



State of New Jersey

ELECTION LAW ENFORCEMENT COMMISSION

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Respond to:

P.O. Box 185

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(609) 292-8700 or Toll Free Within NJ 1-888-313-ELEC (3532)

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Legal Counsel

February 23, 2009

Lynn Schundler, Esq.
The Schundler for Governor 2001 Primary Campaign
299 Varick Street
Jersey City, NJ 07302

Advisory Opinion No. 02-2008

Dear Ms. Schundler:

At its meeting of February 17, 2009, the Commission determined to adopt new regulations concerning the finalization with net debt by publicly-financed gubernatorial candidates; see N.J.A.C. 19:25-15.47B and 15.47C relevant to the general election, and N.J.A.C. 19:25-16.34A and 16.34B relevant to the primary election. The new rules were adopted without change from the proposed text which appeared in the New Jersey Register on December 1, 2008. The new rules are anticipated to become effective upon publication of the adoption notice in the New Jersey Register on or around March 16, 2009. The adoption notice and the proposed new rules appear on the Commission's website, www.elec.state.nj.us, and are also enclosed here.

Due to its adoption of these new regulations which address the issue presented in your Advisory Opinion Request, the Commission also determined at its February 17, 2009 meeting to take no further action as to your Advisory Opinion Request. The Special Programs staff is completing the forms to be used by the campaigns and will provide further assistance to any campaign wishing to make application for finalization.

Thanks to Candidate Schundler and you for your continued interest in the work of the Commission and for bringing your concerns to the attention of the Commission. Thank you further for your extensions of time to answer the Advisory Opinion Request during the regulatory process.

Sincerely,

Carol L. Hoekje
Legal Director

Enclosure



Advisory Opinion Request For Candidates and Committees

NEW JERSEY ELECTION LAW ENFORCEMENT COMMISSION
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Website: www.elec.state.nj.us

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JUN 27 2008

PLEASE PROVIDE THE INFORMATION REQUESTED BELOW

A person, committee or entity subject to, or reasonably believing he, she or it may be subject to, any provision or requirement of the Campaign Reporting Act may request that the Commission provide an advisory opinion pursuant to N.J.S.A. 19:44A-6. Such request must include the following:

1. This request for an Advisory Opinion is being submitted on behalf of:

Full name of Person, Committee, or Entity:

The Schundler for Governor 2001 Primary Campaign

Mailing Address:

299 Varick Street, Jersey City, NJ 07302

*Day Telephone Number:

201-988-7756

*Evening Telephone Number:

201-332-6615

2. Indicate if the above named person, committee, or entity currently files reports with the Commission:

Yes

No

a. If yes, indicate in what capacity it is filing:

Candidate committee

Joint candidates committee

Political committee

Continuing political committee

Political party committee

Legislative leadership committee

Recall committee

Recall defense committee

Personal financial disclosure statement

Other (please describe):

b. If no, indicate if the above named person, committee, or entity has in the past filed reports with the Commission, giving elections (i.e., 2005 general election) or calendar years, and identify filing capacity:

c. If reports are or were filed under a different name than that appearing in Question #1 above, provide that name:

3. Please provide below a statement of the cognizable question of law arising under the Campaign Reporting Act, including specific citations to pertinent sections of the Campaign Reporting Act and Commission regulations (if known).

Whether the Campaign can consider the outstanding obligations listed on Schedule 10 of the G-1 form as settled given that the applicable statute of limitations has run on those debts which were incurred in 2001.

And if so, may the campaign file its final report with zero (0) obligations on its schedule 10.

*Leave this field blank if your telephone number is unlisted. Pursuant to N.J.S.A. 47:1A-1.1, an unlisted telephone number is not a public record and must not be provided on this form.

4. Please provide below a full and complete statement of all pertinent facts and contemplated activities that are the subject of the inquiry. Your statement must affirmatively state that the contemplated activities have not already been undertaken by the person, committee, or entity requesting the opinion, and that the person, committee, or entity has standing to seek the opinion, that is the opinion will affect the person's or committee's reporting or other requirements under the Act. Attach additional sheets if necessary.

Statement of Facts:

Bret Schundler ran for Governor of New Jersey in the Primary and General elections in 2001. After loosing in the general election his Primary campaign had outstanding obligations. Great efforts were made to raise funds to satisfy the outstanding obligations and many were satisfied, but by 2004 there remained \$181,102.55 of debts. At that time the campaign made a request for an Advisory Opinion seeking to settle the debts for less than the amounts owed due to the campaign's inability to raise funds to pay the outstanding obligations. The Commission, in its Advisory Opinion No. 01-2004, advised that the campaign could not do so, but invited the campaign to resubmit its request at a point in time when the debts were no longer enforceable under New Jersey Law. That time is now upon us. The campaign has resolved all outstanding rejection letter issues with the Commission and there are no other reasons to continue to file reports with the Commission.

5. Please provide below a statement of the result that the person, committee, or entity seeks, and a statement of the reasoning supporting that result:

The campaign would like to right off its outstanding obligations since they are no longer legally enforceable under New Jersey law. It would then like to file a final report paying the remaining balance in its accounts to the State as required by law.

6. Person who is submitting this advisory opinion request on behalf of the committee or entity listed in Question #1:

Full Name: Lynn Schundler	
Mailing Address: 299 Varick Street	*Day Telephone Number: 201-988-8311
Jersey City, NJ 07302	*Evening Telephone Number: 201-988-8311
	Fax Number:

a. Official Capacity of Person Requesting Opinion:


Candidate	<input type="checkbox"/>
Treasurer	<input type="checkbox"/>
Organizational Treasurer	<input type="checkbox"/>
New Jersey Attorney representing requesting person, committee, or entity	<input type="checkbox"/>
Other (please describe): Trustee	<input checked="" type="checkbox"/>

7. I hereby consent to an extension of the 10-day response period provided in N.J.S.A. 19:44A-6f to a 30-day period for Commission response, which period shall start on the date of Commission receipt of the completed advisory opinion request.

(CROSS OUT THIS PARAGRAPH IF CONSENT IS WITHHELD).

8. A request for an advisory opinion will not be considered filed until a fully completed and signed application is received by the Commission.

June 24, 2008
Dated: _____


Signature: _____

**Advisory Opinion Request from Schundler for Governor, Inc. (2001 Primary Campaign Committee)
Supplemental Memorandum**

Recd
July 8, 2008
N.J. ELEC
clu

The Schundler for Governor Campaign is seeking guidance, through this advisory opinion request, on how to wind down its 2001 Primary campaign account, which exists solely for the purpose of retiring debt pursuant to *N.J.A.C. 19:25-16.33*.

Issue 1

When a campaign's unpaid obligations are no longer enforceable under the law, they cease to be legal obligations of the campaign – but this in no way makes them contributions by the creditor.

At the conclusion of the 2001 gubernatorial campaign the Schundler campaign had outstanding obligations of \$181,102.55. Every one of its creditors continued to expect and demand payment, as evidenced by these creditors' on-going collection efforts. Moreover, the campaign had every intention of paying these obligations, and continued for years to attempt to do so. From 2001 until 2004 the campaign held fundraisers and distributed fundraiser mailings. The campaign contacted and solicited every contributor who had not previously maxed out; the campaign purchased donor lists from like-minded candidates and solicited those donors to help retire its debts. During that period of time the campaign successfully raised tens of thousands of dollars and proceeded to pay down its debts. There came a time, however, when the cost of the fundraisers and the cost of the mailings exceeded the amount of the contributions received, as increasingly few potential contributors wanted to give to an unsuccessful campaign, ever more distantly past concluded. The campaign made every attempt to pay off its remaining debts. It simply became impossible to do so. In fact, such situations were contemplated by N.J.S.A. 19:44A-16(b) which allows the termination of post-election campaign reporting when outstanding obligations "are likely to be discharged or forgiven."

The federal government also recognizes that there may come a time, in a post-election campaign, when the campaign simply cannot raise the funds necessary to pay its debts. Under such circumstances, the federal government allows the settlement of debt for less than full value under certain circumstances. This campaign urged the Commission to adopt a similar procedure in New Jersey, but the Commission declined to

do so for the reasons set forth in Advisory Opinion No. 01-2004. However, in that opinion, the Commission invited the campaign to revisit the issue concerning unpaid obligations at a point in time when its debts are no longer enforceable under the law.

In New Jersey, the Statute of Limitation on a debt is six years. *N.J.S.A. 2A:14-1*. The debt to both vendors in the primary campaign arose in the first half of 2001. It is now mid year of 2008, well after the statute of limitations has expired. At this point in time, although both vendors would like to be paid, they no longer have a legal claim against the campaign, and the campaign requests permission to file a final report with the Commission removing the creditors from Schedule 10 of the G-1.

Statutes of Limitations exist in all jurisdictions in part because of the desire for closure and to avoid the disruption that would result from longstanding threats of legal action. In this case the Statute of Limitations would allow for the orderly closure of a campaign run over seven years ago as an alternative to its filing in perpetuity.

We anticipate the concerns of the Commission. Would this not open the possibility for any contributor to provide services during the campaign and then simply forgive them after? The answer is an emphatic no. Indeed, the Commission itself has argued (see page 5 of Advisory Opinion No. 01-2004) that no service provider would bill a campaign with the intention of forgiving the debt after Election Day, since it can legally volunteer its services from the start.

Our vendors wanted to get paid, as recognized by the Commission¹, and the campaign wanted to pay them, but has found that it cannot raise the necessary funds. This possibility exists in the world of campaigns. This possibility has been realized in New Jersey and in all other states, and it will occur again in the future. This campaign is

¹ The Commission noted this in its Advisory Opinion when it observed that "the Commission believes that the behavior of the creditors...is evidence that their services were not intended to be voluntary, noncompensated services." (See page 5 of Advisory Opinion No.01-2004.) In that Advisory Request, the campaign argued, in the alternative to urging the adoption of the federal government's procedures, that since the vendors could have volunteered their services at the time rendered, they should be allowed to do so after the fact. The Commission rejected this argument, noting that the facts demonstrated that the services were not intended **at the time** to be voluntary, and that if the vendors intended to forgive the debt after the campaign, they could have easily volunteered their services at the start.

asking the Commission to adopt a procedure to account for a situation where no matter how much creditors want to get paid, and no matter how much a campaign wants to pay its creditors, it cannot.

One possibility, rejected by the Commission, is the Federal Government's approach. A second would be to require a campaign to file in perpetuity. The third approach, which we now urge the Commission to adopt, would be to allow a campaign to file a final report at the expiration of the Statute of Limitations. The filing of such a report by the campaign would in no way involve the creditor in making a "contribution" to the campaign. It would simply recognize that, under the law, the creditor no longer has a legally enforceable claim because of the campaign's absolute defense. This is a final resort – one reached after the campaign has already undertaken all reasonable efforts to pay its debt to creditors that continued to assert their right and desire to be paid.

Issue 2

The Schundler Campaign need not involve the creditors in a plan to settle its debts as the Statute of Limitations has run on the debts.

The Statute of Limitations controlling debts, *N.J.S.A. 2A: 14-1*, is a defense to any claim by a creditor. As such, and as noted by the Commission, subject claims are no longer enforceable under New Jersey law. Under the federal government's procedures, which were not adopted by the Commission, a campaign can settle debts for less than the amount owed under certain circumstances after a campaign has undertaken all reasonable steps to try and pay the debt. Under the Federal procedures the campaign must also submit a debt settlement plan that includes statements from the creditors regarding their understanding of the arrangement. The Schundler campaign need not undertake such an effort in this case as no such procedures are in place at this time in New Jersey, and more importantly, because the situations are materially different. Under the federal rules, the campaign is resolving a debt that is still enforceable under the law. In the present situation, the statute of limitations has run and regardless of the beliefs or desires of the creditors, they are precluded, by law, from collecting the debt. The Statute of Limitations has run. The campaign was under no obligation to alert the creditors in advance of the

running of the statute of this fact, and we respectfully submit that the Commission has no right to demand that the campaign do so.

Relief Sought

The campaign is long over. The Statute of Limitations has run on the outstanding obligations. This campaign asks that the candidate be able to sort out his affairs, file a final report, and move on. Without some process to wind down this campaign, it would theoretically be required to file even after the death of the candidate as the campaign is an incorporated entity. Clearly this would serve no purpose of the campaign, the Commission or the citizens of the State of New Jersey. We ask the Commission to use its powers under N.J.A.C. 19:25-1.4 to provide the relief sought.

Respectfully Submitted,

Schundler for Governor, Inc.



Bret Schundler

Attachment to AO 01-2004

CHAPTER 15

Winding Down the Campaign

1. Sale of Campaign Assets

Purchaser Makes Contribution

Generally, when a campaign sells its property, the purchase is considered a contribution to the campaign by the purchaser. The payment, therefore, must not come from prohibited sources and must not exceed the contribution limits.

Sale of Campaign Materials

The sale of fundraising items or materials developed uniquely for the committee (such as artwork, publications and opinion polls¹) results in contributions from the purchasers. 100.7(a)(2). See also, for example, *Advisory Opinions (AOs)* 1982-24 and 1980-19. (However, note the exception for mailing lists, below.)

Commercial Ventures

The Commission has determined that when a committee asset is sold or used for an ongoing commercial venture to produce revenue for a committee, the proceeds are considered contributions to the committee. See AOs 1991-34 and 1983-2.

Purchaser Does Not Make Contribution

Under limited circumstances, however, the sale of a campaign asset does not result in a contribution.

Mailing Lists

Mailing lists developed by a campaign for its own use may be sold at the "usual and normal" charge without the purchaser making a contribution. See, for example, AOs 1982-41 and 1981-53.

Liquidation of Equipment and Supplies

The Commission has said that the sale of campaign equipment and supplies does not result in a contribution from the purchaser as long as the items are sold at the "usual and normal" charge. AO 1986-14.

1. For more information on opinion polls, see Commission regulations at 106.4.

2. Retiring Debts

Through Contributions

When raising contributions to retire debts after the election is over, a campaign must remember three general rules:

- First, the contributions are still subject to the limits and prohibitions of the Federal Election Campaign Act, even if the candidate lost the election and does not plan to run for future federal office.
- Second, contributions made after an election to retire debts must be specifically designated for that election by the contributor. See "Designated and Undesignated Contributions," page 15.
- Finally, contributions designated for, but made, after a particular election may not exceed the campaign's net debts outstanding, as explained on page 16. 110.1(b)(3)(i).

Through Sale of Assets

A campaign may sell its assets to raise funds to retire debts. Please note that the sale or use of assets to retire debts may result in contributions from the purchasers, as explained in section 1, above.

Through Transfers

A campaign may receive funds to retire debts through transfers of excess funds from the same candidate's campaign for a different election cycle, as long as the transferor committee has no outstanding debts. 116.2(c)(2). See Chapter 10, "Transfers." See also, AO 1997-10.

Salary Owed to Campaign Staff

Unpaid salary or wages owed to campaign employees are not considered contributions from those employees. Uncompensated services rendered by an employee may be converted to volunteer work, or the amount owed may be treated as a debt, as explained below. 116.6(a). Note, however, that FEC rules do not require an employee to accept less than full payment for his or her services. 116.6(b).

Treatment as Volunteer Service

Uncompensated employee service may be considered volunteer service if the employee signs a statement agreeing to the arrangement. 116.6(b). (Services

2. A campaign may raise funds to retire debts through joint fundraising. See Appendix C.

performed by volunteers are exempt from limits and reporting requirements. See page 25.)

Treatment as Debt

Alternatively, the committee may treat the unpaid amount of salary as a debt to the employee (see page 57 for reporting information). The committee and the employee may settle the debt for less than the amount owed, using the procedures described in the next section. 116.6(b).

3. Settling Debts

Eligibility for Debt Settlement

Only a terminating committee may settle a debt for less than the full amount owed to the creditor. A "terminating committee" is one that does not intend to raise contributions or make expenditures—except for the purposes of paying winding-down costs and retiring its debts. 116.1(a) and 116.2(a). An authorized committee may not settle any debts, however, if any other authorized committee of the same candidate has enough permissible cash on hand to pay all or part of the debt. 116.2(c)(1) and (2).

Debts Subject to Settlement

The types of debts that are subject to debt settlement requirements include:

- Amounts owed to commercial vendors;
- Debts arising from advances by individuals (e.g., staff using personal funds or credit to purchase goods and services on behalf of the committee);
- Salary owed to committee employees; and
- Debts arising from loans from political committees or individuals, including candidates. 116.7(b).

The debt settlement rules do not apply to disputed debts, which are covered by other rules (see below). 116.7(c)(2).

They also do not apply to bank loans, though the Commission recognizes that under extraordinary circumstances, such as the death or bankruptcy of the candidate, settlement of bank loans may be appropriate. (The Commission will consider specific requests on a case-by-case basis.)

Debt Settlement Rules

A commercial vendor (incorporated or unincorporated) may forgive or settle a debt owed by a committee without incurring a contribution if:

Attachment to AO 01-2004

- Credit was initially extended in the vendor's ordinary course of business, and the terms of the credit were similar to those observed by the vendor when extending a similar amount of credit to a nonpolitical client of similar risk. 116.3 and 116.4(d)(1).
- The committee undertook all reasonable efforts to satisfy the outstanding debt, such as fundraising, reducing overhead costs and liquidating assets. 116.4(d)(3).
- The vendor made the same efforts to collect the debt as those made to collect debts from a nonpolitical debtor in similar circumstances. Remedies might include, for example, late fee charges, referral to a debt collection agency or litigation. 116.4(d)(2). If the committee or the creditor fails to take these steps, the difference between the amount owed and the amount actually paid may be considered a contribution. 114.2(b).

Debt Settlement Plans

After a terminating committee has reached agreements with its creditors, the treasurer should file a debt settlement plan on FEC Form 8. Once the plan has been submitted to the Commission for review, the committee must postpone payment on the debt until the Commission has completed the review. 116.7(a). Payments to creditors must be disclosed in the committee's termination report.

Completing Form 8

Step-by-step instructions for completing Form 8 are included with the form. The Commission recommends that the committee include as many debts as possible in the plan and submit a separate Part II (second page) for each creditor along with Part I (cover page). The treasurer must also submit Part III (third page) to indicate how the committee intends to address other debts not included in the submission. The treasurer must sign and date the first page. The creditor must also sign the form to indicate his or her acceptance of the settlement. As an alternative, the treasurer may attach a signed statement from the creditor containing the same information.

Reporting Debts Undergoing Settlement

Debts undergoing settlement must be continuously reported until the Commission has completed its review of the committee's debt settlement plan. The committee may file a termination report once all debts have been paid, settled, forgiven or otherwise extinguished. 116.4(f), 116.5(e) and 116.6(c).

Disputed Debts

A disputed debt is a bona fide disagreement between the creditor and the committee as to the existence of a debt or the amount owed by the committee. When filing a debt settlement plan, a terminating committee must describe any disputed debts and the committee's efforts to resolve them on Part III of Form 8. 116.10(a).

Creditor's Rights

No commercial vendor or other creditor is required to forgive or settle debts owed by committees. 116.4(e). Nor is a creditor required to pursue activities that are unlikely to result in the reduction of the debt.

Assigning Debts to Another Committee

To expedite termination, an authorized committee that qualifies as a terminating committee and has no remaining cash on hand may assign its debts to another authorized committee of the same candidate, provided that:

- The committee transferring the debts was organized for an election that has already been held;
- Within 30 days before the assignment takes effect, the transferor committee notifies each creditor in writing of the name and address of the committee assuming the debts; and
- The committee assuming the debts notifies the FEC in writing that it has assumed the obligation to pay the debts. That committee must continue to report the debts until they are retired. 116.2(c)(3).

Forgiveness of Debts Owed by Ongoing Committees

Forgiveness Rules

A creditor may forgive a debt owed by an ongoing committee (that is, one that does not qualify as a terminating committee) if the debt has been outstanding for at least 24 months and:

- The ongoing committee (1) has insufficient cash on hand to pay the debt, (2) has had receipts of less than \$1,000 and disbursements of less than \$1,000 during the previous 24 months and (3) owes debts to other creditors of such magnitude that the creditor could reasonably conclude that the ongoing committee will not pay its particular debt; or

- The creditor is unable, after reasonable diligence, to locate the ongoing committee. 116.8(e).

Notification to Commission

A creditor who intends to forgive a debt owed by an ongoing committee must notify the Commission of its intent in writing. The letter must provide the following information:

- The terms of the initial extension of credit and a description of the terms under which the creditor has extended credit to similar nonpolitical debtors;
- A description of the campaign's efforts to satisfy the debt;
- A description of the steps taken by the creditor to obtain payment, along with a comparison of those remedies with others pursued by the creditor under similar circumstances; and
- An indication that the creditor has forgiven other debts involving nonpolitical debtors in similar circumstances. 116.8(b).

Commission Review

The Commission will review each proposal to forgive a debt to ensure that the creditor, the ongoing committee and the candidate have complied with the Act's contribution limits and prohibitions. 116.8(c).

4. Terminating the Committee

Eligibility

A committee may file a termination report at any time, provided that:

- The committee no longer intends to receive contributions, make expenditures, or make any disbursements that would otherwise qualify it as a political committee; and
- Neither the committee seeking to terminate nor any other authorized committee of the same candidate has any outstanding debts or obligations. 102.3 and 116.1.

A committee involved in an FEC enforcement action, however, must continue to file regularly scheduled reports until the matter is resolved.

Termination Report

When filing the committee's termination report, the treasurer should check the "Termination Report" box on Line 4 of the Summary Page of Form 3. The termina-