October 31, 2003

Lawrence H. Norton, Esq.
General Counsel
Federal Election Commission
999 E Street, NW
Washington, D.C. 20463

Comments on AOR 2003-32

Re: Advisory Opinion Request 2003-32

Dear Mr. Norton:

I am writing on behalf of the Campaign Legal Center to provide comments on Advisory Opinion Request 2003-32, submitted on behalf Inez Tenenbaum. The request concerns the ability of Ms. Tenenbaum, now a federal candidate, to dispose of funds in a state campaign account she controls.

As related by the Advisory Opinion request, Ms. Tenenbaum is the South Carolina State Superintendent of Education and a candidate for U.S. Senate. She was re-elected Superintendent of Education in November of 2002 and became a candidate for U.S. Senate on August 19, 2003. Ms. Tenenbaum raised funds for her state campaign account both before and after her last election in 2002. That state campaign account continues to possess funds, though all expenses from Ms. Tenenbaum's 2002 state election campaign have been paid. The funds in the state campaign account were not raised in accordance with the source prohibitions and amount limitations of the Federal Election Campaign Act of 1971, as amended (FECA).

Ms. Tenenbaum seeks to dispose of the remaining funds in her state campaign account and specifically inquires as to whether she may contribute such funds to Section 501(c)(3) organizations (including those that make disbursements for get-out-the-vote activity in connection with elections where federal candidates appear on the ballot and other "Federal election activity"), the South Carolina Democratic Party or a state legislative caucus committee within South Carolina. In support of the proposition that she may make these donations, the Advisory Opinion request cites and emphasizes the statutory allowances of 2 U.S.C. § 441i(e)(2) and 2 U.S.C. § 441i(e)(4). Given the requestor's emphasis on these statutory provisions, these comments proceed first to address their application in this instance.

1a. 2 U.S.C. § 441i(e)(2)

2 U.S.C. § 441i(e)(1) prohibits federal candidates and officeholders and, separately, any entity "directly or indirectly established, financed, maintained or controlled by or acting on behalf of" such individuals from soliciting, receiving, directing, transferring, spending or disbursing funds:

- in connection with an election for federal office, including for any "Federal election activity" (as defined separately at 2 U.S.C. § 431(20)(A)), unless the funds are subject to the source prohibitions, amount limitations, and reporting requirements of the Federal Election Campaign Act of 1971 (2 U.S.C. § 441i(e)(1)(A)); or

- in connection with any other election, unless the funds do not exceed contributions permitted to candidates and federal political committees under federal campaign finance law, and are not from federally prohibited sources (2 U.S.C. § 441i(e)(1)(B)).

The soft money fundraising and spending prohibitions of 2 U.S.C. § 441i(e)(1) plainly encompass such activity undertaken in connection with elections other than elections for federal office, such as elections for state and local office. Thus, this provision – absent exception – would prevent a federal officeholder who seeks election to state or local office (*e.g.*, a current House Member running for Governor of his or her state) from establishing a state campaign account to receive contributions which were legal under state law and would be used exclusively for conducting his or her state or local campaign but were not compliant with federal source prohibitions and amount limitations.

2 U.S.C. § 441i(e)(2) provides an exception to the prohibitions of 2 U.S.C. § 441i(e)(1) to address this situation and very closely related scenarios. 2 U.S.C. § 441i(e)(2) states:

> *State law.* Paragraph (1) does not apply to the solicitation, receipt, or spending of funds by an individual described in such paragraph 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 the candidate, or both.

The language of 2 U.S.C. § 441i(e)(2) clearly limits its exception to the ban on the spending of soft money on elections (including Federal election activity) by federal candidates and officeholders to circumstances where a federal candidate or officeholder is a past or present candidate for election to state or local office and is making disbursements in connection with only the particular state or local election around which their state or local candidacy centers (in the case of a present candidate for state or local office) or centered (in the case of a former candidate for state or local office). As this provision states, "Paragraph (1) does not apply to the . . . . spending of funds by an

individual described in such paragraph who is or was also a candidate for State or local office *solely in connection with such election for State or local office.*"[1]

Thus, under this exception, a federal officeholder who decides to seek election as Governor of his or her state may set up a state campaign account, raise funds subject only to state law and spend those funds to conduct his or her ongoing gubernatorial campaign. Likewise, a former candidate for state office who decides to seek election to federal office, or ultimately becomes a federal officeholder, may use leftover campaign funds in his or her state campaign account (contributed subject only to state law) to pay off debts arising directly from his or her past candidacy for election to state or local office.

However, this provision does not license a former state candidate to spend funds contributed to his or her state campaign account solely in accordance with state law for any purpose he or she sees fit, or even for any purpose involving a reference to a candidate for the state office sought. As indicated above, in order for the exception to apply, the spending must be "solely in connection" with the particular state or local election around which his or her state or local candidacy centered.

Accordingly, the exception contained at 2 U.S.C. § 441i(e)(2) is not applicable to this Advisory Opinion request. Ms. Tenenbaum is currently a federal candidate seeking election to the U.S. Senate. The spending that she contemplates – contributions to Section 501(c)(3) organizations, the South Carolina Democratic Party and/or a state legislative caucus committee – would not be in connection with the particular state election around which her previous state candidacy centered. It will not advance that candidacy, which has already concluded, nor will it pay for expenses incurred in the course of that candidacy.[2] Likewise, given Ms. Tenenbaum's ongoing campaign to be elected U.S. Senator, it is inconceivable that such spending would be in connection with some hypothetical future candidacy on her part for election to state or local office.

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[1] The plain language of 2 U.S.C. § 441i(e)(2) notwithstanding, the Commission's regulation at 11 C.F.R. § 300.63 implementing this statutory provision omits the condition limiting the application of this exception to circumstances where the spending is "solely in connection with such election for State or local office." The Commission should apply this regulation consistently with the statute, incorporating the condition that the spending be undertaken "solely in connection with such election for State or local office." Indeed, the requirement that the spending refer only to the state or local candidate or any other candidate for the same state or local office – contained both in the statute and at 11 C.F.R. § 300.63 – is an *additional* condition for application of the 2 U.S.C. § 441i(e)(2) exception. Thus, for example, spending of non-federal funds by a federal officeholder seeking election to state office on advertising touting his or her state candidacy and also *mentioning* another federal candidate or officeholder not seeking the same state office would not qualify for this exception. *See also* 148 Cong. Rec. S1992 (daily ed. Mar. 18, 2002) (BCRA section-by-section analysis submitted by Sen. Feingold) ("The restrictions of [sec. 323(e) of BCRA] do not apply to federal officeholders who are running for state office and spending non-Federal money on their own elections, so long as they do not mention other federal candidates who are on the ballot in the same election and are not their opponents for state office.").

[2] The Advisory Opinion request states that "Ms. Tenenbaum's campaign has paid all of its expenses from the 2002 election and is prepared to terminate the campaign."

In general, the Commission should ensure that the exception of 2 U.S.C. § 441i(e)(2) is limited to federal candidates or officeholders who mount *bona fide* candidacies for state or local office and seek to spend non-federal funds in a manner that is clearly and exclusively connected to such state or local candidacies. Broader interpretations would violate the statute and, among other things, offer what may prove a tempting route around the prohibitions on soliciting and spending soft money in connection with federal elections.

1b. 2 U.S.C. § 441i(e)(4)

The Advisory Opinion request cites 2 U.S.C. § 441i(e)(4) as support for the proposition that funds from Ms. Tenenbaum's state campaign account may be donated to certain Section 501(c)(3) organizations. In fact, this statutory allowance also does not apply to the request at hand.

By its plain language, 2 U.S.C. § 441i(e)(4) – generally titled, "Permitting certain solicitations," with subsections titled ""General solicitations" and "Certain specific solicitations" – does not authorize any action other than a "solicitation." *See also* 11 C.F.R. §§ 300.52 & 300.65. It is likewise apparent that if Congress intended to authorize other types of action under this provision – such as expenditures, disbursements or donations – it would have expressly included such terms therein. Notably, 2 U.S.C. § 441i(e)(2)'s limited exception to the soft money prohibitions of 2 U.S.C. § 441i(e)(1) expressly authorizes not only the "solicitation" of non-federal funds in certain circumstances but also the "receipt" and "spending" of such funds. Congress evidently knew how to make express statutory allowances for "spending," strongly suggesting that the absence of such express authorization in 2 U.S.C. § 441i(e)(4) should not be glossed over.[3]

This Advisory Opinion request does not contemplate a solicitation for 501(c)(3) organizations but instead a donation from Ms. Tenenbaum's state campaign account. As explained immediately above, such action does not fall within the allowance of 2 U.S.C. § 441i(e)(4), rendering this provision inapplicable here.

2. 2 U.S.C. § 441i(e)(1)

As 2 U.S.C. § 441i(e)(2) and 2 U.S.C. § 441i(e)(4) do not apply to this Advisory Opinion request, 2 U.S.C. § 441i(e)(1) governs the required analysis. Among other thing, 2 U.S.C. § 441i(e)(1) prohibits entities "directly or indirectly established, financed,

[3] The request cites a statement by Senator McCain indicating that this provision was intended to allow federal officeholders and candidate "to assist, in limited ways, section 501(c) organizations." 148 Cong. Rec. S2140 (daily ed. March 20, 2002) (statement of Sen. McCain). Indeed, one of the respects in which the federal officeholder and candidate assistance for 501(c) organizations authorized by 2 U.S.C. § 441i(e)(4) is "limited" is its confinement to "solicitations" on behalf of such organizations. Senator McCain's statements in the Congressional Record that immediately precede the cited statement explain this provision solely as permitting certain "solicitations" of funds. 148 Cong. Rec. S2140 (daily ed. Mar. 20, 2002) (statement of Sen. McCain).

maintained or controlled" by federal candidates from soliciting, receiving, directing, transferring, spending or disbursing funds in connection with elections, including for Federal election activity, unless the funds at a minimum comply with federal source prohibitions and amount limitations.

The state campaign account in question is clearly "established, financed, maintained or controlled" by Ms. Tenenbaum, AOR 2003-32, p. 2., and its surplus funds were not raised in accordance with the contribution limits and source restrictions of FECA. *Id.* at p. 1.

Moreover, the disbursement of funds from a campaign account (including a state campaign account) occurs in connection with elections by definition. A campaign account is a political organization exempt from taxation under Section 527 of the Internal Revenue Code. This tax code provision provides an exemption from federal income taxation for entities organized and operated primarily for the purpose of accepting contributions or making expenditures for the function of "influencing or attempting to influence the selection, nomination, election or appointment of any individual to any Federal, state or local public office." 26 U.S.C. §§ 527(e)(1)&(2). Notably, in *Buckley v. Valeo*, the Supreme Court indicated that expenditures of organizations whose "major purpose" is "the nomination or election of a candidate" are "by definition, campaign related." 424 U.S. 1, 79 (1976). *See also* FEC Advisory Opinion 1995-25 (concluding that Republican National Committee advertisements assumed not to contain an "electioneering message" should nonetheless be considered as made in connection with both federal and non-federal elections, citing the previously mentioned language from *Buckley* and the nature of a political organization's "exempt function" under 26 U.S.C. § 527(e)).

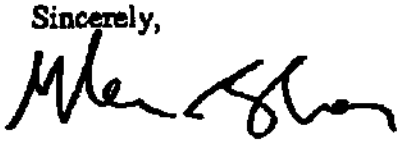
Accordingly, disbursements from the state account in question are prohibited by 2 U.S.C. § 441i(e)(1). This situation is analogous to that confronted by national party committees insofar as they possessed non-federal funds prior to January 1, 2003 (which were raised prior to November 6, 2002) following their payment of outstanding non-federal debts and obligations arising from the 2002 elections and any associated runoffs or recounts. 2 U.S.C. § 441i(a) prohibits national parties from spending non-federal funds starting on November 6, 2002. Moreover, the transition rules enacted by Congress in Section 402 of BCRA expressly allowed use of any remaining non-federal funds raised by the national parties prior to November 6, 2002 solely for the payment of 2002 election expenses (until December 31, 2002). In this situation, the Commission indicated that national parties could vacate leftover non-federal funds from their coffers in compliance with these provisions only by either disgorging such funds to the U.S. Treasury or issuing refund checks to the donors (by December 31, 2002). 11 C.F.R. § 300.12(c).

This rule should govern the analogous situation presented by the Advisory Opinion request at hand – though disgorgement should be permitted to the state's general fund instead of to the U.S. Treasury. Thus, if Ms. Tenenbaum wishes to dispose of remaining funds in her state campaign account while a federal candidate, they must be either refunded to the donors or contributed to the state's general fund. However, the avenues

proposed in the Advisory Opinion request for disposing of the funds would be impermissible.[4] The Commission could also allow Ms. Tenenbaum to retain such funds in the state campaign account while she is a federal candidate, so long as she does not use or augment them in any manner. Then, in the event she ultimately ceases to be a federal candidate or officeholder, she may at that time resume making disbursements of such funds.

Thank you in advance for you consideration of these comments.

Sincerely,



Glen Shor
FEC Program Director

[4] We also note that, in crafting 11 C.F.R. § 300.12(c), the Commission rightly expressed concern about alternative approaches for disposal of remaining national party non-federal funds that would have permitted such funds to be used in future federal elections. In particular, its Explanation and Justification for 11 C.F.R. § 300.12(c) indicated that this regulation foreclosed donations to charitable organizations because this "could result in non-Federal funds making their way into future Federal elections since 501(c)(3) organizations may engage in Federal election activity such as voter registration and get-out-the-vote activities." 67 Fed. Reg. 49,054, 49,092 (Jul. 29, 2002).