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**MEMORANDUM**

TO: Former Electioneering Communications Organizations

FROM: Jennifer Blohm, Esquire   
Ronald Meyer, Esquire 

DATE: August 24, 2009

RE: Florida Division of Elections – Advisory Opinion DE 09-06

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In June, we provided a memorandum informing you of the federal court’s decision in *Broward County Condominiums v. Browning*, Case No. 4:08cv445-SPM/WCS (N.D. Fla. May 22, 2009) which found Florida’s electioneering communications statutes unconstitutional. We also explained the ramifications that this decision could have on your organization. Since June, new developments have occurred which will further impact your organization. **One of the changes required is that reports must now be filed with the IRS on Form 8872 if annual receipts or expenditures exceed \$25,000 or if a Form 8871 has previously been filed.**

At the time we wrote the memorandum, the state had appealed the injunction issued by the federal court and had indicated that it would appeal the federal court’s final order as well. Since that time, the state has decided not to appeal any of the federal court’s rulings, and, therefore, the decision of the federal court is now final. As a result, at this time, electioneering communications organizations do not exist in Florida. Instead, as explained in our prior memorandum, ECOs are now tax exempt political organizations pursuant to section 527 of the Internal Revenue Code.

Additionally, on August 4, 2009, the Division of Elections issued Advisory Opinion DE 09-06. In DE 09-06, the Division clarifies several issues in light of the federal court’s decision. For instance, the Division found that former ECOs no longer have to file periodic reports with the Division, stating:

Because the section is unconstitutional and can no longer be enforced, an ECO need not file the previously required reports. The Division of Elections will continue to accept such filings if the ECO desires to file them; however, the Division will not take any action regarding a late filed report or a failure to file a report.

The unenforceability of the reporting requirements is important because it affects a former ECO's status as a qualified state or local political organization (QSLPO) under the Internal Revenue Code.

An organization that is tax exempt as a "political organization" under Section 527 of the Internal Revenue Code, has annual income or expenses in excess of \$25,000 or previously filed a Form 8871 does not have to report its contributions or expenditures to the IRS if it is *required* to file such a report with the state. Under these circumstances, the 527 organization qualifies as a QSLPO, a status that exempts the organization from having to file a Form 8872 with the IRS.

However, under Florida's present situation, a former ECO is no longer *required* to file with the state. Therefore, a former ECO does not qualify for the QSLPO exemption. Although the state will continue to accept reports from a former ECO, this voluntary reporting **does not meet** the IRS's requirement that the reporting be mandatory. Accordingly, we advise all former ECOs that have an annual income or expenses in excess of \$25,000, or which have previously filed a Form 8871, to begin filing the Form 8872 with the IRS to report contributions and expenditures. Please ensure that your treasurer or accountant is aware of this new reporting requirement. Even if your organization decides to continue reporting with the state, it must still file the Form 8872 with the IRS.

The reporting schedule for the Form 8872 varies according to whether it is an odd or even numbered year. In odd numbered years, a former ECO can choose to file the Form 8872 either monthly or semi-annually (for 2009, the next semi-annual report is due on February 1, 2010). In even numbered years, a former ECO will be required to file the report either monthly or quarterly. A pre- and post-election report also may be required in even numbered years.

In addition, if your organization has income of more than \$25,000 annually, it is now required to file an IRS 990 return, as well. When entitled to QSLPO status, the organization was exempt from filing this tax return unless its receipts exceeded \$100,000. The triggering amount is \$25,000 for a non-QSLPO.

If your organization decides to terminate its reporting to the state, the Division in DE 09-06 clarified the procedure for terminating the organization's registration. In the opinion, the Division states "[a]n ECO may terminate its registration with the applicable filing officer by providing a signed letter from the ECO's chairperson or campaign treasurer to the filing officer informing the filing officer that the ECO is terminating its registration." We see no advantage to continuing an ECO's registration with the state unless and until the Legislature attempts to impose new registration requirements. Accordingly, it is our suggestion that a letter be prepared and sent to the filing officer asking that registration be terminated.

Finally, the Division found that a former ECO which continues to operate as a "527" organization may still receive funds from a committee of continuous existence (CCE) and a political

committee (PC). *See* DE 09-06. While a former ECO is not subject to the Election Code, the CCE and PC “must continue to comply with regulations applicable to its conduct.”

While a former ECO may receive contributions from a CCE or PC, a former ECO should not contribute to a CCE or PC. A former ECO that contributes in excess of \$500 per calendar year to CCEs and/or PCs becomes a PC and is subject to registration and reporting requirements as well as contribution limits. *See* Section 106.011(1)(a)(1), Fla. Stat. (2008).

Please be advised that the provisions of Section 106.0701, Florida Statutes, which govern state reporting when an organization which is exempt from taxation pursuant to Section 527 is established, maintained or controlled by the Governor, Lt. Governor, members of the Cabinet, state legislators or candidates for such offices, continue in effect. Thus, if one of those officers or candidates directly or indirectly solicits or accepts contributions on behalf of the 527 organization, he or she must still establish a website on which such contributions and expenditures made by the organization are filed, current to within five business days.

### **SUMMARY**

In sum, recent developments have clarified the federal court’s decision finding the electioneering communications statutes unconstitutional. Accordingly, at this time, a former ECO: (1) must file a Form 8872 with the IRS if its annual income or expenses are in excess of \$25,000 or if it has previously filed a Form 8871; (2) must file an IRS 990 Return if annual income exceeds \$25,000; (3) may terminate its registration with the Division of Elections by letter from its Chairman or Treasurer; (4) may accept contributions from a CCE or PC, but may not contribute to a CCE or PC; and (5) must be aware that if certain officers or candidates for such offices are involved in the fundraising for the 527 organization, the reporting requirements of Section 106.0701, Florida Statutes, continue in effect.