



State of New Jersey

ELECTION LAW ENFORCEMENT COMMISSION

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January 19, 1993

Edward Gross, Esq., Counsel
New Jersey Republican State Committee
P. O. Box 188
East Brunswick, New Jersey 08816

Re: Advisory Opinion No. 02-1993

Dear Mr. Gross:

The Commission has directed me to issue the following response to your request for an advisory opinion. You have asked three questions concerning the impact of proposed expenditure activity by the New Jersey Republican State Committee (hereafter, the RSC) during the 1993 primary election upon the contribution and expenditure limits of Republican publicly-financed gubernatorial primary election candidates. For your reference enclosed please find a copy of the unofficial text of Subchapter 16 of the Commission Regulations ("Public Financing of Primary Election for Governor") which contains all recently-adopted amendments.

1. You have asked whether a media campaign undertaken during the primary election by the RSC independently of any gubernatorial candidate in the 1993 primary election of the Republican party and containing the name of a specific opposing party candidate for governor will affect the contribution and expenditure limits of publicly-financed Republican 1993 gubernatorial primary election candidates. You write that the media campaign may include visual, audio, and printed communications. You have confirmed in a telephone discussion that your first question is intended to deal with a media campaign by the RSC which will be totally independent of the campaigns of the 1993 primary election Republican gubernatorial candidates. No gubernatorial primary election candidate will exert any control over the media campaign, or consent to its production and distribution. Further, you have indicated that the media campaign will not be coordinated with any of the Republican gubernatorial candidates.

The characteristics of an independent expenditure require that the expenditure be made without the consent of, consultation with, or coordination with any candidate; see N.J.A.C. 19:25-16.29(a). Your first inquiry submits that no Republican candidate for nomination for the office of Governor will have any control over the expenditures contemplated by the RSC.

Under these facts, independent expenditures made during the 1993 primary election without the consent of, consultation with, or coordination with any gubernatorial primary election candidate, are constitutionally protected free speech that may not be limited in total amount and may not be treated as contributions to any candidate; 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). Therefore, the provisions of the Act and Commission regulations that limit a contribution to a gubernatorial candidate cannot be applied to the independent expenditures by the RSC which you have outlined. The fact that the expenditures will be made by a political party committee does not affect the independent status of the expenditures as long as they are not controlled in any way by any of the candidates in the primary election.

Further, the Commission regulation which governs independent expenditures in the context of a publicly-financed gubernatorial primary election states that independent expenditures are not "deemed to be expenditures within the meaning of Section 7 of the Act (N.J.S.A. 19:44A-7);" see N.J.A.C. 19:25-16.29(a). Therefore, independent expenditures by the RSC during the 1993 primary election which are undertaken without consent, consultation or coordination with a publicly-financed candidate are by definition not expenditures and therefore may not be allocated against the primary election expenditure limit of any candidate; see Friends of Tom Kean, supra.

In regard to reporting requirements, an independent expenditure by the RSC for the media campaign which you have described is subject to all of the disclosure and reporting requirements of the Act; see N.J.A.C. 19:25-16.29. The Commission notes that the RSC files quarterly reports (Form R-3) as a continuing political committee. Expenditures by the RSC for the independent media campaign must therefore be reported as expenditures on the quarterly reports filed by the RSC.

In addition to these reporting requirements, please note that pursuant to N.J.A.C. 19:25-16.29(a) independent expenditures require the filing by the RSC with its quarterly reports of a sworn statement on a form provided by the Commission that the independent expenditures were made without the cooperation or prior consent of, and without consultation with or at the request or suggestion of the gubernatorial primary election candidate or candidates intended to benefit from the expenditures; see enclosed form. Also, please note that if the independent expenditure by the RSC is used to purchase an advertisement, the advertisement must include a clear and conspicuous statement that the advertisement is not authorized by any candidate, and must state the name and address of the RSC; see N.J.A.C. 19:25-16.29(b).

If the RSC undertakes the identical media campaign activity discussed above after June 8, 1993, the date of the primary election, such activity may be construed as a "political communication" on behalf of a gubernatorial candidate in the 1993 general election; see N.J.A.C. 19:25-11.10(b) (copy enclosed). Therefore, the contribution and expenditure limits as well as reporting obligations may attach in the context of the 1993 general

election, and the discussion above of independent expenditures in the primary election would not apply.

2. You have asked whether the 1993 gubernatorial primary election contribution and expenditure limits are applicable to expenditures by the RSC for "fundraising efforts" and for the media campaign, discussed above, if those expenditures are made during the 1993 primary election and are coordinated with a Republican candidate or candidates for nomination to the office of Governor. You have indicated that by "fundraising efforts," you mean fundraising events such as cocktail parties which are accompanied by a solicitation for contributions.

State political party committees are no longer prohibited from making contributions to or spending on behalf of party candidates in New Jersey primary elections; see Eu v. San Francisco County Democratic Central Committee, 489 U.S. 214 (1989), and New Jersey Republican State Committee v. Del Tufo, et al, L-91-1645, Superior Court, Mercer County, April 12, 1991 (unpublished). As a result of these opinions, the Commission believes that expenditures by the RSC made on behalf of and with the consent of a Republican primary election candidate for governor are "in-kind" contributions to that candidate and are subject to the 1993 primary election contribution and expenditure limits; see N.J.A.C. 19:25-16.6(a) and N.J.A.C. 19:25-16.9(a)3.

The Commission therefore concludes that RSC expenditures, including the fundraising event and media campaign expenditures you have described, which are coordinated with a Republican primary election gubernatorial candidate, are limited to no more than \$1,800 of such items to that candidate in the 1993 primary election.

As a continuing political committee filing quarterly reports with the Commission pursuant to the Act, the RSC must report on its quarterly reports all expenditures made on behalf of gubernatorial candidates. Further, the RSC is required to provide written notice to a candidate within 48 hours of any expenditure made on behalf of that candidate; see N.J.S.A. 19:44A-8(b) and N.J.A.C. 19:25-10.4 (copy enclosed).

Commission Regulations provide an exemption from the contribution and expenditure limits for certain campaign literature circulated to voters by "direct mail" when issued by political party committees; see N.J.A.C. 19:25-16.30(c). The "direct mail" literature must meet specific criteria regarding the prominence of the gubernatorial candidate to be exempt from application of the primary election contribution and expenditure limits.

With regard to expenditures for food and beverages by the RSC to solicit contributions to a gubernatorial candidate, such expenditures would be included in the RSC's \$1,800 contribution limit, but generally would not count toward the candidate's expenditure limit. The specific requirements concerning application of the primary election expenditure limit to such expenditures are found at N.J.A.C. 19:25-16.27(a)3.

3. You have asked how the expenditures contemplated by the RSC are to be allocated among the 1993 Republican gubernatorial primary election candidates. The Commission notes that the issue of allocation to candidates

has no application to your first question, which describes independent expenditures by the RSC.

Where the expenditures by the RSC are coordinated with and therefore not independent of a gubernatorial primary election candidate or candidates, Commission regulations state that they must be valued for contribution reporting and expenditure limit purposes by the reasonable commercial value of the goods and services to the candidate; see N.J.A.C. 19:25-16.35. N.J.A.C. 19:25-16.35(b) specifically provides with regard to expenditures for the media campaign you have described that:

The costs of a political communication as defined in N.J.A.C. 19:25-11.10 which aids or promotes a candidate for Governor, and is undertaken, made or circulated with the cooperation or consent of the candidate, shall be reported by the candidate in the same manner as the receipt of any goods and services, and shall be valued for the purposes of the contribution limit in N.J.A.C. 19:25-16.6 and the expenditure limit in N.J.A.C. 19:25-16.9(a)3 in the same manner as any other contributed goods or services.


In the absence of specific information concerning the actual value of the expenditures contemplated by the RSC, the content of the media campaign or communications, and the number and identities of the candidates benefitting from the expenditures, the Commission is unable to provide further guidance concerning allocation of the RSC expenditures.

The Commission thanks you for your inquiry.

Very truly yours,

ELECTION LAW ENFORCEMENT COMMISSION

BY:



NEDDA GOLD MASSAR
Director of Public Financing

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