

ETHICS INTERPRETATION EI-1999-008
ISSUED December 10, 1999

The Ethics Commission [“the Commission”], in the executive session portion of its regular meeting held December 10, 1999, considered your request for an ethics interpretation.¹ You have asked:

1. *Do the Constitutional Ethics Rules [“the Rules”], Section 257:1-1-1 et seq. of the Rules of the Ethics Commission 74 O.S. Supp.1999, Ch. 62, App., deem an ideological, not-for-profit corporation’s publication of a new newsletter, which reveals issue positions of candidates pursuant to a written survey and includes voting records of incumbents, to constitute a violation of Section 10-1-2(c)(2)’s prohibition on corporate participation in candidate campaigns?*
2. *If not, would this organization’s newsletter be considered a “contribution” under Rules Section 257:1-1-2(1)(B)’s definition of the term, since the voter guide information was compiled “with the cooperation of, or in consultation with” candidates?*
3. *Would the corporation’s newsletter violate any other Rule?*

FACTS

You have informed us that:

- your organization is a 501(c)(4) not-for-profit ideological corporation formed solely to engage in advocacy for specified issues;
- it intends to distribute an “election related” newsletter to the general public containing the names and party affiliation of candidates for statewide office, together with those running for the Oklahoma Senate and House of Representatives;
- the newsletter will reveal the candidates’ responses [“yes”, “no” or that the candidate “did not answer”] to several of the survey questions regarding issues of concern to the organization;
- the new sletter will indicate whether a “yes” or “no” answer indicates agreement with the organization’s position;
- if the candidate is an incumbent, the new sletter will indicate whether he or she is a leader in support of, or opposition to, the organization’s issues or has a state legislature voting record in favor of, or opposition to, the same;

¹Please be advised that questions pertaining to the Oklahoma Statutes and Constitution cannot be interpreted by the Commission.

- the newsletter will be published during the summer and fall of the year 2000, but will not, in explicit words or by express terms, advocate any candidate's election or defeat; and
- the corporation has no policy against receiving into its treasury fund contributions from for-profit corporations, and, in fact, over a five-year period, such monies have exceeded 25% of all contributions received.

ANALYSIS

Your first question entails whether the survey seeking information concerning candidates' stands on specified issues renders publication of the proposed voter guide a "coordinated" or an "independent" expenditure. It is necessary to explain these terms,

While not separately listed, the Rules describe "coordinated" expenditures within the definition of "contribution."

Definitions

* * *

"Contribution"

(1) means and includes:

* * *

(B) an expenditure made by a person or committee, other than a candidate committee, with the cooperation of, or in consultation with, a committee, a candidate, candidate committee, or candidate's agent or that is made in concert with, or at the request or suggestion of, a candidate, candidate committee, or candidate's agent;

* * *

Section 257:1-1-2

Thus, if made with the cooperation of, or in consultation with, a committee, a candidate, candidate committee, or candidate's agent or in concert with, or at the request or suggestion of, a candidate, candidate committee, or candidate's agent, such expenditures are deemed an in-kind contribution to the candidate committee.

You ask whether sending a survey to candidates for subsequent publication of a voter guide is, under these facts, a "coordinated" expenditure by a corporation, such as would be prohibited by Rule 257:10-1-2, which in applicable part, provides:

Contributions

* * *

(c) Prohibitions and exceptions to corporate contributions.

* * *

(2) A corporation shall not make a contribution or expenditure to, or for the benefit of, a candidate committee in connection with an election, except that this provision shall not apply to:

(A) a campaign or committee solely for or against a ballot measure or local question; or

(B) the establishment, administration, and solicitation of contributions to a political action committee to be utilized for political purposes by a corporation.

* * *

Section 257:10-1-2

This is a question of first impression before this agency. In deciding it, the Commission finds persuasive applicable regulations of the Federal Election Commission ["FEC"], which permit corporate publication of such materials, provided they are not coordinated with candidates.

Voter Guides

A corporation may prepare and distribute to the general public voter guides consisting of two or more candidates' positions on campaign issues, including voter guides obtained from a nonprofit organization which is described in 26 U.S.C. 501 (c)(3) or (c)(4), provided that the voter guides comply with either subsection (a) or (b)(1) through (5) of this section. The sponsor may include in the voter guide biographical information on each candidate, such as education, employment positions, offices held, and community involvement.

(a) **Without survey.** The corporation shall not contact or in any other way act in cooperation, coordination, or consultation with or at the request or suggestion of the candidates, the candidates' committees or agents regarding the preparation, contents and distribution of the voter guide , and no portion of the voter guide may expressly advocate the election or defeat of one or more clearly identified candidate(s) or candidates of any clearly identified political party.

(b) **With survey.**

(1) The corporation shall not contact or in any other way act in cooperation, coordination, or consultation with or at the request or suggestion of the candidates, the candidates' committees or agents regarding the preparation, contents and distribution of the voter guide, except that questions may be directed in writing to the candidates included in the voter guide and the candidates may respond in writing;

(2) All of the candidates for a particular office shall be provided an equal opportunity to respond;

(3) No candidate may receive greater prominence in the voter guide than other participating candidates, or substantially more space for responses;

(4) The voter guide and its accompanying materials shall not contain an electioneering message; and

(5) The voter guide and its accompany materials shall not score or rate the candidates' responses in such a way as to convey an electioneering message.

The Commission thus finds that provided all criteria are met, your organization's proposed voter guide will not constitute a contribution within the meaning of the Rules. Were it not for this exception to the definition of contribution, the answer would be otherwise, for as you have correctly noted, corporations may not make a contribution or expenditure to, or for the benefit of, a candidate or candidate committee in Oklahoma.

In this regard, the Commission notes it has recently interpreted Section 257:10-1-2(c)(2) as prohibiting corporations from making independent expenditures from its treasury, subject to the exceptions outlined in *FEC v. Massachusetts Citizens for Life* ["*MCFL*"], 479 US 238, 93 L Ed 2d 539, 107 S Ct 616 (1986), in which the Court found:

...an expenditure must constitute "express advocacy" in order to be subject to the prohibition of § 441b. We also hold, however, that the publication...constitutes "express advocacy." ...The publication not only urges voters to vote for "pro-life" candidates, but also identifies and provides photographs of specific candidates fitting that description. The Edition cannot be regarded as a mere discussion of public issues that by their nature raise the names of certain politicians. Rather, it provides in effect an explicit directive: vote for these (named) candidates. The fact that this message is marginally less direct than "Vote for Smith" does not change its essential nature. The Edition goes beyond issue discussion to express electoral advocacy. The disclaimer of endorsement cannot negate this fact.

Id., at 249

But, the Court also held that independent expenditures in a candidate election from an ideological corporation's treasury could not be prohibited if the organization meets the following test:

- that the corporation be formed for the express purpose of promoting political ideas and cannot engage in business activities;
- that the corporation have no shareholders or other persons who might have a claim on its assets and earnings; and
- that the corporation not be established by a business corporation or a labor union and it have a policy not to accept contributions from such entities.

Id., at 264

Although an exception conforming to this test is not expressed in the Rules, the Commission interprets Section 257:10-1-2(c)(2) to provide for same. The Commission herein adopts the test and interprets its Rules consistent with the case holding.

We then analyze the instant facts in accordance with the MCFL criteria. The Commission notes that your organization has no policy against receiving contributions from for-profit corporations and, in fact, that such contributions form a significant portion of the organization's treasury, constituting as they do approximately 25% of total receipts. This, alone, causes the group to fail the *MCFL* test. Your organization's treasury funds thus cannot be used for independent expenditures. The Commission notes that, in order to make independent expenditures, this organization must establish a separate segregated fund into which it would solicit/accept no for-profit corporate contributions.

We must then ask whether distribution of the proposed newsletter constitutes an "independent expenditure." This is a defined term under the Rules.

Definitions

* * *

"Independent expenditure" means an expenditure made by a person to advocate the election or defeat of a clearly identified candidate, or, taken as a whole and in context, expressly urges a particular result in an election, but which is not made to, controlled by, coordinated with, requested by, or made upon consultation with a candidate, committee, treasurer, deputy treasurer or agent of a committee.

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The organization's newsletter has not been presented to the Commission. Since the question is fact specific, it is not possible to determine whether its content is such that dissemination to the general public would constitute "express advocacy."

You, nevertheless, have acknowledged that your publication will speak to clearly identified candidates. You intend to report the names and party affiliation of those running for statewide office, as well as for the Oklahoma Senate and House of Representatives. There is little doubt that the message will be for readers to vote for candidates whose survey or voting record show they support your organization's issue and against those who oppose it. Under both *MCFL* and *FEC v. Furgatch*, 807 F.2d 857 (9th Cir. 1987), any "clear plea for action" would constitute "express advocacy." This applies despite your intention that the newsletter not, in explicit words or by express terms, advocate any candidate's election or defeat.

The opposite would hold if the newsletter were drafted in a way to avoid "a clear plea for action." In such instances, the organization could pay for publication from its treasury fund, and such activity would not trigger reporting requirements.

The next question is whether a separate segregated fund established by the corporation would constitute a political action committee subject to the restrictions

and disclosure requirements. For present purposes, the Rules define such groups as a combination of at least two individuals, or a person other than an individual, with the primary purpose of supporting or opposing a candidate or candidates.

Definitions

* * *

"Political action committee"

(1) means a combination of at least two individuals, or a person other than an individual:

(A) with the primary purpose of:

(i) supporting or opposing a candidate or candidates, or a party committee, except those required to file with the Federal Election Commission, or

(ii) supporting or opposing a ballot measure; and

(B) which accepts or gives contributions or makes expenditures from a joint account aggregating at least five hundred dollars (\$500) during a calendar year.

* * *

Section 257:1-1-2

Since this organization – or any separate segregated fund it may establish – would support or oppose candidates only incidentally to its pursuit of an ideological goal, the fund does not fall within the definition and, thus, would not constitute a political action committee. However, the Commission has previously held that any such group having in excess of \$5,000 in activity [contributions accepted or expenditures made] will be presumed to have a primary – as opposed to incidental – purpose and thus incur the registration requirement.

If and when such a group accepts or gives contributions or makes expenditures [which are contributions] from a joint account aggregating at least five thousand dollars (\$5,000), such group will be deemed to have as a primary purpose supporting or opposing a candidate, candidates, party committee or ballot measures within the meaning of the definition of political action committee. When accepting or giving contributions or making expenditures in excess of five hundred dollars (\$500) during a calendar year, the organization will incur the obligation to register and file contributions and expenditure reports with the Commission.

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If, by expressly advocating the election or defeat of clearly identified candidates, the organization should make "independent expenditures," it will be required to register as a PAC once activity exceeds \$5,000. In such instances, the organization will be required to register within 10 days.

On the other hand, if publication and distribution of the new sletter does not constitute “express advocacy” of the election or defeat of clearly identified state candidates, the organization conducts only “issue advocacy.” In such instance, it incurs no reporting obligation.

The Commission notes in passing that the only contributions the Rules permit corporations to make to their PAC from treasury funds is for administrative expenses. These are limited to covering the costs of establishing and soliciting contributions to its political action committee.

Report contents

(a) **Basic reporting form.** The campaign contributions and expenditures report shall include:

* * *

(9) the amount of funds loaned or donated by a corporation, labor organization, or other person to its political action committee for the establishment and for solicitation costs of the committee;

* * *

Section 257:10-1-14

The Commission points out that if the newsletter engages in “express advocacy,” registration of the organization’s political action committee will be required. The Rules provide for this as follows.

Registration requirements

(a) A committee other than a candidate committee, including an out-of-state committee, which accepts one or more contributions or makes one or more expenditures in excess of five hundred dollars (\$500) in the aggregate in this state in a calendar year shall file, or electronically transmit, a statement of organization with the Commission no later than five (5) days after accepting the contribution(s) or making the expenditure(s)
...

* * *

Section 257:10-1-11

Once the organization’s political action committee meets the applicable threshold, it must register with the Commission and begin reporting. Reports are due by the 15th day of the month following each quarter and by the eighth day before any election. We recommend you refer to the agency’s web page for the most current due dates at < [www.state.ok.us/~ ethics/](http://www.state.ok.us/~ethics/)> .

In addition to quarterly and pre-election reports, last minute independent expenditures [those which occur between the 15th day before up to the day of any election and which exceed \$500] must be reported to the Commission within 24 hours:

Report of last minute independent expenditures

A person that makes an independent expenditure of five hundred dollars (\$500) or more after the closing date for the pre-election reporting period, but before the election, shall report the total amount, the date, a brief description of the consideration for the expenditure, and the purpose of the expenditure on the paper form or by computer diskette or electronically transmitting the information on the form or form software provided by the Commission to the Commission office by United States mail, hand delivery, facsimile transmission, telegram, or express delivery service within twenty-four (24) hours of making the expenditure. Electronic filings shall be followed by delivering, faxing or mailing a signed paper copy of the form received or postmarked by the date the report was due. The report shall be signed by the person making the expenditure, or the treasurer or, in the treasurer's absence, the deputy treasurer of a reporting committee, who shall attest to the report's accuracy and veracity. This information shall be included on the next report filed on paper, computer diskette or electronically transmitted by the reporting committee or person.

Section 257:10-1-16

Last minute independent expenditures must again be reported on the next quarterly or pre-election report due.

CONCLUSION

It is therefore the ethics interpretation of the Ethics Commission, as decided at its regular meeting held December 10, 1999, that:

- 1. under the instant facts, the organization may not use its corporate treasury funds to publish and distribute to the general public a newsletter which expressly advocates the election or defeat of clearly identified state candidate;**
- 2. the organization may, however, use treasury funds for campaign literature which does not qualify as "express advocacy;" in such instances, it incurs no reporting requirement under the Rules;**
- 3. the organization may publish a newsletter and it will not be deemed a coordinated expenditure if it is within the voter guide regulations of the FEC, incorporated herein and adopted in this interpretation for Oklahoma;**
- 4. the organization may not use its corporate treasury funds to make independent expenditures – those which expressly advocate the election or defeat of a clearly identified candidate or candidates – since it does not have a policy against accepting corporate business contributions and, in fact, receives a significant level – in excess of 25% – of its receipts from for-profit business corporations;**
- 5. the organization may use its corporate treasury funds to reimburse its own PAC for costs incurred and associated with the overhead, administration and solicitation of contributions; such reimbursements are exclusions from the definition of contributions; and do not count as such; however, the amount of**

such reimbursements must be reported for each reporting period as an “administrative cost”; and

6. quarterly and pre-election reports are required of the organization once its PAC exceeds \$5,000 in a calendar year in independent expenditures advocating the election or defeat of Oklahoma state candidates. Last minute independent expenditures which expressly advocate the election or defeat of a clearly identified Oklahoma state candidate or candidates, which exceed \$500 within the 14 days prior to any election in which such candidate is on the ballot, must report the expenditure within 24 hours of acceptance.

Please be advised that ethics interpretations are fact specific. They answer only the question or questions put forth in the underlying request according to information described in the “Facts” section [*supra*]. While they may shed light on other situations, this opinion does not necessarily control them. To be binding on the future action of this agency, the interpretation must be directed to the individual situation.

Ethics Interpretations are published with sufficient deletions to prevent identification of the person or persons involved in the situations herein described. The name of the requestor is considered confidential. This letter has been labeled accordingly.