



NEWS RELEASE

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PRESS ADVISORY

The New Jersey Election Law Enforcement Commission will hold a public hearing on June 19, 1991 at 10:00 A.M. concerning its proposed regulations on reporting and record keeping violations and its proposed amendments to its political communications regulation. The public hearing will be held on the 12th floor of 28 West State Street in Trenton.

A full text of the proposed regulations is attached.

The Commission invites the participation of interested individuals at the June 19th hearing. Please contact Gregory E. Nagy, Legal Director, at (609) 292-8700 should you wish to testify. Written comments should be submitted by June 5, 1991.

(a)

**ELECTION LAW ENFORCEMENT COMMISSION
Violations; Political Communications****Proposed New Rule: N.J.A.C. 19:25-17.2****Proposed Amendment: N.J.A.C. 19:25-11.10**

Authorized By: Election Law Enforcement Commission,

Frederick M. Herrmann, Ph.D., Executive Director.

Authority: N.J.S.A. 19:44A-6.

Proposal Number: PRN 1991-234.

Submit comments by June 5, 1991 to:

Gregory E. Nagy, Legal Director

Election Law Enforcement Commission

CN 185

Trenton, New Jersey 08625-0185

The agency proposal follows:

Summary

The Election Law Enforcement Commission (hereafter, the Commission) proposes to adopt a new rule concerning reporting and record keeping violations, and to amend its rule concerning political communications.

The proposed new rule at N.J.A.C. 19:25-17.2 would establish the principle that each reporting transaction incorrectly reported, omitted, or filed late, constitutes a separate violation of the act. For example, a report filed late that contained five separate reporting transactions would be treated as five separate violations. Under current practice, the late filing of a report is deemed as a single violation regardless of the number of reporting transactions it contains. For the purposes of the proposed rule, a reporting transaction is the receipt of a contribution, the making of an expenditure, or the occurrence of any other event subject to reporting requirements. Similarly, each record keeping transaction that is not made or retained as required constitutes a separate violation.

The Commission also proposes to amend N.J.A.C. 19:25-11.10, concerning communications that may be deemed as being political and therefore subject to campaign reporting. An expenditure (including an expenditure for a communication) made by a candidate, or a political committee, out of funds deposited in a campaign account is subject to reporting under the act because all campaign account transactions must be reported. However, expenditures not made from a campaign account are not generally subject to reporting unless they are spent to aid or promote a candidate. The proposed amendment would clarify the conditions under which an expenditure for a communication by a person or an entity other than a candidate becomes subject to reporting requirements.

Under the proposed text of N.J.A.C. 19:25-11.10(a), the term "political communication" is defined as a communication that contains an explicit appeal for the election or defeat of a candidate, and which is circulated to an audience of persons substantially comprised of persons eligible to vote for the candidate on whose behalf the appeal is directed. Therefore, if a person or entity expends funds to pay for flyers, or media broadcasts, which specifically advocate the election of a candidate in an upcoming election, and the flyers or broadcasts are circulated to an audience substantially comprised of voters within that candidate's geographic election district, the expenditure becomes subject to the reporting requirements of the act. If the communication contains no specific words of election advocacy, such as "vote for (name of a candidate)," or similar language, the communication generally is not subject to reporting unless made under circumstances set forth in subsection (b).

The proposed amendment is intended to comport with the election advocacy standard established by the United States Supreme Court to protect undue infringement of free speech; see *Buckley v. Valeo*, 424 U.S. 1 (1976), and *Federal Election Commission v. Massachusetts Citizens for Life*, 479 U.S. 238 (1986).

The existing text of subsection (a) provides that a political communication is one "... circulated to 10 or more persons." That standard does not appear in the act, does not provide any requirement that the persons receiving the communication be voters, and does not take into consideration the total number of persons eligible to vote for the office the candidate is seeking. The Commission believes the proposed standard of "... an audience substantially comprised of persons eligible to vote for the candidate on whose behalf the appeal is directed ..." more appropriately correlates the number of communication recipients with the

total number of persons eligible to vote for the office the candidate is seeking in testing whether the communication should be deemed as political. Therefore, a letter circulated to more than a few persons, that is a measurable percentage of the persons eligible to vote for a candidate, would be deemed to constitute a reportable political communication.

The existing text of subsection (a) which provides for "an unambiguous reference to an upcoming election" appears to be too broad to meet the election advocacy test, and therefore has been deleted.

The proposed text of subsection (a) includes "broadcast matter" among the enumerated categories of communications which might become subject to the reporting and record keeping requirements of the act. The inclusion of "broadcast matter" in the proposed language is intended to clarify that election advocacy communications made via electronic media are subject to the act as political communications.

N.J.A.C. 19:25-11.10(b) concerns communications that do not contain explicit election advocacy language, but nevertheless will be deemed to be reportable political communications because of the circumstances surrounding their circulation. Typically, such communications are circulated to constituents of an incumbent officeholder shortly before the election date and are paid for with public funds. An example is a newsletter publication circulated by a governmental entity shortly before an election which contains a laudatory article about an incumbent officeholder seeking reelection; see *In re Dawes*, 156 N.J. Super. 195 (App. Div. 1978), and *ELEC v. Brown*, 206 N.J. Super. 196, (App. Div. 1985). In those opinions, the officeholder-candidate was required to report as an "in-kind" contribution the fair market value of the circulated newsletter even though the text did not contain explicit election advocacy language.

The proposed amendment expands the time period during which such communications on behalf of a non-gubernatorial candidate may be deemed as political, the change being from 60 days before the date of an election to 90 days before the date of an election (see N.J.A.C. 19:25-11.10(b)1). There is no proposed change in the time period pertinent to a gubernatorial candidate, and the time period therefore remains from January 1st of the year in which a gubernatorial election is held to the date of the primary election for a primary election gubernatorial candidate, and from the day following the date of the primary to the date of the general election for a general election gubernatorial candidate.

The "10 or more persons" standard in subsection (b) is proposed to be replaced by the "audience substantially comprised" of voters standard (see proposed N.J.A.C. 19:25-11.10(b)2). Finally, a new requirement has been added that the candidate cooperated, consented, consulted or otherwise participated in the production, circulation, or broadcast of the communication (see proposed N.J.A.C. 19:25-11.10(b)4). In the absence of some candidate participation in the communication, the candidate cannot be held responsible for reporting of a communication expenditure made independently of the candidate.

The reporting requirements generated by political communication expenditures are set forth in N.J.A.C. 19:25-11.11, and no amendments to that section are contemplated.

Social Impact

The proposed new rule concerning violations, N.J.A.C. 19:25-17.2, will affect a candidate, filing entity, treasurer or other person responsible for reporting or record keeping requirements, who violates the act or rules. In particular, larger filing entities and their treasurers will be affected because the proposed rule will enhance the Commission's ability to impose penalties on a report that contains several violations, and it is the larger entities that have more transactions to report or record. The Commission has observed a dramatic increase in contribution and expenditure activity in recent years. For example, a single campaign report by a political committee in the 1989 general election reported more than \$6.5 million in receipts, and a single political party committee quarterly report in that year reported over \$2 million in receipts. The existing practice of treating all reporting violations contained in a single report as a single violation may inadvertently encourage a substantial filing entity to risk incurring a single penalty, which cannot exceed \$1,000 for a first offense, rather than incur costs for accurate reporting and record keeping services that may exceed the penalty maximum. Under the proposed new rule, each reporting transaction (for example, receipt of a contribution) filed late, filed incorrectly, or omitted would constitute a violation. The Commission believes that historically civil penalties have proven to be more effective in promoting compliance than has imposition of criminal penalties by authorities outside of the Commission's jurisdiction. Therefore, to insure that civil penalties remain a meaningful deterrent and are a truer reflection of the number of violations, this new rule is being proposed.

The proposed amendment to N.J.A.C. 19:25-11.10, Political communications, will affect candidates, political committees, or other filing entities or persons who circulate communications to voters, or participate in and benefit from such circulation. The new subsection (a) excludes from the scope of the rule organizations that circulate a communication on public issues but fall outside of campaign reporting because the communication does not contain any explicit election advocacy. The Commission recognizes that some of these communications may be intended to have some influence on the voting public, but constitutional considerations compel considerable latitude in permitting such communications without reporting consequences when they do not contain explicit election advocacy language, and are not paid for with funds subject to the act, or prepared or circulated with the consent, consultation or cooperation of a candidate's campaign.

Of particular social importance is the extension of the preelection period from 60 to 90 days (see proposed N.J.A.C. 19:25-11.10(b)). The Commission believes that an incumbent officeholder particularly should not receive politically beneficial publicity paid for with public funds without acquiring reporting responsibilities for the fair market value of production and circulation of that publicity if the candidate-officeholder cooperated, consented or consulted in the production or circulation of the publicity. Under the existing rule, such a communication circulated to voters for a non-gubernatorial candidate as close as 61 days before the election escapes reporting. The amendment changes that date to 91 days before an election, a date the Commission believes is far enough in advance of a non-gubernatorial election to justify it as a non-political and therefore non-reportable communication to constituents.

Economic Impact

The Commission is unaware of any significant economic impact of the proposed new rule on violations, except for the intended result that the Commission's ability to impose civil penalties for violations of the act be enhanced. Candidates and filing entities with numerous and more complex transactions may choose to invest more funds for accurate and comprehensive compliance.

The Commission does not perceive any significant economic impact from the proposed N.J.A.C. 19:25-11.10, other than possibly relieving issue-oriented organizations not conducting election advocacy activity from incurring reporting and record keeping expenses. Since all candidates must file campaign reports under the act, extending the circumstances under which a candidate has to report receipt of an in-kind contribution (that is, the fair market value of the production and circulation of the publicity) does not raise any significant compliance cost.

Regulatory Flexibility Statement

The proposed new rule and the repeal and new rule do not impose any record keeping, reporting, or other compliance requirements on small businesses, as that term is defined under the Regulatory Flexibility Act, N.J.S.A. 52:14B-16 et seq. The proposed new rule and the repeal and new rule affect candidates, treasurers, and other entities or persons with filing responsibilities under the act.

Full text of the proposal follows (additions indicated in boldface thus; deletions indicated in brackets [thus]):

19:25-11.10 Political communication

(a) A communication circulated to 10 or more persons that contains an appeal for votes for a candidate in an upcoming election, solicits campaign contributions or otherwise makes an unambiguous reference to an upcoming election shall be deemed to be a political communication and any costs associated with production or circulation shall be subject to campaign reporting.]

(a) The term "political communication" means any written statement, pamphlet, advertisement or other printed or broadcast matter containing an explicit appeal for the election or defeat of a candidate which is circulated or broadcast to an audience substantially comprised of persons eligible to vote for the candidate on whose behalf the appeal is directed. Words such as "Vote for (name of candidate)," "Vote against (name of opposing candidate)," "Elect (name of candidate)," "Support (name of candidate)," "Defeat (name of opposing candidate)," "Reject (name of opposing candidate)," and other similar explicit political directives constitute examples of appeals for the election or defeat of a candidate.

((b) A communication that does not contain any of the elements described in (a) above shall nevertheless be deemed political and

subject to campaign reporting if all of the following criteria are applicable to the communication:

1. The communication is circulated to 10 or more persons and contains a statement or reference concerning the governmental or political objectives or achievements of a candidate in an upcoming election;

2. The communication is circulated to an audience that is comprised substantially of persons eligible to vote for the public office being elected in the upcoming election; and

3. The communication is circulated fewer than 60 days before the date of any election in which the candidate referred to is seeking elected office, except that in the case of a candidate for nomination for the office of Governor in a primary election, the period of time that a communication may be deemed political shall be on or after January 1st in a year in which a primary election for Governor is being conducted, and in the case of a candidate for election to the office of Governor in a general election, the period of time that a communication may be deemed political shall begin on the day following the date of the gubernatorial primary election.]

(b) A written statement, pamphlet, advertisement or other printed or broadcast matter that does not contain an explicit appeal pursuant to (a) above for the election or defeat of a candidate shall be deemed to be a political communication if it meets the following conditions:

1. The communication is circulated or broadcast within 90 days of the date of any election in which the candidate on whose behalf the communication is made is seeking elected office; except that in the case of a candidate for nomination for the office of Governor in a primary election, the period of time that a communication shall be deemed political shall be on or after January 1st in a year in which a primary election for Governor is being conducted, and in the case of a candidate for election to the office of Governor in a general election, the period of time that a communication shall be deemed political shall begin on the day following the date of the gubernatorial primary election;

2. The communication is circulated or broadcast to an audience substantially comprised of persons eligible to vote for the candidate on whose behalf the communication was made;

3. The communication contains a statement or reference concerning the governmental or political objectives or achievements of the candidate; and

4. The production, circulation or broadcast of the communication, or any cost associated with the production, circulation or broadcast of the communication, has been made in whole or in part with the cooperation of, prior consent of, in consultation with, or at the request or suggestion of the candidate.

(c) Nothing contained in (b) above shall be construed to require reporting of a communication by an incumbent officeholder seeking reelection [which communication] if it is circulated or broadcast to constituents for the sole and limited purpose of communicating governmental events requiring those constituents to make applications or take other actions within a specified time period, or if it is circulated or broadcast to constituents for the sole and limited purpose of communicating facts relevant to a bona fide public emergency.

(d) Each record keeping transaction which is not made or maintained in the manner prescribed by the act or regulations shall constitute a violation of the act subject to the penalties provided in N.J.S.A. 19:44A-22.

SUBCHAPTER 17. COMPLAINTS AND OTHER PROCEEDINGS; VIOLATIONS

19:25-17.2 Violations

(a) The term "reporting transaction" means the receipt of a contribution, the making of an expenditure, or the occurrence of any other event which is subject to the reporting requirements of the act or this chapter.

(b) The term "record keeping transaction" means the receipt of a contribution, the making of an expenditure, or the occurrence of any other event which is subject to the record keeping requirements of the act or regulations.

(c) Each reporting transaction that is not reported in the manner or not filed on the date established for reporting or filing by the act or regulations shall constitute a violation of the act subject to the penalties provided in N.J.S.A. 19:44A-22.