

MARC E. ELIAS
202/434-1625
MELIAS@PERKINSCOIE.COM

607 Fourteenth Street N.W.
Washington, D.C. 20005-2011
PHONE: 202/638-6500
FAC: 202/434-1625
www.perkinscoie.com

June 17, 2004

Lawrence M. Norton, Esq.
General Counsel
Federal Election Commission
999 E Street, N.W.
Washington, DC 20463

AOR 2004-25

Re: **Advisory Opinion Request**

Dear Mr. Norton:

Pursuant to 2 U.S.C. § 437f (2004), we seek an advisory opinion from the Federal Election Commission on behalf of Senator Jon Corzine.

Senator Corzine now serves as the chairman of the Democratic Senatorial Campaign Committee ("DSCC"), which is a "national committee of a political party" and a "national congressional campaign committee" as those terms are used in the Bipartisan Campaign Reform Act of 2002 ("BCRA"). He is the senior United States Senator from New Jersey. He is also a "candidate" under Commission rules, having filed a Statement of Candidacy with the Secretary of the Senate for the 2006 New Jersey Senate election.

Senator Corzine plans to donate his personal funds, in various amounts, some exceeding \$25,000, to one or more organizations that engage in voter registration activity, as defined in 11 CFR § 100.24(a)(2). He plans to make such donations based solely on his own discretion, without express or implied authority from, or on behalf of, the DSCC. He will donate to organizations that he has not directly or indirectly established, financed, maintained or controlled. He will not exercise any direction or control over how his funds are used by any of these organizations. In order to confirm that he may lawfully donate to an organization engaged in voter registration activity, Senator Corzine seeks the Commission's opinion as to whether 2 U.S.C. § 441i(e) restricts a candidate's or Federal officeholder's donation of personal funds.

DISCUSSION

When it passed BCRA, Congress showed no intent to restrict the personal giving of a covered person. The purpose of BCRA's core soft money restrictions was "to prevent the actual and apparent corruption of federal candidates and officeholders" that resulted from donations made by *others*. *McConnell v. Federal Election Comm'n*, 124 S. Ct. 619, 660 (2003). It was not to curtail the giving of the covered persons *themselves*.

A review of the relevant statutes supports this view. For example, while § 441i(a) prohibits national party committee officers from soliciting, receiving or directing certain donations on the committee's behalf, its plain language does not prohibit party officers from making such donations themselves. *See* 2 U.S.C. § 441i(a).

Similarly, while § 441i(d) does not allow national party officers to "solicit any funds for, or make or direct any donations to "various types of nonprofit organizations, the Supreme Court has characterized these prohibitions as "restrictions on *solicitations*". *McConnell v. Federal Election Comm'n*, 124 S. Ct. 619, 680 (2003) (emphasis added). The Court said that they do not apply when party officers act "in their individual capacities." *Id.*

Finally, while § 441i(e) prohibits federal candidates and officeholders from soliciting, receiving, directing, transferring, or spending certain types of funds, the Commission has described this statute as placing "limits on the amounts and types of funds that can be *raised* by Federal candidates and officeholders". *Prohibited and Excessive Contributions: Non-Federal Funds or Soft Money*, 67 Fed. Reg. 49,064, 49,106 (2002) (emphasis added). There is nothing to suggest that 2 U.S.C. § 441i(e) or 11 CFR §§ 300.61 and 300.62 were intended to place new restrictions on the personal funds of a candidate or Federal officeholder. As the Commission has noted,

[I]n discussing BCRA's restrictions on the solicitations and spending of non-Federal funds by Federal candidates and officeholders, the co-sponsors stated that these provisions were part of a "system of prohibitions and limitations on the ability of Federal officeholders and candidates, to raise, spend and control soft money" in order "to stop the use of soft money as a means of buying influence and access with Federal officeholders and candidates." *See* 148 Cong. Rec. S2139 (Daily ed. March 20, 2002) statement of Sen. McCain).

June 17, 2004

Page 3

Id. at 49107. When a candidate or Federal officeholder gives away his or her own money, it is hard to see how that would be considered "a means of buying influence and access with Federal officeholders and candidates."

Moreover, when the Supreme Court affirmed these provisions, it signaled strongly that they could not be enforced against the personal giving of a covered person. The Court relied on the fact that they place "a marginal restriction upon the contributor's ability to engage in free communication". 124 S.Ct. at 655. It relied also on the fact that they regulate "contributions to or at the behest of entities uniquely positioned to serve as conduits for corruption." *Id.* at 668 n.51.

When the restrictions went beyond the "marginal," and when they went beyond the goal of preventing corruption or its appearance, the Court felt compelled to curtail them. For example, it held that Congress could not prohibit national party committees from donating their own funds to tax-exempt organizations, including § 501(c) and § 527 organizations. *See id.* at 680-82. The Court said that this prohibition, if not narrowed, would impermissibly infringe on parties' First Amendment rights of speech and association:

Parties have many valid reasons for giving to tax-exempt organizations, not the least of which is to associate themselves with certain causes and, in so doing, to demonstrate the values espoused by the party. A complete ban on donations prevents parties from making even the general expression of support that a contribution represents.

Id. at 681.

The Court also observed that the prohibition did "little to further Congress' goal of preventing corruption or the appearance of corruption of federal candidates and officeholders." *Id.* National party committees thus "remain free" to donate unlimited funds to tax-exempt organizations. *Id.* at 681.

It does not appear that extending 2 U.S.C. § 441i(e) to restrict the personal funds of a candidate would be consistent with the statutory scheme of BCRA or with the constitutional concerns raised in *McConnell*. For these reasons, Senator Corzine respectfully requests the Commission's confirmation that 2 U.S.C. § 441i(e) would not apply if he were to donate personal funds to an organization that engages in voter registration activity, as defined in 11 CFR § 100.24(a)(2). In light of the time-

June 17, 2004
Page 4

sensitive nature of this request, Senator Corzine would appreciate the Commission's prompt attention to this matter.

Very truly yours,



Marc E. Elias
Counsel to Senator Jon Corzine

cc: **Chairman Bradley A. Smith**
Vice Chair Ellen L. Weintraub
Commissioner David M. Mason
Commissioner Danny L. McDonald
Commissioner Scott E. Thomas
Commissioner Michael E. Toner