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An Election Law Primer to Keep Your Corporation Out of the Newspaper

Craig M. Engle
General Counsel
National Republican Senatorial Committee

Lawrence M. Noble
General Counsel
Federal Election Commission

Myles V. Lynk
Partner
Dewey Ballantine LP

AN ELECTION LAW PRIMER:
CORPORATE INVOLVEMENT IN FEDERAL ELECTIONS
Presented By
Lawrence M. Noble
General Counsel
FEDERAL ELECTION COMMISSION

This outline covers election-related activities which may be pursued by corporations and labor organizations. One of the core provisions of the Federal Election Campaign Act of 1971, as amended, is Section 441b, which prohibits corporate expenditures and contributions in federal elections. The prohibitions apply to both independent expenditures and contributions made out of general treasury funds. Historically, the prohibition had been read broadly, though in recent years some courts have been giving the prohibition a more narrow reading, including exempting a limited class of corporations from its reach. In addition, Section 441b, itself, contains important exceptions to the ban on corporate activity allowing for certain types of expenditures for such things as internal communications and the administration of separate segregated funds (SSFs) or political action committees (PACs). What follows is a summary of the rules applying to corporations.

1. The Basics

I. Introduction

A. Prohibition on Corporate/Labor Contributions and Expenditures

FECA bans contributions or expenditures by corporations and labor organizations to influence federal elections.

B. Exception: Separate Segregated Fund (SSF)

As specific exception, law permits corporations and labor organizations to use treasury funds to create and run a separate segregated fund (commonly called a PAC) to support federal candidates.

C. Definition: Separate Segregated Fund (SSF)

1. Becomes political committee and must register when formed.
2. Has connected organization.
 - a. Corporation = incorporated membership organization, incorporated trade association, corporation without capital stock, incorporated cooperative
 - b. Labor Organization

3. Connected organization may pay administrative/fundraising costs; not reportable.
4. Solicitation of limited class only.

II. Setting Up the SSF

A. Name of Committee

1. Official name must include full name of connected organization.
 - a. Reports and Statements
 - b. Disclaimer notices for public advertising
2. Abbreviated name must be recognizable form
 - a. Checks and letterhead
 - b. If used, must also be on reports, statements and disclaimer notices.

B. Payment of Administrative and Solicitation Costs

1. Connected organization may pay establishment, administration and solicitation costs.
 - a. Pay vendors and staff directly
 - b. Establish separate account
 - c. No commingling with SSF funds
2. SSF may pay costs; connected organization may reimburse it within 30 days.

III. Solicitation Rules

(Corporations and Labor Organizations may only solicit contributions to their SSF from a "Restricted class" of people. The Restricted Class varies by the type of organization doing the solicitation.)

A. Restricted Class

1. Corporation and SSF

- a. Stockholders: Individuals with:
 - * Vested interest in stock;
 - * Power to vote stock; and
 - * Right to receive dividends.
- b. Executive and administrative personnel: Employees paid on salary (not hourly) basis who have policy-making or supervisory responsibilities
- c. Families of both
- d. Parent and subsidiaries may solicit each other's restricted class.

2. Labor Organization and SSF

- a. Members
- b. Executive and administrative personnel
- c. Families of both
- d. Parent and subsidiaries may solicit each other's restricted class.

3. Incorporated Membership Organization and SSF

- a. Noncorporate members
(FEC recently promulgated new rules on who will be considered a member of a membership organization.)
- b. Executive and administrative personnel
- c. Families of both.

4. Incorporated Trade Association and SSF

- a. Noncorporate members
- b. With prior corporate approval, corporate members' executive and administrative personnel
- c. Families of both

5. Twice Yearly Solicitations

6. Restricted Class of Corporate Affiliates

The connected organization or SSF may solicit the restricted class of any parent, subsidiary, branch, division or other affiliate.

B. Voluntary Contributions Only

1. No threat of physical force, job discrimination or financial reprisal
2. Solicitation must state political purpose of SSF and solicitee's right to refuse without reprisal.
3. Solicitation must state that any guideline on amount is merely suggestion; no minimum may be specified.
4. Organization dues or fees not permissible, even if refunded on request.

IV. Solicitation Techniques

A. Payroll Deduction

1. Written Authorization Required

Employee gives written authorization for periodic deduction of SSF contributions from paycheck; may revoke any time (AO 91-1)

2. Who Benefits

Payroll deduction may be used for corporation's SSF, an affiliated SSF (or labor SSF representing company's employees).

3. No Payroll Deduction for Trade Association SSF

Corporation may not use payroll deduction system to collect contributions for SSF of trade association.

4. No Reverse Checkoff

Illegal to automatically deduct SSF contributions from paycheck, even if individual allowed to request refund.

5. Union Use of Same Method

Corporation must make system it uses available, upon request, to union with members at same corporation. Union must reimburse corporation for costs.

6. Transmitting Funds Directly

Sponsoring organization (called collecting agent) must forward checks payable to SSF to SSF (see Item 8 below).

7. Depositing Funds Temporarily

Checks made out to sponsoring organization (collecting agent) may be temporarily deposited in:

a. Transmittal account

Collecting agent may establish account solely for deposit and transmittal of SSF contributions.

b. Collecting agent's account

Collecting agent's account may be used for deposit and transmittal of SSF contributions.

c. Nonfederal account

Same as collecting agent's account

8. Forwarding Contributions and Records

a. Contributions of \$50 or less: within 30 days

b. Contributions over \$50: within 10 days

c. Collecting agent may write one check to SSF representing all individual contributions.

d. Collecting agent maintains records 3 years.

9. SSF Remains Responsible

- a. Reports original sources; date of receipt = date collecting agent receives check.
- b. Ensures that collecting agent follows rules

B. Combined Dues/Solicitation Statements

An incorporated membership organization, labor organization or trade association may include a solicitation for its SSF with the bill for membership dues.

1. Solicitation Rules Apply

Combined statements are subject to all the rules that apply to other SSF solicitations.

- a. Restricted class only (see III A above).
- b. Rules on voluntary contributions (see III B above).

2. Transmittal Rules Apply

Contributions must be transmitted according to rules listed under Payroll Deduction (items A7, 8 and 9 above).

3. Electronic Deductions

In AO 1997-9, Commission approved electronic deduction/transfer.

C. Promotional Items and One-Third Rule

Connected organization may provide tangible premiums to encourage SSF contributions, e.g., raffle prize. The aggregate costs of prizes may not be disproportionately valuable in comparison with contributions raised. Otherwise SSF must reimburse connected organization for a portion of its costs.

1. One-Third Rule

SSF reimburses connected organization for that portion of the costs of prizes or entertainment that exceeds one-third of the amount raised in contributions. This is reasonable standard recommended by FEC.

2. Example

Trade association spends \$300 in treasury funds to purchase microwave oven as raffle prize. Sales of raffle tickets raise \$600 in SSF contributions. Since one-third of the amount raised (\$200) is less than the cost of the prize (\$300), then the SSF should reimburse the association for the \$100 difference. On the other hand, if the SSF raises \$900 in contributions, then one-third of that amount (\$300) is equal to what the association spent on the prize, so no reimbursement is necessary.

D. Newsletters and Internal Publications

If a corporation/labor organization's in-house publication is circulated beyond the restricted class, the organization may generally not include a solicitation in the publication.

1. What Constitutes a Solicitation

- a. Straightforward request for contributions
- b. Information on how to make a contribution
- c. Statements encouraging support for the SSF
- d. Publicizing SSF's right to accept unsolicited contributions
- e. See AOs 1979-66 and 1979-13.

2. An Article/Communication is Not a Solicitation if it:

- a. Does not encourage support for the SSF
- b. Does not facilitate the making of contributions
- c. Merely announces existence of SSF and explains legal requirements that apply to an SSF
- d. Provides statistical information about the SSF's receipts and contributions
- e. Identifies candidates supported by the SSF (but does not suggest that supporting the PAC will help elect those candidates)
- f. See AOs 1991-3, 1983-38 and 1982-65

3. Exception to General Rule

Publication going outside restricted class may still include solicitation under the following caveats:

- a. Both the number and the percentage of persons receiving the publication are incidental (e.g., less than 3% and 1,000 pieces); and
- b. The article must include caveat that contributions will be screened and those from outside restricted class returned.

V. Contribution Prohibitions - Issues

A. Prohibited Sources

1. Corporations, labor organizations & national banks
2. Government contractors
3. Foreign nationals
 - a. Does not apply to foreign nationals who have permanent residence in USA.

- b. Does not apply to SSF of American subsidiary of foreign corporation if all SSF decisions are made by American citizens and contributions to SSF come from Americans.
 - 4. All elections: foreign, national banks, federally chartered corporations
- B. Contributions in Name of Another**
Corporation cannot reimburse employee and union cannot reimburse member for contributions to candidates.
- C. Earmarking**
 - 1. Corporation and union may not be conduit.
 - 2. SSF may be conduit.
- D. No Commingling Between SSF and Connected Organization**
 - 1. Administrative costs of SSF - paid by connected organization directly or deposited in separate account. May not be commingled in SSF account.
 - 2. Exception: when connected organization functions as collecting agent, it may temporarily deposit SSF contributions into general account.

ELECTION-RELATED COMMUNICATIONS BY CORPORATIONS AND LABOR ORGANIZATIONS

- I. Basic Principle: Audience Determines Message**
 - A. To Restricted Class**
 - 1. Express advocacy is permissible.
 - 2. Coordination with candidate or party is permissible.
 - B. Beyond Restricted Class**
 - 1. No express advocacy.
 - 2. No coordination with federal candidate or party beyond what is specifically permitted in regulations.
- II. Restricted Class (for Communications Purposes)**
(11 CFR 114.1(j), 114(h) and 114.8(h))
 - A. Labor Organization: Members, executive and administrative personnel of organization, and family of both groups.**

- B. Corporation: Stockholders, executive and administrative personnel and families of both groups.
- C. Incorporated Membership Organizations
 - 1. Noncorporate members, representatives of corporate members, executive and administrative personnel and family of both groups.
 - 2. AO 1996-21:
 - a. Membership organization could send express advocacy communications to corporate member representative with whom member organization usually did organization business.
 - b. Communication contained a solicitation for a candidate.
 - c. Less than 2 representatives per corporate member.
- D. Trade Associations
 - 1. Restricted class, defined for purposes of receiving communications, is not identical to group that can be solicited for contributions to the Trade Association's SSF.
 - 2. In addition to executive and administrative personnel and noncorporate members, trade association may direct communications to representatives of corporate members with whom association normally conducts business.
 - 3. AO 1991-24: Representatives of member corporations could distribute communication to corporation's restricted class.

III. Express Advocacy -- Definition

(11 CFR 100.22)

Message unmistakably urges election or defeat of 1 or more clearly identified candidates or the candidates of a clearly identified political party.

A. Magic Words

- 1. Examples: "Re-elect your Congressman," "support your Democratic nominee," "reject the incumbent."
- 2. Urging action with respect to candidates associated with a particular issue, e.g. "Vote Pro-Choice", when accompanied by names or photographs of candidates identified as either supporting or opposing the issue.
- 3. Campaign slogan or words, e.g., on bumper stickers & ads, that can have no other reasonable meaning than to support or oppose candidate, e.g., "Nixon's the one," "Carter 76," "Reagan/Bush."

B. Reasonable Person Test

1. Test

Absent magic words, when taken as whole and with limited reference to outside events, can only be interpreted by reasonable person as advocacy for or against federal candidate

2. Example: ad that discusses candidate's character, qualifications or accomplishments would be express advocacy if, when taken in context, it could have no other reasonable meaning than to encourage action to elect or defeat federal candidate(s).

3. Relevance of timing considered on case-by-case basis.

4. Maine Right to Life v. FEC (1st Cir. 1997) - appeals court struck down this definition; Supreme Court denies petition for cert. (10/97).

5. Other cases on point include:

a) FEC v. Christian Action Network (4th Cir. 1996) upheld District Court ruling stating that for express advocacy to be present, corporations/labor organizations must use specific words like the "magic words." Solicitor General declined Commission request to petition for cert.

b) FEC v. Furgatch (9th Cir. 1987) established reasonable person standard; Supreme Court denies petition for cert. (1987-88).

IV. Coordination with Candidate

A. Rule

1. To Restricted Class (11 CFR 114.3)

a) Any type of coordination is permissible.

b) But coordination about candidate's campaign plans or needs may compromise future independence of organization and its SSF.

2. Beyond Restricted Class (11 CFR 114.4)

a) Only the types of coordination mentioned in regulations are permissible.

b) Coordination about candidate's campaign plans or needs results in prohibited in-kind contribution to candidate.

c) Coordination may compromise independence of future SSF activities.

V. Candidate Appearances

A. Before Restricted Class

(11 CFR 114.3(c)(2))

1. Organization's express advocacy for or against a candidate permissible.
2. Organization (and its representatives) may solicit for candidate, but they may not collect the contributions.
3. Candidates (and his representatives) may solicit and accept contributions for candidate.
4. *De minimis* presence of outsiders (not the restricted class) permissible: employees who facilitate the meeting, news media reps, other guests of the corporation or labor organization who are being honored or who are speaking or participating in the event. 114.3(c)(2).
5. If any news representative is allowed, must give equal access to other news organizations (by providing advance information to regular press contacts and the same to other media, upon request; and allowing all media to cover appearance). 114.3(c)(2).
6. If corporation or union allows more than 1 candidate to appear, and permits news coverage, it must allow news media to cover appearances by other candidates for same office. 114.3(c)(2).
7. Reporting, if express advocacy and cost exceeds \$2,000 when aggregated for primaries or general elections. But no reporting required if appearance is part of a communication that is primarily devoted to subjects other than express advocacy.

B. Before All Employees - For Campaign Purpose (11 CFR 114.4(b))

1. Candidate may advocate election (but the organization may not).
2. Candidate may solicit funds.
3. Candidate may not accept funds at the event, but may leave envelopes (for mailing in contributions) and campaign materials for audience.
4. Organization must give equal opportunity for other candidates running for same office to speak, if they request it.
 - a. House/Senate: All candidates for same seat.
 - b. Presidential: All candidates who meet preestablished objective criteria under 110.13(c) (debate regs).
5. Unless clearly impractical, organization must make equal time and location available to all candidates who wish to appear.
6. Neither organization nor SSF may expressly advocate support or defeat of candidate or encourage express advocacy by employees.

7. Neither organization nor SSF can solicit, direct or control contributions in connection with this appearance.
8. Organization may discuss with candidate the structure, format and timing of the appearance and the candidate's positions on issues, but not candidate's plans, projects or needs relating to campaign.
9. Press may cover event, according to same rules as apply to press coverage of candidate appearance before restricted class (see above).

C. Before All Employees and General Public - For Noncampaign Purpose (AOs 1980-22, 1996-11 and 1992-6)

1. Candidate speaks about issues of interest to industry or union.
2. Candidate avoids reference to campaign: no solicitation and no advocacy of election.
3. Equal opportunity provision (above) does not apply.
4. Timing not relevant.

D. Before Public: Candidate Debates
(11 CFR 110.13 and 114.4(f))

1. **Debate Structure**
Debate must include at least two candidates, meeting face to face, and may not promote one candidate over the other.
2. **Sponsorship**
Debate may be sponsored by nonprofit 501(c)(3) or (c)(4) organization that does not support or oppose any candidate or party, or by a broadcaster, newspaper, magazine or other general circulation periodical publication.
3. **Payment**
Any corporation or labor organization may donate funds to support debate conducted by nonprofit organization.
4. **Candidate Participation**
 - a. Organization must select candidates based on preestablished objective criteria.
 - b. In primary election: May restrict candidates to those seeking nomination of one party.
 - c. In general election: May not use nomination by a particular party as sole criterion.

VI. Written Communications

A. To Restricted Class

(11 CFR 114.3(a), (b) and (c)(1))

1. Express advocacy (as defined above) is permissible.
2. Solicitation for candidate is permissible.
3. Brief quotations from candidate speeches is permissible.
4. But no republication of candidate materials because they are presumed to be coordinated in-kind contribution. 2 U.S.C. §441a(a)(7).
5. Reporting required if express advocacy and cost exceeds \$2,000 when aggregated for primaries or general elections. But no reporting required if material is part of a communication that is primarily devoted to subjects other than express advocacy.
 - a. Use Form 7
 - b. Continue filing quarterly and pre-general election reports if additional advocacy communication expenses for primaries or general elections.
6. No disclaimer because to restricted class only.

B. To General Public (Nonrestricted Class)

(11 CFR 114.4(c)(1))

1. **Voting Records of Incumbents** (11 CFR 114.4(c)(4))
 - a. Factual record of votes on legislative matters.
 - b. No express advocacy.
 - c. Decision on content and distribution not coordinated with candidate or party. 11 CFR 114.4(c)(4).
 - d. Clifton v. FEC (1st Cir. 1997) - appeals court invalidated regulation to extent it prohibited mere informational requests about incumbent's record.
2. **Voter Guides** (11 CFR 114.4(c)(5))
 - a. **Two Types**
 - i. Based on prepared written questions submitted to candidates by organization
 - ii. Not based on prepared written questions

- b. **Characteristics common to both types of guides:**
 - i. Guide consists of at least two candidates' positions on campaign issues.
 - ii. May include biographical information.
 - iii. No coordination with candidates concerning content or distribution.
 - iv. No express advocacy.
 - c. **Characteristics of voter guide based on written questions:**
 - i. Questions directed in writing to candidates, and candidates respond in writing.
 - ii. House or Senate candidates: questions directed to all candidates for seat.
 - iii. Presidential candidates: questions directed to all in one party for primary or all on general election ballot in state where guide is distributed or in enough states to win majority of electoral votes.
 - iv. No candidate may receive greater prominence.
 - v. No electioneering message.
 - vi. No scoring or rating of responses in such a way as to convey electioneering message.
 - d. Clifton v. FEC (1st Cir. 1997) - appeals court invalidated regulation to extent that it prohibits verbal contact with candidate and that it prohibits giving one candidate greater prominence than another.
3. **Press Releases (11 CFR 114.4(c)(6))**
Can announce endorsement previously communicated to restricted class in a press release as long as it is only sent to regular press contacts and costs are de minimis. No coordination with candidate.

VII. Voting Communications & Voter Drives

A. For Restricted Class (11 CFR 114.3(c)(4).)

- 1. May advocate specific candidate and party.
- 2. Phone bank is permissible.
- 3. Transportation to registration place and to polls permissible, but cannot refuse to transport anyone who requests.

B. For General Public

(11 CFR 114.4(c)).

1. Voter Advertisements (11 CFR 114.4(c)(2))

Organization may pay for ads urging general public to register to vote and to vote.

- a. May use posters, billboards, broadcasting, print or direct mail.
- b. No express advocacy.
- c. No coordination with candidate.

2. Distribution of Official Voter Information

(11 CFR 114.4(c)(3))

- a. May distribute voter information produced by official election administrators, including registration-by-mail forms and absentee ballots.
- b. No express advocacy.
- c. No coordination with candidate.
- d. May give funds to state and local governments to defray costs of voter registration, voting information and forms.

3. Voter Drives: Registration and GOTV

(11 CFR 114.4(d))

- a. May support or conduct drives aimed at public, including providing transportation to polls and registration place.
- b. Must make services available without regard to voter's political preference, and give written notification of this requirement to those receiving assistance at time of drive.
- c. No express advocacy.
- d. No coordination with candidate or party.
- e. May not pay individuals conducting drive on basis of number (registered or transported) who support particular candidate or party.
- f. May not target people registered with particular party.

USE OF CORPORATE AND LABOR ORGANIZATION FACILITIES

I. **Prohibition on Use of Facilities/Resources in Candidate/Party Fundraising**

(11 CFR 114.2(f))

As part of the broad prohibition on corporate and labor contributions/expenditures, corporations and labor organizations are generally prohibited from using their facilities or resources to engage in fundraising or other activities in connection with federal elections. However, the regulations contain a number of narrow exceptions to this prohibition. With respect to corporate and labor organization facilities, the exceptions permit some election-related use, provided that the corporation or labor organization receives either advance payment or reimbursement for the use of its facilities.

II. **Use of Facilities: Reimbursement Required**

When using some types of corporate or labor facilities for election-related activities, payment is required at the usual and normal charge within a commercially reasonable time—generally 30 days.

A. **Use of Offices and Equipment** (11 CFR 114.9(c) and (d).)

Reimbursement at usual and normal charge within a commercially reasonable time.

1. Reproducing materials: Use current market rate for reproducing comparable materials
2. Office space and other equipment: Use current market rental fees.

B. **Meeting Rooms**

(11 CFR 114.9 and 114.13)

1. Campaigns may rent meeting rooms (even if organization does not customarily make available) if they reimburse organization at the normal rental charge and within a commercially reasonable time.
2. Exception: Can offer meeting room to candidate at discount or free if organization customarily makes meeting room available to civic, community or other groups under the same conditions and if it makes it available to any other candidate or committee, upon request.

III. Use of Facilities: Advance Payment Required

(11 CFR 114.2(f)(2)(i)(A), (C) and (E) and 114.2(f)(2)(iv))

- “In advance” means before services are provided.
- Payment must be made by one of following sources: candidate, organization’s SSF, party or individual.
- Payment by candidate is campaign expenditure.
- Payment by others is contribution in kind to candidate.

A. Use of Directed Staff

Corporate or labor officials or employees may direct subordinate staff to work on fundraising for candidates, using corporate or labor resources, provided that:

- a. Corporation or labor organization receives advance payment for value of services, including benefits and overhead;
- b. No coercion is used; and
- c. Employees do not collect or forward contributions to candidate.

B. Use of Customer/Client Lists

Corporation or labor organization may, in connection with fundraising for candidate, use corporation/labor organization’s lists of customers, clients, vendors or others not in restricted class to send invitations or solicit contributions provided that corporation or labor organization receives advance payment for fair market value of lists.

C. Use of Catering or Food Services

In connection with fundraising for candidate, corporation or labor organization may operate or obtain catering or other food services provided that corporation/labor organization receives advance payment for fair market value of services.

IV. Special Exception: Employee Use of Facilities

(11 CFR 114.9(a))

- A. Permissible for employees of corporation or members of the labor organization to make "incidental use" of facilities for their own individual volunteer activity in connection with federal election.
- B. "Incidental use" means 1 hour per week or 4 hours per month, or use that does not prevent employee from completing normal work that employee would complete during that period.
- C. Individual must reimburse for any increased overhead (e.g., no need to pay for regular local phone bill, but would have to pay for long distance calls).

- D. If more than "incidental," individual must reimburse the entire cost of using the facilities within commercially reasonable time.
- E. The "incidental use" allowance does not apply if the employee is asked by a superior to do the work as part of his/her regular duties.

V. Joint Activity by Organization and SSF
(11 CFR 114.2(f)(3) and 114.5(i))

- A. **Solicitations and Express Advocacy Beyond the Restricted Class**
The employees and resources of a corporation or the members of the labor organization with an SSF may be used by the SSF for activities involving express advocacy communications or solicitations to the public on behalf of a clearly identified candidate as long as the SSF:
 - 1. Pays for the activity in advance; and
 - 2. Treats the activity as an in-kind contribution to the candidate benefiting from the activity; the contributions are subject to the contribution limits and reporting requirements of the Act.

- B. **SSF as Conduit for Solicited Earmarked Contributions**
(11 CFR 114.2(f)(2)(iii))
When a corporation or labor organization solicits earmarked contributions from its restricted class that are collected and forwarded by the SSF, the contributions are considered made to and made by the SSF, as well as made by the individual contributor to the candidate. Thus, the corporation or labor organization may pay for such solicitation costs, but the limits on contributing to an SSF and from an SSF must be observed.

VI. Other Facilities and Services

- A. **Transportation**
(11 CFR 114.9(e))
 - 1. General Rule About Use of Airplane
 - a. May use airplane owned or leased by organization, if organization is paid in advance.
 - b. Payment Formulae:
 - travel to city served by commercial air, 1st class fare rate.
 - travel to city not served by regular commercial service, usual charter rate.
 - 2. Use of Other Transportation
If other transportation is provided, reimbursement (after) must be made within commercially reasonable time, at usual and normal rental charge.

- B. **Legal & Accounting Services**

(11 CFR 100.7(b)(13) and (14) and 100.8(b)(14) and (15))

An organization, including a corporation or labor organization, may provide certain legal and accounting services provided that:

1. Service is provided only to help candidate committees comply with federal campaign finance laws.
2. Individual performing service is regular employee of corporation or labor organization.
3. Organization does not hire additional staff to enable regular employee to provide service.
4. If services are provided for party, the services do not further election of designated federal candidates.
5. No equipment or software is provided, unless it is being used exclusively by the individual who provides the services.
6. Value of services is reported to recipient committee so that it can disclose information on its report.