



*State of New Jersey*

RONALD DEFILIPPIS  
Chairman

WALTER F. TIMPONE  
Vice Chairman

AMOS C. SAUNDERS  
Commissioner

## ELECTION LAW ENFORCEMENT COMMISSION

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Legal Director

AMY F. DAVIS  
Compliance Director

JAMES P. WYSE  
Legal Counsel

### PUBLIC SESSION MINUTES

April 10, 2012

Chairman DeFilippis, Commissioner Saunders, Legal Counsel Wyse, and senior staff were present. Vice Chairman Timpone participated by telephone. Director of Review and Investigation Shreve Marshall was also present. Report Review Officer Lovinsky Joseph was present for the purpose of recording the minutes.

The Public Session Minutes will be available online in the Commission's website at: <http://www.elec.state.nj.us>.

The meeting convened at 11:00 a.m. in Trenton.

#### 1. Open Public Meetings Statement

Chairman DeFilippis called the meeting to order and announced that pursuant to the "Open Public Meetings Act," N.J.S.A. 10:4-6 et seq., adequate notice of the meeting of the Commission had been filed with the Secretary of State's Office and distributed to the entire State House Press Corps. It was also posted on the Commission's website.

#### 2. Approval of Public Session Minutes of March 20, 2012

On a motion by Vice Chairman Timpone, seconded by Commissioner Saunders and passed by a vote of 3-0, the Commission approved the Public Session Minutes of March 20, 2012.

#### 3. Executive Director's Report

##### A. Pay-to-Play Analytical Press Release

Executive Director Brindle informed the Commissioners of the Commission's analytical press release issued last week relevant to pay-to-play. He stated that the press release had received good coverage in the media. The Executive Director stated that public contractors had reported making \$9.1 million in political contributions in 2011, a 5 percent decline from 2010. He further noted that contractors reported \$5.3 billion in public work, a 9

percent decline from 2010. Executive Director Brindle reported that a declining trend has been observed since the pay-to-play law took effect, but noted that this trend was now leveling off.

The Executive Director informed the Commissioners of an article published in the Newark Star-Ledger that used information provided in the analytical press release to note the increase in the number of PACs and contractor contributions to them, often created in order to circumvent the pay-to-play law.

B. Court Cases

Executive Director Brindle informed the Commissioners of federal court cases relevant to campaign finance. He reported on the decision rendered by District Judge Marvin Aspen of the Northern District of Illinois in the case of Personal PAC v. Illinois State Board of Elections, which ruled that a state law limiting the amount of money an independent-only PAC could raise was unconstitutional.

C. Budget Hearings

The Executive Director reported that he would attend the Law and Public Safety budget hearings in the Assembly on April 16, and the Senate hearing on April 24. He stated that he was prepared for any questions that may be asked by legislators.

D. Meetings with Legislative and Executive Staff

Executive Director Brindle informed the Commissioners that he will meet with representatives of the Authorities Unit on April 19 and the Governor's Chief of Staff on April 20 to discuss upcoming legislation and the Commission's need for computer upgrades.

E. Interactive Online Training Seminar

The Executive Director reported that the new interactive online training seminar was near completion and would be presented at the next meeting. He recognized Director of Campaign Financing Todd Wojcik and Assistant Compliance Officer Danielle Hacker for their work in this project.

F. 2011 Annual Report

Executive Director Brindle informed the Commissioners of new recommendations contained in the Annual Report:

- Requiring school board candidates to file Form A-1;
- Requiring PACs to disclose 48-hour expenditure information in May municipal, June runoff, and school board elections; and
- Requiring candidates to provide more detailed expenditure information, maintain records and provide details about who attended an event, what was purchased, and why the expenditures are ordinary and necessary.

The Executive Director also informed the Commissioners that the recommendation to reduce the contribution limit to county political committees had been removed from the Annual Report as not to further encourage the formation of affiliated PACs and involvement of “super PACs.” He noted that contributions to county committees were already greatly reduced.

On a motion by Commissioner Saunders, seconded by Vice Chairman Timpone and passed by a vote of 3-0, the Commission approved the 2011 Annual Report.

G. Spring/Summer Meeting Schedule

- May 15, 2012 at 10:00 a.m. in Trenton;
- June 19, 2012 at 11:00 a.m. in Trenton; and,
- July 17, 2012 at 11:00 a.m. in Trenton.

4. Request for an Advisory Opinion 01-2012

The Commission received a request for an Advisory Opinion from Ralph Holmen, Esq., on behalf of the National Association of Realtors (NAR). The request concerns whether or not the making of independent expenditures in a New Jersey state or local election by the National Association of Realtors Fund, a segregated account filing as a Section 527 organization under the Internal Revenue Code, results in additional filing obligations as a political committee and imposition of contribution limits.

Legal Director Carol Hoekje provided a summary of the Advisory Opinion for the Commissioners. The Legal Director stated that Mr. Holmen had intended to attend the April 17 meeting, but was unable to reschedule when the meeting date was changed to April 10. She reported that Mr. Holmen requested that the Commissioners table any action on the Advisory Opinion if they desired to ask any questions of him, which he would answer at the next meeting.

The Legal Director stated that the entity proposes to make “independent expenditures” in New Jersey elections as defined in the Reporting Act. These will be funds spent to promote the election of a candidate but not as direct contributions to any candidate or committee. The request asks whether the Fund will become a political committee by making independent expenditures, and if so, asks that the Commission declare that the contribution limits are not applicable to its fundraising. Legal Director Hoekje noted that the funds to be spent on independent expenditures are from a percentage of membership dues deposited into the segregated account, and not from public solicitation. The entity may also cooperate with local affiliated associations in making independent expenditures, and either share or contribute funds for such purpose.

She stated that staff had requested and received additional information from Mr. Holmen concerning the proposed cooperation. She read the following information received by letter into the record:

“Such cooperation with other entities contemplated by the Fund will involve related entities such as state or local Realtor associations in New Jersey. The anticipated cooperation will consist of discussions with those entities regarding candidates for office in New Jersey to be supported by independent expenditures, and the nature, timing, or message to be conveyed in independent expenditure communications to

voters. Such cooperation may also involve agreements to share the costs of creating and distributing such independent expenditure communications and, in cases where those costs are to be shared, the details of such cost sharing agreements and how the costs to be borne by each will be paid by the respective parties.

Finally, the Request also indicates that the monies provided for the Fund's use in making independent expenditures will consist of a portion of NAR membership dues paid by NAR members. Neither the Fund nor NAR will solicit or accept contributions to the Fund from the general public for use for independent expenditures in New Jersey, and in all cases the portion of NAR membership dues transferred to and used by the Fund in all states (including but not limited to New Jersey) will be less than 5% of the dues collected by NAR. The only other monies the Fund may receive and use in making independent expenditures will be those provided by one or more related entities who, as described above, have agreed to share the costs of an independent expenditure communication and transfer to the Fund the agreed upon share of those costs for payment in connection with making the independent expenditure in support of an identified candidate."

Legal Director Hoekje discussed the definition of political committees under the Reporting Act. Legal Director Hoekje noted that the Reporting Act does not distinguish between coordinated and independent expenditures, or between expenditures or monetary contributions to candidates, as a basis for defining a political committee, spending \$2,100 or more to support or oppose candidates in an election. She further noted that the Reporting Act does not carve out an exception for a political committee making only independent expenditures.

Legal Director Hoekje stated that based upon a "major purpose" test which the Commission has followed, the Commission could conclude that the NAR Fund's major purpose is to make independent expenditures in support of candidates in New Jersey.

The Legal Director referenced the case law cited in the request, which case law has arisen in circuits other than the Third Circuit. She described concern at the national level, and in other federal circuits, concerning the constitutionality of contribution limits imposed upon political committees, as defined by the FEC and other jurisdictions. She noted that the Citizens United decision was with regard to corporate expenditures, and did not specifically address contribution limits on political committees making only independent expenditures. The Third Circuit Court of Appeals has not addressed this issue.

Legal Director Hoekje informed the Commissioners of pending legislation endorsed by the Commission that would require registration and disclosure of "Section 527" organizations and other groups seeking to influence an election. At least one bill would also define an independent expenditure committee.

Executive Director Brindle noted that the proposed legislation does not impose contribution limits. He said that based on recent court decisions such as Citizens United and SpeechNow, the imposition of contribution limits involving independent expenditure only committees would be unconstitutional.

The Legal Director stated that the Commission's role as a regulatory agency is to interpret and apply requirements of the Reporting Act. In making its decision, it needs to provide a reason. The Legal Director stated that she does not believe the Commission has the power or the role to declare any part of the Reporting Act unconstitutional. The Commission may wish to ask the Legislature to address additional definitions or exceptions to the Reporting Act.

The Legal Director concluded that the Commission may choose as a first option to determine that the question presented concerning independent expenditures needs to be addressed by the Legislature, and defer to the direction the courts appear to be taking on constitutionality, or as a second option that the Fund will become a political committee based upon meeting the definitions as set forth in the Reporting Act and a major purpose test. In that later regard, the Commission might determine that the activity meets the criteria of a political committee once the Fund pools its resources with an affiliated entity.

Vice Chairman Timpone complimented Legal Director Hoekje on the comprehensive analysis provided in the memorandum. He noted that much of the analysis had to be based on hypothetical scenarios as the NAR Fund has not yet engaged in any activity.

Vice Chairman Timpone asked if staff had a preference to the suggested options. The Legal Director replied that the Commission could go either way as long as there was sufficient basis stated, and that the decision was up to the Commissioners.

Commissioner Saunders asked if it was wise for the Commission to make policy based on anticipated court cases. He expressed his opinion that this was not a solid foundation for future planning, and expressed his preference for Option 2, stating that it was clearer.

Commissioner Saunders noted that staff should state that the Commission has no jurisdiction over constitutional determinations.

The Executive Director stated that he understood Commissioner Saunders' concerns, but noted that the trend in judicial rulings would likely leave the Commission open to a lawsuit if it decided that the NAR Fund met the criteria of a political committee and imposed contribution limits. He stated that a lawsuit might result in the State's political committee statute being thrown out.

Commissioner Saunders asked the Executive Director if he anticipated that the Legislature would pass the pending legislation.

Executive Director Brindle stated that he did not know for sure if the bill would pass, but expressed his preference for Option 1 regardless of the outcome in the Legislature.

Commissioner Saunders asked if the proposed legislation would require disclosure from the NAR Fund.

The Executive Director replied that the bill would require disclosure, but allow unlimited expenditures on behalf of candidates.

Deputy Director Donohue noted that the bill extends disclosure requirements to issue advocacy organizations.

Commissioner Saunders asked if the Commission's own regulations would apply to Option 2.

Legal Director Hoekje stated that the regulations would be subject to the "major purpose" test with regard to determining a reporting obligation as a political committee.

Commissioner Saunders expressed his belief that the Commission should adhere to the existing regulations with regard to political committees. He asked if the Commission would be changing the law if it did so.

The Legal Director replied that would not be the case, but anticipated possible litigation.

Chairman DeFilippis expressed his unease about setting policy based on anticipated legislation.

Legal Counsel Wyse asked if the analysis would be easier if the NAR Fund did not cooperate with local affiliated organizations in supporting candidates.

The Legal Director replied that she believed so.

Commissioner Saunders asked if having Mr. Holmen present would help.

Legal Counsel Wyse noted that the automatic deduction of membership dues to the NAR Fund could make its status analogous to that of a corporation, but that he would like to know if the dues deduction is voluntary or mandatory.

The Chairman asked the Commissioners if they desired to defer action on this item until May.

Vice Chairman Timpone agreed, adding that he desired to hear from Mr. Holmen.

On a motion by Vice Chairman Timpone, seconded by Commissioner Saunders and passed by a vote of 3-0, the Commission resolved to defer action on the Advisory Opinion until the next meeting.

5. Proposed Regulations Concerning the Gubernatorial Public Financing Program

Legal Director Hoekje presented the proposed amendments and proposed two new rules concerning the Gubernatorial Public Financing Program. She stated that the proposed amendments primarily addressed requirements concerning the Lieutenant Governor candidate in the general election.

The Legal Director stated that, if approved by the Commission, the proposed amendments and new rules will be filed at the Office of Administrative Law for publication in the New Jersey Register, and would be the subject of a public hearing scheduled for the July 17, 2012 meeting. She informed the Commissioners that the regulations are anticipated to be in effect by January 1, 2013.

Vice Chairman Timpone asked if "member of household" in the Personal Financial Disclosure definitions was inclusive of civil unions.

Legal Director Hoekje replied that she would examine the civil union statute.

The Legal Director stated that the proposal was the result of a group effort and that she wished to acknowledge Associate Legal Director Michelle Levy and Compliance Director Amy Davis for their work. She told the Commissioners that Michelle Levy would oversee the subsequent filing and notice process.

On a motion by Commissioner Saunders, seconded by Vice Chairman Timpone and passed by a vote of 3-0, the Commission approved the Proposed Regulations Concerning the Gubernatorial Public Financing Program.

6. Resolution to go into Executive Session

On a motion by Commissioner Saunders, seconded by Vice Chairman Timpone and passed by a vote of 3-0, the Commission resolved to go into Executive Session to discuss matters, which will become public as follows:

- A. Final Decision Recommendations in complaint proceedings which will not become public. However, the Final Decisions resulting from those recommendations will become public not later than seven business days after mailing to the named respondents.
- B. A report on requests from the public for investigations of possible violations, which report will not become public in order to protect the identity of informants and maintain the integrity of investigative procedures and priorities. However, any complaint alleging violations, which complaint may be generated as a result of a request for investigation, will become public not later than seven business days after mailing to the named respondents.
- C. Matters under pending or anticipated litigation, the substance of discussions of which will not become public in order to protect the attorney-client privilege and the deliberative process. However, any litigation in which the Commission is currently a party is a public matter and will become public subject to the above limitations and privileges.

Return to Public Session

7. Adjournment

On a motion by Commissioner Saunders, seconded by Vice Chairman Timpone and passed by a vote of 3-0, the Commission resolved to adjourn at 12:50 p.m.

Respectfully submitted as true  
and correct,

Jeffrey M. Brindle  
Executive Director