



FEDERAL ELECTION COMMISSION
Washington, DC 20463

July 20, 2004

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

ADVISORY OPINION 2004-20

Mr. Adam Wood
Diane Farrell for Congress
P.O. Box 5136
Westport, CT 06881-5136

Dear Mr. Wood:

This responds to your letter, dated June 3, 2004, on behalf of Farrell for Congress, requesting an advisory opinion concerning the application of the Federal Election Campaign Act of 1971, as amended (the "Act"), and Commission regulations to the treatment of Connecticut party conventions as elections.

Background

Diane Farrell is the Democratic candidate for the U.S. House of Representatives from Connecticut's 4th Congressional District. Farrell for Congress is Ms. Farrell's principal campaign committee. The Democratic Party in Connecticut held its convention for the U.S. House on May 10, 2004.¹ The primary elections for all of Connecticut, including primaries for Federal offices, are scheduled to be held on August 10, 2004. However, because the Democratic Party has endorsed Ms. Farrell as its candidate for the 4th Congressional District and no other member of the Democratic Party filed a petition for candidacy by the statutory deadline, Ms. Farrell is the Democratic Party's nominee and her name will not appear on the primary election ballot.

Until January 1, 2004, Connecticut law provided that if a candidate received the endorsement of his or her party at the state party's convention, and if

¹ Farrell for Congress filed a pre-convention report with the Commission on April 28, 2004.

no other candidate received at least 15 percent of the endorsement vote at the convention, then no primary would be held for that office and the party-endorsed candidate would be deemed to have been lawfully chosen as the party's nominee. Connecticut Gen. Stat. sections 9-400, 9-416 (2002). In 1976, the Commission considered the status of Connecticut party conventions under the Connecticut law at that time, in Advisory Opinion 1976-58, and concluded that party conventions were elections for purposes of the Act.

In 2003, Connecticut enacted a new law, effective as of January 1, 2004, that provides for an additional route for a candidate's name to be placed on the primary ballot. *See* Conn. Acts 03-241. Specifically, the new law now also permits any registered member of the party, even if that member has not received 15 percent of the endorsement vote at a party convention, to file a petition with the signatures of at least two percent of the party members in the State or district (whichever applies) within 14 days after the end of the convention. Connecticut Gen. Stat. section 9-400 (2003). If a petition is properly filed and has the required number of signatures, the candidate will be placed on the primary ballot along with the party-endorsed candidate. As under the old Connecticut law, if no candidate other than the endorsed candidate qualifies by either method (*i.e.*, by receiving at least 15 percent of the endorsement vote or by filing a petition), then the endorsed candidate is deemed to be the party's nominee and no primary election is held for the office. Connecticut Gen. Stat. section 9-416 (2003).

Question Presented

In light of the change in Connecticut law, do Connecticut party conventions continue to constitute separate elections for purposes of determining (1) whether Ms. Farrell's principal campaign committee may continue to accept undesignated contributions in connection with the primary election process; and (2) whether Ms. Farrell's principal campaign committee is required to file a pre-election report for the primary election with the Commission, even though no primary will be held for that office?

Legal Analysis and Conclusions

The Commission concludes that, despite the change in Connecticut's law, party conventions in Connecticut continue to be separate elections under the Act. However, because Ms. Farrell is not on the ballot for the August 10, 2004, primary, and because the convention is the only election in which Ms. Farrell is participating during the primary process, Farrell for Congress may not accept undesignated primary contributions after May 10, 2004, the date of the Democratic district convention. Likewise, Farrell for Congress is not required to file a second pre-primary report prior to the August 10, 2004, Connecticut primary date.

The Act and Commission regulations define an “election” to include “a general, special, primary, or runoff election” and “a convention or caucus of a political party which has authority to nominate a candidate.” 2 U.S.C. 431(1)(A) and (B); *see also* 11 CFR 100.2. The Commission has previously stated that the question of whether a particular event – including a convention or caucus, which has authority to nominate a candidate – is an election, is determined by an analysis of relevant state law. *See* Advisory Opinions 1992-25, 1986-17, and 1984-16.

Prior Commission advisory opinions make clear that in analyzing state law, a convention or caucus need not actually nominate a candidate for “the authority to nominate” requirement to be met. Rather, so long as the convention or caucus has *any* potential to nominate a candidate, it will be deemed to have the authority to nominate within the meaning of the Act and the Commission’s regulations. *See* Advisory Opinion 1978-30 (finding convention had authority to nominate where state law provided that if the endorsed candidate received at least 70 percent of the convention vote, no primary election would be held, and the endorsed candidate would be deemed nominated). *See also* Advisory Opinion 1992-25 (concluding that where a candidate runs for nomination at a state convention of a political party and receives the nomination, a primary is not necessary and, therefore, the party convention has the authority to nominate a candidate). *Cf.* Advisory Opinion 1984-16 (finding that under state law, the convention only had the authority to endorse, not to nominate a candidate, where the endorsed candidate could not become the party nominee without the holding of a primary election).

In Advisory Opinion 1976-58, the Commission concluded that party conventions in Connecticut *were* elections for purposes of the Act. This was because it was “possible under Connecticut law for the convention’s ‘party-endorsed candidate’ to be ‘deemed . . . chosen as the nominee’” if no other candidate received the required percentage of the delegates’ votes or filed a “candidacy” for nomination. The Commission stated that in such a case the endorsement at the convention was “tantamount to a nomination of the candidate,” and therefore the party convention had the “authority to nominate” candidates. Accordingly, the Commission determined that candidates could be involved in two elections during the primary process – the convention and the primary election (if a primary was in fact held) – and could, consequently, be entitled to two separate contribution limits.

The new Connecticut law does not materially change the situation for purposes of the Act. Under the new law, as under the old law, the potential remains for the party-endorsed candidate to “be deemed to have been lawfully chosen” as the party’s nominee if no other candidate challenges the party’s endorsement. Connecticut Gen. Stat. section 9-416 (2003). The only difference between Connecticut’s old and new laws is that there are now two ways (*i.e.*,

receiving at least 15 percent of the endorsement vote or filing a petition), rather than one, of challenging a party convention's endorsement. However, as the Commission stated in Advisory Opinion 1976-58, the "fact that the party endorsement might result in a tentative nomination subject to challenge would not change" the fact that the party endorsement is tantamount to a nomination in cases where no candidate succeeds in challenging the party's endorsement by obtaining a place on the primary ballot. Significantly, the Commission found the "authority to nominate" requirement was satisfied in Advisory Opinion 1976-58 even though there was a possibility that the convention decision would be subsequently disturbed; the fact that the convention could produce a nominee under state law was sufficient.

Under the new Connecticut law, where no candidate, other than the party-endorsed candidate, obtains at least 15 percent of the endorsement vote or files a petition for candidacy with the required number of signatures, the party-endorsed candidate will be deemed to be the party's nominee solely by virtue of the party's endorsement and without being required to take any additional steps to secure the nomination. In this instance, because no primary for the 4th Congressional District will take place, the only election Ms. Farrell was involved in during this primary process was the May 10, 2004, Democratic district convention.² *See* 11 CFR 110.1(j)(3).

Commission regulations provide that contributions not designated in writing by the contributor for a particular election are presumed to be made for the next election after the contribution is made. 11 CFR 110.1(b)(2)(ii). Furthermore, "[c]ontributions designated in writing for a particular election, but made after that election, shall be made only to the extent that the contribution does not exceed net debts outstanding from such election." 11 CFR 110.1(b)(3)(i). Because the Commission has determined that the May 10, 2004, Democratic district convention was the only election Ms. Farrell was involved in during the primary process, Farrell for Congress must treat undesignated contributions made after May 10, 2004, the date of the Democratic district convention, as contributions to the general election. 11 CFR 110.1(b)(2)(ii). However, Farrell for Congress may use contributions raised after May 10, 2004, to the extent necessary to retire net debts outstanding. 11 CFR 110.1(b)(3)(i).

As a general matter, all such contributions received by convention candidates following the date of nomination by the convention will be general election contributions. However, if a successful convention candidate is

² The Commission notes that your request asserts that the new Connecticut law "resembles . . . the section of the New York election code that [the Commission] reviewed in Advisory Opinion 1986-17." Because the question of whether New York party conventions constitute separate elections under the Act is not relevant to any activities Farrell for Congress is presently undertaking or intends to undertake, the Commission expresses no opinion on the current status of New York party conventions. *See* 11 CFR 112.1(b).

challenged and a primary is triggered under state law, the candidate would have the option of obtaining redesignation of those contributions for the newly created second election, the primary. Following the primary, a successful candidate would receive a third limit for the third election, the general.

Conversely, a candidate that did not put his name before the convention and availed himself only of the primary process will not receive the benefit of a separate contribution limit for the convention and the primary, because he participated in only one election. However, a candidate who did place his name before the convention and lost would also be able to avail himself of a second contribution limit for the primary election.

The Act states that the treasurer of the principal campaign committee of a candidate for the House of Representatives or for the Senate shall file, during regularly scheduled election years “a pre-election report, which shall be filed no later than the 12th day before (or posted by registered or certified mail no later than the 15th day before) any election in which such candidate is seeking election, or nomination for election, and which shall be complete as of the 20th day before such election.” 2 U.S.C. 434(a)(2)(A)(i); 11 CFR 104.5(a)(2)(i)(A). A pre-election report must be filed for any election, including primaries.

Because the May 10, 2004, convention was an election and no primary will be held for the 4th Congressional District on August 10, 2004, Farrell for Congress has fulfilled its pre-election reporting requirement by filing its pre-convention report and need not file a pre-primary report before the August 10, 2004, primary.

The Commission recognizes that where, as here, state law gives state party conventions the authority to nominate, not just endorse, a candidate, the need for separate contribution limits arises for candidates seeking nomination to Federal office during the convention phase, and potentially, also during a primary election. Such an electoral system places more pressure on candidates to put substantial resources into the convention process to secure the nomination, thus increasing the need for separate contribution limits. Where a convention or a caucus has any potential to nominate a candidate, and a candidate has any potential to secure the nomination at such an event, separate contribution limits are needed to supply the necessary resources for the candidates involved.

This approach also facilitates proper and robust disclosure by those seeking federal nomination. Practically speaking, most nominations will be resolved at the convention. This year, 11 of the 12 federal nominations in Connecticut were in fact resolved through that process. Most expenditures made in seeking these party nominations occurred in the period immediately prior to the convention; this makes sense given that the convention had the potential to produce the nominee under Connecticut law. The pre-convention reports filed

prior to this year's convention collectively detail hundreds of thousands of dollars in contributions and expenditures in the twenty-day period leading up to the convention. To not consider the convention to be an election would mean that reports which illuminate this spending would not be produced. Instead, pre-primary reports would be produced during August, when almost all candidates have been officially nominated and when there is no particular value in requiring a round of disclosure. Moreover, those who lost the nomination at the convention and decided against a primary fight would also be required to file reports in August, months after they have ceased seeking the nomination. The filing requirements would be so counterintuitive as to invite violations instead of encouraging compliance.

This response constitutes an advisory opinion concerning the application of the Act and Commission regulations to the specific transaction or activity set forth in your request. *See* 2 U.S.C. 437f. The Commission emphasizes that, if there is a change in any of the facts or assumptions presented, and such facts or assumptions are material to a conclusion presented in this advisory opinion, then the requestor may not rely on that conclusion as support for its proposed activity.

Sincerely,

(signed)

Bradley A. Smith
Chairman

Enclosures (AOs 1992-25, 1986-17, 1984-16, 1978-30, and 1976-58)