



State of New Jersey

ELECTION LAW ENFORCEMENT COMMISSION

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August 15, 1989

Linda B. Bowker
NOW-NJ PAC Chair
110 W. State Street
Trenton, NJ 08608

Advisory Opinion 17-1989

Dear Ms. Bowker:

The Commission has directed me to issue the following response to your request for an Advisory Opinion made in your undated letter received on August 8, 1989. You have asked several questions concerning the reporting responsibilities of the National Organization for Women of New Jersey (hereafter, "NOW-NJ"), and of the National Organization for Women of New Jersey Political Action Committee (hereafter, "NOW-NJ PAC") under the New Jersey Campaign Contributions and Expenditures Reporting Act, N.J.S.A. 19:44A-1, as amended by P.L. 1989, c.4 (hereafter "the Act").

You write that NOW-NJ PAC contemplates undertaking independent expenditures in support of the 1989 gubernatorial general election candidacy of Jim Florio. For the purpose of this opinion, the Commission assumes that Mr. Florio's candidacy will be subject to the statutory gubernatorial general election expenditure limit of \$5 million (see P.L. 1989, c.4, section 2). You represent further that NOW-NJ PAC has not and will not consult or coordinate its expenditure activities to aid or promote the Florio candidacy with that campaign.

You have submitted with your letter a sample of an item you describe as a voter pledge card, and that sample is hereby incorporated in this response. The text of the voter pledge card does not identify any gubernatorial or state candidate, nor does it on its face contain any unambiguous reference to any such candidate. The pledge card does solicit statements to the effect that the signatory will vote for such candidates as the signatory deems will keep abortion legal and accessible, but does not specify any particular candidates.

NOW-NJ PAC files with the Commission quarterly reports (Form R-3) as a continuing political committee. Its most recent report was filed on July 12, 1989, by Laure Lannin, treasurer, and disclosed a closing balance as of June 30, 1989 of \$635.25. The Commission has no record of any reports filed on behalf of NOW-NJ.

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In order to enhance the ability of the Commission to answer this inquiry as clearly and responsively as possible, your questions have been reordered and expanded as follows:

Question No. 1

If NOW-NJ PAC undertakes truly independent expenditures, that is expenditures made without the consent of, consultation with or coordination with any candidate, is the total amount that may be independently expended subject to any limit, and is NOW-NJ PAC precluded from endorsing any candidate?

Response

Opinions handed down from both the United States Supreme Court and the New Jersey Supreme Court have held that truly independent expenditures made without the consent of, consultation with or coordination with any candidate are constitutionally protected forms of free speech that cannot be limited in total amount; see Friends of Tom Kean v. Election Law Enforcement Commission, 114 N.J. 33, 39-40 (1989), citing Buckley v. Valeo, 424 U.S. 1 (1976), and Federal Election Commission v. National Conservative Political Action Committee, 470 U.S. 480 (1985). Nothing in the Act limits independent expenditures, and nothing precludes any reporting entry from endorsing any candidate.

In regard to a gubernatorial general election candidate subject to the \$5 million expenditure limit (see N.J.S.A. 19:44A-7, as amended by P.L. 1989, c.4, section 2), such independent expenditures undertaken without the candidate's consent, consultation or coordination cannot be charged or allocated against the candidate's expenditure limit; see Friends of Tom Kean, supra.

Question No. 2

If NOW-NJ PAC makes independent expenditures to further the election or defeat of a 1989 gubernatorial candidate, what reporting requirements must be observed, and may its organizational bank account be used?

Response

An independent expenditure is subject to all of the reporting and disclosure requirements of the Act; see Commission Regulation N.J.A.C. 19:25-12.7 (copy enclosed). In addition to the reporting requirements that attach to any expenditure in a campaign setting, please note that independent expenditures pursuant to the above-cited regulation necessitate the filing of a sworn statement to the effect that they were made without

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the cooperation of, prior consent of, or in consultation with the gubernatorial candidate intended to benefit from the expenditure; see enclosed affidavit form. Also, please note that if the independent expenditure is used to purchase an advertisement, the text of such advertisement must include a clear and conspicuous statement that the advertisement is not authorized by the benefiting candidate, and must state the name and address of NOW-NJ PAC.

The organizational bank account established by a continuing political committee pursuant to N.J.S.A. 19:44A-10 is an appropriate vehicle for making independent expenditures. Schedule E of the quarterly report (Form R-3) requires that the independent expenditure be allocated to the benefiting candidate. NOW-NJ PAC must identify any candidate or committee benefiting from its expenditure, the date of the election, the election district of the candidate and the amount expended. Schedule E also must disclose the name and address of the payee to whom the expenditure has been made, or the name and address of any creditor or other vendor to whom the committee has incurred an obligation to make future payment. The purpose of the expenditure also must be reported on Schedule E, including a brief description such as, for example, "paid newspaper advertisement," "printing of brochures," etc.; see Continuing Political Committee Compliance Manual, pp. 15 and 16.

The Commission has interpreted N.J.S.A. 19:44A-8(b) to require written notice to a candidate when an independent expenditure by a continuing political committee benefits that candidate. Such written notification in itself would not be construed as evidence of coordination, consent or consultation with that candidate.

Question No. 3

If NOW-NJ (as distinguished from NOW-NJ PAC) receives donations payable to it in response to a solicitation relying exclusively on the text of the enclosed, sample voter pledge card, does NOW-NJ acquire reporting responsibilities under the Act?

Response

The Commission believes that the text of the voter pledge card standing alone does not contain a reference to any specific candidate or any specific election sufficient to meet the "express advocacy" requirement articulated in the United States Supreme Court opinion in Federal Election Commission v. Massachusetts Citizens for Life, Inc., 479 U.S. 238 (1986) (hereafter, "MCFI"). To paraphrase that opinion, a distinction must be made between speech or discussion of issues, and speech which contains "pointed

exhortations to vote for particular persons" containing language such as "vote for," "elect," "support," and other similar terms; MCEL, supra, at 249, citing Buckley v. Valeo, 424 U.S. 1, at 44, n. 52.*

In the absence of "express advocacy" speech in a specific election setting, donations received by NOW-NJ cannot be deemed to be campaign "contributions," as that term is defined in N.J.S.A. 19:44A-3(d), and therefore NOW-NJ cannot be required to report the names and address of persons or entities making such donations. However, the Commission wishes to emphasize that "express advocacy" activity in relation to this solicitation could be established from facts that have not been presented by this inquiry. For example, if the voter pledge card is accompanied by a cover letter expressly endorsing a specific candidate for election, nothing contained in this opinion could be construed as relieving NOW-NJ from any reporting obligations arising under the Act. Furthermore, the Commission does not wish to exclude the possibility that "express advocacy" could be established by a totality of circumstances surrounding the solicitation. For example, if NOW-NJ were to undertake activity intended to communicate to the public or to intended recipients of this solicitation that the funds generated by the solicitation would, in fact, be applied to a specific candidate, nothing contained in this opinion would prevent the Commission from concluding that "express advocacy" activity had occurred and reporting obligations had attached.

* The Commission is aware of the recent opinion in Federal Election Commission v. National Organization for Women, 713 F. Supp. 428, (D.D.C. 1989), appeal filed July 10, 1989. In that case, solicitation letters which in some respects are similar to the text of the voter pledge card being considered in this advisory opinion were held to be outside of the restrictions of federal campaign reporting laws because they did not contain "express advocacy." The District Court held that there must be an "explicit and unambiguous reference to the candidate" for "express advocacy" to be present. While that opinion is not binding precedent in this state, it does underscore a line of federal cases in which federal courts have distinguished between advocacy of political issues and "express advocacy" of a specific candidate; see Federal Election Commission v. Central Long Island Tax Reform Immediately, 616 F.2d 45 (2d Cir. 1980) and Federal Election Commission v. Furgatch, 807 F.2d 857 (9th Cir. 1987).

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QUESTION NO. 4

Assuming NOW-NJ uses such funds exclusively for "educational purposes," does NOW-NJ acquire a reporting responsibility under the Act?

RESPONSE

The phrase "educational purposes" is too vague to permit the Commission to offer any specific guidance as to reporting responsibilities that NOW-NJ may incur.

QUESTION NO. 5

If the donations generated by the contemplated voter pledge card are made payable to and deposited in the bank account maintained by NOW-NJ PAC, does NOW-NJ PAC acquire reporting responsibilities under the Act in regard to such donations?

RESPONSE

If the donations generated by the contemplated voter pledge card are made payable to and deposited in the bank account maintained by NOW-NJ PAC, such donations would be construed as campaign "contributions" subject to reporting under the Act. The total amount deposited would have to be reflected in the appropriate quarterly report (Form R-3) filed by NOW-NJ PAC and NOW-NJ PAC would be required to report the name and address as well as the amount contributed by each person or entity making a contribution in the aggregate exceeding \$100; see N.J.S.A. 19:44A-8(b). Please note also that under that previously cited statute, any contribution of more than \$250 received after the final day of a quarterly reporting period and on or before the date of a primary, general, municipal, school or special election would have to be reported on a 48-hour notice basis; see N.J.A.C. 19:25-10.6 (copy enclosed). For example, if a contribution exceeding \$250 is received during the period beginning on October 1, 1989 and ending on the November 7, 1989 date of the general election, and NOW-NJ PAC is expending funds to further the election or defeat of a candidate or candidates in the 1989 general election, within 48 hours of receipt of such a contribution NOW-NJ PAC would be required to file a notice with the Commission containing the name and address of the contributor and the amount contributed. Please note that Commission regulations permit the filing of a single, cumulative report of contributions received up to 11 days before the general election; see N.J.A.C. 19:25-10.6(b).

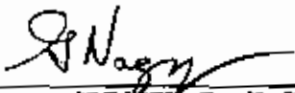
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All contributions received by NOW-NJ PAC, and all expenditures made by it, must be made through its organizational account established pursuant to N.J.S.A. 19:44A-10, and controlled by its organizational treasurer pursuant to N.J.S.A. 19:44A-11. All such contributions and expenditures must be reported on the quarterly report relevant to the period of time in which the transactions occurred; see N.J.S.A. 19:44A-8(b).

Thank you for your inquiry.

Very truly yours,

ELECTION LAW ENFORCEMENT COMMISSION

BY: 
GREGORY E. NAGY

GEN/cn
Enclosurea