

FEC Revises Its Electioneering Communications Rules in Response to *Wisconsin Right to Life*

January 2008

In the wake of the Supreme Court's decision in *FEC v. Wisconsin Right to Life*, which was reviewed in our July 2007 newsletter (www.wileyrein.com/fec_wisconsin), the Federal Election Commission (FEC) has modified its rules regarding electioneering communications. Electioneering communications are targeted television and radio ads run within 30 days of a primary, caucus, or convention and within 60 days of a general election that feature or mention a relevant candidate for federal office.

The main thrust of the modification is an exemption to the general prohibition against the corporate and union funding of electioneering communications. Under this new exemption, electioneering communications that meet the following "safe harbor" criteria may be funded by corporate and union money:

- The communication does not mention an election, candidacy, political party, opposing candidate, or voting by the general public;
- The communication does not take a position on the qualifications, fitness for office, or character of a candidate; and
- The communication focuses on a legislative, executive, or judicial issue and either urges the candidate to take a position or action with regard to that issue or urges the public to adopt a position and contact the candidate with respect to the issue.

Corporate and union communications that fail to meet one or more of the prongs of the safe harbor may still be permissible if, in the opinion of the FEC, the communication is susceptible of a reasonable interpretation other than an appeal to vote for or against a federal candidate. To make that determination, the FEC will consider the following:

- Whether the communication includes indicia of express advocacy; and
- Whether the communication may be interpreted as anything other than an appeal to vote for or against a federal candidate

In interpreting the communication, the rule requires the FEC to resolve any doubts in favor of permitting the communication. Further, the FEC may only consider the communication itself, as well as basic background information that may be determined through only minimal discovery, such as whether the named person is a federal candidate and whether the communication discusses a public policy issue.

Communications that are permissible under this new exemption to electioneering communication rules are still subject to reporting and disclaimer requirements. Specifically, if the cost of an electioneering communication exceeds \$10,000, a corporation must disclose the identities of all persons who made aggregate contributions in excess of \$1,000 specifically for the purpose of making an electioneering communication, which, often, will only be the corporation itself.

Note that a corporation is not required to disclose the identity of every person that provided funds to the corporation, only those funds specifically given for electioneering communication purposes. In addition, the corporation must also disclose, among other things, its identity as the entity making the electioneering communication, the costs of the electioneering communication, the federal candidates mentioned or featured in the communication, the elections in which such candidates are participating, and the first date the electioneering communication was distributed. The reporting must be repeated each time the corporation makes a disbursement for such exempt issue advocacy in excess of \$10,000 that has not already been reported.

Final rules can be found on the FEC's website at www.fec.gov/law/cfr/ej_compilation/2007/notice_2007-26.pdf.