



FEDERAL ELECTION COMMISSION
Washington, DC 20463

October 29, 1999

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

ADVISORY OPINION 1999-27

Timothy A. McKeever
Holmes Weddle & Barcott
701 West Eighth Avenue
Suite 700
Anchorage, Alaska 99501-3408

Dear Mr. McKeever:

This responds to your letters dated August 4 and September 3, 1999, as supplemented by your letters dated September 14 and October 19, on behalf of the Alaska Federation of Republican Women (“the Federation”), requesting an advisory opinion concerning the application of the Federal Election Campaign Act of 1971, as amended (“the Act”), and Commission regulations to the conduct of a presidential straw poll.

Background

You state that the Federation is a party committee as defined under 11 CFR 100.5(e)(4), maintains separate Federal and non-Federal accounts, and is registered with the Commission and the Alaska Public Offices Commission (“APOC”). According to a draft opinion written by APOC staff on the application of State law to the straw poll, which you submitted with your September 14 letter, the Federation is an umbrella organization for six local Republican women’s groups, and the Republican Party of Alaska (“RPA”) has recognized the Federation and its affiliates as a political subdivision.¹

On January 24, 2000, the Federation will conduct a non-binding presidential preference straw poll, in which Alaskans will express their preference as to the

¹ The APOC will consider the draft for approval at its November meeting.

Republican presidential nominee. You describe the process, stating that the straw poll will have several of the features of an election. All publicly announced candidates for the Republican presidential nomination in the year 2000 will be listed on the polling form or “ballot.” All Alaska registered Republicans will be permitted to “vote,”² and the results will be totaled and immediately released to the public. You note that voters can register as Republicans at the straw poll but, under Alaska law, can change their registration immediately thereafter. The Federation will conduct the straw poll simultaneously in all of the RPA’s organized precincts.³ The poll will be held in the same buildings and on the same evening as the Republican precinct caucuses, which will be conducted by the local or district party organizations, but participation in one event is not a prerequisite to participation in the other event. Moreover, you assert that the precinct caucus and the poll will be “physically distinct” from each other, and everyone present will be “aware of the separation of the two.” In most locations, the caucus will be held in a public building and the straw poll will be held in a separate room. In some smaller communities, the straw poll will be held in a separate area of the same room. For voting in those rural areas where no precinct is organized, the Federation will set up a web site for voting by Internet.⁴

You assert that the straw poll will play no part in the election of Alaska’s delegates to the national convention. The poll results are purely advisory and are not binding on the district conventions or State conventions or the delegates selected there, or on the national convention delegates. The precinct caucuses elect delegates to the district convention, and the district convention elects delegates to the State convention. The State convention, held in the spring of 2000, in turn elects delegates to the Republican National Convention. The precinct caucuses, district conventions, and the State convention also perform functions related to the operations of the State party such as electing committee members and officers, developing the State party platform, and candidate recruitment and support at all levels.

You describe how funds will be raised and used for the poll. To pay for the expenses for the poll, the Federation will solicit donations of money and in-kind goods and services, and will deposit the funds in a separate bank account opened specifically to pay for the poll.⁵ The expenses will include costs for the preparation and distribution of ballots; telephone, fax, and other communication charges to coordinate the poll and tally the votes; advertising costs; and rental for the rooms or areas used to conduct the straw poll. No paid staff will be involved and all of the individuals working on the poll will be volunteers. The Federation will not use the funds donated for the poll for any State or

² Your request refers to a “ballot” and individuals casting a “vote” for candidates on the straw poll ballot. The Commission preliminarily applies quotation marks to these terms to indicate that they are not the same as ballots and votes in the context of an actual election.

³ You estimate that, of the 475 precincts in the State, approximately 350 are regularly organized.

⁴ Security provisions will be incorporated to ensure voting only by “qualified persons.”

⁵ According to the description in the draft APOC opinion, contributors will make their checks payable to the Federation Straw Poll Account or designate their intent by some other means. In addition, any surplus money remaining after the poll is conducted will be refunded to contributors on a pro rata basis or given to charity. None of the funds will be contributed to any Federal candidate.

local election purposes, or to advocate a specific presidential candidate's election. Those candidates and their campaigns can be expected to advocate their candidacies, but such advocacy will be separate from any disbursements by the Federation. You state that the solicitation of funds will most likely be "limited and specifically targeted on those who are determined to be eligible to contribute," and will most likely be done through "personal communication over the telephone or in person." Potential donors will be told about the poll, and reminded that one was conducted in 1996, and that the poll can draw significant attention for Alaska and Alaska political issues.

You assert that the advertising will be purely informational and will not be used to obtain new Republican registrants or to advocate voting Republican. Post cards will be sent to all registered Republicans in the State advising them of the straw poll, the nature of the poll, where they can go to participate, and similar details. Advertisements in selected newspapers and on radio will encourage participation and stress that the poll will be the first held in the election year and will put Alaska and Alaska issues before the candidates and the media.⁶ A sample newspaper ad in your request states as follows: "Help generate national media attention with a turnout that shows we take choosing our next President seriously." The Federation will also issue press releases to the media announcing the poll. Both the ads and the press releases will contain a brief reference to the caucuses and a statement that participation in the caucus is not required to vote in the straw poll, in order to avoid reader confusion of the caucuses with the straw poll.⁷

At the straw poll itself, the Federation will not advocate a vote for any particular presidential candidate. The Federation will make no general communications concerning party activities or events, or party platforms and positions, nor will it solicit contributions to the party or candidates, or encourage registration.⁸ However, it is anticipated that individual presidential candidates, or representatives of their campaigns, may be at the buildings where the caucuses and straw polls take place and may advocate their respective candidacies.

You cite Article XV of the Alaska Republican Party ("RPA") rules, the only article that addresses the straw poll. This rule prescribes the voter eligibility, reporting of results, and ballot content with respect to the polls. It also authorizes candidate forums, thus indicating that the poll is part of the process for the selection of a presidential nominee. The article provides that the RPA, its district organizations, and its affiliated

⁶ The promotion of Internet voting may occur in the mailing or in advertising targeted on the rural areas of the State.

⁷ You further emphasize the distinction between the straw poll and the caucuses by stating that the Federation will ask that the State, district and local parties include only a brief reference to the straw poll in their ads for the precinct caucuses, in order to avoid confusion between the two events. You note the existence of a page on the RPA web site publicizing the straw poll and stating that the precinct caucus will be held "in conjunction with the straw poll." The Federation has asked the RPA to change the page to indicate that the straw poll will be separate from the caucus, that one need not participate in both, and that the straw poll is being funded by the Federation.

⁸ Some of these activities, however, may occur during the caucuses, which, as indicated above, are not conducted by the Federation.

organizations are encouraged to provide forums for any Republican presidential candidate campaigning in Alaska, and that the RPA should try to provide a statewide forum for a debate by as many Republican presidential candidates as possible.

Questions Presented

You state that the Federation is merely providing the opportunity for a straw poll, that it is not advocating the election of any particular candidate or candidates, and that the straw poll itself is not an election. Hence, you ask for confirmation of your conclusion that none of the proposed activity is subject to regulation under the Act; that is, that none of the donations to the Federation for the proposed activities and none of the Federation's disbursements with respect to them would constitute contributions or expenditures under the Act. In the alternative, you ask whether the straw poll expenses are subject to the allocation rules at 11 CFR 106.5.

Legal Analysis

The Act and Commission regulations define the terms "contribution" and "expenditure" to include a gift, loan, or payment of money or anything of value for the purpose of influencing a Federal election. 2 U.S.C. §431(8)(A)(i) and (9)(A)(i); 11 CFR 100.7(a)(1) and 100.8(a)(1). The term "anything of value" includes in-kind contributions, and the provision of any goods or services without charge, or at a charge which is less than the usual and normal charge for such goods or services, is a contribution, unless specifically exempted under 11 CFR 100.7(b) or 100.8(b). 11 CFR 100.7(a)(1)(iii) and 100.8(a)(1)(iv).

Commission regulations provide that party committees that make disbursements in connection with Federal and non-Federal elections shall allocate (i) administrative expenses; (ii) the direct costs of a fundraising program or event; (iii) State and local party activities exempt from the definition of contribution and expenditure under 11 CFR 100.7(b)((9), (15), or (17), and 100.8(b)(10), (16), or (18); and (iv) generic voter drives including activities that urge the general public to register, vote, or support candidates of a particular party, without mentioning a specific candidate. 11 CFR 106.5(a)(2)(i)-(iv). Under the allocation regulations, disbursements for such activities must be paid for entirely from funds subject to the limitations and prohibitions of the Act or from separate Federal and non-Federal accounts established pursuant to 11 CFR 102.5(a)(1)(i). 11 CFR 106.5(a)(1). Commission regulations provide that any party committee solicitation that makes reference to a Federal candidate or a Federal election shall be presumed to be for the purpose of influencing a Federal election, and contributions resulting from that solicitation shall be subject to the Act's limitations and prohibitions. The presumption may be rebutted by demonstrating to the Commission that the funds were solicited with express notice that they would not be used for Federal election purposes. 11 CFR 102.5(a)(3).

The Commission agrees that the straw poll itself is not a Federal election; the electoral process for selecting delegates and the choices of those delegates is the process that begins with the precinct caucuses and leads up to the State convention, as described above.⁹ Nevertheless, the Federation proposes to engage in fundraising, advertising, and organizing activities for the poll leading up to a form or ballot that contains a specific group of named Republican presidential candidates. As you state in your request, the straw poll “will encourage voters to select a Republican candidate for the presidential nomination,” and the “purpose of this straw poll is to obtain a valid expression of Alaska’s choice as the Republican nominee.” The Federation’s activities for the poll will thus be for the purpose of influencing the presidential election.¹⁰

The straw poll is an event that pertains entirely to a Federal election. In a mixed Federal/non-Federal context where no candidates are specifically mentioned, the activities you describe seem most similar to a generic vote drive urging support for the party, as compared to the other allocation categories. However, the straw poll and the activities pertaining to it will be devoted solely to the presidential election process. The fundraising and spending will be separated entirely from the other activities of the Federation or the State party, and fundraising appeals will focus on the presidential straw poll and presumably make clear that the funds will be used only for the poll. See 11 CFR 102.5(a)(3). You particularly emphasize the separation of the straw poll from the precinct caucuses which involve a number of party activities, both Federal and non-Federal. The Federation’s advertising of the straw poll will focus solely on the straw poll and will mention the precinct caucuses only to avoid confusion. In addition, unlike allocable generic party activities, this activity will focus on a specific group of candidates and the straw poll form itself will list specific candidates. The Commission concludes therefore that the Federation may only raise and use funds subject to the limitations and

⁹ Although the straw poll may be characterized as “for the expression of a preference” for a Republican Presidential nominee, it is specifically designated as a “straw poll.” As discussed below, it is part of Alaska’s presidential selection process, but does not constitute a primary election. See 2 U.S.C. §431(1)(D) and 11 CFR 100.2(c)(2).

¹⁰ You cite Advisory Opinion 1988-10 for the position that the straw poll is not an election and, hence, the Federation’s activities are not for the purpose of influencing an election. In that opinion, the Commission concluded that the election of precinct committee persons was not in itself an election or a “level” of a delegate selection process, and that activities by committee person candidates solely to achieve that office would not be subject to the Act. The election of the committee persons would occur simultaneously with a presidential preference primary that would determine the apportionment of delegates among the presidential candidates. The committee persons would select the actual delegates to the state and national nominating conventions. The Commission noted that the committee persons were party officials elected for two-year terms, and that, while one of their duties was the selection of delegates, the apportionment of delegates was determined by the preference primary and the preferences of the candidates for committee persons were not indicated on the ballot. Here, however, your request and the rules of the State party make it clear that this straw poll is a part of the presidential election process, that the candidates will be listed by name on the straw poll form, and that this activity is devoted solely to the presidential election process and not for the selection of party officers who perform other duties for the party as well. The fact that the straw poll itself is not an election does not negate the fact that the Federation’s activities are for the purpose of influencing the presidential election.

prohibitions of the Act for its activities in connection with the straw poll. See 2 U.S.C. §§441a(a)(1)(C), 441b, 441c, 441e, and 441f.

The Federation's proposed straw poll activities and related communications do not appear to entail acting in cooperation or with the prior consent of, or in consultation with, or at the request or suggestion of, any candidate or agents or authorized committee of a candidate. See 2 U.S.C. §§431(17) and 441a(a)(7)(B)(i); 11 CFR 109.1(a). Thus, these activities would not entail contributions to any candidate. The expenses for the activities would, however, be operating expenditures of the Federation, reportable on line 21b as "Other Federal Operating Expenditures," i.e., outside the allocation formula. Although the Commission has noted that the activity at issue occurs with respect to a specific group of Federal candidates and includes reference to specific candidates on the straw poll form, the Federation is not participating in activity specifically on behalf of these candidates or in a way that can be directly attributed to each candidate. Hence, the disbursements of the Federation need not be specifically allocated to the presidential candidates in accordance with 11 CFR 106.1(a) or (c)(2).¹¹

You have represented that the solicitation of funds for the Federation's straw poll activities will most likely be done in person or by telephone. Assuming that the Federation will not raise funds for the poll through any form of general public advertising, the solicitations of funds need not include a disclaimer. Moreover, if the public media advertising for participation in the poll does not contain any message expressly advocating the election or defeat of a candidate, the advertisements need not include a disclaimer. See 2 U.S.C. §441d(a); 11 CFR 110.11(a)(1).

¹¹ Section 106.1(a) provides that expenditures made on behalf of more than one clearly identified Federal candidate shall be attributed to each such candidate according to the benefit reasonably expected to be derived. Section 106.1(c)(2) provides that expenditures for registration or get-out-the-vote drives need not be attributed to individual candidates unless the expenditures are made on behalf of a clearly identified candidate and the expenditure can be directly attributed to that candidate.

This non-attribution approach is consistent with the Commission's response in Advisory Opinion 1988-22 to a political organization established to help elect more Republicans but not officially tied to the Republican Party. In discussing a newsletter published by the organization, the Commission stated that, if statements or references regarding clearly identified candidates appear in the newsletter and do not expressly advocate their election or defeat, nor solicit contributions on their behalf, and such communications are not made in coordination with the candidates, the payments for the allocable newsletter costs incurred in making these types of communications would "constitute operating expenses generally allocable to federal political activity," and not specifically attributable to candidates.

This response constitutes an advisory opinion concerning application of the Act and Commission regulations to the specific transaction or activity set forth in your request. 2 U.S.C. §437f.

Sincerely,

(signed)

Scott E. Thomas
Chairman

Enclosures (AOs 1988-22 and 1988-10)