

**STATE ETHICS COMMISSION
ADVISORY OPINION
S.E.C. 2010-02**

Question 1:

Whether Georgia bans corporate independent expenditures.

The Act does not ban nor does it limit independent expenditures by any person or corporation. Georgia Regulation 189-3-.01(5)(f) specifically states that candidate campaign contribution limits do not apply to independent expenditures. O.C.G.A. 21-5-34(e) and (f)(1) which provide for registration and reporting of independent committee expenditures do not limit such expenditures.

Question 2:

Whether a corporation which makes independent expenditures is required to register and report as an independent committee.

The Act requires that independent committees shall register with the Commission prior to accepting or making contributions or expenditures (O.C.G.A. 21-5-34(e),(f)).

In its request for opinion, the AFC states that requiring a corporation to register as a committee is an impermissible prohibition on “corporate independent expenditures and is thus a ban on speech.” AFC states that authority for the above proposition is found in the recent Supreme Court decision of *Citizens United v. Federal Election Commission*, 130 U.S. 876 (2010).

This Commission disagrees. The quote that AFC cites from the *Citizens* opinion does not state that registration of PACs is an impermissible ban on corporate independent expenditures and thus a ban on speech. In fact, AFC has truncated the quote in its request for opinion from this Commission. The quote in full reads, “Section 441b’s¹ prohibition on ***corporate independent expenditures is thus a ban on speech.*** As a ‘restriction on the amount of money a person or group can spend on political communication during a campaign,’ that statute ‘necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached.’ *Buckley v. Valeo*, 424 U. S. 1, 19 (1976) (*per curiam*).” *supra* at 898.

The Supreme Court in the paragraph preceding the above cite discusses the federal regulations applying to PACs, but only as dicta to emphasize the point that PACs are not a viable remedy to

¹2 USC §441b (or the Bipartisan Campaign Reform Act of 2002(BCRA). Section 441b of the federal law prohibits corporations and unions from using their general treasury funds to make independent expenditures for speech that is an “electioneering communication” or for speech that expressly advocates the election or defeat of a candidate.

resolve the ban on corporate speech resulting from the restrictions imposed by §441b. Nowhere in Citizens United decision does the Supreme Court state that the registration and disclosure requirements placed on PACs or independent committees is an “impermissible ban” or even effective ban on speech.

In fact, the Supreme Court rejected Citizens United’s challenge to the disclaimer and disclosure requirements found in BCRA §§201 and 311. Citizens United argued that the governmental interest in providing information to the electorate does not justify requiring disclaimers for any commercial advertisements, including the ones at issue here. In rejecting this argument the Court stated, “The disclaimers required by §311 ‘provid[e] the electorate with information,’ *McConnell, supra*, at 196, and ‘insure that the voters are fully informed’ about the person or group who is speaking, *Buckley, supra*, at 76; see also *Bellotti*, 435 U. S., at 792, n. 32 (“Identification of the source of advertising may be required as a means of disclosure, so that the people will be able to evaluate the arguments to which they are being subjected”). At the very least, the disclaimers avoid confusion by making clear that the ads are not funded by a candidate or political party.” *supra* at 915.

As with the disclaimer requirements under BCRA §§201 and 311, the registration and reporting of PACs and independent committees is a source for disclosure to the public and the only method by which this Commission may determine compliance with the Act. Additionally, without such reporting by PACs and independent committees of the independent expenditures made and the contributions collected, the public cannot be fully informed as to the source of funds paying for the advertising and will not be able to adequately evaluate the influence of private interests on the information received.

Question 3:

Whether a corporation may contribute to a committee whose activities are limited to independent expenditures.

The Act defines an Independent Committee as one “which receives donations during a calendar year from **persons** who are members or supporters of the committee.” (§21-5-3(15)). Political Action Committee is defined as “Any committee ... which receives donations during a calendar year from **persons** who are members or supporters of the committee...” Persons is defined by the Act as any individual, partnership, committee, association, corporation ... or other business entity recognized in the State of Georgia, labor organization, or any other organization or group of persons” (§21-5-3(19)).

As the definition of “persons” includes a corporation (or other forms of a business entity as recognized in the State of Georgia) and there are no other prohibitions or limits within the Act with respect to independent contributions made by any person, a corporation may contribute to a committee whose activities are limited to independent expenditures.

Question 4:

Whether expenditures not made with the cooperation or consent of, or in consultation with, or at the request or suggestion of any candidate or any of his or her agents or authorized committee and that do not expressly advocate the election or defeat of a clearly identified candidate, that is, that do not use “magic words,” are reportable as independent expenditures.

If an expenditure does not expressly advocate the election or defeat of a clearly identified candidate, then it is not by definition campaign related and is not reportable under the Act as an independent expenditure (See Georgia Regulation 189-3-.01(5)(f)).

Question 5:

Whether an entity which makes expenditures or receives contributions for the purpose of influencing an election, but does not have the “major purpose” to nominate or elect candidates for public office in Georgia, is subject to registration and reporting as a political committee.

The question as posed by AFC is too vague for the Commission to respond directly. That is, the phrase “for the purpose of influencing an election” does not give the Commission sufficient facts to determine the type of expenditure to which AFC is referring. If AFC is referring to an independent expenditure or one which “expressly advocates the election or defeat of a clearly identified candidate but which is made independently of any candidate’s campaign” (O.C.G.A. §21-5-3(15); see also Buckley v. Valeo, Secretary of the United States Senate, et al., 424 U.S. 1, 80 (1976)), then the political committee, person or PAC is subject to registration and reporting under the Act.

Persons, PACs or independent committees which make expenditures solely to engage in issue discussion (Buckley, supra at 79) when there is no specific mention of a candidate or identifiable reference to a candidate, are not required to report such expenditures under the Act. This does not mean, however, that a person, PAC or independent committee does not have to register with the Commission because any one of these organizations may have a dual purpose. A PAC may decide to make both independent expenditures as well as expenditures advocating a position on a specific issue not related to one of the candidates.

Question 6:

Whether a PAC which has contributed to a candidate or candidate’s committee is permitted to make independent expenditures advocating the election or defeat of that candidate without having those expenditures treated as contributions to that candidate under Georgia Regulation 189-3-.02.

Georgia Regulation 189-3-.01(5)(f) states that independent expenditures are not restricted by the campaign contribution limits under the Act. Therefore, a non-candidate committee, whether a person, PAC or independent committee may make contributions directly to the candidate and still expend funds which are independent of the candidate campaign committee.

To qualify as an independent, however, the expenditure must truly be made without the cooperation, consent or consultation of the candidate.

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