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AOR 2003-32

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October 14, 2003

Lawrence Norton, Esq.
Federal Election Commission
Office of the General Counsel
999 E Street, N.W.
Washington, D.C. 20463

Re: Advisory Opinion Request

Dear Mr. Norton:

This letter constitutes a request for an advisory opinion on behalf of Inez Tenenbaum, a state officeholder and federal candidate, regarding the use of funds in her state campaign account.

Factual Background

Ms. Tenenbaum is the South Carolina State Superintendent of Education and a candidate for United States Senate. She was first elected Superintendent in 1998 and was reelected to the office in 2002. She became a candidate for United States Senate on August 19, 2003.

As a candidate for South Carolina state office in the 2002 election, Ms. Tenenbaum's campaign maintained a state campaign account into which she raised funds to support her candidacy. Ms. Tenenbaum's campaign has paid all of its expenses from the 2002 election and is prepared to terminate the campaign. The account contains surplus funds that, while compliant with South Carolina law, were not raised in accordance with the contribution limits and source restrictions of the Federal Election Campaign Act (the "Act"). Ms. Tenenbaum would like to donate these funds to several organizations, both within and outside South Carolina. As she is now a federal candidate, Ms. Tenenbaum understands that the Act, as amended by the Bipartisan Campaign Reform Act ("BCRA"), may limit her ability to spend these funds.

Legal Framework

As amended, the Act and its implementing regulations generally prohibit federal candidates and officeholders, and entities they establish, finance, maintain, or control, from soliciting, receiving, directing, transferring, or spending funds in connection with an election for federal office unless the funds are "subject to the limitations, prohibitions, and reporting requirements" of the Act. 2 U.S.C. § 441i(e)(1)(A) (2003); see also 11 C.F.R. § 300.61 (2003). The Act similarly prohibits federal candidates and officeholders from spending funds in connection with nonfederal elections unless the funds are subject to the contribution limitations and source restrictions of the Act. 2 U.S.C. § 441i(e)(1)(B); 11 C.F.R. § 300.62.

Ms. Tenenbaum's state campaign account is "established, financed, maintained, or controlled" by a federal candidate, and is therefore subject to the Act's general prohibition on raising and spending nonfederal funds. See 2 U.S.C. § 441i(e)(1); 11 C.F.R. § 300.2(c). However, the Act provides that the limitations of Section 441i(e)(1) do not apply to the spending of funds by a federal candidate or officeholder "who is or was also a candidate for State or local office." 2 U.S.C. § 441i(e)(2) (emphasis added). This exemption notwithstanding, the Commission's rule interpreting the statute applies only to federal candidates and officeholders who are currently candidates for state or local office. See 11 C.F.R. § 300.63.

As Ms. Tenenbaum has operated her state campaign account in accordance with South Carolina law, the account contains funds that do not comply with the contribution limits and source restrictions of the Act. South Carolina law allows state campaigns to accept contributions from corporations; however, the Act generally prohibits corporations from making contributions and expenditures in connection with federal elections. 2 U.S.C. § 441b. In addition, statewide candidates in South Carolina may accept contributions of up to $3,500 per election cycle from an individual, and South Carolina law does not restrict contributions on a per-election basis. S.C. Code Ann. § 8-13-1314 (2003). The Act, however, prohibits individual donors from making contributions to a federal candidate aggregating to more than $2,000 per election. 2 U.S.C. § 441a(a)(1).

South Carolina law enumerates the ways a state campaign may spend its campaign funds upon termination. A campaign with surplus contributions in excess

of expenditures after an election may spend the funds "upon final disbursement" in a number of ways, including: 1) making a contribution to a Section 501(c)(3) charitable organization; 2) making a contribution to a political party or to a legislative caucus committee; 3) making a contribution to the state's general fund; and 4) returning them pro rata to all contributors. S.C. Code Ann. §§ 8-13-1340, -1370.

In compliance with South Carolina law, Ms. Tenenbaum would like to use the excess money in her state campaign account to make donations to a number of organizations. Ms. Tenenbaum wishes the Commission to clarify whether she may make these donations, and therefore asks the Commission the following questions:

1) May Ms. Tenenbaum donate the funds in her nonfederal account to Section 501(c)(3) charitable organizations?

Under South Carolina law, Ms. Tenenbaum's campaign committee may donate campaign funds in excess of its obligations to Section 501(c)(3) charitable organizations. S.C. Code Ann. § 8-13-1370. Ms. Tenenbaum would like to know if she may make donations to the following organizations: a) a Section 501(c)(3) organization that conducts no election-related activity; b) a Section 501(c)(3) organization that conducts some election-related activity, including "federal election activity," but not as its principal purpose; and c) a Section 501(c)(3) organization that either conducts certain "federal election activity" as its principal purpose or would spend her donation specifically on those activities.

Section 441i(e)(2) of the Act excepts individuals who are or were state candidates from Section 441i(e)(1)'s general prohibition on soliciting, receiving, directing, transferring, or spending nonfederal funds. The plain language of this exception would allow an individual who <u>was</u> a state candidate when the funds were raised to spend nonfederal funds in accordance with state law as long as the expenditure refers only to a state candidate for the office sought. 2 U.S.C. § 441i(e)(2).

If the Commission believes that Section 441i(e)(1) applies to the activities Ms. Tenenbaum contemplates, Ms. Tenenbaum would like the Commission to clarify whether she may nonetheless donate campaign funds from her state campaign account to certain Section 501(c)(3) organizations under the terms established in 2 U.S.C. § 441i(e)(4).

The Act and its implementing rules allow a federal candidate or officeholder to solicit nonfederal funds for Section 501(c) charitable organizations under certain circumstances. 2 U.S.C. § 441i(e)(4)(A); 11 C.F.R. § 300.65. A federal candidate may make a general solicitation of funds, without source or amount restrictions, for a Section 501(c) organization whose principal purpose is not to conduct election activities, including certain "federal election activities" enumerated under the law, as long as the solicitation is not to obtain funds for activities in connection with an election. See 2 U.S.C. § 441i(e)(4)(A); see also 11 C.F.R. § 300.65. A federal candidate may also make a specific solicitation of funds, from individuals in amounts of $20,000 or less in a calendar year, to support a Section 501(c) organization's certain "federal election activities" or to support a Section 501(c) organization that carries out these activities as its principal purpose. Id. These provisions of the law were intended to allow federal candidates and officeholders "to assist, in limited ways, section 501(c) organizations." 148 Cong. Rec. S2140 (daily ed. March 20, 2002) (statement of Sen. McCain).

Ms. Tenenbaum first asks whether she may donate the funds in her state campaign account to a Section 501(c)(3) organization that conducts no election-related activity. As the Act allows federal candidates to raise nonfederal funds for such an organization, Ms. Tenenbaum does not believe the Act prohibits her from making a donation under terms consistent with the Act's solicitation exception. See Explanation and Justification of Final Rule, Prohibited and Excessive Contributions: Non-Federal Funds or Soft Money, 67 Fed. Reg. 49,064, 49,109 (July 29, 2002).

In addition, Ms. Tenenbaum requests the Commission to clarify whether she may donate the funds in her state campaign account to a Section 501(c)(3) organization that does participate in some activities in connection with an election, including the "federal election activities" enumerated at 11 C.F.R. § 300.65(c), but not as its principal purpose. Following the guidelines established by 2 U.S.C. § 441i(e)(4)(A), Ms. Tenenbaum would not specify how she wishes the funds to be spent.

Finally, Ms. Tenenbaum asks the Commission to clarify whether she may donate funds from her state campaign account to a Section 501(c)(3) organization to be used specifically for the "federal election activities" enumerated in 11 C.F.R. § 300.65(c) or to a Section 501(c)(3) organization whose principal purpose is to carry

out those activities, as long as she does so within the $20,000 limit set out in 2 U.S.C. § 441i(e)(4)(B).

2) May Ms. Tenenbaum donate the funds to the South Carolina Democratic Party or a state legislative caucus committee in South Carolina?

South Carolina law would permit Ms. Tenenbaum's campaign committee to donate surplus campaign funds to a state party committee or a state legislative caucus committee formed under state law. S.C. Code Ann. §§ 8-13-1340, -1370. Ms. Tenenbaum would like the Commission to clarify whether the Act would prohibit her from contributing funds from her state campaign account to these entities.

The Act and its implementing regulations generally prohibit federal candidates and officeholders from soliciting, receiving, directing, transferring, or spending nonfederal funds in connection with federal elections. See 11 C.F.R. § 300.61. However, the Commission has not issued specific guidance as to when an expenditure is made "in connection with" a federal election under the Act.

Ms. Tenenbaum asks the Commission whether the proposed expenditures would be "in connection with an election for federal office." Ms. Tenenbaum raised the funds to support her state candidacy and the suggested recipients are entities formed and governed by South Carolina law. She will make the donations to dispose of surplus campaign funds in accordance with state law. The donors to her state campaign account have notice of these potential recipients and expect that their funds, if not used during the campaign, will be spent in these ways.

Moreover, the Commission's rules allow a state candidate to spend nonfederal funds in connection with his or her state candidacy even if he or she is also a federal candidate. Explanation and Justification for Final Rule, 67 Fed. Reg. at 49,107 (noting that a candidate in both a state and a federal election "must raise and spend only Federal funds in connection with the Federal campaign" (emphasis added)). This reasoning would seemingly apply equally to Ms. Tenenbaum, who is simultaneously a state officeholder and a federal candidate. Accordingly, Ms. Tenenbaum should be permitted to donate her excess state campaign funds in accordance with state law in her capacity as a state officeholder and former state candidate, as long as she spends only federally-permissible funds in connection with her federal candidacy.

Finally, Ms. Tenenbaum asks the Commission to confirm that a donation of funds from Ms. Tenenbaum's state campaign account to the South Carolina Democratic Party or a legislative caucus committee would not constitute the unlawful spending of nonfederal funds "in connection with [a] nonfederal election." See 11 C.F.R. § 300.62. The Commission has not issued specific guidance addressing when an expenditure of this nature is made "in connection with" a nonfederal election so as to bring it within the purview of the prohibition. As Ms. Tenenbaum is no longer a candidate for state office and does not propose to donate the funds to support state candidates, she does not believe that her spending of these funds would be "in connection with" a nonfederal election. Ms. Tenenbaum asks the Commission to confirm this understanding.

Please do not hesitate to call us should you have questions about this matter.

Very truly yours,

Marc E. Elias
Counsel to Inez Tenenbaum

"Elias, Marc-WDC" <MElias@perkinscoie.com> on 10/20/2003 09:27:46 PM

To: "'mmarinelli@fec.gov'" <mmarinelli@fec.gov>
cc: mdinh@fec.gov

Subject: RE: questions on Tenenbaum AOR

Here is the response to your questions:

None of her fundraising for state office referenced her potential candidacy for federal office.

My client did raise money into the state account after the 2002 election in anticipation of a 2006 reelection bid. No funds have been raised into that account since she declared her federal candidacy.

Please let me know if you have any additional questions.

-----Original Message-----
From: mmarinelli@fec.gov [mailto:mmarinelli@fec.gov]
Sent: Thursday, October 16, 2003 1:28 PM
To: Elias, Marc-WDC
Cc: mdinh@fec.gov
Subject: questions on Tenenbaum AOR

Mr. Elias

Thank you for getting back to me on the request questions.

We would want the responses to our questions in writing but for that purpose- an e-mail response would be considered a written response. Therefore an e-mail confirmation of your previous responses would do fine

You indicated that none of Ms. Tenenbaum's fundraising for her campaign for Superintendent referenced a possible candidacy for Federal office.

With regard to the fundraising, I had asked whether any funds were raised after her election to become the Superintendent of Education. My question should have been more focused. We would want to know if any of the surplus state funds she describes in her request were raised after her 2002 re-election to State office

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