



The Corporation as Political Host: When Corporations Sponsor Appearances by Federal Candidates

Corporations often have an interest in hosting appearances by candidates for federal office. The Federal Election Campaign Act (FECA) and regulations issued by the Federal Election Commission (FEC) impose certain restrictions on corporate-sponsored forums for federal candidates. Corporations must comply with these rules to avoid making illegal contributions since a speaking forum and audience can constitute “anything of value” under the definition of “contribution.” The rules for candidate appearances before an audience limited to the restricted class differ from appearances before all employees. Both types of appearances are discussed below. Pertinent regulations can be found at 11 C.F.R. §§ 114.3 & 114.4.

Appearances Before the Restricted Class

The FECA permits a corporation to host appearances by federal candidates and political party leaders on corporate premises at a meeting, convention or other function of the corporation to address the corporation’s officers, executive and administrative personnel, including professionals, stockholders and their families (commonly referred to as the “restricted class”). The corporation may sponsor the event and select the candidates it wishes to hear from, at no charge to the candidate, in order to facilitate a political communication to its senior executives and stockholders. The following rules generally apply to events attended only by the corporation’s restricted class:

- (1) The candidate and corporate officers may expressly advocate the candidate’s election before the restricted class. The corporation may communicate its preference for the candidate.
- (2) Corporate representatives may coordinate the political message to be conveyed at the event with the candidate and his staff prior to the event.

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Showdown on Campaign Finance

On June 5, 2003, the U.S. Supreme Court indicated probable jurisdiction over the appeal of the constitutional challenge to the Bipartisan Campaign Reform Act of 2002 (BCRA). The appeal is from a decision of the statutorily-mandated three-judge panel of the U.S. District Court for the District of Columbia. *McConnell v. FEC*, 251 F. Supp. 2d 948 (D.D.C. May 2, 2003); *stay granted by* 253 F. Supp. 2d 18 (May 19, 2003); *probable jurisdiction noted*, No. 02-1674, et al. (U.S. June 5, 2003).

Now the consolidated case of 77 plaintiffs (including Senator McConnell and the U.S. Chamber of Commerce) and 17 defendants/intervenors (including the Federal Election Commission, the law’s sponsors and the Department of Justice) heads to the Supreme Court. The Court has scheduled a summer-long briefing schedule and set an oral argument for Monday, September 8, 2003, at 10 a.m. The oral argument is scheduled to last four hours.

Wiley Rein & Fielding LLP represents Senator McConnell, as well as the Chamber of Commerce, the National Association of Manufacturers and the Associated Builders & Contractors in this case. ♦

For more information, please contact Jan Witold Baran (202.719.7330 or jbaran@wrf.com) or visit the Stanford Law School website to read any of the pleadings filed in the case—www.law.stanford.edu/library/campaignfinance

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Changes in the States

Minnesota

The Minnesota legislature recently passed a statute that amended several provisions in the state's lobbying law. H.F. 1 (May 28, 2003). The statute is effective on July 1, 2003. The three major changes are discussed below.

First, the legislature has changed the definition of lobbyist. It eliminated the five-hour time threshold and replaced this trigger mechanism with a flat definition of a lobbyist as an individual engaged for pay or other consideration of \$3,000 a year from all sources for the purpose of attempting to influence legislative or administrative action or the official action of a metropolitan government unit, by communicating with or urging others to communicate with public or local officials. Minn. Stat. Ann. § 10A.01(21).

Second, the legislature reduced the reporting requirements for lobbyists. Beginning in 2004, lobbyists need only file reports on January 15 and June 15 of each year. *Id.* § 10A.04(2). For 2003, lobbyists must still file the July 15 report.

Finally, the legislature imposed fees on both lobbyists and lobbyist principals. Lobbyists must pay a \$50 fee by January 15 of each year for each person on whose behalf the lobbyist is registered. *Id.* § 10A.04(2a). Principals must pay a separate \$50 fee with their March 15 annual reports. *Id.* § 10A.04(6). For this year, each lobbyist who was registered on January 15, 2003 must pay the \$50 fee for each client by August 1, 2003. Principals must pay a separate \$50 fee by the same date.

New York

On June 16, 2003, Governor Pataki of New York issued Executive Order No. 127. This Executive Order (EO) requires a disclosure of lobbying information by those seeking contracts in excess of \$15,000 with any New York state department, office or division; or with any board, commission or bureau thereof; or with any public benefit corporation, public authority or commission at least one of whose members is appointed by the Governor, including the State University of New York and the City University of New York. The EO also requires that covered agencies take certain lobbying and "non-responsibility" findings into account when awarding covered contracts and to identify all persons trying to influence the procurement process.

The EO is applicable to procurement contracts to which a solicitation for bids, officers or proposals is made 60 days or more after the EO has taken effect. The EO, however, does not cover contracts that by law must be awarded to the lowest responsible bidder or awarded on the basis of the lowest price subsequent to a competitive bid process.

New York's Office of General Services is required to issue written guidance to covered agencies regarding the implementation of the EO within 45 days.

South Carolina

South Carolina Governor Mark Sanford signed a law on June 26, 2003, which changes the state's campaign finance and lobbying laws. Parts of the new law are effective immediately and other parts become effective on July 1 and November 3. A detailed analysis of this new law will appear in the next issue of *Election Law News*.

South Dakota

Effective July 1, 2003, the state has increased its annual lobbyist registration fee from \$25 to \$35.

Washington

Washington Governor Gary Locke signed former H.R. 1294 on May 7, 2003, which eliminates the need for out-of-state federal PACs to file reports with Washington state's Public Disclosure Commission. Amending chapter 42.17 of the Revised Code of Washington, the new law outlines new filing requirements for nonfederal out-of-state PACs and exempts federal PACs from these requirements completely. The new law, which is effective July 27, 2003, also eliminates the forfeiture penalty previously imposed on candidates who received contributions from out-of-state PACs that failed to report to the state.

West Virginia

The West Virginia legislature recently passed legislation that specifically exempts federal PACs from the requirement to file state campaign contribution reports. W. Va. Code Ann. § 3-8-2(a). The law became effective on June 5, 2003. ♦

For more information, contact Carol A. Laham (202.719.7301 or claham@wrf.com) or Mark Renaud (202.719.7405 or mrenaud@wrf.com).

Electronic Filing With the IRS

Beginning on July 1, 2003, political organizations that have to file Form 8872, Political Organization Report of Contributions and Expenditures, with the IRS will be required to do so electronically if the organization has or expects to have contributions or expenditures of more than \$50,000 during the calendar year. If you represent such an organization, make sure you have the organization's user name and password. The user name and password were issued after the organization filed its initial Form 8871, Political Organization Notice of Section 527 Status. If you have forgotten or misplaced the user name and/or password, immediately send a letter requesting a new user name and password to:

Internal Revenue Service
Attn: Request for 8872 Password
Mail Stop 6273
Ogden, UT 84201

It may take several weeks for your new user name and password to arrive, as they will be mailed to the organization.

Federal PACs and Qualified State or Local Political Organizations (QSLPOs) are not required to file periodic IRS Forms 8872. A QSLPO is a state or local PAC that (1) focuses solely on state and local affairs, (2) reports with a state that makes the reports publicly available, and (3) makes its own reports available for public inspection per IRS rules. ♦

For more information, contact Mark Renaud (202.719.7405 or mrenaud@wrf.com).

Confidentiality of Files Protected

On June 20, 2003, the U.S. Court of Appeals for the District of Columbia invalidated a Federal Election Commission (FEC) regulation that required materials subpoenaed during investigations of alleged violations of Federal election law to be immediately disclosed to the public upon completion of the investigation. The court found that, by forcing political organizations to make confidential internal documents a matter of public record, the regulation seriously infringed upon the First Amendment rights of said organizations. The AFL-CIO contended, and the court agreed, that the regulation encouraged political groups to manufacture claims against rival groups in order to gain access to their confidential documents. The FEC contended that the regulations were necessary to deter violations of federal campaign finance laws and promote agency accountability. The court declined to engage in a detailed analysis of the importance of these goals since the agency had made no attempt to narrowly tailor the regulation to avoid impinging on the First Amendment rights of appellees. Accordingly, the regulation was struck down. *Amer. Fed'n of Labor and Congress of Indus. Orgs. v. FEC*, No. 01-cv-01522 (D.C. Cir. June 20, 2003), available at: pacer.cadc.uscourts.gov/docs/common/opinions/200306/02-5069a.pdf. ♦

For more information, contact Jan Witold Baran (202.719.7330 or jbaran@wrf.com).

Bookmark WRF's Election Law Website for information on the following frequently asked questions and other useful information:

www.wrf.com/practice/detail.asp?group=13

- ♦ Gift Rules
- ♦ Travel On Corporate Aircraft by Candidates, Members of Congress and Staff
- ♦ Merging and Terminating PACS
- ♦ The "One-Third" Rule Checklist
- ♦ Foreign Nationals and U.S. Subsidiaries of Foreign Parent Corporations

Upcoming Filing Dates to Remember

- July 15, 2003** – Second Quarterly FEC Report due for House and Senate Candidates
- July 20, 2003** – July Monthly FEC Report due for Federal PACs filing monthly
- July 20, 2003** – Monthly IRS Form 8872 for Nonfederal PACs filing monthly*
- July 31, 2003** – Semiannual FEC Reports due for Federal PACs filing semiannually
- July 31, 2003** – First Half 2003 IRS Form 8872 due for Nonfederal PACs filing semiannually*
- August 14, 2003** – Lobbying Disclosure Act Report due, covering January 1 to June 30, 2003
- August 20, 2003** – August Monthly FEC Report due for Federal PACs filing monthly
- August 20, 2003** – Monthly IRS Form 8872 due for Nonfederal PACs filing monthly*

(*Note: Qualified state and local political organizations are not required to file Form 8872 with the IRS.)

If you have any questions or would like any additional information, please contact a member of Wiley Rein & Fielding's Election Law & Government Ethics Group at 202.719.7000 or visit the website at www.wrf.com. We welcome the opportunity to discuss any matter of specific concern to you or to tell you more about our practice and our capabilities. ♦

Recent FEC Advisory Opinions

In the past several months, the Federal Election Commission (FEC) has issued several Advisory Opinions on questions of federal campaign finance. A summary of a few selected opinions follows below.

- ♦ **AO 2003-14 (June 18, 2003):** Given Home Depot's custom of employees wearing shop apron pins, the size of the proposed pin, the pin's relative size to other pins, the limited time the pins would be worn, and the message contained on the pin, the FEC allowed Home Depot to give pins to members of its restricted class to be worn on their shop aprons. The pins bear the capitol dome, the Home Depot logo, and the word "PAC."
- ♦ **AO 2003-23 (June 12, 2003):** The FEC allowed Rory Reid, the son of Senator Reid of Nevada, to solicit contributions for the state party outside the prohibitions and limitations of the Act even though he a) is the son of a sitting Senator and candidate for the Senate; b) has solicited contributions for his father in the past; and c) may solicit contributions for his father in the future. The AO endorses a dual-agency theory—that persons may wear different hats at different times.
- ♦ **AO 2003-13 (June 12, 2003):** Under the case-by-case exception for the definition of "member" in the FEC's regulations, the FEC allowed the American Academy of Ophthalmologists to solicit members-in-training even though they don't pay dues and do not have a right to vote. The institutional relationship with the Academy and corresponding financial relationship of the members-in-training were taken into account. ♦

For more information, contact Mark Renaud (202.719.7405 or mrenaud@wrf.com).

Upcoming Events

NABPAC Rap Session: "Best Compliance Practices for PAC Professionals: A Dialogue with FEC Chair Ellen Weintraub and NABPAC Legal Hotline Counsel Jan Baran"

Wiley Rein & Fielding LLP, Washington, DC

Jan Witold Baran, Co-Chair

July 15, 2003

12:00 p.m. – 1:30 p.m.

Practising Law Institute's "Corporate Political Activities 2003: Complying With Campaign Finance, Lobbying & Ethics Laws"

Washington, DC

Jan Witold Baran, Co-Chair

Carol Laham, Speaker

September 11-12, 2003

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- (3) The candidate and corporate representatives may solicit contributions to the candidate and the candidate may accept contributions from members of the restricted class before, during or after the candidate's appearance.
- (4) The corporation may *not* collect any contributions through any officers, directors or other representatives of the corporation, either before, during or after the appearance.
- (5) The corporation is not required to offer all candidates an opportunity to appear before its restricted class. The corporation may select one candidate to appear and speak.
- (6) *If* the corporation permits more than one candidate for the same office to address its restricted class, and *if* the corporation permits the news media to cover or carry an appearance by one candidate, the corporation must permit the news media to cover or carry the appearances by the other candidate(s) for that office, as well. In addition, if the corporation permits a representative of the news media to cover or carry a candidate appearance, the corporation must provide all other representatives of the news media with equal access for covering or carrying that appearance, but equal access permits "the use of pooling arrangements if necessary."

Appearances Before All Employees of the Corporation

Sometimes a corporation wishes to make a political forum open to all of its employees, not just its restricted class. If a corporation wishes to invite a political candidate to speak to all employees in an open forum, the corporation must comply with the following conditions:

- (1) If a candidate for the House or Senate or a candidate's representative is permitted to address or meet employees, all candidates for that seat who request to appear must be given a similar opportunity to appear.
- (2) The candidate's representative or party representative (other than an officer, director or other representative of a corporation) or the candidate, may ask for contributions to his or her campaign or party, or ask that contributions to the separate segregated fund of the corporation be designated for his or her campaign or party. The candidate, candidate's representative or party representative may *not*, however, accept contributions before, during or after the appearance while at the meeting, convention or other function of the corporation, but may leave campaign materials or envelopes for members of the audience.
- (3) A corporation, its officers or employees, or its federal PAC may *not*, either orally or in writing, solicit or direct or control contributions by members of the audience to any candidate or party in conjunction with any appearance by any candidate or party representative, and may *not* facilitate the making of contributions to any such candidate or party.
- (4) A corporation or its separate segregated fund may *not*, in conjunction with any candidate appearance, expressly advocate the election or defeat of any clearly identified candidate or candidates of a clearly identified political party and may *not* promote or encourage express advocacy by employees.
- (5) A corporation may *not* endorse the candidate in connection with his or her appearance.
- (6) No candidate, candidate's representative or party representative may be provided more time or a substantially better location than other candidates, candidates' representatives or party representatives who appear, unless the corporation is able to demonstrate that it is clearly impractical to provide all candidates, candidates' representatives and party representatives with similar times or locations.
- (7) Corporate representatives may coordinate the appearance logistics with the candidate, candidate's agent and candidate's authorized committee. Such coordination may include discussions of the structure, format and timing of the candidate appearance and the candidate's positions on issues. This coordination must *not* include discussions of the candidate's campaign plans, projects, or strategic or financial needs.
- (8) Representatives of the news media are permitted to attend a candidate's or candidate representative's appearance before a corporation's employees.
- (9) A corporation may *not* reproduce, republish or distribute the candidate's or a political party's campaign literature, advertisements, campaign signs and similar material. The corporation may, however, produce and distribute, on its own, announcements for the candidate forum that identify the candidate who will attend the forum and the office the candidate seeks. In producing these announcements, the corporation may use campaign-provided photographs and biographical information.

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Official Visit or Campaign Stop?

Sometimes a question will arise regarding whether these rules apply to an appearance by an incumbent federal officeholder who is invited to speak in his capacity as the local Congressman rather than in his capacity as a federal candidate. The Federal Election Commission has opined that invitations extended to multiple candidates for the same office, to appear together or separately, are in connection with the federal election and the rules outlined above apply. Where the incumbent officeholder appears in his capacity as a candidate, then the event is, in fact, in connection with a federal election and the rules outlined above apply.

However, where the invitation to a speaker is not based on his status as a candidate, but rather is based on his role as a legislator who has had an impact upon current statutes and future legislation of interest to the corporation's employees, the corporation may invite him to speak without triggering the restrictions outlined above. If this is the case, the officeholder's

remarks should be strictly limited to a discussion of his work as a legislator, legislation and policy. There should be no reference to his candidacy or campaign. There is a risk, however, that the incumbent officeholder's remarks might go beyond the discussion of legislation and policy and place the corporation in an awkward position. For example, complaints have been filed with the FEC over closing remarks that talked about re-election. *See, e.g.*, FEC MUR 2872. A simple statement like that can possibly transform a non-campaign forum into a campaign-related forum. For this reason, it is advisable to observe as many of the rules noted above as possible and to reach a clear understanding with an incumbent federal officeholder ahead of time to ensure that remarks will not be campaign-related. ♦

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