



NORTH CAROLINA STATE BOARD OF ELECTIONS

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Mr. Jonathan S. Berkon
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May 5, 2020

Re: Request for an Advisory Opinion under N.C.G.S. § 163-278.23 regarding contributions from Federal Super PACs to state political parties

Dear Mr. Berkon and Ms. Weisman,

Thank you for contacting our office. As counsel for the Democratic Governors Association (“DGA”), you asked: (1) whether a Federal Super PAC may contribute to a state political party despite being able to accept funds in excess of the state’s \$5,400 contribution limit and from impermissible sources such as corporations or labor unions, and (2) whether a Federal Super PAC funded solely from unlimited contributions may contribute to a state political party despite being able to accept contributions in excess of \$5,400.

Each state political party may establish a North Carolina political party committee through which it accepts contributions and makes expenditures in support of North Carolina candidates. A political party committee is a type of political committee.

In your request, you note that the DGA maintains two political committees registered with the Federal Election Commission (“FEC”). One committee operates within the federal contribution limits and source restrictions – a traditional federal political committee. The other committee accepts unlimited contributions from “virtually any domestic source, including corporations and labor unions” – referred to as a federal independent expenditure-only political committee, Federal Super PAC or Federal IE PAC. The DGA may also establish a second Federal IE PAC that elects to only accept contributions from individuals.

Since the 1980s, the North Carolina State Board of Elections has permitted federal political committee to make contributions to North Carolina candidates and political committees if certain conditions are met. *See* Letter from Yvonne L. Southerland to Mr. John N. Davis, NC FREEPAC (August 29, 1994); NC State Board of Elections, August 8, 1985 Meeting Minutes. In 1995, this practice was codified in N.C.G.S. § 163-278.7A with the adoption of HB 1157 “An Act to

Codify and Clarify the State Board of Elections’ Ruling Concerning Contributions to State Campaigns by Federal Committees.” N.C. Sess. Laws 1995-593.

While a federal political committee is permitted to make contributions to North Carolina candidates or political committees, it is required to make its contributions within the limits specified in Article 22A. N.C.G.S. § 163-278.7A(3).

I. Contribution Limits under N.C.G.S. § 163-278.13

States may impose contribution limits that are “closely drawn” to the state’s interest in preventing corruption and the appearance thereof. *North Carolina Right to Life*, 525 F.3d 278, 291 (2008) (citing *Buckley v. Valeo*, 424 U.S. 1, 24-29 (1976)). While contribution limits may be applied to most political committees, the application of contribution limits to independent expenditure committees is limited. *Id.* at 293. The Fourth Circuit has held that North Carolina’s contribution limits cannot be imposed on independent expenditure political committees given the remove of independent expenditure committees from candidates themselves. *Id.* at 295. Independent expenditure committees do not coordinate their messages with candidates. *Id.*

Thus, the State of Board of Elections must consider whether a given committee operates as a traditional political committee, or as an independent expenditure political committee (“IE PAC”) in applying contribution limits. In applying the contribution limits in Article 22A to a federal political committee, North Carolina must consider whether the federal political committee is a traditional political committee or a Federal IE PAC.

North Carolina recognizes an IE PAC as a “political committee whose treasurer makes and abides by a certification to the State Board of Elections that the political committee does not and will not make contributions, directly or indirectly, to candidates or to political committees that make contributions to candidates.” N.C.G.S. § 163-278.13(j).

N.C.G.S. § 163-278.13(a) prohibits an individual, political committee, or other entity from contributing any money or other contributions in excess of the dollar limit for that election. Paragraph (c) prohibits any candidate or political committee from receiving the same. N.C.G.S. § 163-278.13(j), grants a specific exception to these contribution limits for IE PACs, however, the IE PAC must abide by the certification that it will not make contributions to candidates or to political committees that make contributions to candidates. *North Carolina Right to Life*, at 295 (“If independent expenditure committees are not in fact independent, they risk forfeiting their exemption from North Carolina’s contribution limits.”)

Much like a North Carolina IE PAC, a Federal IE PAC certifies to the FEC that “This committee will not use those funds to make contributions, whether direct,

in-kind, or via coordinated communications, to federal candidates or committees.” Federal Elections Commission, *Registering a Super PAC*, <https://www.fec.gov/help-candidates-and-committees/filing-pac-reports/registering-super-pac/> (last visited 04/14/2020).

Given the similarity between a NC IE PAC and Federal IE PAC, North Carolina is limited in its ability to apply contribution limits to Federal IE PACs. As a result, the Campaign Finance Division has provided guidance to committees that Federal IE PACs may make unlimited contributions to North Carolina IE PACs.

However, a Federal IE PAC is not also exempt from N.C.G.S. § 163-278.13(j). N.C.G.S. § 163-278.7A cannot be read to grant a Federal IE PAC the ability to make contributions to North Carolina candidates and political committees when N.C.G.S. § 163-278.13(j) explicitly prohibits a North Carolina IE PAC from making the same contribution. The conditions imposed prior to and after the adoption of N.C.G.S. § 163-278.7A demonstrate an intent to subject federal committees to the rules and regulations that apply to North Carolina committees. A federal political committee, including a Federal IE PAC, is required to make its contributions within the limits specified in Article 22A. N.C.G.S. § 163-278.7A(3). N.C.G.S. § 163-278.13(j) is a limit specified in Article 22A.

There is also no support for the proposition that North Carolina intended to permit a Federal IE PAC to engage in activity with regards to North Carolina candidates that it is prohibited from engaging in with regards to federal candidates. If a Federal IE PAC were allowed to contribute to North Carolina candidates or political committees, there would be a significant loophole in North Carolina law which would incentivize a North Carolina IE PAC to file with the FEC, instead of the State Board, to take advantage of the loophole and avoid the application of N.C.G.S. § 163-278.13(j). North Carolina’s existing rules and regulations with regards to state candidates would be made irrelevant by use of a federal political committee structure.

II. Source Limitations under N.C.G.S. § 163-278.19(a)

In additional to the analysis above, N.C.G.S. § 163-278.19(a) prohibits a corporation, business entity, labor union, professional association or insurance company from directly or indirectly contributing to a candidate or political committee. Key to this limitation is the fact that the prohibition applies to both direct and *indirect* contributions.

A North Carolina political committee is also prohibited from accepting contributions from corporations under N.C.G.S. § 163-278.15.

A federal political committee which accepts corporate contributions may not make contributions to a North Carolina political committee. To permit a contribution would create a pathway for corporations to violate N.C.G.S. § 163-

278.19(a) and expose North Carolina political committees to receiving corporate contributions prohibited by N.C.G.S. § 163-278.15.

In conclusion, a Federal IE PAC that accepts unlimited contributions from prohibited sources may not make contributions to a North Carolina political party committee. A Federal IE PAC that only accepts unlimited contributions from individuals also may not make contributions to a North Carolina political party committee. All Federal IE PACs must comply with the limit in N.C.G.S. § 163-278.13(j) and may not make any contributions to North Carolina candidates or political committees that make contributions to North Carolina candidates.

At present, North Carolina's federal committee reporting forms do not ask federal political committees to disclose whether they operate as a federal political committee or as a Federal IE PAC. I am directing the Campaign Finance Division to update these disclosures to ensure greater transparency for the public and for North Carolina political committees accepting contributions from registered federal political committees.

The opinion will be filed with the Codifier of Rules to be published unedited in the North Carolina Register and North Carolina Administrative Code.

Sincerely,



Karen Brinson Bell
Executive Director
North Carolina State Board of Elections

Cc: Molly Masich, Codifier of Rules

February 7, 2020

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Re: Request for Written Advisory Opinion

Dear Ms. Brinson Bell:

Pursuant to N.C. Gen. Stat. § 163-278.23, we write on behalf of our client, the Democratic Governors Association (“*DGA*”) seeking a written advisory opinion regarding the permissibility of certain federal political committees to make contributions to state political parties and any affiliated party committees (each a “*state political party*”). It is the intention of the DGA and its representatives to rely on your advice and to abide by the terms and provisions of your opinion.

DGA maintains two political committees that are registered with the Federal Election Commission (“*FEC*”): (1) a political committee that complies with federal contribution limits (\$5,000 per year) and source restrictions (no contributions from corporations or labor unions) (“*Regular PAC*”) and (2) a political committee that may accept unlimited contributions from virtually any domestic source, including corporations and labor unions (“*Super PAC*”). Donors who contribute in excess of \$200 per calendar year to either the Regular PAC or Super PAC are disclosed to the FEC through ongoing campaign finance reports. Depending on the outcome of this request, DGA might also establish a second Super PAC with the FEC that is funded solely from an account maintained within DGA that only accepts unlimited contributions from individuals (“*Unlimited Individual PAC*”). Original donors would not be disclosed on the Unlimited Individual PAC’s campaign finance reports; instead, those reports would show lump sum transfers from the DGA.

The DGA asks two questions:

1. May the Super PAC contribute to a state political party despite being able to accept funds in excess of the state’s \$5,400 contribution limit and from impermissible sources such as corporations or labor unions?
2. May the Unlimited Individual PAC contribute to a state political party despite being able to accept contributions in excess of \$5,400?

I. North Carolina Law Governing State PACs

The North Carolina State Board of Elections' ("**Board**") position on non-federal political committees registered with the Board ("**state PACs**") is not complicated. A conventional state PAC may only make contributions to a state political party if it accepts contributions in permissible amounts and from permissible sources.¹ More specifically, if a state PAC wants to make contributions to a state political party, it may only accept contributions that comply with the \$5,400 limit on incoming contributions, and it may not accept contributions from corporations or labor unions.²

Alternatively, if a state PAC wishes to accept contributions from otherwise impermissible sources or in otherwise impermissible amounts, it must limit itself only to independent expenditure activity, and its treasurer must first certify that it "*does not and will not make any contributions...directly or indirectly, to a candidate or a political committee that makes contributions to candidates.*"³ In other words, it must agree to operate as an independent-expenditure only PAC.⁴ If the certification is not made, accepting such contributions is prohibited. Therefore, such independent expenditure committees are prohibited from making contributions to a state political party in North Carolina.

The Board's position is logical and consistent: a person or entity cannot do indirectly what it is prohibited from doing directly. If a corporation is prohibited from directly contributing to a state political party under North Carolina law, it should not be able to do so through a state PAC. Indeed, the Board's latest guidance confirms that "[i]t is unlawful for any corporation, business entity, labor union, professional association, or insurance company to *directly or indirectly* contribute to any political party committee."⁵ Similarly, if an individual can only give \$5,400 per election to a candidate, that donor should not be able to circumvent that restriction by giving indirectly through a state PAC. While the state *does* allow a state political party to accept unlimited contributions from individuals and state PACs,⁶ that exception does not extend to other types of committees.

¹ N.C. Gen. Stat. §§ 163-278.13(a), 163-278.15(a); N.C. State Bd. of Election, Campaign Finance, General Campaign Finance Information, <https://www.ncsbe.gov/campaign-finance> (adjusting limit to for inflation from Jan. 1, 2019 to Dec. 31, 2020); *see also* NC Statement of Organization - Independent Expenditure Committee, Form CRO-2100G, https://s3.amazonaws.com/dl.ncsbe.gov/Campaign_Finance/Forms/cro2100G/cro2100G.pdf.

² Form CRO-2100G, *supra* note 1; N.C. Gen. Stat. §§ 163-278.13(a), 163-278.15(a).

³ Form CRO-2100G, *supra* note 1 (emphasis added); *see also* 2019 Campaign Finance Manual at 90, NCSBE, https://s3.amazonaws.com/dl.ncsbe.gov/Campaign_Finance/Campaign%20Finance%20Manual%20Version%202019.3.pdf ["2019 Board Manual" herein]; N.C. Gen. Stat. §§ 163-278.13(a), 163-278.15(a).

⁴ N.C. Gen. Stat. § 163-278.13(j).

⁵ 2019 Board Manual, at 73 (emphasis added); *see also* N.C. Gen. Stat. § 163-278.19(a).

⁶ N.C. Gen. Stat. § 163-278.13(h); *see also* 2019 Board Manual, at 73 ("These political party committees are not subject to the five thousand four hundred dollar (\$5,400) per election contribution limitation that other political

II. Federal Political Committees and N.C. Gen. Stat. § 163-278.7A

To reduce unnecessary reporting burdens, North Carolina law permits federally-registered PACs to participate in North Carolina elections with truncated registration and reporting obligations. Specifically, North Carolina law permits a “federal political committee, as defined by the Federal Election Campaign Act and regulations pursuant thereto, to make contributions to a North Carolina candidate or political committee” so long as the committee (i) is registered with the Board, (ii) “[c]omplies with the reporting requirements specified by the [Board],” (iii) “[m]akes its contributions within the limits specified in this Article,” and (iv) appoints an assistant or deputy treasurer who is a resident of North Carolina.⁷

The substantive state laws governing federal PACs appears to be materially the same as those governing state PACs, in that federal PACs must “compl[y] with the [Board’s] reporting requirements” as well as make any contributions within the limits set out in Article 22A of the North Carolina General Statutes, which governs state political committees. DGA has found no evidence that N.C. Gen. Stat. § 163-278.7A was intended to allow federal PACs to accept funds otherwise prohibited under state law and spend those funds in state races. In fact, when this provision was enacted in 1996, the Super PAC and the Unlimited Individual PAC would have been prohibited entities under federal law.⁸

III. Legal Discussion

This request asks whether N.C. Gen. Stat. § 163-278.7A—the statute specifically addressing federal PACs—can somehow be interpreted to permit the Unlimited Individual PAC to make contributions to a state political party in ways that state PACs cannot. North Carolina law would appear to answer that question in the negative. Under N.C. Gen. Stat. § 163-278.7A(3), a federally-registered PAC that contributes to a state political party must “[m]ake[] its contributions within the limits specified in this Article.” North Carolina law, in turn, prohibits state PACs that accept contributions in excess of \$5,400 or from corporations or unions from contributing to a state political party. Accordingly, to the extent that federal PACs take money

committees and subordinate political party committees face....A contributor may give any amount to these political party committees and the political party committee may give any amount to any other North Carolina political committee.”).

⁷ N.C. Gen. Stat. § 163-278.7A.

⁸ *Citizens United v. FEC*, 558 U.S. 310 (2010); *SpeechNow.org v. FEC*, 599 F.3d 686 (D.C. Cir. 2010). The Board’s campaign finance forms appear to suggest that a federal PAC could make independent expenditures, but there is nothing to indicate that such an entity could make contributions to North Carolina candidate, party, or political committees. See NC Registered Federal Committee Independent Expenditure Report, Form CRO-4220, https://s3.amazonaws.com/dl.ncsbe.gov/Campaign_Finance/Forms/cro4220/cro4220.pdf.

from corporations or unions, or accept contributions in excess of \$5,400, they, like state PACs, would appear to be prohibited from making contributions to a state political party.⁹

Put differently, the question is whether the Board interprets N.C. Gen. Stat. § 163.278.7A and other governing statutes to give federal PACs a distinct advantage over state PACs in two material respects: (1) by allowing them to use funds received from impermissible sources or funds in excess of \$5,400 per source to make contributions to a state political party; and/or (2) by allowing them to use funds that have not been demonstrated to originate from permissible sources to make contributions to a state political party. The plain language of the statute suggests that it does not, since N.C. Gen. Stat. § 163-278.7A aims to create parity between state PACs and federal PACs. If anything, the statute allows for a more stringent scheme to be applied to federal PACs, stating, for example, that the reporting requirements can actually be *more* stringent than those applicable to state PACs when the “federal political committee makes any contribution to a North Carolina political committee in any election in excess of four thousand dollars (\$4,000) for that election.”¹⁰

To conclude that N.C. Gen. Stat. § 163-278.7A was intended to advantage federal PACs over state PACs would effectively gut the state’s corporate contribution ban and undermine existing contribution limits by creating a significant loophole through which excessive and impermissible funds can influence North Carolina elections. State PACs would deregister with the Board and register as Super PACs or Unlimited Individual PACs with the FEC. They would take in contributions well in excess of \$5,400, obscure the original source of those funds, and finance their North Carolina activities with funds the state legislature has intentionally banned from state elections. Had the state legislature intended to advantage federal PACs in this way, it likely would have included them in the same exemption that now allows a state political party to raise unlimited funds from individuals and state PACs.

With respect to donor disclosure, it would again appear that one cannot do indirectly what one cannot do directly.¹¹ The source and amount of a donor’s contribution to a state PAC must normally be disclosed under state law. Yet the filed reports of the Unlimited Individual PAC would not disclose the original source of its funds. It would run counter to the underlying purposes of North Carolina’s regulatory scheme to create a loophole through which a donor can obscure itself and the amount of its contribution simply by routing its donation through a non-reporting organization that subsequently contributes to a federal PAC. Washing contributions in this way would make it practically impossible for even a sophisticated observer to determine

⁹ N.C. Gen. Stat. §§ 163-278.13(a), 163-278.15(a); Form CRO-2100G, *supra* note 1.

¹⁰ N.C. Gen. Stat. § 163-278.7A.

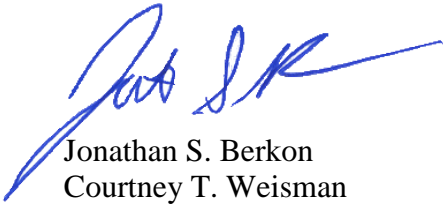
¹¹ *Id.* § 163-278.21 (“The State Board of Elections shall have responsibility, adequate staff, equipment and facilities, for promulgating all regulations necessary for the enforcement and administration of this Article and to prevent the circumvention of the provisions of this Article.”).

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whether such donations are complying with the law, thereby encouraging abuse and ultimately allowing the exception to outstrip the rule.

The Board must issue clear guidance on these questions – well in advance of the 2020 election – so that all political committees, regardless of partisan affiliation, are treated equally.

Sincerely,



Jonathan S. Berkon
Courtney T. Weisman
Counsel to Democratic Governors Association