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COMMISSION
OFFICE OF GENERAL
COUNSEL

2003 FEB 21 P 4:01

Federal Election Commission
Office of General Counsel
999 E Street, NW
Washington, DC 20463

Re: Advisory Opinion Request

Dear Commissioners:

On behalf of State Senator Bill Boling, State Delegate Bill Janis, and Chesterfield County School Board Member Beth Davis, who are candidates in the November 4, 2003, Virginia election, and Eric Cantor, a Member of the United States House of Representatives, ("Requestors") we respectfully request an advisory opinion from the Federal Election Commission pursuant to 2 U.S.C. § 437f of the Federal Election Campaign Act of 1971, as amended.

While there are no Federal candidates to be elected this year in Virginia, there will be hundreds of state and local candidates on the ballot. Virginia will elect forty State Senators, one hundred Delegates to the General Assembly, City Councilmen, Boards of Supervisors, local School Boards, Sheriffs, Commissioners of Revenue, Commonwealth's attorneys, and local Soil and Water Boards. There is a long and established history of Federal candidates and officeholders being politically involved in these races.

The state and local candidates requesting this advisory opinion would like, as in past campaigns, the participation and support of Republican Federal candidates and officeholders including Congressman Cantor. Specifically, they would like such officials to (1) attend campaign events, including fundraisers, (2) solicit financial support, and (3) do so orally or in writing. Congressman Cantor would like to similarly participate in their campaigns. However, Requestors are unsure about the degree to which Federal candidates and officeholders may engage in state and local election activities and request guidance from the Commission.

LEGAL ANALYSIS

A. Federal Law

The recently passed Bipartisan Campaign Reform Act ("BCRA") states that Federal candidates, officeholders, their agents, or entities they control shall not "solicit, receive, direct, transfer, or spend funds" in connection with a non-Federal election unless the funds comply with Federal amount and source restrictions. 2 U.S.C. § 441i(e)(1). However, a Federal candidate or officeholder "may attend, speak, or be the featured guest at a fundraising event for a State, district, or local committee of a political party." *Id.* § 441i(e)(3).

B. Federal Regulations

Regulations implementing the BCRA explain that Federal candidates, officeholders, their agents, or entities they control "may solicit, receive, direct, transfer, spend, or disburse funds in connection with any non-Federal election, only in amounts and from sources that are consistent with State law, and that do not exceed the Act's contribution limits or come from prohibited sources under the Act." 11 C.F.R. § 300.62. The term "solicit" is defined as "*to ask* that another person make a contribution, donation, transfer of funds, or otherwise provide anything of value, whether the contribution, donation, transfer of funds, or thing of value, is to be made or provided directly, or through a conduit or intermediary." *Id.* § 300.2(m) (emphasis added). The term "direct" means "*to ask* a person who has expressed an intent to make a contribution, donation, or transfer of funds, or to provide anything of value, to make that contribution, donation, or transfer of funds, or to provide that thing of value, including through a conduit or intermediary." *Id.* § 300.2(n) (emphasis added).

Consistent with the BCRA, an exception to this general rule was promulgated to allow a Federal candidate or officeholder to "attend, speak, or be a featured guest at a fundraising event for a State, district, or local committee of a political party." *Id.* § 300.64. The political party may publicize the Federal candidate or officeholder's participation in the fundraising event, and the Federal candidate or officeholder "may speak at such events without restriction or regulation." *Id.*

C. Explanation and Justification of Federal Regulations

The Explanation and Justification ("E&J") of the meaning of "solicit" and "direct" suggests that their scope is narrowly limited to direct pleas by Federal candidates and officeholders. The relevant portion begins by explaining that earlier proposed definitions of "solicit" and "direct" "included a request, suggestion, or recommendation." 67 Fed. Reg. 49086. In apparent recognition that the definitions must be narrowly limited to verbal or written appeals by Federal candidates or officeholders, the E&J restated the language of the final rule requiring a Federal candidate or officeholder to actually "ask" for the funds or other things of value. *Id.* The E&J continued by describing comments that criticized the rulemaking's proposed use of a "request, suggestion, or recommendation" standard as too vague. *Id.*

Furthermore, when discussing whether the meaning of "solicit" should include "a series of conversations which, when taken together, constitute a request for contributions or donations," the E&J offered the following response, the principles of which provide a theoretical justification for regulation in this area based only upon actual words spoken or written by Federal candidates or officeholders:

> The Commission does not believe it is appropriate to promulgate a regulation that would require examination of a private conversation to impute intent when the conversation is not clear on its face. The Commission is concerned that the ability to impute intent could lead to finding a violation when the individual who made the comment may have had no intention whatever of soliciting a contribution. Such a result is not dictated by BCRA's statutory language, and would raise constitutional concerns.

67 Fed. Reg. 49087. Similarly, in the context of the meaning of the term "direct," the E&J "concludes that a precise definition in this context is necessary to avoid vague and overbroad application of the term." *Id.*

D. Virginia Law

Virginia does not restrict the amount or sources of funds that can be raised by the state and local candidates requesting this opinion. Therefore, they may raise funds in unlimited amounts and may do so from corporations and other entities that are otherwise prohibited from participating in Federal elections.

QUESTIONS PRESENTED

To what extent may Federal candidates and officeholders participate in Requestors' campaign activities when state law permits contributions in excess of Federal amount limitations and without source restrictions? Specifically:

1. May a Federal candidate or officeholder "solicit" or "direct" contributions to state or local candidates, either orally or in writing, provided he does so within the Federal contribution limits and source restrictions? Are general solicitations that do not request specific amounts permissible? Would oral or written disclaimers be appropriate, and if so, what should they say?

2. Has a Federal candidate or officeholder committed a violation if, in response to a proper solicitation by the Federal candidate or officeholder (to be determined by the answer to question 1), a state or local candidate receives a contribution in excess of the Federal amount limitations or from a federally prohibited source?

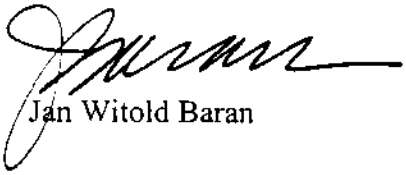
3. May a Federal candidate or officeholder attend fundraising events sponsored by state or local candidates at which funds in excess of the Federal amount or source restrictions are raised? If no, how can the events be structured to allow for Federal candidate and officeholder attendance? If yes, may Federal candidate and officeholder attendance at the event be publicized and may they participate in the event as featured guests or by speaking, provided that they do not "solicit" or "direct" funds in excess of the Federal amount or source limitations (i.e., in violation of the standard provided in response to question 1)?

4. May a Federal candidate or officeholder attend a fundraising or campaign event for a state or local candidate if the event is paid for with funds lawful under Virginia law but in excess of the Federal amount or source restrictions?

5. May the name of a Federal candidate or officeholder appear on written fundraising solicitations that are not signed by the Federal candidate or officeholder (e.g., a solicitation stating that the Federal candidate or officeholder is an "honorary chairperson" of the state candidate's campaign committee, or that the Federal candidate or officeholder is a member of the "host committee" of a state candidate's fundraising event that the Federal candidate or officeholder does not attend)?

6. May a Federal candidate or officeholder ask individuals who are not Federal candidates or officeholders to raise money on behalf of a candidate for state or local office?

Sincerely,



Jan Witold Baran