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OFFICE OF THE
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Opinion No. 11-7

Corporate Contributions to Political Action Committees under 2010 Tenn. Pub. Acts Ch. 1095

QUESTIONS

1. Does Tennessee law, as amended by 2010 Tenn. Pub. Acts Ch. 1095, allow corporate contributions to political action committees?
2. If the answer to Question 1 is yes, is a corporation required to report these contributions?
3. If the answer to Question 1 is yes, does it make any difference whether the political action committee is controlled by a candidate for public office?

OPINIONS

1. The answer to this question depends on the campaign-related activity in which the committee receiving the corporate donation is engaged. Under the new law, a corporation is prohibited from using corporate funds for the purpose of making a contribution to any candidate. Accordingly, a corporation could not donate to a candidate's campaign committee. Similarly, a corporation could not donate to a political campaign committee that would use corporate funds to make contributions to candidates. The new law allows corporations to use corporate money to make independent expenditures to support a candidate. Similarly, a corporation could contribute to political campaign committees that are solely engaged in making independent expenditures. It is not clear under the new law whether a corporation could donate funds to a political campaign committee that makes contributions to candidates if the corporate funds were used by the committee for purposes other than candidate contributions, such as paying the committee's overhead expenses or making independent expenditures to support a candidate. It is the opinion of this Office that the Registry may issue written opinions concerning whether use of corporate funds in these circumstances violates Tenn. Code Ann. § 2-10-131. But such opinions could not confer immunity from criminal prosecution.

2. If a corporation makes a contribution to a political campaign committee, then the committee would report receiving the contribution but the corporation would not report making the expenditure. A corporation that uses its own funds to pay for communications expressly advocating the election or defeat of a candidate would be required to report its expenditures as if the corporation were a political campaign committee.

3. The controlling question is how the political campaign committee uses the funds contributed by the corporation. If the committee uses the funds in a manner that a corporation is prohibited from funding, then the corporation cannot donate to the committee, regardless of who controls the committee. If the committee does not use the funds in such a manner, then a corporation can donate to the committee, regardless of who controls it.

ANALYSIS

1. Corporate Contributions to a Political Action Committee

In Op. Tenn. Att’y Gen. 10-30 (March 11, 2010), this Office concluded that, in light of *Citizens United v. Federal Election Commission*, 130 S.Ct. 876 (2010), “a court likely would hold that Tenn. Code Ann. § 2-19-132 is unconstitutional to the extent that it prohibits corporations from making independent expenditures for the purpose of aiding either in the election or defeat in any primary or final election of a candidate for public office.”

After that opinion was written, the General Assembly enacted 2010 Tenn. Pub. Acts Ch. 1095 (“Chapter 1095”). This opinion will focus on the effect of the new act, which was adopted to reflect the Supreme Court ruling.

Sections 1 and 2 of Chapter 1095 repealed Tenn. Code Ann. § 2-19-132 and § 2-19-133 governing the use of corporate funds in elections. Section 3 added a new section to Tennessee Code Annotated, Title 2, Chapter 10, Part 1, the state campaign finance law. The new section has been codified as follows:

2-10-131. Prohibition against corporations making contributions to any candidate—Application—Penalty.—

(a) No corporation shall use any of the funds, moneys, or credits of the corporation for the purpose of making contributions to any candidate with respect to any election.

(b) The prohibition of subsection (a) does not apply to a contribution made by a national committee of a political party as defined in 2 U.S.C. § 431(14) and (16), which has incorporated in accordance with 11 C.F.R. § 114.12(a), when such committee contributes to a state political party executive committee, established by chapter 13, part 1 of this title, if the funds contributed do not contain any corporate contributions to the national committee of the political party.

(c) A violation of this section is a Class C misdemeanor.

Section 4 of Chapter 1095 added an additional section to Tennessee Code Annotated, Title 2, Chapter 10, Part 1, which has been codified as follows:

2-10-132. Designation as a political campaign committee for reporting purposes.—

Notwithstanding any other provision of law to the contrary, a corporation that uses corporate funds, moneys or credits for communications expressly advocating the election or defeat of a clearly identified candidate which funds, moneys or credits are not used with the cooperation or with the prior consent of, or in consultation with, or at the request of, or suggestion of, a candidate or any agent or authorized committee of the candidate shall be considered a political campaign committee for purposes of reporting such expenditures. The corporation shall be required to file reports required by § 2-10-105(c)(1) and an appointment of treasurer form.

Section 5 of the act is a severability clause. Chapter 1095 became effective when the Governor signed it on June 23, 2010. 2010 Tenn. Pub. Acts Ch. 1095, § 6.¹

1. Corporate Contributions to Political Action Committees

The first question is whether Tennessee law, as amended by Chapter 1095, allows corporate contributions to political action committees. Chapter 1095 prohibits a corporation from using “any of the funds, moneys, or credits of the corporation for the purpose of making contributions to any candidate with respect to any election.” The answer to this question requires analysis of this statutory prohibition.

Under Tenn. Code Ann. § 2-10-102(4), a contribution is defined as follows:²

(4) “Contribution” means any advance, conveyance, deposit, distribution, transfer of funds, loan, loan guaranty, personal funds of a candidate, payment, gift, or subscription of money or like thing of value, and any contract, agreement, promise or other obligation, whether or not legally enforceable, *made for the purpose of influencing a measure or nomination for election or the election of any person for public office or for the purpose of defraying any expenses of an officeholder incurred in connection with the performance of the officeholder's duties, responsibilities, or constituent services. . . .*

The state election laws do not define the term “political action committee.” Tenn. Code Ann. § 2-10-102(12) defines the term “political campaign committee” as follows:

(12) “Political campaign committee” means:

(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;

¹ Both the former and the new law allow contributions by national political party committees to a state political party executive committee, so long as the funds were not contributed to the national committee by a corporation.

² The scope of the ban under Chapter 1095 must be considered within the context of Tenn. Code Ann. §§ 2-10-101, *et seq.* Unlike former Tenn. Code Ann. § 2-19-132, the new statute was placed in Title 2, Chapter 10, which governs campaign finances, and therefore is now a part of that broader statutory scheme, including its definitions.

(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(a) defines the term “multicandidate political campaign committee” to mean “a political campaign committee to support or oppose two (2) or more candidates for public office or two (2) or more measures.” This opinion assumes the term “political action committee” in the request refers to organizations defined as multicandidate political campaign committees under state law.

The answer to Question 1 depends on the campaign-related activity in which the committee receiving the corporate donation is engaged. Before Chapter 1095 was passed, Tenn. Code Ann. § 2-19-132(a) prohibited the use of corporate funds “for the purpose of aiding either in the election or defeat in any primary or final election, of any candidate for office, national, state, county, or municipal, or in any way contributing to the campaign fund of any political party, for any purpose whatever.” By contrast, Chapter 1095 prohibits a corporation from using corporate funds “for the purpose of making contributions *to* any candidate with respect to any election.” (emphasis added). This prohibition is narrower than the prohibition in Tenn. Code Ann. § 2-19-132(a).³ Under state law, an independent expenditure is not a contribution “to” a candidate subject to the Campaign Contribution Limits Act of 1995. *See* Tenn. Code Ann. § 2-10-303(5) (coordinated expenditures are considered a contribution to a candidate for the purpose of the limits on the amount of campaign contributions a person may make to a candidate); *Op. Tenn. Att’y Gen. 96-90* (July 24, 1996) (independent expenditures are not subject to the Campaign Contribution Limits Act of 1995). Thus, the new law clearly allows a corporation to make direct independent expenditures to support a candidate. Logically, then, a corporation could also use funds to support a political campaign committee that is making independent expenditures to support a candidate or candidates.

In contrast, a corporation is prohibited from using its funds “for the purpose of making contributions to any candidate.” This language clearly prohibits a corporation from contributing to a political campaign committee created by a candidate to support his or her candidacy.⁴ As the definition of contribution is broadly drafted to include “anything of value,” the term would also encompass expenditures made by a corporation in cooperation or concert with the candidate, the candidate’s political campaign committees, or their agents. Such expenditures are deemed to be “in-kind” contributions. *See* Tenn. Code Ann. § 2-10-107(c), 2-10-303(2), (5).

³ For this reason, opinions of this Office interpreting Tenn. Code Ann. § 2-19-132 on corporate contributions have been superseded by 2010 Tenn. Pub. Acts Ch. 1095.

⁴ Under Tenn. Code Ann. § 2-10-303(1), a donation made to any political campaign committee authorized by a candidate to accept contributions on the candidate’s behalf is considered a contribution made “to” such candidate.

Whether a corporation is permitted by Chapter 1095 to make contributions to political campaign committees, particularly multicandidate political campaign committees, that in turn make contributions to candidates is a more complicated question.

Under Tenn. Code Ann. § 2-10-303(3), all contributions made directly or indirectly on behalf of a particular candidate, including contributions earmarked or directed through an intermediary or conduit to such candidate, are treated as contributions from such person “to” such candidate. Accordingly, Chapter 1095 would prohibit a corporation from making a contribution to a political campaign committee in which the committee is used as a conduit to a particular candidate.

Similarly, even if the corporation did not instruct the political campaign committee to forward its contribution to a particular candidate, if the corporation gave to the committee knowing that the committee would use the corporate money for candidate contributions, such a donation would likely be construed to be “for the purpose of making contributions **to any candidate** with respect to any election” (emphasis added) and therefore prohibited by Chapter 1095.

It is less clear how Chapter 1095 would apply if a corporation donated funds to a political campaign committee that makes contributions to candidates but uses corporate money for purposes other than candidate contributions. For example, a committee could use corporate funds to pay the committee’s overhead expenses. Or the committee could engage in multiple political activities, such as candidate contributions and independent expenditures in support of candidates, and might use corporate funds only for the latter activities. It is unclear how Chapter 1095 would affect uses of corporate money that could be characterized as having only an indirect effect on candidate contributions.

The Registry of Election Finance has the statutory authority to administer and enforce Chapter 1095 as part of its authority to “administer and enforce” Title 2, Chapter 10, in which the relevant provisions of Chapter 1095 have been codified. Tenn. Code Ann. § 2-10-205(1). This authority includes assessing a civil penalty for violations of the disclosure laws. Tenn. Code Ann. § 2-10-207(7). Thus, the Registry can impose a penalty on a corporation for violating the disclosure requirements imposed under the new Tenn. Code Ann. § 2-10-132.

But the new Tenn. Code Ann. § 2-10-131 is not a disclosure provision. Moreover, a violation of the statute is a Class C misdemeanor. Tenn. Code Ann. § 2-10-131(c). Ordinarily, criminal statutes are enforced by district attorneys general, not the Registry of Election Finance. Thus, the Registry is not authorized to penalize a corporation for using “any of the funds, moneys, or credits of the corporation for the purpose of making contributions to any candidate with respect to any election” under Tenn. Code Ann. § 2-10-131(a).⁵ Tenn. Code Ann. § 2-10-207(3) provides:

The registry of election finance has the following powers:

⁵ The Registry is directed by statute, where the results of its investigation indicate a criminal act may have occurred, to refer such matters to the appropriate district attorney general for criminal prosecution. Tenn. Code Ann. § 2-10-207(8).

* * *

(3) Issue written advisory opinions concerning compliance with this chapter, *which may be relied upon without threat of sanction with respect to the issue addressed by the opinion, if the candidate or committee conforms the candidate's or committee's conduct to the requirements of the advisory opinion.* Such advisory opinions shall be posted on the web site of the registry of election finance. (emphasis added)

It is the opinion of this Office that the Registry may issue written advisory opinions addressing the circumstances under which a corporate contribution to such a political campaign committee violates Tenn. Code Ann. § 2-10-131. But such opinions could not confer immunity from criminal prosecution.

2. Disclosure of Corporate Donations to Political Action Committee

The next question, assuming that the answer to Question 1 is yes, is whether a corporation must report its donations to a political campaign committee. Section 4 of Chapter 1095 adds a new statute to Tenn. Code Ann. §§ 2-10-101, *et seq.* As noted above the new statute has been codified as follows:

2-10-132. Designation as a political campaign committee for reporting purposes.—

Notwithstanding any other provision of law to the contrary, a corporation that uses corporate funds, moneys or credits for communications expressly advocating the election or defeat of a clearly identified candidate which funds, moneys or credits are not used with the cooperation or with the prior consent of, or in consultation with, or at the request of, or suggestion of, a candidate or any agent or authorized committee of the candidate shall be considered a political campaign committee for purposes of reporting *such expenditures*. The corporation shall be required to file reports required by § 2-10-105(c)(1) and an appointment of treasurer form.

(emphasis added). Under this statute, a corporation must report independent “expenditures” of corporate funds, moneys or credits for communications expressly advocating the election or defeat of a clearly identified candidate.

Obviously, the corporation must report any expenditures it makes directly for such communications. The question then becomes whether a corporate donation to a political campaign committee that is engaged in independent express advocacy falls within the class of expenditures covered by this reporting requirement. A committee that receives a corporate contribution is already required by law to disclose the source and amount of that contribution if it exceeds \$100. *See* Tenn. Code Ann. § 2-10-107(a). We do not interpret Chapter 1095 to impose an additional reporting requirement on corporations for such contributions. Rather, the disclosure requirement under Section 2-10-132 appears to be triggered only if the corporation pays directly for the communications at issue.

3. Corporate Donations to a Political Action Committee or Corporation Controlled by a Candidate for Public Office

The last question is whether, under the new law, it makes any difference if a recipient political action committee is controlled by a candidate for public office. The fact that a recipient organization is controlled by a candidate for public office does not affect our answers to Question 1 and 2. The main inquiry is whether the donation is made for the purpose of making a contribution to a candidate for public office. Of course, as a practical matter, it would make a difference if the candidate who controls the political action committee is using it to support that candidate's own campaign.

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