



NORTH CAROLINA

State Board of Elections

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KIM WESTBROOK STRACH
Executive Director

October 2, 2015

Mr. Roger Knight
8510 Six Forks Road, Suite 102
Raleigh, NC 27615

Re: Request for Advisory Opinion

Dear Mr. Knight:

The following opinion is provided in accordance with N.C.G.S. § 163-278.23. In your request for opinion, you seek guidance as to the obligation of your clients that are registered with the Internal Revenue Service (IRS) under 26 U.S. Code Section 527 to register as North Carolina political committees and file required disclosure reports in accordance with North Carolina law. For purposes of this opinion, I will refer to your clients as “Section 527 political organizations.”

As you point out in your request, in order to be eligible to register as a Section 527 political organization with the IRS, the organization must be organized for the primary purpose of carrying out “exempt functions.” And, as you point out, an “exempt function” is described as “influencing or attempting to influence the selection, nomination, election or appointment of an individual to a federal, state or local public office or office in a political organization. The election of Presidential or Vice-Presidential electors is also part of the exempt function of a political organization. Activities that directly or indirectly relate to or support an exempt function are exempt function activities.”

N.C.G.S. § 163-278.6(14) provides that a “political committee” means a combination of two or more individuals, such as any person, committee, association, organization, or other entity that makes, or accepts anything of value to make, contributions or expenditures and has one or more of the following characteristics:

- a) Is controlled by a candidate;
- b) Is a political party or executive committee of a political party or is controlled by a political party or executive committee of a political party;
- c) Is created by a corporation, business entity, insurance company, labor union, or professional association pursuant to G.S. 163-278.19(b); or
- d) Has the major purpose to support or oppose the nomination or election of one or more clearly identified candidates.

Supporting or opposing the election of clearly identified candidates includes supporting or opposing the candidates of a clearly identified political party.

If an entity qualifies as a “political committee” under subdivision a., b., c., or d. of this subdivision, it continues to be a political committee if it receives contributions or makes expenditures or maintains assets or liabilities. A political committee ceases to exist when it winds up its operations, disposes of its assets and files a final report.

The term “political committee” includes the campaign of a candidate that serves as his or her own treasurer.

Special definitions of “political action committee” and “candidate campaign committee” that only apply in Part 1A of this Article are set forth in G.S. 163-278.38Z.

It should be noted that the special definitions of “political action committee” and “candidate campaign committee” found in N.C.G.S. § 163-278.38Z only apply to disclosure requirements for media advertisements. N.C.G.S. § 163-278.6(14) provides the relevant definition for determining North Carolina political committee status.

You pose three specific questions regarding Section 527 political organizations and the obligations of such organizations in North Carolina:

1. Does the IRS definition of “exempt function” automatically and conclusively establish that a 527 organization existing in this State meets the “major purpose test” under NCGS Section 163-278.6(14)?

Not necessarily.

26 U.S. Code § 527 defines political organization as “a party, committee, association, fund, or other organization (whether or not incorporated) organized and operated primarily for the purpose of directly or indirectly accepting contributions or making expenditures, or both, for an exempt function.” It further defines “exempt function” as “the function of influencing or attempting to influence the selection, nomination, election, or appointment of any individual to any Federal, State, or local public office or office in a political organization, or the election of Presidential or Vice-Presidential electors, whether or not such individual or electors are selected, nominated, elected, or appointed. Such term includes the making of expenditures relating to an office described in the preceding sentence which, if incurred by the individual, would be allowable as a deduction under section 162(a).”

A Section 527 political organization or any other entity that is determining whether they must register as a North Carolina political committee must consider the two prongs of the political committee definition. First, does the entity make or accept anything of value to make

contributions or expenditures? And second, does the entity have the major purpose to support or oppose the nomination or election of one or more clearly identified candidates or candidates of a clearly identified political party?

As provided in the U.S. Code, in order to qualify for Section 527 political organization status, the organization must have the primary purpose to influence the selection, nomination, election or appointment of candidates. The term “influence” is not a defined term. Guidance provided by the IRS for educational purposes¹ indicates that a Section 527 political organization can only engage in limited public advocacy not related to legislation or election of candidates.

The educational guidance defines three types of advocacy: political campaign activity, lobbying, and general advocacy.

Political activity-Any activities that favor or oppose candidates for public office, including: endorsements of candidates, contributions to candidates and/or PACs, public statements for/against a particular candidate and distributing materials prepared by self or others that favor or oppose candidates.

Lobbying-Attempting to influence legislation through directly contacting members of a legislative body, encouraging the public to contact members of a legislative body and advocating a position on a public referendum.

General Advocacy-Influence public opinion on issues, influence non-legislative governing bodies (the executive branch, regulators), encourage voter participation through voter registration, get out the vote drives, voter guides and candidate debates.

Section 527 organization advocacy	
Political activity	Permitted as exempt activity
Lobbying	Limited amount permitted provided not substantial
General Advocacy	Limited amount permitted provided not substantial

Based on the information in the table and the IRS definition of political organization, it appears that Section 527 political organizations must primarily engage in those activities defined as political activities (exempt function). The guidance defines “political activity” as any activities that favor or oppose candidates for public office. The word “support” is not used and it is unclear if “favor” would equate to our definition of support but the examples of

¹ The educational guidance was a PowerPoint presentation entitled “Rules for Exempt Organizations During an Election Year” by Judith Kindell, Senior Advisor to the Director, Exempt Organizations and Justin Lowe, Tax Law Specialist, Exempt Organizations.

these activities do appear to be activities that would be considered express advocacy according to North Carolina laws.

In your request for opinion, you refer to activities related to voter turnout, voter education and issue advocacy. It would appear that these types of activities would likely fall into the lobbying or general advocacy definitions and would not be considered political activity (exempt functions).

Therefore, if the registered Section 527 political organization is not primarily engaged in exempt functions, or if the activities of influencing or attempting to influence the selection, nomination, election, or appointment of any individual to public office do not include expressly advocating for the election or defeat of a candidate, then the Section 527 political organization may not meet the definition of a North Carolina political committee.

2. Does the State still have to make a showing as to what the major purpose is?

In the North Carolina Right to Life v. Leake, 525 F.3d 274 (2008) decision, the United States Court of Appeals Fourth Circuit stated the following:

“Basically, if an organization explicitly states, in its bylaws or elsewhere, that influencing elections is its primary objective, or if the organization spends the majority of its money on supporting or opposing candidates, that organization is under “fair warning” that it may fall within the ambit of Buckley’s test.”

In consequence, a Section 527 political organization should recognize that based on their requirement to have the primary objective of influencing the selection of candidates for election in order to qualify for tax-exempt status under Section 527, the organization has “fair warning” that their activities could deem the organization a North Carolina political committee.

Ultimately, if the State believes an organization has not appropriately registered as a North Carolina political committee and the organization disagrees with that assertion, it is the State that has the burden to show that the organization meets the definition of a North Carolina political committee.

3. Does sponsoring one ad conclusively establish the organization as a “political committee” under NCGS § 163-278.6(14)(d)?

Not necessarily.

In order to be required to register as a North Carolina political committee, an organization must satisfy the elements of both prongs of the political committee definition. For example,

if an organization does not have the major purpose to support or oppose candidates but makes a payment for one ad that expressly advocates for a candidate, the organization does not satisfy both prongs of the political committee definition and is therefore not required to register as a North Carolina political committee. It is also possible for an organization to have the major purpose to support clearly identified candidates for election but if their activities do not include making contributions to the candidates or spending the organization's funds on express advocacy, then the organization would also not satisfy both prongs of the North Carolina political committee definition and not be required to register and disclose as a North Carolina political committee. To further explain this scenario, if an organization stated on its website that it wanted to see candidates of a particular political party elected to office, but the organization did not make contributions to candidates or spend any money expressly advocating for those candidates, the organization would not be required to register as a North Carolina political committee.

On the other hand, if the organization did have the major purpose to support candidates and the organization sponsored an ad that expressly advocated for a candidate, then both prongs of the political committee definition would have been met and that organization would need to register and disclose as a North Carolina political committee.

This opinion is based upon the information provided in your request for opinion. If any information in that letter should change, you should consult with our office to ensure that this opinion would still be binding. Finally, this opinion will be filed with the Codifier of Rules to be published unedited in the North Carolina Register and the North Carolina Administrative Code.

Sincerely,



Kim Westbrook Strach

cc: Mollie Masich, Codifier of Rules

Amy Strange, Deputy Director-Campaign Finance and Operations