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August 13, 2004

MEMORANDUM

AGENDA ITEM
For Meeting of: 8-19-04

TO: The Commission

THROUGH: James A. Pehrkon *[Signature]*
Staff Director

FROM: Lawrence H. Norton *[Signature]*
General Counsel

Rosemary C. Smith *[Signature]*
Associate General Counsel

Brad C. Deutsch *[Signature]* *(RCS)*
Assistant General Counsel

Jonathan Levin *[Signature]*
Senior Attorney

Subject: Draft AO 2004-25 - Alternative Draft

SUBMITTED LATE

Attached is a proposed Alternative Blue Draft of Advisory Opinion 2004-25. The Blue Draft submitted on August 5, 2004 (Agenda Document No. 04-70) and the alternative draft address whether Senator Jon Corzine, a national party officer and a Federal candidate and officeholder, is restricted by 2 U.S.C. 441i(a), 441i(d), or 441i(e) from donating his personal funds to various organizations that engage in voter registration activity, as defined in the Federal election activity provisions at 11 CFR 100.24(a)(2).

Both the August 5 Blue Draft and the Alternative Blue Draft conclude that sections 441i(a) and 441i(d) would not restrict Senator Corzine's donations, where the recipient organizations do not qualify as political committees.

The alternative draft differs from the August 5 Blue Draft as to the application of section 441i(e) to Federal candidates and officeholders. The August 5 draft states that the anti-corruption purpose of 2 U.S.C. 441i(e) is not furthered by restricting Federal candidates and officeholders who, solely at their own discretion, spend their personal funds, as opposed to spending funds raised or received from others. It concludes that 2 U.S.C. 441i(e) would not limit Senator Corzine's donations of personal funds. In contrast, the Alternative Draft relies on the plain wording of 2 U.S.C. 441i(e), which restricts spending by Federal candidates and officeholders in connection with Federal elections, including Federal election activity, and concludes that the contribution limits at 2 U.S.C. 441a(a)(1)(C) would apply to Senator Corzine's donations to the organizations.

This Office prepared, and the Commission approved, a legislative recommendation urging Congress to amend 2 U.S.C. 441i(e) to clarify whether the prohibition in that section extends to candidates spending their personal funds. Although we recognize the policy arguments underlying the August 5 Blue Draft, we believe these concerns should yield to the plain language of the statute until Congress acts to amend the law. Accordingly, the Office of General Counsel recommends that the Commission approve the Alternative Draft.

We request that the Alternative Draft be placed on the agenda for August 19, 2004.

Attachment
Alternative Draft

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3 Marc E. Elias, Esq.
4 Perkins Coie LLP
5 607 14th Street, N.W.
6 Washington, D.C. 20005-2011

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8 Dear Mr. Elias:

9 This responds to your letter dated June 17, 2004, requesting an advisory opinion on
10 behalf of Senator Jon Corzine, concerning the application of the Federal Election Campaign Act
11 of 1971, as amended (the "Act"), and Commission regulations to the donation of his personal
12 funds to organizations engaging in voter registration activity.

13 *Background*

14 Senator Corzine is a U.S. Senator from New Jersey and a candidate for re-election in
15 2006. He currently serves as chairman of the Democratic Senatorial Campaign Committee
16 ("DSCC"), which is a national congressional campaign committee of the Democratic Party. He
17 plans to donate his "personal funds" (as defined in 2 U.S.C. 431(26) and 11 CFR 100.33) in
18 various amounts, including amounts exceeding \$25,000, to one or more organizations that
19 engage in "voter registration activity," as defined in 11 CFR 100.24(a)(2). You state that such
20 donations will be made solely at his own discretion, without express or implied authority from,
21 or on behalf of, the DSCC. Further, Senator Corzine will not donate to organizations that he has
22 directly or indirectly established, financed, maintained, or controlled, and he will not exercise any
23 direction or control over how his funds are used by any organization to which he donates.
24 Senator Corzine seeks an advisory opinion on whether the amounts he donates from his personal
25 funds to these organizations will be restricted by 2 U.S.C. 441i(a), 441i(d), or 441i(e), and any of
26 the Commission's regulations implementing those provisions.

1 *Question Presented*

2 Does Senator Corzine’s status as an officer of a national party committee, a Federal
3 candidate, or a Federal officeholder place limits on donations from his personal funds to
4 organizations that engage in voter registration activity, as defined in 11 CFR 100.24(a)(2)?

5 *Legal Analysis and Conclusions*

6 Based upon the analysis set out below, the Commission concludes that 2 U.S.C. 441i(a)
7 and 441i(d) do not restrict Senator Corzine’s ability to donate his personal funds to organizations
8 engaging in voter registration activity, as defined in 11 CFR 100.24(a)(2). However, Senator
9 Corzine’s ability to donate his personal funds to organizations engaging in such voter registration
10 activity is restricted by 2 U.S.C. 441i(e), as the result of his status as a Federal candidate and
11 officeholder.

12 1. *National Party Committee Officer*

13 The Act, as amended by the Bipartisan Campaign Reform Act of 2002 (“BCRA”), and
14 the Commission’s rules bars national party committees (including national congressional
15 committees of a political party, such as the DSCC) from raising or spending any non-Federal
16 funds, which are funds not subject to the limitations, prohibitions, and reporting requirements of
17 the Act. See 2 U.S.C. 441i(a); 11 CFR 300.2(k) and 300.10. BCRA also restricts national party
18 committees in the raising and spending of funds for 501(c) organizations that make expenditures
19 and disbursements in connection with an election for Federal office, and for 527 organizations.
20 See 2 U.S.C. 441i(d); 11 CFR 300.11 and 300.50.

21 Although these restrictions extend to officers and agents of a national party committee,
22 the plain language of both the Act and the Commission’s regulations specifically limit
23 application of these restrictions to national party committee officers and agents only when such

1 individuals are *acting on behalf of* the national party committee.¹ See 2 U.S.C. 441i(a) and (d);
2 11 CFR 300.10(c)(1), 300.11(b)(1), and 300.50(b)(1). Moreover, in discussing the application of
3 2 U.S.C. 441i(a) and 441i(d) to party officers, the Supreme Court has acknowledged that these
4 provisions do not apply to officers acting in “their individual capacities.” *McConnell v. Federal*
5 *Election Commission*, 540 U.S. ___, 124 S.Ct. 619, at 658, 668, 679 (2003).

6 Based on your representation that Senator Corzine’s donation of his personal funds will
7 be made solely at his own discretion, without express or implied authority from, or on behalf of,
8 the DSCC, the Commission concludes that Senator Corzine would not be *acting on behalf of* the
9 DSCC.² Accordingly, Senator Corzine is not restricted under 2 U.S.C. 441i(a) and 441i(d) from
10 donating his personal funds to organizations that engage in voter registration activity, as defined
11 in 11 CFR 100.24(a)(2), because of his status as the DSCC chairman. However, if any of these
12 organizations qualifies as a political committee, his contributions would be subject to the same
13 dollar limits as those applicable to the contributions of any other individual. See 2 U.S.C.
14 441a(a)(1).

¹ These provisions also apply to entities directly or indirectly established, financed, maintained or controlled by a national party committee, and agents or officers of such entities. 2 U.S.C. 441i(a)(2) and 441i(d); 11 CFR 300.10(c), 300.11(b), and 300.50(b). In defining the term “agent” for the purposes of part 300 (see 11 CFR 300.2(b)), the Commission explained that “a principal can only be held liable for the actions of an agent when the agent is acting on behalf of the principal, and not when the agent is acting on behalf of other organizations or individuals. Specifically, it 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.” Explanation and Justification for Final Rules on “Prohibited and Excessive Contributions; Non-Federal Funds or Soft Money,” 67 Fed. Reg. 49064, 49083 (July 29, 2002).

² The Commission assumes that your representations also mean that the DSCC will not solicit or direct Senator Corzine’s donations of his personal funds to the organizations. See 2 U.S.C. 441i(a) and (d).

1 **2. Federal Candidate or Officeholder**

2 BCRA and the Commission’s rules also restrict Federal candidates and officeholders in
3 their ability to raise and spend funds in connection with an election for Federal office, including
4 funds for any Federal election activity. *See* 2 U.S.C. 441i(e)(1)(A) and 11 CFR 300.61.³ The
5 term “Federal election activity” includes voter registration activity that occurs during the period
6 beginning on the date that is 120 days before the date a regularly scheduled Federal election is
7 held and ending on the date of the election. 2 U.S.C. 431(20); 11 CFR 100.24(b)(1). For the
8 purposes of defining “Federal election activity,” voter registration activity

9 means contacting individuals by telephone, in person, or by other individualized
10 means to assist them in registering to vote. Voter registration includes, but is not
11 limited to, printing and distributing registration and voting information, providing
12 individuals with voter registration forms, and assisting individuals in the
13 completion and filing of such forms.

14 11 CFR 100.24(a)(2).

15 Section 441i(e)(1)(A) of the Act states that a Federal candidate or officeholder

16 shall not:

17 solicit, receive, direct, transfer, or spend funds in connection with an election for
18 Federal office, including funds for any Federal election activity, unless the funds
19 are subject to the limitations, prohibitions, and reporting requirements of this Act.

20 2 U.S.C. 441i(e)(1)(A); *see also* 11 CFR 300.61 (implementing 2 U.S.C. 441i(e)(1)(A)).

21 Unlike the restrictions regarding national party committees, discussed above, the Act and
22 Commission regulations do not contain any language that explicitly limits application of the
23 restrictions on Federal candidates and officeholders only to when such an individual is acting in

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³ These provisions also apply to agents of Federal candidates and officeholders, as well as to entities directly or indirectly established, financed, maintained or controlled by, or acting on behalf of, one or more Federal candidates or officeholders. 2 U.S.C. 441i(e)(1); 300.60(c) and (d).

1 his or her official capacity. Rather, section 441i(e)(1)(A) contains a general prohibition that
2 clearly restricts all Federal candidates and officeholders from spending funds that are not subject
3 to the Act's limitations, prohibitions, and reporting requirements. The plain language of this
4 prohibition extends to spending (*i.e.*, donations) by a Federal candidate or officeholder from his
5 personal funds in connection with a Federal election.

6 In Advisory Opinion 2003-32, the Commission determined that the restrictions found in
7 section 441i(e) apply to a Federal candidate when spending funds from a State campaign
8 committee that were raised for a previous race for State office. The Commission does not
9 perceive a meaningful distinction between a Federal candidate's spending of funds that were
10 raised in a race for State office (*i.e.*, funds that were raised for strictly non-Federal purposes) and
11 a Federal candidate's donation of his own personal funds. Just as section 441i(e) restricts
12 spending by Federal candidates or officeholders when the funds come from their non-Federal
13 committees, this section also restricts spending by Federal candidates and officeholders from
14 their personal funds and requires that these donations be subject to the limitations and
15 prohibitions of the Act.

16 Based on the foregoing, the Commission concludes that Senator Corzine's donations of
17 his personal funds to organizations engaging in voter registration activity that constitutes Federal
18 election activity, as defined at 11 CFR 100.24(a)(2), are subject to the limitations and
19 prohibitions of the Act. Accordingly, the applicable limit on Senator Corzine's donation of his
20 personal funds to each such organization is \$5,000 per calendar year, *i.e.*, the limit on
21 contributions by an individual to a political committee other than an authorized committee or a

