

LEGAL SERVICES

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MEMORANDUM

February 23, 2010

SUBJECT: Changes to AS 15.13 in response to the Citizens United case
(Work Order No. 26-LS1495\A)

TO: Representative Bob Lynn
Chair of the House State Affairs Committee
Attn: Nancy Manly

FROM: Alpheus Bullard *LAB*
Legislative Counsel

This memorandum accompanies the work order described above.

You requested a bill that would tighten up state disclosure laws in response to the United States Supreme Court's holding in Citizens United v. Federal Election Commission, No. 08-205, 558 U.S. ____ (January 21, 2010).

Alaska campaign finance statutes are currently crafted to prohibit certain expenditures by persons on the basis of the person's identity. Because these persons are prohibited under existing law from making expenditures to influence the outcome of elections for state political office, existing statutes relating to disclosure of expenditures to the Alaska Public Offices Commission and identification of who has paid for certain advertisements and announcements do not all apply to makers of expenditures other than individuals, groups,¹ and nongroup entities.²

¹ AS 15.13.400(8) provides:

(8) "group" means

(A) every state and regional executive committee of a political party; and

(B) any combination of two or more individuals acting jointly who organize for the principal purpose of influencing the outcome of one or more elections and who take action the major purpose of which is to influence the outcome of an election.

² AS 15.13.400(13) provides:

The attached bill draft expands the disclosure and communication identification requirements of AS 15.13 to all "persons," except for existing exemptions for (1) individuals who, acting independently of other persons, spend less than \$500 on certain speech concerning ballot propositions and (2) nongroup entities with an annual budget of \$250 or less.

WHAT THE DRAFT BILL'S DISCLOSURE PROVISIONS REQUIRE

Sections 3 and 4 of the bill require persons making expenditures to disclose under AS 15.13.040(d), (e), and (p):

- the name of the candidate or the title of the ballot proposition or question supported or opposed by the expenditure and whether the expenditure is made to support the candidate or ballot proposition or question;
- the name and address of each officer and director (when applicable);
- the aggregate amount of all contributions made to the person for the purpose of influencing the outcome of an election (if any), and for all such contributions in excess of \$100 in the aggregate a year, the date and amount contributed by each contributor; and
- the name, address, principal occupation, and employer of individual contributors of over \$100; or if the contributor is not an individual, the name and address of contributors of over \$100 and the name and address of each officer and director of the contributor.

Section 10 of the bill requires all communications paid for by a person other than a candidate, individual, or political party under AS 15.13.090 to clearly:

- identify the person's principal officer and the officer's title;
- include a statement from the principal officer approving the communication;
- provide the address of the person's principal place of business;
- identify the person's five largest contributors (if any) during the twelve-month period before the date of the communication, with the words "top five contributors"; and
- state that the communication is not authorized or approved by any candidate (if made to influence the outcome of a candidate election).

(13) "nongroup entity" means a person, other than an individual, that takes action the major purpose of which is to influence the outcome of an election, and that

- (A) cannot participate in business activities;
- (B) does not have shareholders who have a claim on corporate earnings; and
- (C) is independent from the influence of business corporations.

Section 11 of the bill adds a new subsection (g) to AS 15.13.110 that requires all expenditures made under AS 15.13 to be reported within 10 days (as is currently required by AS 15.13.040(e)) except for expenditures over \$250 made within nine days of an election, which must be reported within 24 hours.

These additional requirements are based on my legal opinion of what information would be relevant to the government's interest in ensuring that the electorate is able to evaluate the arguments to which it is being subjected, and are not mandated by the Citizens United holding. If you would like to modify these requirements, please advise.

Note that the bill draft's sec. 6 amends AS 15.13.040(p) to require contributions made to persons making expenditures (which include independent expenditures) to disclose the "true source" of the "funds, property, or services being contributed." "True source" is not currently defined by statute and this bill draft does not include a definition. Disclosure may be best served by not attempting to define the term, since a definition in this instance would only serve to limit the latitude with which the Alaska Public Offices Commission might be able to interpret and enforce the provision.³

ADDITIONAL PROVISIONS THAT MIGHT BE REQUIRED OF PERSONS MAKING INDEPENDENT EXPENDITURES IN STATE ELECTIONS

You asked for a survey of measures that are being considered on the state and federal levels to address the changes in campaign finance wrought by Citizens United. Below are some ideas that may be relevant to your efforts. I include only those ideas that, in my legal opinion are defensible from a post Citizens United constitutional standpoint.

Crafting provisions that address coordination between makers of independent expenditures and groups and candidates.

At present, no statute specifically addresses the matter of coordination between candidates and persons making independent expenditures. The matter is dealt with indirectly by the definition of "independent expenditure" under AS 15.13.400(10), which provides:

"independent expenditure" means an expenditure that is made without the direct or indirect consultation or cooperation with, or at the suggestion or the request of, or with the prior consent of, a candidate, a candidate's campaign treasurer or deputy campaign treasurer, or another person acting as a principal or agent of the candidate;

A statute could be drafted to specifically prohibit coordination. The statute might additionally:

³ Note that the attorney general has previously interpreted the "true source" language of AS 15.13.040 to require "the disclos[ure] of the ultimate source of funds contributed for use in an Alaska election campaign (Attorney General's Opinion, file 883-01-0051, 2001 at 4, Alas. AG LEXIS 9, *5 - *6 (May 21, 2001))."

- require persons making independent expenditures to certify that the person has not collaborated with a candidate or party, or
- prohibit persons making independent expenditures from employing the same advertising firms or consultants as the campaigns and candidates the person is supporting.

Requiring more in communication identification.

Beyond the requirements included in the bill, it may be constitutionally possible to require:

- a corporation or union making an independent expenditure to disclose how much of corporation or union's general treasury was being expended in aggregate on the communication in question, or
- a certified statement from the corporation's or union's principal officer, that it is the officer's conclusion (as in Sarbanes-Oxley)⁴ that making the expenditure from general treasury funds, as opposed to making it through a corporate or union political action committee, significantly advances the person's business interest.

Prohibit persons who do business with the state, are the subject of extensive state regulation, or employ legislative lobbyists from making independent expenditures or require greater disclosure from them.

Persons that receive state contracts, leases, or grants, or businesses and industries that require extensive state regulation (because of the risk to public safety or well-being if such businesses and industries were to operate without public supervision) could be subjected to heightened disclosure requirements regarding their campaign finance related activities. There is also the possibility that these persons can be prohibited from making certain independent expenditures endorsing or opposing a ballot proposition or candidate for public office, not because of their corporate identity, but on the basis of the special risks of corruption and the appearance of corruption independent expenditures made by these persons present. It might also be possible to include persons who employ or retain registered lobbyists in such a regulatory scheme.

DEFAMATORY STATEMENTS BY CORPORATE PERSONS

You asked whether it was constitutionally possible in state law to make corporate persons "more accountable" for defamatory or false statements made in relation to an issue or matter of public interest than the protections the First Amendment provide an individual.

⁴ See 15 U.S.C. § 7241 (section 302) and 18 U.S.C. § 1350 (section 906). These provisions require senior officers of public companies to certify that they are responsible for establishing and maintaining internal controls to ensure the accuracy of financial reports filed with the Security Exchange Commission. A person who fails to comply with the certification requirements or who falsely certifies a report is subject to civil and criminal penalties.

It is my legal opinion that this is not possible. Given that the Supreme Court's holding in Citizens United, 558 U.S. ___ establishes that political speech does not lose First Amendment protection "simply because its source is a corporation," *id.* at 26, it does not seem possible to offer a lower degree of protection to the political speech of corporate persons without violating the First Amendment.

FOREIGN CORPORATIONS

You asked whether foreign corporations may now make independent expenditures in connection with state elections. In Citizens United, the Supreme Court neither considered nor overruled the existing federal law that prohibits a "foreign national" from making a direct or indirect expenditure in connection with a federal, state, or local election. 2 U.S.C. § 441e provides:

Contributions and donations by foreign nationals:

(a) Prohibition

It shall be unlawful for—

(1) a foreign national, directly or indirectly, to make—

(A) a contribution or donation of money or other thing of value, or to make an express or implied promise to make a contribution or donation, in connection with a Federal, State, or local election;

(B) a contribution or donation to a committee of a political party;

or

(C) **an expenditure, independent expenditure, or disbursement for an electioneering communication** (within the meaning of section 434 (f)(3) of this title); or

(2) a person to solicit, accept, or receive a contribution or donation described in subparagraph (A) or (B) of paragraph (1) from a foreign national.

(b) "Foreign national" defined:

As used in this section, the term "foreign national" means—

(1) **a foreign principal, as such term is defined by section 611 (b) of title 22**, except that the term "foreign national" shall not include any individual who is a citizen of the United States; or

(2) an individual who is not a citizen of the United States or a national of the United States (as defined in section 1101 (a)(22) of title 8) and who is not lawfully admitted for permanent residence, as defined by section 1101 (a)(20) of title 8 (emphasis added).

A foreign principal is defined by 22 U.S.C. § 611(b), which provides:

[t]he term "foreign principal" includes—

(1) a government of a foreign country and a foreign political party;

(2) a person outside of the United States, unless it is established that such person is an individual and a citizen of and domiciled within the

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United States, or that such person is not an individual and is organized under or created by the laws of the United States or of any State or other place subject to the jurisdiction of the United States and has its principal place of business within the United States; and

(3) a partnership, association, corporation, organization, or other combination of persons organized under the laws of or having its principal place of business in a foreign country (emphasis added).

Note however that the U.S. subsidiaries of foreign corporations are not "foreign nationals." The definition of foreign nationals above exempts any person that is "not an individual and is organized under or created by the laws of the United States or of any State or other place subject to the jurisdiction of the United States and has its principal place of business within the United States[.]"

As long as the foreign parent of the U.S. subsidiary is not financing the subsidiary's independent expenditures and a foreign national (as defined above) is not participating in the subsidiary's decision to make an independent expenditure in connection with a state election, a U.S. subsidiary of a foreign corporation is not prohibited from making independent expenditures in connection with a state election.

In the bill draft, I've proposed an immediate effective date. The immediate effective date is not legally required, but given that this is an election year, it may prove helpful to both the electorate and those persons who plan to make expenditures and independent expenditures in this year's state elections.

Alternatively, an effective date provision could be drafted that would delay the application of the bill until the end of the 2010 election cycle. Without any effective date, the bill could be enacted in the middle of the election cycle so that two different sets of standards would apply, with a significant change falling in mid-campaign season.

I will look forward to your further direction.

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Enclosure