

Communicating with the “Restricted Class”

April 13, 2016

Election and Political Law

Federal Election Commission (“FEC”) regulations permit a corporation to communicate with its “restricted” or “solicitable class” on any subject, including electoral advocacy and political fundraising. See 11 C.F.R. § 114.3(a). This includes solicitations of contributions to the corporation’s PAC. We frequently see questions arising about who falls within the restricted class in one of two contexts: (a) in an effort to ensure the class is not too narrowly defined, depriving the PAC of potential donors; and (b) when a company reads the definition of “professional or administrative personnel” in the statute to only be a question of whether the employee is “salaried” or not, not considering the second prong of the test described below.

Congress has defined a corporation’s restricted class as consisting of the following:

- The corporation’s “executive or administrative personnel.”
- The corporation’s “stockholders,” as defined by FEC regulations.
- Individuals who are members of the restricted class of any subsidiary, branch, division, or “affiliate” of the company (the FEC has a multi-part test for determining which entities count as affiliates”).
- Immediate family members of the above individuals.

52 U.S.C. 30118((b)(A); see also 11 C.F.R. § 114.5(g)(1); “FEC Campaign Guide for Corporations and Labor Organizations” (2007), at 20.

The statute goes on to define a corporation’s “executive or administrative personnel” to include any (i) salaried employee who (ii) has “policymaking, managerial, professional, or supervisory responsibilities.” 52 U.S.C. 30118(b)(4)(D)(7); 11 C.F.R. § 114.1(c). This includes, at a minimum, the corporation’s officers and most senior executives; plant, division, and section managers; and non-unionized members of the “recognized professions” (e.g., lawyers and engineers).¹

It is not uncommon for companies to view this test as having only one part, and to include in their restricted class all employees who are not paid on an hourly basis. This may be a challenging standard to defend, for at lower levels of the corporate hierarchy, particular employees or classes of employees may not qualify as executive or administrative personnel.

¹ It should be noted that the Department of Labor has issued proposed regulations that would increase the number of employees eligible for overtime, potentially decreasing the number of salaried employees eligible for solicitation. 80 Fed. Reg. 38515 (July 6, 2015).

To resolve close calls, the FEC regulations refer to the Labor Department's regulations under the FLSA, 29 C.F.R. part 541, which "may serve as a guideline in determining whether individuals have policymaking, managerial, professional, or supervisory responsibilities." 11 C.F.R. § 114.1(c)(4).

Generally, the FLSA regulations focus on whether the employee's "primary duty" consists of "nonmanual work directly related to management policies or general business operations of his employer or his employer's customers" and whether the employee's job requires "exercise of discretion and independent judgment." 29 C.F.R. § 541.2(e)(2). This determination typically must be made based on a review of the job description for the employee's position.

The FEC regulations specifically exclude from the definition of "executive or administrative personnel" salaried "lower-level supervisors" who have "direct supervision over hourly employees." 11 C.F.R. § 114.1(c)(2). While salaried managers who oversee "lower-level supervisors" of hourly workers generally should qualify as executive or administrative personnel, whether a branch manager who solely supervises hourly employees would qualify may turn on specific facts. For example, the FEC concluded that store managers were within a company's restricted class, despite the fact that they primarily supervise hourly, part-time workers and performed manual duties when necessary. The FEC based its conclusion on the store manager's job duties, which were primarily managerial in nature and required the exercise of discretion in matters affecting the store, including the authority to hire and fire employees, to receive or refuse inventory shipments, to manage safety programs, and to analyze store profit and expense estimates. AO 2012-02 (Wawa). The agency has adopted a similar commonsense approach in a number of cases, looking at the overall responsibilities of the position, rather than a rote reading of the regulations. See, e.g., AO 2010-4 (Wawa) (supervision of hourly workers not dispositive of manager's status as member or restricted class); AO 2011-25 (Atlas Air) (managers were members of the restricted class despite being inactive members of a union for purposes of retaining flight seniority).

The company's various outside consultants, including outside counsel and auditors, are not "employees" of the company within the meaning of Internal Revenue Service regulations, and therefore are not part of the restricted class. Other consultants and independent contractors for whom a corporation is not required to withhold income tax are likewise not "employees" and are excluded from the restricted class. Suppliers, vendors, and other outside business associates of the company are not part of the restricted class. (The one exception to the rule is that such non-employees would be members of the restricted class if they happened to be "stockholders" of the company or immediate family members of individuals who are corporate stockholders or executive or administrative personnel.) Retired or former employees are not considered to be within the restricted class unless they are stockholders or qualify through their family relationships.

As a practical matter, in order to determine whether classes of employees other than senior managers and executives qualify as "executive or administrative personnel," it is necessary to review the relevant job descriptions and analyze them under the FEC and FLSA standards. Some corporations simply limit the restricted class to senior managers and executives, rather than engage in the often laborious task of reviewing job descriptions of mid-level and lower-level employees. Others will select a salary band at which they are highly confident that all employees will meet the test of being executive or administrative personnel.

Often close attention is required to determine which elements of a corporation's sales force qualify as executive or administrative personnel. In an important advisory opinion, the FEC distinguished between telemarketing "sales representatives" or other low-level sales personnel, who are outside of the restricted class, and "regional sales managers," who are within the restricted class, with various shades of gray between the two. See FEC Advisory Opinion 1993-16. A corporation must scrutinize the categories within its sales force in light of the guidance provided by this advisory opinion. Court decisions on pharmaceutical sales representatives may also play a factor in some companies' analyses.

Members of a corporation's board of directors are not automatically considered members of the restricted class. Directors are within the restricted class if they (a) are stockholders; (b) receive a "director's fee" or stipend for their service on other than an hourly basis; (c) otherwise qualify as "executive or administrative personnel"; or (d) are a family member of someone who is in the restricted class. Inside directors, because they generally will otherwise qualify as executive or administrative personnel, typically are within the restricted class. AO 2010-12 (Procter & Gamble). The FEC has also held that directors eligible to contribute to the PAC may do so by having their contribution deducted from their quarterly director retainer payments. *Id.*

Conclusion

These are broad guidelines for defining a corporation's "restricted class." We would be pleased to assist you in analyzing particular positions or categories of positions. If you have questions regarding these or other matters, please contact the following members of our Election and Political Law practice group:

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