



COMMONWEALTH of VIRGINIA

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July 12, 2013

The Honorable Scott A. Surovell
Member, House of Delegates
Post Office Box 289
Mount Vernon, Virginia 22121

Dear Delegate Surovell:

I am responding to your request for an official advisory opinion in accordance with § 2.2-505 of the *Code of Virginia*.

Issues Presented

You inquire whether a member of the Virginia General Assembly may solicit or accept contributions during a regular session of the General Assembly on behalf of any of the following: (1) statewide or legislative candidates for public office in states other than Virginia; (2) federal political action committees; (3) federal accounts maintained by state or local political party committees; and/or (4) what you refer to as “the new ‘Super-PAC’s’” or “independent expenditure organizations” that are tax exempt pursuant to Section 527 of the Internal Revenue Code (“IRC”).¹

Response

It is my opinion that a member of the General Assembly is not precluded from soliciting or accepting contributions during a regular session of the General Assembly on behalf of the following: (1) candidates for public office in states other than Virginia; (2) federal political action committees; (3) federal accounts maintained by state, congressional district, or county or city political party committees pursuant to federal campaign finance laws; and (4) independent expenditure only committees (commonly referred to as “Super PACs”) if they are considered “federal political action committees” under § 24.2-945.1(A).

¹ You also inquire regarding the solicitation of funds for “federal statewide coordinated campaign committees.” This term, however, does not identify a type of political committee subject to the Federal Election Campaign Act of 1971 (2 U.S.C. §§ 431 through 457) and the Federal Election Commission regulations (11 C.F.R. §§ 1.1 through 9039.3.) Rather, the “coordinated campaign” of the Democratic Party of Virginia and the “victory” program of the Republican Party of Virginia are candidate-support activities undertaken by those respective state political party committees for which one or more separate state political party bank accounts may be maintained but no separate political committee is created. Consequently, this inquiry is the same as your question regarding federal accounts maintained by political party committees pursuant to federal campaign finance laws.

Applicable Law and Discussion

Section 24.2-954 is the provision of the *Code of Virginia* that governs the fundraising activities of members of the General Assembly while the legislature is in session. It provides:

A. No member of the General Assembly or statewide official and no campaign committee of a member of the General Assembly or statewide official shall solicit or accept *a contribution for the campaign committee of any member of the General Assembly or statewide official, or for any political committee*, from any person or political committee on and after the first day of a regular session of the General Assembly through adjournment sine die of that session.

B. No person or political committee shall make or promise to make *a contribution to a member of the General Assembly or statewide official or his campaign committee* on and after the first day of a regular session of the General Assembly through adjournment sine die of that session.^[2]

As you note, a previous opinion of this Office, in addressing whether a member of the General Assembly may raise funds during the legislative session for a candidate for federal office, concluded that the restrictions imposed by § 24.2-954 are limited to campaigns for state office.³ Rules of statutory construction require that § 24.2-954 be read together with the Campaign Finance Act of 2006⁴ (“2006 Act”) and other related sections in Title 24.2, rather than in isolation.⁵ Section 24.2-945.1(A) of the 2006 Act defines a “campaign committee” as “the committee designated by a candidate to receive all contributions and make all expenditures for him or on his behalf in connection with his nomination or election.”⁶ Section 24.2-101 defines a “candidate” as “a person who seeks or campaigns for *an office of the Commonwealth or one of its governmental units . . .*”⁷ Applying the plain language of the statute, the opinion reasoned that because a candidate seeking federal office, whether a member of the General Assembly or not, is not seeking “an office of the Commonwealth or one of its governmental units” a member of the General Assembly is not precluded from raising funds for such a candidate while the General Assembly is in session.⁸ Similarly, statewide or legislative candidates for public office in states other than Virginia are not seeking “an office of the Commonwealth or one of its governmental units.” Therefore, the prohibitions of § 24.2-954 do not apply to fundraising activities for a candidate seeking a statewide or legislative office in a state other than Virginia.

² VA. CODE ANN. § 24.2-954 (2011) (emphasis added).

³ 2012 Op. Va. Att’y Gen. 100, 101.

⁴ See §§ 24.2-945 through 24.2-953.5 (2011 & Supp. 2012).

⁵ See *Alston v. Commonwealth*, 274 Va. 759, 769, 652 S.E.2d 456, 462 (2007) (applying statutory canon that a statute must be read *in pari materia* – that is, in conjunction with other statutes on the subject – to determine its meaning).

⁶ Section 24.2-945.1(A) (2011) (emphasis added).

⁷ Section 24.2-101 (2011) (emphasis added). See also § 24.2-945.1(A) (referring to § 24.2-101 for the definition of “candidate”).

⁸ 2012 Op. Va. Att’y Gen. at 100-01; see also 2010 Op. Va. Att’y Gen. 131, 131 (“It is my opinion that § 24.2-954 precludes members of the General Assembly from engaging in fundraising activity in connection with a campaign for *state office* during a regular session of the General Assembly.”) (emphasis in original).

Section 24.2-954 forbids, under certain circumstances, the solicitation and acceptance of contributions for or from political committees. In defining “political committee,” the General Assembly expressly has provided that the term “shall not include: (i) a federal political action committee or out-of-state political committee”⁹ Consequently, the prohibition on a member of the General Assembly soliciting or accepting contributions for political committees during a regular session does not apply to *federal* political action committees.¹⁰

Political party committees often are active participants in both state and federal elections and, consequently, are subject to both state and federal campaign finance laws. Political parties typically are organized with separate committees at the national, state, congressional district, state legislative district and county or city levels. The 2006 Act requires both state political party committees and congressional district political party committees to file a statement of organization and periodic campaign finance disclosure reports with the State Board of Elections (“SBE”).¹¹ Certain city and county political party committees also must file with the SBE (or the appropriate local electoral board if not filing electronically) if they are not otherwise exempted from doing so.¹² Under federal law, a state, district or local political party committee must register with, and send periodic campaign finance disclosure reports to, the Federal Election Commission (“FEC”) when it receives or spends funds in connection with a federal election in excess of a specific threshold.¹³

As I have noted previously, it is my opinion that the preemption doctrine, grounded in the Supremacy Clause¹⁴ of the Constitution of the United States, operates to preempt § 24.2-954 to the extent that this state law strays into the field of regulation of federal elections occupied by federal campaign finance laws.¹⁵ The Federal Election Campaign Act of 1971¹⁶ (“FECA”) includes a clear statement that its provisions supersede and preempt any provision of state law with respect to election to federal office.¹⁷ FEC regulations specifically provide that “[f]ederal law supersedes State law concerning the . . . [l]imitation on contributions and expenditures regarding Federal candidates and political committees.”¹⁸ While no court to date has ruled on whether § 24.2-954 has been preempted by FECA in the context of campaign finance limitations for federal candidates and federal political

⁹ Section 24.2-945.1(A).

¹⁰ Section 24.2-945.1(A) defines a “federal political action committee” as “any political action committee registered with the Federal Election Commission that makes contributions to candidates or political committees registered in Virginia.”

¹¹ See §§ 24.2-950 through 24.2-950.9 (2011).

¹² Sections 24.2-950.1 and 24.2-950.8.

¹³ See 2 U.S.C. §§ 431(4), 433, 434; 11 C.F.R. §§ 100.5, 102.1, 102.5, 104.1, 104.3 (2013).

¹⁴ U.S. CONST. art. VI, cl. 2.

¹⁵ See 2010 Op. Va. Att’y Gen. 131, 133 (further citation omitted). See also 2012 Op. Va. Att’y Gen. 100.

¹⁶ See Pub. L. No. 92-225, 86 Stat. 3 (codified in scattered sections, as amended, at 2 U.S.C. §§ 431 through 457).

¹⁷ 2 U.S.C. § 453(a) (“the provisions of this Act, and of rules prescribed under this Act, supersede and preempt any provision of State law with respect to election to Federal office”).

¹⁸ 11 C.F.R. § 108.7(b)(3). The FEC regulations also confirm that the FECA does not preempt certain enumerated state laws (e.g., manner of qualifying as a candidate or political party and candidate’s personal financial disclosure) that are not the subject of this opinion. 11 C.F.R. § 108.7(c).

committees, a persuasive precedent from the Eleventh Circuit and an FEC advisory opinion regarding a similar statute in Georgia leave little doubt that it has been.¹⁹

FEC regulations require each state, district, and local party committee receiving or expending funds for federal election activity to establish one or more separate non-federal accounts and federal accounts.²⁰ Funds deposited into a non-federal account are governed by state law.²¹ Funds deposited into a federal account are governed by federal law, because only contributions that comply with the federal contribution limits, prohibitions and reporting requirements of FECA (“federal funds”) may be deposited into a federal account, regardless of whether the funds are for use in connection with federal or non-federal elections.²²

Federal preemption removes from the reach of § 24.2-954 the solicitation or acceptance of contributions of federal funds to be deposited into the federal account of a state, district, or county or city political party committee. Moreover, I find no restriction under federal law that would prevent a member of the General Assembly from soliciting or accepting contributions during a regular session of the General Assembly as outlined above. Thus, a member of the General Assembly is not precluded during a regular session from soliciting or accepting federal funds for a political party committee so long as those funds are deposited into the federal account of that committee. A note of caution is warranted, however, in light of the dual nature of campaign finance regulation of state and local political party committees. A state officeholder subject to the restrictions of § 24.2-954 would be in violation of that section if a contribution the officeholder solicited or accepted for a political party committee during a regular session exceeds the limits of the FECA, or comes from a source prohibited by the FECA, or is deposited into a non-federal account of the political party committee.²³

Whether or not the restrictions found in § 24.2-954 apply to fundraising activities for “Super PACs” requires more discussion. “Super PACs” were not created or authorized by federal or Virginia

¹⁹ See *Teper v. Miller*, 82 F.3d 989, 994-999 (11th Cir. 1996) (finding a Georgia statute preempted to the extent it prohibited state legislator from soliciting contributions for his campaign for federal office while the state legislature was in session); Day for Senate, Adv. Op. Fed. Election Comm’n No. 1995-48 (1996), available at <http://saos.nictusa.com/saos/searchao> (search for 1995-48) (same).

²⁰ 11 C.F.R. § 300.30(b).

²¹ 11 C.F.R. § 300.30(b)(1).

²² 11 C.F.R. § 300.30(b)(3). Under the FECA, corporations, labor organizations, national banks, federal government contractors and foreign nationals are prohibited from making contributions in connection with a federal election. 2 U.S.C. §§ 441b, 441c, 441e. Thus, contributions from those sources are not eligible to be federal funds. See 11 C.F.R. § 300.2(g) (2013). When a political party committee establishes one or more separate accounts in a campaign depository to hold receipts and make disbursements for federal election activity, it is treated as a separate political committee for purposes of FEC registration and reporting requirements. 11 C.F.R. §§ 102.5(a)(1)(i), 300.30(c).

²³ Virginia law does not provide a safe harbor for a state officeholder in this circumstance. Nevertheless, a member of the General Assembly who desires during a regular session to solicit or accept contributions qualifying as federal funds for deposit into a federal account maintained by political party committee may wish to adopt the procedures followed by federal candidates and officeholders to protect against inadvertent receipt of prohibited funds. See, e.g., 11 C.F.R. § 300.64(b) (2013) (where federal candidate or officeholder is soliciting funds at a nonfederal fundraising event, a clear and conspicuous written notice or oral statement must be given that the candidate or officeholder “does not seek funds in excess of \$[federally permissible amount], and does not seek funds from corporations, labor organizations, national banks, federal contractors, or foreign nationals.”).

statutes, nor are they called Super PACs by the FEC. The term “Super PAC” is a common expression for what the FEC recognizes and regulates as “independent expenditure only committees” (“IEOC”).²⁴

IEOCs can make only independent expenditures.²⁵ An independent expenditure is an expenditure that expressly advocates the election or defeat of a clearly identified candidate and is not made in coordination with the candidate, the candidate’s authorized political committee or its agents, or a political committee or its agents.²⁶ The FEC has ruled that an IEOC could solicit and accept unlimited contributions from individuals, political committees, corporations, and labor organizations to fund its independent expenditures.²⁷

Although § 24.2-954 prohibits a member of the General Assembly from soliciting on behalf of a “political committee” associated with a Virginia campaign during the legislative session, § 24.2-945.1(A) specifically excludes “federal political action committee” and “out-of-state political committee” from the definition of “political committee.”²⁸ An “out-of-state political committee,” however, must not “have as its primary purpose expressly advocating the election or defeat of a clearly identified candidate.”²⁹ Because IEOCs make expenditures that expressly advocate the election or defeat of a clearly identified candidate, they likely cannot qualify as “out-of-state political committees.” “Federal political action committee means any political action committee registered with the Federal Election Commission that makes contributions to candidates or political committees registered in Virginia.”³⁰ Whether or not a Super PAC qualifies as a “federal political action committee” under § 24.2-945.1(A) can only be determined on a case-by-case basis. If it does qualify, then the restrictions contained in § 24.2-954 would not apply to solicitations made on its behalf.

Conclusion

Accordingly, it is my opinion that a member of the General Assembly is not precluded from soliciting or accepting contributions during a regular session of the General Assembly on behalf of the following: (1) candidates for public office in states other than Virginia; (2) federal political action committees; (3) federal accounts maintained by state, congressional district, or county or city political party committees pursuant to federal campaign finance laws; and (4) independent expenditure only

²⁴ The FEC issued an advisory opinion in 2010 discussing the limits of an IEOC. See Club for Growth, Inc., Adv. Op. Fed. Election Comm’n No. 2010-09 at 1, available at <http://saos.nictusa.com/saos/searchao> (search for 2010-09). The rise of IEOCs is the product of two recent cases. After *Citizens United v. FEC*, 558 U.S. 310, 372 (2010), held that restrictions on corporate independent expenditures are unlawful, and *SpeechNow.org v. FEC*, 599 F.3d 686, 696 (D.C. Cir. 2010), held that contributions made to IEOCs could not be constitutionally limited, the Club for Growth approached the FEC concerning the organization’s plans to create and administer a “new independent expenditure-only political committee” that would be regulated by the FEC. *Id.* In the advisory opinion issued in response, the FEC deemed lawful the Club for Growth’s plan to establish, administer, and pay the solicitation costs of the political committee that sought to ask for unlimited contributions from individuals in the general public. *Id.*

²⁵ 2 U.S.C. § 431(17).

²⁶ *Id.*

²⁷ Commonsense Ten, Adv. Op. Fed. Election Comm’n No. 2010-11 at 2-3 (2010), available at <http://saos.nictusa.com/saos/searchao> (Search for 2010-11).

²⁸ Section 24.2-945.1; Section 24.2-954.

²⁹ Section 24.2-945.1(A).

³⁰ *Id.*

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committees (commonly referred to as "Super PACs") if they are considered "federal political action committees" under § 24.2-945.1(A).

With kindest regards, I am

Very truly yours,

A handwritten signature in black ink, appearing to read "Ken C II". The signature is stylized and cursive.

Kenneth T. Cuccinelli, II
Attorney General