



Government Relations Bulletin



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Corporations & Labor Unions May Fund Certain Electioneering Communications Under Revised FEC Regulations

Permissible Electioneering Communications

Under Federal law, corporations and labor unions are generally prohibited from using their general treasury funds to finance “electioneering communications.” However, under revised federal campaign finance regulations, corporations and unions may now finance electioneering communications unless those communications are the “functional equivalent of express advocacy.” These revisions, set forth in 11 CFR 114.15, were intended to implement the U.S. Supreme Court’s 2007 decision in *FEC v. Wisconsin Right to Life, Inc.*, 127. S. Ct. 2652.

A communication is the functional equivalent of express advocacy only if it is “susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate.” The revised regulations thus provide an exemption for corporate and union funding of electioneering communications that are issue advocacy.

“Electioneering communications” is defined under federal law as broadcast, cable or satellite communication that refers to a clearly identified [federal] candidate, is publicly distributed within 30 days of a primary election or within 60 days of a general election and is targeted to the relevant electorate.

The Safe Harbor Provision

To provide guidance to corporations and unions in determining which electioneering communications are “susceptible of no reasonable interpretation

other than an appeal to vote for or against a clearly identified candidate,” the revised rules provide a three prong safe harbor provision. If an electioneering communication is able to satisfy all three prongs of the safe harbor, the electioneering communication is not the functional equivalent of express advocacy and may be paid for by corporate or union funds.

An electioneering communication qualifies under the safe harbor provision if it:

- Does not mention any election, candidacy, political party, opposing candidate or voting by the general public;
- Does not take a position on any candidate or officeholder’s character, qualifications or fitness for office; and
- Focuses on a legislative, executive or judicial matter or issue and either urges the candidate to take a position or action with regard to the issue or urges the public to adopt a position and contact the candidate with respect to the issue.

Other “Qualifying” Electioneering Communications

It is important to note that an electioneering communication may still be permissible even if it fails to meet any one of the prongs of the safe harbor provision because the communication is susceptible of a reasonable interpretation other than an appeal to vote for or against a federal candidate. In its review of the communication, the Federal Elections Commission (FEC) will consider the following two factors:

- Whether the communication includes any indicia of express advocacy, meaning that it mentions any election, candidacy, political party, opposing candidate or voting by the general public or takes a position on the candidate’s character, qualifications or fitness for office; and
- Whether the communication has content that would support a determination that it has an interpretation other than as an appeal to vote for or against a clearly identified federal candidate.

Both of these factors will be considered by the FEC to determine whether the communication has a reasonable interpretation other than as an appeal to vote for or against a federal candidate. If there is any doubt about whether the communication qualifies for the general exemption, the FEC will permit the communication.

Reporting & Disclosure Requirements

Communications qualifying under the exemption continue to be “electioneering communications,” and consequently, they are still subject to the applicable reporting and disclaimer requirements. Corporations and unions making electioneering communications aggregating in excess of \$10,000 in a calendar year must file a disclosure statement which must include the identities of those persons who made a donation aggregating \$1,000 or more specifically for the purpose of furthering electioneering communications.

Conclusion

Prior to this revision, corporations and unions were strictly prohibited from using corporate or union funds to communicate via broadcast, cable or satellite messages that referred to a clearly identified federal candidate within 30 days of a primary election or within 60 days of a general election – regardless of whether the communication was the functional equivalent of express advocacy. Today, corporations and labor unions may finance certain electioneering communications that are truly issue advocacy communications.

Ohio law. It is important to remember that under Ohio law corporations and labor unions continue to be prohibited from funding or distributing electioneering communications, which are defined as communications via broadcast, cable or satellite messages that refer to a clearly identified Ohio candidate within 30 days of an election. Because it remains unclear if and how the U.S. Supreme Court’s Wisconsin Right to Life decision will impact Ohio’s enforcement of this prohibition, corporations should refrain from any and all communications that fall under the definition of Ohio’s electioneering communications.

For more information about these revised rules, please contact Miranda Motter at motter@bricker.co or 614.227.4810.

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