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Election Law News

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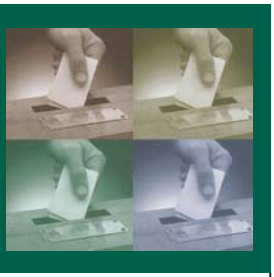

Three Cheers for Corporate Partisan Communications

Practical Tips for Election Year Activities

With the increased regulation of political action that has emanated from the Bipartisan Campaign Reform Act of 2002 (BCRA) and continues to pile up, it is refreshing to return to an area of corporate political involvement that remains unchanged. Such an area is corporate partisan communications to high-level employees and shareholders and their families (the restricted class). For trade associations, it entails communications to individual members or to the one or two corporate representatives from each member company who normally deal with trade association matters.

By partisan communications, we mean communications on any topic. Indeed, corporations and trade associations may communicate with their respective restricted classes about federal candidates, federal parties and federal elections. A corporation or trade association may urge members of its restricted class to vote for a particular federal candidate, to vote against a particular federal candidate or to donate personal funds to selected federal candidates or committees. Such communications can take the form of emails, letters, phone banks and candidate appearances (See July 2003 *Election Law News*).

Corporations often urge members of their restricted classes to attend a fundraiser for a candidate or to register in order to vote for a particular candidate. Federal law and regulations proclaim communications may be on "any topic whatsoever," so this is indeed a broad avenue of political action, but a corporation should research state law before discussing state or local candidates or ballot issues. (For example, California allows certain types of employee partisan communication, but San Diego County declares them to be "expenditures," thus triggering reporting.) Federal partisan communications may even be coordinated with federal candidates.

With such a broad mandate for corporate activity, there are bound to be some limits. Indeed, there are five main limitations, which are described below.

1. Corporations and trade associations may only send partisan communications to their respective "restricted classes." For corporations, this includes certain salaried executive, administrative and professional employees and their families. A corporation's restricted class also includes its stockholders and their families.

For trade associations, the restricted class sphere is much more limited. A trade association may make partisan communications with representatives of its corporate members with whom the trade association normally communicates about association matters. (The association may also communicate with any individual member and with its executive and administrative personnel and their families.) To make up for this limited restricted class, the trade association may ask its corporate members, at their own expense, to communicate the same message to their corporate restricted classes. Corporations and trade associations, then, may not communicate with the public about federal candidates. Such an activity would be a corporate contribution, which is prohibited.

continued on page 6

Also in This Issue

FCC Unveils Its Electioneering Communications Database 2

FEC Largely Sidesteps 527 Issue—For Now 2

What Is a 527? 3

Tax Corner: Annual Returns for 501(c) Organizations 3

Upcoming Dates to Remember 4

New Jersey State Legislature Amends Gift Rules 4

Advisory Opinions 5

Government Contractor Criminally Violates FECA 5

FCC Unveils Its Electioneering Communications Database

Pursuant to a mandate contained in the Bipartisan Campaign Reform Act of 2002 (BCRA), the Federal Communications Commission (FCC) unveiled its electioneering communications database in February.

The database, available at http://gullfoss2.fcc.gov/ecd, enables persons to determine whether a broadcast, cable or satellite media outlet can reach 50,000 or more people in a Congressional District or state. Such information is important because federal law bans corporations, unions and organizations using corporate or union funds from airing broadcast, satellite or cable communications that clearly identify a federal candidate within 30 days of a primary election and 60 days of a general election if the communications are targeted. "Targeted," under the BCRA, means the communications can be received by 50,000 or more people in the candidate's Congressional District (for House elections) or state (for Senate elections and Presidential primaries).

Under the Federal Election Commission's (FEC) regulations, the data contained in the FCC database is a complete defense to a charge of an illegal corporate or union electioneering communication. In order to determine whether a particular broadcast radio or television station, cable system or satellite system is unable to reach 50,000 or more people in a given Congressional District or state (and is therefore "safe" for electioneering communication purposes), a media buyer simply goes to the FCC database website and enters the type of race, state, Congressional District, type of communication and the call letters or other type of station identification. ✦

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FEC Largely Sidesteps 527 Issue—For Now

In Federal Election Commission (FEC) Advisory Opinion (AO) 2003-37 issued on February 19, 2004, the FEC largely sidestepped the thorny issue of whether political organizations exempt from taxation under section 527 of the Internal Revenue Code (527s) are covered by the Federal Election Campaign Act, as amended. Instead, the Commission limited its analysis in the AO to entities with the same status as the requestor, Americans for a Better Country (ABC), which is a 527 that also is registered as a political committee with the FEC with federal and non-federal accounts. The Commission deferred all other judgments as to 527s to a rulemaking set to begin in March.

In the AO, the Commission stated that, as a political committee, ABC must pay for public communications that "promote, support, attack, or oppose" a federal candidate solely with federal funds ("hard money") and with no allocation from the non-federal account. An example of such communications includes the following:

President George W. Bush, Senator X, and Representative Y have led the fight in Congress for a stronger defense and stronger economy. Call them and tell them to keep fighting for you.

Moreover, the FEC mandated that ABC pay for get-out-the-vote (GOTV) drives and messages that urge support for general policy positions solely with federal funds or with funds allocated between its federal and non-federal accounts pursuant to FEC regulations. For GOTV messages that promote or support an identified federal candidate, political committees like ABC may use only federal funds. For messages that advocate votes for specific federal candidates, as well as support for the entire party ticket, allocation is necessary. Voter registration and messages are treated in a similar manner. According to the Commission, however, contributions by ABC to federal candidates, in and of themselves, do not cause ABC's activities to be coordinated with the recipient candidates.

Finally, the Commission limited ABC's fundraising activities in several ways. First, a political committee like ABC may not solicit non-federal funds by conveying in the solicitation the fact that the funds raised will be used to support or oppose specific federal candidates. In addition, federal candidates and officeholders may raise funds for ABC's non-federal account only within federal contribution limits and from federally permissible sources. A disclaimer developed earlier in FEC Advisory Opinions 2003-3 and 2003-36 must be used in such instances. Moreover, the disclaimer must be used in any written invitation or solicitation that identifies a federal candidate or officeholder as an honored guest, featured speaker or host of the non-federal fundraiser. ✦

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What Is a 527?

With the abundance of media outlets covering and commenting on the actions of the Federal Election Commission (FEC) in its advisory opinion to Americans for a Better Country (See article on page 2.), a refresher on exactly what constitutes a 527 political organization may be useful. A federal PAC is, by definition, a 527, but not all 527s are federal PACs.

Political organizations that claim tax-exempt status under Section 527 of the Internal Revenue Code are referred to as "527 organizations" or "527s." These organizations are formed and operated primarily to receive and make contributions for the purpose of influencing the selection, nomination, election or appointment of any individual to federal, state or local public office. 527 organizations are exempt from federal income tax on contributions received (although they are taxed at the highest corporate rate (currently 35 percent) to the extent that they have investment income above $100).

There are some 527 organizations (*e.g.* federal political action committees) that must comply with the requirements of the FEC. These organizations do not need to file most of the Internal Revenue Service (IRS) reports described below. 527s that are not subject to the FEC's oversight are often called "shadow" or "soft money" organizations because they can raise unlimited funds from a variety of sources. However, these organizations must register with the IRS and must disclose information about the contributions that they receive and the expenditures that they make.

A 527 organization does not need to be incorporated or have formal organizational documents. However, it must have its own employer identification number, which can be obtained instantly from the IRS by applying online at https://sa1.www4.irs.gov/sa_vign/newFormSS4.do.

In order to qualify as a 527, most organizations must file Form 8871 electronically with the IRS at www.irs.gov/polorgs. If the organization reasonably expects to have more than $25,000 in annual gross receipts, then the form must be filed within 24 hours after the date that the organization is formed (otherwise it must be filed within 30 days after the organization actually receives $25,000). The following organizations are not required to file Form 8871: (i) political committees required to file FEC reports; (ii) state or local political party committees; (iii) political committees of state or local candidates and (iv) organizations that expect that they will always have gross receipts of less than $25,000.

Most 527 organizations also must file the following reports with the IRS: (A) periodic reports (Form 8872); (B) an annual information return (Form 990) and (C) an annual income tax return (Form 1120-POL). IRS Form 8872 reports must be filed electronically either monthly, quarterly or semi-annually, while IRS Form 990 must be filed by May 15 of the following year (for calendar year filers). Organizations that are not required to file IRS Form 8871 also are not required to file either the IRS Form 8872 or IRS Form 990. Also, 527s that file regular disclosure reports with one or more states disclosing all of their financial information, are not required to file IRS Forms 8872. (These organizations are known in IRS lingo as QSLPOs or "qualified state and local political organizations.") QSLPOs are not required to file IRS Form 990 unless their gross receipts exceed $100,000.

All 527 organizations, including federal political committees, that have taxable income of more than $100 must file IRS Form 1120-POL, which is due by March 15 of the following year (for calendar year filers). ✦

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Tax Corner: Annual Returns for 501(c) Organizations

Q: *Do organizations that are tax-exempt under Section 501(c) of the tax code (e.g., educational organizations, lobbying groups, trade associations, etc.) need to file annual tax returns with the Internal Revenue Service (IRS)?*

A: Yes, with some exceptions. In general, all 501(c) organizations (except for certain types of religious organizations) need to file an annual information return (Form 990) with the IRS if they "normally" have annual gross receipts of more than $25,000. In the beginning years of an organization it is difficult to know the organization's "normal" income, but there are bright-line tests that vary depending on the age of the organization. If an organization is less than a year old, it will need to file a return if it has receipts (including donation pledges) of more than $37,500. If an organization is between one and three years old, it will need to file a return if it had average receipts of more than $30,000 in its first two years. If an organization is three or more years old, it will need to file a return if had average receipts of more than $25,000 over the previous three years. For calendar year filers, Form 990 is due by May 15 of each year. The instructions for preparing and filing Form 990 can be found on the IRS website at www.irs.gov/pub/irs-pdf/i990-ez.pdf. ✦

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Upcoming Dates to Remember

Deadline	Filing
March 15, 2004	IRS Form 1120-POL due for those political organizations, including federal PACs, with more than $100 in interest or dividend income
March 20, 2004	March monthly FEC report due for federal PACs filing monthly
March 20, 2004	March monthly IRS Form 8872 due for non-federal PACs filing monthly*
April 15, 2004	First quarter FEC report due for federal PACs filing quarterly and for federal candidates
April 15, 2004	First quarter IRS report due for non-federal PACs filing quarterly*
April 20, 2004	April monthly FEC report due for federal PACs filling monthly
April 20, 2004	April monthly IRS Form 8872 due for non-federal PACs filing monthly*

Note: Deadlines are not extended if they fall on a weekend. For a complete listing of FEC, IRS and lobbying disclosure filing dates for 2004, please visit our website at www.wrf.com. ✦

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

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Changes in the States

New Jersey State Legislature Amends Gift Rules

New Jersey's legislature recently amended the state's gift rules. The following five changes, among other provisions, apply to lobbyists and, more generally, to state employees. The new rules are effective April 13, 2004.

First, covered executive and legislative branch officials may not accept a gift, honorarium or anything of value from a lobbyist or legislative agent in excess of $250 in the aggregate for a calendar year. This prohibition also applies to the receipt of gifts by the immediate family of covered officials. The restriction does not apply if the gift is received in the course of non-state employment or if full reimbursement is made within 90 days.

Second, no person may "confer any benefit, whether the benefit inures to a public servant or another person, to influence a public servant in the performance of any official duty or to commit a violation of an official duty."

Third, high-level executive branch officials may not receive honoraria from any person.

Fourth, state employees and legislative and executive officials may not receive honoraria or gifts for any matter related to their official duties.

Exceptions to the above-three prohibitions include the following:

- In-state travel;
- Out-of-state travel up to $500 per trip;
- Out-of-state travel paid by a non-profit organization of which the covered official is an active member and
- Out-of-state travel provided by a non-profit organization that does not contract with the state to provide goods, materials, equipment or services.

Finally, campaign contributions may not be given in lieu of gifts or honoraria prohibited above. ✦

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Advisory Opinions

Credit Union PAC and Matching Charitable Gifts (FEC AO 2003-39)

On February 6, 2004, the Federal Election Commission (FEC) issued a favorable advisory opinion to the Credit Union National Association (CUNA), its separate segregated fund, the Credit Union Legislative Action (CULAC) and the North Carolina Local Government Employees' Federal Credit Union (Local Government FCU). Advisory Opinion 2003-39 allows credit unions such as Local Government FCU that are members of CUNA, a "federation of trade associations," to match contributions to CULAC by individual credit union members with charitable donations. Under the Federal Election Campaign Act, as amended, such matching charitable contributions are considered to be permissible solicitation expenses of the PAC's connected organization or, in this case, of the collecting agent credit unions. Jan Baran and Mark Renaud of Wiley Rein & Fielding LLP, represented CUNA, CULAC and Local Government FCU in their request.

Bush-Cheney and Coordinated Campaign Ads (FEC AO 2004-1)

In the first numbered Advisory Opinion of 2004, the FEC interpreted its coordination regulations. In this opinion, the FEC considered a television ad for a Republican candidate for Congress in a special election. This candidate, Kentucky state senator Alice Forgy Kerr, wanted to include in her ad video and audio of President Bush supporting her candidacy. The President's agents would review the script and ad, but the Kerr campaign was to pay for its production.

The FEC ruled that any ad that featured both Kerr and Bush, and that aired within 120 days of Kentucky's Presidential primary where Bush was a candidate, must be attributed to both candidates. If a portion of the broadcast, production and distribution costs were not attributed to the Bush campaign, then the Kerr campaign would be making an excessive in-kind contribution to the Bush campaign because the ads were coordinated.

According to the FEC, the costs needed to be divided between the campaigns based on the proportion of space and time devoted to each candidate.

Because of the language of the FEC's coordination regulations, the Kerr campaign was allowed to pay for the entire cost of similar ads that were aired more than 120 days before the presidential primary. Such ads, even without attribution, would not be in-kind contributions to the Bush campaign, according to the FEC. ✦

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Government Contractor Criminally Violates FECA

According to a February 11, 2004 press release, the head of a government contractor entered into a plea agreement with the U.S. Attorney for the Southern District of California for criminal violations of the Federal Election Campaign Act (FECA), as amended. The February agreement and a previous December agreement acknowledged violations of FECA as well as other federal statutes.

First, Parthasarathi Majumder violated the prohibition on contributions in the name of another by providing political donors with cash and check reimbursements for political contributions, instructing the payroll department of his company, Science & Applied Technology, Inc. (SAT), to award donors bonuses and instructing subcontractors to inflate labor time sheets to cover the amount of the contributions.

Second, because some of the reimbursements for contributions came from SAT, the activities violated the prohibition on corporate contributions.

Third, SAT also violated the ban on contributions by government contractors with its reimbursements. This federal ban applies to all government contractors, whether or not they are incorporated.

Finally, other illegal activities also violated the Byrd Amendment, which prohibits persons from using federal funds to lobby members of Congress and the Executive Branch. Moreover, the defendants created false expenses to conceal the improper nature of the lobbying payments.

Pursuant to an earlier civil settlement, the defendants agreed to pay the United States more than $3 million. The criminal sentences have yet to be determined. ✦

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continued from page 1

2. Corporate and association partisan communications may entail reporting requirements. If a corporation or trade association spends more than $2,000 in the aggregate for all primaries in an election year, or exceeds $2,000 in the aggregate for all candidates for the general election, then the corporation or trade association must file reports with the Federal Election Commission (FEC) beginning with the first quarter during which the threshold is met and continuing for each quarter during which additional expenditures of any amount are made. The report is on FEC Form 7. There are also special reports due before general elections.

3. If the communications solicit money for federal candidates, the corporation or trade association should include a disclaimer stating that contributions are voluntary and that the individual has a right to refuse to contribute without reprisal. The disclaimer should also state that contributions are not tax deductible.

4. The corporation may not provide an envelope or postage in order to facilitate the employee's contribution. Likewise, no corporate employee may collect the contributions. Solicitation letters should simply include the address of the campaign to which individuals can send contributions at their own cost.

5. Corporate and trade association employee/member partisan communications may not be republications or reproductions, in whole or in part, of any candidate or political committee campaign materials. Brief quotations are permitted in order to demonstrate a candidate's position.

Within these clear limits, corporate partisan communications provide corporations and trade associations with an opportunity to participate in the political arena regardless of the changes wrought by BCRA. ✦

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