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August 5, 2004

AGENDA ITEM

For Meeting of: 8-12-04

MEMORANDUM

TO: The Commission

THROUGH: James A. Pehrkon *AKJ/P*
Staff Director

FROM: Lawrence H. Norton *LHN*
General Counsel

Rosemary C. Smith *RCS*
Associate General Counsel

Brad C. Deutsch *BCD*
Assistant General Counsel

Jonathan Levin *JL*
Staff Attorney

Subject: Draft AO 2004-25

Attached is a proposed draft of the subject advisory opinion. We request that this draft be placed on the agenda for August 12, 2004.

Attachment

1 ADVISORY OPINION 2004-25

2

3 Marc E. Elias, Esq.

4 Perkins Coie LLP

5 607 14th Street, N.W.

6 Washington, D.C. 20005-2011

7

8 Dear Mr. Elias:

DRAFT

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 Senator Corzine’s donation of
12 his personal 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, as defined in 11 CFR 100.24(a)(2)?

5 *Legal Analysis and Conclusion*

6 Based upon the analysis set out below, the Commission concludes that 2 U.S.C. 441i(a),
7 441i(d), and 441i(e) do not restrict Senator Corzine’s ability to donate his personal funds to
8 organizations engaging in voter registration activity.

9 1. *National Party Committee Officer*

10 The Act, as amended by the Bipartisan Campaign Reform Act of 2002 (“BCRA”), and
11 the Commission’s rules restrict the ability of national party committees (including national
12 congressional committees of a political party, such as the DSCC) to raise and spend funds in
13 connection with an election for Federal office, including funds for any Federal election activity.
14 See 2 U.S.C. 441i(a) and (d); 11 CFR 300.10, 300.11 and 300.50. Although the restrictions
15 extend to officers and agents of a national party committee, the plain language of both the Act
16 and the Commission’s regulations specifically limit application of these restrictions to national
17 party committee officers and agents only when such individuals are *acting on behalf of the*
18 national party committee.¹ See 2 U.S.C. 441i(a) and (d); 11 CFR 300.10(c)(1), 300.11(b)(1), and

19 _____
¹ These provisions also apply to an entity that is directly or indirectly established, financed, maintained or controlled by a national party committee, and agents or officers of such an entity. 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).

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

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

13 2. *Federal Candidate or Officeholder*

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

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).

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); 11 CFR 300.60(c) and (d).

1 means contacting individuals by telephone, in person, or by other individualized
2 means to assist them in registering to vote. Voter registration includes, but is not
3 limited to, printing and distributing registration and voting information, providing
4 individuals with voter registration forms, and assisting individuals in the
5 completion and filing of such forms.

6 11 CFR 100.24(a)(2).

7 Section 300.61 of the Commission's rules, 11 CFR 300.61, implements 2 U.S.C.
8 441i(e)(1)(A) and states that no Federal candidate or officeholder:

9 shall solicit, receive, direct, transfer, spend, or disburse funds in connection with
10 an election for Federal office, including funds for any Federal election activity as
11 defined in 11 CFR 100.24, unless the amounts consist of Federal funds that are
12 subject to the limitations, prohibitions, and reporting requirements of the Act.

13
14 11 CFR 300.61; *see also* 11 CFR 300.60 (defining the persons covered by 2 U.S.C. 441i(e) and
15 11 CFR 300.61).

16 Unlike the restrictions regarding national party committees, discussed above, the Act and
17 Commission regulations do not contain any language that explicitly limits application of the
18 restrictions on a Federal candidate or officeholder only to when such an individual is acting in his
19 or her official capacity. Nevertheless, the language of 2 U.S.C. 441i(e)(1)(A), as well as its
20 implementing regulation at 11 CFR 300.61, is not clear as to whether the restrictions on the use
21 of funds extend to personal funds of the Federal candidates or officeholders, and there is no
22 legislative history suggesting that Congress intended the section 441i(e)(1)(A) restrictions to
23 apply to the personal funds of Federal candidates and officeholders. Additionally, the underlying
24 purposes of 2 U.S.C. 441i(e)(1)(A) and 11 CFR 300.61 are not furthered by restricting Federal
25 candidates or officeholders who, solely at their own discretion, spend their personal funds, as
26 opposed to those who spend funds contributed or donated by others, or who raise funds for other
27 persons or organizations to spend.

1 A principal sponsor of BCRA, in discussing the purpose of the restrictions on the
2 activities of Federal officeholders contained in 2 U.S.C. 441i(e), stated that “a key purpose” of
3 section 441i(e) was “to stop the use of soft money as a means of buying influence and access
4 with Federal candidates and officeholders.” 148 Cong. Rec. S2139 (Daily ed. March 20, 2002)
5 (statement of Senator McCain). The sponsor characterized the prohibitions contained in section
6 441i(e) as being “no different from the Federal laws and ethical rules that prohibit Federal
7 officeholders from using their offices or positions of power to solicit money or other benefits.”
8 *Id.* He further characterized the “compelling purpose” of section 441i(e) as “deter[ring] any
9 possibility that solicitations of large sums from corporations, unions, and wealthy private
10 interests will corrupt or appear to corrupt” *Id.* Similarly, the Supreme Court’s discussion
11 of 2 U.S.C. 441i(e) in *McConnell* noted that, “[w]ithout some restriction on solicitations, federal
12 candidates and officeholders could easily avoid FECA’s contribution limits by soliciting funds
13 from large donors and restricted sources to like-minded organizations engaging in federal
14 election activities.” *McConnell*, 124 S.Ct., at 683.

15 The Commission notes that the restriction on each of the activities listed in 2 U.S.C.
16 441i(e)(1)(A) and 11 CFR 300.61 (*i.e.*, soliciting, receiving, directing, transferring, spending, or
17 disbursing) furthers the anti-corruption purpose of those sections. The inclusion of each of these
18 activities addresses not just the solicitation and receipt of funds by a Federal candidate or
19 officeholder but also his or her ability to use funds that have been either solicited for, or received
20 by, a committee or entity that is directly or indirectly established, financed, maintained, or
21 controlled by, or acting on behalf of, the candidate or officeholder. The purpose of these sections
22 is not furthered, however, by restricting an individual who happens to be a Federal candidate or
23 officeholder from donating his or her own personal funds, when acting solely at his or her own

1 discretion. Such funds have not been solicited or received from others at the behest of the
2 Federal candidate, officeholder or agent (*see* Advisory Opinion 2003-32 applying the section
3 441i(e) restrictions to funds from a Federal candidate's State campaign committee raised in a
4 previous race for non-Federal office). Thus, because the funds Senator Corzine plans to donate
5 would not be solicited or received from others, he would not, through his donation of such
6 personal funds, incur an obligation toward any other person that would raise concerns regarding
7 corruption or the appearance thereof. The Commission concludes, therefore, that Senator
8 Corzine may donate his personal funds in amounts exceeding the Act's limits to organizations
9 that engage in voter registration activity, irrespective of his status as a Federal candidate or
10 officeholder. In reaching this conclusion, the Commission assumes that Senator Corzine's
11 donations to each organization will not be in amounts that are so large or in amounts that
12 comprise such a substantial percentage of the organization's receipts that the organization would
13 be considered one that is "financed" by Senator Corzine. *See* 2 U.S.C. 441i(e)(1); 11 CFR
14 300.61.

15 The Commission notes again that, if any of these organizations qualifies as a political
16 committee, Senator Corzine's contributions would be subject to the same dollar limits as those
17 applicable to the contributions of any other individual. *See* 2 U.S.C. 441a(a)(1).

18 This response constitutes an advisory opinion concerning the application of the Act and
19 Commission regulations to the specific transaction or activity set forth in your request. *See* 2
20 U.S.C. 437f. The Commission emphasizes that, if there is a change in any of the facts or
21 assumptions presented and such facts or assumptions are material to a conclusion presented in
22

1 this advisory opinion, then the requester may not rely on that conclusion as support for its
2 proposed activity.

3 Sincerely,
4

5
6
7 Bradley A. Smith
8 Chairman
9

10 Enclosure (AO 2003-32)