



August 11, 2009

Donald Palmer, Director
Division of Elections
Room 316, R.A. Gray Building
500 South Bronough Street
Tallahassee, FL 32399-0250

Dear Mr. Palmer:

RE: ECO Regulation and Reporting in Florida

The purpose of this correspondence is to request an advisory opinion from the Division of Elections pursuant to Section 106.23(2), Florida Statutes. The undersigned serves as the chairman and treasurer of several committees of continuous existence (CCE) and requests guidance as to actions which the CCE proposes to take, if permissible under state law. In addition, the undersigned serves as the treasurer of a candidate's campaign and seeks guidance as to actions which the campaign proposes to take, if permissible under state law.

As you are aware, the United States District Court for the Northern District of Florida declared Florida's electioneering communications statutes unconstitutional.¹ Specifically declared unconstitutional in their entirety were provisions of Florida law exempting ECOs from the definition of a political committee;² defining when an ECO makes an "expenditure;"³ defining an "electioneering communication;"⁴ defining an "electioneering communication

¹ *The Broward Coalition of Condominiums, Homeowners Associations and Community Organizations, Inc., et al., v. Browning*, Case No. 4:08cv445-SPM/WCS (N.D. Fla. May 22, 2009).

² Section 106.011(1)(b)3, Florida Statutes. This provision also required an ECO to register and report contributions and expenditures, including contributions received from a CCE.

³ Section 106.011(4)(b), Florida Statutes.

⁴ Section 106.011(18), Florida Statutes. This provision included language that "an expenditure made for...an electioneering communication shall not be considered a contribution to or on behalf of any candidate." This language forms the basis for the Division of Elections opinion that an ECO and a candidate could coordinate their respective activities. See DE 05-04 ("An act of coordination or consultation between a political committee and the candidate depicted or referred to in or who

organization;⁵ establishing timelines for registration of an ECO;⁶ establishing additional reporting requirements for ECOs;⁷ requiring the return of contributions received by an ECO within five days of an election;⁸ prohibiting receipt of contributions from an IRS 527 organization or an IRS 501(c)(4) entity in certain circumstances;⁹ requiring a specific disclaimer on electioneering communications;¹⁰ and requiring a specific disclaimer on electioneering communications paid for by public funds.¹¹ Specific references to ECOs in a number of other statutory provisions were likewise stricken as unconstitutional.

Although the State initially indicated that it would appeal the decision of the district court, it ultimately did not do so. As a result of the district court decision, it is my understanding that there are no enforceable state regulations on ECOs. These developments may result in changes to the way that entities still subject to state regulation, such as CCEs and candidate campaigns, will operate and report contributions and expenditures.

Impact of the Decision on Reporting of Contributions and Expenditures

The immediate impact of the court's decision is that the regulation and reporting of ECO contributions and expenditures will revert to compliance with regulations promulgated by the Internal Revenue Service governing IRS 527 organizations.¹² An ECO was considered to be an IRS 527 organization.¹³ These

benefits from the political committee's electioneering communication would not cause the expenditure for the electioneering communication to become a contribution to the candidate.")

⁵ Section 106.011(19), Florida Statutes.

⁶ Section 106.03(1)(b), Florida Statutes.

⁷ Section 106.0703, Florida Statutes.

⁸ Section 106.08(4)(b), Florida Statutes.

⁹ Section 106.08(5)(d), Florida Statutes.

¹⁰ Section 106.1439, Florida Statutes.

¹¹ Section 106.147(1)(e), Florida Statutes.

¹² Because the ECO had to register and file periodic reports of its contributions and expenditures pursuant to state law, it was considered to be a "Qualified State and Local Political Organization" and thus exempt from filing IRS Form 8872 reports.

¹³ IRS 527 organizations are political organizations organized and operated primarily to accept contributions and make expenditures for the purpose of influencing the "selection, nomination, election, or appointment of any individual to Federal, State, or local public office or office in a political organization, or the election of Presidential electors." Political organizations include political

regulations require – in the absence of a state law requiring registration and reporting – that an IRS 527 organization which anticipates collecting or, in fact, receives, in excess of \$25,000 annually periodically file IRS Form 8872 with the IRS detailing contributions and expenditures.¹⁴

Due dates for IRS Form 8872 reports vary depending on whether the form is due for a reporting period that occurs during an even-numbered or an odd-numbered year. In an odd-numbered year, an IRS 527 organization can elect to file its reports on either a semi-annual or monthly basis, but it must file on the same basis for the entire year. If filing on a semi-annual basis, the mid-year report is due by July 31 for the period January 1, 2009 through June 30, 2009. In an even-numbered year, an IRS 527 organization can elect to file its reports on either a semi-annual or monthly basis, but it must file on the same basis for the entire year.

Impact of the Decision on Activities of the IRS 527 Organization and a CCE

Florida law contained a number of provisions that provided structure and certainty regarding the activities of the ECO and of persons or entities interacting with the ECO which have now been stricken by the decision of the district court. As a result of the court's decision, some uncertainty has been created.

For example, an ECO was specifically authorized to receive contributions from a committee of continuous existence. The district court struck provisions of Florida law authorizing such transfers from a CCE.¹⁵ Recently the Division opined that a CCE could make a contribution to an IRS 527 organization. DE 09-06¹⁶ However, under the provisions of Florida law stricken by the district court an ECO was specifically authorized to make a contribution to a CCE. As a consequence, the question arises as to whether an IRS 527 organization can make a contribution to a

party committees, Federal, State and local candidate committees and other political committees such as political action committees (PACs).

¹⁴ IRS Form 8872 essentially requires the same information that was required to be reported under Florida's reporting requirements.

¹⁵ Section 106.011(1)(b)3, Florida Statutes, provides as follows:

"Contribution" means:

(b) A transfer of funds between political committees, between committees of continuous existence, between electioneering communications organizations, or between any combination of these groups.

¹⁶ The decision of the district court did not limit the amounts an IRS 527 organization can spend for the purpose of influencing the "selection, nomination, election, or appointment of any individual to Federal, State, or local public office or office in a political organization, or the election of Presidential electors," subject to the qualifications and limitations noted herein.

CCE without registering as a political committee, as was the case prior to the decision of the district court.

**Impact of the Decision on Activities of the IRS 527 Organization
and a Candidate's Campaign**

Under provisions of Florida law that were stricken by the district court, an "electioneering communication" was defined as a paid expression in any communications media that referred to a clearly identified candidate or issue without expressly advocating the election or defeat of the candidate or the passage of the issue.¹⁷ In an opinion,¹⁸ the Division of Elections determined that the term "expressly advocate" was limited to the "magic words" announced by the United States Supreme Court in its decision of *Buckley v. Valeo*.¹⁹ For a communication to be considered to "expressly advocate," the communication must contain express words of advocacy of election or defeat of a candidate or issue such as "vote for," "elect," "support," "cast your ballot for," "Smith for Congress," "vote against," "defeat," "oppose," and "reject."²⁰

As a consequence, there was a bright line between communications that were "electioneering communications" and those which were not. This was significant especially when considered in light of the provisions of law and an opinion of the Division which concluded that a candidate and an ECO could coordinate their activities.²¹

In its decision, the district court identified two narrow categories of political speech that may be regulated by government: (1) communications that in express terms advocate the election or defeat of a clearly identified candidate (i.e., express advocacy) and (2) the "functional equivalent of express advocacy," which is speech that is susceptible of no reasonable interpretation other than an appeal to vote for or against a specific candidate and which otherwise meets the requirements of an electioneering communication under the Bipartisan Campaign Reform Act of 2002.²²

¹⁷ See Section 106.011(18), Florida Statutes.

¹⁸ DE 05-06.

¹⁹ 96 S. Ct. 612 (1976).

²⁰ DE 05-06.

²¹ Section 106.011(18), Florida Statutes; DE 05-04.

²² *The Broward Coalition of Condominiums, Homeowners Associations and Community Organizations, Inc., et al., v. Browning*, Case No. 4:08cv445-SPM/WCS (N.D. Fla. May 22, 2009), "Order Granting Plaintiff's Motion for Summary Judgment," at pp. 12-13.

Thus, a question arises as to whether an expenditure by an IRS 527 organization for a communication that is the "functional equivalent of express advocacy," which is made in coordination with a candidate, is contribution that is reportable by a candidate as a "contribution" as that term is defined by Florida's election laws.²⁴ If so, does the concept of being the "functional equivalent of express advocacy" reportable as a "contribution" include other forms of communications media such as newspapers, magazines, outdoor advertising facilities, printers, direct mail, advertising agencies, the Internet, and telephone companies as provided in Section 106.011(13), Florida Statutes, or is it limited to those forms of media expressed in the district court's decision. If not, can a candidate's campaign still coordinate its activities with an IRS 527 organization provided the communication of the IRS 527 organization does not expressly advocate the election or defeat of any candidate without that communication being reportable as a contribution by the candidate.

Because of the upcoming special election for Senate District 8, the answers to these inquiries are time sensitive. If you have any additional questions or concerns, please let me know.

Sincerely,

Mark Herron

²³ The outer limit of such regulation under the Bipartisan Campaign Reform Act of 2002, according to the district court, is "a broadcast, cable, or satellite communication that refers to a clearly identified candidate within sixty days of a general election or thirty days of a primary election." *Id.* at p. 13.

²⁴ Section 106.011(3)(a), Florida Statutes, defines a "contribution" to mean:

(a) A gift, subscription, conveyance, deposit, loan, payment, or distribution of money or anything of value, including contributions in kind having an attributable monetary value in any form, made for the purpose of influencing the results of an election or making an electioneering communication.