



NORTH CAROLINA

State Board of Elections

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KIM WESTBROOK STRACH
Executive Director

August 28, 2015

Mr. Michael Weisel
Bailey & Dixon, LLP
Post Office Box 1351
Raleigh, North Carolina 27602

Re: Request for Written Advisory Opinion pursuant to NC.C. Gen. Stat. § 163-278.23 on Questions Related to the Scope of Article 22A of Chapter 163 of the N.C. General Statutes (“G.S.”)

Dear Mr. Weisel:

In your request for opinion, you seek guidance on the State Board of Election’s regulatory authority over “issue advocacy.” The following opinion is provided in accordance with N.C.G.S. § 163-278.23 and is based upon the information supplied in your request for opinion.

Factually, you have provided that several of your clients are nonprofit North Carolina corporations organized under sections 501(c)(4) and 527 of the Internal Revenue Code. Your letter indicates “These entities conduct research, sponsor educational activities and events, and disseminate information regarding issue and policy positions. These efforts educate the public about and promote the maintenance and improvement of North Carolina’s common good, quality of life, and social welfare (*e.g.* the importance of adequately funding the state’s public education system), while holding public officials accountable for their actions and statements concerning these matters.” In 2015 and 2016, your clients wish to engage in communications with the public through broadcast, cable, internet or satellite transmission, mass mailing or telephone “as a component of educating the general public about various issue, policy, and accountability matters.” These communications are the subject of the specific advisory question you pose:

Could any payment for issue advocacy communications made during the Relevant Time Period (2015 and 2016) by the Entities (your clients) ever be deemed a “coordinated expenditure” or “contribution?”

In addressing this question, there are several other facts you include in your letter that are relevant. First, you confirm that none of the Entites are “owned or controlled by a candidate, authorized political committee of that candidate, a State or local political party or committee of that party, or an agent or official of any such candidate, party, or committee (hereinafter referred to as “Candidate”).” Second, you indicate that none of the Entities will make contributions to

candidates and none have the major purpose to support or oppose the nomination or election of one or more clearly identified candidates. It will also be assumed that this includes candidates of a clearly identified political party. Third, your letter states that the issue advocacy communications will not contain express advocacy or be deemed electioneering communications. Based on the assertion of all of these facts, the Entities would not be considered North Carolina political committees or assumed to be engaging in communications that would be deemed electioneering communications or independent expenditures.

The State Board of Elections has regulatory authority over North Carolina political committees and entities engaging in electioneering communications and/or independent expenditures. If an organization is not a North Carolina political committee and is not engaging in electioneering communications or communications that contain express advocacy, then communications made by those organizations are not subject to State Board of Elections regulation.

If an organization that is not a North Carolina political committee coordinates issue advocacy communications with a Candidate and those issue advocacy communications do not constitute electioneering communications or contain express advocacy, payments for those communications cannot be deemed "coordinated expenditures" or "contributions."

This opinion is based upon the information provided in your request for opinion. If any information in that letter should change, you should consult with our office to ensure that this opinion would still be binding. Finally, this opinion will be filed with the Codifier of Rules to be published unedited in the North Carolina register and the North Carolina Administrative Code.

Sincerely,



Kim Westbrook Strach

cc: Mollie Masich, Codifier of Rules

Amy Strange, Deputy Director-Campaign Finance and Operations

July 7, 2015

VIA HAND DELIVERY, U. S. MAIL AND ELECTRONIC MAIL

Ms. Kimberly Westbrook Strach
Executive Director
State Board of Elections
P.O. Box 27255
Raleigh, North Carolina 27611-7255

Re: Request for Written Advisory Opinion pursuant to N.C. Gen. Stat. §163-278.23 on Questions Related to the Scope of Article 22A of Chapter 163 of the N.C. General Statutes (“G.S.”)

Dear Ms. Strach,

This is a request for a formal written advisory opinion from you pursuant to G.S. §163-278.23 on questions related to the scope of Article 22A of Chapter 163 concerning the North Carolina State Board of Election’s (“Board”) regulatory authority over “issue advocacy”.

Facts

We represent several nonprofit North Carolina corporations (“Entities”) organized under sections 501(c)(4) and 527 of the Internal Revenue Code, respectively. These Entities conduct research, sponsor educational activities and events, and disseminate information regarding issue and policy positions. These efforts educate the public about and promote the maintenance and improvement of North Carolina’s common good, quality of life, and social welfare (*e.g.* the importance of adequately funding the state’s public education system), while holding public officials accountable for their actions and statements concerning these matters.

A separate and distinct board of directors comprised of individual citizens governs each of the Entities. The Entities are not owned or controlled by any candidate, authorized political committee of that candidate, a State or local political party or committee of that party, or an agent or official of any such candidate, party, or committee (hereinafter referred to as “Candidate”).

As a component of educating the general public about various issue, policy and accountability matters, these Entities may communicate to the public during calendar years 2015 and 2016 (“Relevant Time Period”) by means of broadcast, cable, internet or satellite transmission, mass mailing or telephone. These are commonly referred to as “issue advocacy” communications.

During the Relevant Time Period, the Entities will not make contributions to a Candidate, nor engage in any communications to the public that are “express advocacy”¹ or “electioneering communications.”² Further, the major purpose of each of the Entities is not to support or oppose the nomination or election of one or more clearly identified candidates.

The Entities may coordinate issue advocacy communications with a Candidate during the Relevant Time Period. However, each of the Entities through its independent board of directors has sole and final control and authority over all issue advocacy communication decisions.

Advisory Question

Could any payment for issue advocacy communications made during the Relevant Time Period by the Entities ever be deemed a “coordinated expenditure” or “contribution?”³

Analysis

Our analysis of Article 22A of Chapter 163 containing North Carolina’s election laws leads us to the conclusion that the sole answer to this question is “No.” The North Carolina General Assembly has not granted regulatory authority to the Board over issue advocacy communications. This answer remains accurate, even if the Entities and the Candidate “coordinated” within the definition of G.S. §163-278.6(6h) concerning issue advocacy communications to the general public.

This conclusion is based on analysis of the following statutory and constitutional provisions:

1. The definition of “expenditure” in G.S. §163-278.6(9).
2. The definition of “coordinated expenditure” in G.S. §163-278.6(6g).
3. The definition of “contribution” in G.S. §163-278.6(6).
4. The description in G.S. §163-278.14A of when a person acts to support or oppose the nomination or election of one or more clearly identified candidates.
5. The definition of independent expenditure in G.S. §163-278.6(9a).
6. The First Amendment to the United States Constitution and N.C. Constitution Article I, § 14.

¹ Communications that “support or oppose” a Candidate within the meaning of G.S. §163-278.14A

² As defined by G.S. §163-278.6(8j)

³ As defined by G.S. §163-278.6(6g) and (6), respectively.



G.S. §163-278.6(6g) defines “coordinated expenditure” as an expenditure that is made in concert or cooperation with, or at the request or suggestion of, a candidate, a candidate campaign committee as defined in G.S. §163-278.38Z(3), the agent of the candidate, or the agent of the candidate campaign committee.

Therefore, in order for an expenditure to be a “coordinated expenditure,” it must be both “coordinated” and an “expenditure.”

A “coordinated expenditure” is also treated as a “contribution” to the Candidate with whom it is coordinated.⁴ However, a communication that does not “support or oppose” a Candidate within the meaning of G.S. §163-278.14A and does not qualify as an “electioneering communication” can never constitute a “contribution.”

G.S. §163-278.6(6h) defines “coordination,” as “in concert or cooperation with, or at the request or suggestion of.”

G.S. §163-278.6(9) defines “expenditure.” By definition, an “expenditure” is anything of value given “to support or oppose the nomination, election, or passage of one or more clearly identified candidates, or ballot measure.”

G.S. §163-278.14A provides that a communication is made “to support or oppose the nomination or election of one or more clearly identified candidates” when it uses specified phrases, such as “vote for” or “vote against” a named candidate or another similar phrase. A communication that uses the phrases specified in G.S. §163-278.14A is commonly referred to as “express advocacy.” A communication is deemed “to support or oppose” a candidate only when it uses words of “express advocacy.” This understanding stems from the cases of *Buckley v. Valeo*, 424 U.S. 1, 68, 96 S. Ct. 612, 46 L. Ed. 2d 659 (1976) and *North Carolina Right to Life, Inc. v. Leake*, 525 F.3d 274 (4th Cir. 2008).

Reading the definition of “expenditure” together with G.S. §163-278.14A compels the conclusion that a “coordinated expenditure” must be an expenditure for a communication that contains express advocacy.

This conclusion is bolstered by the definition of “independent expenditure” set out in G.S. §163-278.6(9a). Under that definition, an “independent expenditure” is “an expenditure to support or oppose the nomination or election of one or more clearly identified candidates that is not a coordinated expenditure.” This definition assumes that all coordinated expenditures are

⁴ G.S. §163-278.6(6) and (6g)

expenditures to support or oppose candidates and distinguishes expenditures that are not coordinated from those that are.

The conclusion that a “coordinated expenditure” must be an expenditure for a communication that contains only express advocacy is further bolstered by the principles of statutory construction as well as the legislative history of G.S. §163-278.14A. Under the principles of statutory construction, a statute will be interpreted in a manner that is constitutional.⁵

If the term “coordinated expenditure” included expenditures for issue advocacy as well as express advocacy, the statute would place an impermissible burden on political speech.⁶

The legislative history of G.S. §163-278.14A also supports a narrow interpretation. As stated in its title, S.L. 2008-150 was enacted in response to the 2008 *N.C. Right to Life* decision.⁷ The General Assembly’s response was to narrow G.S. §163-278.14A(a) by deleting then subdivision (a)(2), which set out a vague standard of “communications whose essential nature expresses electoral advocacy.” [see Exhibit A, p. 7]

Historically, the Board has not sought to regulate an area in which the General Assembly has chosen not to give the Board the authority to regulate.⁸ We believe the General Assembly specifically has chosen not to regulate issue advocacy and are available to discuss our statutory interpretation at your convenience. In the meantime, our clients plan to proceed forward under the above referenced statutory interpretation, pending receipt of your written advisory opinion to the contrary.

⁵ “Where one of two reasonable constructions will raise a serious constitutional question, the construction which avoids this question should be adopted.” *In re Arthur*, 291 N.C. 640, 642, 231 S.E.2d 614, 616 (1977). “Thus if two reasonable constructions of the statute are possible, this Court will adopt the construction which renders the statute constitutional.” *State v. Petersilie*, 334 N.C. 169, 180, 432 S.E.2d 832, 838 (1993) (political speech case).

⁶ *North Carolina Right to Life, Inc. v. Bartlett*, 168 F.3d 705, 713, 718 (4th Cir. 1999) (finding a statute unconstitutionally vague and overbroad because it encompassed entities engaging in issue advocacy and did not limit its coverage to entities engaging in express advocacy), *cert. denied* 528 U.S. 1153 (2000). In *FEC v. Christian Action Network*, 110 F.3d 1049, 1064 (4th Cir. 1997) (ruling that the Christian Action Network’s advertisement was constitutionally protected issue advocacy that could not be regulated) “But the Supreme Court has unambiguously held that the First Amendment forbids the regulation of our political speech under such indeterminate standards. “Explicit words of advocacy of election or defeat of a candidate,” “express words of advocacy,” the Court has held, are the constitutional minima. To allow the government’s power to be brought to bear on less, would effectively be to dispossess corporate citizens of their fundamental right to engage in the very kind of political issue advocacy the First Amendment was intended to protect – as this case well confirms.”

⁷ *N.C. Right to Life v. Leake*, 524 F.3d 427 (4th Cir. 2008)

⁸ 8 NCAC 14 (December 10, 2010) *State Board of Elections Advisory Opinion*

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As always, we thank you for your consideration.

Very truly yours,

BAILEY & DIXON, LLP

A handwritten signature in black ink that reads "Michael L. Weisel". The signature is written in a cursive style with a large initial "M" and a long, sweeping underline.

Michael L. Weisel

MLW/db

Enclosures: As Stated

