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Office of Campaign and Political Finance
One Ashburton Place, Room 411
Boston, MA 02108

Advisory Opinion

July 2, 2001
AO-01-16

Jerome P. Solomon, Treasurer
The Shannon O'Brien Committee
P.O. Box 8914
Boston, MA 02114

Re: Clean Elections Law

Dear Mr. Solomon:

This letter is in response to your May 24 request for an opinion regarding the Clean Elections Law, M.G.L. c. 55A.

You have stated that you are concerned about the status of the Clean Elections Law because the House of Representatives recently did not provide additional funding for the program in connection with the FY 2002 budget. The issue of funding will not likely be settled until the Senate and House reach a compromise on the budget, which you believe could take several months.

Because of this uncertainty, candidates who may wish to become participants in the Clean Elections program who currently comply with the limits established by chapter 55A, e.g., by limiting contributions to $100 from any contributor, are "at risk of not receiving the public funding provided for by the law." As such, you believe that these candidates are at a serious disadvantage compared to those who choose not to participate and can therefore receive up to $500 during a calendar year from contributors.

QUESTION 1

(a) Is it possible for a candidate to raise money, during this period of uncertainty, over the $100 limit established by the Clean Elections Law and deposit amounts over $100 ("excess funds") into an existing prior year election account, not to be spent by the candidate until later in the election cycle assuming the candidate decides to not be a participant?

RESPONSE: Yes. The excess funds can be deposited in a prior year election account and used in the current election cycle only if the candidate decides to not become a participant.

(b) If the candidate decides to become a participant, can the excess funds be kept in the prior year election account during this election cycle and used in a future election cycle?

RESPONSE: No. If the candidate decides to participate in the Clean Elections program during the current election cycle, the candidate must return or refund all amounts received over $100 before filing a declaration of intent. Once the amount exceeding $100 is returned or refunded, the remaining amount may be converted into an allowable contribution and transferred to the candidate's segregated participant election account.

A candidate who wishes to participate in the Clean Elections system must agree to accept only "allowable contributions" and clean election funds. Allowable contributions are, by definition, contributions from individuals and political committees that do not exceed $100 in the aggregate during an election cycle. In addition, the candidate is required to state, when filing a "declaration of intent" prior to raising qualifying contributions, that the candidate "has complied with and agrees to continue to comply with allowable and in-kind contribution and expenditure limits set forth in this chapter for participants." See M.G.L. c. 55, § 1.

Section 9(b) of chapter 55A states, however, that "any candidate may return a contribution or any portion thereof, and such returned amount shall be neither counted as part of the contribution, nor counted toward the limit stated in subsection (a)." Subsection (a) of section 9 states that during an election cycle, candidates are limited in the aggregate amount of allowable contributions, e.g., candidates for representative may receive no more than $6,500 in such contributions.

Because of the recognition in section 9(b) of the possibility of refunding or returning a portion of an allowable contribution, it is our opinion that a candidate may raise funds that exceed the $100 limit prior to filing a declaration of intent, if before filing the declaration of intent the candidate returns or refunds any contribution or part thereof from an individual or political committee that exceeds the limit on such contributions established by chapter 55A. The office anticipates issuing regulations that will provide for such refunds in more detail.

You should note, however, that the statute provides that *expenditures*, including expenditures made in connection with fundraising activities, may not be made during the election cycle unless made from a separate, segregated participant election account using only allowable contributions and clean election funds deposited into or spent from that account.

The proposed regulations will provide a rather complicated mechanism to correct a situation where limited campaign funds are expended from an account other than a participant election account before a declaration of intent is filed. All funds spent from such account will need to be reimbursed using allowable contributions[1] raised and deposited into a participant election account. Only after

[1] Because the amount of allowable contributions that may be raised is limited by section 9 of chapter 55A, the extent to

taking these steps would the candidate be able to file a declaration of intent, which must be filed before the candidate may raise qualifying contributions.

It is obviously preferable for candidates who may wish to become participants to exclusively raise and spend funds from a separate segregated participant election account in accordance with the limits established by c. 55A.

QUESTION 2

What provisions have been made for those who choose to comply with the law if there are not enough resources to fully fund each candidate? As of today, there is approximately $22 million in the Clean Elections Fund. If the Legislature does not provide additional funds, what options are available to participants if the money runs out? Will they have the option of exiting the Clean Elections system and accepting contributions of up to $500?

RESPONSE

No statutory provisions have been made in the event of a failure to fully appropriate funds for the Clean Elections program. If additional funds are needed to meet the requirements of chapter 55A and the Legislature does not provide those additional funds, a certified candidate would not, as the law is now enacted, have the option of opting out of Clean Elections, once the candidate's application for certification has been approved.

If a certified candidate were to not comply with chapter 55A, the candidate could be decertified in accordance with section 16 of chapter 55A. Section 16 provides that after notice and opportunity for hearing, the candidate would be "fined an amount equal to two times the amount at issue for each violation. Such fine shall not be paid from the campaign account of the certified candidate's committee." Therefore, once a candidate is certified, the candidate would not have the option of accepting and spending contributions over $100 in this election cycle without risking a substantial fine.

When a candidate files a declaration of intent, the candidate agrees to continue to comply with all requirements set forth in chapter 55A, including the limits on expenditures and allowable contributions that may be received. Although the office anticipates issuing regulations that would allow a candidate to withdraw a declaration of intent[2] before approval of the application for certification, there are no provisions in the statute allowing a certified candidate, on the candidate's own initiative, to become decertified in order to avoid the provisions of chapter 55A before the end of an election cycle.

In section 8 of the statute the distribution of clean election funds is made "subject to appropriation." Nowhere in section 8 (or anywhere else in chapter 55A), however, does the statute provide any mechanism for a certified candidate to opt out if appropriations are not made to fully fund the law.

We recognize that the uncertain funding situation poses a problem for candidates contemplating participation in Clean Elections. Absent legislative or judicial guidance, however, the statute must be

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which a candidate may reimburse an election account other than a participant election account for expenditures made from that account during the election cycle is also limited.

[2] The statute reflects an intent that candidates may withdraw a declaration of intent. See definition of "participant" in M.G.L. .c 55, § 1 states that a participant is a candidate who "…has submitted and not withdrawn a declaration of intent…"

interpreted to require candidates, once they are certified, to continue to comply with chapter 55A during the balance of an election cycle.

This opinion is issued within the context of the Clean Elections Law and is provided solely on the basis of representations in your letter. Please contact us if you have further questions.

Sincerely,

Michael J. Sullivan
Director

MJS/gb