1. Introduction

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1.1 USING THE PRIMER

The *Election Law Primer for Corporations* is what its name suggests. It is an introduction to a subject and a summary of basic principles. The original *Primer* was devoted exclusively to the basic principles of federal campaign finance laws that regulated political activity by corporations, executives, employees, and stockholders. Over the years, the *Primer* expanded to related legal areas and now includes explanations about the regulation of lobbying activities, ethics rules, and tax laws.

The *Primer* consists of nine explanatory chapters (including this introduction) and nine appendices. The extensive materials in the appendices are meant to augment the explanatory chapters and serve as useful reference tools. For example, the Federal Election Commission (FEC) forms in appendix A include detailed instructions that further explain what needs to be disclosed by a political action committee (PAC), as described in chapter 2. Similarly, the lobbying forms and guidance in appendix D contain extensive information in addition to that found in section 5.4. The same is true of the tax forms in appendix H, which supplement chapter 8. For convenience, the appendix items are printed on the back cover of this book and correlate to black tabs on pages that are visible when the edge of the book faces the reader.

The *Primer* begins with a discussion about campaign finance rules, PACs, and campaign communications and activities by and at the corporation. The remaining chapters address lobbying laws, tax considerations, and enforcement. We begin now with campaign finance.

1.2 THE BASICS OF CAMPAIGN FINANCE LAW

The Federal Election Campaign Act (FECA) regulates the raising and spending of money in election campaigns for federal office (House, Senate, and President). Election campaigns for state and local offices are regulated by state and local law, with three exceptions. Federal law prohibits foreign nationals, federal contractors, and corporations chartered by federal law from donating or spending money in connection with all elections—federal, state, or local.

The law defines "contributions"[1] and "expenditures"[2] as "anything of value" made for the purpose of influencing an election for federal office. This includes cash, gifts, loans, purchases, and advances as well as goods and services that are given to or used in connection with campaigns. The provision of tangible items is often treated as an "in-kind" contribution if coordinated with or given to a candidate or political committee.

How FECA regulates campaign finance depends on which person is being regulated. A "person" includes an individual, partnership, committee, association, corporation, labor organization, or any other organization or group of persons, but not the federal government.[3] The various prohibitions, restrictions, and reporting obligations of the law apply differently to the different persons who may be donating, raising, or spending money.

There are many different types of political committees.[4] Each candidate for federal office must designate and register with the FEC a "principal campaign committee"[5] once the candidate raises or spends over $1,000. A corporation or union must register a "separate segregated fund"[6] or PAC as soon as it is created. A group of individuals may create a "nonconnected" political committee if over $1,000 is raised or spent. A political party must file with the FEC once its federal committee raises or spends over $5,000.

Subsequent to the Supreme Court decision in *Citizens United v. FEC*, additional types of committees were recognized. A committee that collects money for the sole purpose of making independent expenditures is an "independent expenditure only committee" (IEOC) that must register with the FEC.[7] An IEOC may accept contributions without limit from any source except a foreign national, federal contractor, or corporation chartered by federal law. An IEOC is popularly referred to as a "super PAC." In addition, a super PAC may create a separate account to raise limited contributions from individuals and committees and use that account to make contributions to candidates and other committees. This type of committee is a "hybrid PAC."[8]

All committees that must register with the FEC also must file regular reports with the FEC disclosing receipts and disbursements. Itemization of the financial information usually is required when the receipt or disbursement exceeds $200.[9] All reports are publicly available and can be accessed online through the FEC's website www.fec.gov and other public sites.

Under FECA, individuals (except foreign nationals) may contribute to candidates or any political committee. An individual's contribution is subject to a dollar limit unless the donation is to a super PAC. Individuals also may finance independent expenditures which are not subject to a limit but are subject to reporting requirements.

Candidates may accept limited donations and make expenditures through their designated committee(s). In addition to designating a principal campaign committee, incumbent candidates often are associated with a "leadership PAC" which is a committee that raises money from individuals and PACs (subject to limits) as though it were a nonconnected committee.[10] The leadership PAC then makes contributions to candidates other than the incumbent.

Corporations and unions are prohibited from making any contributions to candidates or political committees. However, they may establish and sponsor a PAC (separate segregated fund) which collects voluntary contributions from certain people within their organizations. Corporations and unions also may finance independent expenditures or electioneering communications either by paying directly for such communications or donating funds to super PACs. Those expenditures are subject to public disclosure requirements.

In sum, individuals, candidates, committees, corporations, and unions, as well as other types of organizations such as limited liability corporations (LLCs), partnerships, or cooperatives, must observe various restrictions, prohibitions, and obligations when donating to political campaigns or spending money in connection with those campaigns. Such financial activity is subject to some form of reporting to the FEC and results in public disclosure.

1.3 GENERAL RULE ABOUT CORPORATE POLITICAL ACTIVITY

Under FECA, all corporations (and unions), including incorporated trade associations and not-for-profit membership corporations, are barred from making contributions to candidates for federal office or to committees that support those candidates, including party committees, except for so-called Super PACs.[11] This broad prohibition on contributions applies to the use of corporate funds in connection with conventions, as well as primary, special, and general elections at which candidates for senator, U.S. representative, or president are either nominated or elected.[12] The FEC construes the law as barring the use of corporate funds and resources for the direct or indirect benefit of any federal candidate or any political organization that supports federal candidates.[13] Again, Super PACs may accept corporate funds (but not from nationally chartered companies, government contractors, or foreign nationals).

The concept of contributions encompasses more than just direct money payments. A contribution is something of value used in connection with a federal election. For example, the use of corporate facilities and personnel for campaign purposes, the reimbursement of corporate personnel for political contributions, or the payment of continued health and retirement benefits for an employee who takes unearned leave to campaign on behalf of a candidate generally constitute illegal corporate contributions. A corporate loan of funds to, or for the use of, political parties or candidates is illegal (unless made by certain lending institutions).

Other corporate resources, including aircraft, automobiles, offices, equipment, phones, credit cards, administrative services, and trademarks, are “something of value,” and may not be given to candidates, political parties, or political committees unless paid for at fair market value. Reimbursing employees for political contributions generally is illegal, and particularly is illegal when corporate money is used.

TEST

To determine whether a disbursement or activity is governed by federal law, ask the following questions:

- Is something of value being given or made available to a federal candidate or political committee by the corporation?
- Is the activity or disbursement related to an election to federal office?

If the answer to either question is yes, then the corporate disbursement is barred or in some way regulated by federal election laws.

1.4 EXCEPTIONS

The law and the FEC provide many exceptions to the general rule that corporate political contributions are illegal. These exceptions allow significant, direct corporate political action through the use of a corporation's funds and resources. The exceptions permit: the establishment, administration, and solicitation of contributions to a separate segregated fund (commonly referred to as a political action committee, or PAC);[14] any type of communication to a corporation's stockholders and executive or administrative personnel and their families, as well as certain nonpartisan communication, registration, and get-out-the-vote campaigns aimed at employees and the general public;[15] and the use of corporate facilities and property, subject to conditions set forth in FEC regulations.[16] Corporations (and unions) also have a First Amendment right to engage in and finance public advocacy for or against candidates, provided the advocacy is done independently of the candidates and political parties.[17]

These general exceptions are discussed in detail later in this *Primer*. In addition, there are other very specific activities that may be financed with corporate dollars. These activities include:

- **Political activity in connection with state and local elections** (unless regulated by state law—see chapter 7), except that foreign corporations, national banks, and federally chartered corporations are barred from financing any elections, whether federal, state, or local.[18]
- **Payment of legal or accounting services** rendered to or on behalf of a political party or a candidate's authorized committee or any other political committee, but only if the services are performed by the company's regularly employed personnel. The services must be solely for the purpose of ensuring compliance with the federal election laws,[19] and may not be attributable to activities that directly further the election of candidates for federal office.[20] A corporation is not allowed, however, to provide personal computers to selected candidates for use in doing the accounting necessary to comply with federal campaign laws.[21]
- **Anything of value given to a *state or local* committee of a political party to defray any cost incurred in the construction or purchase of any office facility** that is not acquired for the purpose of influencing the election of any candidate for federal office (the political parties often refer to this exception as the "building fund" exception).[22] State law dictates whether and how much corporations may contribute. This exception became unavailable to *national* committees of political parties beginning on November 6, 2002.[23]
- **The sale of food or beverages** at a charge at least equal to the corporate vendor's cost up to $1,000 for each candidate per election, and up to $2,000 in a calendar year as to all committees of each political party.[24]
- **Commercial transactions**, unless a political aspect dominates the commercial aspect of the transaction.[25] Generally, a corporation may provide services at the usual and normal charge to a political committee.[26]
- **Unreimbursed volunteer personal services**,[27] such as stuffing envelopes, canvassing, entertainment at fund-raising events,[28] or radio commercials by corporate officers.[29]

- **Loans** by state banks or federally chartered institutions or federally insured depository institutions made in the ordinary course of business, in accordance with applicable banking law and under several other conditions.[30]
- **Extension of credit** to candidates or political committees in connection with a federal election if:
  - the credit is extended in the ordinary course of the corporation's business; and
  - the terms are substantially similar to extensions of credit under similar circumstances to nonpolitical debtors.[31]

  Such debts may be forgiven if the corporation has treated the outstanding debt in a commercially reasonable manner in accordance with federal regulations, or the amount forgiven is exempted from the definition of "contribution."[32]
- **News stories,** if they are bona fide news accounts or other content in a publication, or a broadcast or other medium not owned by a political party or candidate.[33]
- **The cost of providing the use of residential premises** and community meeting rooms.[34]
- **Unreimbursed transportation expenses of a volunteer worker** up to $1,000 on behalf of a candidate per election, and $2,000 on behalf of all political committees of each political party per year.[35]
- **Unreimbursed living expenses** of a volunteer in connection with volunteer services.[36]
- **Hospitality suites** at national political party conventions.[37]
- **National political party convention** "host committees" may accept donations from businesses.[38] Corporations may provide goods and services without charge, in exchange for promotional consideration, to national party convention committees.[39]
- **"Levin Funds"** contributions by corporations can be made to state and local political parties to finance political activity, as long as: the activity does not refer to a clearly identified candidate for federal office; the activity is not broadcast, unless it refers solely to a state or local candidate; the contributions are paid in accordance with state law, but not in excess of $10,000 per year; and the contributions are raised by that particular state or local party and are not provided by any other national, state, or local party. "Levin Funds," are named after Sen. Carl Levin (D-Mich.), whose amendment to the Bipartisan Campaign Reform Act created them so that state and local parties could use nonfederal funds for "generic" party-building activities without violating the soft money ban.[40]

NOTES

1. 52 U.S.C. § 30101(8) (2014).
2. 52 U.S.C. § 30101(9) (2014).
3. 52 U.S.C. § 30101(11) (2014).
4. 52 U.S.C. § 30101(4) (2014).
5. 52 U.S.C. § 30101(5) (2014).
6. 52 U.S.C. § 30118(b) (2014).
7. FEC Advisory Opinion 2010-09 (2010).
8. FEC Advisory Opinion 2013-09 (2013).
9. 52 U.S.C. § 30104 (2014).
10. 52 U.S.C. § 300104(i)(8)(B) (2014).

11. 52 U.S.C. § 30118(a) (2014). For the definition of what the terms “contribution” and “expenditure” do and do not include, *see* 52 U.S.C. §§ 30101(8)-(9) (2014); 11 C.F.R. § 114.1(a) (2015).
12. 52 U.S.C. § 30118(a) (2014).
13. 11 C.F.R. § 114.2(a) (2015).
14. 52 U.S.C. § 30118(b)(2)(C) (2014); 11 C.F.R. § 114.1(a)(2)(iii) (2015).
15. 52 U.S.C. §§ 30118(b)(2)(A)-(B) (2014); 11 C.F.R. §§ 114.1(a)(2)(i)-(ii), 114.4(c) (2015).
16. 11 C.F.R. § 114.9 (2015).
17. *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010).
18. 52 U.S.C. § 30118(a) (2014); 11 C.F.R. § 114.2(a) (2015).
19. 52 U.S.C. § 30101(8)(B)(viii) (2014); 11 C.F.R. § 114.1(a)(2)(vii) (2015).
20. 11 C.F.R. § 114.1(a)(2)(vi) (2015).
21. FEC Advisory Opinion 1989-13 (1989).
22. 52 U.S.C. § 30143(b) (2014).
23. 11 C.F.R. § 114.1(a)(2)(ix) (2015).
24. 52 U.S.C. § 30101(8)(B)(iii) (2014); 11 C.F.R. §§ 100.78, 114.1(a)(2)(v) (2015).
25. *See, e.g.*, FEC Advisory Opinion 1976-50 (1976) (corporation may not produce T-shirts with candidate’s name on them and provide campaign committee with a commission for each shirt sold).
26. FEC Advisory Opinion 1990-1 (1990) (corporation may provide a “900” line phone service to candidates and committees for fund-raising purposes); FEC Advisory Opinion 1996-2 (1996) (Internet service provider not permitted to provide free service to candidate).
27. 52 U.S.C. § 30101(8)(B)(i) (2014); 11 C.F.R. § 100.74 (2015).
28. FEC Advisory Opinion 1975-97 (1975).
29. FEC Advisory Opinion 1978-77 (1978).
30. 52 U.S.C. § 30101(8)(B)(vii) (2014); 11 C.F.R. § 114.1(a)(1) (2015).
31. 11 C.F.R. § 116.3(b) (2015).
32. 11 C.F.R. § 116.4(b) (2015).
33. 52 U.S.C. § 30101(9)(B)(i) (2014); 11 C.F.R. §§ 100.73, 100.132 (2015); *see also* FEC Advisory Opinion 1980-90 (1980); *Reader’s Digest Ass’n v. FEC*, 509 F. Supp. 1210 (S.D.N.Y. 1981).
34. 11 C.F.R. §§ 100.75, 100.76, 100.135, 100.136 (2015).
35. 52 U.S.C. § 30101(8)(B)(iv) (2014); 11 C.F.R. §§ 100.79, 100.139 (2015).
36. 11 C.F.R. §§ 100.79, 100.139 (2015).
37. FEC Advisory Opinion 1983-23 (1983); Public Financing of Presidential Candidate and Nominating Conventions, 68 Fed. Reg. 47,386, 47,405 (Aug. 8, 2003).
38. 11 C.F.R. § 9008.52 (2015).
39. 11 C.F.R. § 9008.9 (2015).
40. 52 U.S.C. §§ 30125(b)(2)(B)(i)-(iv) (2014).