KENTUCKY REGISTRY OF ELECTION FINANCE

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David R. Martin
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Executive Director

Rhonda Farmer-Gray
Assistant Executive Director

Emily Dennis
General Counsel

ADVISORY OPINION 2011-002

Any Advisory Opinion rendered by the Registry under subsection (1) or (2) of this section may be relied upon only by the person or committee involved in the specific transaction or activity with respect to which the Advisory Opinion is required. KRS 121.135(4).

April 25, 2011

VIA FACSIMILE – 202.662.4923
AND FIRST CLASS U.S. MAIL
Mr. Michael G. Adams
Deputy Executive Director & General Counsel
Republican Governors Association
1747 Pennsylvania Ave., NW, Suite 250
Washington, DC 20006

In re: Registration and reporting requirements for proposed unauthorized campaign committee of the Republican Governors Association

Dear Mr. Adams:

This Advisory Opinion is sent in response to your March 23, 2011 request regarding the proposed registration of an unauthorized campaign committee in Kentucky by the Republican Governors Association ("RGA"). Pursuant to KRS 121.135(5)(a), the Registry of Election Finance ("Registry") posted your request for public comment on March 28, 2011. No public comments were received.

You specifically ask the Registry to clarify that KRS Chapter 121 permits the RGA to establish an unauthorized campaign committee for the purpose of making express advocacy

communications in a Kentucky election, using funds which need not comply with the source and amount limitations also set forth in KRS Chapter 121. In the event registration of an unauthorized campaign committee is permitted, you also ask whether the RGA accurately reports the RGA as the donor to the committee or if particular donors to the RGA should be reported as donors to the committee.

As noted in your request, the RGA is a nonfederal unincorporated organization exempt from taxation under § 527 of the Internal Revenue Code. According to the RGA's Bylaws, the organization's membership consists of Republican governors and governors-elect of the United States, its commonwealths and territories. Among its several purposes, the RGA's mission includes assisting in the election of Republican gubernatorial candidates and the re-election of incumbent Republican Governors. See attached RGA Bylaws, as amended February 24, 2007.

"Campaign committee" is defined in relevant part by KRS 121.015(3)(a) as " . . . *one (1) or more persons who* <u>*receive contributions and make expenditures*</u> to support or oppose one (1) or more specific candidates or slates of candidates for nomination or election to any state, county, city, or district office." Emphasis added. Kentucky law contemplates that a person (including an association such as the RGA) may organize a campaign committee that is not authorized by a candidate ("unauthorized campaign committee"). KRS 121.210(4) specifically states that "(c)ampaign committees not authorized by, or disavowed by the candidate, shall not include the name of the candidate as part of the committee's name and shall file the reports and statements with the Registry as prescribed in KRS 121.180." An unauthorized campaign committee registers in Kentucky using a "Political Committee Registration" form (See attached KREF 010 Revised 05/2005).

By definition, an unauthorized campaign committee may only be formed for the purpose of making independent expenditures. Kentucky law does not permit an unauthorized campaign committee to contribute directly to candidates, slates of candidate, or other committees or to coordinate its activities with the candidates or slates it supports. Because only independent expenditures are permitted, contributions to an unauthorized campaign committee are not subject to source and amount limitations as set forth in KRS Chapter 121. See KRS 121.015(3)(a), *Citizens United v. FEC*, 130 S.Ct. 876, 913 (2010), *SpeechNow.org, et al., v. FEC*, 599 F.3d 686, 695 (D.C. Cir. 2010).

KRS 121.015(12) defines independent expenditure to mean:

> . . . (t)he expenditure of money or other things of value for a communication which expressly advocates the election or defeat of a clearly identified candidate or slate of candidates, and which is made without any coordination, consultation, or cooperation with any candidate, slate of candidates, campaign committee, or any authorized person acting on behalf of any of them, and which is not made in concert with, or at the request or suggestion of any candidate, slate of candidates, campaign committee, or any authorized person acting on behalf of any of them.

An independent expenditure is an act not within the control of the candidate. *Wilkinson v. Jones*, 876 F. Supp. 916, 927 (W.D. Ky. 1995). If there is any coordination, consultation, cooperation, or consent by the candidate, slate of candidates, candidate campaign committee, or authorized person acting on behalf of the candidate, slate, or campaign agents, then what appears to be an independent expenditure is in reality an in-kind contribution. See KRS 121.015(6). To prove coordination of campaign activities requires more than showing a prior communication or consultation. The complainant must show that the campaign discussed the content, timing, place, nature or volume of communications to be made. *Martin v. Commonwealth*, 96 S.W.3d 38, 56 (Ky. 2003). If the RGA registers an unauthorized campaign committee, then the RGA and its unauthorized campaign committee must take steps to avoid discussing its advertising strategy with the Kentucky candidate(s) it seeks to support.

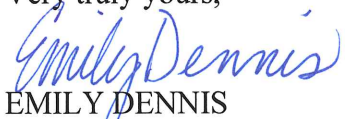
Having addressed your initial question regarding the RGA's proposed establishment of an unauthorized campaign committee, the Registry turns to the question regarding the committee's reporting requirements. Many of the RGA's activities fall outside the Registry's jurisdiction, which is limited to the RGA's express advocacy in Kentucky state and local elections. It is the Registry's understanding, due to the RGA's status as a § 527 association of state officials having gross receipts of at least $25,000, that the RGA is required to periodically file Form 8872, *Political Organization Report of Contributions and Expenditures*, with the Internal Revenue Service ("IRS"). Although 2011 is considered a non-election year at the federal level, you advise the RGA must still file Form 8872 semi-annually. Under semi-annual filing, the RGA must file Form 8872 reporting contributions and expenditures for the period of January 1, 2011-June 30, 2011, by no later than August 1, 2011, and also file Form 8872 for the period of July 1, 2011-December 31, 2011, by no later than January 31, 2012. These filings are public record and may be researched online at http://forms.irs.gov/politicalOrgsSearch/. Thus, it appears that the IRS filing requirements establish a framework with sufficient transparency as to the organization's funding sources and expenditures.

So long as the RGA's current fundraising efforts do not include solicitations of funds for independent expenditures to be segregated for use in Kentucky elections, the RGA may establish its unauthorized campaign committee in Kentucky by an initial transfer of RGA general treasury funds, as approved by its governing body, naming the RGA as the initial donor to the committee. If, however, the RGA currently or in the future solicits contributions specifically for its Kentucky efforts or otherwise receives contributions with the contributor's understanding that the funds will be segregated, earmarked or otherwise "passed through" the RGA as an administrative conduit to fund the Kentucky unauthorized campaign committee, then donors must be named specifically as contributors to the Kentucky unauthorized campaign committee. Disclosure of RGA donors as contributors to the Kentucky unauthorized campaign committee under the above-described pass-through scenario provides a means for the Registry to verify that no coordination with a candidate's campaign has occurred.

In re: Registration and reporting requirements for proposed unauthorized campaign committee of the Republican Governors Association

Please keep in mind that this Advisory Opinion is based on the specific facts set forth in your written request and does not cover past conduct. If you have any questions concerning this Advisory Opinion, please do not hesitate to contact the Registry. Thank you.

Very truly yours,



EMILY DENNIS
General Counsel

Attachments
Cc: Registry Members
Sarah M. Jackson, Executive Director

Republican Governors Association
Bylaws

ARTICLE I – NAME AND PRINCIPAL OFFICE

Section 1. These bylaws shall govern the Republican Governors Association, ("Association").

Section 2. The principal office of the Association shall be in Washington, D.C., or in such other place as may be determined by the membership of the Association.

ARTICLE II – MEMBERSHIP

Section 1. The membership of the Association shall consist of the Republican governors and governors-elect of the United States, its commonwealths and territories. However, in the case of a governor and a governor-elect being from the same state, commonwealth or territory, only the governor-elect shall have voting rights.

Section 2. A governor or governor-elect shall be deemed Republican and thus eligible for membership if he or she is (a) an enrolled Republican (b) is endorsed by the Republican Party of the jurisdiction in which he or she was elected.

Section 3. Membership in the Association shall terminate concurrently with a member's retirement from office.

Section 4. The Association shall be the judge of the eligibility of its members.

ARTICLE III – PURPOSES

The purposes of this Association shall be:

Section 1. To assist in the solution of significant national public policy problems.

Section 2. To enable the Republican governors to take their proper position in expressing, developing and preserving the philosophy of the Republican party within the national party framework.

Section 3. To assist in the election of Republican gubernatorial candidates and the re-election of incumbent Republican Governors.

Section 4. To speak out on public issues.

Section 5. To provide a mechanism to facilitate communication and cooperation among its members; with local, state and national party organizations; with Republicans in the U.S. Congress; and with the President, Vice President, and other key officials of Republican national administrations.

ARTICLE IV – MEETINGS AND VOTING

Section 1. The Association shall hold one regular business meeting annually at a time and site agreed upon by its members. This meeting shall be known as the Annual Republican Governors Conference ("Annual Conference").

Section 2. The Association may hold additional meetings during the year in conjunction with meetings of the National Governors Association, at which business may be conducted.

Section 3. Additional extraordinary meetings may be called with the consent of two-thirds of the membership.

Section 4. A quorum shall consist of a majority of membership.

Section 5. Unless otherwise provided, in these bylaws, all Association business shall be conducted by a vote of a simple majority of members present in person or by proxy and voting except for Association policy resolutions which shall require a two-thirds vote of members present in person or by proxy and voting.

Section 6. Actions may be taken at a meeting in the absence of a quorum of the Association's members. Each action must be ratified subsequently by a two-thirds vote of members present in person.

Section 7. Proxies must be in writing and may only be exercised by members of the Association.

ARTICLE V – ELECTIVE OFFICERS

Section 1. At the Annual Conference or as soon as practicable thereafter, the Association shall elect five members to serve on an executive committee, and a chairman, vice-chairman and dinner chairman, who also will serve on the executive committee. Election shall be by a majority of members present and voting by the procedures specified in Article VII, Section 2.

Section 2. Each elected officer shall take office upon election for a term of one year, and shall serve until his successor is duly elected. Officers may stand for reelection.

Section 3. The chairman shall be the principal elective officer of the Association and shall be a member ex-officio, with right to vote, on all committees except the nominating committee. The chairman shall serve as the principal national spokesman for the Association. The chairman shall approve the operating budget of the Association in consultation with the vice-chairman. The chairman will have the authority to send out letters on behalf of the organization. Pro forma letters need no special approval nor consultation from the executive committee. (Such letters would include invitations to RGA and other events or correspondence to thank people, etc.) The chairman will also have the authority to send out communiqués (letters or press releases) articulating the Association's position on a range of topics or issues of interest to the Governors (such as legislation before Congress or issues before the Administration). The chairman shall seek the approval of a majority of the executive committee governors for such communiqués.

Section 4. The vice-chairman shall succeed to the chair in the case of the death, resignation or ineligibility of the chairman, and shall preside over Association meetings in the absence of the chairman..

Section 5. The chairman may fill any vacancy on the executive committee with the approval of the other members of the executive committee.

Section 6. Acting as the Republican Caucus of the National Governors' Association, the Association shall elect the Vice-Chairman of the National Governors' Association. Such election will be held at the National Governors' Association Winter Meeting in the year which such meeting is chaired by a Republican Governor or at any point up to that year's NGA Annual (summer) Meeting. If the election cannot be conducted at the NGA Winter Meeting, this election may be conducted by a mail or telephone vote in accordance with Article VIII of these bylaws.

ARTICLE VI – APPOINTIVE OFFICERS

Section 1. The administration and management of the Association shall be in a salaried executive director appointed by the chairman with the advice and consent of the executive committee.

Section 2. The executive director shall serve at the pleasure of the executive committee.

Section 3. The executive director shall serve as secretary of the Association and shall give notice of and attend all meetings of the Association and keep a record of all proceedings.

Section 4. The executive director shall serve as treasurer of the Association and shall be responsible for keeping an account of all moneys received and expended for that account. He shall make disbursements authorized by the chairman.

Section 5. The executive director shall employ and direct and may terminate the employment of staff necessary to carry on the work of the Association. He may delegate his duties as necessary and proper. He may create or alter position descriptions and assign or reassign duties at his discretion. However, additional staff positions may be created only with the authorization of the chairman.

ARTICLE VII – COMMITTEES

Section 1. Executive Committee. The executive committee shall be the Association's chief governing committee. In addition to the duties elsewhere specified in these bylaws, the executive committee shall consider all resolutions timely submitted by any member for adoption by the Association. A resolution shall be timely if it is submitted in writing to the executive director of the Association at least three (3) days prior to any called meeting of the Association. The executive committee shall report to the Association any resolution that it recommends for approval or amendment or both. The Association shall consider any resolution, without consideration by the executive committee, if it has the demonstrated support of two-thirds of members, present in person or by proxy.

Section 2. Nominating Committee. At the outset of the Annual Conference the chairman shall appoint a nominating committee of three members to nominate candidates for chairman, vice-chairman, dinner chairman and five additional members of the executive committee. The vice-chairman shall serve as the committee chairman. The chairman shall not be eligible for membership on the committee. The committee shall present its report at the Annual Conference. At that time other

nominations may be made, and the members then shall elect a chairman, vice-chairman, dinner chairman and five additional members of the executive committee.

Section 3. Republican Governors Public Policy Committee. The Republican Governors Public Policy Committee shall consist of members appointed by the chairman. The mandate of the committee shall be as prescribed by the executive committee.

Section 4. Finance Committee. The chairman shall appoint a finance committee, to be headed by the dinner chairman but which otherwise need not consist of members. The mandate of the committee shall be as prescribed by the executive committee.

Section 5. Other committees. The chairman may from time to time create special or ad-hoc committees as he may find necessary. No new standing committees may be created without amendment to these bylaws.

ARTICLE VIII - MAIL AND TELEPHONE VOTES

Section 1. Whenever it is deemed inexpedient to call a special meeting of the Association, the chairman, with the advice and consent of the executive committee, may conduct a mail vote of the membership on any appropriate matter not inconsistent with these bylaws.

Section 2. The chairman of the several committees may conduct business before their committees and vote thereupon by mail or telephone in lieu of calling regular or special meetings for those purposes.

ARTICLE IX – USE OF FUNDS

The Association shall use its funds only to accomplish the objectives and purposes specified in these bylaws. In the event of dissolution of the Association, the executive committee may vote to transfer any remaining funds to any entity permitted by law.

ARTICLE X – FISCAL YEAR

The Association shall operate on a calendar-year basis.

ARTICLE XI – AMENDMENTS

These bylaws may be amended, repealed or altered, in whole or in part, (a) by a two-thirds vote of the members present in person or by proxy and voting at any meeting of the Association or (b) by approval of two-thirds of the members through mail vote in accordance with the provisions of Article VIII.

As amended February 24, 2007, in Washington, D.C.

KENTUCKY REGISTRY OF ELECTION FINANCE
140 Walnut Street, Frankfort, KY 40601-3240
(502) 573-2226 / FAX (502) 573-5622
www.kref.ky.gov

REGISTRY USE

Date Received

Date Approved

POLITICAL COMMITTEE REGISTRATION

Please type or print

Committee Name - Do not include candidate's name in committee name unless authorized by candidate. (KRS 121.210(4)). Acronyms are permitted but full title from which derived must be shown. (KRS 121.170).

Mailing address (including city, state and zip) ( ) - Daytime Telephone Number

State the name of sponsor, the specific source of funds and the purpose for which this committee is being registered. (Permanent committees must list the major business, social, or political interest represented.)

Date committee plans to be active:
(Committees with on-going activity use "Indefinite")

FROM: ___/___/___

THROUGH: ___/___/___

This committee is being organized as a: (check one)

☐ **CAMPAIGN COMMITTEE** (for a candidate during an election campaign) - KRS 121.015(3)(a).

☐ **CAUCUS CAMPAIGN COMMITTEE -** KRS 121.015(3)(b).

☐ **POLITICAL ISSUES COMMITTEE** (for an issue which will appear on the ballot) - KRS 121.015(3)(c).

☐ **PERMANENT COMMITTEE** (a permanent organization which functions on a regular basis) - KRS 121.015(3)(d).

NOTE: The chairperson and the treasurer of a committee shall be separate persons - KRS 121.170(4)

CHAIRPERSON INFORMATION:

Daytime Telephone Number: ( ) -
Home Telephone Number: ( ) -
E-mail Address:

Name

Mailing address (including city, state and zip)

TREASURER INFORMATION:

Daytime Telephone Number: ( ) -
Home Telephone Number: ( ) -
E-mail Address:

Name

Mailing address (including city, state and zip)

CUSTODIAN OF FINANCIAL RECORDS INFORMATION:
(if other than treasurer)

Daytime Telephone Number: ( ) -
Home Telephone Number: ( ) -
E-mail Address:

Name

Mailing address (including city, state and zip)

Kentucky UNBRIDLED SPIRIT

This Section to be completed by Campaign Committees Only

Candidate to be supported by committee:

_____ ____/____/_____ _____

Name Date of Birth Party Affiliation

_____

Mailing Address (Including city, state and zip) Office Sought

_____

Does the candidate's name appear in the name of the committee? _____YES _____NO

Has the candidate approved the use of his name? ____YES (See Candidate's Authorization Box at bottom) ____NO

This Section to be completed by Political Issues Committees ONLY

Constitutional amendment or public question to be advocated or opposed - KRS 121.015(3)(c)

_____

_____

This committee • **Supports** or • **Opposes** the above listed consitutional amendment or public question.

This Section to be completed by ALL Committees

Primary Depository - Designate depository bank or financial institution in which the committee will maintain its funds.

_____

Name of bank or institution

_____

Mailing Address (Including city, state and zip)

VERIFICATION BY OATH OR AFFIRMATION

We, the undersigned, state we are the Chairperson and Treasurer of the above described committee and this Political Committee Registration is true, correct and complete.

_____ _____

Signature of Chairperson *Date* *Signature of Treasurer* *Date*

CANDIDATE'S AUTHORIZATION - (If Applicable) I have read and understand the conditions of KRS 121.180(9); and further understand that I am personally relieved from filing the CANDIDATE ELECTION FINANCE STATEMENT, as long as I comply with these conditions. I will immediately notify the Registry of Election Finance if I can no longer comply with these conditions and I will file any and all reports required by KRS Chapter 121.

I, _____, hereby agree to the above statement and authorize the

Print Candidate's Name

use of my name by this committee.

_____

Signature of Candidate *Date*