal office. You state that Ripon intends to disseminate the advertisement via cable television both within the 19th Congressional District and nationwide through the November 2, 2004 general election. You assert that the advertisement is "intended to promote a policy Ripon deems relevant to the current public debate regarding homeland security and post-9/11 security reforms." You also indicate that Ripon intends to coordinate its plans to disseminate the advertisement with Representative Kelly, other Federal candidates, and one or more Federal political committees of the Republican Party.

Legal Analysis and Conclusions

Your request asks a number of questions concerning two separate areas of law.

(1) May Ripon, as a corporation prohibited by the Act from funding certain communications, pay to disseminate "A Little Safer Now" in the manner you describe? For the reasons explained below, the Commission concludes that Ripon is prohibited from using its general treasury funds to pay to televise the proposed advertisement in the 19th Congressional District through the November 2, 2004 general election, but may, during that time period, pay to televise the communication outside the 19th Congressional District so long as it does not coordinate its plans with any officials of the Republican Party.

(2) Is Ripon an entity that is "directly or indirectly established, financed, maintained, or controlled by, or acting on behalf of," one or more Federal candidates or individuals holding Federal office and therefore subject to funding prohibitions regarding certain public communications? For the reasons discussed below, the Commission concludes that Ripon is not such an entity.

1A. Does "A Little Safer Now" expressly advocate the election or defeat of a clearly identified candidate?

The Act prohibits corporations, including corporations organized under 26 U.S.C. 501(c)(4), from making expenditures in connection with any election for Federal office. 2 U.S.C. 441b(a). The Commission regulations implementing this prohibition specifically provide that corporations may not make expenditures in connection with a Federal election "for communications to those outside the restricted class that expressly advocate the election or defeat of one or more clearly identified candidate(s) or the candidates of a clearly identified political party." 11 CFR 114.2(b)(2)(ii) (emphasis added).

The proposed advertisement does not contain any of the illustrative phrases from 11 CFR 100.22(a) or similar phrases, or "individual word(s), which in context can have no other reasonable meaning than to urge the election" of Representative Kelly. *Id.* Also, "[w]hen taken as a whole and with limited reference to external events," it cannot be said that the advertisement "could only be interpreted by a reasonable person" as advocating Representative Kelly's election. 11 CFR 100.22(b). Thus, because the advertisement does not contain express advocacy, Ripon may pay to produce and televise it as long as it complies with the restrictions on electioneering communications and coordinated communications described below.

1B. Does "A Little Safer Now" constitute an electioneering communication?

Yes, Ripon's proposed advertisement would be an electioneering communication if publicly distributed within the 19th Congressional District of New York. Ripon's proposed advertisement, however, would not be an electioneering communication if it is only publicly

distributed outside the 19th Congressional District of New York.

Corporations are also prohibited from making or financing "electioneering communications." 2 U.S.C. 441b(b)(2) and 11 CFR 114.2(b)(2)(iii); see also 11 CFR 114.14(a). With certain exceptions, an "electioneering communication" is any broadcast, cable or satellite communication that (1) refers to a clearly identified candidate for Federal office; (2) is publicly distributed for a fee within 60 days of a Federal candidate's general election or within 30 days of a primary election; and (3) is targeted to the relevant electorate. See 2 U.S.C. 434(f)(3) and 11 CFR 100.29; see also Advisory Opinions 2004-15 and 2003-12. "Refers to a clearly identified candidate" means that the candidate's name, nickname, photograph, or drawing appears, or the identity of the candidate is otherwise apparent through an unambiguous reference. 11 CFR 100.29(b)(2). "Publicly distributed" means "aired, broadcast, cablecast or otherwise disseminated for a fee through the facilities of a television station, radio station, cable television system, or satellite system." 11 CFR 100.29(b)(3)(i). In the case of a candidate for Representative in Congress, "targeted to the relevant electorate" means the communication can be received by 50,000 or more persons in the district the candidate seeks to represent. 2 U.S.C. 434(f)(3)(C); 11 CFR 100.29(b)(5)(i).

You state that Representative Kelly will appear and speak on camera. Thus, as you acknowledge, she will be clearly identified in the proposed advertisement. Ripon proposes to televise the advertisement within the 19th Congressional District of New York in a manner that would allow it to be received by 50,000 or more people within the district in which Representative Kelly is running for office. Moreover, Ripon plans to pay to disseminate the advertisement via cable television within 30 days of the September 14, 2004 New York primary election and within 60 days of the November 2, 2004 general election.

None of the six exemptions from the definition of "electioneering communication" applies to the proposed advertisement. See 2 U.S.C. 434(f)(3)(B)(i) through (iv), and 11 CFR 100.29(c)(1) through (6). First, the proposed advertisement would not be disseminated through means other

than broadcast, cable or satellite communication. Second, it would not constitute a reportable expenditure or independent expenditure. Third, it would not constitute a candidate debate or forum or promotion of such an event. Fourth, it would not be a communication by local or State candidates. Fifth, this communication would not be made by an entity organized under 26 U.S.C. 501(c)(3). Finally, the advertisement would not appear in a news story, commentary, or editorial distributed through the facilities of any broadcast, cable, or satellite television or radio station.

The Commission therefore concludes that the proposed advertisement constitutes an electioneering communication when disseminated in the manner you describe within the 19th Congressional District of New York.¹ Accordingly, because Ripon is a corporation, it may not use general treasury funds to televise the proposed advertisement featuring Representative Kelly in the 19th Congressional District of New York before the September 14, 2004 New York primary election or, if Representative Kelly wins the primary election, before the November 2, 2004 general election.²

Although you indicate that the proposed advertisement does not contain references to any clearly identified candidates other than Representative Kelly, it does contain a reference to "Republicans in Congress." The Commission determines that, unlike the examples listed in section 100.29(b)(2) (i.e. "the President," "your Congressman," "the Republican candidate for Senate in the State of Georgia," or "the incumbent"), "Republicans in Congress" does not constitute an unambiguous reference to any specific Federal candidate.³ Accordingly, the proposed advertisement would not constitute an electioneering communication outside New York's 19th Congressional District even if it were televised within 30 days of a primary election or within 60 days of the November 2, 2004 general election.

1C. Does "A Little Safer Now" constitute a "coordinated communication" with respect to (1) Representative Kelly, (2) any other Federal candidate, or (3) any political committee of the Republican Party?

For the reasons stated below, the Commission does not make any determination as to whether "A Little Safer Now" would qualify as a coordinated communication with respect to Representative Kelly. The Commission concludes that the

communication would not be a coordinated communication with respect to any other Federal candidate, but would be a coordinated communication to the extent that any of the conduct standards in 11 CFR 109.21(d) would be satisfied through the involvement of officials of the Republican Party. A corporation is prohibited from making contributions to Federal candidates or political party committees, and therefore Ripon may not pay for the proposed communication if it is coordinated with any political committee of the Republican Party.

a) Coordinated communication test

The Act has long defined as an in-kind contribution an expenditure made by any person "in cooperation, consultation, or concert, with, or at the request or suggestion of, a candidate, his authorized political committees, or their agents."

2 U.S.C. 441a(a)(7)(B)(i). In the Bipartisan Campaign Reform Act of 2002, Pub. Law No. 107-155, sec. 214(a), 116 Stat. 81, 94 (Mar. 27, 2002) ("BCRA"), Congress expanded this definition to include expenditures made by any person "in cooperation, consultation, or concert, with, or at the request or suggestion of" a political party committee or its agents. See 2 U.S.C. 441a(a)(7)(B)(ii). The Commission's "coordinated communication" regulation at 11 CFR 109.21 implements both statutory provisions through a single three-pronged test. A payment for a communication satisfying each of the three prongs is made for the purpose of influencing a Federal election, and is an in-kind contribution to the candidate, authorized committee or political party committee with whom, or with which, it is coordinated.

11 CFR 109.21(b)(1). Thus, a corporation is prohibited from using its general treasury funds to pay for a coordinated communication.

(i) Coordinated Communication - Payment source

The first prong of the definition of a "coordinated communication" specifies that a communication is coordinated with a candidate or an authorized committee when the communication is paid for by "a person other than that candidate [or] authorized committee." 11 CFR 109.21(a)(1).

(ii) Coordinated Communication - Content

The second prong of the definition of "coordinated communication" provides four content standards. 11 CFR 109.21(c)(1) through (4). A communication will satisfy this content prong if the communication: (1) is an electioneering communication as defined in 11 CFR 100.29; (2) disseminates, distributes, or republishes, in whole or in part, campaign materials prepared by a Federal candidate, the candidate's authorized committee, or their agents; (3) expressly advocates the election or defeat of a clearly identified candidate for Federal office; or (4) is a public communication, as defined in 11 CFR 100.26,4 that refers to a political party or a clearly identified candidate for Federal office, is publicly distributed or disseminated within one hundred and twenty days of an election for Federal office, and is directed to voters within the jurisdiction of the clearly identified candidate or to voters in a jurisdiction in which one or more candidates of the political party appear on the ballot. 11 CFR 109.21(c)(1) through (4).

(iii) Coordinated Communication - Conduct

The third prong of the "coordinated communication" test is a "conduct standard" focusing on the interactions between the person paying for the communication and the candidate, an authorized committee, a political party committee, or agents of the foregoing. 11 CFR 109.21(a)(3). These conduct standards are set forth in 11 CFR 109.21(d)(1) through (5).

b) Coordination with Representative Kelly

With respect to Representative Kelly, the Commission does not reach the issue of whether Ripon, as a corporation, would be prohibited from paying for the advertisement as a coordinated communication because the Commission has already determined that the electioneering communications provisions bar Ripon from paying to televise "A Little Safer Now" in the 19th Congressional District of New York between August 15, 2004 and November 2, 2004. See discussion above.

c) Coordination with Federal candidates other than Representative Kelly

The Commission concludes that "A Little Safer Now" would not satisfy any of the four content standards in 11

CFR 109.21(c) with respect to any other Federal candidate, and therefore would not constitute a coordinated communication with respect to any other Federal candidate. The communication does not expressly advocate the election or defeat of any clearly identified candidate for Federal office, and it does not constitute an electioneering communication with respect to any candidate other than Representative Kelly. See 11 CFR 109.21(c)(1) and (3). You confirmed by telephone that "A Little Safer Now" would not contain any campaign material prepared by any Federal candidate or authorized committee or agent of either. Therefore it would not satisfy the third content standard. See 11 CFR 109.21(c)(2). Finally, because the communication would not refer to any clearly identified candidate for Federal office other than Representative Kelly, the communication would not satisfy the fourth content standard in 11 CFR 109.21(c) with respect to any other candidate. See 11 CFR 109.21(c)(4).

d) Coordination with the Republican Party

Your request indicates that Ripon may satisfy all three prongs of the test for coordination with one or more political committees of the Republican Party. Ripon's payment for "A Little Safer Now" satisfies the "payment source" prong in 11 CFR 109.21(a). Furthermore, you indicate that Ripon may discuss its distribution of "A Little Safer Now" with agents of the Republican Party in a manner that would satisfy the conduct prong in 11 CFR 109.21(d). Accordingly, you ask whether the communication's reference to "Republicans in Congress" constitutes a reference to a political party that would, in combination with the other requirements of the content standard in 11 CFR 109.21(c)(4), satisfy the content prong. The Commission concludes that it would.

Congress amended the Act in BCRA by stating for the first time that an expenditure made by any person in coordination with a political party committee or its agents is a contribution to that party committee. See 2 U.S.C. 441a(a)(7)(B)(ii). One way in which the Commission implemented this statutory provision in the context of coordinated communications was to include in the fourth content standard of 11 CFR 109.21(c) both communications that refer to a clearly identified candidate and communications that refer to a political party.

While the fourth content standard of 11 CFR 109.21(c) requires that Federal candidates be "clearly identified," it does not contain a similar requirement for political parties. 11 CFR 109.21(c)(4)(i). That portion of the content standard is satisfied if a communication merely "refers to a political party." Id. As you note, "political party" is defined in 11 CFR 100.15 as an organization that nominates or selects a candidate for election to any Federal office. The Republican Party, like the Democratic Party, meets that definition. The use of "Democratic" or "Democrats," or "Republican," "Republicans" or "GOP" or other terms that are variations of the formal name of a political party, is inherently a reference to a political party, whether or not it also serves other purposes.⁵ Thus, the phrase "Republicans in Congress" is a reference to the Republican Party and satisfies the portion of the fourth content standard set forth in 109.21(c)(4)(i).

The proposed advertisement would also satisfy the remaining elements of the fourth content standard in 11 CFR 109.21(c)(4). Ripon's "A Little Safer Now" qualifies as a public communication under 11 CFR 100.26 because it would be disseminated via cable television, and your request indicates that you intend to televise the communication prior to the November 2, 2004 general election, which is within the applicable 120-day window. See 11 CFR 109.21(c)(4)(ii). Finally, Ripon would direct its communication to voters in a jurisdiction in which one or more Republican candidates appear on the ballot because it is a Presidential election year and at least one Republican candidate will appear on the ballot in every district in the upcoming November 2, 2004 election. See 11 CFR 109.21(c)(4)(iii). Therefore, the proposed advertisement would satisfy 11 CFR 109.21(c)(4) and Ripon must not pay for the communication if Ripon's interactions with any political committee of the Republican Party satisfy any of the conduct standards in 11 CFR 109.21(d).

However, you also ask whether the result would be different if Ripon were to remove the words "Republicans in" from the advertisement. The Commission determines that if Ripon were to remove the term "Republicans in" and make no other changes, the dissemination of the proposed advertisement outside the 19th Congressional District of New York would not refer to a political party and thus would not

satisfy any of the four standards in the content prong of the coordinated communication test at 11 CFR 109.21(c) with respect to a political party committee. Nevertheless, as discussed above, Ripon would still be prohibited under the electioneering communication restrictions from using its general treasury funds to televise the communication within the 19th Congressional District of New York from August 15, 2004 to November 2, 2004. Accordingly, the Commission need not address whether the advertisement without "Republicans in" would satisfy the content prong of the coordinated communication test within Representative Kelly's district.

2. Is Ripon directly or indirectly established, financed, maintained, or controlled by a candidate for Federal office or an individual holding Federal office?

The Commission concludes that Ripon is not directly or indirectly established, financed, maintained, or controlled by a candidate or Federal officeholder. As explained below, the issue is relevant to your questions as to whether "A Little Safer Now" is a communication that promotes or supports, or attacks or opposes, any candidate for Federal office, or promotes or opposes a political party.

As amended by BCRA, the Act prohibits entities directly or indirectly established, financed, maintained, or controlled by, or acting on behalf of, one or more Federal candidates or individuals holding Federal office⁶ from raising or spending funds in connection with either Federal or non-Federal elections, unless the amounts consist of funds that are subject to the limitations and prohibitions of the Act. 2 U.S.C. 441i(e)(1)(A) and (B); 11 CFR 300.61 and 300.62. For example, such entities must use Federally permissible funds to pay for "Federal election activity" under 11 CFR 100.24, which includes any communication that promotes or supports, or attacks or opposes, a candidate for Federal office or promotes or opposes a political party. See 2 U.S.C. 431(20)(A)(iii) and (21); 11 CFR 300.61, 11 CFR 100.24(b)(3), and 11 CFR 100.25. Thus, corporations that are directly or indirectly established, financed, maintained, or controlled by a candidate or Federal officeholder are not permitted to use their general treasury funds to pay for such communications.

To determine whether an entity is directly or indirectly established, financed, maintained, or controlled by a candidate or Federal officeholder, the Commission examines the ten factors set out at 11 CFR 300.2(c)(2)(i) through (x) in the context of the overall relationship between the entity and the candidate or Federal officeholder. 11 CFR 300.2(c)(2); see also Advisory Opinion 2003-12.

You state that Members of Congress serving on Ripon's Advisory Board "do not engage in active governance or similar control over Ripon's activities, but instead serve merely in an honorary capacity to advise Ripon from time to time on policy development" (emphasis in original) and assist Ripon through participation in conferences and communications. See 11 CFR 300.2(c)(2)(ii). You specify that no candidate or Federal officeholder has authority over employment matters or Ripon's employees. See 11 CFR 300.2(c)(2)(iii). Ripon does not share past or current overlapping membership, employees or officers with any authorized committee of a Federal candidate. See 11 CFR 300.2(c)(2)(iv) through (vi). In addition, you state that Federal candidates do not, directly or indirectly, provide funds or goods on an ongoing basis to Ripon, nor is Ripon aware of any current Member of Congress who played a role in founding Ripon. See 11 CFR 300.2(c)(2)(vii) through (ix). Finally, you indicate that there is no similar pattern of receipts or disbursements between Ripon and any campaign committee of a Federal candidate on its Advisory Board. See 11 CFR 300.2(c)(2)(x).

Based on your representations regarding the relationship between Ripon and Federal candidates and Federal officeholders, the Commission concludes that Ripon is not an entity that is directly or indirectly established, financed, maintained, or controlled by a candidate or Federal officeholder and is therefore not subject to the provisions in 2 U.S.C. 441i(e) and 11 CFR 300.61, which govern certain activities of such entities. Because Ripon is not subject to the restrictions in 2 U.S.C. 441i(e) and 11 CFR 300.61, the Commission need not address the question of whether "A Little Safer Now" promotes or supports, or attacks or opposes, any candidate for Federal office, or promotes or opposes a political party.

The Commission expresses no opinion regarding Ripon's qualification for tax-exempt status under 26 U.S.C. 501(c)(4) or any other ramifications of the proposed activities under the Internal Revenue Code because those questions are outside the Commission's jurisdiction.

This response constitutes an advisory opinion concerning the application of the Act and Commission regulations to the specific transaction or activity set forth in your request. See 2 U.S.C. 437f. The Commission emphasizes that, if there is a change in any of the facts or assumptions presented, and such facts or assumptions are material to a conclusion presented in this advisory opinion, then the requestor may not rely on that conclusion as support for its proposed activity.

Sincerely,

(signed)

Bradley A. Smith
Chairman

Enclosures (AOs 2004-15, 2003-12, and 1985-14)

ATTACHMENT A

TELEVISION: 30 Seconds
CLIENT: Ripon Society
PRODUCER: Bill Greener III
TITLE: A Little Safer Now

Video (scene 1)

Scenes of terrorist activity throughout the world not limited to 9-11 (with support headlines).

Audio (scene 1)

Kelly: We all have to do everything possible to fight terrorism.

Video (scene 2)

Sue Kelly to Camera with chyron i.d.

Audio (scene 2)

Republicans in Congress are working for bipartisan solutions to the challenges we face.

Video (scene 3)

Man and woman at screen of computer in high-tech situation.

Super: Locate The Terrorists Money.

Audio (scene 3)

We're creating new tools to detect and sever the financial lifelines that support terrorist cells.

Video (scene 4)

Picture or video of terrorists being arrested, support headlines. Super: Stop The Terrorists Money.

Audio (scene 4)

Shutting down the bankrolls of an enemy that hides in the shadows will do a lot to help make our country safer.

Video (scene 5)

Video reinforcing continuing nature of threat. Super: There's More To Be Done.

Audio (scene 5)

We need to do more, and we will.

Video (scene 6)

Ripon Society Information, including website, phone number, etc. (Disclaimer)

Audio (scene 6)

The Ripon Society wanted you to have these facts. For more information, contact us.

1 The electioneering communication source restrictions do not apply to any corporation that is a qualified nonprofit corporation ("QNC") under 11 CFR 114.10. See 2 U.S.C. 441b(c)(2) and 11 CFR 114.2(b)(2). However, 11 CFR 114.10(c)(4)(ii) provides that entities that "directly or indirectly accept any donations of anything of value from business corporations..." do not qualify as QNCs. For purposes of this request, the Commission assumes that Ripon is not a QNC because you indicate that Ripon "receives contributions from corporations" and your request does not claim QNC status for Ripon.

2 August 15, 2004 is the thirtieth day prior to the primary on September 14, 2004, and September 14 falls within 60 days of the New York general election on November 2, 2004.

3 See also Advisory Opinion 1985-14 (determining that advertisements using the tagline "the Republicans in Congress" were not subject to the Act's limitations on expenditures for political advertisements under a standard

that required such advertisements to depict "a clearly identified candidate" in order to come within the Act's limitations).

4 A "public communication" includes, among other communications, "any broadcast, cable or satellite communication." 11 CFR 100.26.

5 In some cases the terms may also be used as an unambiguous reference to a specific Federal candidate, such as "the Democratic presidential nominee" or "the Republican candidate for Senate in the State of Georgia." See 11 CFR 100.17 and 100.29(b)(2).

6 Under 2 U.S.C. 431(3), "Federal office" means "the office of President or Vice President, or of Senator or Representative in, or Delegate or Resident Commissioner to, the Congress." See also 11 CFR 100.4.