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AGENDA ITEM

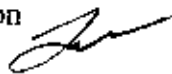
For Meeting of: 2-21-02

February 13, 2002

MEMORANDUM

TO: The Commission

THROUGH: James A. Pehrkon
Staff Director 

FROM: Lawrence H. Norton
General Counsel 

N. Bradley Litchfield *NBL/RS*
Associate General Counsel

Jonathan M. Levin *JL*
Senior Attorney

Subject: Draft AO 2002-02

Attached is a proposed draft of the subject advisory opinion. We request that this draft be placed on the agenda for February 21, 2002.

Attachment

DRAFT

2
3 Eric Gally
4 7239 Grinnell Drive
5 Rockville, MD 20855
6

7 Dear Mr. Gally:

8 This responds to your letter dated December 24, 2001, as supplemented by
9 information received on January 9 and February 1, 2002, requesting an advisory opinion
10 concerning the application of the Federal Election Campaign Act of 1971, as amended
11 ("the Act"), and Commission regulations to the preemption of a State law regulating
12 contribution solicitation activity by lobbyists.

13 **Background**

14 You are a regulated lobbyist in the State of Maryland. You intend to engage in
15 fundraising activities on behalf of a Congressional candidate who is currently a member
16 of the Maryland General Assembly. A Maryland statute prohibits regulated lobbyists
17 from actively fundraising on behalf of members of the Maryland General Assembly (as
18 well as other specified State officers or candidates for the Assembly or those other State
19 offices). You are concerned specifically with the provisions that would prohibit you from
20 (i) soliciting or transmitting a political contribution to a member of the General Assembly
21 from any person, including a political committee; and (ii) serving on a fundraising
22 committee or political committee of a candidate who is a member of the General
23 Assembly. See Md. Code Ann., State Gov't § 15-714(d)(1)(i) and (ii) (2001).¹

¹ Section 15-714 states as follows:

§ 15-714 Certain regulated lobbyists -- Restriction on campaign contributions.

(a) Definitions. -- In this section, "candidate", "contribution", and "political committee" have the meanings provided in Article 33, § 1-101 of the Code.

(b) Applicability. -- This section applies only to a regulated lobbyist described in § 15-701 (a) (1), (2), (3), or (4) of this subtitle.

(c) Applicable time period. -- The restrictions in this section apply from the starting date of the regulated lobbyist's registration to the end of the calendar year in which the registration period ends.

(d) Restrictions on activities. -- (1) A regulated lobbyist who is subject to this section or a person acting on behalf of the regulated lobbyist may not, for the benefit of the Governor, Lieutenant Governor, Attorney General, Comptroller, or member of the General Assembly, or candidate for election to the office of Governor, Lieutenant Governor, Attorney General, Comptroller, or member of the General Assembly, engage in the following activities:

- (i) soliciting or transmitting a political contribution from any person, including a political committee;
- (ii) serving on a fund-raising committee or a political committee;
- (iii) acting as a treasurer for a candidate or official or as treasurer or chairman of a political committee;

1 (Maryland law does not prohibit individual contributions from lobbyists.) You explain
2 that staff counsel for the Maryland State Ethics Commission has interpreted these
3 restrictions to mean that regulated lobbyists may not actively fund-raise on behalf of a
4 candidate for U.S. Congress if that candidate happens to be a sitting member of the
5 Maryland General Assembly. In addition, the Maryland State Ethics Commission, in an
6 informal consideration of the application of the prohibition in section 15-714 on
7 solicitation and transmittal of contributions by a regulated lobbyist to such a candidate,
8 concluded that the prohibition applies.

9 Specifically, you intend to solicit contributions for State Senator Christopher Van
10 Hollen, Jr. who is a candidate in the Democratic primary for the U.S. House of
11 Representatives in Maryland's Eighth Congressional District. You will be engaged in
12 two activities. First, you will hold a private fundraiser for the candidate in your home.
13 You will invite friends and family members to attend the event and the attendees will
14 make contributions, in the form of checks, to Mr. Van Hollen's principal campaign
15 committee. Second, besides holding the actual event, you will solicit another group of
16 friends, family members, and associates to make contributions to the principal campaign
17 committee.

18 Since you intend to raise funds on behalf of a Congressional candidate who is a
19 member of the General Assembly, you ask whether the Act and Commission regulations
20 preempt the application of the particular provisions to your proposed activities.

21 ***Act and Commission Regulations***

22 The Act states that its provisions and the rules prescribed under the Act
23 "supersede and preempt any provision of State law with respect to election to Federal
24 office." 2 U.S.C. §453; 11 CFR 108.7(a). The House committee that approved this
25 provision explained its meaning in sweeping terms, stating that it is intended "to make

(iv) organizing or establishing a political committee for the purpose of soliciting or transmitting contributions from any person; or

(v) forwarding tickets for fund-raising activities, or other solicitations for political contributions, to a potential contributor.

(2) This section does not prohibit a regulated lobbyist from:

(i) making a personal political contribution;

(ii) informing any entity of a position taken by a candidate or official; or

(iii) engaging in other activities not specifically prohibited under paragraph (1) of this subsection.

(3) This section does not apply to a regulated lobbyist who is a candidate with respect to the regulated lobbyist's own campaign.

1 certain that the Federal law is construed to occupy the field with respect to elections to
2 Federal office and that the Federal law will be the sole authority under which such
3 elections will be regulated." *H.R. Rep. No. 93-1239, 93d Cong., 2d Sess. 10 (1974)*.
4 According to the Conference Committee report on the 1974 Amendments to the Act,
5 "Federal law occupies the field with respect to criminal sanctions relating to limitations
6 on campaign expenditures, the sources of campaign funds used in Federal races, the
7 conduct of Federal campaigns, and similar offenses, but does not affect the States' rights"
8 as to other election related conduct such as voter fraud and ballot theft. *H.R. Rep. No. 93-*
9 *1438, 93d Cong., 2d Sess. 69 (1974)*. The Conference report also states that Federal law
10 occupies the field with respect to reporting and disclosure of political contributions to and
11 expenditures by Federal candidates and political committees, but does not affect State
12 laws as to the manner of qualifying as a candidate, or the dates and places of elections.
13 *Id.* at 100-101.²

14 When the Commission promulgated regulations at 11 CFR 108.7 to clarify and
15 explain the scope of the Act's preemption of State law, it stated that the regulations
16 follow section 453 and that, specifically, Federal law supersedes State law with respect to
17 the organization and registration of political committees supporting Federal candidates,
18 disclosure of receipts and expenditures by Federal candidates and political committees,
19 and the limitations on contributions and expenditures regarding Federal candidates and
20 political committees. *Federal Election Commission Regulations, Explanation and*
21 *Justification, House Document No. 95-44, at 51*; 11 CFR 108.7(b). The regulations
22 provide that the Act does not supersede State laws concerning the manner of qualification
23 as a candidate or political party organization, dates and places of elections, voter
24 registration, voting fraud and similar offenses, or candidates' personal financial
25 disclosure. 11 CFR 108.7(c). The Commission explained that these "types of electoral

² The reference to *criminal* sanctions is of only limited significance since, as amended in 1976, violations of the Act may result in either criminal or civil sanctions, or both. The House report should thus be read as reflecting Congress' intent that the Act would occupy the field of Federal election campaign financing, both under the language of 2 U.S.C. §453 and under an identical Federal preemption amendment to the criminal code in 1974. Although the statement at p. 69 of the Conference report referred to substantive criminal provisions of Title 18 that were repealed in 1976, they were, in virtually all respects, renumbered and relocated in Title 2. For example, the contribution limits formerly in 18 U.S.C. §608 became 2 U.S.C. §441a(a), and the corporate prohibitions in 18 U.S.C. §610 became 2 U.S.C. §441b. The disclosure provisions were already in Title 2 and were explicitly covered by the discussion cited above at pp. 100-101 of the Conference Report.

1 matters are interests of the states and are not covered in the Act." House Document No.
2 95-44, at 51. See Advisory Opinions 2001-19, 2001-12, 2000-23 and 1999-12.³

3 ***Analysis***

4 With respect to Federal campaigns, the cited Maryland Code provisions do not
5 regulate those areas reserved for the States in the legislative history and regulations
6 discussed above. Subsections (d)(1)(i) and (ii) prohibit regulated lobbyists from
7 soliciting or transmitting campaign donations to members of the General Assembly, or
8 administering or directing those activities. In that respect, if the State of Maryland
9 applied those subsections to your proposed activities, it would be regulating activity in an
10 area reserved solely for coverage by Federal law; i.e., the sources of funds used in
11 Federal races. Additionally, to the extent that your fundraising activities may be
12 construed by the State of Maryland as "serving on a fund-raising committee or a political
13 committee," subsection (d)(1)(ii) would also regulate the conduct of a Federal campaign
14 with respect to its organization, another area reserved for Federal coverage. The
15 coverage of these areas is demonstrated in the provisions of the Act and regulations.

16 In provisions on prohibited contributions, the Act and Commission regulations
17 directly address issues pertaining to the solicitation of contributions and who may solicit
18 contributions. For example, the Act and regulations state that it shall be unlawful for any
19 person to solicit a contribution from a foreign national or "knowingly to solicit" a
20 contribution from a Federal contractor. 2 U.S.C. §§441e(a) and 441c(a)(2); 11 CFR
21 110.4(a)(2) and 115.2(c). The Act also addresses solicitations with respect to the
22 exceptions to the prohibition on corporate contributions, restricting the class of persons
23 that may be solicited for contributions to separate segregated funds (SSFs). See 2 U.S.C.
24 §441b(b)(4); 11 CFR Part 114. Most directly pertinent within the corporate solicitation
25 context is the restriction on what trade association may solicit SSF contributions from the
26 executive and administrative personnel of a member corporation that belongs to a number
27 of trade associations, where the Act and regulations provide that only the one trade
28 association receiving prior authorization for the calendar year from that member

³ In past opinions, the Commission has summarized the legislative history of 2 U.S.C. §453 as showing that "the central aim of the clause is to provide a comprehensive, uniform Federal scheme that is the sole source of regulation of campaign financing . . . for election to Federal office." Advisory Opinions 2001-19, 2001-12, 2000-23 and 1999-12.

1 corporation may solicit such personnel during the year. 2 U.S.C. §44b(b)(4)(D); 11 CFR
2 114.8(c) and (d). Moreover, the Act and regulations address the transmittal of
3 contributions. The regulations speak to the issue of who may transmit contributions in
4 prescribing what entity may collect and transmit contributions to an SSF, and in
5 providing, outside the SSF collecting agent context, that entities prohibited by the Act
6 from making contributions and expenditures are also prohibited from acting as a conduit
7 for contributions earmarked to candidates or their authorized committees. 11 CFR
8 102.6(b)(1) and 110.6(b)(2)(ii). In addition, the Act and regulations set the time period in
9 which a person receiving a contribution for a political committee must transmit it to the
10 committee. 2 U.S.C. §432(b); 11 CFR 102.8.

11 The foregoing examples demonstrate that the subjects of solicitation and
12 transmittal of contributions for Federal campaigns are within the field occupied by
13 Federal law. The application, to your proposed activities on behalf of a Congressional
14 candidate who is a General Assembly member, of the described Maryland Code
15 prohibitions on solicitation or transmittal by regulated lobbyists is preempted by the
16 provisions of the Act and Commission regulations.

17 As indicated above, subsection (d)(1)(ii) pertains to the organization of political
18 committees, as well as to the solicitation and transmittal of contributions. The Act and
19 regulations provide requirements as to the organizational framework in which a Federal
20 political committee must conduct its operations. For example, they address this subject
21 by requiring committees to have a treasurer and a custodian of records. 2 U.S.C.
22 §§432(a) and 433(b)(3) and (4); 11 CFR 102.2(a)(1)(iii) and (iv), and 102.7. More
23 particularly as to who may serve on such committees, the regulations prohibit
24 participation by foreign nationals in the decision-making process of a political committee
25 with regard to its election-related activities. 11 CFR 110.4(a)(3). Thus, it is clear that the
26 organization of a Federal candidate's political committee with respect to its personnel is
27 within the field occupied by Federal law. Therefore, in addition to the basis for
28 preemption discussed above, the provisions of the Act and Commission regulations
29 preempt the application of subsection (d)(1)(ii) to your proposed activities as they pertain
30 to the organization of a political committee of a Congressional candidate who is a
31 General Assembly member.

