



FYI

FLORIDA DEPARTMENT *of* STATE

RICK SCOTT
Governor

KEN DETZNER
Secretary of State

August 4, 2016

Florida Education Association Advocacy Fund
c/o Ronald G. Meyer, Esq.
131 North Gadsden Street
Tallahassee, Florida 32301

Florida Watch Action, Inc.
c/o Ronald G. Meyer, Esq.
131 North Gadsden Street
Tallahassee, Florida 32301

Re: DE 16-10 Campaign Financing –
Contributions; Political Advertising –
Miscellaneous Advertisements;
Electioneering Communications; §§
106.011, 106.1437, Florida Statutes

To Whom It May Concern:

As two entities engaged in political activity—a political committee and corporation—you have requested through counsel an advisory opinion regarding whether certain messages you propose to disseminate are regulated under chapter 106, Florida Statutes, and whether the money used to purchase those messages will be considered a “contribution” under chapter 106. Because you are entities engaged in political activity proposing to take certain actions with respect to the Florida Election Code, the Division is authorized to issue an opinion pursuant to section 106.23(2), Florida Statutes.

FACTS

You state in your request that the messages you propose to disseminate will have the following characteristics:

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- They will refer to or depict a clearly identified candidate for office without expressly advocating the election or defeat of the candidate, but they will be susceptible of no reasonable interpretation other than an appeal to vote for or against a specific candidate.
- They will be targeted to the relevant electorate in the geographic area the candidate would represent if elected.
- They will be disseminated more than 30 days before a primary or special primary election or more than 60 days before any other election for the office sought by the candidate.
- They will be coordinated with candidates who may be mentioned in the materials.

You essentially ask two questions:¹ first, whether these proposed messages would be regulated by the Florida Election Code, and second, whether the costs for these messages would be “contributions” as defined in the Election Code.

ANALYSIS

Issue 1: Whether your proposed messages would be regulated by the Election Code.

Chapter 106 of the Florida Statutes contains the definitions and requirements for various types of disseminated messages. If a particular message is regulated under chapter 106, then it must meet the requirements for such regulated communications. *See, e.g.*, § 106.011(15), Fla. Stat. (political advertisement definition); § 106.011(12), Fla. Stat. (independent expenditure definition); § 106.011(8), Fla. Stat. (electioneering communication definition); § 106.1437, Fla. Stat. (miscellaneous advertisement requirements).

To be a “political advertisement” or an “independent expenditure,” a communication must “expressly advocate” the election or defeat of a candidate or the approval or rejection of an issue. *See* § 106.011(12), (15), Fla. Stat. You state that your proposed communications will *not* “expressly advocate”; therefore, such communications which do not expressly advocate would not be “political advertisements” or “independent expenditures.”²

To be an “electioneering communication,” a communication must meet several requirements, including that it must be “made within 30 days before a primary or special primary election or 60 days before any other election for the office sought by the candidate.” *See* § 106.011(8)(a)(2.), Fla. Stat. You indicate that your proposed communications will *not* be disseminated within those timeframes; therefore, as long as that is the case, such communications would not be “electioneering communications.”

¹ In your request, you present four questions, which the Division has reordered and consolidated into two questions.

² You also indicate the messages will be “coordinated with candidates who may be mentioned in the materials.” For this reason as well, the messages would not be “independent expenditures.” *See* § 106.011(12), Fla. Stat.

To be a “miscellaneous advertisement,” a communication must meet the definition outlined in section 106.1437, Florida Statutes, as follows:

Any advertisement, other than a political advertisement, independent expenditure, or electioneering communication, on billboards, bumper stickers, radio, or television, or in a newspaper, a magazine, or a periodical, *intended to influence public policy or the vote of a public official*, shall clearly designate the sponsor of such advertisement by including a clearly readable statement of sponsorship. If the advertisement is broadcast on television, the advertisement shall also contain a verbal statement of sponsorship. This section does not apply to an editorial endorsement. For purposes of this chapter, an expenditure made for, or in furtherance of, a miscellaneous advertisement is not considered to be a contribution to or on behalf of a candidate, and does not constitute an independent expenditure. Such expenditures are not subject to the limitations applicable to independent expenditures.

§ 106.1437, Fla. Stat. (emphasis supplied). It does not appear from your request that your proposed messages would meet this definition because you have not indicated that they would be made to influence public policy or the vote of a public official.

Because the messages would not meet the definition for any of these terms, they would not be regulated as such under the Florida Election Code.

Issue 2: Whether the costs of your proposed messages would be contributions to a candidate.

Your second question deals with whether the money spent on your proposed communications would be considered “contributions” under the Election Code, and if so, then to whom those contributions would be deemed to be made. The Division only has authority to issue advisory opinions with regard to actions that the *requester* has taken or proposes to take. *See* § 106.23(2), Fla. Stat. In turn, your question will be construed to inquire as to the effect on you as the requester of the opinion as to whether the costs of your proposed messages would be counted toward the limits for contributions under section 106.08, Florida Statutes.

Under Florida law, the definition of “contribution” includes “[a] gift, subscription, conveyance, deposit, loan, payment, or distribution of money or anything of value, including contributions in kind having an attributable monetary value in any form, made for the purpose of influencing the results of an election or making an electioneering communication.” *See* § 106.011(5)(a), Fla. Stat. Based on the facts you provide, your proposed communications would appear to fall under the definition of “contribution.”

The Legislature has expressly stated that an expenditure is not considered a contribution made “to or on behalf of any candidate” if it is made for a true electioneering communication. § 106.011(8)(c), Fla. Stat. The question you raise is whether an expense for a communication that

is neither a “miscellaneous advertisement” nor a “political advertisement,” and which would be an electioneering communication but for being made outside the statutory time periods for such, would be a contribution to the candidate it supports.

Here, your proposed communications would *not* meet the definition of “electioneering communications”; therefore, the exception in section 106.011(8)(c) would not apply. Instead, as proposed, the costs of your communications would appear to meet the definition of “contribution” under section 106.011(5). In turn, the contributions would be subject to the monetary limits in section 106.08.³

SUMMARY

Communications that do not meet the definitions of “political advertisement,” “independent expenditure,” “electioneering communication,” or “miscellaneous advertisement” contained in sections 106.011 and 106.1437, Florida Statutes, are not regulated by disclaimer requirements under chapter 106. The expenses incurred to make communications not otherwise regulated under chapter 106 may still be subject to the limits set out in section 106.08 if they meet the definition of “contribution” in section 106.011(5)(a).

Respectfully,



Maria I. Matthews, Esq.
Director, Division of Elections

³ However, the expense for a communication would not meet the definition of “contribution” or “expenditure” if the communication were to contain only negative advertising against an unopposed candidate, because at that point the expense would not be “made for the purpose of influencing the results of an election or making an electioneering communication.” See § 106.011(5), (10), Fla. Stat.