

SOUTH CAROLINA SENATE ETHICS COMMITTEE

Advisory Opinion 2007-1

Monday July 23, 2007

SUBJECT: SOUTH CAROLINA CODE SECTION 8-13-1300(7) AND (31), "THE 45-DAY RULE"

SUMMARY: This advisory opinion is given to clarify the interpretation of Section 8-13-1300(7) and (31) of the South Carolina Code, which has been referred to as the "45-day rule". The "45-day rule" provides that certain communications made within the final 45 days before an election must be reported as "expenditures" but are not "contributions" and, therefore, are not subject to the contribution limitations of the Ethics Act.

QUESTIONS:

1. What are communications as defined by Section 8-13-1300(31)(c)?
2. Are there any restrictions on how much a legislative caucus committee can spend on (31)(c) communications?
3. Where should a legislative caucus committee deposit funds to be used on (31)(c) communications? Must those funds be reported?
4. Must a legislative caucus committee report expenditures on (31)(c) communications?
5. May a legislative caucus committee transfer funds to a 31(C) third account from existing legislative caucus accounts?

DISCUSSION:

There has been some confusion regarding what is commonly referred to as the 45-day rule, and the impact of the rule on communications made by legislative caucus committees during the 45-day period preceding an election. The requirements the rule places on legislative caucus committees can be determined by an examination of current law.

Section 8-13-1300(31)(c) of the South Carolina Code expands the definition of "influence the outcome of an election" to include:

(c) any communication made, not more than forty-five days before an election, which promotes or supports a candidate or attacks or opposes a candidate, regardless of whether the communication expressly advocates a vote for or against a candidate. For purposes of this paragraph, "communication" means (i) any paid advertisement or purchased program time broadcast over television or radio; (ii) any paid message conveyed through telephone banks, direct mail, or electronic mail; or (iii) any paid advertisement that costs more than five thousand dollars that is conveyed through a communication

medium other than those set forth in subsections (i) or (ii) of this paragraph. "Communication" does not include news, commentary, or editorial programming or article, or communication to an organization's own members.

However, it is important to note that the expanded definition provided by subsection 31(c) only applies to the types of communications described that are made within 45 days of an election.

Section 8-13-1300(7) defines the term "contribution". This section provides in part:

"Contribution" does not include . . . (b) a gift, subscription, loan, guarantee upon which collection is made, forgiveness of a loan, an advance, in-kind contribution or expenditure, a deposit of money, or anything of value made to a committee, other than a candidate committee, and is used to pay for communications made not more than forty-five days before the election to influence the outcome of an elective office as defined in Section 8-13-1300(31)(c). These funds must be deposited in an account separate from a campaign account as required in Section 8-13-1312.

Section 8-13-1300(7) exempts from the definition of "contribution" anything of value given to a committee used to pay for 31(C) communications made within 45 days of an election. This language makes it clear that funds given to pay for a (31)(c) communication are not considered contributions, even though they fall within the definition of influencing the outcome of an election.

Because (31)(c) communications are specifically exempted from the definition of contribution, legislative caucus committees are not restricted by the \$5,000 contribution limit found in Section 8-13-1316. Therefore, **a legislative caucus committee may spend any amount on (31)(c) communications within 45 days of an election.**

Legislative caucus committees must **deposit funds used for (31)(c) communications in a separate account** pursuant to the last sentence of 8-13-1300(7). However, they do **NOT have to report the receipt of funds to be used for (31)(c) communications within 45 days of an election.** Section 8-13-1308(G) provides in part:

Notwithstanding any other reporting requirements in this chapter, a political party, legislative caucus committee, and a party committee must file a certified campaign report upon the receipt of anything of value which totals in the aggregate five hundred dollars or more. For purposes of this section, "anything of value" includes **contributions** received, which may be used for the payment of operation expenses of a political party, legislative caucus committee, or a party committee.

This section requires legislative caucus committees to report all contributions over \$500, whether used for operating expenses or campaign purposes. **Because funds to be used for (31)(c) communications within 45 days of an election are not contributions, they do not have to be reported like operating funds and campaign funds.**

However, funds used to pay for (31)(c) communications within 45 days of an election are expenditures as defined by the Ethics Act. Section 8-13-1300(12) defines expenditure as a purchase, payment, loan, forgiveness of a loan, an advance, in-kind contribution or expenditure, a deposit, transfer of funds, gift of money, or anything of value for any purpose. Therefore, a **legislative caucus committee must report money spent on (31)(c) communications.**

Section 8-13-1302 requires legislative caucus committees making expenditures on (31)(c) communications within 45 days of an election to maintain an account of their expenditures; the name and address of each person to whom an expenditure is made including the date, amount, purpose, and beneficiary of the expenditure; and any proof of payment for each expenditure. Pursuant to Section 8-13-

1308(D)¹, legislative caucus committees making (31)(c) communications within 45 days of an election **must file a pre-election report showing expenditures to or by the committee for the period ending twenty days before the election.**²

Legislative caucus committees making (31)(c) communications within 45 days of an election are required to immediately **file a campaign report upon incurring expenditures in excess of \$10,000 in the case of a candidate for statewide office and \$2,000 in the case of a candidate for any other office** within the calendar quarter in which the election is conducted or twenty days before the election (whichever period is greater). Pursuant to Section 8-13-1308(D)(2), the expenditure does not have to be made, only incurred, to trigger this section's reporting requirements. Certified campaign reports must contain the total expenditures made by or on behalf of the committee and the name and address of each person to whom an expenditure (from campaign funds) is made including the date, amount, purpose, and beneficiary of the expenditure.

Further, legislative caucus committees maintain two banking accounts. One account described in Section 8-13-1300(34) is maintained for operational expenses, which are defined as:

for salaries and/or fringe benefits for part-time, full-time, temporary and/or contract employees; meeting expenses, travel, utilities, communications and/or communications equipment whether leased or purchased, printing or printing services, postage, food and/or beverage, advertising, consulting services, and/or any other expenditures which are not authorized contributions to a candidate, committee, or ballot measure committee.

Because these funds are not to be made to, controlled by, coordinated with, or requested by a candidate or candidate committee, expenditures from these funds do not have to be reported. Persons giving to this fund must be identified, but there is no limit to the amount that may be given. The second account is a campaign account and is restricted to deposits of funds that are contributed to candidates and spent in cooperation with candidates as specified by Section 8-13-1308. Funds deposited into the campaign account are considered contributions and are subject to the applicable limits, so it would not be appropriate to use funds from the campaign account for 31(c) communications.

Due to the requirement that legislative caucus committees report expenditures made for 31(c) communications, it is advised that the caucuses open a third account to deposit funds for this purpose. Funds deposited into the 31(c) account may include transfers from the operations account or new funds deposited directly into the account. Again, because funds deposited into the campaign account are considered contributions, funds from the campaign account should not be transferred to the 31(c) account.

Finally, a legislative caucus making (31)(c) communications within 45 days of an election must identify the caucus in the communication. Section 8-13-1354 requires committees or persons making expenditures on communications "supporting or opposing a public official, a candidate, or a ballot measure" to identify their name and address. By definition, a (31)(c) communication is a communication made within 45 days of an election "which promotes or supports a candidate or attacks or opposes a candidate."

CONCLUSION:

If a legislative caucus makes a communication within forty-five days of an election that promotes or supports a candidate or attacks or opposes a candidate, regardless of whether the communication expressly advocates a vote for or against a candidate, the caucus must deposit the funds used to pay for that communication in a separate account and must report those funds as expenditures. A legislative caucus committee does not have to report, as contributions, the funds it receives that are

used to pay for these communications and there is no limit on how much a legislative caucus committee can spend on these communications.

Due to the expenditure reporting requirements, it is advised that a caucus open a third account for funds used to make 31(c) communications. If a legislative caucus committee chooses to use its existing funds for (31)(c) communications, it may only use funds transferred from its operations account and not funds deposited in its campaign account.

Further, a legislative caucus making (31)(c) communications within 45 days of an election must identify the caucus in the communication.