

AGENDA DOCUMENT NO. 03-26-A



FEDERAL ELECTION COMMISSION  
WASHINGTON, D.C. 20463

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**AGENDA ITEM**  
For Meeting of: 04-24-03

**SUBMITTED LATE**

MEMORANDUM

TO: The Commission  
FROM: Vice Chairman Bradley A. Smith *BAS*  
DATE: 04/18/2003  
SUBJECT: AO 2003-03

Attached for consideration at Thursday's meeting is an alternative draft for AO2003-03.

1 **Advisory Opinion 2003-3**

2

3 **Mr. Jan Witold Baran**

4 **Wiley, Rein & Fielding, LLP**

5 **1776 K Street, N.W.**

6 **Washington, D.C. 20006**

7

8 **Dear Mr. Baran:**

9

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

17 **Although no Federal candidates are to be elected in 2003 in Virginia, hundreds of**  
18 **State and local candidates are on the ballot. Your request states that there is a long and**  
19 **established history of Federal candidate and officeholder involvement in these races.**  
20 **State Senator Boling, Delegate Janis, and Board Member Davis would like the continued**  
21 **participation and support of Federal candidates and officeholders including Rep. Cantor.**

1 Specifically, they would like Rep. Cantor to: (1) attend campaign events, including  
2 fundraisers, (2) solicit financial support, and (3) do so orally or in writing. Rep. Cantor  
3 would like to participate in their campaigns in this manner. Requestors ask for guidance  
4 from the Commission about the degree to which Rep. Cantor, as a Federal officeholder  
5 and candidate, may engage in Virginia state and local election activities in light of the  
6 passage of the Bipartisan Campaign Reform Act ("BCRA"), given that Virginia law does  
7 not restrict the amounts or sources of campaign funds.

8 You also ask the following, more specific questions about fundraising:

- 9 1. a. May Rep. Cantor solicit or direct donations to the other Requestors either  
10 orally or in writing, provided he does so within the Federal contribution limits and  
11 source restrictions?
- 12 b. Are general solicitations of funds that do not request specific amounts  
13 permissible?
- 14 c. Are oral or written limitations in conjunction with the solicitation appropriate,  
15 and if so, what should they say?
- 16 2. Will Rep. Cantor have violated the Act if, in response to a lawful solicitation by  
17 him, a State or local candidate receives a donation in excess of the Federal amount  
18 limitations or from a Federally prohibited source?
- 19 3. a. May Rep. Cantor attend a fundraising event sponsored by one or more of the  
20 other Requestors at which funds in excess of the Federal amount or source  
21 restrictions are raised?
- 22 b. If no, how can the fundraising event be structured to allow him to attend?

- 1           c. If yes, may his attendance at the fundraising event be publicized?
- 2           d. If yes, may he participate in the fundraising event as a featured guest or
- 3                 speaker, provided that he does not solicit or direct funds in excess of the
- 4                 Federal amount or source limitations?
- 5   4.    May Rep. Cantor attend a fundraising or campaign event for one or more of the
- 6           other Requestors if the event is paid for with funds lawful under Virginia law but
- 7           in excess of the Federal amount or source restrictions?
- 8   5.    May Rep. Cantor's name appear on written fundraising solicitations that are not
- 9           signed by him, for example, on a solicitation stating that he is an "honorary
- 10          chairperson" of one of the other requestor's campaign committee, or that he is a
- 11          member of the "host committee" of one of the other requestor's fundraising event
- 12          that he will not attend?
- 13   6.    May Rep. Cantor ask individuals who are not Federal candidates or officeholders
- 14          to raise money on behalf of one or more of the other Requestors as candidates for
- 15          State or local office?

16   ***Analysis and conclusions***

17           On November 6, 2002, the Bipartisan Campaign Reform Act of 2002 (Pub. L.

18   107-155 (Mar. 27, 2002)) (BCRA) came into effect. As amended by BCRA, the Act

19   regulates the conduct of Federal candidates<sup>1</sup> and officeholders<sup>2</sup>, their agents,<sup>3</sup> and entities

20   directly or indirectly established, financed, maintained, or controlled by them

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<sup>1</sup> 2 U.S.C. 431(2).

<sup>2</sup> 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."

1 (collectively, "covered persons")<sup>4</sup> when they raise or spend "funds in connection with  
2 any election other than an election for Federal office." 2 U.S.C. 441i(e). Specifically,  
3 section 441i(e)(1) provides,

4 (e) *Federal candidates.*

5 (1) *In general.*

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

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

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

17 (i) are not in excess of the amounts permitted with respect to  
18 contributions to candidates and political committees under paragraphs (1),  
19 (2), and (3) of section 315(a) (2 U.S.C. § 441a(a)); and

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<sup>3</sup> 11 CFR 300.2(b)(3).

<sup>4</sup> 11 CFR 300.60.

1           (ii) are not from sources prohibited by this Act from making  
2           contributions in connection with an election for Federal office.<sup>5</sup>

3

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

10          The Commission's regulations define the terms "to solicit" and "to direct." 11  
11          CFR 300.2(m) and (n). To solicit "means *to ask* that another person make a contribution,  
12          donation, transfer of funds, or otherwise provide anything of value," whether done so  
13          directly or through a conduit or intermediary. 11 CFR 300.2(m) (emphasis added). A  
14          solicitation does not include "merely providing information or guidance as to the  
15          requirement of particular law." *Id.* To direct "means *to ask* a person who has expressed  
16          an intent to make a contribution, donation, or transfer of funds, or to provide anything of  
17          value, to make that contribution, donation, or transfer of funds, or to provide that thing of  
18          value." 11 CFR 300.2(n) (emphasis added). As with the definition of "to solicit," "to

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<sup>5</sup> 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).

<sup>6</sup> 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 direct" does not include merely providing guidance or information about the law. *Id.* A  
2 general request for "support" that does not solicit money is not a solicitation under the  
3 Act. *See, e.g.* H.R. Conf. Rep. No. 94-1057 at 38 (1976) ("general request for assistance"  
4 not regulated as suggestion that person make expenditure).

5 The statute, at section 441i(e)(1) and the regulation at section 300.62 are specific  
6 as to what and to whom they apply. Each forbids certain conduct by Federal candidates,  
7 officeholders, their agents, and entities directly or indirectly established, financed,  
8 maintained, or controlled by them.

9

10 A covered person's liability is evaluated by his or her own speech and actions (or  
11 those of his or her agents), and not by that of another person outside his or her control. A  
12 solicitation ban, prohibiting speech on the basis of its content, burdens both speech and  
13 association liberties at the core of our First Amendment freedoms, and must be narrowly  
14 tailored to serve a compelling state interest. *Republican Party of Minnesota v. White*, 122  
15 S.Ct. 2528, 2534 (2002); *Village of Schaumburg v. Citizens for a Better Environment*,  
16 100 S.Ct. 826, 833 (1980). That the covered persons at issue are public officials is also  
17 important: "The role that elected officials play on our society makes it all the more  
18 imperative that they be allowed freely to express themselves on matters of current public  
19 importance." *Republican Party of Minnesota*, 122 S.Ct. at 2538 (quoting *Wood v.*  
20 *Georgia*, 370 U.S. 375, 395 (1962)).

21

22 Prohibitions on certain types of speech – solicitations, here – must also be clear.

23 This Commission cannot set standards – exposing respondents to potential criminal

1 sanctions – based upon a listener’s perception, intuition or inference that a covered  
2 person’s statements amount in some way to a solicitation. Liability cannot rest upon the  
3 “varied understanding” of members of an audience. “In these conditions it blankets with  
4 uncertainty whatever may be said. It compels the speaker to hedge and trim.” *Buckley v.*  
5 *Valeo*, 424 U.S. 1, 43 (quoting *Thomas v. Collins* (1945) 323 U.S. 516, 535 (1945)).

6

7       Were the Commission to announce guidance requiring such interpretive readings,  
8 we anticipate many practical enforcement difficulties. Even bona fide complaints would  
9 raise difficult issues regarding credibility and verification about what was said or not said  
10 by whom, when and where. In anticipation of such enforcement, officeholders would  
11 face the alternatives described by the Court in *Thomas v. Collins*: “(1) To stand on his  
12 right and speak freely; (2) to quit, refusing entirely to speak; (3) to trim, and even thus to  
13 risk the penalty.” *Thomas v. Collins*, 323 U.S. at 536. The Court in that case concluded  
14 that the risk of prosecution and its chilling effect on speech was “incompatible with the  
15 freedoms secured by the First Amendment.” *Id.* at 537.

16

17       Mindful of the legal landscape, this Commission must now set forth guidance that  
18 is both tailored and clear. We find that covered persons may attend whatever events they  
19 deem worthwhile without running afoul of the Act. Our regulations, by defining “to  
20 solicit” and “to direct” as “to ask,” establish that a covered person will not be found to  
21 have solicited impermissible funds merely by virtue of attending a fundraising event at  
22 which non-Federal funds are raised or which is financed by non-Federal funds.

23



1           Nor will covered persons be held liable based on remarks or conversations that  
2 would require an examination to impute their intent. "Prohibited and Excessive  
3 Contributions: Non-Federal Funds or Soft Money; Final Rule," 67 Fed. Reg. 49064,  
4 49086-87 (July 29, 2002). The Commission shall not sanction speech based on "winks"  
5 or "nods" or the "impressions" of attendees or the press regarding a speaker's intentions.

6  
7           Accordingly, to be liable, a covered person must "ask" for funds for a campaign  
8 that exceed the limits and source restrictions of Federal law. *Id.*; *see also*, "Prohibited  
9 and Excessive Contributions: Non-Federal Funds or Soft Money; Proposed Rule," 67  
10 Fed. Reg. 35654, 35660, 35681 (May 20, 2002). Specifically, permissible funds include  
11 contributions by individuals and committees to candidates of up to \$2,000 per election,  
12 by multicandidate committees of up to \$5,000 per election, and by national, state, and  
13 local party committees of up to \$5,000 per election. 2 U.S.C. 441a(a).

14  
15           In light of the above general principles, the Commission advises you as follows  
16 regarding the specific questions you raised.

17  
18       1.     *a. May Rep. Cantor, a Federal candidate or officeholder, solicit or direct*  
19 *donations to the other Requestors, as State or local candidates, either orally or in*  
20 *writing, provided he does so within the Federal contribution limits and source*  
21 *restrictions?*

22           Yes.

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

3 Yes. Certainly if the solicitation is in the context of a fundraising effort that itself  
4 solicits only funds under the federal limits and prohibitions, general requests for  
5 donations are permissible. An unqualified solicitation of funds even at an event raising  
6 funds that fall outside those permitted under the Act will not be deemed an impermissible  
7 solicitation unless Rep. Cantor refers to excessive amounts or prohibited sources in the  
8 solicitation. The Commission will not subject officeholders to vague and uncertain  
9 regulations by "interpreting" that the speaker's "intent" is to raise illegal funds, absent a  
10 statement that by the speaker asking for funds that do not comport with federal law.

11 Should a covered person ask for a donation of an excessive amount, for example  
12 request an individual give \$20,000 to a candidate for state office, or solicit a contribution  
13 specifically from a corporation or labor organization, that solicitation would violate the  
14 limits in the Act.

15 Although the Act and the Commission's regulations do not require a disclaimer,  
16 when soliciting donations, covered persons may include limiting disclaimer language as a  
17 safe harbor against a finding of a violation, as discussed in 1(c) below.

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

20 Although the law does not require a disclaimer, covered persons may choose to  
21 include specific limiting language as a safe harbor against a finding of violation. The  
22 Commission would find the following language to be an adequate disclaimer:

1           *[For a solicitation on behalf of a candidate for state office] This*  
2           *solicitation is for a donation of up to \$2,000 from an individual's own*  
3           *funds. Funds from corporations, labor organizations, foreign nationals,*  
4           *government contractors, or minors are not requested.*

5           A covered person may not use a disclaimer to inoculate a solicitation of non-  
6           Federal funds, such as by reciting a disclaimer, but then encouraging the potential donor  
7           to disregard the limitation.

8           2.       *Will Rep. Cantor, a Federal candidate or officeholder, violate the Act if, in*  
9           *response to a lawful solicitation by him, a State or local candidate receives a donation in*  
10          *excess of the Federal amount limitations or from a Federally prohibited source?*

11          No. The Commission will look to the acts of covered persons like Rep. Cantor  
12          and that person's agents to determine liability. Rep. Cantor will not be liable for a  
13          violation of the solicitation ban if a donor, in response to a lawful solicitation, makes an  
14          excessive contribution or one from a prohibited source.

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

18          Yes.

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

20          See 3a.

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

1           **Yes. If the publicity materials also solicit contributions, then the advice regarding**  
2 **solicitations should be followed.**

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.**

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

10           **Yes. The fact an event is funded with lawful Virginia funds that do not comply**  
11 **with federal limits and source restrictions does not, in and of itself, place Rep. Cantor in**  
12 **violation of section 441i(e)(1) or section 300.62 if he attends the event.**

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

18           **As explained above, Rep. Cantor may ask for funds in connection with a non-**  
19 **Federal election or disburse funds in connection with such an election as long as he does**  
20 **not ask for, or spend or disburse, funds that are in excess of the amounts permitted with**  
21 **respect to contributions to candidates under 2 U.S.C. 441a(a), or are from sources**  
22 **prohibited by the Act from making contributions in connection with an election for**

1 Federal office. 2 U.S.C. 441i(e)(1). This is true with regard to written as well as verbal  
2 solicitations.

3 The Commission concludes that merely by agreeing to appear as an "honorary co-  
4 chair" of a non-Federal campaign, a covered person has not solicited funds for the  
5 campaign. The Commission believes such use of a covered person's name is little  
6 different from circulating a list of endorsers, or from an officeholder appearing in  
7 advertising endorsing the nonfederal candidate. If a non-Federal campaign routinely uses  
8 letterhead featuring a covered person as an "honorary co-chair" or in a similar capacity  
9 not related to fundraising, the campaign's use of that letterhead also for a written  
10 solicitation signed by another would not constitute a solicitation by the covered person.

11 A covered person may be found to have solicited impermissible funds if that  
12 person's name is included (for instance as a host or featured guest) on an invitation for a  
13 fundraising event that solicits impermissible funds, unless the invitation includes a  
14 statement limiting the covered person's solicitation to funds that comply with the limits  
15 and source prohibitions of the Act.

16 6. *May Rep. Cantor, as a Federal candidate or officeholder, ask individuals who are*  
17 *not Federal candidates or officeholders to raise money on behalf of a candidate for State*  
18 *or local office?*

19 Yes, unless the person performs as an agent of Rep. Cantor to raise funds for the  
20 state or local candidate on Cantor's behalf. A covered person, such as Rep. Cantor, may  
21 ask another individual to raise funds in connection with a non-Federal election, and such  
22 a request without more will not make the individual an agent of the officeholder.

1           The Commission defined "agent" in 11 CFR 300.2(b)(3) to include any person  
2 who has actual authority, either express or implied, to solicit, receive, direct, transfer, or  
3 spend funds in connection with any election on behalf of the Federal candidate or  
4 officeholder. *Id.* If an individual is raising funds as an agent of Rep. Cantor that person  
5 must comply with the amount limitations and source prohibitions of FECA.

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

12

13

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Sincerely,

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16

17

Ellen L. Weintraub

18

Chair