



*State of New Jersey*

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July 24, 2009

Margaret F. Catalano, Esq.  
Carroll, McNulty & Kull L.L.C.  
120 Mountain View Blvd.  
Basking Ridge, NJ 07920

### **Advisory Opinion 01-2009**

Dear Ms. Catalano:

The Commission considered your request for an advisory opinion at its meeting of June 16, 2009 and at its meeting of July 21, 2009. At its meeting of July 21, 2009, the Commission directed me to issue this response. Your request is made on behalf of Daggett for Governor, Inc., the single candidate committee of Christopher J. Daggett, an Independent candidate for Governor in the 2009 general election (“the Daggett campaign” or “the campaign”). You have asked the Commission about reporting obligations in connection with the proposed sale of merchandise as a means of promoting the candidate.

### **Questions Presented**

May the Daggett campaign sell merchandise as a means of promoting information about the candidate and if so, 1) how does the campaign report expenditures associated with the sale of merchandise; and 2) are any or all portions of the receipts from such sale reportable as “contributions” as defined by the New Jersey Campaign Contributions and Expenditures Reporting Act, N.J.S.A. 19:44A-1 et seq. (the Reporting Act)?

### **Commission Response**

The Commission hereby advises you that the proposed transactions are reportable events by the campaign and that: 1) all expenditures from the sale of the merchandise must be reported as operating disbursements of the campaign, and 2) all receipts from the proposed transactions involving the sale of merchandise by the campaign must be reported as contributions as that term is defined in the Reporting Act, subject to the contribution limits, the reporting of contributor information, and the requirements of the pay-to-play laws.

### **Submitted Facts**

Commission records indicate that Christopher J. Daggett filed Form D-1 on March 10, 2009, designating a single candidate committee, “Daggett for Governor, Inc.” as an Independent Candidate for Governor in the 2009 general election. Commission records further indicate that the campaign has filed two quarterly reports, on April 15, 2009, and on July 15, 2009, and that the campaign applied for public matching funds on July 7, 2009. That application is currently pending.

The campaign writes that it seeks to sell merchandise such as T-shirts and buttons “at cost” to the public to promote awareness of the candidate. The merchandise would be sold for the “exact cost” of the item to the campaign, either through direct solicitation or through the internet, and the campaign would make no profit from the sale. The campaign asks whether or not the purchase of the merchandise by the campaign is an expense that must be reported and whether or not the sale price received for the merchandise would be considered a “contribution” to the campaign. The campaign argues that the proposed transactions are non-reportable events as an “even exchange” with no profit derived to the campaign.

### **Discussion**

N.J.S.A. 19:44A-2 provides that the public policy of the Reporting Act is to require the reporting of all contributions received and expenditures made to provide political information on any candidate for public office in order to “limit political contributions as a method of preventing undue influence upon candidates and committees”; N.J.S.A. 19:44A-2.

A candidate committee is required to make a full cumulative report “of all contributions in the form of moneys, loans, paid personal services or other things of value, made.... and all expenditures paid out of the election fund,” see N.J.S.A. 19:44A-16, and to report “contributor information” for all contributions received in excess of \$300 in the aggregate in the election, including the name and address of each contributor, and for contributions received from an individual contributor, occupation and employer information, see N.J.S.A. 19:44A-16 and N.J.A.C. 19:25-10.1 et seq. All gubernatorial candidates in the 2009 general election, whether or not accepting public financing, are subject to a contribution limit of \$3,400, see N.J.S.A. 19:44A-29 and N.J.A.C. 19:25-15.6. A publicly financed gubernatorial candidate is also subject to additional restrictions concerning the use of public funds, see N.J.S.A. 19:44A-35, and additional requirements concerning submission of contributions eligible for public matching funds, see N.J.A.C. 19:25-15.14 through 15.17.

#### **1. Are the proposed transactions a permissible use of campaign funds?**

Pursuant to the provisions of N.J.S.A. 19:44A-11.2, the proposed transactions as described are a permissible use of campaign funds as campaign expenses to promote the candidate and transmit a political message in the 2009 general election. However, because they involve a fundraising aspect and are associated with the receipt of funds from the public, they may not fall within the enumerated uses of public funds found in the Reporting Act; see N.J.S.A. 19:44A-35 and N.J.A.C. 19:25-15.24. In Advisory Opinion 01-2005, the Commission wrote that costs to develop and operate a candidate’s website may be paid with public matching funds to the extent they relate directly to communication of a candidate’s message to voters and not to fundraising purposes to solicit and receive contributions.

## **2. Are the expenses associated with the proposed transactions reportable as “expenditures”?**

An expenditure subject to reporting by the campaign includes any transfer of money or other thing of value, as well as any pledge or commitment, or assumption of liability to make such transfer, see definitions at N.J.S.A. 19:44A-3d and N.J.A.C. 19:25-1.7. In the proposed transactions, the costs of the merchandise paid for by the campaign are clearly “transfers” of money or other thing of value or assumptions of liability to make such transfers, and subject to reporting as expenditures pursuant to the provisions of N.J.A.C. 19:25-12.1 et seq.

Whether or not the campaign makes a profit on the transactions is irrelevant to the reporting requirement. For example, if a campaign mails out campaign literature, costs associated with the production and mailing are clearly expenditures subject to reporting as political communication costs pursuant to the provisions of N.J.A.C. 19:25-10.11. Should a campaign mailer contain a solicitation card through which contributions are returned and received by the campaign, the expenditure reporting requirements do not change. Similarly, if a campaign holds a fundraiser at a banquet hall, fundraising costs are also reportable as “expenditures” of the campaign such as costs for the caterer, food, and the hall rental.

In-kind contributions and expenditures. If the costs associated with the transactions are paid for by another entity and coordinated with the campaign, the costs are reportable by the campaign as coordinated expenditures. Once an expenditure of the campaign becomes treated as an “in-kind” expenditure, however, it also becomes treated as an “in-kind” contribution, see definition at N.J.A.C. 19:25-1.7, and subject to the contribution limits. The campaign indicates it will sell the merchandise at “cost”; any discount provided by a vendor would become a reportable in-kind contribution subject to the contribution limits.

## **3. Are the receipts associated with the proposed transactions reportable as “contributions” subject to the contribution limit?**

N.J.S.A. 19:44A-3d defines “contributions” as all “transfers of money or other thing of value” to a candidate committee; see also N.J.A.C. 19:25-1.7. Even if the primary purpose of the sale of merchandise is voter communication, the receipts generated by the transactions are clearly transfers of money or other things of value and therefore reportable “contributions” by the campaign. This reporting requirement does not make an exception for the concept of an “equal exchange” or “reimbursement” of “out of pocket expense.”

The Commission has a long history of determining that a contribution received by a fundraising method may not be “netted out” to subtract the cost of obtaining the contribution. In one of its earliest Advisory Opinions, Advisory Opinion 0-19-73, the Commission advised that the “gross proceeds” from a cocktail party authorized or incurred by candidates in furtherance or in aid of their candidacies must be reported as contributions. Both the Compliance Manual for Candidates (at page 20) and the Gubernatorial Public Financing Manual (at page 14) contain similar instructions in this regard. The concept that a gross receipt rather than a net receipt is a reportable contribution is also found in the regulation concerning electronic transfer of funds, N.J.A.C. 19:25-10.16, under which a candidate must report as the amount of the contribution the total amount authorized to be charged and not “net out” any fees charged by the financial institution.

To treat the receipts from these transactions in any category other than reportable “contributions,” would pose a possible threat to the contribution limits. For example, a third party could offer to buy an amount of t-shirts at a total cost in excess of the \$3,400 contribution limit, or an individual contributor could purchase an unlimited amount of merchandise while also making a monetary or other in-kind contribution of \$3,400. The Commission does not mean to suggest that this campaign has any intention to circumvent the contribution limits.

The Pay-to-Play laws. The Commission also notes the potential implication under the state’s “pay-to-play” laws, which contain prohibitions and disclosure requirements relevant to “contributions” by business entities that have or are seeking New Jersey government contracts. See N.J.S.A. 19:44A-20.3 through 20.25 (prohibition laws) and N.J.S.A. 19:44A-20.26, 20.27 (disclosure laws). These statutes reference the Reporting Act in defining a “contribution”; see N.J.S.A. 19:44A-20.16 and N.J.S.A. 19:44A-20.4.

Public Financing provisions; contributions eligible for match. The Commission advises you that the entire amount of the contributions received under the proposed transactions may be submitted for matching public funds. This response is based upon the relatively small value of the merchandise and with the caveat that the campaign should seek further advice concerning any other contemplated sale of merchandise.

### **Conclusion**

The Commission advises the campaign that the proposed transactions involving sale of merchandise by the campaign will trigger reporting obligations to report: the costs of such transactions as “expenditures” of the campaign and the gross receipts from such transactions as “contributions” subject to the \$3,400 gubernatorial contribution limit and reporting of contributor information where required. In any transactions involving a vendor which are not paid for as an expenditure through the depository, the expenditure of the vendor becomes an in-kind contribution subject to the \$3,400 gubernatorial contribution limit.

Should the campaign become eligible to receive public matching funds, the contributions may be submitted for matching public funds in the full amount of the contribution. Finally, the Commission advises the campaign that public funds may not be used for the purchase of merchandise for sale to the public.

The Commission wishes to thank the Daggett campaign and you for your inquiry. Thank you also for your extensions of time to answer during the Commission’s consideration of your request.

Very truly yours,

Election Law Enforcement Commission

By: \_\_\_\_\_  
Carol L. Hoekje, Esq.



Advisory Opinion Request
For Candidates and Committees

NEW JERSEY ELECTION LAW ENFORCEMENT COMMISSION
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PLEASE PROVIDE THE INFORMATION REQUESTED BELOW

A person, committee or entity subject to, or reasonably believing he, she or it may be subject to, any provision or requirement of the Campaign Reporting Act may request that the Commission provide an advisory opinion pursuant to N.J.S.A. 19:44A-6. Such request must include the following:

1. This request for an Advisory Opinion is being submitted on behalf of:

Full name of Person, Committee, or Entity:

Daggett for Governor, Inc.

Mailing Address:

P.O. Box 93

Liberty Corner, NJ 07938

\*Day Telephone Number:

(973) 425-3212

\*Evening Telephone Number:

(908) 229-2374

2. Indicate if the above named person, committee, or entity currently files reports with the Commission:

[X] Yes [ ] No

a. If yes, indicate in what capacity it is filing:

Candidate committee [X]

Joint candidates committee [ ]

Political committee [ ]

Continuing political committee [ ]

Political party committee [ ]

Legislative leadership committee [ ]

Recall committee [ ]

Recall defense committee [ ]

Personal financial disclosure statement [ ]

Other (please describe): [ ]

b. If no, indicate if the above named person, committee, or entity has in the past filed reports with the Commission, giving elections (i.e., 2005 general election) or calendar years, and identify filing capacity:

\_\_\_\_\_

c. If reports are or were filed under a different name than that appearing in Question #1 above, provide that name:

\_\_\_\_\_

3. Please provide below a statement of the cognizable question of law arising under the Campaign Reporting Act, including specific citations to pertinent sections of the Campaign Reporting Act and Commission regulations (if known).

The Daggett for Governor campaign would like to sell merchandise, i.e. buttons, t-shirts, etc., as a means of promoting information about the candidate and the upcoming election. If the item is sold at cost is there an expense and/or a contribution that is reportable or does the sale and purchase of the merchandise, without profit to the campaign, cancel each other out?

\*Leave this field blank if your telephone number is unlisted. Pursuant to N.J.S.A. 47:1A-1.1, an unlisted telephone number is not a public record and must not be provided on this form.

4. Please provide below a full and complete statement of all pertinent facts and contemplated activities that are the subject of the inquiry. Your statement must affirmatively state that the contemplated activities have not already been undertaken by the person, committee, or entity requesting the opinion, and that the person, committee, or entity has standing to seek the opinion, that is the opinion will affect the person's or committee's reporting or other requirements under the Act. Attach additional sheets if necessary.

Statement of Facts:

The Daggett for Governor campaign committee, Daggett for Governor, Inc., has standing to seek this opinion and respectfully requests consideration of this Advisory Opinion as the issue raised directly impacts how and when expenses and contributions are measured and reported. In addition, the Daggett for Governor campaign affirmatively represents that it has not undertaken the sale of any merchandise for either promotion or fundraising purposes. Prior to the commencement of the sale of merchandise, the Daggett for Governor campaign seeks this advisory opinion.

The campaign envisions selling merchandise at cost to the public either through direct solicitation or through the internet. The merchandise item would be sold for the exact cost of the item to the campaign. In this situation, the campaign does not make any money off the sale of the item. The sale of merchandise does, however, create an important avenue for further promotion and communication with the voters of New Jersey at no expense to the campaign. It is, for an independent campaign, an extremely effective way to communicate with voters and to spread the word about the candidate without incurring a direct expense to the campaign. The question posed by the contemplated activity is whether or not the purchase of the merchandise by the campaign is an expense that must be reported and whether or not the sale price received for the merchandise would be considered a contribution to the campaign where the sales price equals the expense cost.

5. Please provide below a statement of the result that the person, committee, or entity seeks, and a statement of the reasoning supporting that result:

It is the position of Daggett for Governor, Inc. that the correct result would be that the sale of merchandise for cost results in a non reportable event from either an expense or a contribution perspective. It is simply a vehicle used by the campaign to promote awareness of the candidate, foster enthusiasm and name recognition, and to encourage further involvement and potential contribution to the campaign itself. There do not appear to be any specific regulations that relate or pertain to the sale of merchandise and therefore we have not cited to any specific sections of the Campaign Reporting Act and the Commission regulations.

(continued on next page)

6. Person who is submitting this advisory opinion request on behalf of the committee or entity listed in Question #1:

Full Name: Margaret F. Catalano	
Mailing Address: 120 Mountain View Blvd. Basking Ridge, NJ 07920	*Day Telephone Number: (908) 848-6300
	*Evening Telephone Number: (908) 616-2965
	Fax Number: (908) 848-6310

a. Official Capacity of Person Requesting Opinion:

Candidate	<input type="checkbox"/>
Treasurer	<input type="checkbox"/>
Organizational Treasurer	<input type="checkbox"/>
New Jersey Attorney representing requesting person, committee, or entity	<input checked="" type="checkbox"/>
Other (please describe):	<input type="checkbox"/>

7. I hereby consent to an extension of the 10-day response period provided in N.J.S.A. 19:44A-6f to a 30-day period for Commission response, which period shall start on the date of Commission receipt of the completed advisory opinion request.  
(CROSS OUT THIS PARAGRAPH IF CONSENT IS WITHHELD).

8. A request for an advisory opinion will not be considered filed until a fully completed and signed application is received by the Commission.

June 1, 2009  
Dated:

Margaret F. Catalano  
Signature:

**5. Please provide a statement of the result the entity seeks and a statement of the reasoning supporting that result:**

(continued from page 3)

It is noted that the requirements of the Act contemplate that the reasonable value of food and beverage to persons attending a testimonial affair, 19:25-15.26, does not constitute an expense subject to the expense limitations under the Act. In these cases, the purchase price of a ticket for a testimonial affair is considered a contribution to the campaign and is not diminished by valuing the meal in any way and attempting to set off the meal cost against the contribution. The sale of merchandise is analogous in that the purchaser is receiving an item unique to the campaign, and campaign identifiable, and simply reimbursing the campaign for its out of pocket expense. There is clearly an even exchange and no profit is derived resulting in some sort of quantifiable contribution to the campaign.

It is further noted that a campaign is free to give away merchandise as long as it is clear the merchandise is not used in any way to solicit a vote. The only difference in actually selling the merchandise is that there is an attempt to minimize expense to the campaign. Daggett for Governor, Inc. seeks creative avenues for increasing public awareness while preserving critical campaign contributions. Selling merchandise is exactly the sort of creative mechanism that could help promote awareness for the candidate with the public and we respectfully seek this advisory opinion in order to pursue this important communications avenue.