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FEDERAL ELECTION COMMISSION
Washington, DC 20463

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AGENDA ITEM

For Meeting of: 04-24-03

APR 17 2003

MEMORANDUM

TO: The Commission

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

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

James Kahl *[Signature]*
Deputy General Counsel

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

John C. Vergelli *[Signature]*
Acting Assistant General Counsel

Subject: Draft AO 2003-03

Attached is a proposed draft of the subject advisory opinion. We request that this draft be placed on the agenda for April 24, 2003.

Attachment

1 **Advisory Opinion 2003-3**

2 **Mr. Jan Witold Baran**

3 **Wiley, Rein & Fielding, LLP**

4 **1776 K Street, N.W.**

5 **Washington, D.C. 20006**

6
7 **Dear Mr. Baran:**

8 This responds to your letter of March 7, 2003, requesting an advisory opinion on
9 behalf of State Senator Bill Boling, State Delegate Bill Janis, Chesterfield County School
10 Board Member Beth Davis, and Eric Cantor, a Member of the United States House of
11 Representatives (collectively, "Requestors"). Your request focuses on the application of
12 the Federal Election Campaign Act of 1971, as amended ("the Act"), to fundraising that
13 Representative Cantor wishes to undertake on behalf of the other requestors in State
14 elections in Virginia.

15 ***Background***

16 While there are no Federal candidates to be elected this year (i.e., 2003) in
17 Virginia, there will be hundreds of State and local candidates on the ballot. You report
18 that there is a long and established history of Federal candidates and officeholders being
19 politically involved in these races.

20 State Senator Boling, Delegate Janis, and Board Member Davis would like, as in
21 past campaigns, the participation and support of Republican Federal candidates and
22 officeholders including Representative Cantor. Specifically, they would like
23 Representative Cantor to: (1) attend campaign events, including fundraisers, (2) solicit
24 financial support, and (3) do so orally or in writing. Congressman Cantor would like to

1 participate in their campaigns in this manner. Requestors ask for guidance from the
2 Commission about the degree to which Representative Cantor, as a Federal officeholder
3 and candidate, may engage in State and local election activities.

4 *Questions presented*

5 You ask the following general question: Given that Virginia law permits
6 donations to State and local candidates without amount limitation and from sources that
7 are prohibited from contributing to Federal candidates, to what extent may Representative
8 Cantor, a Federal candidate and officeholder, raise funds on behalf of the other
9 Requestors who are State and local candidates? You also ask the following, more
10 specific questions about fundraising:

- 11 1. a. May Representative Cantor solicit or direct donations to the other Requestors
12 either orally or in writing, provided he does so within the Federal contribution limits and
13 source restrictions?
- 14 b. Are general solicitations of funds that do not request specific amounts
15 permissible?
- 16 c. Are oral or written limitations in conjunction with the solicitation appropriate,
17 and if so, what should they say?
- 18 2. Will Representative Cantor have violated the Act if, in response to a lawful
19 solicitation by him, a State or local candidate receives a donation in excess of the Federal
20 amount limitations or from a Federally prohibited source?

1 3. a. May Representative Cantor attend a fundraising event sponsored by one or
2 more of the other Requestors at which funds in excess of the Federal amount or source
3 restrictions are raised?

4 b. If no, how can the fundraising event be structured to allow him to attend?

5 c. If yes, may his attendance at the fundraising event be publicized?

6 d. If yes, may he participate in the fundraising event as a featured guest or
7 speaker, provided that he does not solicit or direct funds in excess of the
8 Federal amount or source limitations?

9 4. May Representative Cantor attend a fundraising or campaign event for one or
10 more of the other Requestors if the event is paid for with funds lawful under Virginia law
11 but in excess of the Federal amount or source restrictions?

12 5. May Representative Cantor's name appear on written fundraising solicitations
13 that are not signed by him, for example, on a solicitation stating that he is an "honorary
14 chairperson" of one of the other requestor's campaign committee, or that he is a member
15 of the "host committee" of one of the other requestor's fundraising event that he will not
16 attend?

17 6. May Representative Cantor ask individuals who are not Federal candidates or
18 officeholders to raise money on behalf of one or more of the other Requestors as
19 candidates for State or local office?

20 *Analysis and conclusions*

21 On November 6, 2002, the Bipartisan Campaign Reform Act of 2002 (Pub. L.
22 107-155 (Mar. 27, 2002)) (BCRA) took effect. As amended by BCRA, the Act regulates

1 the conduct of Federal candidates¹ and officeholders², their agents,³ and entities directly
2 or indirectly established, financed, maintained, or controlled by them (collectively,
3 "covered persons")⁴ when they raise or spend "funds in connection with any election
4 other than an election for Federal office." 2 U.S.C. 441i(e) (emphasis added).

5 Specifically, section 441i(e)(1) provides,

6 (e) *Federal candidates.*

7 (1) *In general.*

8 A candidate, individual holding Federal office, agent of a candidate or
9 an individual holding Federal office, or an entity directly or indirectly
10 established, financed, maintained or controlled by or acting on behalf of 1
11 or more candidates or individuals holding Federal office, shall not--

12 (A) solicit, receive, direct, transfer, or spend funds in connection with
13 an election for Federal office, including funds for any Federal election
14 activity, unless the funds are subject to the limitations, prohibitions, and
15 reporting requirements of this Act; or

16 (B) solicit, receive, direct, transfer, or spend funds in connection with
17 any election other than an election for Federal office or disburse funds in
18 connection with such an election unless the funds--

¹ 2 U.S.C. 431(2).

² Under 2 U.S.C. 431(3) and 11 CFR 100.3, "Federal office" means the office of President or Vice President, or of Senator or Representative in, or Delegate or Resident Commissioner to, the Congress."

³ 11 CFR 300.2(b)(3).

⁴ 11 CFR 300.60.

1 ... (i) are not in excess of the amounts permitted with respect to
2 contributions to candidates and political committees under paragraphs (1),
3 (2), and (3) of section 315(a) (2 U.S.C. § 441a(a)); and
4 (ii) are not from sources prohibited by this Act from making
5 contributions in connection with an election for Federal office.^[5]

6 The Commission's regulations at 11 CFR 300.62, which took effect on
7 November 6, 2002, implement this statutory provision. Section 300.62 provides that
8 covered persons "may solicit, receive, direct, transfer, spend, or disburse funds in
9 connection with any non-Federal election, only in amounts and from sources that are
10 consistent with State law, and that do not exceed the Act's contribution limits or come
11 from prohibited sources under the Act."⁶

12 Although the Act, as amended by BCRA, does not define the terms, the
13 Commission's regulations define the terms "to solicit" and "to direct." 11 CFR 300.2(m)
14 and (n). To solicit "means *to ask* that another person make a contribution, donation,
15 transfer of funds, or otherwise provide anything of value," whether done so directly or
16 through a conduit or intermediary. 11 CFR 300.2(m) (emphasis added). A solicitation
17 does not include "merely providing information or guidance as to the requirement of

⁵ Paragraph (e)(1) of section 441i does not apply to the solicitation, receipt or spending of funds by a Federal candidate or officeholder who is also a candidate for State or local office if permitted by State law and if the solicitation refers only to a candidate for that State or local office. 2 U.S.C. 441i(e)(2).

⁶ Under the Act, the following persons may not contribute in connection with a Federal election: National banks, corporations, and labor organizations (2 U.S.C. 441b); Federal government contractors (2 U.S.C. 441c); foreign nationals (2 U.S.C. 441e); and minors, although a minor may contribute to a Federal PAC (2 U.S.C. 441k). It is unlawful for the following persons to contribute in connection with *any* election: National banks and corporations organized by authority of Congress (2 U.S.C. 441b); Federal government contractors (2 U.S.C. 441c); and foreign nationals (2 U.S.C. 441e).

1 particular law.” *Id.* To direct “means to ask a person who has expressed an intent to
2 make a contribution, donation, or transfer of funds, or to provide anything of value, to
3 make that contribution, donation, or transfer of funds, or to provide that thing of value
4” 11 CFR 300.2(n) (emphasis added). As with the definition of “to solicit,” “to
5 direct” does not include merely providing guidance or information about the law. *Id.*

6 By defining “to solicit” and “to direct” as “to ask,” the regulations establish that a
7 Federal candidate will not be held liable for soliciting funds in violation of section
8 441i(e) or section 300.62 of the regulations merely by virtue of attending or participating
9 in *any* manner in connection with a fundraising event at which non-Federal funds are
10 raised. Nor will a Federal candidate or officeholder be held liable based on private
11 conversations that would require an examination to infer the Federal candidate’s or
12 officeholder’s intent. “Prohibited and Excessive Contributions: Non-Federal Funds or
13 Soft Money; Final Rule,” 67 Fed. Reg. 49064, 49086-87 (July 29, 2002). To be liable,
14 the Federal candidate must “ask” for non-Federal funds. *Id.*, *see also*, “Prohibited and
15 Excessive Contributions: Non-Federal Funds or Soft Money; Proposed Rule,” 67 Fed.
16 Reg. 35654, 35660, 35681 (May 20, 2002). Thus, the scope of a covered person’s
17 potential liability under section 441i(e)(1) and section 300.62 must be determined by his
18 or her own speech and actions in asking for funds or those of his or her agents,⁷ but not
19 by the speech or actions of another person outside his or her control.

⁷ In implementing BCRA, including section 441i(e)(2), the Commission defined “agent,” as “any person who has actual authority, either express or implied,” to act on behalf of a covered person. *See* 11 CFR 300.2(b). The Commission made clear that under BCRA, an agent “does not apply to individuals who do not have any actual authority to act on their [principal’s] behalf, but only ‘apparent authority’” to do so. Explanation and Justification, 67 Fed. Reg. 49063, 49082 (July 29, 2002). The Commission also made clear that a principal may only be held liable under BCRA for the actions of an agent when the agent is acting on behalf of the principal. *Id.* at 49083. “[I]t is not enough that there is some relationship or contact between the principal and agent; rather, the agent must be acting on behalf of the principal to create

1 The Commission is also mindful of relevant constitutional principles.
2 Restrictions on core political speech by covered persons must be narrowly tailored to
3 serve a substantial governmental interest. *Buckley v. Valeo*, 424 U.S. 1, 25 (1976). Here,
4 the substantial governmental interest is to prevent opportunities for actual and apparent
5 corruption that arise when Federal candidates and officeholders risk incurring political
6 debts by soliciting large monetary contributions and funds from prohibited sources.
7 Congress has made the judgment that this interest is served by banning the solicitation of
8 funds in excess of the Federal contribution limits and from sources prohibited from
9 contributing under the Act. 2 U.S.C. 441i(e)(1).⁸ The Commission notes, however, that
10 section 441i(e) does *not* forbid a covered person from making *any* solicitation of funds in
11 connection with a non-Federal election. The Commission understands section 441i(e) to
12 provide that a covered person may make solicitations, but must do so *only* for funds that
13 comply with the amount limitations and source prohibitions of the Act. With this in
14 mind, the fact that an event is a non-Federal fundraiser is relevant to establishing that a
15 covered person must qualify or limit his or her solicitations at the event, but not to
16 whether he or she may make a solicitation at all.

17

18 1. a. *May Representative Cantor, a Federal candidate or officeholder, solicit or*
19 *direct donations to the other Requestors, as State or local candidates, either orally or in*

potential liability for the principal. This additional requirement ensures that liability will not attach due solely to the agency relationship, but only to the agent's performance of prohibited acts for the principal." *Id.*

⁸ The Commission is also mindful of the principle that one person's free speech rights may not be measured or determined by another person's subjective understanding of what was said. *Thomas v. Collins*, 323 U.S. 516, 535 (1945).

1 *writing, provided he does so within the Federal contribution limits and source*
2 *restrictions?*

3 Yes. Representative Cantor may ask for funds in connection with a State election
4 or direct funds in connection with such an election as long as he does not ask for funds
5 that are in excess of the amounts permitted with respect to contributions to candidates
6 under 2 U.S.C. 441a(a), or that are from sources prohibited by the Act from making
7 contributions in connection with an election for Federal office. 2 U.S.C. 441i(e)(1).
8 Specifically, such Federally permissible funds include contributions by individuals and
9 non-multicandidate committees to candidates of up to \$2,000 per election, by
10 multicandidate committees of up to \$5,000 per election, and by national, state, and local
11 party committees of up to \$5,000 per election.

12 1. b. *Are "general solicitations" of funds that do not request specific amounts*
13 *permissible?*

14 No. Section 441i(e)(1) and section 300.62 explicitly and unambiguously permit
15 Federal candidates and officeholders, such as Representative Cantor, to ask *only* for funds
16 that comply with the amount limitations and source prohibitions of the Act. An
17 unqualified solicitation of funds for a State candidate in a State permitting donations of
18 unlimited amounts or from corporations or labor organizations is, by its very nature, a
19 request for funds that do not comply with the Act. In contrast, a general expression of
20 support by a covered person, standing alone, is not the equivalent of "ask[ing]" for a
21 contribution, donation, or transfer of funds, or the provision of anything of value, and
22 therefore does not constitute a solicitation in violation of section 441i(e)(1)(B) of the Act
23 and section 300.2(m) of the regulations.

1 *1. c. Are oral or written limitations on the solicitation appropriate, and if so, what*
2 *should they say?*

3 Yes. As a general matter, a covered person asking for funds in connection with a
4 non-Federal election in a State that permits donations that would not be lawful if in
5 connection with a Federal election must expressly qualify or limit his or her request so
6 that it is clear that he or she is asking only for funds that comply with Act's amount
7 limitations and source prohibitions. 2 U.S.C. 441i(e)(1)(B); 11 CFR 300.62.

8 This should not, however, be construed to permit a covered person to inoculate a
9 solicitation of non-Federal funds by reciting a rote limitation, but then encouraging the
10 potential donor to disregard the limitation.

11 *2. Will Representative Cantor, a Federal candidate or officeholder, violate the Act*
12 *if, in response to a lawful solicitation by him, a State or local candidate receives a*
13 *donation in excess of the Federal amount limitations or from a Federally prohibited*
14 *source?*

15 No. If Representative Cantor by his own speech and conduct complies with the
16 law, he will not have violated the Act if, in response to a lawful solicitation, a person who
17 is not his agent acting on his behalf or an entity directly or indirectly established,
18 financed, maintained, or controlled by him, makes a donation to a non-Federal candidate
19 in excess of the Federal amount limitations or from a Federally prohibited source.

20

1 3. a. *May Representative Cantor attend a fundraising event sponsored by one or*
2 *more of the other Requestors, as State or local candidates, at which funds that do not*
3 *comply with the Federal amount or source restrictions are raised?*

4 Yes, mere attendance at a fundraiser where non-Federal funds are raised cannot in
5 and of itself give rise to a violation of section 441i(e)(4) or section 300.62.

6 3. b. *If no, how can the fundraising event be structured to allow him to attend?*

7 This question is moot, given the answer to question 3.a., above.

8 3. c. *If yes, may his attendance at the event be publicized and may he participate in*
9 *the event as a featured guest?*

10 Section 441i(e)(1) and section 300.62 do *not* apply to publicity for an event that
11 does not constitute a solicitation or direction of non-Federal funds by a covered person,
12 nor to a Federal candidate or officeholder merely because he or she is a featured guest at
13 a non-Federal fundraiser.

14 In the case of publicity, the analysis is two-fold: First, whether the publicity for
15 the event constitutes a solicitation for donations in amounts exceeding the Act's
16 limitations or from sources prohibited from contributing under the Act; and, second,
17 whether the covered person approved, authorized, or agreed or consented to be featured
18 or named in, the publicity. If the covered person has approved, authorized, or agreed or
19 consented to the use of his or her name or likeness in publicity, and that publicity
20 contains a solicitation for donations, there must be an express statement in that publicity
21 to limit the solicitation to funds that comply with the amount limitations of the Act, and

1 the publicity may only be sent to permissible sources under the Act. 2 U.S.C.

2 441i(e)(1)(B); 11 CFR 300.62.

3 3. *d. If yes, may he participate in the event by speaking, provided that he does not*
4 *solicit or direct funds not in compliance with the Federal amount or source limitations?*

5 Yes, Representative Cantor may speak at such an event, provided that by his own
6 speech and conduct he complies with section 441i(e)(1)(B) and section 300.62 in the
7 course of his participation in a fundraiser. The answers to questions 1.a., 1.b., 1.c., and 2.
8 also apply in answer to this question.⁹

9 4. *May Representative Cantor attend a fundraising or campaign event for*
10 *one or more of the other Requestors, as State or local candidates, if the event is paid for*
11 *with funds lawful under Virginia law but not in compliance with the Federal amount or*
12 *source restrictions?*

13 Yes. The reasons underlying the answer to question 3.a., above, apply here as
14 well. The fact that a fundraiser is paid for with funds lawful under Virginia law but not
15 in compliance with the Federal amount restrictions or source prohibitions does not, in and
16 of itself, place Representative Cantor in violation of section 441i(e)(1) or section 300.62
17 if he attends the fundraising or campaign event.

⁹ It should be noted that BCRA contains a statutory exclusion from BCRA's fundraising prohibitions that permits Federal candidates and officeholders to attend, speak, and appear as featured guests at state and local party committee fundraising events in which funds are raised outside the amount limitations and source prohibitions of the Act. *See* Section 441i(e)(3). The Commission implemented this statutory exclusion at 11 CFR 300.64 and made clear that Federal candidates and officeholders may freely speak at state and local party committee fundraising events "without restriction or regulation" (*id.*), even if the funds raised at such events are outside of the Act's limits and prohibitions. The Commission also made clear that state and local party committees may "publicize featured appearances of Federal candidates and officeholders at these events, including [making] references to these individuals in invitations." "Prohibited and Excessive Contributions: Non-Federal Funds or Soft Money; Final Rule," 67 Fed. Reg. 49064, 49108 (July 29, 2002).

1 5. *May Representative Cantor's name, as a Federal candidate or officeholder,*
2 *appear on written fundraising solicitations that are not signed by him, for example, on a*
3 *solicitation stating that he is an "honorary chairperson" of a State candidate's campaign*
4 *committee, or that he is a member of the "host committee" of a State candidate's*
5 *fundraising event that he will not attend?*

6 Yes, within the limits of section 441i(e)(1) and section 300.62. As explained
7 above, Representative Cantor may ask for funds in connection with a non-Federal
8 election or direct funds in connection with such an election as long as he does not ask for,
9 or spend or direct, funds that are in excess of the amounts permitted with respect to
10 contributions to candidates under 2 U.S.C. 441a(a), or are from sources prohibited by the
11 Act from making contributions in connection with an election for Federal office.
12 2 U.S.C. 441i(e)(1). This is true with regard to written as well as verbal solicitations.

13 As also explained above, in these circumstances, an unqualified solicitation of
14 funds by a Federal candidate or officeholder is not permitted under section 441i(e)(1) or
15 section 300.62. If a covered person, such as Representative Cantor, approves or
16 authorizes the use of his or her name in a writing that constitutes a solicitation for funds,
17 the solicitation must include an express statement to limit or qualify the solicitation to
18 funds that comply with the amount limitations and must not be sent to persons prohibited
19 from contributing to Federal candidates.

20 Your question is framed in terms of whether a covered person, such as
21 Representative Cantor, actually "signs" the fundraising letter. The important questions,
22 however, are whether the letter constitutes a solicitation of non-Federal funds and
23 whether the covered person approved, authorized, or consented or agreed to, the use of

1 his or her name in the solicitation. The Commission concludes that by agreeing to be an
2 “honorary co-chair” of a non-Federal campaign or, especially, by agreeing to be on the
3 host committee of a fundraising event or program, a covered person approves the use of
4 his or her name in communications by that campaign, including solicitations for funds by
5 that campaign or in the context of that fundraising event or program.¹⁰ Indeed, lending
6 one’s name and imprimatur to the campaign’s activities is the very point of agreeing to be
7 an “honorary co-chair” or hosting a fundraiser. Therefore, any such solicitation must
8 include an express statement to limit it to funds that comply with the amount limitations
9 and must not be sent to persons prohibited from contributing to Federal candidates.

10 6. *May Representative Cantor, as a Federal candidate or officeholder, ask*
11 *individuals who are not Federal candidates or officeholders to raise money on behalf of a*
12 *candidate for State or local office?*

13 Although your question does not so specify, the Commission interprets your
14 question to ask whether Representative Cantor, as a covered person, may ask individuals
15 who are not covered persons to raise funds in connection with a non-Federal election that
16 would comply with State law, but that would be in excess of the Act’s contribution
17 amounts limits or from sources that would be prohibited from contributing under the Act.

18 In the context of this question, it is important to note that section
19 441i(e)(1) and section 300.62 expressly apply to an “agent” of a Federal candidate

¹⁰ This is consistent with the Commission’s explanation and justification (E&J) for 11 CFR 300.64. 67 Fed. Reg. 49064, 49108 (July 29, 2002). In the E&J for 11 CFR 300.64, the Commission stated “that Federal candidates and officeholders are prohibited from serving on ‘host committees’ for a party fundraising event or from personally signing a solicitation in connection with a State, district, or local party fundraising event, on the basis that these pre-event activities are outside the permissible activities described [in 11 CFR 300.64] flowing from a Federal candidate’s or officeholder’s appearance or attendance at the event.”

1 or officeholder. The Commission defined “agent” for the purpose of this analysis
2 in 11 CFR 300.2(b), (b)(3) to mean any person who has actual authority (*see*
3 footnote 7, above), either express or implied, to solicit, receive, direct, transfer, or
4 spend funds in connection with any election on behalf of the Federal candidate or
5 officeholder. *Id.* The Commission also made clear that a principal may only be
6 held liable under BCRA for the actions of an agent when the agent is acting on
7 behalf of the principal. Explanation and Justification, 67 Fed. Reg. 49063, 49083
8 (July 29, 2002). “[I]t is not enough that there is some relationship or contact
9 between the principal and agent; rather, the agent must be acting on behalf of the
10 principal to create potential liability for the principal. This additional requirement
11 ensures that liability will not attach due solely to the agency relationship, but only
12 to the agent’s performance of prohibited acts for the principal.” *Id.*

13 The regulatory definition of an “agent” of a Federal candidate or officeholder
14 explicitly applies in “*any* election.” 11 CFR 300.2(b), (b)(3) (emphasis added). Thus,
15 the plain language of the regulation expressly contemplates that an agent of a Federal
16 candidate or officeholder may solicit funds on behalf of the Federal candidate or
17 officeholder in an election other than one in which the Federal candidate or officeholder
18 is himself or herself running. This interpretation is consistent with the most obvious
19 legislative purpose behind the explicit scope of section 441i(e)(1): By explicitly
20 extending the restrictions of section 441i(e)(1) to not just Federal candidates and
21 officeholders but also to their agents acting on their behalf (and to entities directly and
22 indirectly established, financed, maintained, or controlled by them), Congress intended to

1 prevent a Federal candidate or officeholder from accomplishing through another person
2 what he or she cannot do himself or herself under section 441i(e)(1).

3 Therefore, the Commission concludes that a covered person, such as
4 Representative Cantor, may ask another individual to raise funds in connection with a
5 non-Federal election, but when that individual is doing so as the agent of Representative
6 Cantor, he or she must comply with the provisions of section 441i(e)(4) and section
7 300.62 requiring the raising of money in compliance with the amount limitations and
8 source prohibitions of FECA. 11 CFR 300.2(b), (b)(3). The generalized nature of the
9 question, however, does not allow the Commission to advise you as to whether specific
10 persons Representative Cantor might wish to ask to raise funds have actual or implied
11 authority under the Regulations.

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

18

19

Sincerely,

20

21

Ellen L. Weintraub

22

Chair