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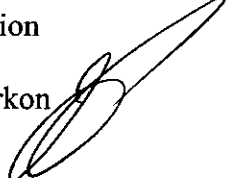
FEDERAL ELECTION COMMISSION
Washington, DC 20463


2003 DEC 16 P 2:15


December 16, 2003


MEMORANDUM


TO: The Commission

THROUGH: James A. Pehrkon 
Staff Director

FROM: Lawrence H. Norton 
General Counsel

Rosemary C. Smith 
Acting Associate General Counsel

Mai T. Dinh 
Acting Assistant General Counsel

Michael Marinelli 
Attorney

AGENDA ITEM
For Meeting of: 12-18-03

SUBMITTED LATE

SUBJECT: Draft AO 2003-32 - Alternative Drafts

Attached to this memo are revised Drafts A and B and new Draft C. The revised drafts contain changes to Draft A and Draft B (Agenda Document No. 03-97) reflecting the Commission's discussion at the December 11, 2003 meeting. While there are some substantive changes to the analysis in Draft A, the conclusions in revised drafts A and B remain unchanged from the versions considered at the December 11 meeting. The discussion and conclusions in new Draft C address the possibility that a response to question two of Draft A (concerning donations to section 501(c)(3) organizations that engage in election activity but not as their principal purpose) may not receive the necessary votes for approval. Its conclusions are otherwise consistent with revised Draft A. We request that these drafts be placed on the agenda for December 18, 2003.

Attachments

Drafts A, B and C

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. These section 501(c)(3) organizations, however, must
19 not during the current six-year senatorial election cycle have conducted election activity,
20 including Federal election activity enumerated at 11 CFR 300.65(c). *See* 11 CFR 100.3(b).
21 Additionally, these donations cannot be earmarked or designated for any election activity,
22 including Federal election activity and debts arising from any election activity.

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

5 Yes, Ms. Tenenbaum may, subject to the limitations discussed below, donate the
6 funds to section 501(c)(3) organizations that conduct election activity, including Federal
7 election activity,⁶ but whose principal purpose is not to conduct election activities where the
8 section 501(c)(3) organizations are not directly or indirectly established, financed,
9 maintained or controlled by Ms. Tenenbaum or her agents. For reasons stated below,
10 donations from the State campaign account to these organizations would not be subject to
11 the restrictions and prohibitions of 2 U.S.C. 441i(e)(1) because the donations would not be
12 in connection with a Federal, State or local election, provided that the donations are not
13 earmarked or designated for election activity.

14 Section 441i(e)(4) of the Act provides the policy rationale for this determination. In
15 this section Congress treats section 501(c) organizations that conduct election activity but
16 not as their principal purpose differently than those that conduct election activity as their
17 principal purpose. Under 2 U.S.C. 441i(e)(4)(A), a covered individual may make “general
18 solicitations” for section 501(c) organizations if the principal purpose of the organizations is
19 not to conduct election activities, including certain types of Federal election activities.

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 the solicitations may not specify how the funds will or should be spent, they may be
2 made by a Federal candidate without regard to the Act's source prohibitions or amount
3 limitations subject to this condition. *See* 2 U.S.C. 441i(e)(4)(A) and 11 CFR 300.65(a)(2)(i)
4 and (ii). In contrast, section 441i(e)(4)(B) allows covered individuals to make only a
5 "specific solicitation" on behalf of section 501(c) organizations whose principal purpose is
6 to conduct election activity, including certain types of Federal election activity. "Specific
7 solicitations" are subject to amount limitations and source prohibitions. 2 U.S.C.
8 4411(e)(4)(B); 11 CFR 100.65(b).

9 This different treatment of section 501(c) organizations that conduct election activity
10 but not as their principal purpose and those that conduct election activity as their principal
11 purpose suggests solicitations to the former are not in connection with an election provided
12 that the conditions in 2 U.S.C. 441i(e)(4)(A) are satisfied. It is appropriate to extend that
13 rationale to donations to section 501(c) organizations that conduct election activity but not
14 as their principal purpose and to conclude that such donations are not subject to the
15 restrictions and prohibitions of 2 U.S.C. 441i(e)(1) because they are not in connection with a
16 Federal, State or local election provided that the donations are not earmarked or otherwise
17 designated for election activities, including Federal election activity. To ensure that the
18 section 501(c)(3) organizations' principal purposes are not to conduct election activities, Ms.
19 Tenenbaum may wish to obtain certifications similar to those described in 11 CFR 300.65(e)
20 from each recipient section 501(c)(3) organization prior to donating State campaign funds to
21 these organizations.

1 *Question 3. May Ms. Tenenbaum donate the funds in her State campaign account to section*
2 *501(c)(3) charitable organizations that conduct election activity, including Federal election*
3 *activity listed in 11 CFR 300.65(c), as their principal purpose?*

4 No, Ms. Tenenbaum may not donate the non-Federal funds in her State campaign
5 account to section 501(c)(3) charitable organizations that conduct election activity, including
6 the types of Federal election activity described at 11 CFR 300.65(c), as their principal
7 purpose. Unlike solicitations on behalf of section 501(c) organizations that conducts
8 election activity but not as their principal purpose, solicitations by covered persons on behalf
9 of section 501(c) organizations that conduct election activity as their principal purpose are
10 subject to amount limitations and source prohibitions. There is also a strong likelihood that
11 these section 501(c) organizations would use the donations for election activity. Therefore,
12 donations to such organizations are in connection with a Federal, State or local election and
13 would be subject to the restrictions and prohibitions of 2 U.S.C. 441i(e)(1).

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

20 Ms. Tenenbaum was until recently a candidate for State office but is not one
21 currently. Commission regulations implementing 2 U.S.C. 441i(e)(2) limit the exception
22 only to candidates who are concurrently candidates for both Federal and State office.

1 11 CFR 300.63. However, the wording of 2 U.S.C. 441i(e)(2) concerns an individual who
2 “was also a candidate for a State or local office.” This language encompasses Federal
3 candidates who, like Ms. Tenenbaum, were once but are no longer candidates for State
4 office.

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

16 Your request proposes that the donations to section 501(c)(3) organizations that
17 conduct election activity, including Federal election activity, as their principal purpose
18 should be nonetheless permitted by the exception at section 441i(e)(4)(B). This section,
19 however, applies only to solicitations and does not extend to donations. Therefore, Ms.
20 Tenenbaum’s State campaign account may not donate its excess funds to section 501(c)(3)
21 organizations that conduct election activity, including Federal election activity, as their
22 principal purpose because none of the exceptions in 2 U.S.C. 441i(e) apply.

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

4 No, these funds may not be donated to the South Carolina Democratic Party or a
5 State legislative caucus committee in South Carolina. Because Ms. Tenenbaum's 1998 and
6 2002 elections are over, and because she is not a candidate in 2004 or 2006 for State or local
7 office, neither the South Carolina Democratic Party nor a State legislative caucus committee
8 would be able to use funds donated by Ms. Tenenbaum in connection with any of her
9 campaigns for State or local office. Therefore, 2 U.S.C. 441i(e)(2) does not apply because
10 the donated funds cannot be used "solely in connection with [her] election for State or local
11 office." The exception in section 441i(e)(4)(A) also does not apply because neither the
12 South Carolina Democratic party committee nor a State legislative caucus committee is a
13 section 501(c) organization.

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 Sincerely,

21
22 Ellen L. Weintraub
23 Chair

24
25 Enclosures (AOs 2003-20, 2003-12 and 2003-5)

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

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9 Dear Mr. Elias:

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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. These section 501(c)(3) organizations, however, must
19 not during the current six-year senatorial election cycle have conducted election activity,
20 including Federal election activity enumerated at 11 CFR 300.65(c). *See* 11 CFR 100.3(b).
21 Additionally, these donations cannot be earmarked or designated for any election activity,
22 including Federal election activity and debts arising from any election activity.

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

4 No, Ms. Tenenbaum may not donate the non-Federal funds in her State campaign
5 account to section 501(c)(3) organizations that conduct election activity, including Federal
6 election activity. Donations by Federal candidates of funds not complying with the amount
7 limitations and source prohibitions of the FECA to such organizations is barred by 2 U.S.C.
8 441i(e)(1) because Federal election activity is, by definition, in connection with Federal
9 elections.⁶ Furthermore, the exceptions to section 441i(e)(1) do not apply where the section
10 501(c)(3) organization engages in such activity.

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

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

5 While Ms. Tenenbaum falls within the scope of 441i(e)(2) because she is a former
6 State candidate, donations from her State campaign account to a section 501(c)(3)
7 organization must also meet the other elements of this exception. Section 441i(e)(2) applies
8 to funds spent “*solely* in connection with such election for State or local office” (emphasis
9 added). Donations to section 501(c)(3) organizations that conduct Federal election activity
10 would not constitute the spending of funds solely in connection with Ms. Tenenbaum’s
11 election for State office. As stated above, donating funds to organizations that conduct
12 Federal election activity constitutes spending in connection with elections for Federal office,
13 and therefore cannot be considered to be “solely” in connection with Ms. Tenenbaum’s
14 election for State office. Therefore, the proposed donations of non-Federal funds to section
15 501(c)(3) organizations that conduct Federal election activity do not fall within the
16 exception in 2 U.S.C. 441i(e)(2).

17 Your request proposes that Ms. Tenenbaum’s donations of non-Federal funds to
18 section 501(c)(3) organizations should be permitted under the exception at section
19 441i(e)(4). This exception provides that, if a section 501(c) organization satisfies certain
20 conditions, a covered individual may make “general solicitations” or “specific solicitations”
21 for the section 501(c) organization. The Commission concludes that section 441i(e)(4) is

1 inapplicable to your request because this provision applies only to solicitations of funds and
2 does not extend to donations.⁷

3 Therefore, because none of the exceptions in section 441i(e) apply to the proposed
4 donations, Ms. Tenenbaum may not donate the funds in her State campaign account to
5 section 501(c)(3) organizations that conduct election activity, including Federal election
6 activity.

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

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

18 This response constitutes an advisory opinion concerning the application of the Act
19 and Commission regulations to the specific transaction or activity set forth in your request.
20 See 2 U.S.C. 437f. The Commission emphasizes that, if there is a change in any of the facts
21 or assumptions presented, and such facts or assumptions are material to a conclusion

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 presented in this advisory opinion, then the requestor may not rely on that conclusion as
2 support for her proposed activity.

3 Sincerely,
4

5
6
7 Ellen L. Weintraub
8 Chair
9

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

1 ADVISORY OPINION 2003-32

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Marc E. Elias, Esq.
Perkins Coie
607 Fourteenth Street, N.W.
Washington, D.C. 20005-2011

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. These section 501(c)(3) organizations, however, must
19 not during the current six-year senatorial election cycle have conducted election activity,
20 including Federal election activity enumerated at 11 CFR 300.65(c). *See* 11 CFR 100.3(b).
21 Additionally, these donations cannot be earmarked or designated for any election activity,
22 including Federal election activity and debts arising from any election activity.

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

5 The Commission considered this question but could not approve a response to this
6 part of your request by the required four affirmative votes. 2 U.S.C. 437c(c) and 11 CFR
7 112.4(a).

8 *Question 3. May Ms. Tenenbaum donate the funds in her State campaign account to section*
9 *501(c)(3) charitable organizations that conduct election activity, including Federal election*
10 *activity listed in 11 CFR 300.65(c), as their principal purpose?*

11 No, Ms. Tenenbaum may not donate the non-Federal funds in her State campaign
12 account to section 501(c)(3) charitable organizations that conduct election activity, including
13 the types of Federal election activity described at 11 CFR 300.65(c), as their principal
14 purpose. Given that there is a strong likelihood that these section 501(c) organizations
15 would use the donations to fund directly or indirectly election activity, donations to such
16 organizations are in connection with a Federal, State or local election and would be subject
17 to the restrictions and prohibitions of 2 U.S.C. 441i(e)(1) unless one of the exceptions to this
18 section applies.

19 Under 2 U.S.C. 441i(e)(2), the prohibitions of section 441i(e)(1) do not apply to the
20 solicitation, receipt, or spending of funds by an individual described in section 441i(e)(1)

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1 who is or was also a candidate for a State or local office solely in connection with such
2 election for State or local office if the solicitation, receipt, or spending of funds is permitted
3 under State law and refers only to such State or local candidate, or to any other candidate for
4 the State or local office sought by such candidate or both.

5 Ms. Tenenbaum was until recently a candidate for State office but is not one
6 currently. Commission regulations implementing 2 U.S.C. 441i(e)(2) limit the exception
7 only to candidates who are concurrently candidates for both Federal and State office. 11
8 CFR 300.63. However, the wording of 2 U.S.C. 441i(e)(2) concerns an individual who
9 “was also a candidate for a State or local office.” This language encompasses Federal
10 candidates who, like Ms. Tenenbaum, were once but are no longer candidates for State
11 office.

12 While Ms. Tenenbaum falls within the scope of 441i(e)(2) because she is a former
13 State candidate, donations to a section 501(c)(3) organization must also meet the other
14 elements of this exception. Section 441i(e)(2) applies to funds spent “*solely* in connection
15 with such election for State or local office” (emphasis added). Donations to section
16 501(c)(3) organizations that conduct Federal election activity would not constitute the
17 spending of funds solely in connection with her election for State office. As stated above,
18 donating funds to organizations that conduct Federal election activity constitutes spending in
19 connection with elections for Federal office, and therefore cannot be considered to be
20 “solely” in connection with Ms. Tenenbaum’s election for State office. Therefore, the

1 proposed donations of non-Federal funds to section 501(c)(3) organizations that conduct
2 Federal election activity do not fall within the exception in 2 U.S.C. 441i(e)(2).⁶

3 Your request proposes that the donations to section 501(c)(3) organizations that
4 conduct election activity, including Federal election activity, as their principal purpose
5 should be nonetheless permitted by the exception at section 441i(e)(4)(B). This section,
6 however, applies only to solicitations and does not extend to donations. Therefore, Ms.
7 Tenenbaum's State campaign account may not donate its excess funds to section 501(c)(3)
8 organizations that conduct election activity, including Federal election activity, as their
9 principal purpose because none of the exceptions in 2 U.S.C. 441i(e) apply.

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

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 office.” The exception in section 441i(e)(4)(A) also does not apply because neither the
2 South Carolina Democratic party committee nor a State legislative caucus committee is a
3 section 501(c) organization.

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

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11 Sincerely,

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Ellen L. Weintraub
Chair

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