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A GUIDE FOR CORPORATIONS ON THE CAMPAIGN FINANCE LAW

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On December 10, 2003, the United States Supreme Court upheld the constitutionality of the Bipartisan Campaign Reform Act ("BCRA" or "McCain-Feingold"). The new law imposes two significant restrictions on corporate political activities: (1) it prevents federal and state political parties from spending corporate money on federal election activities, and (2) it prevents corporations from funding certain political advertisements — known as "electioneering communications" — that refer to candidates for federal office.

The Federal Election Campaign Act ("FECA") has long prohibited national banks, corporations and labor organizations from making contributions or expenditures in connection with a federal election. Prior to BCRA, these prohibitions extended only to funds used to "expressly advocate" for the election or defeat of a federal candidate. Corporate funds that were used for activities that did not constitute express advocacy generally fell outside the scope of FECA and therefore became known as "soft money."

In recent election cycles, corporations contributed increasing amounts of soft money to political parties to help fund "issue advertisements" on television and radio and so-called "party-building" activities (i.e., get-out-the-vote and voter registration drives). The rise of these soft-money activities — particularly issue advertisements that referred to federal candidates but fell short of express advocacy — motivated the reform effort in Congress that eventually led to the passage of BCRA.

BCRA's prohibition on soft money and electioneering communications will not prevent corporations from engaging in political activities. Instead, BCRA will cause corporations to refocus their political strategy on at least three distinct, permissible activities:

- Internal political advocacy to shareholders and management.
- Establishing or strengthening corporate political action committees (PACs).
- Supporting political organizations other than political parties.

Before developing any new corporate political strategy, however, it is important that corporations understand the rules governing the types of corporate political activities that are permissible after BCRA. The penalties for violating FECA's contribution and expenditure limits can be severe: up to five years imprisonment for violations exceeding $25,000 and up to a year imprisonment for violations exceeding $2,000.

This Guide is intended to provide corporations with a topical overview of the rules governing corporate political activities. It is intended only as a guide, and you should consult with your FEC counsel if you have any specific questions regarding the application of these rules. The applicable federal election laws are found in 2 U.S.C. § 431 *et seq.* and the applicable FEC regulations are found at 11 C.F.R § 100 *et seq.*

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I. Corporate Political Activities Prohibited by BCRA

A. Corporations may not contribute any funds to federal political parties.

BCRA bans federal political parties from receiving or spending any money from corporations (so-called "soft money"). Note that this prohibition extends to the major national party committees (the RNC and the DNC) as well as the Republican and Democratic Senatorial Committees (NRSC and DSCC) and the Republican and Democratic Congressional Committees (NRCC and DCCC).

B. State political parties may not spend soft money on federal election activities except in narrowly defined circumstances.

BCRA also severely restricts state political parties from spending soft money on any "federal election activity" — a new term that includes voter registration activity within 120 days of a federal election, get-out-the vote drives where a federal candidate appears on the ballot, and any public communication that refers to a federal candidate. The restriction on soft money spending by state parties is intended to prevent federal parties from channeling prohibited soft money contributions to state parties for use in influencing federal elections.

In the 28 states where corporate contributions are permitted under state law in connection with a state or local election, state parties may continue to spend soft money on activities that refer solely to candidates for state or local office. (State parties also may spend a limited amount of corporate contributions on get-out-the-vote and voter registration activities that involve a federal candidate. These funds are known as "Levin funds" and are subject to highly technical and complex accounting rules).

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C. Corporations may not fund any electioneering communications.

A principal purpose of BCRA was to decrease the flow and influence of issue advertisements funded by political parties using corporate funds. Proponents of BCRA were particularly concerned with issue ads that referred to federal candidates but escaped federal regulation because the ads did not meet the definition of express advocacy.

To remedy this concern, BCRA forbids corporations from contributing or spending any funds to purchase issue ads that are considered to be "electioneering communications." BCRA defines an electioneering communication as any broadcast, cable, or satellite communication that (1) refers to a clearly defined federal candidate, (2) is made within 30 days of a primary election or 60 days of a general election, and (3) is targeted to 50,000 or more people within an electoral area.

II. Permissible Corporate Political Activities After BCRA

On its face — and certainly in the press reports — BCRA appears to restrict the influence of corporations on federal elections. But BCRA did not disturb any of the federal election laws or regulations that permit corporations to (1) engage in internal political advocacy among shareholders and management, (2) establish or strengthen their PACs, or (3) contribute money to political organizations (other than political parties) for issue advocacy and other soft-money activities. The rules governing internal political advocacy, PACs and soft-money contributions can be extremely complex, but understanding these rules will become increasingly important as corporations allocate their resources internally to achieve specific political and public policy goals.

A. Internal political advocacy

1. Partisan communications to shareholders and management

Corporations may engage in a variety of internal political activities directed to a Corporation's "restricted class" –– that is, its shareholders, executive and administrative personnel and their families. Indeed, a corporation may use its corporate treasury funds to "expressly advocate" to members of the restricted class for the election or defeat of a federal candidate by:

- Producing and distributing partisan communications to its restricted class that expressly advocates for the election or defeat of a federal candidate. The partisan communications may come in any form — including letters, other printed material, or a website, so long as the communication reaches only the restricted class. If a corporation spends more than $2,000 per election on express advocacy communications, it must file a report of these expenditures with the Federal Election Commission (FEC).

- Inviting a candidate to address — and seek contributions from — the restricted class at a meeting, convention, or any other corporate function. A corporation also "may bar" other candidates for the same office from addressing the restricted class.

- Encouraging members of the restricted class to make contributions to a candidate. Corporations may not, however, collect or bundle contributions and may not provide material (e.g., stamps or pre-addressed envelopes) "to facilitate in the making of contributions."

- Establishing or operating phone banks to urge its restricted class to vote for a particular candidate or a particular political party.

- Conducting registration or get-out-the-vote drives that urge members of the restricted class to register with a particular party or vote for a particular candidate. Such "drives" may include providing transportation to and from the polls or place of registration.

2. Communications with employees and the general public

Other than to its restricted class (i.e., shareholders, executive and administrative personnel and their families), a corporation may not engage in any political activity with its employees or the general public that expressly advocates for the election or defeat of a candidate. Corporations, however, are permitted to engage in important non-partisan activities or issue advocacy with their employees by:

- Inviting candidates to speak at corporate functions involving employees and their families so long as all other candidates for the same office are afforded the same opportunity.

- Conducting registration and get-out-the-vote drives to employees and the general public, provided that the drive does not expressly advocate for the election or defeat of a clearly identified candidate, is not coordinated with a campaign, and is not targeted toward political voters.

- Preparing and distributing voting records and voting guides that do not expressly advocate for the election or defeat of a clearly identified candidate.

3. Use of corporate resources for political purposes

FEC regulations permit an employee or stockholder of a corporation to use a corporation's resources and/or facilities for any volunteer political activity that is "occasional, isolated, or incidental." Whether an activity is "occasional, isolated or incidental" depends on the facts and circumstances of each case. The test is automatically met, however, if the activity does not exceed one hour per week or four hours per month for each employee or stockholder.

Employees or stockholders can, of course, engage in more than "occasional, isolated, or incidental" use of corporate resources for volunteer political activity. They simply must reimburse the corporation for such use on a commercially reasonable basis — i.e., pay the "normal and i.e., pay the "normal and usual" rental charge for goods or services within a commercially reasonable time. If someone other than an employee or stockholder uses corporate resources for political purposes (such as a candidate's staff), they must reimburse the corporation for the normal and usual rental charge for goods and services regardless whether the use is occasional, isolated, or incidental.

B. Establishing or strengthening corporate or trade association PACs

BCRA does not impose any new restrictions on the ability of corporations to establish and administer federal PACs. Because PACs remain free to contribute money to political parties and engage in electioneering communications, it appears likely that PACs will play an increasingly important role in the post-BCRA political landscape.

Because federal PACs may engage in express advocacy, federal law limits the amount of money any individual may contribute to a PAC as well as the amount of money a PAC may contribute to a candidate or a political party. An individual may contribute up to $5,000 to a PAC each year. A "multicandidate" federal PAC (i.e., a federal PAC that has more than 50 contributors, has been registered for more than 6 months and has made contributions to five or more federal candidates) may contribute up to $5,000 to a federal candidate per election, up to $5,000 to any other PAC per year, and up to $15,000 to a national political party committee per year. Any other federal PAC may contribute up to $2,000 per candidate per election, up to $5,000 to any other PAC per year, and up to $25,000 to any national political party committee per year. Federal PACs also must register and file periodic reports with the FEC.

1. Corporate PACs

A corporation may pay for the costs of establishing, administering, and soliciting contributions to its PAC. The corporation may solicit contributions from its restricted class members at any time and may solicit its employees no more than twice a year and the solicitation must be in writing. Members of a corporation's restricted class (i.e., its shareholders, executive and administrative personnel, and their families) — but not its employees — may make contributions to the corporate PAC through payroll deductions.

When a corporation solicits PAC contributions from its employees or makes any written solicitation for PAC contributions, the corporation must disclose:

(1) the political purposes of the PAC,

(2) that the individual may refuse to contribute without fear of reprisal, and

(3) that any suggested guidelines for contributions are voluntary and unenforceable and the employee may give any other permissible amount (or refuse to contribute at all) without falling out of favor with the corporation.

A corporation also must notify employees that the corporation has a custodial arrangement for collecting employee PAC contributions that prevents the custodian from disclosing to the corporation the names of employees who do not make contributions and protects the anonymity of persons who contribute $50 or less or persons who make several contributions that total $200 or less.

It is important to remember that a corporation may not encourage PAC contributions throughthe use of bonuses, expense accounts or other direct or indirect forms of compensation.

2. Trade Association PACs

A corporation may have its own PAC and also be a member of a trade association that has a PAC. Although a trade association may solicit PAC contributions from any of its members, a corporate member of a trade association cannot contribute to the trade association PAC because such a contribution would violate the ban on corporate contributions in connection with a federal election. Instead, a corporate member of a trade association may authorize the trade association to solicit PAC contributions from the corporation's executive or administrative personnel. The corporation may give this authorization to only one trade association each year and the authorization must be in writing.

A corporation's executive or administrative personnel may not use a payroll deduction or a "checkoff" program to make contributions to a trade association PAC. A corporation also may not use corporate funds to solicit contributions for its trade association PAC and may not collect, forward, or otherwise facilitate contributions to the trade association PAC.

C. Corporate contributions to political organizations other than political parties

While BCRA bans federal political parties (and most state political parties) from receiving or spending soft money in connection with a federal election, BCRA imposes no similar restrictions on special interest organizations.

The rising influence of special interest organizations presents both an opportunity and a challenge for corporations seeking to influence public policy. Certain special interest organizations may prove to be excellent vehicles for promoting a particular public policy issue during an election season. By definition, special interest organizations focus on specific and targeted political issues — often a single issue such as tort reform, capital gains tax cuts, or environmental reform. When that issue is in harmony with a corporation's own specific public policy interests, the corporation may be able to use its resources in a more targeted and directed fashion by contributing to the organization.

The challenge, however, is to identify the most credible and competent special interest organizations among those that share a corporation's public policy goals. The number of special interest organizations promoting and criticizing certain issues is sure to increase in light of BCRA, and it will be essential for companies wishing to contribute money to special interest organizations to receive accurate legal and political advice regarding competing organizations. Many special interest groups are tax-exempt entities organized under either Section 501(c)(4) or Section 527 of the Internal Revenue Code, and it is expected that these organizations will play a central role in conducting a variety of issue advocacy campaigns using soft money.

Note: BCRA prohibits political parties and restricts federal candidates from soliciting corporate funds to tax-exempt organizations that engage in any federal election activities.

1. Section 501(c)(4) social welfare organizations

Section 501(c)(4) organizations must be operated "exclusively for the promotion of social welfare" to secure and maintain their tax-exempt status. Federal tax laws permit 501(c)(4) organizations to engage in political activities if that activity is not the organization's primary activity and does not violate federal election laws. Because most 501(c)(4) organizations are, in fact, corporations, they generally are subject to FECA's prohibition on corporate funds used for express advocacy or electioneering communications.

BCRA prohibits political parties and restricts federal candidates from soliciting corporate funds to tax-exempt organizations that engage in any federal election activities.

Section 501(c)(4) organizations, however, may receive contributions from corporations and may engage in traditional unregulated activities — i.e., issue ads that are not "electioneering communications" and other generic, issue-oriented election activities that were conducted by political parties before BCRA.

2. Section 527 political organizations

Section 527 organizations are "political organizations" that are organized and operated primarily for the purpose of accepting contributions or making expenditures to influence a federal, state, or local election. All Section 527 organizations must register and file periodic disclosure reports with the Internal Revenue Service (IRS) or the FEC, and file annual reports with the IRS.

Corporations may contribute money to a Section 527 organization but the organization may not use corporate funds for express advocacy or for electioneering communications. Instead, such entities must spend corporate money on traditional unregulated soft-money activities. Section 527 organizations that are not incorporated (but are loose associations that qualify for tax-exempt status) are not subject to the ban on electioneering communications.

Many observers have projected that Section 527 organizations — such as Moveon.org, Club for Growth and Americans Coming Together — will fill the void created by BCRA's ban on soft-money spending by political

parties because Section 527 organizations are permitted to engage exclusively in political activities (without the "social welfare" restriction of a Section 501(c)(4) organization).

****New rules proposed to limit influence of Section 527 organizations.*** The FEC has proposed new rules that, if adopted, could classify many Section 527 organizations as "political committees" subject to regulation by the FEC. If Section 527 organizations are classified as political committees, they will be subject to FEC limitations on contributions and expenditures –– including a $5,000 maximum contribution from individuals and specific rules restricting the use of soft-money contributions from corporations and labor unions. The FEC also recently issued an advisory opinion stating that BCRA's prohibition on the use of soft money by political parties to fund communications that "promote, support, attack, or oppose" a clearly identified Federal candidate extends to all political committees — not just political parties. The FEC is scheduled to vote on these proposed new rules in August.

Despite BCRA's new restrictions on soft money, corporations have a number of different outlets through which they can continue to engage in political activities. If you have any questions regarding this memorandum or would like any additional information, please do not hesitate to contact us.

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