



State of New Jersey

RONALD DEFILIPPIS  
Chairman

WALTER F. TIMPONE  
Vice Chairman

AMOS C. SAUNDERS  
Commissioner

## ELECTION LAW ENFORCEMENT COMMISSION

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JEFFREY M. BRINDLE  
Executive Director

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Deputy Director

CAROL L. HOEKJE  
Legal Director

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Compliance Director

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Legal Counsel

### PUBLIC SESSION MINUTES

March 19, 2013

Chairman DeFilippis, Vice Chairman Timpone, Commissioner Saunders, Legal Counsel Matthews, and senior staff were present. Director of Review and Investigation Shreve Marshall was also present. Assistant Review Officer Lovinsky Joseph was present for the purpose of recording the minutes.

The Public Session Minutes will be available online in the Commission's website at: <http://www.elec.state.nj.us>.

The meeting convened at 11:00 a.m. in Trenton.

#### 1. Open Public Meetings Statement

Chairman DeFilippis called the meeting to order and announced that pursuant to the "Open Public Meetings Act," N.J.S.A. 10:4-6 et seq., adequate notice of the meeting of the Commission had been filed with the Secretary of State's Office and distributed to the entire State House Press Corps. It was also posted on the Commission's website.

#### 2. Approval of Public Session Minutes of February 19, 2013

On a motion by Vice Chairman Timpone, seconded by Chairman DeFilippis, and passed by a vote of 2-0, the Commission approved the Public Session Minutes of February 19, 2013. Commissioner Saunders abstained from the vote.

#### 3. Executive Director's Report

##### A. Staff Changes

Executive Director Brindle informed the Commissioners of the selection of Christopher Mistichelli as Director of Finance and Administration. He highlighted Director Mistichelli's previous accomplishments in the Review and Administration section and experience at the Office of Management and Budget. The Executive

Director indicated that Assistant Review Officer Lovinsky Joseph had assumed Director Mistichelli's former investigative position.

B. Budget

The Executive Director reported on the status of the Commission's budget. He stated that the Commission had been granted a continuation budget of \$4.254 million, and \$10 million for the Gubernatorial Public Financing Program, with \$1.1 million for administration of ballot statements.

The Chairman asked what happened to unused funds in the Commission's budget.

The Executive Director replied that unused funds typically revert back to the Treasury.

C. Training Sessions

Executive Director Brindle informed the Commissioners of upcoming training seminars in Woodland Park (Passaic County) on April 4, and Hackensack (Bergen County) on April 18.

D. Analytical Press Releases

The Executive Director stated that the Commission had issued an analytical press release relevant to the 4<sup>th</sup> Quarter Lobbying Report. He recognized Deputy Director Joseph Donohue, Director of Lobbying Linda White, Associate Compliance Officer Nancy Fitzpatrick, Senior Compliance Officer Kim Key, Director of Information Technology Carol Neiman, Data Entry Supervisor Brenda Brickhouse, and Administrative Assistant Elbia Zeppetelli for their efforts in completing the press release.

Executive Director Brindle noted that \$56.6 million had been spent by lobbyists in 2012, a 24 percent decrease from 2011. He attributed most of this decline to the lack of spending by the New Jersey Education Association, whose spending decreased by 96 percent over the same period. The Executive Director further noted that a lack of major issues contributed to the decrease in lobbying expenditures.

Executive Director Brindle reported that the Commission would issue an analytical press release relevant to pay-to-play on April 8.

E. New Addition to ELEC Home Page

The Executive Director informed the Commissioners that staff has completed a summary of gubernatorial spending totals by candidate, election, and year going back to the 1970s. He noted that this summary was now available on the home page of the Commission's website.

F. Federal Cases

Executive Director Brindle reported on the status of the case McCutcheon v. FEC, being heard by the U.S. Supreme Court this term. He stated that this case challenges aggregate limits to candidates and political parties, and anticipated that the aggregate limits would be found unconstitutional.

G. Annual Report

The Executive Director informed the Commissioners that the 2012 Annual Report will be released in April, and reminded them that photos would be taken during the next meeting.

H. Gubernatorial Public Financing Hearing

Executive Director Brindle stated that the Commission had planned to hold a public hearing during the April 9, 2013 meeting to select sponsors for the gubernatorial debate, but was in the unusual position of not having any applicants. He noted that it does not appear as if there will be a debate as only one candidate has thus far qualified for public financing, and the statute requires a minimum of two qualified candidates.

The Executive Director reported that the due date for qualifying is April 1, and that if another candidate qualifies, the Commission will attempt to recruit sponsors.

I. Spring Meeting Schedule

- April 9, 2013 at 11:00 a.m. in Trenton;
- May 21, 2013 at 11:00 a.m. in Trenton; and,
- June 18, 2013 at 11:00 a.m. in Trenton.

4. Report on 2013 Gubernatorial Public Financing Program

Compliance Director Amy Davis informed the Commissioners of submissions received in the 2013 Gubernatorial Public Financing Program.

She reported that Candidate Barbara Buono filed her first submission for 2013 primary election matching funds on February 26, 2013 containing \$459,983.13 in contributions (an amount in excess of the \$380,000 required threshold). She noted that Candidate Buono filed a signed Statement of Agreement to participate in the 2013 primary election debates and a Candidate Certification of Non-Participation in Issue Advocacy Organizations (Form P-2A). Director Davis further noted that the expenditure information provided by the Buono campaign indicated that expenditures had been made or committed to be made in excess of the \$380,000 expenditure qualification threshold.

The Compliance Director reported that staff completed its review of Candidate Buono's first submission and issued public funds totaling \$559,265.38 on March 6, 2013. She indicated that Candidate Buono filed a second submission on March 12, 2013. Director Davis stated that staff completed its review and on March 15, 2013, issued public funds totaling \$125,032. She noted that to date, Candidate Buono has received public funds totaling \$684,297.38.

Director Davis informed the Commissioners that the next date for filing matching fund submissions is March 26, 2013, and that staff will report to the Commission at its next meeting on April 9th on the status of any submissions received.

5. Request for Advisory Opinion 01-2013

The Commission received a request for an Advisory Opinion from Marc E. Elias, Esq., on behalf of the Fund for Jobs and Growth (the Fund), an organization that will be registered as a Section 527 organization under the Internal Revenue Code. Mr. Elias requested a determination on whether or not the making of independent expenditures in a New Jersey election would result in a filing obligation as a political committee, and if so, whether or not the contribution limits apply.

Ezra W. Reese, Esq. appeared on behalf of the requester.

Mr. Reese informed the Commissioners that the Fund is a new national political organization that is seeking permission from the Commission to accept contributions in excess of \$7,200 per election and spend those funds on independent expenditures in support of candidates in New Jersey elections.

Mr. Reese cited the Citizens United v. FEC case as precedent for the request, stating that concern over the appearance of corruption previously found in Buckley v. Valeo was determined not to apply for independent expenditure-only committees. He further noted with regard to the "major purpose test" that the Fund's major purpose was clearly stated. He requested that the Commission take the same steps as other states have already done in waiving contribution limits. He noted that the Fund preferred a result under which it would report to the Commission.

Vice Chairman Timpone informed Mr. Reese that the Fund could voluntarily report.

Mr. Reese replied that the Fund could consider doing so. He noted that if the Fund was not required to file with the Commission, it would have to file with the IRS.

Chairman DeFilippis asked if the Fund's activities were national in scope or limited to New Jersey.

Mr. Reese replied that the Fund's scope was national, but that it had not yet engaged in activity as it had only recently formed. He noted that the Fund was based in Washington, D.C. Mr. Reese stated that the Fund planned to spend most of its New Jersey funds in 2013, and anticipated being in many other states in the future.

The Chairman asked if this Advisory Opinion was similar to that submitted by Better Education for Kids, Inc.

Legal Director Carol Hoekje replied that the Better Education request was more related to issue advocacy, and that the group did not engage in explicit appeals to vote for or against candidates required for an entity to qualify as a political committee. She stated that the Advisory Opinion request submitted by the Realtors' Fund was a closer match but noted that in this instance the Fund stated that it sought to solicit contributions. The Legal Director noted that the Fund's major purpose, to spend money in New Jersey to support candidates, was plainly stated, which was also not the case for the prior request.

Legal Director Hoekje further noted that the Reporting Act has not been amended in a long time, and that while political committees and independent expenditures were defined in the statute, the definitions have not considered or reflected concerns expressed in current court decisions. She noted that the law does not distinguish between different kinds of expenditures as the basis for the definition of a political committee.

She noted that pending legislation endorsed by the Commission would impose reporting requirements on independent expenditure-only committees while not imposing contribution limits.

Legal Director Hoekje stated that although the request noted holdings in federal and municipal jurisdictions the U.S. Supreme Court had not specifically issued a ruling on the constitutionality of contribution limits applied to political committees making independent expenditures only. Nor had the 3<sup>rd</sup> Circuit ruled with regard to contribution limits imposed on independent expenditure-only committees. She added that staff recommended that the Commission should nonetheless be aware of other federal cases.

The Legal Director provided three potential courses of action that could be taken by the Commission:

- Recognize that the Fund meets the criteria for a political committee, including contribution limits;
- Exempt the Fund from contribution limits while carving out a registration and reporting requirement; and
- Impose an independent expenditure reporting requirement only pending legislative action to address the matter of independent expenditure-only committees.

Vice Chairman Timpone asked if the U.S. Supreme Court has approached the issue of disclosure.

The Legal Director replied that disclosure had been upheld by the court.

The Chairman stated that he would be more comfortable with ruling under current law rather than waiting for the Legislature to act.

The Vice Chairman asked if such a course of action would entail imposing contribution limits.

Chairman DeFilippis replied in the affirmative.

Commissioner Saunders stated that such a move would invite litigation.

The Chairman replied that he understood that was possible.

Legal Director Hoekje also referred to another case rendered in 2012 by the Vermont District Court in Vermont Right to Life v. Sorrell, in which the District Court discussed the governmental interests advanced by the state of Vermont in imposing contribution limits. The decision had found that the state of Vermont had failed to provide sufficient evidence to support its interests but also looked to coordination issues.

A member of the public, William Palatucci, asked Mr. Reese what the nature of the Fund was.

Mr. Reese replied that the Fund was organized as a Section 527 organization under the Internal Revenue Code.

The Legal Director asked if the organization had just been formed.

Mr. Reese replied that the Fund had been formed several weeks ago.

Mr. Palatucci stated that he appreciated the explanation provided by Mr. Reese and Legal Director Hoekje, and noted that the existence of a clear major purpose was a distinguishing factor in this matter. He praised the Commission's experience in providing guidance through Advisory Opinions.

Vice Chairman Timpone stated that he had not found a way to solve the contradiction between state law and the U.S. Supreme Court ruling.

Mr. Reese noted that the states of New Hampshire and Kentucky had issued administrative rulings in advance of any legislative action.

The Vice Chairman stated that he agreed with the general premise of Mr. Reese' presentation and viewed the current statute as unconstitutional, but did not think that the Commission had the authority to resolve the conflict between the statute and the U.S. Supreme Court language.

Legal Counsel Matthews expressed his agreement with the Vice Chairman.

Legal Director Hoekje stated that this was why staff was recommending that the Commission wait for guidance from the Legislature.

Vice Chairman Timpone asked if the Fund should report immediately, or should wait for the Legislature to take action.

The Legal Director replied that it might be better to wait for legislative guidance.

Chairman DeFilippis asked how such a course of action would affect the Fund's spending on a practical level, as state races were happening right now.

Legal Director Hoekje replied that the independent expenditures could not be coordinated.

The Chairman asked what the Fund should do in the meanwhile, as the Legislature may not act in a timely fashion. He asked about others that may be similarly situated.

The Legal Director stated that the Advisory Opinion precludes action on the specific facts presented.

Executive Director Brindle stated his opinion that imposing contribution limits would be unconstitutional and provoke a legal challenge. He noted that the Commission had no authority to force 501(c) or 527 groups to report without legislation.

Legal Director Hoekje suggested that the Commission could possibly attempt to distinguish among committees through rulemaking.

Commissioner Saunders stated that he understood the points made by the Chairman and Vice Chairman, but added that the Commission would inevitably lose in federal court, and should use common sense to avoid needless waste of time and money, especially as there is pending legislation to resolve the matter. He noted that the Commission has previously carved out an exception for independent expenditure-only committees in the Realtors' Fund Advisory Opinion.

Chairman DeFilippis expressed his discomfort with waiting for or superseding the Legislature.

The Executive Director inquired how the Commission would approach other independent expenditure-only groups supporting candidates in New Jersey.

The Legal Director replied that staff must look at the facts in each case, and ascertain the major purpose. She noted that the major purpose was stated up front for the Fund. Legal Director Hoekje added that regulated entities must know in advance what regulations they will be subject to.

Vice Chairman Timpone stated that courts generally defer to the legislature unless a law is clearly unconstitutional.

Commissioner Saunders replied that courts also defer to the opinion of the U.S. Supreme Court.

The Vice Chairman expressed his opinion that there was no way for the Commission to resolve the conflict between the statute and U.S. Supreme Court ruling on its own.

Mr. Reese stated that the Fund was asking for relief from contribution limits with regard to the fundraising, and that it would not make contributions to candidates or political party committees.

The Legal Director noted that the current law exempts only public question political committees from contribution limits.

The Vice Chairman asked if under current law, contributions to the Fund would be regulated the same as other political committees.

Legal Director Hoekje replied in the affirmative, noting that there would be a contribution limit of \$7,200 per election. She added that there was currently no concept of a political committee making only independent expenditures in the law, although the Commission could consider its authority to craft a rule.

Deputy Director Donohue stated that there was nothing preventing the Fund from filing voluntarily. He noted that the Commission would lose disclosure of contributions, but would receive expenditure information in the filing.

Commissioner Saunders stated that he would not make a motion.

Vice Chairman Timpone stated that he was still unconvinced that the Commission had the authority to rectify the discrepancy between the statute and U.S. Supreme Court on its own. He asked the Legal Director what options the Commission had in this matter.

The Legal Director provided three potential courses of action that could be taken by the Commission:

- Conclude that the Fund meets the criteria for a political committee with all of the registration, reporting, and contribution limits imposed by the Reporting Act and Commission regulations;
- Conclude that the Fund is a political committee under the Act, but in view of constitutional concerns expressed by the U.S. Supreme Court and federal courts, carve out contribution limits, but impose registration and reporting requirements;
- Conclude that the Fund has a reporting requirement only for independent expenditures.

Chairman DeFilippis expressed his support for the first option, stating that the Commission should only enforce current law. He asked the Commissioners for a motion.

The Vice Chairman asked Legal Director Hoekje to read the first option again.

The Legal Director repeated the first option.

On a motion by Vice Chairman Timpone, seconded by Chairman DeFilippis and passed by a vote of 2-1, Commissioner Saunders voting against, the Commission directed staff to recognize the Fund for Jobs and Growth as a political committee under the Commission's laws, and enforce all requisite contribution and reporting requirements.

Commissioner Saunders warned the Commissioners that they would provoke an appeal.

Vice Chairman Timpone stated that he understood Commissioner Saunders' concern.

Legal Director Hoekje noted that under the Attorney General formal opinion previously cited by the Commission approval of the Advisory Opinion required a majority of the actual Commissioners. Therefore the vote was valid.

## 6. Public Comments

Chairman DeFilippis asked if any members of the public wished to comment.

Ingrid Reed, former director of the Eagleton Institute's New Jersey Project, and board member of New Jersey Spotlight, thanked the Commissioners for a thorough discussion and noted that action to require disclosure from independent expenditure-only committees appeared to have much more of a consensus.

7. Resolution to go into Executive Session

On a motion by Vice Chairman Timpone, seconded by Commissioner Saunders and passed by a vote of 3-0, the Commission resolved to go into Executive Session to discuss anticipated litigation and current litigation, which will become public as follows:

- A. Final Decision Recommendations in complaint proceedings which will not become public. However, the Final Decisions resulting from those recommendations will become public not later than seven business days after mailing to the named respondents.
- B. Investigative Reports of possible violations, which reports will not become public. However, any complaint generated as the result of an Investigative Report will become public not later than seven business days after mailing to the named respondents. The reports will not become public in order to protect the identity of informants and maintain the integrity of investigative procedures and priorities. However, any complaint alleging violations, which complaint may be generated as a result of a request for investigation, will become public not later than seven business days after mailing to the named respondents.
- C. Matters under current litigation, the substance of discussions of which will not become public in order to protect the attorney-client privilege and the deliberative process. However, any litigation in which the Commission is currently a party is a public matter and will become public subject to the above limitations and privileges.

Return to Public Session

8. Adjournment

On a motion by Vice Chairman Timpone, seconded by Commissioner Saunders and passed by a vote of 3-0, the Commission resolved to adjourn at 12:35 p.m.

Respectfully submitted as true  
and correct,

Jeffrey M. Brindle  
Executive Director

JMB/elz