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NATIONAL STATE BANK BLDG., SUITE 1215  
28 W. STATE STREET, CN-185  
TRENTON, NEW JERSEY 08625-0185  
(609) 292-8700

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COUNSEL

October 21, 1988

Todd R. Caliguire, Esq.  
456 Sylvan Avenue  
Englewood Cliffs, NJ 07632

Advisory Opinion No. 12-1988

Dear Mr. Caliguire:

The Commission has directed me to respond to your letter received October 11, 1988 in which you requested an advisory opinion. You have asked several questions concerning the application of "The New Jersey Campaign Contributions and Expenditures Reporting Act," N.J.S.A. 19:44A-1 et. seq. (hereafter, "the Act") to the raising of donations and the making of payments by a group of individuals seeking to encourage Attorney General Cary Edwards to undertake a gubernatorial candidacy in the upcoming primary election.

In your letter, you state that a group of individuals, of which you are a member, wish to support the possible gubernatorial candidacy of Attorney General Cary Edwards in 1989. Attorney General Edwards is presently not a declared candidate for Governor. You anticipate that he will be evaluating a possible candidacy over the next few months and will make a decision by the end of this year. The group on whose behalf you are writing believes that his decision will require significant expenditures and anticipates raising donations for Attorney General Edwards' benefit.

The questions you have submitted, and the Commission responses are as follows:

"1. May funds be raised and expended for 'testing the waters' activities by a committee formed for such purposes on behalf of an individual who is not affiliated with such committee?"

The Commission regulations contemplate that funds may be received by an individual, "...or a committee in his or her behalf..." solely for the purpose of determining whether that individual should become a gubernatorial candidate (i.e. "testing the waters" or pre-candidate activity); see N.J.A.C. 19:25-16.5. The language in this regulation does not specify the affiliation status or relationship between the individual on whose behalf the committee has been formed and the committee itself, and it is conceivable that a committee may be working to recruit an individual as a candidate without any affiliation with that individual. Nothing contained in the Act or the regulations prohibits the formation of such a committee.

"2. What is the schedule pursuant to which such a committee must report amounts raised and expenditures made for such purposes?"

Upon the receipt of funds for the purpose of determining whether an individual should become a candidate, a committee formed on behalf of such an individual must establish a depository account, maintain records and file with the Commission a notice containing the name, address and account number of the depository not later than ten days after the receipt of such funds; see N.J.A.C. 19:25-16.5. The Commission is enclosing for your convenience a Form T-1 to be used for filing the depository account information.

At this point in time, the Commission cannot determine what further filing requirements will arise until more facts become known. If the individual subsequently becomes a candidate, funds received and payments made become subject to the requirements of the Act; see N.J.A.C. 19:25-3.1(b). At that time, the individual may designate as his or her campaign depository the depository account established by this committee for pre-candidacy activity (see N.J.A.C. 19:25-16.5) and would be responsible for reporting all contributions received and expenditures made by the committee, including pre-candidacy activities; see Advisory Opinion No. 07-1988, enclosed.

"3. May such a committee accept contributions in excess of the contribution limit imposed on an individual pursuant to N.J.S.A. 19:44A-29(a) and, if so, how must such contributions be treated in the event such possible candidate does, in fact, become a candidate?"

Funds received for pre-candidacy activity are not regarded as "contributions" as that term is defined in N.J.S.A. 19:44A-3(d) until such time as an individual on whose behalf such funds are received achieves "candidate" status; see N.J.S.A. 19:44A-3(c) defining the term "candidate" to mean an individual seeking or having sought election to State public office. Assuming Attorney General Edwards does become a candidate as defined in the Act, he will be required, whether or not he seeks to participate in public funding, to certify to the Commission within ten days after the commencement of his candidacy that he did not have a "testing the waters" account, or alternatively that any contribution in excess of \$800 received for pre-candidacy "testing the waters" activity has been reduced to an aggregate \$800 contribution by the return to the contributor of any excess amount over \$800; see N.J.A.C. 19:25-16.12.

"4. May such a committee borrow money from a lending institution or individual and, if so, are there are limits on such borrowing?"

The public financing statutes and regulations promulgated thereunder do contain restrictions on borrowing by gubernatorial candidates; see N.J.S.A. 19:44A-33 and N.J.A.C. 19:25-16.30. However, as is the case with the restrictions on contributions, these limitations do not arise until the individual on whose behalf the pre-candidacy activity has been undertaken achieves candidate status. Upon achieving that status, a candidate who has borrowed in excess of \$50,000 must within ten days repay the excess amount; see N.J.A.C. 19:25-16.12(f).

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"5. Will all expenditures incurred for 'testing the waters' purposes prior to the time an individual becomes a candidate for Governor be included in determining the amount of permitted expenditures by such candidate pursuant to N.J.S.A. 19:44A-7?"

Commission Regulation N.J.A.C. 19:25-16.9(a)3 provides as follows:

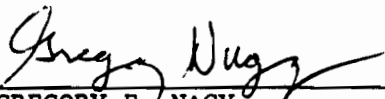
"3. The amount which any qualified candidate may spend in aid of his or her candidacy shall not exceed \$0.35 for each voter who voted in the last preceding general election in a presidential year in New Jersey, which amount shall include all expenditures for testing the waters activity prior to candidacy. Such amount shall not include expenditures listed in N.J.A.C. 19:25-16.27."

The above regulation contemplates that a candidate participating in public funding will include "...all expenditures..." for pre-candidacy activity in calculating compliance with the expenditure limit in N.J.S.A. 19:44A-7, with the exception of the few specifically described items in N.J.A.C. 19:25-16.27 that are outside the expenditure limit (i.e., compliance costs, travel expense, and food and beverage expense). At this time, it is unknown whether Attorney General Edwards will become a candidate, whether he will choose to participate in public financing and, if so, whether he will designate this committee's pre-candidacy account as his campaign account. The Commission cannot preclude the possibility that a fact pattern might develop that would require it to consider whether specific pre-candidacy expenditures were sufficiently independent of the candidate on whose behalf they were incurred to justify excluding them from the above regulation. However, the Commission would need a more developed fact statement than is presently available to consider this question, and therefore it must respectfully decline to express any opinion.

Thank you for your inquiry and your interest in the administration of public financing.

Very truly yours,

Election Law Enforcement Commission

By:   
GREGORY E. NAGY

GEN/cn  
Enclosure