

STATE OF TENNESSEE

OFFICE OF THE
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Opinion No. 10-39

Filing of Disclosure Statements By Corporations For Independent Expenditures

QUESTION

Whether a corporation would be required to file a report of its independent expenditures in the same manner as a political campaign committee under Tennessee's current campaign finance laws.

OPINION

Under the plain language of Tenn. Code Ann. § 2-10-102(12)(B), if a corporation is making expenditures to support or oppose a measure, then it meets the definition of a political campaign committee and, therefore, would be required to file disclosure statements in accordance with the requirements of Tenn. Code Ann. §§ 2-10-105 and -106. However, to the extent a corporation makes expenditures to support or oppose any candidate for public office, it does not meet the definition of political campaign committee set forth in Tenn. Code Ann. § 2-10-102(12)(A) or (C) and, therefore, would not be required to file statements disclosing its contributions and expenditures.

ANALYSIS

In *Citizens United v. Federal Election Comm'n*, 130 S.Ct. 876 (2010), the United States Supreme Court held that there is no legitimate governmental interest that would justify a ban on independent corporate expenditures. Accordingly, this Office has opined that Tenn. Code Ann. § 2-19-132 is unconstitutional to the extent that it prohibits corporations from making such expenditures. See Op. Tenn. Att'y Gen. 10-30 (March 11, 2010). House Bills 3587 and 3626, which are currently pending in the General Assembly, would require corporations to file statements of their independent expenditures, contributions, or both, with the Division of the Registry of Election Finance of the Bureau of Ethics and Campaign Finance. You have asked whether corporations are already required to file such disclosure statements in the same manner as a political campaign committee under Tennessee's current campaign finance laws.

In 1980, the Tennessee General Assembly adopted the Campaign Financial Disclosure Act, Tenn. Code Ann. §§ 2-10-101, *et seq.* (“the Act”), which regulates the disclosure of contributions and expenditures within the context of political campaigns. Under the Act, a political campaign committee is defined as follows:

- (A) A combination of two (2) or more individuals, including any political party governing body, whether state or local, making expenditures, to support or oppose any candidate for public office or measure, but does not include a voter registration program;
- (B) Any corporation or any other organization making expenditures, except as provided in subdivision (4), to support or oppose a measure; or
- (C) Any committee, club, association or other group of persons which receives contributions or makes expenditures to support or oppose any candidate for public office or measure during a calendar quarter in an aggregate amount exceeding two hundred fifty dollars (\$250).

Tenn. Code Ann. § 2-10-102(12).¹ An expenditure is defined as “a purchase, payment, distribution, loan, advance, deposit or gift of money or anything of value made for the purpose of influencing a measure or the nomination for election or election of any person to public office.” Tenn. Code Ann. § 2-10-102(6)(A).

Tenn. Code Ann. § 2-10-105(e) requires each political campaign committee to certify the name and address of the committee’s political treasurer to the registry of election finance or the county election commission, where appropriate, before the committee may receive a contribution or make an expenditure in a state or local election. Tenn. Code Ann. § 2-10-105(a) further requires each political campaign committee to file statements disclosing all contributions received and all expenditures made by or on behalf of such committee. Political campaign committees are required to file these reports on a quarterly basis, as well as a pre-primary and a pre-general statement in an election year. Tenn. Code Ann. § 2-10-105(c). Tenn. Code Ann. § 2-10-106 sets forth the information that must be included in these disclosure statements.

Under the plain language of Tenn. Code Ann. § 2-10-102(12)(B), if a corporation is making expenditures to support or oppose a measure, then it meets the definition of a political campaign committee and, therefore, would be required to file disclosure statements in accordance with the requirements of Tenn. Code Ann. §§ 2-10-105 and -106.² The issue

¹ A multicandidate political campaign committee is defined as a “political campaign committee to support or oppose two (2) or more candidates for public office or two (2) or more measures.” Tenn. Code Ann. § 2-10-102(9).

² This requirement does not apply to any written, oral or electronically transmitted communications by a corporation to its members or stockholders, if the corporation is not organized primarily for the purpose of influencing the nomination for election, or election, of any person to public office. *See* Tenn. Code Ann. § 2-10-102(4).

remains, however, whether a corporation making independent expenditures for the nomination for election or election of any person to state or local public office meets the definition of a political campaign committee and therefore is required to file disclosure statements.

Subsection (A) of Tenn. Code Ann. § 2-10-102(12) defines a political campaign committee as a combination of *two or more individuals* making expenditures to support or oppose any candidate for public office or measure. Clearly, a corporation does not meet this definition as it is not a combination of two or more individuals. Similarly, a corporation does not meet the definition of a political campaign committee contained in subsection (C) of Tenn. Code Ann. § 2-10-102(12). That subsection defines a political campaign committee as a *committee, club, association or other group of persons* which receives contributions or makes expenditures to support or oppose any candidate for public office or measure during a calendar quarter in an aggregate amount exceeding two hundred fifty dollars (\$250). However, the term “person” is specifically defined as “an individual, partnership, committee, association, corporation, labor organization or any other organization or group of persons”. Tenn. Code Ann. § 2-10-102(10). Under this definition of “person,” a political campaign committee as defined in subsection (C) would appear to apply only to a group of corporations and not an individual corporation. Such an interpretation is consistent with the fact that at the time the General Assembly adopted this definition of a political campaign committee, corporations were prohibited under Tenn. Code Ann. § 2-19-132 from making expenditures to support or oppose any candidate for public office. Consequently, the General Assembly could not have intended for a corporation to be included within this definition of a political campaign committee.

Accordingly, it is our opinion that, to the extent a corporation makes expenditures to support or oppose any candidate for public office, it does not meet the definition of political campaign committee set forth in Tenn. Code Ann. § 2-10-102(12)(A) or (C) and, therefore, would not be required to file statements disclosing its contributions and expenditures in accordance with the requirements of Tenn. Code Ann. §§ 2-10-105 and -106. We would note, however, that in striking down the ban on independent expenditures by corporations in *Citizens United*, the Supreme Court repeatedly recognized that corporations were simply *associations* of citizens that had taken on the corporate form. *See Citizens United v. Federal Election Comm’n*, 130 S.Ct. 876 (2010). For example, in rejecting the government’s antidistortion rationale³ in support of the ban on corporate expenditures, the Court stated:

If the First Amendment has any force, it prohibits Congress from fining or jailing citizens, or *associations of citizens*, for simply engaging in political speech. If the antidistortion rationale were to be accepted, however, it would permit Government to ban political speech simply because the speaker is an *association that has taken on the corporate form*.

³The Federal Election Commission had argued, relying upon the decision in *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990), that the government had a compelling interest in preventing “the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public’s support for the corporation’s political ideas”, *i.e.*, the antidistortion rationale. *Citizens United*, 130 S.Ct. at 903.

Citizens United, 130 S.Ct. at 904 (emphasis added). The Supreme Court further noted that, if the ban on corporate independent expenditures were constitutional, wealthy individuals and unincorporated associations could spend unlimited amounts on independent expenditures, “[y]et certain disfavored *associations of citizens – those that have taken on the corporate form –* are penalized for engaging in the same political speech.” *Id.* at 908 (emphasis added). In other instances, it is clear that the Court considered corporations simply to be one form of an *association*. *Id.* at 900 (“The Court has thus rejected the argument that political speech of corporations or other associations should be treated differently under the First Amendment simply because such associations are not ‘natural persons.’” (citing *First Nat. Bank of Boston v. Bellotti*, 435 U.S. 763, 776 (1978))).

The Supreme Court went on to find that requiring the disclosure of corporate independent expenditures under 2 U.S.C. § 434(f)(1) was “justified based on a governmental interest in ‘provid[ing] the electorate with information’ about the sources of election-related spending,” 130 S.Ct. at 914 (quoting *Buckley v. Valeo*, 424 U.S. 1, 66 (1976)), stating as follows:

[P]rompt disclosure of expenditures can provide shareholders and citizens with the information needed to hold corporations and elected officials accountable for their positions and supporters. Shareholders can determine whether their corporation’s political speech advances the corporation’s interest in making profits, and citizens can see whether elected officials are “ ‘in the pocket’ of so-called moneyed interests.” The First Amendment protects political speech; and disclosure permits citizens and shareholders to react to the speech of corporate entities in a proper way. This transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages.

Id. at 916 (internal citations omitted).

In summary, it is the opinion of this Office that current Tennessee law does not require corporations making independent expenditures for the nomination or election of any person to state or local political office to file statements disclosing such expenditures under the Campaign Financial Disclosure Act. The Supreme Court’s opinion in *Citizens United* holds that legislation requiring such disclosure by corporations would not violate the First Amendment.

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