

Executive Fundraising for Federal Candidates

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Election and Political Law

As the amount of money raised in federal elections surges and changes to fundraising rules increasingly favor large individual donors, there is rising pressure on—as well as opportunities for—senior executives to help raise funds for federal candidates. However, this is an area of law rich in counterintuitive rules. Familiarity with those rules can help avoid making mistakes that could have legal and reputational consequences.

In practice, senior executive fundraising activity appears most frequently in one of two forms. The first is the hosting of a small fundraising breakfast, lunch, or reception for a member of Congress or a challenger, often at the corporation's headquarters, at which the candidate appears and discusses issues of the day with senior executives of the company. The second is a fundraising reception or dinner at a senior executive's home or at a restaurant, at which the executive invites a mix of corporate colleagues as well as friends and business associates.

Both types of events potentially raise one of two legal questions: Has there been an inappropriate use of corporate resources to fund the activity, and have the contribution limits (including any limits on in-kind contributions) been complied with?

The Supreme Court's decision in *Citizens United v. FEC* provides clear First Amendment protection to independent corporate speech about candidates running for office. However, the court upheld the prohibition on corporate contributions to candidates, which includes corporate spending that is done in cooperation with, or at the request or suggestion of, the candidate. Therefore, traditional executive fundraising for federal candidates, which involves coordinating the event with the candidate and his or her staff, is likely to remain largely as regulated as it was prior to *Citizens United*.

Although, absent media attention, the FEC often is not aware of executives' activities, once known to the FEC, the agency has in the past taken strong action in cases involving fundraising by senior corporate executives. Corporations should consider reviewing their existing political law training and compliance policies for senior executives to ensure that these rules are clearly understood by those active in political fundraising.

Corporate Versus Personal Activity

Generally, executives may act in their corporate capacity using corporate resources if solicitations are limited to individuals within the corporation's "restricted class." If attendees will include individuals who are not members of the restricted class, the activity must be conducted in the executive's personal capacity, without using corporate resources.

The restricted class is defined to include a corporation's "executive or administrative personnel" (a term of art drawn from the Fair Labor Standards Act), its shareholders and the family members of those individuals, and the executive or administrative personnel of the corporation's subsidiaries, branches, divisions, and departments, and their families.

Executive Fundraising for Events Limited to the "Restricted Class"

A. General Rules for Fundraising for Corporate Events Limited to the Restricted Class

1. Executives may solicit contributions to federal candidates, parties, and PACs from members of the corporation's restricted class.
2. The solicitation can include an endorsement of a candidate on behalf of the corporation.
3. The solicitation may be communicated orally or in writing (including email).
4. While the only specific legal disclaimer required by law is that contributions are not tax deductible, we recommend that the solicitation include disclaimers similar to those required for a PAC solicitation. In particular, there should be a clear statement that contributions are voluntary.
5. While communications soliciting contributions within the restricted class are permissible, a corporation may not "facilitate" the making of a contribution.
 - a) Facilitation means providing assistance in physically conveying the contribution check to the candidate or other beneficiary.
 - b) Facilitation includes, at least, the following:
 1. Physically collecting the checks and delivering them.
 2. Providing an envelope for use in sending the check to the candidate.
 3. Using corporate resources such as couriers or FedEx accounts to convey the checks.
 - c) It is, therefore, very important that the corporation not do anything more than solicit the contribution. The solicitation may include the address of the candidate and information on how to make out the check. A candidate who attends a fundraising event will frequently bring a campaign staff member to collect all checks.
 - d) While this may seem like a minor and inconsequential distinction, the difference between merely soliciting contributions and "facilitating" their delivery is the difference between permissible fundraising and a potential enforcement action.

EXAMPLE: How mistakes can be made

The CEO solicits contributions to a senator from members of the restricted class. Later, one of the solicited junior executives sends his check to the CEO's office or to the government affairs department, which in turn sends the check to the senator's campaign. This would be a violation.

The CEO solicits the same contributions as above, and a well-meaning government affairs department lobbyist or executive secretary decides to follow up with one or more of the solicited executives and offers to convey their checks to the campaign. This would be a violation.

- e) The best practice is for the corporation to avoid “tracking” contributions made in response to an executive’s solicitation. The tracking of contributions has been cited in enforcement actions—in conjunction with other factors—as an indication that a corporation viewed executive contributions as required rather than a voluntary act.

EXAMPLE: Westar Energy case

The FEC won a settlement from Westar for facilitating the delivery of executives’ personal contributions. What makes *Westar* significant is that for the first time, the FEC also pursued Westar’s outside lobbyist for facilitating contributions. The outside lobbyist had delivered personal checks from the CEO and other executives to federal candidates. (Had there been a corporate PAC check, he could have delivered the check because the FEC regulations specifically permit a corporation to pay for the “operating costs” of a PAC, including the costs of delivering the PAC’s checks.)

B. Attendance at a Restricted Class Fundraising Event for a Candidate

1. The event should be limited to the restricted class, except that non-restricted class personnel necessary to conduct the event (e.g., security staff, catering staff) may attend.
2. The candidate may attend the restricted class fundraising event. The candidate is free to advocate his or her own election or to solicit funds. The corporation is free to solicit funds for the candidate and/or to endorse the candidate at the event.

C. Reporting the Costs of Restricted Class Solicitations and Fundraisers

1. Generally, the costs of restricted class solicitations and fundraisers are not reportable, unless the total amount spent on all restricted class solicitations and fundraisers for a particular election exceed \$2,000. The details of this reporting rule are somewhat complex. Counsel should be consulted regarding reporting obligations, if any.

The Harder Part: Executive Fundraising Outside “Restricted Class”

A. General Rules for Fundraising Outside the Restricted Class

1. When an executive seeks to solicit contributions to a fundraising event at which the candidate will attend, and that solicitation is made to individuals who are outside the restricted class, an entirely different set of rules apply.
2. An executive who wants to host a fundraising event at which the candidate will attend, with individuals who are outside the company, must do so in his or her personal capacity or do it through the corporate PAC if one exists. In either case, extreme care must be taken to ensure that no corporate resources are used.
 - a) The executive should not task corporate staff with assisting him or her in the personal fundraising activity. This includes government affairs staff, the corporation’s lobbyists, and, importantly, secretaries and administrative assistants.
 1. In principle, it is possible to use corporate personnel to assist the executive so long as the executive reimburses the corporation for their time in advance. In practice, this often does not occur, or is not handled properly, and thus the best practice is not to involve corporate staff in an executive’s personal fundraising.

2. Often, an alternative to using corporate staff is to enlist the assistance of the candidate's campaign staff. For example, instead of having the executive's secretary take RSVPs for a fundraising event, the campaign will often be willing to take the RSVPs itself. Campaigns have increasingly been willing to take on tasks associated with organizing and funding these events to help ensure compliance. (But note, a corporation generally should not provide an employee contact list or other mailing list to a candidate or federal political committee, as it may constitute a prohibited corporate in-kind contribution to the campaign.)

EXAMPLE: CarePlus case

The FEC investigated CarePlus Health Plans for making unlawful corporate contributions related to a fundraiser at the CEO's house. The CEO directed his administrative assistant to perform several tasks during working hours in connection with the fundraiser. The FEC noted that the CEO's assistant typed and sent a memorandum to executives, vendors, and family members soliciting contributions; prepared the invitation and address labels; and created spreadsheets of contributions pledged and received. In addition, the caterer's bills for the event were sent to, and paid by, the corporation, though the executive and members of his family reimbursed those costs once the investigations began. Neither the CEO nor the assistant reimbursed the corporation for the other services, company equipment, or supplies used for the personal fundraising event. The FEC calculates penalties, in part, based on the amount of contributions received rather than the corporate funds unlawfully used, so the FEC settled its investigation into CarePlus after the company agreed to pay \$62,000 in penalties.

- b) The executive should not use office supplies, office couriers, office fax machines and duplicating facilities, or other things that add incremental costs to the corporation unless the corporation is reimbursed within a commercially reasonable period. (Such reimbursements count as an in-kind contribution by the person making the reimbursement, unless the payment is made by the campaign.) Again, the best practice is to avoid using these corporate resources.
- c) Any use of a corporate contact list or mailing list must be reimbursed in advance. Valuation of such lists can be difficult. Accordingly, it is best not to use them in compiling a solicitation or invitation list for a personal fundraising activity.
- d) Use of a corporate meeting room for the fundraising event must be reimbursed within a commercially reasonable period of time, unless it is a room that is routinely made available for free to outside civic groups and the room is made available on the same terms to any other federal candidate who requests to use it.
- e) Time spent by an executive on personal political activity must not interfere with performance of corporate duties. The "safe harbor" for time spent using corporate facilities to perform individual volunteer activity for a campaign is one hour per week or four hours per month.

B. The Exemption for Fundraisers Held at an Executive's Home

1. If an executive chooses to "host" a fundraiser for a candidate, and does so in his or her personal capacity because non-restricted class individuals will be invited, a special exemption applies if the event is held in the executive's home.

2. The first \$1,000 in personal funds spent by the executive on catering and invitation costs for a home fundraiser will not count as a contribution to the candidate. The executive's spouse, if they live in the same residence, could also take advantage of the same exemption, for a total of \$2,000. Any amount spent over and above these limits would count as an in-kind contribution to the candidate. That in-kind contribution is subject to the contribution limit of \$2,700 per election for each executive and his or her spouse, and will count against the limits for the next scheduled election.
3. For home fundraisers benefiting a political party, there is a similar exemption of the first \$2,000 an individual spends in a calendar year on catering and invitation costs for fundraisers for all political committees of that political party.
4. Strangely, these exemptions apply only for events benefiting candidates and political parties. They would not apply, for example, to a fundraising event at an executive's home benefiting a "leadership PAC."

C. Reporting Executive Fundraising Outside the Restricted Class

1. The expenses paid by an executive in connection with personal fundraising beyond the restricted class must be reported to the beneficiary candidate, PAC or political party as an "in-kind contribution." This is accomplished by sending a letter to the campaign.
2. As noted above, in the case of a fundraising event in the executive's home, only the amount that exceeds the exemption would be reported as an in-kind contribution.

D. There Must Be No Link Between Executive Compensation and Contributions

1. It is illegal for a corporation to provide bonuses or pay increases to defray the cost of campaign contributions.
2. It is illegal for a corporation to reimburse the personal campaign contributions of its executives or other employees. Many criminal prosecutions have been brought over the years against corporate executives who authorized reimbursement of employees' contributions.
3. It is never permissible to submit a political contribution, whether cash or in-kind, on an expense reimbursement report.

If you have any questions concerning the material discussed in this client alert, please contact the following members of our Election and Political Law Practice Group:

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