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Advisory Opinion No. 07-2001

Dear Mr. Sheridan:

Your request for an advisory opinion, submitted on behalf of the Republican National Committee (hereafter, RNC), has been considered by the Commission, and the Commission has directed me to issue this response.

Submitted Facts

You write that the RNC is interested in making independent expenditures in New Jersey for communications, including television, radio, direct mail, and other forms of public communications, that would expressly advocate the election or defeat of a clearly identified gubernatorial candidate in the 2001 general election. You also indicated that the RNC may make independent expenditures for other candidates as well. You have further stated that the RNC would include the "required disclaimers," that is, political identification information, on its independent expenditure communications, would not consult with the gubernatorial campaign of Bret Schundler or its agents about the communications, and "would be solely responsible for the content, production and placement" of the communications.

In your request, you explained that the RNC, an unincorporated association, is the "governing body of the Republican Party at the national level," and was created by the Rules of the Republican Party, adopted by the Republican Party on July 31, 2000, by the Republican National Convention in Philadelphia, Pennsylvania. According to your request, the RNC "is involved in elections for public office across the United States at the federal, state and local level." Also, the RNC and the New Jersey Republican State Committee (hereafter, RSC) "are separate and distinct organizations." You have indicated that each organization has its own employees and bylaws, raises contributions separately, and "has its own decision-making process." Further you have stated that "RNC has no control over RSC in any manner."

Commission records indicate that an entity entitled the Republican National State Elections Committee (hereafter, RNSEC) is currently filing quarterly reports (Forms R-3) as a continuing political committee (hereafter, CPC). On its Continuing Political Committee-Registration Statement and Designation of Organizational Depository (Form D-4), filed on April 10, 1995, the RNSEC described itself as the "National Party Committee organized to assist candidates in various states and Republican organizations." Based upon this description, and for the purpose of this response, the Commission has considered that the RNSEC is the "national committee of a political party," as that term is defined at N.J.A.C. 19:25-1.7, and that the RNC and RNSEC are the same entity.

The Commission notes that as the national committee of a political party, the RNSEC is subject to the $72,000 annual limit on contributions to the State political party committee; see N.J.S.A. 19:44A-11.4a(2) (as adjusted pursuant to N.J.S.A. 19:44A-7.2). Contributions by the RNSEC are otherwise subject to the contribution limits applicable to a CPC; see N.J.S.A. 19:44A-11.3 through 11.4 and N.J.A.C. 19:25-11.2. The most recent quarterly report filed by the RNSEC with the Commission on July 18, 2001, reports that the RNSEC had cash-on-hand on June 30, 2001, in the amount of $2,283,993.22. You have confirmed in a telephone conversation with staff on August 13, 2001, that the RNSEC is an account of the RNC, and that if the RNC is permitted to make independent expenditures for New Jersey candidates in the 2001 general election, such expenditures will be made from the RNSEC organizational depository. Therefore, in this response, the Commission will refer to the RNC as the RNSEC.

At the Commission public meeting conducted on this date, you have amplified on your request and orally represented two additional facts to the Commission. First you stated that if the Commission finds that the RNSEC may make independent expenditures in the 2001 general election, it will not use "common vendors," that is, it will not use the same vendors as the Schundler campaign, to determine the content, or to produce or place the communications. Second, you indicated that the RNSEC would agree that it may not accept any contributions from entities that are prohibited from making contributions to New Jersey candidates and committees by statutes that are not part of the New Jersey Campaign Contributions and Expenditures Reporting Act and therefore not under the jurisdiction of the Commission.

Questions Presented

The Commission believes that your inquiry gives rise to the following two questions:

1. Pursuant to the New Jersey Campaign Contributions and Expenditures Reporting Act, N.J.S.A. 19:44A-1 *et seq*. (hereafter, the Act), and Commission regulations, N.J.A.C. 19:25-1 *et seq*., may the RNSEC make independent expenditures in New Jersey for communications, including television, radio, direct mail, and other forms of public communications, that expressly advocate the election or defeat of a clearly identified gubernatorial candidate in the 2001 general election and other candidates if the communications are made without coordination or consultation with or the consent of the affected candidates and if the communications contain required political identification information?

2. Assuming the Act permits the RNSEC to make independent expenditures for communications in the 2001 general election that expressly advocate the election or defeat of a clearly identified gubernatorial or other candidate, what reporting obligations arise as a result of those independent expenditures?

Commission Response to Question One

The Commission concludes that nothing contained in the Act prohibits or otherwise limits the RNSEC, a national political party committee, from making independent expenditures for communications that expressly advocate the election or defeat of a clearly identified gubernatorial or other candidate in the 2001 general election. The Commission notes that while there are explicit limits placed on the activities of a State political party committee, and on the county and municipal political party committees in regard to a gubernatorial candidate, the Act is silent in regard to similar limits on independent expenditure activity by a national political party committee; see N.J.S.A. 19:44A-29d and 29e. The silence is present notwithstanding that in other respects the national political party committees are explicitly regulated in regard to the amount they may contribute; see N.J.S.A. 19:44A-11.4a(2), limiting the amount a national committee may contribute to a State committee. In the absence of any statutory prohibition or limitation, the Commission lacks statutory authority to prohibit independent expenditures. Further, the Commission believes that any attempt to limit such independent expenditures may be constitutionally suspect.

Constitutional Protection of Independent Expenditures

Independent expenditures made by individuals or associational entities for communications that expressly advocate the election or defeat of a clearly identified gubernatorial or other candidate in the 2001 general election are permissible as constitutionally protected speech under the First Amendment. Beginning with the decision of the United States Supreme Court in Buckley v. Valeo, 424 U.S. 1 (1976), courts have consistently upheld the right of a person or entity to make expenditures for communications that expressly advocate the election or defeat of a clearly identified candidate if the expenditures are made independently of a candidate and his or her campaign. Such independent expenditures are protected by the United States Supreme Court as "core First Amendment expression." Buckley, 424 U.S. at 48.

More recently, while it did not address the issue of independent expenditures in the context of a publicly-financed election, the United States Supreme Court held that limits contained in the Federal Election Campaign Act on the amount that a State political party committee can expend on independent expenditures were impermissible infringements on the Free Speech of that political party entity, and therefore those limits were struck down; see Colorado Republican Federal Campaign Comm. v. Federal Election Comm'n, 518 U.S. 604 (1996) (Colorado I). The Court noted that:

> "[a] political party's independent expression not only reflects its members' views about the philosophical and governmental matters that bind them together, it also seeks to convince others to join those members in a practical democratic task, the task of creating a government that voters can instruct and hold responsible for subsequent success or failure. The independent expression of a political party's views is "core" First Amendment activity no less than is the independent expression of individuals, candidates, or other political committees." Colorado I at 615-616.

Requirements for Independent Expenditures

In order for an expenditure to be independent of any candidate, the following requirements must be met: neither the gubernatorial or other candidate nor any member of his or her campaign staff or its agent may in any way authorize, consent to, coordinate with, or consult with the RNSEC concerning any aspect of the content, production or placement of the communication; each communication must clearly state the name and address of the RNSEC and that the communication has been paid for by the RNSEC; each communication must include a clear and conspicuous statement that it was not made with the cooperation or prior consent of, or in consultation with or at the request or suggestion of, the gubernatorial or other candidate, or any person or committee acting on behalf of the gubernatorial or other candidate; and the communication must be reported to the Commission as discussed below. See N.J.A.C. 19:25-12.7, 12.8, 13.2, 13.3, 15.28, and 15.29.

As applied to the RNSEC, Commission regulations define an independent expenditure for a candidate as "[a]n expenditure by a . . . continuing political committee . . . to support or defeat a candidate, which expenditure is made without the cooperation or prior consent of, or in consultation with or at the request or suggestion of, a candidate or any person or committee acting on behalf of a candidate . . . " (N.J.A.C. 19:25-12.7(a)). The determination of whether or not an expenditure is a constitutionally protected independent expenditure, or is instead an expenditure coordinated with a candidate, requires an individualized, fact-sensitive inquiry into the actions and communications between the candidate and the entity making the expenditure.

The Commission finds that the factors to be considered in determining whether or not an expenditure is independent of or coordinated with a candidate include, but are not limited to:

1. Whether or not the gubernatorial or other candidate or his or her candidate committee has consented to, authorized, or exercised control over the production or circulation of the communication;
2. Whether or not the expenditure was made at the request or suggestion of the candidate, the candidate committee, or its agents;
3. Whether or not the candidate, any members of the candidate's campaign, its staff or agents participated in decisions by or provided information to the RNSEC/RNC with regard to the content, timing, location, mode, intended audience, distribution, or placement of the television, radio, direct mail, or other forms of public communications;
4. Whether or not there was substantial discussion or negotiation between the purchaser, creator, producer, or distributor of the communication and the candidate or his or her agents that results in collaboration or agreement about the content, timing, location, mode, intended audience, distribution, or placement of the communication;
5. Whether or not the candidate or his or her campaign staff or agents and the RNSEC shared information or held discussions on campaign or media strategy;
6. Whether or not the RNSEC shared its polling or other research with the candidate's campaign and whether or not the campaign shared its polling or other research with the RNSEC; and,
7. Whether or not the RNSEC and the campaign used the same consultants, employees, staff, or agents to create, target, or place the television, radio, direct mail, and other forms of public communications.

Publicly-Financed Gubernatorial Campaign

The Commission notes that the deadline for a candidate to file to qualify to participate in the 2001 gubernatorial matching fund program is September 4, 2001. For the purpose of this response only, the Commission has assumed that Republican Party Candidate Bret Schundler will apply to receive matching funds and will be deemed qualified to participate in the public financing program in the 2001 general election.

As a condition of receipt of public matching funds in the 2001 general election, each publicly-financed gubernatorial candidate is subject to an $8.4 million expenditure limit; see N.J.S.A. 19:44A-7 (as adjusted pursuant to N.J.S.A. 19:44A-7.1) and N.J.A.C. 19:25-11(a)3. In order to protect the integrity of the expenditure limit, N.J.A.C. 19:25-15.29, Coordinated expenditures, specifically requires that if a person or entity other than the gubernatorial campaign, such as the RNSEC, spends funds to make a communication, the costs of the communication are a contribution to the publicly-financed gubernatorial candidate, subject to the contribution limit, and an expenditure allocable against the $8.4 million expenditure limit if:

> 1. The communication makes a reference to the gubernatorial candidate in an audio, visual, printed, or electronic format which reference names, depicts, pictures, characterizes, represents, dramatizes, or in any written, spoken, visual, or electronic manner represents a gubernatorial candidate or opponent; and
>
> 2. The gubernatorial candidate or his or her campaign committee has consented to, authorized, or exercised control over the production or circulation of the communication.

You have specifically stated in your request that the RNSEC communications will expressly advocate the election or defeat of a clearly identified gubernatorial candidate in the 2001 general election, and therefore will make a reference to the gubernatorial candidate as defined in N.J.A.C. 19:25-15.29(a)1. Therefore, if the communication expenditures contemplated by the RNSEC are in any way coordinated with or controlled by, authorized, or consented to by the publicly-financed gubernatorial candidate or his agents, the expenditures will be considered coordinated and will be allocated against Candidate Schundler's $8.4 million expenditure limit; see N.J.A.C. 19:25-15.29(a)2.

Prohibition on Independent Expenditures by the State Political Party Committee

In New Jersey, the Commission has found that the general election gubernatorial candidate is in a position to control the State political party committee based upon the fact that the gubernatorial candidate "influences the selection of his or her party's chairperson and thereby exerts influence over the direction and activities of the party." See 28 N.J.R. 4395 at 4398 (October 7, 1996). N.J.A.C. 19:25-15.28A therefore prohibits the State political party committees in the general election from making independent expenditures to support or defeat a candidate for Governor or in aid of the candidacy of a candidate for Governor. Accordingly, the Commission concludes that the RNSEC may not consult with or coordinate with the RSC concerning the expenditures for public communications that expressly advocate the election of Candidate Schundler or the defeat of his opponent in the 2001 general election.

Response to Question Two

Independent expenditures by the RNSEC are subject to the reporting and political identification requirements of the Act and Commission regulations.

Quarterly and 48-Hour Notice Reporting

N.J.A.C. 19:25-15.28 governs the reporting of independent expenditures in a publicly-financed gubernatorial election, and provides that if the RNSEC makes, incurs or authorizes an independent expenditure, for a communication to support or defeat a gubernatorial candidate in the general election it must report the independent expenditure pursuant to N.J.A.C. 19:25-12.8. Therefore, each separate expenditure made independently by the RNSEC for a gubernatorial or other candidate must be specifically reported on Schedule C (Itemized Operating Disbursements) of the CPC's quarterly reports (Forms R-3). For each expenditure, the RNSEC must report the date of the expenditure, the full name and address of the payee, and the purpose and amount of the expenditure; see N.J.A.C. 19:25-9.1, 19:25-12.1, and 19:25-12.2.

In addition to reporting each expenditure on the quarterly report (Form R-3), if an independent expenditure is made by the RNSEC after September 30, 2001 (the closing date of the 2001 third quarter report period), and on or before November 6, 2001 (the day of the 2001 general election), the expenditure is subject to 48-hour notice reporting as an expenditure made immediately before the general election; see N.J.A.C. 19:25-9.4.

Political Identification Requirement

You have indicated in your request the RNSEC will include political identification information on all communications. Please be advised that the RNSEC must on each independent expenditure communication clearly state its name and business address, as that information appears on the Form D-4 filed with the Commission, and shall also state that it has paid for the communication. The text of the communication must include a clear and conspicuous statement that the communication was not made with the cooperation or prior consent of, or in consultation with or at the request or suggestion of, any candidate, or any person or committee acting on behalf of any candidate; see N.J.S.A. 19:44A-11 and 19:44A-22.3, N.J.A.C. 19:25-13.2 and 19:25-13.3, and N.J.A.C. 19:25-15.28.

The same reporting and political identification requirements apply for independent expenditures for non-gubernatorial candidates.

Thank you for your inquiry, and your interest in the work of the Commission.

Very truly yours,

NEDDA G. MASSAR
Deputy Legal Director