ADVISORY OPINION 1975-12

Application of Federal Election Campaign Act to Candidates for Delegate to National Nominating Conventions.

This advisory opinion responds to requests submitted by the Michigan Democratic Party and the Republican State Committee of Pennsylvania, which were published together as AOR 1975-12 in the July 9, 1975, Federal Register (40 FR 28945). Interested parties were given an extended time period in which to present their views to the Commission, both orally and in written form.

The Commission created a Task Force on Delegate Selection to study the complexity of the problems posed in these requests, to determine the applicability of the Federal Election Campaign Act of 1971, as amended (the Act), to delegate selection processes, and to formulate possible approaches to legislation should Congress seek to address imbalances among types of delegates existing under the present Act.

This advisory opinion is a product of the Task Force's deliberations; it represents the Commission's understanding of the restrictions which the Act places upon activity by and on behalf of candidates for delegate (delegate-candidates), pending possible amendment by Congress.

The requesting parties inquire generally to what extent the current Federal election campaign statutes pertain to delegate-candidates and contributions to delegate-candidates. The Commission understands the urgency for providing guidance to all parties and potential delegates, and seeks to answer the explicit questions of the requesting parties within the text of a broader and more comprehensive statement.

Several important issues, falling within three major categories, must be examined. They are:

A. Expenditure limitations

1. In what cases, if any, are the expenditures of a delegate-candidate subject to any ceiling?

2. In what cases, if any, are the independent expenditures of persons on behalf of delegate-candidates subject to 18 U.S.C. 608(e)?

3. Are any disbursements by delegate-candidates exempt from ceilings on attributable expenditures?

B. Contributions limitations

1. In what cases, if any, are contributions to delegate-candidates by individuals, political committees and all other "persons" subject to any ceiling?

C. Disclosure

1. Are delegate-candidates and contributors to delegate-candidates required to report contributions and expenditures? If so, at what threshold level?

2. Are local, county, district and state party committees required to file reports of expenses incurred in connection with their conventions or elections at which delegates are chosen to attend the national nominating convention?

A. EXPENDITURE LIMITATIONS

1. Expenditures of delegate-candidates

The Act imposes a dual ceiling upon a candidate for nomination for President (a presidential candidate), a $10 million limit nationally and double the ceiling for a senatorial candidate in any one state [18 U.S.C. 608(c)(1)(A)]. These restraints apply to expenditures by or on behalf of a presidential candidate which are authorized by the candidate or his committee [18 U.S.C. 608(c)(2)(B)].

Because a delegate is not included within the Act's definition of a federal "candidate" [18 U.S.C. 591(b)], delegate's expenditures are not directly limited by 608(c)(2)(B). Whether or not a delegate-candidate's campaign disbursements are restricted otherwise will depend upon that delegate's status with regard to, or relationship with, a clearly identified candidate for President.

(a) *Delegate authorized by a Presidential candidate*. A delegate-candidate who is specifically authorized by a presidential candidate to receive contributions or make expenditures on behalf of that presidential candidate acts, in effect, as an agent of that Candidate. Such authorized expenditures by the delegate-candidate in promotion of his/her own election would be charged to the presidential candidate's national and state limits, since such expenditures are "made on behalf of a [Presidential] candidate . . . by any person authorized or requested by that candidate . . . to make the expenditure" [18 U.S.C. SS 608(c)(2)(B)(ii)]. Similarly, direct expenditures by a presidential candidate in support of a delegate-candidate, or any transfer of funds from a presidential candidate's principal campaign committee to any authorized delegate-candidate, will be

attributable to the presidential candidate's limits. For purposes of this paragraph, an expenditure by a delegate-candidate will be deemed to have been "authorized" by a presidential candidate if, for example, (i) the presidential candidate or his/her campaign committee has participated, either directly or indirectly, in the determination of the manner in which funds should be expended by or on behalf of a delegate-candidate, or (ii) the presidential candidate or his/her campaign committee has participated in any financial activity or transaction undertaken by or on behalf of a delegate-candidate (as, for example, public or private solicitations on behalf of delegate-candidates, guarantees for loans made to or on behalf of delegate-candidates, active participation in the financial management of a delegate- candidate's campaign efforts).

(b) *"Pledged-but-unauthorized" delegates*. Expenditures by a delegate-candidate who announces his/her support for or who is publicly pledged to a particular presidential candidate (but is not authorized to raise or spend funds on behalf of that candidate) are limited to $1,000 under 18 U.S.C. 608(e). Section 608(e) provides that no person may make expenditures (other than authorized expenditures on behalf of a candidate) in excess of $1,000 per year "relative to a clearly identified candidate." Section 608(e)(2) defines "clearly identified" to mean that

"(i) the candidate's name appears;
(ii) a photograph or drawing of the candidate appears; or
(iii) the identity of the candidate is apparent by unambiguous reference."

In campaign efforts, a delegate who declares support for or otherwise publicly associates his candidacy with the promotion of a particular presidential candidate is "unambiguously identified" with that candidate. In fact, certain states list the presidential candidate's name next to that of the delegate-candidate on a primary ballot. Furthermore, independent disbursements by a delegate-candidate in promotion of his/her own election are clearly "expenditures" under the definition of 18 U.S.C. 591 (f)(1). These disbursements are transfers of money or things of value "made for the purpose of influencing the nomination for election . . . of any person to Federal office . ." As expenditures by a "pledged-but-unauthorized" delegate-candidate are viewed as advocating the election of a particular presidential candidate at the national nominating convention, they are made "relative to a clearly identified candidate" and, thus, subject to an aggregate ceiling of $1,000.

(c) *Unpledged and uncommitted delegates.* Whereas 608(e) will be applied to pledged or committed delegates, it does not furnish an adequate basis for restricting expenditures by unpledged or uncommitted delegate-candidates. Although expenditures by uncommitted delegates are unlimited, the Commission would regard a delegate who spuriously

maintains that he/she is unpledged and who exceeds the $1,000 ceiling to be in violation of 18 U.S.C. 608(e), determining the existence of sham or collusion upon examination of the facts of an individual case.

2 Independent Expenditures on Behalf of Delegate-Candidates by Any Person.

On the basis of the foregoing discussion, independent expenditures by individuals, political committees and organizations, and other "persons" within the definition of 18 U.S.C. 591 will be chargeable against their $1,000 limit relative to a particular presidential candidate under 608(e) if made on behalf of any "authorized" or "pledged-but-unauthorized" delegate- candidate. Independent expenditures on behalf of truly uncommitted delegates, like the delegate-candidates' own expenditures, are not attributable to any ceiling. See, on this point, discussion under B.1. of this opinion.

3. Disbursements Exempt from Expenditure Limitations (and Reporting Requirements).

A delegate-candidate necessarily incurs expenses for travel and subsistence during a nominating convention, whether on the national, state, district or county level. The Commission does not consider disbursements for travel, food and lodging to and from or at such conventions as "expenditures" within the contemplation of 18 U.S.C. 591(f). While such disbursements are "in connection with" a Federal election and may not therefore be paid from corporate, union or national bank treasury funds under 18 U.S.C. 610, these necessary expenses are not "made for the purpose of influencing the nomination for election . . . of any person to Federal office . . ." As non-campaign disbursements, these costs will not be attributable to expenditure limitations, nor will the Commission require that they be reported.

B. CONTRIBUTION LIMITATIONS

1. *Contributions to Delegate-Candidates by Individuals, Political Committees and Other "Persons".*

Under 18 U.S.C. 608(b)(1), contributions by a person "to any candidate with respect to any election for Federal office" -7 - are restricted to an aggregate of $1,000, whether made directly or indirectly through an "intermediary" or "conduit" [18 U.S.C. 608(b)(6)]. Section 608(b)(2) increases the limit to $5,000 for any political committee which supports 5 or more Federal candidates and meets other specific requirements (i.e., a multi-candidate committee).

Because the definitions of "candidate" and "Federal office" in 18 U.S.C. 591 do not include delegate-candidates at any level of the selection process, the limitations of 608(b)(1)-(2) will not apply to contributions to a delegate unless the delegate-candidate acts as an agent or conduit for a presidential candidate. A delegate authorized in the sense understood in Section A.1. of this opinion establishes such an agency relationship. Contributions to an "authorized" delegate-candidate are presumed to come within the

dominion and control of the respective presidential candidate or his/her campaign committee. As "indirect" contributions "to a candidate" [608(b)(6)], they are attributable to the contributions limit for that presidential candidate.

A mere declaration of support for a particular presidential candidate, however, does not establish a relationship of agency between a delegate-candidate and the presidential candidate. Because a donation to a "pledged-but-unauthorized" delegate does not come within the dominion and control of the presidential candidate whose nomination the delegate promotes, such a donation cannot be treated as a contribution made "indirectly" to the candidate through a "conduit," nor can it be credited against the donor's ceiling on contributions to that presidential candidate. Rather, the transfer of monies or things of value to a pledged-but-unauthorized delegate-candidate is an "independent expenditure" made "relative to a clearly identified candidate" and subject to the $1,000 aggregate ceiling of 18 U.S.C. 608(e). This transaction falls within the definition of "expenditures" in 18 U.S.C. 591(f) as a "gift . . . made for the purpose of influencing the nomination for election . . . of any person to Federal office," and that of "independent expenditure" in 608(e) because it advocates the election of a particular and unambiguously identified presidential candidate. By financing his/her campaign efforts with monies accepted from any person, a pledged-but- unauthorized delegate-candidate completes the act of "independently" expending "relative to a clearly identified" presidential candidate which the donor began. The pledged delegate implicitly operates as an agent for the donor who promotes the election of a particular candidate through the act of giving. Therefore a person may independently expend no more than $1,000, on behalf of all delegate-candidates publicly supporting a particular presidential candidate.

18 U.S.C. 608(e) does not furnish adequate legal basis for similar restrictions regarding truly uncommitted delegate-candidates. A donation to an unpledged delegate clearly is not an "independent expenditure" made "relative to a clearly identified candidate." Yet, such a transfer does meet the "purpose test" in the definitions of "contribution" and "expenditure": It does "influence the nomination for election of any person to Federal office" as the benefit of such a transaction inures eventually to the presidential candidate whom the delegate finally supports. Thus, while a person's "gift of monies" to uncommitted delegates is not subject to 608(e), the $25,000 aggregate ceiling upon all contributions by an individual in a calendar year includes contributions to uncommitted delegates as well as those to authorized or pledged delegates [18 U.S.C. 608(b)(3)].

C. DISCLOSURE

1. *Disclosure by Delegate-Candidates and By Contributors to Delegate-Candidates.*

Under the authority of 2 U.S.C. 434(e), delegate-candidates competing at any level of a state's delegate selection process (i.e., in local, county, district or state conventions and in congressional district or state-wide primaries) who make campaign expenditures in excess of $100, excluding travel and subsistence costs

(*see* prior discussion under A. 3.) will be required to file statements of receipts and expenditures.

2 U.S.C. 434(e) provides: "Every person . . . who makes contributions or expenditures, other than by contribution to a political committee or candidate, in an aggregate amount in excess of $100 within a calendar year shall file with the Commission." As already noted, a financial transaction " . . . made for the purpose of influencing the nomination for election . . .of any person to Federal office . . ." must be reported as an "expenditure" according to 2 U.S.C. 431(f)(1). Because the end to be served by the delegate selection process is nomination of a party's candidate for president, and because delegate expenditures are not reported by a candidate or committee, expenditures in excess of $100, exclusive of travel and subsistence, must be reported by all delegates. Authorized delegates must report to the principal campaign committee of the candidate they support. All other delegates must report to the Commission under 434(e).

The same rationale applies to any person who contributes to or independently expends on behalf of delegate-candidates. Such transfers of monies or things of value clearly meet the "purpose test" for reporting in 2 U.S.C. 431(e)(1), (f)(1). The language of the statute does not require a direct relation between a financial transaction and the promotion of a single, particular candidate. If Congress had desired to restrict the "purpose test" of 2 U.S.C. 431 to particular Federal candidates, it would have limited coverage to the specifically defined word "candidate" [2 U.S.C. 431(h)] and certainly would not have qualified "person" by inclusion of the word "any." The Commission concludes that Congress intended to require reporting of contributions and expenditure to all delegates, "made for the purpose of influencing the nomination for election" of any presidential candidate. A financial transaction to or for an uncommitted delegate "influences" the electoral chances of any presidential candidate, and is reportable. A contribution or independent expenditure for an authorized or merely pledged delegate obviously fulfills the "purpose test," even where a legally unbound delegate "votes his conscience" and shifts presidential candidate allegiance; the donor still must be presumed to have intentionally acted in order to influence the success of any presidential candidate at the national primary election.

For reasons already fully developed under Sections A. and B., *supra*, contributions and expenditures by any person for an authorized delegate-candidate should be credited against that person's limitations with respect to a presidential candidate under 18 U.S.C. 608(b)(1)-(2), (e). The reporting requirements of 434(e) will be effective whenever contributions or expenditures on behalf of any number of delegate-candidates exceed $100 in the aggregate within a calendar year. The Commission will soon publish guidelines designating the appropriate reporting form to be used, to whom and when delegate financial statements must be submitted.

2. Reporting Obligations of Local, County, District, and State Party Committees.

The Michigan Democratic Party inquires specifically whether local, county, district and state party committees are required to file reports of expenses incurred in connection with conventions or elections at which delegates are chosen to attend either the next stage in the delegate selection process or the national nominating convention itself. The issues raised here fall within the larger question of allocating party expenditures among various party functions, some of which are related to federal elections. The Commission will accordingly defer determination of the allocation question posed here until the work of the Task Force is concluded and the corresponding Advisory Opinion Request has been answered.