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INFORMATION ONLY

January 5, 2000

The Honorable Kurt S. Browning
Pasco County Supervisor of Elections
38053 Live Oak Avenue, Room 212
Dade City, Florida 33523-3892

RE: DE 99-04
Rescinding DE 94-15, DE 98-04
and DE 98-10

Dear Mr. Browning:

This is in response to your request for an advisory opinion regarding three Division of Elections (Division) opinions that may be superseded by recent judicial decisions or administrative order. The Division is authorized to provide advisory opinions pursuant to section 106.023(2), Florida Statutes, when requested by any supervisor of elections.

You have expressed concerns about the continuing viability of DE 94-15, 98-04, and DE 98-10. For the reasons that follow, we hereby rescind DE 94-15 and DE 98-10, and DE 98-04 is rescinded in part. For purposes of discussion, we will address each opinion separately.

DE 94-15

In DE 94-15, the Division opined that a political committee formed to support only issues must register as a committee that also supports *candidates* when it sends out a mass mailing advocating certain issues which includes incidental support for candidates supporting those issues. The conclusion in DE 94-15 implicated several provisions in chapter 106, Florida Statutes, relating to independent expenditures, in-kind contributions and contribution limits. Given the recent holding in *Florida Right to Life, Inc. v. Mortham*, No. 98-770-CIV-ORL-19A (M.D. Fla. Sept. 29, 1998), the conclusion reached in that opinion is no longer correct. Only those organizations whose major purpose is to engage in the *express advocacy* of candidates fall within the definition of a political

committee, as defined in section 106.011(1), Florida Statutes. *Doe v. Mortham*, 708 So.2d 929 (Fla. 1998). Material such as the mass mailing in DE 94-15 that incidentally supports a candidate does not qualify as a political advertisement " supporting any candidate" as that term is defined in section 106.011(17), Florida Statutes. Further, based upon the court's holding, express advocacy does not include communication that leaves an 'unmistakable impression' of supporting or opposing specific candidates. Therefore, based upon the *Florida Right to Life* decision, the Division rescinds DE 94-15.

DE 98-04

In DE 98-04, the Division was asked to what extent the Florida Supreme Court's decision in *Doe v. Mortham*, 708 So.2d 929 (Fla. 1998), affected Florida's political disclaimer with respect to general political advertising requirements, and like advertising which is in the form of an independent expenditure. The Division opined that sections 106.143(1)(b) and 106.071(1), Florida Statutes, still require the full political disclaimers on political advertisements unless the person responsible for the advertisement is a private individual who is not a candidate and uses his own "modest resources." Based upon the reporting requirements in section 106.071(1), Florida Statutes, the Division concluded that expenditures of less than \$100 in the aggregate constitute "modest resources."

However, in two recent cases, courts held that expenditures in excess of \$100 constituted "modest resources." See *Smithers v. Florida Elections Commission*, No. 96-5705 (2nd Cir. July 17, 1998) (summary judgment), and *Kappelmann v. Florida Elections Commission*, No. 1998-3629 (Fla. 1st DCA 1998). In *Smithers*, the expenditure was in excess of \$100, but less than \$500. In *Kappelmann*, the expenditure was \$341.77. Based on the two cases cited above, it now appears that "modest resources" may mean an amount less than \$500. Accordingly, the Division amends DE 98-04 only to the extent that the term "modest resources" meant "expenditures of less than \$100 in the aggregate."

DE 98-10

DE 98-10 relates to the calculation of fines resulting from the late filing of a campaign report by a political committee that is registered federally and in Florida. The Division opined that an automatic fine cannot be based upon the committee's out-of-state activity. The Division stated that only those contributions and expenditures that are made for the purpose of influencing non-federal elections conducted in *Florida* must be reported under chapter 106, Florida Statutes.

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However, in a recent order issued by the Florida Elections Commission (Commission), *In re: Shaw, Pittman, Potts & Trowbridge PAC*, FEC 98-083W, the Commission ruled that the calculation of a fine is based upon expenditures or *receipts*, not expenditures or contributions. The Commission stated that the term "receipts" includes anything of value received by a committee during a reporting period whether or not the receipts are used for Florida electoral purposes. The Commission noted that a committee not wishing to be subject to a fine based upon its total receipts, including those unrelated to Florida, can create a Florida committee and open a separate depository for its Florida activity. Therefore, based upon the Commission's ruling in *Shaw*, the Division rescinds DE 98-10.

Summary

Division opinions DE 94-15 and DE 98-10 are hereby rescinded, and DE 98-04 is rescinded in part.

Sincerely,

A handwritten signature in black ink, appearing to read "L. Clayton Roberts", with a stylized flourish at the end.

L. Clayton Roberts
Director, Division of Elections

Prepared by:
Kristi Reid Bronson
Assistant General Counsel

LCR/KRB/st

Enclosures