FEDERAL ELECTION COMMISSION

Washington, DC 20463

April 19, 2005

MEMORANDUM

TO: The Commission

THROUGH: James A. Pehrkon
Staff Director

FROM: Lawrence H. Norton
General Counsel

Rosemary C. Smith
Associate General Counsel

Brad C. Deutsch
Assistant General Counsel

Jonathan M. Levin
Attorney

SUBJECT: Draft AO 2005-02

Attached is a proposed draft of the subject advisory opinion. We request that this draft be placed on the agenda for April 21, 2005.

Attachment

AO DRAFT COMMENT PROCEDURES

The Commission permits the submission of written public comments on draft advisory opinions when proposed by the Office of General Counsel and scheduled for a future Commission agenda.

Today, DRAFT ADVISORY OPINION 2005-02 is available for public comments under this procedure. It was requested by counsel, Marc E. Elias and Brian G. Svoboda, on behalf of Senator Jon Corzine and Corzine for Governor, Inc.

Proposed Advisory Opinion 2005-02 is scheduled to be on the Commission's agenda for its public meeting of Thursday, April 21, 2005.

Please note the following requirements for submitting comments:

1) Comments must be submitted in writing to the Commission Secretary with a duplicate copy to the Office of General Counsel. Comments in legible and complete form may be submitted by fax machine to the Secretary at (202) 208-3333 and to OGC at (202) 219-3923.

2) The deadline for the submission of comments is 2:00 PM (Eastern Time) on April 20, 2005.

3) No comments will be accepted or considered if received after the deadline. Late comments will be rejected and returned to the commenter. Requests to extend the comment period are discouraged and unwelcome. An extension request will be considered only if received before the comment deadline and then only on a case-by-case basis in special circumstances.

4) All timely received comments will be distributed to the Commission and the Office of General Counsel. They will also be made available to the public at the Commission's Public Records Office.

CONTACTS

Press inquiries: Robert Biersack (202) 694-1220

Commission Secretary: Mary Dove (202) 694-1040

Other inquiries:

To obtain copies of documents related to AO 2005-02, contact the Public Records Office at (202) 694-1120 or (800) 424-9530.

For questions about comment submission procedures, contact Rosemary C. Smith, Associate General Counsel, at (202) 694-1650.

MAILING ADDRESSES

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ADVISORY OPINION 2005-02 BLUE DRAFT

Marc E. Elias, Esq.
Brian G. Svoboda, Esq.
Perkins Coie LLP
607 14th Street, N.W.
Washington, D.C. 20005-2011

Dear Messrs. Elias and Svoboda:

We are responding to your advisory opinion request on behalf of United States Senator Jon Corzine and Corzine for Governor, Inc., concerning the application of the Federal Election Campaign Act of 1971, as amended (the "Act"), and Commission regulations to fundraising activities by Senator Corzine in connection with his current candidacy for Governor of New Jersey and also for the benefit of other non-Federal candidates and committees in New Jersey.

Background

The facts of this request are presented in your letters dated February 11 and 23, 2005, as well as in reports on file with the Commission and publicly available materials.

Senator Corzine is a United States Senator from New Jersey, elected in 2000. On December 2, 2004, he announced his intention to run for Governor of New Jersey in the 2005 primary election. Corzine for Governor, Inc., is his State campaign committee. In early May 2001, Senator Corzine became a candidate, as defined in 2 U.S.C. 431(2), for re-election to the U.S. Senate in 2006. You indicate that, after announcing his gubernatorial candidacy, Senator Corzine is no longer seeking re-election to Federal office.

The primary election for New Jersey governor and other State and local offices will take place on June 5, 2005, and the general election for those offices will take place on November 8, 2005. Neither of those elections will involve either the nomination or election of any candidates

for Federal office; unlike most other States, New Jersey elects candidates to statewide office, the State legislature, and other State and local offices during odd-numbered years.

Senator Corzine "would like to be able to act like any other gubernatorial candidate, notwithstanding his status as a United States Senator." As a gubernatorial candidate, he wishes to raise funds, both by himself and through his agents, for Corzine for Governor, for other New Jersey State and local candidates, for New Jersey State political action committees ("PACs"), and for the non-Federal accounts of State and local party committees – all within the limits prescribed by New Jersey State law. You indicate that Senator Corzine and his agents "would like to participate in the spending activities undertaken by New Jersey State and local party committees to the maximum extent permitted by New Jersey State law."

Briefly stated, 2 U.S.C. 441i(e)(1)(B) and 11 CFR 300.62 provide that a Federal candidate or officeholder may raise and spend funds in connection with a non-Federal election only in amounts and from sources that are consistent with State law *and* that do not exceed the Act's limitations or come from sources prohibited by the Act. An exception to the application of the Act's limitations and prohibitions, at 2 U.S.C. 441i(e)(2) and 11 CFR 300.63, applies when the Federal candidate or officeholder raises funds "solely in connection" with his own State election and the "solicitation, receipt, or spending" refers only to himself or to his non-Federal opponent. You note that the source restrictions and donation limits of New Jersey law differ significantly from those of Federal law. Significantly, New Jersey law permits donations by labor organizations and most types of corporations, and New Jersey donation limits differ from the Act's limits at 2 U.S.C. 441a(a).[1]

[1] For example, under New Jersey law, gubernatorial candidates may receive up to $3,000 per election from each lawful source. Other non-Federal candidates may receive $2,600 per election from individuals, corporations, and labor organizations, $8,200 from a State PAC, and unlimited amounts from State party and from county party committees (for candidates within the county). Individuals, corporations, and labor organizations may donate up to

Although the proposed solicitations to be made by Senator Corzine and his agents would not always be for donations payable to his gubernatorial campaign committee, you state that they would be "in connection with" his gubernatorial campaign and that none of the activities would be in connection with any Federal election or refer to any Federal candidate. You indicate that State and local candidates often look to the "top of the ticket" for support, and that the extent of the cooperation and help the candidates give to Senator Corzine's gubernatorial bid may depend upon the extent he is able to offer such support. You also indicate that the success of efforts by State PACs and party committees on behalf of the November 2005 Democratic ticket may depend on the support given by the "top of the ticket." You state that all of the activity described in your request will be "exclusively for the purpose of influencing" Senator Corzine's 2005 gubernatorial campaign.

In your threshold question, you ask the Commission to confirm that the Act and Commission regulations allow Senator Corzine and his agents to raise funds within New Jersey limits, but not subject to the Federal restrictions, for the above-described entities.. If the Commission concludes otherwise, *i.e.*, that Senator Corzine and his agents would, through 2 U.S.C. 441i(e)(1)(B), be subject to the Act's limitations and prohibitions, you seek responses to a number of questions set out below.

Threshold Question Presented

May Senator Corzine and his agents raise funds that comply with State law, but not with the limits and prohibitions of the Act, for the campaigns of other New Jersey State and local candidates, State PACs, and the non-Federal accounts of State and local party committee, so long as the Senator and his agents (1) comply with State law; (2) solicit, receive, and spend funds solely in connection with the June and November 2005 elections; and (3) refer to Senator

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$7,200 per calendar year to State PACs, and up to $25,000 and $37,000 per calendar year to the non-Federal accounts of a State party committee and county party committee respectively. *See* New Jersey Statutes Annotated ("NJSA"), 19.44A-1, *et. seq.*; New Jersey Administrative Code ("NJAC"), 19:25-11.2, 15.6, and 16.6.

Corzine only in his capacity as a gubernatorial candidate and do not refer to any other Federal candidate?

Response to the Threshold Question

No. Senator Corzine and his agents may raise funds for the campaigns of the other New Jersey State and local candidates, State PACs, and the non-Federal accounts of State and local party committees *only* in amounts that are not in excess of 2 U.S.C. 441a(a) and from sources that are permissible under the limitations and prohibitions of the Act.

As amended by the Bipartisan Campaign Reform Act of 2002 ("BCRA"), Public Law 107-155, 116 Stat. 61 (2002), the Act regulates certain actions of Federal candidates and officeholders, their agents, and entities directly or indirectly established, financed, maintained or controlled by, or acting on behalf, of Federal candidates or officeholders when they raise or spend funds in connection with either Federal or non-Federal elections. 2 U.S.C. 441i(e); 11 CFR 300.60 through 300.65. In pertinent part, BCRA, and the Commission regulations implementing BCRA prohibit those persons from soliciting, receiving, directing, transferring, spending, or disbursing funds in connection with any non-Federal election unless the funds do not exceed the amounts permitted with respect to contributions to candidates and political committees under 2 U.S.C. 441a(a)(1), (2), and (3) and do not come from sources prohibited under the Act. 2 U.S.C. 441i(e)(1)(B); 11 CFR 300.62; *see also* 2 U.S.C. 441a, 441b, 441c, 441e, and 441f. Commission regulations also require such funds to be in amounts and from sources that comply with State law. 11 CFR 300.62.

The aim of these provisions is to limit the ability of Federal candidates and officeholders to raise or spend soft money in connection with State and local elections, but not to eliminate the

activity entirely. *See McConnell v. Federal Election Commission*, 540 U.S. 93, 182.[2] Unlike other sections of BCRA specifically dependent upon the appearance of a Federal candidate on the ballot (*see, e.g.*, 2 U.S.C. 431(20)(A)(i) and (ii)), the limitations and prohibitions in 2 U.S.C 441i(e)(1)(B) apply to a Federal officeholder at any time, regardless of whether any Federal candidate appears on the ballot for the relevant election.

In 2 U.S.C. 441i(e)(2), BCRA provides a limited exception for the situation in which a Federal candidate or officeholder is seeking election to a State office. Specifically, section 441i(e)(2) provides that the restrictions of 2 U.S.C. 441i(e)(1)(B) do not apply to the solicitation, receipt, or spending of funds by a Federal officeholder who is also a candidate for a State or local office *solely* in connection with such election, if the solicitation, receipt, or spending of funds is permitted under State law *and refers only to the Federal officeholder* who is also a State or local candidate, *and/or to his opponents*. *See* 11 CFR 300.63; s*ee also* Explanation and Justification for Prohibited and Excessive Contributions; Non-Federal Funds or Soft Money; Final Rule ("Soft Money Final Rules"), 67 FR 49064, 49107 (July 29, 2002).[3] Thus, any solicitation, receipt, or spending of funds by a Federal officeholder that refers to State or local candidates running for entirely different offices does not come within the exception.

Therefore, the Commission concludes that, as a Federal officeholder, Senator Corzine, his agents, and Corzine for Governor may solicit donations to other State and local candidates

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[2] In *McConnell*, the Supreme Court upheld 2 U.S.C. 441i(e), stating:

> Large soft-money donations at a candidate's or officeholder's behest give rise to all of the same corruption concerns posed by contributions made directly to the candidate or officeholder. Though the candidate may not ultimately control how the funds are spent, the value of the donation to the candidate or officeholder is evident from the fact of the solicitation itself.

540 U.S. at 182.

[3] Neither 2 U.S.C. 441i(e)(2) nor 11 CFR 300.63 contains an express allowance for fundraising or spending by an officeholder's agents. The Commission concludes that, in view of the kinds of activities that all campaigns normally engage in, the exception described in 2 U.S.C. 441i(e)(2) and 11 CFR 300.63 applies to all individuals described in 2 U.S.C. 441i(e)(1) and 11 CFR 300.60, and hence applies to the activities of agents and to entities established, financed, maintained, or controlled by, or acting on behalf of, the Federal officeholder.

only in accordance with the limitations and prohibitions of the Act, as well as with State law ("Federally permissible funds"). 2 U.S.C. 441i(e)(1)(B) and 11 CFR 300.62.[4] This includes solicitations by Senator Corzine for donations to State PACs or party committees, regardless of whether the solicitations refer to other non-Federal candidates, because solicitations for such entities will be, as you indicate, for the purpose of raising funds to be used "in efforts to support the November 5, 2005 Democratic ticket," which includes other non-Federal candidates.

Additional Questions

You ask several additional questions in the event the Commission concludes that, pursuant to 2 U.S.C. 441i(e)(1)(B), there are circumstances under which Senator Corzine and his agents are limited to raising and spending funds that comply with the Act's limitations and prohibitions by virtue of Senator Corzine's status as a Federal officeholder.

1. *New Jersey law permits two State or local candidates to conduct their activities together through a "joint candidates committee." May Senator Corzine raise only up to $2,100 per election from an individual donor for such a joint candidates committee (in which Senator Corzine is not involved), or may he raise up to $4,200 per election because there are two candidates?*

Pursuant to 2 U.S.C. 441i(e)(1)(B) and 11 CFR 300.62, Senator Corzine and his agents may raise up to $2,100 per election[5] from an individual donor for a candidate for State or local office. *See* 2 U.S.C. 441a(a)(1)(A); Advisory Opinion 2003-03. Under New Jersey law, a "joint candidates committee" ("JCC") is a committee that is established by two or more candidates running "in the same election [but for different offices] in a legislative district, county,

[4] Federally permissible funds are funds that could have been deposited in a federal account of a political committee. Thus, in terms of solicitations for candidates, they are donations from individuals in amounts up to $2,100 per election. In terms of solicitations for State PACs, individuals may donate up to $5,000 per calendar year.
[5] Similar to the Act, a primary election and a general election are separate elections under New Jersey law. *See* NJAC 19:25-1.7.

municipality, or school district . . . ." NJSA 19.44A-3(r). A candidate may establish his own single candidate committee while also co-establishing a JCC. Donations to a JCC are attributable on an equally divided basis among the candidates, and the amounts attributable to a candidate must be aggregated with the amounts received by his single candidate committee for the purpose of determining whether the donor has exceeded the New Jersey limits on donations to candidates. *See* NJAC 19:25-11.4 and 11.5.[6]

Using your example of a JCC for two candidates, the Commission views such a committee as equivalent to an additional authorized committee for each of the two candidates. Accordingly, Senator Corzine may raise up to $4,200 per election from an individual donor for the JCC, if he raises no other funds for the participating candidates' campaigns or single candidate committees from that individual. If Senator Corzine raises funds from an individual donor for either of the two candidates, other than funds raised for the JCC, such donations must be taken into account when determining how much Senator Corzine can raise for the JCC to ensure that he does not raise more than $2,100 per election in the aggregate from the individual for either candidate.

2. *Questions regarding raising funds for State and local party committee non-Federal accounts.*

You ask a series of questions pertaining to the solicitation by Senator Corzine and his agents for the non-Federal accounts of the New Jersey State and local Democratic party committees. In accordance with 2 U.S.C. 441i(e)(1)(B) and 11 CFR 300.62, the responses to these questions implicate the limits on contributions to party committees in 2 U.S.C. 441a(a), the affiliation of State and local party committees, and the effect of previous contributions by an individual to a party committee's Federal account.

[6] Thus, under "equal attribution," the limit for donations to one of the candidates in a JCC committee can compel a

We address your specific questions below. As a preliminary matter, however, we note that the Act, as interpreted by Commission regulations, provides a complete exemption from the restrictions at 2 U.S.C. 441i(e)(1)(B) and 11 CFR 300.62 under one set of circumstances. Specifically, 2 U.S.C. 441i(e)(3) states that "[n]otwithstanding [2 U.S.C. 441i(e)(1)], a candidate or an individual holding Federal office may attend, speak or be a featured guest at a fundraising event for a State, district, or local committee of a political party." Under 11 CFR 300.64(b), candidates and Federal officeholders may speak at such events "without restriction or regulation." Therefore, Senator Corzine may appear at a fundraising event for a State or local party committee and solicit donations at that event exceeding the amount limitations and without regard to the source prohibitions of the Act. *See* Soft Money Final Rules, 67 FR at 49108 (describing the manner in which the name of the Federal candidate or officeholder may appear in pre-event publicity and explaining the circumstances where solicitation restrictions would attach, notwithstanding the exception described above).[7]

a. *With respect to donations to a Federally registered party committee, must the prospective donor's previous contributions to the committee's Federal account be considered by Senator Corzine in determining the amount he may solicit for the committee's non-Federal account?*

No. The Commission concludes that Senator Corzine does not need to consider a prospective donor's previous contributions to a Federally registered party committee's Federal account, or any amounts Senator Corzine may have previously solicited from the donor for that account, in determining the amount he may now solicit from that donor for the party committee's

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donor to reduce his donation to the JCC, and the donation cannot be re-apportioned to another candidate whose receipt limit would not be exceeded.

[7] The Commission notes that, in response to *Shays v. FEC*, 337 F. Supp. 2d 28 (D.D.C. 2004), *appeal filed*, No. 04-5352 (D.C. Cir. Sept. 28, 2004), 11 CFR 300.64(b) is the subject of an ongoing rulemaking. *See* Candidate Solicitation at State, District, and Local Party Fundraising Events, Notice of Proposed Rulemaking, 70 FR 9013 (February 24, 2005). The Commission's current regulation remains in full force and effect pending the outcome of this rulemaking proceeding.

non-Federal account. This conclusion is consistent with an explanation of 2 U.S.C. 441i(e)(1)(B) by a principal sponsor of BCRA, stating that "a Federal candidate or officeholder may solicit up to [the applicable annual limit] for a State party's non-Federal account, even if that same individual or PAC has already given a similar amount to the State party's Federal, or hard money, account." 148 Cong. Rec. S2140 (daily ed. March 20, 2002) (statement of Sen. McCain). Similarly, the Supreme Court, in *McConnell v. FEC, supra*, stated that 2 U.S.C. 441i(e)(1)(B), in effect, "doubles" the limit on what an individual can contribute at the behest of a Federal candidate or officeholder, "while restricting the use of the additional funds to activities not related to federal elections." 540 U.S. at 181.

b. *May Senator Corzine and his agents solicit up to $10,000 per individual donor for the non-Federal account of the State, and each local, party committee? Does the solicitation limit apply to each party committee separately, or to all of them collectively? Does a different limit apply if Senator Corzine solicits Federal PACs for donations to those party committees?*

The Act and Commission regulations provide that an individual may contribute no more than $10,000 per calendar year to a political committee established and maintained by a State committee of a political party. 2 U.S.C. 441a(a)(1)(D); 11 CFR 110.1(c)(4). A $5,000 per calendar year limit on contributions by an individual to "any other political committee" applies to contributions to local party committees. 2 U.S.C. 441a(a)(1)(C); 11 CFR 110.1(d).

Commission regulations at 11 CFR 110.3(b)(3) establish a rebuttable presumption that a State party committee and the local party committees in that State are affiliated with each other and hence share one limit on contributions they receive. *See* 2 U.S.C. 441a(a)(5); *see also* 11 CFR 100.14.[8] Hence, the amount that Senator Corzine and his agents may solicit from an

[8] This presumption may be rebutted if the party unit in question has not received funds from any other political committee established, financed, maintained or controlled by any party unit and there is no cooperation, consultation or concert between the party unit and any other political party committee or unit regarding the making

individual donor for the non-Federal accounts of the State party committee and all affiliated local party committees is subject to a shared donation limit of $10,000 per calendar year. Within this $10,000 limit, however, Senator Corzine and his agents may solicit no more than $5,000 per year from an individual for any one affiliated local party committee's non-Federal account. If a local party committee is not affiliated with the State committee or other local committees, Senator Corzine may solicit up to $5,000 per calendar year from an individual for that committee's non-Federal account without regard to the amounts he solicits for the other party committees.

The Commission concludes that the same principles as to aggregation and non-aggregation for donations by *individuals* to party committees' non-Federal accounts apply to donations by *Federal PACs* to those accounts at the request of Senator Corzine or his agent. Hence, the donations must comply with 11 CFR 300.62 with respect to the amounts and the sources of the funds used for the donations. The Commission also notes that the amount that Senator Corzine may solicit will depend upon whether the Federal PAC is a multicandidate committee. Although a non-multicandidate PAC may contribute $10,000 per year to the State party committee and $5,000 per year to a local party committee, the contribution limit on yearly contributions by a multicandidate PAC to the State party committee is only $5,000. *See* 2 U.S.C. 441a(a)(1)(C) and (D), and (2)(C).

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of contributions. 11 CFR 110.3(b)(3)(i) and (ii). Even if the presumption is rebutted, these committees may be affiliated under the affiliation factors set out in 11 CFR 110.3(a). *See* Advisory Opinions 1997-18, n.2, and 1978-9.

c. *Would a separate limit apply to solicitations for unregistered local party committees?*

Yes. Normally, all contributions received by more than one affiliated committee, *regardless of whether they qualify as political committees* (and are therefore required to register with the Commission), shall be considered to be received by one committee and must be aggregated for the purpose of determining whether such contributions comply with the Act's limits. *See* 11 CFR 110.3(a)(1). In applying 2 U.S.C. 441a(a)(5) and 11 CFR 110.3(b) to State and local party committees, however, the Commission has concluded that a local party organization must be a political committee in order for its received contributions to be subject to such aggregation, even if such a local committee or organization is not "independent" of the other State or local party committees. *See* Advisory Opinions 1999-4 and 1978-9. Hence, Senator Corzine and his agents may solicit up to $5,000 from an individual donor for an unregistered local party committee's non-Federal account, without regard to the amount he solicits from that donor for any other New Jersey State or local party committee, so long as the unregistered committee does not qualify as a political committee under 2 U.S.C. 431(4)(C) and 11 CFR 100.5(c).

3. *Questions regarding the involvement of Senator Corzine in certain other non-Federal activities.*

You ask several questions about the application of section 441i(e) to activities that may benefit Senator Corzine's gubernatorial campaign but that do not necessarily involve the solicitation of funds by him or his agents for his campaign or for other committees.

a. *May Senator Corzine and his agents help State and local candidates, State PACs, and State and local party committees plan the structure of their fundraising and spending activities? For example, may Senator Corzine and his agent convey their views about the types of fundraising events non-Federal candidates and committees might schedule and when such events should occur; how these non-Federal candidates and committees might spend funds effectively in support of the entire Democratic ticket; and how such*

candidates and committees might effectively coordinate their activities with the Corzine campaign, subject to New Jersey State law.

Yes, Senator Corzine may engage in these activities. The Supreme Court's decision in *McConnell* sheds light on this question. In addressing the conduct of national party officers under the national party soft money ban at 2 U.S.C. 441i(a), the Supreme Court stated, "Nothing on the face of [section 441i(a)] prohibits national party officers, whether acting in their official or individual capacities, from sitting down with State and local party committees or candidates to plan and advise how to raise and spend soft money. As long as the national party officer does not personally spend, receive, direct, or solicit soft money, [section 441i(a)] permits a wide range of joint planning and electioneering activity." 540 U.S. at 160. Similarly, Senator Corzine and his agents may consult with non-Federal candidates and committees to help them plan how to raise and spend non-Federal funds, so long as Senator Corzine and his agents do not solicit, receive, direct, transfer, spend, or disburse non-Federal funds. *See McConnell v. FEC* , 540 U.S. 93, 160 (citing to Brief for Intervenor-Defendants Sen. John McCain et al. in No. 02--1674 et al., p. 22 which stated that "BCRA leaves parties and candidates free to coordinate campaign plans and activities, political messages, and fund-raising goals with one another").[9] By themselves, such consultations do not constitute spending by Corzine for Governor or by any non-Federal committees.

b. *May Senator Corzine and his agents recommend individuals for employment to candidates, PACs, and parties if those individuals' duties would involve soliciting, receiving, directing, transferring, spending, or disbursing non-Federal funds?*

[9] Commission regulations state that to "solicit" means "to ask that another person make a contribution, donation, transfer of funds, or otherwise provide anything of value," whether done so directly or through a conduit or intermediary. 11 CFR 300.2(m). Similarly, to "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 . . . ." 11 CFR 300.2(n). *See also McConnell v. Federal Election Commission*, 540 U.S. at 160. The Commission's definitions of "solicit" and "direct" are the subject of ongoing litigation in *Shays v. FEC, supra,* and those definitions are being addressed in the course of the Commission's appeal of the district court's decision in that case. The Commission's current regulations defining "solicit" and "direct" remain in full force and effect pending the outcome of the appeal.

Yes. Neither the Act nor Commission regulations prohibit such recommendations. So long as the recommended individual is not acting as an agent for Senator Corzine or the Corzine gubernatorial campaign, the individual may solicit, receive, transfer, spend, or disburse non-Federal funds for the other candidates or committees, without being subject to the restrictions contained in 2 U.S.C. 441i(e)(1)(B) and 11 CFR 300.62. *See* 11 CFR 300.2(b)(3) and Advisory Opinion 2003-10; *see also* Soft Money Final Rules, 67 FR at 49083 (describing the ability of individuals to wear "multiple hats").

c. *What specific conduct by Senator Corzine or his agents would result in "spending" or "disbursing" funds under 11 CFR 300.62? In particular, are there limits on what Senator Corzine and his agents can say to State and local candidates, State PACs, and State and local party committees regarding their spending plans?*

In the absence of further information regarding specific conduct by Senator Corzine or his agents or statements by them regarding the spending plans of other specific candidates, we cannot provide an exhaustive answer to your question. *See* 11 CFR 112.1(b). However, *McConnell* has made clear as a matter of law that BCRA does not preclude parties and candidates from discussing campaign strategy and fund-raising goals with one another. Therefore, if Senator Corzine or his agents discuss the spending plans of other specific candidates or committees, such discussions would not, in and of themselves, constitute "spending" or "disbursing" funds. For example, if Senator Corzine or his agents were to discuss with the State and local party committees plans to spend $50,000 on get-out-the-vote ("GOTV") efforts, such discussions would not constitute spending or disbursing funds by Senator Corzine.

4. *Are there circumstances under which individuals might be agents of Corzine for Governor, Inc. and yet not of Senator Corzine – and thus not subject to the provisions of section 441i(e)? Does an individual automatically become an "agent" of Senator Corzine simply by working for his gubernatorial campaign, or even by volunteering for it?*

Under 11 CFR 300.2(b)(3), an "agent" of a Federal officeholder is any person who has actual authority, either express or implied, to solicit, receive, direct, transfer, or spend funds in connection with any election on behalf of the Federal officeholder.[10]

The restrictions contained in 2 U.S.C. 441i(e)(1), as well as the exception in 2 U.S.C. 441i(e)(2), apply to the Federal candidate or Federal officeholder, as well as agents acting on behalf of the Federal candidate or officeholder and entities directly or indirectly established, financed, maintained, or controlled by, or acting on behalf of, the Federal candidate or officeholder. 11 CFR 300.60 through 300.63; *see also* 2 U.S.C. 441i(e)(1). When an individual is acting as an "agent" for Corzine for Governor, he is acting on behalf of an entity directly or indirectly established, financed, maintained, or controlled by Senator Corzine for the purposes of the gubernatorial campaign, and hence the individual's activities are governed by 2 U.S.C. 441i(e)(1) and (2). The individual is thus Senator Corzine's agent as well.

However, the individual may be an agent of Corzine for Governor for a number of purposes related to raising and spending funds and yet perform other acts *that are not on behalf* of Corzine for Governor. For example, a fundraiser, whether professional or volunteer, may be raising funds for more than one candidate or committee. In explaining the regulation defining "agent" at 11 CFR 300.2(b), the Commission made clear that a principal may only be held liable under BCRA for the actions of an agent when the agent is acting on behalf of the principal. Soft Money Final Rules, 67 FR at 49083. "[I]t is not enough that there is some relationship or contact between the principal and agent; rather, the agent must be acting on behalf of the principal to create potential liability for the principal. This additional requirement ensures that liability will

[10] The Commission's regulations defining "agent" are the subject of an ongoing rulemaking. *See* Definition of "Agent" for BCRA Regulations on Non-Federal Funds or Soft Money and Coordinated and Independent Expenditures, Notice of Proposed Rulemaking, 70 FR 5382 (February 2, 2005). The Commission's current regulations defining "agent" remain in full force and effect pending the outcome of this rulemaking proceeding.

not attach due solely to the agency relationship, but only to the agent's performance of prohibited acts for the principal." *Id; see also* Advisory Opinions 2003-36, 2003-10, and 2003-03.

Whether a specific individual is an agent of Senator Corzine would depend upon a number of factors, including the individual's position with the gubernatorial campaign, the duties he performs, and the scope of the authority that the individual has been granted – either expressly or impliedly Whether that person is acting on behalf of Senator Corzine in a particular activity, and thus is subject in that activity to the provisions of section 441i(e)(1) and (2), is also necessarily a fact-based determination, that will be based on what the Senator and that individual say and do. As the Supreme Court has recognized, an individual may be subject to BCRA's fundraising restrictions in some contexts and not in others.[11]

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,

Scott E. Thomas
Chairman

Enclosures (AOs 2003-36, 2003-10, 2003-03, 1999-4, 1997-18, and 1978-9)

[11] *See McConnell*, 540 U.S. at 161 (holding that "party officials may also solicit soft money in their unofficial capacities").