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Opinion No. 01-045

Political Action Committee Fundraising for Referendum

QUESTIONS

1. When must a single measure committee supporting or opposing adoption of the proposed amendment to the Tennessee Constitution regarding a lottery certify its treasurer to the Registry of Election Finance under Tenn. Code Ann. § 2-10-105(e)?

2. Can a single measure committee that raises funds before the referendum is an official referendum, register when required and report its funds raised before that time and expenditures made before that time as a lump sum without disclosing the source or amount of the contribution or the amount and recipient of the expenditure?

OPINIONS

1. The General Assembly has enacted a joint resolution agreeing to the amendment regarding the lottery by a two-thirds vote of each House under Article XI, Section 3, and the Speaker of each House signed the resolution on February 15, 2001. As of February 15, therefore, the language to appear on the ballot and the election at which the measure will appear on the ballot were set forth in a resolution that has received the required legislative approval. Beginning February 15, 2001, therefore, a single measure committee supporting or opposing adoption of the amendment at the referendum must certify its treasurer to the Registry before accepting a contribution or making an expenditure to influence the approval or rejection of the lottery amendment to the Tennessee Constitution in 2002.

2. Activity that took place before February 15, 2001 is not subject to disclosure under campaign finance disclosure laws, Tenn. Code Ann. §§ 2-10-101, *et seq.* Individuals paid to lobby the General Assembly to adopt or defeat the joint resolution could, depending on the facts and circumstances, be subject to registration and reporting requirements under Tenn. Code Ann. §§ 3-6-101, *et seq.*

ANALYSIS

1. Registration and Disclosure Requirements

This opinion concerns registration and disclosure requirements for an organization supporting or opposing adoption of the amendment to the Tennessee Constitution regarding lotteries. Article XI, Section 3 of the Tennessee Constitution describes the processes by which the state constitution may be amended. Under this provision, the General Assembly may provide for a constitutional amendment by a resolution, which must then be submitted to the voters at the next statewide election. The Tennessee General Assembly recently passed Senate Joint Resolution 1. That resolution provides for amendment of Article XI, Section 5 of the Tennessee Constitution by adding new language, contained in the resolution, at the end of that provision. The resolution further provides "[t]hat the foregoing amendment shall be submitted to the people at the next general election in which a Governor is to be chosen, the same being the 2002 November general election and the Secretary of State is directed to place such amendment on the ballot for that election." Research indicates that the Speakers of the House and Senate signed the final joint resolution on February 15, 2001.

Under Tennessee law, a political campaign committee must certify the name and address of its treasurer to the Registry of Election Finance and/or the county election commission before it may receive a contribution or make an expenditure in a state or local election. Tenn. Code Ann. § 2-10-105(e). A political campaign committee must also file a quarterly report disclosing "contributions" and "expenditures" as required under Tenn. Code Ann. § 2-10-107. The statutes define "political campaign committee" as follows:

> "Political campaign committee" means:
>
> (A) A combination of two (2) or more individuals, including any political party governing body, whether state or local, making expenditures, to support or oppose any candidate for public office *or measure*, but does not include a voter registration program;
>
> (B) Any corporation or any other organization making expenditures, except as provided in subdivision (3) [exempting certain activities from the definition of "contribution"], *to support or oppose a measure; or*
>
> (C) Any committee, club, association or other group of persons which receives contributions or makes expenditures to support or oppose any candidate for public office *or measure* during a calendar quarter in an aggregate amount exceeding two hundred fifty dollars ($250);

Tenn. Code Ann. § 2-10-102(10) (emphasis added). "Measure" means:

> any proposal submitted to the people of the entire state, or any political subdivision of the state, for their approval or rejection at an election, including any proposed law, act, or part of an act of the general assembly, *or revision of or amendment to the constitution;*

Tenn. Code Ann. § 2-10-102(7) (emphasis added). "Election" means "any general, special or primary election or run-off election, held to *approve or disapprove a measure* or nominate or elect a candidate for public office." Tenn. Code Ann. § 2-10-102(4) (emphasis added). "Contribution" means, in part:

> any advance, conveyance, deposit, distribution, transfer of funds, loan, loan guaranty, personal funds of a candidate, payment, gift, pledge or subscription, of money or like thing of value, and any contract, agreement, promise or other obligation, whether or not legally enforceable, *made for the purpose of influencing a measure* or nomination for election or the election or any person for public office or for the purpose of defraying any expenses of an officeholder incurred in connection with the performance of the officeholder's duties, responsibilities, or constituent services.

Tenn. Code Ann. § 2-10-102(3) (emphasis added). "Expenditure" means:

> a purchase, payment, distribution, loan, advance, deposit or gift of money or anything of value *made for the purpose of influencing a measure* or the nomination for election or election of any person to public office.

Tenn. Code Ann. § 2-10-102(5)(A) (emphasis added).

The Tennessee Supreme Court, interpreting the constitutionality of disclosure requirements in the context of a referendum campaign, noted "the Act [the disclosure requirement] does not apply to financing of generalized discussion of public issues and is triggered only when a group is financing *election outcome specific advocacy in a particular campaign.*" *Bemis Pentecostal Church v. State,* 731 S.W.2d 897, 905 (Tenn. 1987), *appeal dismissed*, 485 U.S. 930, 108 S.Ct. 1102 (1988), *reh'g denied*, 485 U.S. 1029, 108 S.Ct. 1587 (1988)(emphasis added). The Court noted that this distinction is constitutionally important under *Buckley v. Valeo*, 424 U.S. 1, 96 S.Ct. 612 (1976). That case established a distinction between "issue advocacy" and "express advocacy." While disclosure requirements may constitutionally apply to a group engaged in "express advocacy," they may not constitutionally apply to a group engaged only in "issue advocacy." 96 S.Ct. at 646-47, 662. In *Bemis,* the Tennessee Supreme Court addressed the constitutionality of applying disclosure requirements to a church organization that had broadcast an advertisement opposing adoption of a local liquor-by-the-drink measure. The Court stated:

> Plaintiffs' [several churches] regular and continuing programs of broadcasting their religious services on radio or television or of publishing and distributing church newsletters are not and cannot be considered campaign contributions or expenditures,

> regardless of whether they advocate a particular result or not in the course of such activities, as these activities are protected by the First Amendment and are expressly excluded from the operation of the Act under T.C.A. 2-10-102(3)(B). Only the financing of their direct participation in the campaign, through activities in which Plaintiffs would not otherwise have engaged but for an impending election, trigger the Act. Ongoing or standing political campaign committees, however, would be encompassed under . . .[the statutory definition of political campaign committee], but the predominantly religious activities of Plaintiffs are not within the scope of the Act and would not result in Plaintiffs being considered political campaign committees for any purpose under the Act. If Plaintiffs published advertisements or other forms of general expression that warned of the potential and actual effects of alcohol consumption or other perceived social evils, outside the context of an election campaign or even during a campaign but without financing election outcome specific advocacy, then such activities would not fall within the Act, absent any indication these activities were timed and intended to circumvent the requirements of the Act. Nevertheless, that Plaintiffs in this case contributed and spent funds *directly to influence the result of the vote in this referendum* is undisputed in this case; such activity as that shown on this record can only be considered financing of election outcome specific activity.

Bemis Pentecostal, 731 S.W.2d 897 at 905-06 (footnotes omitted; emphasis added).

Since the registration requirement applies before a political campaign committee may receive a "contribution" or make an "expenditure" in a state election, and in light of the statutory definition of these terms and of cases regarding constitutionality of disclosure requirements, the question is when the terms of a measure and its submission to the public for approval are specific enough that money may be given or spent "for the purpose of influencing" the measure. In the case of the lottery referendum, the General Assembly adopted the resolution setting forth the language of the proposed amendment and providing for its inclusion on the ballot in November, 2002, and the Speaker of each House signed the final resolution February 15, 2001. Remaining matters regarding placement on the ballot are largely ministerial. Op. Tenn. Atty. Gen. 85-59 (March 4, 1985)(once the General Assembly has approved a resolution for a constitutional amendment by a two-thirds vote, it is its duty to submit the amendment to the people at the next general election in which a governor is chosen). For this reason, beginning February 15, 2001, a political campaign committee must certify its treasurer to the Registry of Election Finance before it may receive a contribution or make an expenditure to influence the approval or rejection of the lottery amendment to the Tennessee Constitution in 2002.

2. Disclosure Requirements for Earlier Fundraising

The second question is whether a single measure committee that raised funds before February 15, when the resolution was signed, may register when required and report its funds raised before that time and

expenditures made before that time as a lump sum without disclosing the source or amount of the contribution or the amount and recipient of the expenditure. Until the joint resolution providing for the lottery referendum enacted by the General Assembly was signed by the Speaker of each House February 15, 2001, we do not think any organization received a "contribution" or made an "expenditure" for the purpose of influencing the outcome of the referendum under state campaign finance laws. For this reason, that activity is not subject to disclosure requirements under Tenn. Code Ann. §§ 2-10-101, *et seq.* Individuals paid to lobby members of the General Assembly on the resolution to amend the Tennessee Constitution to allow a state lottery could, depending on the facts and circumstances, be subject to registration and reporting requirements under the state lobbying laws, Tenn. Code Ann. §§ 3-6-101, *et seq.*

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