

CORPORATE COUNSEL: A Monthly Feature for In-House Lawyers

Campaign Contributions

Many corporations avoid any participation in federal elections, but corporate funds may be lawfully used in several meaningful ways.

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Scores of corporations and individual executives have been accused, fined, or even imprisoned for knowingly violating the prohibition on corporate contributions and expenditures “in connection with” any federal election. Even minor alleged violations involving small sums of money can become front-page stories and public relations nightmares. In view of the legal and public relations consequences of mistakes in this area, it is no wonder that prudent corporate counsel often steer their clients clear of any significant participation in campaign activity.

So long has it been the conventional wisdom among corporate counsel that corporations cannot engage in campaign activity that corporate America has largely neglected valuable tools that are widely and effectively used by labor unions and other special interest groups. Although a corporation can avoid legal pitfalls by eschewing all campaign activity, many corporations with a significant stake in the political process are finding that abstinence is an unacceptable cure.

Corporations large and small that are affected by legislative and regulatory action will often have an interest—even a duty to their shareholders—to participate in the electoral process to the extent allowed by law. In-house counsel should be aware that their companies can par-

ticipate through several perfectly legal and well-established corporate political tools.

The Federal Election Campaign Act (FECA) broadly defines the terms “contribution or expenditure” to include “anything of value” provided to a candidate or political party for use in a federal election. Direct corporate contributions to candidates are obviously prohibited, but so are any uses of corporate facilities, resources, or employees provided by the corporation to a campaign. These prohibitions are stringent, and both the Federal Election Commission and the Department of Justice are aggressive in enforcing them with civil and criminal actions.

That much is well-known. What is less known is that FECA and Federal Election Commission regulations expressly authorize a wide array of meaningful corporate political activity.

RESTRICTED CLASS' COMMUNICATIONS

Perhaps the most important political tool available to corporations is the least understood and most underused. A corporation may use corporate treasury funds to communicate with its so-called restricted class of employees and shareholders “on any subject.” The FEC’s regulations explicitly allow communications expressly advocating the election or defeat of a

clearly identified federal candidate. In other words, a corporation may:

- attempt to persuade members of its restricted class to vote for or contribute to particular candidates,
- (subject to certain restrictions) invite preferred candidates to appear in person before its restricted class to receive the corporation’s endorsement and to seek votes, volunteers, and contributions, and
- operate telephone banks for the purpose of urging members of the restricted class to register and get out to vote for (or against) particular candidates.

Although there is no legal limit on the amount that may be spent on restricted-class communications, FEC regulations require amounts in excess of \$2,000 to be reported.

These communications must be limited to the corporation’s restricted class members and their families, but a properly defined restricted class for a major corporation can comprise tens or even hundreds of thousands of people: all stockholders and “executive or administrative personnel,” a term defined in FECA as “individuals employed by a corporation who are paid on a salary, rather than hourly, basis and who have policy making, managerial, professional, or supervisory responsibilities.”

The number of shareholders and their families alone can be quite large; when

salaried supervisory personnel and their families are added, the number of potential voters or contributors may be very large indeed. Although corporations are often justifiably reluctant, for business reasons, to communicate with their shareholders or other elements of their restricted classes on political issues, communicating to only part of the class is perfectly permissible. On the other hand, it is easy to envision some elections presenting issues of sufficient importance to a company or industry to justify making an all-out effort.

Trade associations may also communicate with their members, subject, of course, to certain restrictions. Since the purpose of many trade associations is to be their industry's spokesperson and liaison with the federal government, their use of this authority seems only natural.

For corporations with activities focused in one state or geographic area, the message to members of the restricted class may be identical. For large corporations with nationwide operations, members of the restricted class could be sent messages tailored to their particular area. By using electronic mail, communications to the restricted class, or segments of it, need not be unduly expensive.

Restricted-class communications, paid for with corporate treasury funds to mobilize shareholders, executive and administrative personnel, and their respective families to support or oppose candidates is a powerful but little used political tool.

The desirability and effectiveness of this tool is amply demonstrated by the resources organized labor has poured into communications. In the 2000 election cycle, the AFL-CIO alone reported spending over \$4.1 million in union funds on federal campaign communications to its members; the 10 largest component members of the AFL-CIO reported spending an additional \$3.8 million. The National Education Association reported spending over \$2.9 million. The total of almost \$11 million does not include events, such as candidate appearances before local union shops, that each cost less than \$2,000.

In sharp contrast, only one of the 10 largest American corporations, as ranked by *Fortune*, reported any such expenditures: AT&T reported spending \$263,872.

A survey of filings for 10 of the best-known trade associations revealed that only two, the American Medical Association and the National Association of Home Builders, reported any restricted-class communications, and their total was less than \$83,000. The U.S. Chamber of Commerce, the National Association of Manufacturers, and Pharmaceutical Research and Manufacturers of America reported no such expenditures.

The FEC has repeatedly condoned labor unions' restricted-class communications that were closely coordinated with their preferred candidates or with the Democratic Party. In short, so long as the communications are confined to the restricted class and their families and are timely reported, there are few restrictions on the content, method of communication, or amount spent on these efforts. These activities must be carefully undertaken and monitored, however, because communications beyond the restricted class may result in a prohibited corporate expenditure.

The value to a preferred candidate of a program of restricted-class communications may far exceed the value of a maximum contribution from the corporation's political action committee. A properly structured program presents no greater legal risk.

GENERAL CORPORATE COMMUNICATIONS

Corporations may also sponsor political events that are open to the general public. For example, a corporation may invite candidates to speak to all employees, or even at events that are open to the general public. At such events, the candidate may expressly advocate his own election and solicit campaign contributions. But the corporation may not endorse a candidate before an unrestricted audience, and the candidate and his staff may not collect contributions before, during, or immediately after the event. The candidate may, however, leave contribution envelopes and campaign materials for the audience.

A corporation that allows one candidate the opportunity to speak to a non-restricted class audience must provide a "similar opportunity" to competing candidates. Although this might appear at first blush to be a show-stopper, the candidate's opponents usually will not avail themselves of the opportunity to appear.

PACs

Finally, as is widely known, corporations may establish "separate segregated funds," commonly known as political action committees, or PACs. A corporation may solicit its restricted class to contribute up to \$5,000 per person per year to its PAC; payroll "check-off" plans for these contributions are widely used. The PAC in turn can contribute up to \$5,000 per election (the primary and general elections each count as one election) to a favored candidate. The corporation may solicit each member of its restricted class as often as it likes, and may even (subject to some important restrictions) solicit all its employees twice a year. The corporation may pay the PAC's administrative costs, including legal, accounting, and fund-raising solicitation costs, out of its treasury funds.

Many corporations have active PACs, but few are fully satisfied with their PACs as an exclusive tool for participating in the political arena. Many corporations limit the effectiveness of their PACs by adopting overly narrow definitions of the restricted class. While a corporation need not solicit its entire restricted class, not doing so will artificially limit the amount of money its PAC will raise. The first step toward fully funding a PAC is to properly define the restricted class.

These are just three ways in which corporations could be more active politically under current law. Notably, unlike corporate donations of "soft money" to political parties, none of the activities discussed above would be prohibited or even restricted by the campaign finance reform legislation passed by the Senate last year or the similar bill passed by the House last week. Indeed, it seems likely that prohibiting corporations and labor unions from making direct contributions to political parties would only enhance their incentive to take advantage of these three tools for lawful participation in elections.

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