



FEDERAL ELECTION COMMISSION
Washington, DC 20463

July 11, 1980

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

ADVISORY OPINION 1980-68

H. Oliver Welch, Esquire
Treasurer
Zell Miller for U.S. Senate Committee
3340 Peachtree Road, N.E.
Atlanta, Georgia 30326

Dear Mr. Welch:

This responds to your letter of May 30, 1980, in which you requested an advisory opinion on behalf of the Zell Miller for U.S. Senate Committee (hereinafter "the Committee") concerning application of the Federal Election Campaign Act of 1971, as amended ("the Act"), and applicable Commission regulations to questions concerning a possible Georgia primary runoff election scheduled (if needed) for August 26, 1980, in which Mr. Miller, as a Democratic senatorial candidate, may be involved.

You pose three questions with regard to the possible primary runoff election scheduled for August 26, specifically:

1. Whether contributions designated for a possible primary runoff election may be currently received and held in escrow to be spent after the August 5, primary on the primary runoff campaign or returned to the contributor if no runoff occurs;
2. Whether the candidate may establish a separate authorized committee to currently collect and deposit funds designated for the possible August 26 primary runoff election and accept contributions from persons who have reached their limits for the primary election; and,
3. Whether the committee may currently collect post-dated checks, and if so, whether the receipt of such checks should be reported in the filing period when received or in the filing period when deposited for collection.

In response to the first question -- whether contributions designated for a potential runoff election may be received currently and held in escrow to be spent after the primary or returned to the contributors if no runoff occurs -- the Commission concludes that contributions may be made and received with respect to a possible runoff election before the actual need for that election is determined under State law.

The term "election" is defined in 2 U.S.C. 431(1) to mean a general, special, primary, or runoff election. Commission regulations at 11 CFR 100.2(d), further explain that a runoff election includes:

(1) The election held after a primary election, and prescribed by applicable State law as the means for deciding which candidate(s) should be certified as a nominee for the Federal office sought ...

The language of the regulation indicates that the Commission regards a runoff election as a separate election if, under State law, it is the prescribed means for selecting the candidate who should be certified as the nominee of a particular political party for Federal office in the succeeding general election. In addition, the definition of "candidate" in 2 U.S.C. 431(2) refers to an individual seeking nomination for election, or election, to Federal office. Although it is uncertain that a candidate for the primary election will still be seeking nomination after the primary election is held, the situation of accepting contributions for a primary runoff election is analogous to accepting general election contributions before the primary election. Such acceptance is specifically permitted in Commission regulations. 11 CFR 102.9(e).

In view of the foregoing conclusion, contributions to Mr. Miller as a Senate candidate may be made and accepted with respect to a possible primary runoff election and subject to the condition indicated in your request that they will be returned to the donors if Mr. Miller is not in the primary runoff. See 11 CFR 102.9(e).

With regard to the second question posed -- whether the candidate may establish a separate authorized committee to currently collect and deposit funds designated for the possible primary runoff election from contributors who have reached their limits for the primary election - - the Commission concludes that any number of authorized committees may be established by Mr. Miller pursuant to 2 U.S.C. 432(e)(1). These authorized committees may accept contributions for a possible primary runoff, on the basis described above, before the runoff has been called pursuant to State law. The contributions may be accepted from persons who have reached their limits for the primary election since a primary runoff election, if held and if Mr. Miller qualifies as a candidate therein, would be considered a separate election. 11 CFR 100.2(d).

The Commission has discussed a proposed response to your third question regarding the collection of post-dated but has not approved a response at this time. Further consideration will be given to question three at a later date.

This response constitutes an advisory opinion concerning application of the Act, or regulations prescribed by the Commission, to the specific transaction or activities set forth in your request. See 2 U.S.C. 437f.

Sincerely yours,

(signed)

Max L. Friedersdorf
Chairman for the
Federal Election Commission



FEDERAL ELECTION COMMISSION
Washington, DC 20463

August 28, 1980

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

ADVISORY OPINION 1980-68 Supplement

H. Oliver Welch, Esquire
Treasurer
Zell Miller for U.S. Senate Committee
3340 Peachtree Road, N.E.
Atlanta, Georgia 30326

Dear Mr. Welch:

This opinion supplements the Commission's response of July 11, 1980 which addressed two questions, and deferred a third, presented in your letter of May 30, 1980 in which you requested an advisory opinion on behalf of the Zell Miller for U.S. Senate Committee (hereinafter "the Committee") concerning application of the Federal Election Campaign Act of 1971, as amended ("the Act"), and applicable Commission regulations to questions concerning a possible Georgia primary runoff election scheduled (if needed) for August 26, 1980, in which Mr. Miller, as a Democratic senatorial candidate may be involved.

Though you posed three questions, one was not reached in the initial opinion due primarily to the conclusions drawn regarding the first two questions. With respect to your unanswered question -- whether post-dated checks may be currently collected and, if so, in what period should they be reported -- the Commission recognizes that post-dated checks are negotiable instruments and as such may be prematurely converted into cash or the equivalent value, though the payee is not entitled to payment until the date on the check. See U.C.C. §3-114, Ga. Code Ann. §109A-3-114. Since they are prematurely transferable and assignable, they represent the gift of "anything of value" made by any person for the "purpose of influencing [any] election for Federal office." 2 U.S.C. 431(8)(A)(i). Thus, such post-dated checks are considered to be "contributions" for purposes of the Act.

The Act and Commission regulations require that all receipts of a political committee be deposited, within ten (10) days of the treasurer's receipt, in account(s) established in a designated

depository. 2 U.S.C. 432(h) and 11 CFR 103.2 and 103.3. Post-dated checks are not receipts until they can be deposited for collection; therefore, they are not subject to the foregoing deposit requirements. However, since a post-dated check is “anything of value” and thus a contribution in kind, it should be reported by using a memo entry; it should not be included in reported cash totals until it may be deposited for collection. 11 CFR 104.13(b). Post-dated checks are, of course, subject to the separate contribution limits of 2 U.S.C. 441a for the primary, primary runoff, and general elections. Finally, Commission regulations at 11 CFR 102.9(a)(1) and (2), expressly stipulate that in an accounting of contributions, the date the contribution is received is important rather than the date of deposit; therefore, contributions via post-dated checks should be reported in the filing period when the post-dated checks are received. 2 U.S.C. 434(b).

This response together with the response dated July 11, 1980, constitute an advisory opinion concerning the application of the Act, or regulations prescribed by the Commission, to the specific transaction or activity set forth in your request. See 2 U.S.C. 437f.

Sincerely yours,

(signed)

Max L. Friedersdorf
Chairman for the
Federal Election Commission