

NEW YORK STATE
BOARD OF ELECTIONS
2013 OPINION #1

DATE: July 29, 2013

QUESTIONS PRESENTED

A 501(c)4 organization has requested that the New York State Board of Elections (“State Board”) review certain activities of the organization and then issue a Formal Opinion addressing:

1. Does the organization's engaging in any one, or any combination of, the delineated activities require it to register as a political committee?

2. Must the organization report the expenditures it has incurred in connection with any of the delineated activities? If so, how should those expenditures be calculated?

It is the Opinion of the State Board, as further detailed below, that the organization would be deemed a political committee, and as such, would be required to register as a political committee and file requisite campaign financial disclosure reports detailing receipts and expenditures relative to its activity as a political committee, pursuant to Article 14 of the New York State Election Law.

DISCUSSION

The organization states that “(we are) a nonpartisan 501(c)(4) good government organization based in New York City that works to promote honest, efficient, and accountable government in New York City and New York State. We seek reforms to the manner in which government performs, elections operate, voters participate, and our political system functions. Although much of our work is focused on public education, issue research, policy advocacy, and direct lobbying, we also evaluate and candidates for city and state office.”

With respect to the evaluation of candidates, the organization states that said candidate evaluation “involves inviting candidates to return a completed questionnaire on a wide variety of issues and to meet with a small committee of (the organization) members for an interview. The board of directors ultimately decides which of the candidates recommended by our local candidates committee to support for election. Our expression of support is simply a declaration of our belief that a particular candidate is qualified, deserves our backing and would make an effective elected official. We do not go further and engage with either the candidate or his or her campaign once our decision is made known. Consequently, we do not participate in campaigns or electioneering with the candidate. On their own, candidates however are free to use our recommendation in their communications to voters.” The organization further states that “(i)t is our practice to use the term “prefer” to indicate the candidates we support in a

primary election because it is not the final election where all voters have the final say. We use the term “endorse” for candidates we support in a general election since it is the determinative election. We participate in this process to inform our members and believe our communications are primarily intended for our membership.”

The activities the organization requests review of by the State Board are as specifically delineated as follow:

“i. in the weeks before the election send the members of our organization a listing of the candidates we prefer or endorse and a brief description of our evaluation of their candidacy. This information is contained in a booklet called the Voters Directory that is sent via U.S. Mail and email;

ii. post our preferences/endorsements on our organizational website which is used to post all of our activities, events, and information. The candidate endorsement list is but one small part of our website and is intended for our members (the New York City Campaign Finance Board has promulgated regulations regarding disclosure of independent expenditures that exempt from express advocacy communications paid electoral advertising done over the internet in which a website is not primarily for the election or defeat of a candidate (footnote omitted);

iii. issue a single news release stating the entirety of our preferences and a single news release stating all of our endorsements and the reasons for them; and

iv. have in the distant past invited all supported candidates to attend a single news conference at which we publicly make known candidates we support. On rare occasions, we may have held a separate news conference with a citywide candidate. We have not done so in some time, but have interest in possibly engaging in this practice again.”

Based upon the foregoing activities, the organization asks the State Board:

1. Does engaging in any one, or any combination of, these activities require the organization to register as a political committee?

2. Must the organization report the expenditures it has incurred in connection with any of these activities? If so, how should those expenditures be calculated?

Relevant to the questions posed, the New York State Election Law section 14-100(1) defines a “political committee” as “any corporation aiding or promoting...; or to aid or take part in the election or defeat of a candidate for public office or to aid or take part in the election or defeat of a candidate for nomination at a primary election or convention, including all proceedings prior to such primary election, or of a candidate for any party position voted for at a primary election, or to aid or defeat the nomination by petition of an independent candidate for public office; but nothing in this article shall apply to any committee or organization for the discussion or advancement of political questions or principles without connection with any vote ... ;

provided, however, that a person or corporation making a contribution or contributions to a candidate or a political committee which has filed pursuant to section 14–118 shall not, by that fact alone, be deemed to be a political committee as herein defined.”

The Election Law goes on to require that the any political committee which, in connection with any election, receives or expends any money or other valuable thing or incurs any liability to pay money or its equivalent shall file statements sworn to by the treasurer of such committee. EL 14-102(1).

The first part of the analysis is to determine whether the activities of the organization cause it to fall within the definition of “political committee?” If so, then it would be required to register as a political committee and disclose its receipts and expenditures as such via the filing of campaign financial disclosure statements.

In applying the definition of political committee, the standard to apply to the activity in question is whether it expressly advocates for the election or defeat of the candidate. “Express Advocacy” has been defined by the State Board as “a standard created by the United States Supreme Court in *Buckley v. Valeo*, 424 U.S. 1 (1976), (which) means a communication that contains express words such as vote, oppose, support, elect, defeat, or reject, which call for the election or defeat of a candidate.” (9 NYCRR 6200.10(b)(2)).

Based upon the description of activities delineated above and provided by it, the organization appears to be expressly advocating the success of a select list of candidates to both its own members and to the public in general. Words such as “Prefer” or “Endorse” are express words within the definition of Express Advocacy stated above. Such Express Advocacy by this organization, and the activities to which it specifically relates, would cause the organization to be deemed a political committee within the definition of the Election Law.

The second part of the analysis is to determine what expenditures to report. Generally speaking, activities by a political committee that are “Express Advocacy” and coordinated, would be deemed “in-kind” contributions subject to the candidate’s contribution limit, and would have to be reported as expenditures by the political committee making them, and reported as “in-kind” contributions received by the candidate. Activities that are “Express Advocacy” and that are “Independent Expenditures”, are not deemed “in-kind” contributions. They would only have to be reported by the political committee making the expenditures. The State Board has issued an analogous Formal Opinion 1978 #16.

The analysis of what constitutes coordination is highly fact-specific and needs to be undertaken on a case by case basis. “Independent Expenditures” have been defined by the State Board to mean “an expenditure made in support or opposition of a candidate: (i) that expressly advocates for the election or defeat of a candidate; and (ii) that the candidate or his/her agents or authorized political committee(s) did not authorize, request, suggest, foster or cooperate with in any way.” (9 NYCRR 6200.10(b)(1)).

In order to make such a determination, the Board has reviewed the process and activities of the organization outlined in its correspondence dated April 3, 2013, with respect to the evaluation of candidates, which stated that said candidate evaluation “involves inviting candidates to return a completed questionnaire on a wide variety of issues and to meet with a small committee of members for an interview. The board of directors ultimately decides which of the candidates recommended by our local candidates committee to support for election. Our expression of support is simply a declaration of our belief that a particular candidate is qualified, deserves our backing and would make an effective elected official. We do not go further and engage with either the candidate or his or her campaign once our decision is made known. Consequently, we do not participate in campaigns or electioneering with the candidate. On their own, candidates however are free to use our recommendation in their communications to voters.” The organization further states that “(i)t is our practice to use the term “prefer” to indicate the candidates we support in a primary election because it is not the final election where all voters have the final say. We use the term “endorse” for candidates we support in a general election since it is the determinative election. We participate in this process to inform our members and believe our communications are primarily intended for our membership.”

While this information is informative, it is not necessarily dispositive on the issue of independence. For instance, in outlining its process for candidate evaluation, the organization states that: “We do not go further and engage with either the candidate or his or her campaign once our decision is made known. Consequently, we do not participate in campaigns or electioneering with the candidate.” (emphasis added). This presumes that such activity on the part of the organization prior to its announcement of “prefer” or “endorse” of a particular candidate is not participation, or that its activities after such announcement are not coordinated with any candidate. It is also unclear what role the candidates or their campaigns have relative to the content, including editing, of the “Voter Directory” , or any related news release, or Web Page materials relative to said candidates.

There is no description of the cost for any of these activities which are designed to promote a candidate. The State Board is of the opinion that only those specific expenditures made by this organization in connection with any election relative to its activity as a political committee are required to be reported. Statements reporting expenditures that are a portion of a larger expenditure (e.g. a web page that has political related material as well as non political related material) shall disclose such reportable expenditures on a pro rata basis.

STATE BOARD OF ELECTIONS