



NORTH CAROLINA

State Board of Elections

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KIM WESTBROOK STRACH
Executive Director

December 4, 2015

Mr. Michael Weisel
Bailey & Dixon, LLP
Post Office Box 1351
Raleigh, North Carolina 27602

Re: Request for Written Advisory Opinion pursuant to NC. Gen. Stat. § 163-278.23 on Questions Related to the Scope of Article 22A of Chapter 163 of the N.C. General Statutes (“G.S.”)

Dear Mr. Weisel:

In your request for opinion of October 29, 2015, you seek guidance regarding the scope of Article 22A of Chapter 163 of the General Statutes concerning electioneering communications. The following opinion is provided in accordance with G.S. § 163-278.23 and is based narrowly upon the information provided in your request.

Your letter informs us that several of your clients are nonprofit North Carolina corporations (cited in your inquiry as “Entities”) organized under sections 501(c)(3) and 501(c)(4) of the Internal Revenue Code. You also note that you represent referendum committee(s) as defined by G.S. § 163-278.6(18b). You state that the “Entities” are:

not owned or controlled by a candidate, authorized political committee of that candidate, a State or local political party or committee of that party, or an agent or official of any such candidate, party, or committee (hereinafter referred to as “Candidate”).

(emphasis added). Your principal inquiry is not whether a candidate may own or control a referendum committee,¹ though I will address why North Carolina law would deem that impermissible.

G.S § 163-278.6(14) provides the definition of a “political committee.”

The term “political committee” means a combination of two or more individuals, such as any person, committee, association, organization, or other entity that makes,

¹ Instead, you state that “the Candidate will ‘coordinate’ with the Entities and the Committee(s).”

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 the 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 ceases to exist when it winds up its operations, disposes of its assets, and files its final report.

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

Special definitions of “political action committee” and “candidate campaign committee” that apply only in Part 1A of this Article are set forth in G.S. 163-278.38Z.²

A “referendum committee” is defined by G.S. § 163-278.6(18b). All funds given to a referendum committee are contributions by definition.³ All payments made by a referendum committee are expenditures.⁴

A committee that accepts contributions or makes expenditures and is controlled by a candidate is by definition a *political committee* prohibited by statute from accepting contributions from certain sources⁵ or in amounts⁶ otherwise available to a referendum committee. Accordingly, to permit a

² G.S. § 163-278.38Z(3) provides that a “candidate campaign committee” means any political committee organized by or under the direction of a candidate.

³ G.S. § 163-278.6(6)

The terms ‘contribute’ or ‘contribution’ mean any advance, conveyance, deposit, distribution, transfer of funds, loan, payment, gift, pledge or subscription of money or anything of value whatsoever, *made to, or in coordination with* a candidate . . . or to a referendum committee[.]

(emphasis added).

⁴ G.S. § 163-278.6(9)

⁵ G.S. § 163-278.15

⁶ G.S. § 163-278.13

candidate (i.e. a political committee) to own or control a referendum committee would void statutory limitations on contributions.

Your letter states that for the remainder of the 2015 calendar year and through at least March 15, 2016, your client entities and referendum committees will

educate the general public about a proposed “Connect NC” \$2 Billion bond debt package, urging passage of the bond referendum on the 15 March 2016 North Carolina ballot, by means of broadcast, cable, internet or satellite transmission, mass mailing and/or telephone calls (“Communication(s)”).

The timespan you describe falls within the electioneering communication period set out in G.S. § 163-278.6(8j). Your letter states further that both your client entities and referendum committees

will solicit and take unlimited amounts of contributions from the individuals, corporations (including the Entities to a Committee), labor unions, insurance companies, business entities, and/or professional associations. Expenditures for Communications, including electioneering communications, shall be made by the Committees or Entities from these solicited contributions.

Bearing in mind the foregoing and with consideration of applicable law, I provide the following responses to your questions.

1. If an Entities’ or Committee Communication occurs within sixty (60) days of the 15 March 2016 primary day, is that Communication an “electioneering communication” as defined under G.S. § 163-278.6?

Given the definition of an “electioneering communication,” a referendum committee cannot make electioneering communications, because a communication that constitutes an expenditure for a referendum committee is not an electioneering communication.⁷ As provided in G.S. § 163-278.6(9), an expenditure includes any payment or other transfer made by a referendum committee.

Your client entities would be making electioneering communications if

- their communications refer to a clearly identified candidate for elected office during the 60 days prior to the March 15, 2016 primary
- and
- the communications are to be received by either:

⁷ § 163-278.6. Definitions 8k) The term "electioneering communication" does not include any of the following:

b. A communication that constitutes an expenditure or independent expenditure under this Article.

- a. 50,000 or more individuals in the State if the candidate mentioned is involved in a statewide election or 7,500 or more individuals in any other election if in the form of broadcast, cable or satellite communication, or
- b. 20,000 or more households, cumulative per election, if the candidate mentioned is involved in a statewide election or 2,500 households, cumulative per election, in any other election if in the form of a mass mailing or telephone bank.

However, if your client entities are expressly advocating the passage of the bond referendum, as indicated in your letter, and if the communication(s) were made without coordination with a referendum committee, then the communications would not be considered electioneering communications; they would be “independent expenditures” under G.S. § 163-278-6(9a).

If the communications by these entities were coordinated with a referendum committee, the costs of the communications would be in-kind contributions to the referendum committee.

2. If the answer to Question 1, is yes, the Communication is an electioneering communication, then:

- a. **Is a clearly identified Candidate prohibited from appearing in, or referenced by, an Entities or a Committee electioneering communication, if the Committees or Entities have accepted contributions from a corporation, labor union, insurance company, business entity, or professional association?**
- b. **Has a clearly identified Candidate received a contribution (something of value) within the meaning of G.S. § 163-278.6(6) from appearing in, or referenced by, an Entities or Committee electioneering communication?**
- c. **May a clearly identified Candidate coordinate with the Entities and Committees regarding electioneering communications within the meaning of G.S. § 163-278.6(6g) and (6h)?**

The answer to Question 1 is two-fold. First, if the communication is made by the referendum committee(s), it is not an electioneering communication. Second, as discussed in Question 1, the communications made by your client entities may be electioneering communications if they meet the elements of an electioneering communication as defined above and do not expressly advocate for the passage of the bond referendum.

In the event the communications made by the entities in question do not expressly advocate for the passage of the bond referendum but do meet the definition of an electioneering communication, the question remains whether a clearly identified candidate is prohibited from appearing in or being referenced by these entities’ electioneering communication(s). Bear in mind the entire definition of “contribution” as set forth in G.S. § 163-278.6(6). Specifically:

“*If:*

- a. Any individual, person, committee, association, or any other organization or group of individuals, including but not limited to, a political organization (as defined in section 527(e)(1) of the Internal Revenue Code of 1986) makes, or contracts to make, any disbursement for any electioneering communication, as defined in this section; and
- b. That disbursement is coordinated with a candidate, an authorized political committee of that candidate, a State or local political party or committee of that party, or an agent or official of any such candidate, party or committee

that disbursement or contracting shall be treated as a contribution to the candidate supported by the electioneering communication or that candidate's party and as an expenditure by that candidate or that candidate's party."

G.S. § 163-278.6(6). The definition states that if an electioneering communication is coordinated with a candidate, the disbursement for that electioneering communication shall be treated as a *contribution* to the candidate who is "supported" by the electioneering communication.

Since an electioneering communication cannot expressly advocate for a candidate—an electioneering communication simply "refers to a clearly identified candidate"⁸—it is assumed that in this instance the term "support" refers to the candidate who was coordinating with the entity making the electioneering communication.⁹ Since your letter has confirmed that the candidate will be coordinating with your client entities with respect to the electioneering communication, the disbursements for those electioneering communications would be deemed contributions to the candidate.

Note that if the entity making the electioneering communication has received donations in excess of the contribution limitations and/or from sources that are prohibited from giving to candidate committees, the contribution to the candidate is prohibited.¹⁰

If your client entities are making communications that expressly advocate the passage of the bond referendum and the communications are not coordinated with a candidate or an agent of a candidate but they do mention or reference a candidate, the communication would be either an

⁸ § 163-278.6(8j)(a)

⁹ It appears the reason the statute uses the word "support" is to address the circumstance in which the candidate is not the individual coordinating with respect to the electioneering communication. It is possible that an electioneering communication could mention the opponent rather than the candidate represented by the agent. Therefore, the recipient of the contribution could not be the candidate mentioned in the electioneering communication.

¹⁰ G.S. § 163-278.13(e1)

No referendum committee which received any contribution from a corporation, labor union, insurance company, business entity, or professional association may make any contribution to another referendum committee, to a candidate or to a political committee.

independent expenditure or an *in-kind contribution* to a referendum committee. As long as the communication is not coordinated with a candidate, no contribution is made to a candidate.

If your client entities are making communications that expressly advocate the passage of the bond referendum and the communications are coordinated with a candidate or agent of a candidate, the communication would be considered a “coordinated expenditure”¹¹ and the cost would be an in-kind contribution to the candidate.

The question is whether a candidate may coordinate with the referendum committee regarding expenditures for communications.¹² It is clear that a candidate cannot coordinate with one of these entities regarding electioneering communications. It is also clear that a referendum committee that accepts contributions from sources that are prohibited for the candidate may not make contributions to the candidate.¹³ A “coordinated expenditure” would be an in-kind contribution to the candidate coordinating with the referendum committee making the expenditure. Therefore, it would be impermissible for the candidate to coordinate with the referendum committee regarding expenditures for communications.

- 3. If the answer to Question 1, is no, the Communication is not an electioneering communication, or the Communications are outside sixty (60) days and issue advocacy, then:**
 - a. Has a clearly identified candidate received a contribution (something of value) within the meaning of G.S. § 163-278.6(6) from appearing in, or referenced by, an Entities or Committee Communication?**
 - b. May a clearly identified Candidate coordinate with the Entities and Committees on Communications within the meaning of G.S. § 163-278.6(6g) and (6h)?**

If the entities in question disburse funds for communications that are not electioneering communications (because they are made outside the 60 day window and they do not expressly advocate for the candidate or the passage of the bond referendum), the funds spent are not considered an *expenditure* and are therefore not a contribution to the candidate.

¹¹ G.S. § 163-278.6(6g)

The term "coordinated expenditure" means an expenditure that is made in concert or cooperation with, or at the request or suggestion of, a candidate, a candidate campaign committee as defined in G.S. 163-278.38Z(3), the agent of the candidate, or the agent of the candidate campaign committee. An expenditure for the distribution of information relating to a candidate's campaign, positions, or policies, that is obtained through publicly available resources, including a candidate campaign committee, is not a coordinated expenditure if it is not made in concert or cooperation with, or at the request or suggestion of, a candidate, the candidate campaign committee, the agent of the candidate, or the agent of the candidate campaign committee.

¹² By definition, expenditures by referendum committees cannot be classified as *electioneering communications*.

¹³ See G.S. § 163-278.13(e1) at note 9, *supra*.

If the communications do expressly advocate for the passage of the bond referendum and they are coordinated with the candidate, they would be coordinated expenditures and therefore considered prohibited contributions to the candidate. Again, if the candidate coordinates an expenditure with the referendum committee, that coordinated expenditure constitutes a prohibited contribution to the candidate.¹⁴

4. If a Committee and/or Entities solicit and accept contributions from donors while identifying a purpose of the contributions as supporting the bond referendum, including educating the public through Communications, must those donors contributing over \$1,000 to the Committee and Entities be disclosed on electioneering communications reports filed with the State Board of Elections, even if the donor contributed to the Entities, which in turn contributed to the Committee?

Only donations to your client entities for communications that are deemed electioneering communications, independent expenditures or contributions to committees are required to be disclosed on disclosure reports. However, if the donor contributed to one of these entities with the purpose that the contribution be directed to the Committee, such an act would violate N.C.G.S. § 163-278.14, which prohibits contributions being made in the name of another.¹⁵ As noted earlier, communications made by referendum committees would not be considered electioneering communications, but any contributions made to the referendum committee must be disclosed on required disclosure reports.

If the communications were deemed electioneering communications, your client entities would be required to disclose any donor that made a donation of \$1,000 (one thousand dollars) or more if the donor made the donation for the purpose of making these communications or if your client entities solicited donations for the purpose of making communications. However, if the communications in question were deemed to be independent expenditures by these entities, donations of more than \$100 (one hundred dollars) would require disclosure.

Further, if the communication were coordinated with a referendum committee, the cost of the communication would be an in-kind contribution to the referendum committee; any donations given to your client entities to further the communication that exceeded \$100 would require disclosure by those entities.

This opinion is based upon the information provided in your request for opinion. If any information in that letter should change, please consult with our office to ensure that this opinion is still binding.

¹⁴ This conclusion is based on the information that the contributions to the referendum committee would likely be in excess of contribution limitations to candidate committees and from sources that cannot contribute to a candidate committee.

¹⁵ If the donation was earmarked for the purpose of being contributed to the referendum committee, the donor would be giving in the name of the Entity.

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. If you should have any questions, please do not hesitate to contact me or Amy Strange, Deputy Director.

Sincerely,

A handwritten signature in black ink that reads "Kim Westbrook Strach". The signature is written in a cursive, slightly slanted style.

Kim Westbrook Strach

cc: Mollie Masich, Codifier of Rules

Amy Strange, Deputy Director-Campaign Finance and Operations