



GEORGIA GOVERNMENT TRANSPARENCY & CAMPAIGN FINANCE COMMISSION

Advisory Opinion

2016-02

In response to a request on April 28, 2016, from Robert Highsmith, the Georgia Government Transparency and Campaign Finance Commission advises that contributions to and expenditures from newsletter funds established under I.R.C. § 527(g) do not need to be reported as candidate contributions and expenditures under Georgia's Campaign Finance Act if the contributions or expenditures were not made for the purpose of influencing the nomination for election or election of a candidate or official. The mere registration of a newsletter fund under I.R.C. § 527(g), however, does not create an irrebuttable presumption that the contributions to or expenditures from the funds are not "contributions" or "expenditures" under Georgia law, and an independent examination must be made in each case to determine whether the funds have not been used in a manner that subjects them to disclosure under Georgia law.

Question Presented

Do contributions to and expenditures from a newsletter fund established under 26 U.S.C. § 527(g) that are used solely for the preparation and circulation of a newsletter, consistent with the terms of § 527(g), constitute "contributions" or "expenditures" under the Campaign Finance Act that must be disclosed under the Act?

Background

Section 527(g) of the federal Internal Revenue Code provides:

(g) Treatment of newsletter funds

(1) In general. For purposes of this section, a fund established and maintained by an individual who holds, has been elected to, or is a candidate (within the meaning of paragraph (3)) for nomination or election to, any Federal, State, or local elective public office, for use by such individual exclusively for the preparation and circulation of such individual's newsletter shall, except as provided in paragraph (2), be treated as if such fund constituted a political organization.

(2) Additional modifications. In the case of any fund described in paragraph (1) --

(A) the exempt function shall be only the preparation and circulation of the newsletter, and

(B) the specific deduction provided by subsection (c)(2)(A) shall not be allowed.

(3) Candidate. For purposes of paragraph (1), the term “candidate” means, with respect to any Federal, State, or local elective public office, an individual who --

(A) publicly announces that he is a candidate for nomination or election to such office, and

(B) meets the qualifications prescribed by law to hold such office.

26 U.S.C. § 527(g) (sometimes “I.R.C. § 527(g)”).

Treating a newsletter fund as a “political organization” under § 527(g) exempts the fund from taxation if the fund only collects or expends money on “exempt functions.” *See* I.R.C. § 527(c)(1) (“gross income” for a defined “political organization” excludes “exempt function income”).¹ For newsletter funds, exempt functions are “only the preparation and circulation of the newsletter,” *id.* at (g)(2)(A), and include, among other things, secretarial services, printing, addressing, and mailing. 26 C.F.R. § 1.527-7(c). Significantly, the Code of Federal Regulations expressly provide: “Newsletter fund assets may not be used for campaign activities.” 26 C.F.R. § 1.527-7(d).

Section 527 political organizations are generally required to file monthly or quarterly disclosures related to the contributions they receive and the expenditures they make via the filing of an IRS Form 8872 disclosure. *See* I.R.C. § 527(j). However, this disclosure is not required if the 527 organization is, among other things, a “qualified State or local political organization.” *Id.* at (j)(5)(C). Nonetheless, to be a “qualified state or local political organization” the entity or fund must be:

(ii) ... subject to State law that requires the organization to report (and it so reports) --

(I) information regarding each separate expenditure from and

¹ Under § 527:

- (3) ... "exempt function income" means any amount received as--
- (A) a contribution of money or other property,
 - (B) membership dues, a membership fee or assessment from a member of the political organization,
 - (C) proceeds from a political fundraising or entertainment event, or proceeds from the sale of political campaign materials, which are not received in the ordinary course of any trade or business, or
 - (D) proceeds from the conducting of any bingo game (as defined in section [I.R.C. §] 513(f)(2)) to the extent such amount is segregated for use only for the exempt function of the political organization.

26 U.S.C. § 527(c)(3). The general rules for exemption of “political organizations” under § 527 are different than those for newsletter funds, for, while a newsletter fund is defined as a “political organization” it may not engage campaign activities while campaign activities are precisely what other 527 political organizations engage in.

contribution to such organization, and

(II) information regarding the person who makes such contribution or receives such expenditure, which would otherwise be required to be reported under this section, and

(iii) with respect to which the reports referred to in clause (ii) are (I) made public by the agency with which such reports are filed, and (II) made publicly available for inspection by the organization in the manner described in section [I.R.C. §] 6104(d).

26 U.S.C.S. 527(e)(5). Thus, if the newsletter fund does not report under State law, it is required to report under federal law. On the other hand, if it is required to report under State law – and does so report – then it is likely not required to file reports under federal law.

On April 28, 2016, Robert Highsmith of Holland & Knight LLP, requested an advisory opinion as to whether a public officer and/or candidate for public office, in this instance a member of the Georgia General Assembly, must report Georgia’s Campaign Finance Act contributions to and expenditures from a newsletter fund established under I.R.C. § 527(g).

Discussion

The Campaign Finance Act (hereinafter “CFA”), O.C.G.A. § 21-5-1 *et. seq.*, requires every public officer and candidate for public office to file periodic campaign finance disclosures and personal financial statements with the Commission in the form of Campaign Contribution Disclosure Reports (CCDRs) and Personal Financial Disclosure Statements (PFDS), respectively. *See* O.C.G.A. §§ 21-5-2, 21-5-34(a)(1)(A), and 21-5-50(a)(1). In addition to requiring periodic disclosures, the CFA also regulates the amount and types of contributions and expenditures that public officers and candidates for public office are permitted to accept and make in their bid to either obtain or retain elected office. *See generally* O.C.G.A. §§ 21-5-30.1, 21-5-30.2, 21-5-33, and 21-5-41.

Georgia’s CFA contains no provision or exemption for “newsletters” from candidates or public officers.² The Commission, therefore, must determine whether contributions to and expenditures from a newsletter fund established under I.R.C. § 527(g) would be “contributions” or “expenditures” to a “candidate” within the meaning of the CFA.

² The CFA does provide:

No agency and no person acting on behalf of an agency shall make, directly or indirectly, any contribution to any campaign committee, political action committee, or political organization or to any candidate; but nothing in this Code section shall prohibit the furnishing of office space, facilities, equipment, goods, or services to a public officer for use by the public officer in such officer's fulfillment of such office.

O.C.G.A. § 21-5-30.2. Thus, if a newsletter issued by a public officer is a contribution to the public officer as “candidate,” within the meanings of the CFA, the newsletter could not be issued by the agency. If, however, the newsletter is simply in fulfillment of office and is not a contribution, within the meaning of the CFA and, specifically, § 21-5-30.2, then the newsletter could, in theory, be issued by the agency without violating the CFA.

In analyzing this question the Commission assumes that the newsletter fund is, in fact, properly constituted and operating under I.R.C. § 527(g). This entails assuming that the newsletter fund is not being used for campaign activities. That is because the I.R.C. expressly forbids newsletter funds from being used for campaign activities. 26 C.F.R. § 1.527-7(d). A newsletter fund that is being used for campaign activities would not qualify as exempt under the I.R.C. and, likewise, contributions and expenditures to and from such a fund would plainly be “contributions” and “expenditures” that must be reported under the CFA.³

In determining what constitutes a “contribution” or an “expenditure,” the Commission looks to the CFA’s definitions of the terms. Under the CFA:

"Contribution" means a gift, subscription, membership, loan, forgiveness of debt, advance or deposit of money or anything of value conveyed or transferred for the purpose of influencing the nomination for election or election of any person for office, bringing about the recall of a public officer holding elective office or opposing the recall of a public officer holding elective office, or the influencing of voter approval or rejection of a proposed constitutional amendment, a state-wide referendum, or a proposed question which is to appear on the ballot in this state or in a county or a municipal election in this state. The term specifically shall not include the value of personal services performed by persons who serve without compensation from any source and on a voluntary basis. The term "contribution" shall include other forms of payment made to candidates for office or who hold office when such fees and compensation made can be reasonably construed as a campaign contribution designed to encourage or influence a candidate or public officer holding elective office. The term "contribution" shall also encompass transactions wherein a qualifying fee required of the candidate is furnished or paid by anyone other than the candidate.

O.C.G.A. § 21-5-3(7) (emphasis added).

Similarly:

"Expenditure" means a purchase, payment, distribution, loan, advance, deposit, or any transfer of money or anything of value made for the purpose of influencing the nomination for election or election of any person, bringing about the recall of a public officer holding elective office or opposing the recall of a public officer holding elective office, or the influencing of voter approval or rejection of a proposed constitutional amendment, a state-wide referendum, or a proposed question which is to appear on the ballot in this state or in a county or a municipal election in this state. The

³ While a newsletter fund that is being used for campaign activities under the meaning of federal law – and so does not qualify for exempt federal tax treatment under I.R.C. § 527 – would plainly constitute “contributions” and “expenditures” under the CFA, *see* O.C.G.A. § 21-5-3(7), (12)(definitions), the converse is not necessarily so: it is possible that payments that do not constitute “campaign activities” under federal law may still constitute “contributions” or “expenditures” under the CFA.

term specifically shall not include the value of personal services performed by persons who serve without compensation from any source and on a voluntary basis. The term "expenditure" shall also include the payment of a qualifying fee for and on behalf of a candidate.

O.C.G.A. § 21-5-3(12) (emphasis added). *See also* 52 U.S.C.S. §§ 30101(8)(A)(i), 30101(9)(A)(i) (definitions of "contribution" and "expenditure" under federal law, similar in their terms to Georgia's).

In short, as relevant here, "anything of value made for the purpose of influencing the nomination for election or election of any person" constitutes a "contribution" and "expenditure" under the CFA. Contributions to and expenditures from a newsletter fund meet this definition (since, as monetary amounts related to a fund, they fall into the category of "anything of value") if they are "made for the purpose of influencing the nomination for election or election of any person."

The primary purpose of a newsletter, however, may not be to "influence the nomination for election or election of an official" but to provide information to the official's constituents.⁴ And, indeed, federal law seems to envision providing information to constituents as the primary purpose of newsletter funds. As noted above, it may not be used for campaign activity, 26 C.F.R. § 1.527-7(d); it is, in short, a *newsletter*.

The mere fact that a newsletter enhances a candidate's or official's name recognition does not, in itself, make the primary purpose of the newsletter to influence the nomination for election or election of a candidate or an official. Nor does the fact that the newsletter ties activities to a candidate or official make the primary purpose of the newsletter to influence the nomination for election or election of a candidate or an official. If the primary purpose of the newsletter is to provide information rather than to campaign for a candidate or official, contributions to and expenditures from the newsletter's fund do not constitute "contributions" or "expenditures" under the CFA.

Each newsletter must be examined on a case-by-case basis (by the Commission and its staff, when an appropriate complaint is received) to determine whether its primary purpose is as a newsletter or, rather, to influence the nomination for election or election of a candidate or an official. The reference in the newsletter to a specific candidacy by the candidate or official, the closeness of the newsletter's distribution to the date of an election, the scope of distribution of the newsletter, the presence of political attacks on opposing candidates or viewpoints, and the solicitation of funds or political support by the newsletter may show that its primary purpose is not to disseminate news but to solicit voters or campaign contributions. *Cf.* 52 U.S.C. 30104(f)(3) (defining "electioneering communication"). If the primary purpose of the fund's activities is, in light of all of the facts, to influence the nomination for election or election of a Georgia candidate or official, then the filings and disclosures mandated by the CFA must be

⁴ Of course, an action may have more than one purpose or goal. We look to the primary purpose in interpreting the CFA's "contribution" and "expenditure" definitions. If we did not, any activity of any kind related to a candidate or elected official could be a contribution or expenditure if the activity has any value, since all activities of all kinds may have the effect of influencing the nomination for election or election of the person.

made.

The fact that a newsletter fund qualifies under I.R.C. § 527(g) newsletter, however, creates a rebuttable presumption that the primary purpose of the fund is not to influence the nomination for election or election of a candidate or an official since such a qualifying fund cannot be used for a political purpose. The fact that a fund may be so registered or accepted by the I.R.S., however, does not dispositively establish that the fund is not receiving “contributions” or making “expenditures” within the meaning of Georgia law. The Commission, and Georgia agencies in general, are not bound by such independent conclusions but must make an appropriate analysis in each case as governed by Georgia law.

Conclusion

For the forgoing reasons, the Georgia Government Transparency and Campaign Finance Commission advises contributions to and expenditures from newsletter funds established under I.R.C. § 527(g) do not need to be reported as candidate contributions and expenditures under Georgia’s Campaign Finance Act if the contributions or expenditures were not made for the purpose of influencing the nomination for election or election of a candidate or official. The mere registration of a newsletter fund under I.R.C. § 527(g), however, does not create an irrebuttable presumption that the contributions to or expenditures from the funds are not “contributions” or “expenditures” under Georgia law, and an independent examination must be made in each case to determine whether the funds have not been used in a manner that subjects them to disclosure under Georgia law. Moreover, the Commission advises that the nondisclosure to the Commission of such a newsletter funds’ contributions or expenditures may trigger the disclosure requirements of federal law pursuant to 26 U.S.C.S. 527(e)(5).

This Advisory Opinion concerns the application of the Georgia Government Transparency and Campaign Finance Act, or regulations prescribed by the Georgia Government Transparency and Campaign Finance Commission, to the specific facts, transaction or activity set forth *supra*.

Advisory Opinion 2016-02 is hereby adopted by the Commission in conformity with O.C.G.A.

§ 21-5-6(13) on _____, 2016.

R. Lawton Jordan, III
Chair of the Commission

AO 2016-02 prepared by Stefan Ritter and Robert S. Lane.
June 21, 2016.