

December 4, 2003

NOTICE AO DRAFT COMMENT PROCEDURES

The Commission has approved a revision in its advisory opinion procedures that 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 2003-32 is available for public comments under this procedure. It was requested by Marc E. Elias, on behalf of Inez Tenenbaum. The draft may be obtained from the Public Disclosure Division of the Commission.

Proposed Advisory Opinion 2003-14 will be on the Commission's agenda for its public meeting of Thursday December 4, 2003.

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 12:00 noon (EST) on December 3, 2003.

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 comments timely received 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 Disclosure Division.

CONTACTS

Press inquiries: Ron Harris (202) 694-1220

Acting Commission Secretary: Mary Dove (202) 694-1040

Other inquiries:

To obtain copy of draft AO 2003-32 contact Public Records Office-
Public Disclosure Division (202) 694-1120, or 800-424-9530.

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

ADDRESSES

Submit single copy of written comments to:

Commission Secretary
Federal Election Commission
999 E Street NW
Washington, DC 20463



FEDERAL ELECTION COMMISSION
Washington, DC 20463

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COMMISSION
SECRETARIAT

2003 DEC -4 P 2:09

December 4, 2003

MEMORANDUM

TO: The Commission

THROUGH: James A. Pehrkon *JAP*
Staff Director

FROM: Lawrence H. Norton
General Counsel

James Kahl *JK*
Deputy General Counsel

Rosemary C. Smith *RS*
Acting Associate General Counsel

Mai T. Dinh *MD*
Acting Assistant General Counsel

Michael Marinelli *mm*
Attorney

AGENDA ITEM

For Meeting of: 12-11-03

SUBJECT: Draft AO 2003-32 - Alternative Drafts

The attached documents respond to questions raised by Ms. Inez Tenenbaum, a former State candidate and now a Federal candidate. Ms. Tenenbaum wishes to make donations to various organizations using funds remaining from her State campaign account. These funds were not raised in accordance with the contribution limits and source prohibitions of the Act. The organizations she wishes to donate the funds to are: (1) section 501(c)(3) organizations that conduct no election activity; (2) section 501(c)(3) organizations that conduct some election activity, including Federal election activity, but not as their principal purpose; (3) organizations that conduct election activity, including Federal election activity, as their principal purpose; and (4) the South Carolina Democratic Party or a State legislative caucus committee. The question is whether 2 U.S.C. 441i(e) permits the donations.

In response to the desires of several Commissioners, we are presenting two

alternative drafts. Both drafts conclude that the donations to section 501(c)(3) organizations that conduct no election activity are permissible. The drafts likewise conclude that donations to South Carolina Democratic Party or a State legislative caucus committee would violate 2 U.S.C. 441i(e).

The drafts differ in their treatment of donations to section 501(c)(3) organizations that conduct election activity, including Federal election activity. Draft A uses an analysis based on the solicitation exception at section 441i(e)(4). It concludes that donations to section 501(c)(3) organizations whose principal purpose is not to conduct election activity would be permitted. Draft A also concludes that donations to organizations whose principal purpose is to conduct election activity is impermissible. Draft B concludes that section 441i(e)(4) does not apply to donations and that donations to section 501(c)(3) organization that engage in election activity, including Federal election activity, would violate section 441i(e). We request that these drafts be placed on the agenda for December 11, 2003.

Attachments

Drafts A and B

1 ADVISORY OPINION 2003-32

2
3
4 Marc E. Elias, Esq.
5 Perkins Coie
6 607 Fourteenth Street, N.W.
7 Washington, D.C. 2005-2011

8
9 Dear Mr. Elias:

10 This responds to your letter dated October 14, 2003, as supplemented by your e-
11 mails dated October 20, and 27, 2003 requesting an advisory opinion on behalf of Ms. Inez
12 Tenenbaum, concerning the application of the Federal Election Campaign Act of 1971, as
13 amended ("the Act"), and Commission regulations, to the use of funds remaining from Ms.
14 Tenenbaum's 2002 State campaign account.

15 *Background*

16 You state that Ms. Tenenbaum is the South Carolina State Superintendent of
17 Education and also a candidate for election to the U.S. Senate. You state she was first
18 elected to her State office in 1998 and was re-elected in 2002. She became a candidate for
19 the U. S. Senate on August 19, 2003.¹

20 You explain that as a candidate for South Carolina State office in the 2002 election,
21 Ms. Tenenbaum's campaign maintained a State campaign account into which she placed
22 funds raised for her candidacy. Ms. Tenenbaum's State campaign account has paid all its
23 expenses from the 2002 election and is prepared to terminate.² You state that some of the
24 funds in the State campaign account were raised prior to the 2002 election and some were

¹ On August 19 2003, Ms. Tenenbaum filed a Statement of Candidacy with the Secretary of the Senate.

² In your October 27, 2003 email, you state that Ms. Tenenbaum is not a candidate for State office. In a conversation with Commission staff, the Office of the Secretary of State of South Carolina confirmed that Ms. Tenenbaum has not made any filings indicating that she is a candidate in the 2006 election for State Superintendent of Education.

1 raised following the 2002 election in anticipation of a 2006 re-election campaign. You also
2 affirm that none of the fundraising for her State campaigns referenced her potential
3 candidacy for Federal office and no funds have been raised for her State campaign account
4 since she declared her Federal candidacy. The State campaign account contains surplus
5 funds that, while compliant with South Carolina law, were not raised in accordance with the
6 contribution limits and source prohibitions of the Act.³

7 Ms. Tenenbaum would like to donate these funds to several organizations within and
8 outside South Carolina. These organizations include those organized under section
9 501(c)(3) of the Internal Revenue Code of 1986 (26 U.S.C. 501(c)(3)), the South Carolina
10 Democratic Party, and a State legislative caucus committee in South Carolina. You state
11 that these proposed uses are consistent with South Carolina law concerning the distribution
12 of unexpended State campaign funds.⁴ You also state that Ms. Tenenbaum does not directly
13 or indirectly establish, finance, maintain or control any of the section 501(c)(3)
14 organizations that might receive the funds. Some of the section 501(c)(3) organizations to
15 which she would like to donate the funds would be organizations that do conduct some
16 activities in connection with an election, including the Federal election activities enumerated
17 at 11 CFR 300.65(c) (e.g. voter registration, voter identification, get-out-the-vote ("GOTV")
18 activity and generic campaign activity). You state that some of these organizations conduct
19 some Federal election activity, but not as their principal purpose, while others either conduct
20 "certain "[F]ederal election activity" as [their] principal purpose or would spend the

³ South Carolina law does not prohibit contributions by corporations. Furthermore, statewide candidates, like Ms. Tenenbaum, may accept up to \$3,500 per election cycle. See S.C. Code Ann. 8-13-1314.

⁴ Under S.C. Code Ann. 8-13-1340(A)(2), unexpended funds of a State campaign committee may be contributed to an organization exempt from tax under section 501(c) of the Internal Revenue Code of 1986, a political party, or a committee.

1 donation specifically on those activities.” In a November 10 phone conversation with
2 Commission staff, you also confirmed that South Carolina legislative caucus committees
3 conduct State election activity.⁵ Ms. Tenenbaum understands that as a Federal candidate
4 she may be limited in her ability to spend these funds.

5 *Legal Analysis and Conclusions*

6 *Question 1. May Ms. Tenenbaum donate the funds in her State campaign account to*
7 *section 501(c)(3) charitable organizations that do not conduct any election activity?*

8 Yes, Ms. Tenenbaum may donate the non-Federal funds in her State campaign
9 account to section 501(c)(3) charitable organizations that do not conduct any election
10 activity.

11 On November 6, 2002, the Bipartisan Campaign Reform Act of 2002, Pub. L. 107-
12 155, 116 Stat. 81 (2002) (“BCRA”), took effect. As amended by BCRA, the Act regulates
13 Federal candidates and officeholders, their agents, and entities directly or indirectly
14 established, financed, maintained, or controlled by them (collectively, “covered persons”),
15 when they raise or spend funds in connection with either Federal or non-Federal elections.
16 2 U.S.C. 441i(e)(1). Both BCRA and the Commission’s rules implementing BCRA prohibit
17 covered persons from soliciting, receiving, directing, transferring, or spending any “funds in
18 connection with an election for Federal office” or any “funds in connection with an election
19 other than an election for Federal office” unless such funds are “subject to the limitations,
20 prohibitions, and reporting requirements of this Act” or consistent with FECA’s amount

⁵ South Carolina law treats these entities as political committees. See S.C. Code Ann. 8-13-1300(6).

1 limitations and source prohibitions, respectively. 2 U.S.C. 441i(e)(1)(A) and (B); 11 CFR
2 300.61 and 300.62.

3 In analyzing the application of 2 U.S.C. 441i(e), the threshold question is whether
4 the funds involved are in connection with an election for Federal office or any election other
5 than an election for Federal office, under subsection (e)(1). If they are, then the analysis
6 proceeds to whether the exceptions to subsection (e)(1) in subsection (e)(2) through (e)(4)
7 apply. See Advisory Opinion 2003-20 (citing Advisory Opinion 2003-12).

8 As a candidate for election to the U.S. Senate, Ms. Tenenbaum is a Federal candidate
9 and a covered person under section 441i(e). However, although the funds in the State
10 campaign account were raised in connection with a non-Federal election, Ms. Tenenbaum
11 was not a Federal candidate and was not subject to the restrictions in 2 U.S.C. 441i(e)(1)(A)
12 at the time she solicited and received these funds. While Ms. Tenenbaum would be a
13 Federal candidate at the time these funds are proposed to be spent, donations to section
14 501(c)(3) organizations that conduct no election activity of any kind would not be in
15 connection with a Federal or non-Federal election. Therefore, such donations do not fall
16 within the restrictions and prohibitions of 2 U.S.C. 441i(e)(1). Ms. Tenenbaum may donate
17 the unexpended funds in her State campaign account to section 501(c)(3) organizations that
18 do not conduct any election activity.

19 *Question 2. May Ms. Tenenbaum donate the funds in her State campaign account to*
20 *section 501(c)(3) charitable organizations that conduct election activity, including Federal*
21 *election activity enumerated at 11 CFR 300.65(c), but whose principal purpose is not to*
22 *conduct election activities?*

1 Yes, Ms. Tenenbaum may, subject to the limitations discussed below, donate the
2 funds to section 501(c)(3) organizations that conduct election activity, including Federal
3 election activity, but whose principal purpose is not to conduct election activities where the
4 section 501(c)(3) organizations are not directly or indirectly established, financed,
5 maintained or controlled by Ms. Tenenbaum or her agents. Donations to such organizations
6 would be subject to the restrictions and prohibitions of 2 U.S.C. 441i(e)(1) because Federal
7 election activity is, by definition, in connection with Federal elections.⁶

8 Under 2 U.S.C. 441i(e)(2), the prohibitions of section 441i(e)(1) do not apply to the
9 solicitation, receipt, or spending of funds by an individual described in section 441i(e)(1)
10 who is or was also a candidate for a State or local office solely in connection with such
11 election for State or local office if the solicitation, receipt, or spending of funds is permitted
12 under State law and refers only to such State or local candidate, or to any other candidate for
13 the State or local office sought by such candidate or both.

14 Ms. Tenenbaum was until recently a candidate for State office but is not one
15 currently. Commission regulations implementing 2 U.S.C. 441i(e)(2) limit the exception
16 only to candidates who are concurrently candidates for both Federal and State office.
17 11 CFR 300.63. However, the wording of 2 U.S.C. 441i(e)(2) concerns an individual who
18 "was also a candidate for a State or local office." This language clearly encompasses

⁶ Federal election activity means any of the following activities: (1) voter registration activity during the 120 days before a regularly scheduled Federal election and ending on the day of the election; (2) voter identification activity, GOTV activity, and generic campaign activity that is conducted in connection with an election in which one or more candidates for Federal office appear on the ballot; (3) a public communication that refers to a clearly identified Federal candidate and that promotes, supports, attacks or opposes a candidate for that office; and (4) services provided during any month by an employee of a state, district or local party committee who spends more than 25 percent of the employee's compensated time during that month on activities in connection with a Federal election. 2 U.S.C. 431(20); 11 CFR 100.24(b).

1 Federal candidates who, like Ms. Tenenbaum, were once but are no longer candidates for
2 State office.

3 While Ms. Tenenbaum falls within the scope of 441i(e)(2) because she is a former
4 State candidate, donations to a section 501(c)(3) organization must also meet the other
5 elements of this exception. Section 441i(e)(2) applies to funds spent "*solely* in connection
6 with such election for State or local office" (emphasis added). Donations to section
7 501(c)(3) organizations that conduct Federal election activity would not constitute the
8 spending of funds solely in connection with her election for State office. As stated above,
9 donating funds to organizations that conduct Federal election activity constitutes spending in
10 connection with elections for Federal office, and therefore cannot be considered to be
11 "*solely*" in connection with Ms. Tenenbaum's election for State office. Therefore, the
12 proposed donations of non-Federal funds to section 501(c)(3) organizations that conduct
13 Federal election activity do not fall within the exception in 2 U.S.C. 441i(e)(2).

14 Your request proposes that the donations to section 501(c)(3) organizations should
15 be nonetheless permitted by the exception at section 441i(e)(4). This exception provides
16 that, if a 501(c) organization satisfies certain conditions, a covered individual may make
17 "general solicitations" or "specific solicitations" for the 501(c) organization. A general
18 solicitation is permitted if the principal purpose of the organization is not to conduct election
19 activities, including certain types of Federal election activities. The solicitation may not
20 specify how the funds will or should be spent. A general solicitation may be made by a
21 Federal candidate without regard to the Act's source prohibitions or amount limitations
22 subject to this condition. See 2 U.S.C. 441i(e)(4)(A) and 11 CFR 300.65(a)(2)(i) and (ii).

1 The wording of the exception applies to the solicitations of funds and does not
2 mention donations. Section 441i(e)(4), however, evidences a legislative intent to permit
3 Federal candidates to assist certain types of section 501(c) organizations under certain
4 circumstances. While the section 441i(e)(4)(A) exception only addresses the solicitation of
5 funds, it is appropriate to permit a Federal candidate to donate non-Federal funds to section
6 501(c)(3) organizations whose principal purpose is not to conduct election activities,
7 including Federal election activity; provided that there is no agreement between Ms.
8 Tenenbaum or her agent(s) and the recipient 501(c)(3) organizations to use the non-Federal
9 funds in connection with an election or any Federal election activity listed in 11 CFR
10 300.65(e).⁷ See 11 CFR 300.65(a)(2)(ii). To ensure that the 501(c)(3) organizations'
11 principal purposes are not to conduct election activities, Ms. Tenenbaum should obtain
12 certifications similar to those described in 11 CFR 300.65(e) from each recipient section
13 501(c)(3) organization prior to donating State campaign funds to those organizations.
14 *Question 3. May Ms. Tenenbaum donate the funds in her State campaign account to section*
15 *501(c)(3) charitable organizations that conduct election activity, including Federal election*
16 *activity listed in 11 CFR 300.65(c), as their principal purpose?*

17 No, Ms. Tenenbaum may not donate the non-Federal funds in her State campaign
18 account to section 501(c)(3) charitable organizations that conduct election activity, including
19 the types of Federal election activity described at 11 CFR 300.65(c), as their principal
20 purpose. Section 441i(e)(4)(B) permits Federal candidates to make specific solicitations for
21 section 501(c) organizations whose principal purpose is to conduct certain types of Federal

⁷ The activities listed in section 300.65(c) are: voter registration, voter identification, get-out-the-vote activity and generic campaign activity as further described in 11 CFR 100.24(a)(1) through (4) and 11 CFR 100.25.

1 election activity. However, unlike section 441i(e)(4)(A), section 441i(e)(4)(B) limits these
2 solicitations in that they may only be made to individuals and are subject to an annual limit
3 of \$20,000 for each individual. *See also* 11 CFR 300.65(b). Thus, Congress drew a
4 distinction between section 501(c)(3) organizations whose principal purpose is to conduct
5 certain Federal election activities and ones whose principal purpose is not to do so. This
6 distinction is the basis for the Commission's conclusion that Ms. Tenenbaum may not
7 donate non-Federal funds from her State campaign account to section 501(c)(3)
8 organizations whose principal purpose is to conduct election activity, including the types of
9 Federal election activity described in 11 CFR 300.65(c).

10 *Question 4. May Ms. Tenenbaum donate the funds in her State campaign account to the*
11 *South Carolina Democratic Party or a State legislative caucus committee in South*
12 *Carolina?*

13 No, these funds may not be donated to the South Carolina Democratic Party or a
14 State legislative caucus committee in South Carolina. Because Ms. Tenenbaum's 1998 and
15 2002 elections are over, and because she is not a candidate in 2004 or 2006 for State or local
16 office, neither the South Carolina Democratic Party nor a State legislative caucus committee
17 would be able to use funds donated by Ms. Tenenbaum in connection with any of her
18 campaigns for State or local office. Therefore, 2 U.S.C. 441i(e)(2) does not apply because
19 the donated funds cannot be used "solely in connection with [her] election for State or local
20 office." The exception in section 441i(e)(4)(A) also does not apply because neither the
21 South Carolina Democratic party committee nor a State legislative caucus committee is a
22 section 501(c) organization.

1 **ADVISORY OPINION 2003-32**

2
3
4 **Marc E. Elias, Esq.**
5 **Perkins Coie**
6 **607 Fourteenth Street, N.W.**
7 **Washington, D.C. 2005-2011**

8
9 **Dear Mr. Elias:**

10 **This responds to your letter dated October 14, 2003, as supplemented by your e-**
11 **mails dated October 20, and 27, 2003 requesting an advisory opinion on behalf of Ms. Inez**
12 **Tenenbaum, concerning the application of the Federal Election Campaign Act of 1971, as**
13 **amended ("the Act"), and Commission regulations, to the use of funds remaining from Ms.**
14 **Tenenbaum's 2002 State campaign account.**

15 ***Background***

16 **You state that Ms. Tenenbaum is the South Carolina State Superintendent of**
17 **Education and also a candidate for election to the U.S. Senate. You state she was first**
18 **elected to her State office in 1998 and was re-elected in 2002. She became a candidate for**
19 **the U. S. Senate on August 19, 2003.¹**

20 **You explain that as a candidate for South Carolina State office in the 2002 election,**
21 **Ms. Tenenbaum's campaign maintained a State campaign account into which she placed**
22 **funds raised for her candidacy. Ms. Tenenbaum's State campaign account has paid all its**
23 **expenses from the 2002 election and is prepared to terminate.² You state that some of the**
24 **funds in the State campaign account were raised prior to the 2002 election and some were**

¹ On August 19 2003, Ms. Tenenbaum filed a Statement of Candidacy with the Secretary of the Senate.

² In your October 27, 2003 email, you state that Ms. Tenenbaum is not a candidate for State office. In a conversation with Commission staff, the Office of the Secretary of State of South Carolina confirmed that Ms. Tenenbaum has not made any filings indicating that she is a candidate in the 2006 election for State Superintendent of Education.

1 raised following the 2002 election in anticipation of a 2006 re-election campaign. You also
2 affirm that none of the fundraising for her State campaigns referenced her potential
3 candidacy for Federal office and no funds have been raised for her State campaign account
4 since she declared her Federal candidacy. The State campaign account contains surplus
5 funds that, while compliant with South Carolina law, were not raised in accordance with the
6 contribution limits and source prohibitions of the Act.³

7 Ms. Tenenbaum would like to donate these funds to several organizations within and
8 outside South Carolina. These organizations include those organized under section
9 501(c)(3) of the Internal Revenue Code of 1986 (26 U.S.C. 501(c)(3)), the South Carolina
10 Democratic Party, and a State legislative caucus committee in South Carolina. You state
11 that these proposed uses are consistent with South Carolina law concerning the distribution
12 of unexpended State campaign funds.⁴ You also state that Ms. Tenenbaum does not directly
13 or indirectly establish, finance, maintain or control any of the section 501(c)(3)
14 organizations that might receive the funds. Some of the section 501(c)(3) organizations to
15 which she would like to donate the funds would be organizations that do conduct some
16 activities in connection with an election, including the Federal activities enumerated at 11
17 CFR 300.65(c) (e.g. voter registration, voter identification, get-out-the-vote ("GOTV")
18 activities, and generic campaign activity). You state that some of these organizations
19 conduct Federal election activity, but not as their principal purpose, while others either
20 conduct "certain "[F]ederal election activity" as [their] principal purpose or would spend the

³ South Carolina law does not prohibit contributions by corporations. Furthermore, statewide candidates, like Ms. Tenenbaum, may accept up to \$3,500 per election cycle. See S.C. Code Ann. 8-13-1314.

⁴ Under S.C. Code Ann. 8-13-1340(A)(2), unexpended funds of a State campaign committee may be contributed to an organization exempt from tax under section 501(c) of the Internal Revenue Code of 1986, a political party, or a committee.

1 donation specifically on those activities.” In a November 10 phone conversation with
2 Commission staff, you also confirmed that South Carolina legislative caucus committees
3 conduct State election activity.⁵ Ms. Tenenbaum understands that as a Federal candidate
4 she may be limited in her ability to spend these funds.

5 *Legal Analysis and Conclusions*

6 *Question 1. May Ms. Tenenbaum donate the funds in her State campaign account to*
7 *section 501(c)(3) charitable organizations that do not any conduct election activity?*

8 Yes, Ms. Tenenbaum may donate the non-Federal funds in her State campaign
9 account to section 501(c)(3) charitable organizations that do not conduct any election
10 activity.

11 On November 6, 2002, the Bipartisan Campaign Reform Act of 2002, Pub. L. 107-
12 155, 116 Stat. 81 (2002) (“BCRA”), took effect. As amended by BCRA, the Act regulates
13 Federal candidates and officeholders, their agents, and entities directly or indirectly
14 established, financed, maintained, or controlled by them (collectively, “covered persons”),
15 when they raise or spend funds in connection with either Federal or non-Federal elections. 2
16 U.S.C. 441i(e)(1). Both BCRA and the Commission’s rules implementing BCRA prohibit
17 covered persons from soliciting, receiving, directing, transferring, or spending any “funds in
18 connection with an election for Federal office” or any “funds in connection with an election
19 other than an election for Federal office” unless such funds are “subject to the limitations,
20 prohibitions, and reporting requirements of this Act” or consistent with FECA’s amount

⁵ South Carolina law treats these entities as political committees. See S.C. Code Ann. 8-13-1300(6).

1 limitations and source prohibitions, respectively. 2 U.S.C. 441i(e)(1)(A) and (B); 11 CFR
2 300.61 and 300.62.

3 In analyzing the application of 2 U.S.C. 441i(e), the threshold question is whether
4 the funds involved are in connection with an election for Federal office or any election other
5 than an election for Federal office, under subsection (e)(1). If they are, then the analysis
6 proceeds to whether the exceptions to subsection (e)(1) in subsection (e)(2) through (e)(4)
7 apply. See Advisory Opinion 2003-20 (citing Advisory Opinion 2003-12).

8 As a candidate for election to the U.S. Senate, Ms. Tenenbaum is a Federal candidate
9 and a covered person under section 441i(e). However, although the funds in the State
10 campaign account were raised in connection with a non-Federal election, Ms. Tenenbaum
11 was not a Federal candidate and was not subject to the restrictions in 2 U.S.C. 441i(e)(1)(A)
12 at the time she solicited and received these funds. While Ms. Tenenbaum would be a
13 Federal candidate at the time these funds are proposed to be spent, donations to section
14 501(c)(3) organizations that conduct no election activity of any kind would not be in
15 connection with a Federal or non-Federal election. Therefore, such donations do not fall
16 within the restrictions and prohibitions of 2 U.S.C. 441i(e)(1). Ms. Tenenbaum may donate
17 the unexpended funds in her State campaign account to section 501(c)(3) organizations that
18 do not conduct any election activity.

19 *Question 2. May Ms. Tenenbaum donate the funds in her State campaign account to*
20 *section 501(c)(3) charitable organizations that conduct election activity, including Federal*
21 *election activity enumerated at 11 CFR 300.65(c)?*

22 No, Ms. Tenenbaum may not donate the non-Federal funds in her State campaign
23 account to section 501(c)(3) organizations that conduct election activity, including Federal

1 election activity. Donations by Federal candidates of funds not complying with the amount
2 limitations and source prohibitions of the Act to such organizations is barred by 2 U.S.C.
3 441i(e)(1) because Federal election activity is, by definition, in connection with Federal
4 elections.⁶ Furthermore, the exceptions to section 441i(e)(1) do not apply where the section
5 501(c)(3) organization engages in such activity.

6 Under 2 U.S.C. 441i(e)(2), the prohibitions of section 441i(e)(1) do not apply to the
7 solicitation, receipt, or spending of non-Federal funds by an individual described in section
8 441i(e)(1) who is or was also a candidate for a State or local office solely in connection with
9 such election for State or local office if the solicitation, receipt, or spending of funds is
10 permitted under State law and refers only to such State or local candidate, or to any other
11 candidate for the State or local office sought by such candidate or both.

12 Ms. Tenenbaum was until recently a candidate for State office but is not one
13 currently. Commission regulations implementing 2 U.S.C. 441i(e)(2) limit the exception
14 only to candidates who are concurrently candidates for both Federal and State office.
15 11 CFR 300.63. However, the wording of 2 U.S.C. 441i(e)(2) covers an individual who
16 "was also a candidate for a State or local office." This language clearly encompasses
17 Federal candidates who, like Ms. Tenenbaum, were once but are no longer candidates for
18 State office.

⁶ Federal election activity means any of the following activities: (1) voter registration activity during the 120 days before a regularly scheduled Federal election and ending on the day of the election; (2) voter identification activity, GOTV activity, and generic campaign activity that is conducted in connection with an election in which one or more candidates for Federal office appear on the ballot; (3) a public communication that refers to a clearly identified Federal candidate and that promotes, supports, attacks or opposes a candidate for that office; and (4) services provided during any month by an employee of a state, district or local party committee who spends more than 25 percent of the employee's compensated time during that month on activities in connection with a Federal election. 2 U.S.C. 431(20); 11 CFR 100.24(b).

1 While Ms. Tenenbaum falls within the scope of 441i(e)(2) because she is a former
2 State candidate, donations from her State campaign account to a section 501(c)(3)
3 organization must also meet the other elements of this exception. Section 441i(e)(2) applies
4 to funds spent "*solely* in connection with such election for State or local office" (emphasis
5 added). Donations to section 501(c)(3) organizations that conduct Federal election activity
6 would not constitute the spending of funds solely in connection with Ms. Tenenbaum's
7 election for State office. As stated above, donating funds to organizations that conduct
8 Federal election activity constitutes spending in connection with elections for Federal office,
9 and therefore cannot be considered to be "*solely*" in connection with Ms. Tenenbaum's
10 election for State office. Therefore, the proposed donations of non-Federal funds to section
11 501(c)(3) organizations that conduct Federal election activity do not fall within the
12 exception in 2 U.S.C. 441i(e)(2).

13 Your request proposes that Ms. Tenenbaum's donations of non-Federal funds to
14 section 501(c)(3) organizations should be permitted under the exception at section
15 441i(e)(4). This exception provides that, if a 501(c) organization satisfies certain conditions,
16 a covered individual may make "general solicitations" or "specific solicitations" for the
17 501(c) organization. The Commission concludes that section 441i(e)(4) is inapplicable to
18 your request because this provision applies only to solicitations of funds and does not extend
19 to donations.⁷

20 Therefore, because none of the exceptions in section 441i(e) apply to the proposed
21 donations, Ms. Tenenbaum may not donate the funds in her State campaign account to

⁷ Note that the past advisory opinions analyzing section 441i(e)(4) have examined this section in terms of solicitations. See Advisory Opinions 2003-20, 2003-12 and 2003-5.

1 section 501(c)(3) organizations that conduct election activity, including Federal election
2 activity.

3 *Question 3. May Ms. Tenenbaum donate the funds in her State campaign account to the*
4 *South Carolina Democratic Party or a State legislative caucus committee in South*
5 *Carolina?*

6 No, these funds may not be donated to the South Carolina Democratic Party or a
7 State legislative caucus committee in South Carolina. Because Ms. Tenenbaum's 1998 and
8 2002 elections are over, and because she is not a candidate in 2004 or 2006 for State or local
9 office, neither the South Carolina Democratic Party nor a State legislative caucus committee
10 would be able to use funds donated by Ms. Tenenbaum in connection with any of her
11 campaigns for State or local office. Therefore, 2 U.S.C. 441i(e)(2) does not apply because
12 the donated funds cannot be used "solely in connection with [her] election for State or local
13 office."

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

20 The Commission notes that this advisory opinion analyzes the Act, as amended by
21 BCRA, and Commission regulations, including those promulgated to implement the BCRA
22 amendments, as they pertain to your proposed activities. On May 2, 2003, a three-judge
23 panel of the United States District Court for the District of Columbia ruled that a number of

1 BCRA provisions are unconstitutional and issued an order enjoining the enforcement,
2 execution, or other application of those provisions. *McConnell v. FEC*, 251 F.Supp. 2d 176
3 (D.D.C. 2003); *prob. juris. noted*, 123 S.Ct. 2268 (U.S. argued Sept. 8, 2003).
4 Subsequently, the district court stayed its order and injunction in *McConnell v. FEC*, 253 F.
5 Supp. 2d 18 (D.D.C. 2003), pending review by the Supreme Court. The Commission
6 cautions that the legal analysis in this advisory opinion may be affected by the eventual
7 decision of the Supreme Court.

8 Sincerely,
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10
11
12 Ellen L. Weintraub
13 Chair
14

15 Enclosures (AOs 2003-20, 2003-12 and 2003-5)