VENABLE® LLP

Articles

October 28, 2011

Communicating with Members after *Citizens United*

AUTHORS

Ronald M. Jacobs

Jeffrey J. Hunter

RELATED PRACTICES

Political Law

RELATED INDUSTRIES

Nonprofit Organizations and Associations

ARCHIVES

2011 2007 2003
2010 2006 2002
2009 2005 2001
2008 2004

Related Topic Area(s): Lobbying and Political Activity, Tax and Employee Benefits

Informing members of new developments and their meaning is central to any association's mission. That message may involve commending or criticizing a federal candidate or officeholder. Although associations have always had broad leeway to communicate with their members, many association communications reach beyond just the membership and include the general public. In the past, this presented a problem because federal law prohibited corporations—including associations (both membership organizations and trade associations)—had always been prohibited from spending money for communications to the general public that advocated electing or defeating a federal candidate.

The U.S. Supreme Court's *Citizens United* decision loosened these constraints, offering associations more choices in what they may communicate through newsletters, mailings, the web, paid advertisements, and other communication vehicles that go beyond just their membership. This is important because the people you consider to be members may not be members in the eyes of the Federal Election Commission's ("FEC"). Thus, *Citizens United*'s ultimate benefit for associations may simply be that you are now free to use your usual suite of communications vehicles without worrying whether the audience is just your membership as defined under federal campaign finance law.

Overview of FEC Rules

Restrictions and the changes brought by Citizens United

The Federal Election Campaign Act ("FECA") prohibits corporations from spending treasury funds to influence a federal election. This includes giving money to campaigns, providing candidates with free or discounted services and, until January 2010, paying for "independent expenditures" – communicating to the public messages containing express advocacy. "Express advocacy" means certain "vote for/against" phrases or their functional equivalent, what a reasonable person would conclude means nothing but a call to elect or defeat a clearly identified federal candidate. Roughly one-half of the states also prohibited direct corporate contributions or independent expenditures.

In January 2010, the U.S. Supreme Court invalidated significant political speech restrictions in *Citizens United vs. Federal Election Commission*. Thus, all types of corporations, business or nonprofit, may now urge the public to elect or defeat federal candidates or fund other groups' independent expenditures. Many of the states that prohibit corporate political activity have stricken the corporate independent expenditure ban from their laws in response to *Citizens United* or announced they will not enforce the old prohibitions. The Court upheld disclosure requirements for the costs of making independent expenditures and "electioneering communications" (radio/TV/cable/satellite ads that air just before an election and merely identify a federal candidate without urging any election-related action), as well as contributors who funded these activities.

In short, *Citizens United* changed the way associations may legally communicate political messages, freeing them up to advocate for or against candidates. Although many think of expensive television campaigns, the real value to associations may be the ability to use the full toolkit of ways associations communicate with their members, and not worrying about whether those communications go beyond the membership.

Your members may not be your members

It is important to remember that your definition of who is a member of your association may be much broader than the federal campaign finance law's definition. Thus, even internal communications to members may include non-members, so you will need to consider the rules governing communication of political speech to the general public.

FECA's statutory provisions and the FEC's regulations have long permitted corporations to engage in

certain election-related activities, such as endorsing a candidate in a press release to the usual list of reporters the association contacts for other subjects, or operating political action committees ("PACs") to raise money from certain individuals, write PAC checks to campaigns, and spend PAC money on independent expenditures. A corporation may use corporate resources to solicit funds from, and communicate express advocacy to, its "restricted class." This group varies for business corporations, membership organizations, and trade associations. Generally, it includes each entity's salaried, professional or policy-making employees, shareholders (if any), and these groups' family members at home. A membership organization or trade association must meet six organizational criteria, and members must have some significant tie to the association such as paying annual dues each year to fit within the association's restricted class.

What can I do now?

Most associations may now communicate just about any political message they want, short of asking the public for PAC contributions or coordinating their communications with a campaign or political party. Before *Citizens United*, only media organizations and certain nonprofits that met restrictive FEC "qualified nonprofit" criteria could urge the public to vote for or against a particular candidate. Associations that publish mixed member services/news websites or periodicals no longer must fret over whether they meet the FEC's "press exemption" or "qualified nonprofit" criteria.

For instance, an association no longer needs to refrain from using language in mixed member/public mailings the FEC might deem an independent expenditure, such as lauding one candidate's environmental record, faintly praising the other's, and urging the reader to "Vote Your Conscience." In our experience, associations often held back before *Citizens United* from speaking out on important campaign issues for fear of attracting an FEC enforcement proceeding and possible fine. Associations that hosted blogs worried that a user-written post or tweet might subject the organization to penalty if the content included express advocacy. Fear of walking into an FEC penalty for even inadvertent, user-posted political speech should now be gone.

Considerations for Communications Beyond the Membership

When making use of these new rights to communicate with the public, there are four important issues to keep in mind.

1. Coordination

Under the campaign finance rules, an independent expenditure may not be "coordinated" with a campaign. An independent expenditure becomes a "contribution" when it is coordinated. Even after *Citizens United*, contributions are still illegal for corporations (and limited to $2,500 per candidate per election for individuals and $5,000 per candidate per election for multicandidate PACs). Broadly speaking, coordination means consulting with or discussing the communication with a campaign.

The coordination rules are complicated. They include using common vendors to produce communications or making a communication because a campaign requested it. One common issue is sharing a draft newsletter article with a campaign's press office for edits before publication, which should not be done. Similarly, the association may link to campaign materials such as a candidate's speech on YouTube, but it may not discuss republishing campaign materials on its own website with campaign staff.

Associations often wish to learn about a candidate's positions on the issues. Either so they can determine whom to endorse or to create voter guides. As long as these communications do not involve a discussion of the campaign's plans, activities, or needs, the association may make inquiries about the candidate's positions on issues.

Finally, is worth noting that if the communication is going only to members (and remember, the FEC defines who is or is not a member), then the association may coordinat the communication with the campaign. Limiting the audience to association members who also meet the FEC's definition may be worthwhile if the association wants to discuss the communication with the candidate or campaign staffers.

2. Disclaimers and Disclosure

Communications that expressly advocate for or against a candidate must include a disclaimer stating who paid for them, the address, web address, or phone number, and that they are not authorized by a candidate. This is fairly simple for advertisements, but may be a little more complicated for articles in

newsletters. Fortunately, Internet-based communications sent via email or posted to a website without a fee do not need disclaimers.

Disclosure can be a bit more complicated. An association that makes only very infrequent express advocacy messages should consider communicating these messages through email, its Internet website, or another's website so long as the other website does not charge a fee. This would cover occasional "vote for/against" statements in an online newsletter's "Message from the President" column. Email and most online content have no direct cost that one can attribute to a members-only express advocacy or independent expenditure communication. If the expenditure is low enough, no report is required.

Spending more than $250 in the aggregate during a calendar year on independent expenditure communications to the public triggers a quarterly reporting requirement. Spending $10,000 in a calendar year will require filing a report within 48 hours. And spending an aggregate of just $1,000 in the 20 days before the election will require filing a report within 24 hours.

For messages sent to an association's restricted class, spending $2,000 per election will trigger an internal express advocacy reporting requirement unless the communication was primarily devoted to other subjects (for instance, one small article within a member magazine).

3. Tax Issues

Federal tax law imposes additional restrictions on nonprofits' political activity. For example, 501(c)(3) organizations may not spend any money to intervene in an election, such as by endorsing a candidate in a newsletter or paying for an independent expenditure. This rule is strictly enforced and can result in loss of tax status. Other rules include the "multiple clicks" requirement for 501(c)(3)s' websites to avoid direct links to political content on other websites. Thus, 501(c)(3) organizations should consult counsel experienced in nonprofit tax and political activity before linking to election-related content.

501(c)(4) and 501(c)(6) organizations may engage in political activity, but not if the political activity comprises the organization's "primary activity." The IRS has announced plans to increase scrutiny of 501(c)(6) and 501(c)(4) political activity, so care must be taken.

Finally, permissible nonprofit association political speech may also trigger a 35 percent proxy tax on the total communication cost (or on net investment income for the organization, whichever is lower). And business corporations cannot deduct the cost of their lobbying or election-related activities on their income tax returns as business expenses.

4. Super PACs

Finally, an association may have another choice to make if it will be heavily involved in independent expenditures. That is, it may consider forming what is called a "Super PAC" to centralize its public express advocacy communications. This is really an issue for an association that plans to make large outlays (as opposed to including express advocacy within one newsletter's article). Centralizing costs and communications in a Super PAC can help avoid failing to file quarterly and 24- or 48-hour reports. This entity can speak freely and raise money from anyone—the association, corporations, or individuals. Moreover, the Super PAC's reports may disclose the association as the donor, rather than individual or corporate members.

* * *

In sum, the *Citizens United* decision opened many new avenues to associations, freeing them to communicate express advocacy beyond just their members. Associations must be careful about how they do it, know if and when they need to file FEC reports, and whether disclaimers are needed. Associations certainly now have a whole new world of opportunities that were not available before.

* * *

For more information on nonprofit organizations and political activities, contact the authors at ***rmjacobs@Venable.com*** *or 202.344.8215 and* ***jhunter@Venable.com*** *or 202.344-4467.*