



FEDERAL ELECTION COMMISSION

Washington, DC 20463

2004 JUL -8 P 3:10

July 8, 2004

MEMORANDUM

AGENDA ITEM

For Meeting of: 7-15-04

TO: The Commission

THROUGH: James A. Pehrkon
Staff Director

FROM: Lawrence H. Norton
General Counsel

Rosemary C. Smith *RC*
Associate General Counsel

Brad C. Deutsch *BCD*
Assistant General Counsel

Ron B. Katwan *RK*
Attorney

SUBJECT: AO 2004-20 – Alternative Drafts

Attached are two proposed drafts of Advisory Opinion 2004-20, which responds to a request from Farrell for Congress, the principal campaign committee for Diane Farrell. Farrell for Congress seeks the Commission's determination whether, in light of a recent change in Connecticut's law governing parties' nominating procedures, party conventions in Connecticut continue to be elections for purposes of the Act.

Draft A concludes that party conventions in Connecticut are no longer elections for purposes of the Act because the new Connecticut law permits candidates to obtain a place on the primary ballot without participating in the convention and, therefore, conventions no longer have the authority to nominate candidates.

Draft B concludes that party conventions in Connecticut continue to be elections under the Act because under the new Connecticut law it remains possible for a candidate who was endorsed by the party convention to be deemed the party's lawfully chosen nominee and, therefore, conventions continue to have the authority to nominate candidates.

We request that these drafts be placed on the agenda for July 15, 2004.

Attachments

Drafts A and B

1 ADVISORY OPINION 2004-20

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Mr. Adam Wood
Diane Farrell for Congress
P.O. Box 5136
Westport, CT 06881-5136

DRAFT

Dear Mr. Wood:

10 This responds to your letter, dated June 3, 2004, on behalf of Farrell for
11 Congress, requesting an advisory opinion concerning the application of the
12 Federal Election Campaign Act of 1971, as amended (the "Act"), and
13 Commission regulations to the treatment of Connecticut party conventions as
14 elections.

15 ***Background***

16 Diane Farrell is the Democratic candidate for the U.S. House of
17 Representatives from Connecticut's 4th Congressional District. Farrell for
18 Congress is Ms. Farrell's principal campaign committee. The Democratic Party
19 in Connecticut held its convention for the U.S. House on May 10, 2004.¹ The
20 primary elections for all of Connecticut, including primaries for Federal offices,
21 are scheduled to be held on August 10, 2004. However, because the Democratic
22 Party has endorsed Ms. Farrell as its candidate for the 4th Congressional District
23 and no other member of the Democratic Party filed a petition for candidacy by the
24 statutory deadline, Ms. Farrell is the Democratic Party's nominee and her name
25 will not appear on the primary election ballot.

26 Until January 1, 2004, Connecticut law provided that if a candidate
27 received the endorsement of his or her party at the state party's convention, and if

¹ Farrell for Congress filed a pre-convention report with the Commission on April 28, 2004.

1 no other candidate received at least 15 percent of the endorsement vote at the
2 convention, then no primary would be held for that office and the party-endorsed
3 candidate would be deemed to have been lawfully chosen as the party's nominee.
4 Connecticut Gen. Stat. sections 9-400, 9-416 (2002). In 1976, the Commission
5 considered the status of Connecticut party conventions under the Connecticut law
6 at that time, in Advisory Opinion 1976-58, and concluded that party conventions
7 were elections for purposes of the Act.

8 In 2003, however, Connecticut enacted a new law, effective as of January
9 1, 2004, that provides for an additional route for a candidate's name to be placed
10 on the primary ballot. *See* Conn. Acts 03-241. Specifically, the new law now
11 also permits any registered member of the party, -- whether that member has
12 participated in a party convention but not received 15 percent of the endorsement
13 vote or whether he or she has not participated at all in a party convention, -- to file
14 a petition with the signatures of at least two percent of the party members in the
15 State or district (whichever applies) within 14 days after the end of the
16 convention. Connecticut Gen. Stat. section 9-400 (2003). If a petition is properly
17 filed and has the required number of signatures, the candidate will be placed on
18 the primary ballot along with the party-endorsed candidate. If no candidate other
19 than the endorsed candidate qualifies by either method (*i.e.*, by receiving at least
20 15 percent of the endorsement vote or by filing a petition), then the endorsed
21 candidate is deemed to be the party's nominee and no primary election is held for
22 the office. Connecticut Gen. Stat. section 9-416 (2003).

1 ***Question Presented***

2 In light of the change in Connecticut law, do Connecticut party
3 conventions continue to constitute separate elections for purposes of determining
4 (1) whether Ms. Farrell's principal campaign committee may continue to accept
5 undesignated contributions in connection with the primary election process; and
6 (2) whether Ms. Farrell's principal campaign committee is required to file a pre-
7 election report for the primary election with the Commission, even though no
8 primary will be held for that office?

9 ***Legal Analysis and Conclusions***

10 Because of the change in Connecticut law governing primary elections,
11 the Commission concludes that party conventions in Connecticut are no longer
12 elections under the Act, and that the Connecticut primaries are now the only
13 elections during the primary process. Therefore, Farrell for Congress may accept
14 undesignated primary contributions up until August 10, 2004, the day of the
15 Connecticut primaries, and, consequently, is also required to file a pre-primary
16 report no later than July 29, 2004.

17 The Act and Commission regulations define an "election" to include "a
18 general, special, primary, or runoff election" and "a convention or caucus of a
19 political party which has authority to nominate a candidate." 2 U.S.C. 431(1)(A)
20 and (B); *see also* 11 CFR 100.2. The Commission has previously stated that the
21 question of whether a particular event – including a convention or caucus, which
22 has authority to nominate a candidate – is an election, is determined by an

1 analysis of relevant state law. *See* Advisory Opinions 1992-25, 1986-17, and
2 1984-16.

3 In Advisory Opinion 1976-58, the Commission concluded that party
4 conventions in Connecticut *were* elections for purposes of the Act. This was
5 because in cases where no candidate, other than the party-endorsed candidate,
6 garnered 15 percent of the vote and hence no primary would be held, the
7 endorsement at the convention was “tantamount to a nomination of the
8 candidate,” and therefore the party convention had the “authority to nominate”
9 candidates. *See also* 11 CFR 100.2(e).

10 Under the old Connecticut law, a candidate could secure a nomination
11 only by going through the convention process and by obtaining at least 15 percent
12 of the endorsement vote. Where only one candidate received at least 15 percent
13 of the endorsement vote, the convention’s nomination was final. Thus, under
14 certain circumstances there was the potential to know with certainty within the
15 confines of the convention that the endorsed candidate was, in fact, the party’s
16 nominee.

17 In contrast, under Connecticut’s new law, any member of the party (even a
18 member who did not participate in the convention process) may obtain a place on
19 the primary ballot by filing a petition with the Secretary of State with signatures
20 of at least two percent of the party members in the State or district (whichever
21 applies) within 14 days after the end of the convention. Thus, candidates now
22 have a route toward securing a party nomination that entirely bypasses the party
23 convention. Moreover, as a result of the new law, it is no longer possible to know

1 with certainty whether the candidate endorsed at the party convention will in fact
2 be the party's nominee until at least 14 days after the convention. Thus, the
3 convention no longer has the potential authority to make a final decision on a
4 nomination under any circumstances, regardless of the outcome of the
5 endorsement vote. Whether or not the party's endorsement will amount to a
6 nomination is now entirely dependent on a condition that can be satisfied only
7 outside the confines of the convention and after the convention has taken place.
8 Therefore, the Commission concludes that under the new law, Connecticut party
9 conventions no longer have the authority to nominate candidates and,
10 consequently, are not elections for purposes of the Act. This decision is
11 consistent with Advisory Opinion 1986-17, which addressed the status of party
12 conventions under a New York law that resembled the new Connecticut law in
13 many significant respects, including the fact that it allowed a candidate to bypass
14 party conventions by filing a petition with a certain number of signatures.

15 Under the old Connecticut law, candidates could be involved in two
16 elections during the primary process – the convention and the primary election (if
17 a primary was in fact held). Consequently, in Advisory Opinion 1976-58, the
18 Commission determined that candidates who were involved in two elections
19 during the primary process were entitled to two separate contribution limits.
20 However, because Connecticut's party conventions no longer constitute separate
21 elections, all candidates in Connecticut, including Ms. Farrell, are now restricted
22 to only one contribution limit for the entire primary process.

1 Commission regulations provide that a “primary or general election which
2 *is not held because a candidate is unopposed* or received a majority of votes in a
3 previous election *is a separate election* for the purposes of the limitations on
4 contributions . . . [and the] . . . date on which the election would have been held
5 shall be considered to be the date of the election” (emphasis added). 11 CFR
6 110.1(j)(3). However, 11 CFR 110.1(j)(4) creates an exception to this general
7 rule. It provides that in the limited circumstances where a primary election is not
8 held specifically because a candidate was nominated by a party convention with
9 the authority to nominate, the primary election *does not constitute a separate*
10 *election*. Because the Commission had determined that under Connecticut’s old
11 law, Connecticut party conventions had the authority to nominate candidates,
12 primary elections in Connecticut used to be governed by section 110.1(j)(4), and
13 therefore a primary that was not held because a candidate was nominated by a
14 convention did not constitute a separate election. However, because party
15 conventions under Connecticut’s new law no longer have the authority to
16 nominate candidates, Connecticut’s primary elections are now governed by 11
17 CFR 110.1(j)(3). Consequently, the August 10, 2004, primary election in
18 Connecticut is a separate election for Ms. Farrell, even though she is unopposed
19 and therefore no Democratic primary will be held for Connecticut’s 4th
20 Congressional District on that date.

21 Commission regulations provide that contributions not designated in
22 writing by the contributor for a particular election are presumed to be made for
23 the next election after the contribution is made. 11 CFR 110.1(b)(2)(ii).

1 Furthermore, “[c]ontributions designated in writing for a particular election, but
2 made after that election, shall be made only to the extent that the contribution
3 does not exceed net debts outstanding from such election.” 11 CFR
4 110.1(b)(3)(i). Consequently, Farrell for Congress should treat undesignated
5 contributions made before August 10, 2004, as primary contributions. 11 CFR
6 110.3(b)(2)(ii). Farrell for Congress may presumptively redesignate these
7 contributions for the general election under the conditions described in 11 CFR
8 110.3(b)(5)(ii)(B). Farrell for Congress may also raise contributions for the
9 primary election after August 10, 2004, to the extent necessary to retire net debts
10 outstanding. 11 CFR 110.1(b)(3)(i).

11 The Act states that the treasurer of the principal campaign committee of a
12 candidate for the House of Representatives or for the Senate shall file, during
13 regularly scheduled election years “a pre-election report, which shall be filed no
14 later than the 12th day before (or posted by registered or certified mail no later
15 than the 15th day before) any election in which such candidate is seeking election,
16 or nomination for election, and which shall be complete as of the 20th day before
17 such election.” 2 U.S.C. 434(a)(2)(A)(i); 11 CFR 104.5(a)(2)(i)(A). A pre-
18 election report must be filed for any election, including primaries.

19 Because the August 10, 2004, primary is an election, Farrell for Congress
20 must file a pre-primary report even though Ms. Farrell is unopposed in the
21 primary and therefore not on the primary ballot. Therefore, although Farrell for

1 Congress has already submitted a pre-convention report,² it must now also submit
2 a pre-primary report no later than July 29, 2004, which is the 12th day before
3 August 10, 2004, the day of the Connecticut primaries.

4 The Commission recognizes that Farrell for Congress and other authorized
5 committees may have filed their April or July quarterly and pre-election reports
6 based on the understanding that the party conventions were separate elections.
7 Moreover, on April 7, 2004, the Commission sent pre-convention report notices to
8 Connecticut candidates that were arguably inconsistent with this advisory opinion
9 insofar as they appeared to require authorized committees to file pre-convention
10 reports and indicated that only committees involved in the August primaries
11 would be required to file a second pre-primary report. Because the Commission's
12 guidance regarding the reporting requirements for committees in Connecticut for
13 2004 was based on Connecticut's old law, the Commission will allow affected
14 committees in Connecticut to amend their reports in a manner consistent with this
15 advisory opinion within 30 days after the date this advisory opinion is issued.

16 This response constitutes an advisory opinion concerning the application
17 of the Act and Commission regulations to the specific transaction or activity set
18 forth in your request. *See* 2 U.S.C. 437f. The Commission emphasizes that, if
19 there is a change in any of the facts or assumptions presented, and such facts or
20

²Because the May convention was not an election for purposes of the Act, Farrell for Congress was not required to file a pre-election report prior to the convention.

1 assumptions are material to a conclusion presented in this advisory opinion, then
2 the requestor may not rely on that conclusion as support for its proposed activity.

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Sincerely,

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Bradley A. Smith
Chairman

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12 Enclosures (AOs 1992-25, 1986-17, 1984-16, and 1976-58)

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1 ADVISORY OPINION 2004-20

2
3 Mr. Adam Wood
4 Diane Farrell for Congress
5 P.O. Box 5136
6 Westport, CT 06881-5136

DRAFT

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8 Dear Mr. Wood:

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10 This responds to your letter, dated June 3, 2004, on behalf of Farrell for
11 Congress, requesting an advisory opinion concerning the application of the
12 Federal Election Campaign Act of 1971, as amended (the "Act"), and
13 Commission regulations to the treatment of Connecticut party conventions as
14 elections.

15 ***Background***

16 Diane Farrell is the Democratic candidate for the U.S. House of
17 Representatives from Connecticut's 4th Congressional District. Farrell for
18 Congress is Ms. Farrell's principal campaign committee. The Democratic Party
19 in Connecticut held its convention for the U.S. House on May 10, 2004.¹ The
20 primary elections for all of Connecticut, including primaries for Federal offices,
21 are scheduled to be held on August 10, 2004. However, because the Democratic
22 Party has endorsed Ms. Farrell as its candidate for the 4th Congressional District
23 and no other member of the Democratic Party filed a petition for candidacy by the
24 statutory deadline, Ms. Farrell is the Democratic Party's nominee and her name
25 will not appear on the primary election ballot.

26 Until January 1, 2004, Connecticut law provided that if a candidate
27 received the endorsement of his or her party at the state party's convention, and if

¹ Farrell for Congress filed a pre-convention report with the Commission on April 28, 2004.

1 no other candidate received at least 15 percent of the endorsement vote at the
2 convention, then no primary would be held for that office and the party-endorsed
3 candidate would be deemed to have been lawfully chosen as the party's nominee.
4 Connecticut Gen. Stat. sections 9-400, 9-416 (2002). In 1976, the Commission
5 considered the status of Connecticut party conventions under the Connecticut law
6 at that time, in Advisory Opinion 1976-58, and concluded that party conventions
7 were elections for purposes of the Act.

8 In 2003, Connecticut enacted a new law, effective as of January 1, 2004,
9 that provides for an additional route for a candidate's name to be placed on the
10 primary ballot. *See* Conn. Acts 03-241. Specifically, the new law now also
11 permits any registered member of the party, even if that member has not received
12 15 percent of the endorsement vote at a party convention, to file a petition with
13 the signatures of at least two percent of the party members in the State or district
14 (whichever applies) within 14 days after the end of the convention. Connecticut
15 Gen. Stat. section 9-400 (2003). If a petition is properly filed and has the required
16 number of signatures, the candidate will be placed on the primary ballot along
17 with the party-endorsed candidate. As under the old Connecticut law, if no
18 candidate other than the endorsed candidate qualifies by either method (*i.e.*, by
19 receiving at least 15 percent of the endorsement vote or by filing a petition), then
20 the endorsed candidate is deemed to be the party's nominee and no primary
21 election is held for the office. Connecticut Gen. Stat. section 9-416 (2003).

22

1 ***Question Presented***

2 In light of the change in Connecticut law, do Connecticut party
3 conventions continue to constitute separate elections for purposes of determining
4 (1) whether Ms. Farrell’s principal campaign committee may continue to accept
5 undesignated contributions in connection with the primary election process; and
6 (2) whether Ms. Farrell’s principal campaign committee is required to file a pre-
7 election report for the primary election with the Commission, even though no
8 primary will be held for that office?

9 ***Legal Analysis and Conclusions***

10 The Commission concludes that, despite the change in Connecticut’s law,
11 party conventions in Connecticut continue to be separate elections under the Act.
12 However, because Ms. Farrell is not on the ballot for the August 10, 2004,
13 primary, and because the convention is the only election in which Ms. Farrell is
14 participating during the primary process, Farrell for Congress may not accept
15 undesignated primary contributions after May 10, 2004, the date of the
16 Democratic district convention. Likewise, Farrell for Congress is not required to
17 file a second pre-primary report prior to the August 10, 2004, Connecticut
18 primary date.

19 The Act and Commission regulations define an “election” to include “a
20 general, special, primary, or runoff election” and “a convention or caucus of a
21 political party which has authority to nominate a candidate.” 2 U.S.C. 431(1)(A)
22 and (B); *see also* 11 CFR 100.2. The Commission has previously stated that the
23 question of whether a particular event – including a convention or caucus, which

1 has authority to nominate a candidate – is an election, is determined by an
2 analysis of relevant state law. *See* Advisory Opinions 1992-25, 1986-17, and
3 1984-16.

4 In Advisory Opinion 1976-58, the Commission concluded that party
5 conventions in Connecticut *were* elections for purposes of the Act. This was
6 because it was “possible under Connecticut law for the convention’s ‘party-
7 endorsed candidate’ to be ‘deemed . . . chosen as the nominee’” if no other
8 candidate received the required percentage of the delegates’ votes or filed a
9 “candidacy” for nomination. The Commission stated that in such a case the
10 endorsement at the convention was “tantamount to a nomination of the
11 candidate,” and therefore the party convention had the “authority to nominate”
12 candidates. Accordingly, the Commission determined that candidates could be
13 involved in two elections during the primary process – the convention and the
14 primary election (if a primary was in fact held) – and could, consequently, be
15 entitled to two separate contribution limits.

16 The new Connecticut law does not materially change the situation for
17 purposes of the Act. Under the new law, as under the old law, the potential
18 remains for the party-endorsed candidate to “be deemed to have been lawfully
19 chosen” as the party’s nominee if no other candidate challenges the party’s
20 endorsement. Connecticut Gen. Stat. section 9-416 (2003). The only difference
21 between Connecticut’s old and new laws is that there are now two ways (*i.e.*,
22 receiving at least 15 percent of the endorsement vote or filing a petition), rather
23 than one, of challenging a party convention’s endorsement. However, as the

1 Commission stated in Advisory Opinion 1976-58, the “fact that the party
2 endorsement might result in a tentative nomination subject to challenge would not
3 change” the fact that the party endorsement is tantamount to a nomination in cases
4 where no candidate succeeds in challenging the party’s endorsement by obtaining
5 a place on the primary ballot. Where no candidate, other than the party-endorsed
6 candidate, obtains at least 15 percent of the endorsement vote or files a petition
7 for candidacy with the required number of signatures, the party-endorsed
8 candidate will be deemed to be the party’s nominee solely by virtue of the party’s
9 endorsement and without being required to take any additional steps to secure the
10 nomination. In this instance, because no primary for the 4th Congressional
11 District will take place, the only election Ms. Farrell was involved in during this
12 primary process was the May 10, 2004, Democratic district convention.² See 11
13 CFR 110.1(j)(3).

14 Commission regulations provide that contributions not designated in
15 writing by the contributor for a particular election are presumed to be made for
16 the next election after the contribution is made. 11 CFR 110.1(b)(2)(ii).
17 Furthermore, “[c]ontributions designated in writing for a particular election, but
18 made after that election, shall be made only to the extent that the contribution
19 does not exceed net debts outstanding from such election.” 11 CFR
20 110.1(b)(3)(i). Because the Commission has determined that the May 10, 2004,

² The Commission notes that your request asserts that the new Connecticut law “resembles . . . the section of the New York election code that [the Commission] reviewed in Advisory Opinion 1986-17.” Because the question of whether New York party conventions constitute separate elections under the Act is not relevant to any activities Farrell for Congress is presently undertaking or intends to undertake, the Commission expresses no opinion on the current status of New York party conventions. See 11 CFR 112.1(b).

1 Democratic district convention was the only election Ms. Farrell was involved in
2 during the primary process, Farrell for Congress must treat undesignated
3 contributions made after May 10, 2004, the date of the Democratic district
4 convention, as contributions to the general election. 11 CFR 110.3(b)(2)(ii).
5 However, Farrell for Congress may use contributions raised after May 10, 2004,
6 to the extent necessary to retire net debts outstanding. 11 CFR 110.1(b)(3)(i).

7 The Act states that the treasurer of the principal campaign committee of a
8 candidate for the House of Representatives or for the Senate shall file, during
9 regularly scheduled election years “a pre-election report, which shall be filed no
10 later than the 12th day before (or posted by registered or certified mail no later
11 than the 15th day before) any election in which such candidate is seeking election,
12 or nomination for election, and which shall be complete as of the 20th day before
13 such election.” 2 U.S.C. 434(a)(2)(A)(i); 11 CFR 104.5(a)(2)(i)(A). A pre-
14 election report must be filed for any election, including primaries.

15 Because the May 10, 2004, convention was an election and no primary
16 will be held for the 4th Congressional District on August 10, 2004, Farrell for
17 Congress has fulfilled its pre-election reporting requirement by filing its pre-
18 convention report and need not file a pre-primary report before the August 10,
19 2004, primary.

20 This response constitutes an advisory opinion concerning the application
21 of the Act and Commission regulations to the specific transaction or activity set
22 forth in your request. *See* 2 U.S.C. 437f. The Commission emphasizes that, if
23 there is a change in any of the facts or assumptions presented, and such facts or

1 assumptions are material to a conclusion presented in this advisory opinion, then
2 the requestor may not rely on that conclusion as support for its proposed activity.

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4 Sincerely,

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Bradley A. Smith
Chairman

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Enclosures (AOs 1992-25, 1986-17, 1984-16, and 1976-58)