

How Can Corporations Support the Voting Process?

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Election and Political Law

In the midst of the COVID-19 pandemic, voting in the 2020 general election is likely to look different than we have seen in recent times. Election officials across the country are working through in-person voting and vote-by-mail procedures and individual voters are deciding how best to cast their ballots. At the same time, many corporations are recognizing this unprecedented situation and are asking how they can help support the voting process. Covington's Election and Political Law Group has significant experience in this area and has advised a number of corporations on their plans leading up to the 2020 general election.

Corporations Should Take a Careful Approach

It is important for corporations to be cautious and deliberate when engaging in any activities related to elections. The laws in this area are complex, the penalties can be harsh, and the reputational harm can be significant. When considering opportunities to support the voting process, there are generally two sets of laws that most frequently restrict what corporations may do.

First, federal and state campaign finance and election laws govern activities and communications related to registering to vote, voting, and encouraging others to do either. These laws determine when a corporation is permitted to use its resources to engage in these election-related activities, as well as any resulting reporting requirements.

Second, federal and state vote buying and voter intimidation statutes address whether a corporation can provide products or services to those registering to vote, voters, or those who are running elections.

Both of these topics are addressed in more detail below.

Part I. How Can Corporations Help Individuals Register to Vote and to Vote?

Understanding the Law

Before highlighting what corporations can do in this area, it is important to understand the background prohibitions. Under federal law, corporations are generally prohibited from making

contributions to influence federal elections.¹ Prohibited contributions include not only corporate funds sent to federal candidates, but also non-monetary contributions of goods and services provided for the benefit of federal candidates and committees, referred to as “in-kind” contributions. The laws of several states are similar, although many allow limited contributions to candidates. Based on these restrictions, corporations need to be careful when engaging in communications or activities related to political candidates or elections to ensure that they are not violating contribution prohibitions or limits.

Despite popular commentary, this is still the case after the Supreme Court’s well-known *Citizens United* decision. *Citizens United* allowed corporations to engage in unlimited independent political speech, including communications that expressly advocate for or against the election of candidates. The decision did not alter any prohibitions on monetary or in-kind contributions from corporations to candidates, including expenditures made in coordination with candidates or political party committees.

Many thought that *Citizens United* would open the floodgates for corporations running ads for or against candidates. While the decision certainly has changed the campaign finance landscape, corporate express advocacy ads are still relatively uncommon. Corporations more frequently want to know what types of activities they can engage in with all of their employees² or the general public that support the voting process generally, but do not rise to the level of reportable express advocacy activities or lead to impermissible in-kind contributions.

What Can Corporations Do in This Area?

Federal campaign finance statutes and Federal Election Commission (“FEC”) regulations helpfully spell out several categories of election-related activities conducted by corporations that are permissible and do not lead to reporting requirements, the most common of which are summarized below. Although the specific parameters for compliance with these laws are not always clear, and state election law should always be considered, these are areas that form a good starting point when discussing how corporations can support the voting process.

For each of the activities below, the FEC will not consider these communications to be a prohibited or reportable contribution or expenditure so long as (1) the communications do not expressly advocate for or against the election of a clearly identified candidate, and (2) the preparation and distribution of the communication is not coordinated with any candidates or political party committees.

¹ Federal law allows corporations to use their funds to establish and administer “separate segregated funds,” more commonly referred to as corporate PACs, that pool the funds of employees for the purpose of making contributions to candidates and other political committees. This advisory focuses on the permissible use of corporate treasury funds and not on the activities of corporate PACs.

² At the federal level, corporations have more flexibility to engage in political speech and activities when it is limited to the corporation’s “restricted class,” which is a subset of executive and administrative employees defined by federal campaign finance law. This advisory focuses on activities that extend beyond a corporation’s restricted class.

- **Voter registration and get-out-the-vote communications.** Corporations can encourage employees and the general public to register to vote or to vote in an upcoming federal election. Because of the nonpartisan nature of these communications and the broad appeal to wide audiences, this is often the most attractive option for for-profit corporations. It is important to note that activities related to voter registration efforts, in particular, are heavily regulated by state law, as well.
- **Official election information.** Where permitted by state law, corporations may distribute to employees or the general public any voter registration or voter information materials (*i.e.*, instructional materials, official registration-by-mail forms) produced by election officials. Because the use and distribution of these materials are regulated by state law and election agencies, close coordination with election officials is important.
- **Voter guides.** Corporations can publish guides containing federal candidates' positions on campaign and policy issues, or distribute guides prepared by nonprofit organizations. The guides can be compiled from news articles, voting records, and other non-campaign sources, or can be based on answers to questions submitted by the corporation to candidates. If the latter, the corporation must comply with additional requirements related to equal opportunity for candidates to respond, equal space in the guide, and if there are ratings of candidates, they cannot convey an electioneering message.
- **Endorsements.** Corporations may endorse a federal candidate to their employees or the general public. The corporation may talk to candidates about their positions in order to decide on an endorsement, but may not coordinate the announcement of its endorsement with any candidates. In order to not be considered a contribution or expenditure, disbursements for press releases with endorsements must be *de minimis* under FEC regulations.

Part II. Can Corporations Provide Products or Services to Voters on Election Day?

Understanding the Law

This is a common question, but one that is full of traps for the unwary. The first step corporations take to support the voting process, through offering programs that provide access to products and services to those who are voting or who have voted, often leads to quick reversals and sometimes embarrassing news stories. In 2008, for example, a few prominent corporations offered free ice cream, coffee, and donuts to voters, but had to quickly change their plans after [concerns](#) were raised. It is a problem that [recurs](#) frequently. Read our previous alert on this issue [here](#).

Specific federal and state laws apply to benefits offered to individuals as an incentive to vote or as a reward for voting. Federal and state vote buying laws regulate attempts to influence voting through offering such benefits. Federal statutes, 52 U.S.C. § 10307(c) and 18 U.S.C. § 597, in particular, prohibit paying any person to register to vote or for voting. Although this may seem like an easy prohibition to avoid—corporations typically would not consider paying an individual to cast a vote—it is important to recognize that the law is interpreted more broadly than most would expect. Consider the following:

- The Department of Justice's [Federal Prosecution of Election Offenses](#) (“DOJ Election Offenses Manual”) notes that the restriction in § 10307(c) applies to providing “anything having monetary value,” not just money. In this way, it could potentially cover products and services of value provided by corporations to voters.

- The law does not contain a *de minimis* exception. The DOJ Election Offenses Manual provides the examples of “cash, liquor, lottery chances, and welfare benefits such as food stamps,” but the law itself does not address the value of the item offered. While items with higher monetary value increase the risk in this context, corporations should consider the risks involved with providing anything of value to individuals in connection with voting.
- Section 10307(c) does not require that the products or services are provided as an incentive to vote *for a particular candidate*. The DOJ Election Offenses Manual notes that the law may be implicated by any offer or payment “intended to induce or reward the voter for engaging in one or more acts necessary to cast a ballot.”

What Can Corporations Do in This Area?

The broad nature of federal and state vote buying laws should cause corporations to carefully consider programs that offer products or services related to voting. As with the activities in the previous section, it is important to work closely with counsel to structure any programs to comply with these laws.

Although the scope of vote buying laws are broad, they are not limitless. For example, under § 10307(c) discussed above, the DOJ Election Offenses Manual clarifies that there is a distinction between items offered to individuals as an inducement to vote (prohibited) and items offered to “help individuals who have already made up their minds to vote to do so” (permissible). Unfortunately, these two categories may be hard to distinguish. Without a bright line rule, the risk of a particular corporate program will depend on the specific facts of the products or services offered, the anticipated recipients, and the timing of the program.

The following categories of activities can form the starting point for creating a permissible program around providing products and services to individuals related to voting:

- Paid time off to vote. The DOJ Election Offenses Manual states that it is permissible for a corporation to provide employees paid leave to vote. This is an example of something that is offered not as an inducement to vote, but to help someone who has already decided to vote.
- Free rides to the polls. This is another permissible activity highlighted in the DOJ Election Offenses Manual. As discussed earlier, the FEC has detailed regulations on get-out-the-vote drives, which includes providing transportation to the polls, so corporations engaged in this activity should keep those rules in mind, as well.
- Items provided to everyone. Programs that involve providing products and services to all individuals, whether they voted or not, are far less likely to implicate federal and state vote buying laws. These “election day specials” offered to everyone may be a way to raise awareness about the election but avoid the common pitfalls discussed in this section.
- Goods and services provided to the elections agency. Instead of offering products or services to individual voters, some corporations consider offering items that might help the individuals running elections. This activity implicates yet another set of laws—those that restrict gifts provided to government officials—but can sometimes fall within exemptions that allow gifts that are given to agencies rather than specific government

officials. This issue was highlighted in Covington's [previous advisory](#) on working with government agencies and officials during COVID-19.

If you have any questions about the items discussed in this advisory or if you would like to consult on potential ways your corporation can help with the voting process, in compliance with applicable laws, please reach out to any of the lawyers in Covington's Election and Political Law practice group listed below.

Robert Kelner	+1 202 662 5503	rkelner@cov.com
Bob Lenhard	+1 202 662 5940	rlenhard@cov.com
Peter Koski	+1 202 662 5096	pkoski@cov.com
Derek Lawlor	+1 202 662 5091	dlawlor@cov.com
Zack Parks	+1 202 662 5208	zparks@cov.com
Andrew Garrahan	+1 202 662 5841	agarrahan@cov.com

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