FEDERAL ELECTION COMMISSION
Washington, DC 20463

December 19, 2003

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

ADVISORY OPINION 2003-32

Marc E. Elias, Esq.
Perkins Coie
607 Fourteenth Street, N.W.
Washington, D.C. 2005-2011

Dear Mr. Elias:

This responds to your letter dated October 14, 2003, as supplemented by your e-mails dated October 20, and 27, 2003 requesting an advisory opinion on behalf of Ms. Inez Tenenbaum, concerning the application of the Federal Election Campaign Act of 1971, as amended ("the Act"), and Commission regulations, to the use of funds remaining from Ms. Tenenbaum's 2002 State campaign account.

Background

You state that Ms. Tenenbaum is the South Carolina State Superintendent of Education and also a candidate for election to the U.S. Senate. You state she was first elected to her State office in 1998 and was re-elected in 2002. She became a candidate for the U. S. Senate on August 19, 2003. [1]

You explain that as a candidate for South Carolina State office in the 2002 election, Ms. Tenenbaum's campaign maintained a State campaign account into which she placed funds raised for her candidacy. Ms. Tenenbaum's State campaign account has paid all its expenses from the 2002 election and is prepared to terminate.[2] You state that some of the

[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.

funds in the State campaign account were raised prior to the 2002 election and some were raised following the 2002 election in anticipation of a 2006 re-election campaign. You also affirm that none of the fundraising for her State campaigns referenced her potential candidacy for Federal office and no funds have been raised for her State campaign account since she declared her Federal candidacy. The State campaign account contains surplus funds that, while compliant with South Carolina law, were not raised in accordance with the contribution limits and source prohibitions of the Act.[3]

Ms. Tenenbaum would like to donate these funds to several organizations within and outside South Carolina. These organizations include those organized under section 501(c)(3) of the Internal Revenue Code of 1986 (26 U.S.C. 501(c)(3)), the South Carolina Democratic Party, and a State legislative caucus committee in South Carolina. You state that these proposed uses are consistent with South Carolina law concerning the distribution of unexpended State campaign funds.[4] You also state that Ms. Tenenbaum does not directly or indirectly establish, finance, maintain or control any of the section 501(c)(3) organizations that might receive the funds. Some of the section 501(c)(3) organizations to which she would like to donate the funds would be organizations that do conduct some activities in connection with an election, including the Federal election activities enumerated at 11 CFR 300.65(c) (*e.g*. voter registration, voter identification, get-out-the-vote ("GOTV") activity and generic campaign activity). You state that some of these organizations conduct some Federal election activity, but not as their principal purpose, while others either conduct "certain "[F]ederal election activity" as [their] principal purpose or would spend the donation specifically on those activities." In a November 10 phone conversation with Commission staff, you also confirmed that South Carolina legislative caucus committees conduct State election activity.[5] Ms. Tenenbaum understands that as a Federal candidate she may be limited in her ability to spend these funds.

Legal Analysis and Conclusions

Question 1. May Ms. Tenenbaum donate the funds in her State campaign account to section 501(c)(3) charitable organizations that do not conduct any election activity?

Yes, Ms. Tenenbaum may donate the non-Federal funds in her State campaign account to section 501(c)(3) charitable organizations that do not conduct any election activity.

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[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.

[5] South Carolina law treats these entities as political committees. *See* S.C. Code Ann. 8-13-1300(6).

On November 6, 2002, the Bipartisan Campaign Reform Act of 2002, Pub. L. 107-155, 116 Stat. 81 (2002) ("BCRA"), took effect. As amended by BCRA, the Act regulates Federal candidates and officeholders, their agents, and entities directly or indirectly established, financed, maintained, or controlled by them (collectively, "covered persons"), when they raise or spend funds in connection with either Federal or non-Federal elections. 2 U.S.C. 441i(e)(1). Both BCRA and the Commission's rules implementing BCRA prohibit covered persons from soliciting, receiving, directing, transferring, or spending any "funds in connection with an election for Federal office" or any "funds in connection with an election other than an election for Federal office" unless such funds are "subject to the limitations, prohibitions, and reporting requirements of this Act" or consistent with FECA's amount limitations and source prohibitions, respectively. 2 U.S.C. 441i(e)(1)(A) and (B); 11 CFR 300.61 and 300.62.

In analyzing the application of 2 U.S.C. 441i(e), the threshold question is whether the funds involved are in connection with an election for Federal office or any election other than an election for Federal office, under subsection (e)(1). If they are, then the analysis proceeds to whether the exceptions to subsection (e)(1) in subsection (e)(2) through (e)(4) apply. *See* Advisory Opinion 2003-20 (citing Advisory Opinion 2003-12).

As a candidate for election to the U.S. Senate, Ms. Tenenbaum is a Federal candidate and a covered person under section 441i(e). However, although the funds in the State campaign account were raised in connection with a non-Federal election, Ms. Tenenbaum was not a Federal candidate and was not subject to the restrictions in 2 U.S.C. 441i(e)(1)(A) at the time she solicited and received these funds. While Ms. Tenenbaum would be a Federal candidate at the time these funds are proposed to be spent, donations to section 501(c)(3) organizations that conduct no election activity of any kind would not be in connection with a Federal or non-Federal election. Therefore, such donations do not fall within the restrictions and prohibitions of 2 U.S.C. 441i(e)(1). Ms. Tenenbaum may donate the unexpended funds in her State campaign account to section 501(c)(3) organizations that do not conduct any election activity. Additionally, these donations cannot be earmarked or designated for any election activity, including Federal election activity and debts arising from any election activity.

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

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

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

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

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

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

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

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

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

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

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

This response constitutes an advisory opinion concerning the application of the Act and Commission regulations to the specific transaction or activity set forth in your request.

[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 (defining the statutory phrase "in connection with an election in which a candidate for Federal office appears on the ballot").

See 2 U.S.C. 437f. The Commission emphasizes that, if there is a change in any of the facts or assumptions presented, and such facts or assumptions are material to a conclusion presented in this advisory opinion, then the requestor may not rely on that conclusion as support for her proposed activity.

Sincerely,

(signed)

Ellen L. Weintraub
Chair

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