



Please contact any of the following attorneys if you have any questions regarding this Political Law Alert:

Ronald M. Jacobs
rmjacobs@Venable.com
202.344.8215

George E. Constantine
geconstantine@Venable.com
202.344.4790

D.C. Circuit Paves Way for Unlimited Contributions for Independent Expenditures

On March 26, 2010, the D.C. Circuit issued an opinion, *SpeechNow.org v. FEC*, No. 08-5223, striking down contribution limits to independent expenditure committees. An independent expenditure is a communication made to the general public expressly advocating the election or defeat of a clearly identified candidate for federal office. Previously, if an organization raised funds for the purpose of making independent expenditures, it was potentially subject to contribution limits. *SpeechNow.org* is the finale in the following trilogy of recent cases that have dramatically altered how independent expenditures can be made and financed:

1. September 2009: In *Emily's List v. FEC*, the D.C. Circuit struck down FEC rules that required entities other than political committees (1) to fund certain activities using "hard dollars" (i.e., funds from individuals who have given no more than \$5,000 in a calendar year) and (2) to treat funds raised as hard dollars if the solicitation of the funds suggested to the donors that the money raised would be used to support the election or defeat of a federal candidate.
2. January 2010: In *Citizens United v. FEC*, the Supreme Court allowed corporations to use their general treasury funds to make independent expenditures.
3. March 2010: Finally, with the *SpeechNow.org* decision, the D.C. Circuit has allowed individuals (and corporations) to contribute unlimited funds to a political committee for the purpose of making independent expenditures, so long as the political committee does not also make direct contributions to candidates or political parties. The court upheld FEC rules that require *SpeechNow.org* to register with and report to the FEC as a political committee.

With this decision, the options for making independent expenditures are now clearer. In essence, individuals and corporations can make an independent expenditure by:

- paying for the expenditure directly;
- paying dues to a trade association or other entity that will fund the expenditure;
- making a contribution to an association for the purpose of funding the expenditure, or
- contributing to an independent expenditure committee.

The different choices impose different tax and disclosure obligations.

Source of Funds	Disclosure Requirements	Tax Implications
Corporation directly funds independent expenditure (e.g., by paying for advertisement, by sending email)	Must file independent expenditure reports with the FEC	Money spent on independent expenditures is not deductible as a business expense
Individual directly funds independent expenditure (e.g., by paying for advertisement, by sending email)	Must file independent expenditure reports with the FEC	Individual may not deduct amounts spent on expenditures (i.e., paid for with post-tax dollars)
Trade association uses dues from members (corporations) to pay for independent expenditures	Association will have to file independent expenditure reports, but likely will not have to disclose donors on those reports	Association will be taxed on lesser of funds used for independent expenditures (and state contributions) or net investment income at the highest corporate tax rate
	Must disclose either to FEC as a political committee, to a state, or to the IRS as a 527 committee	Amount of member contributions used for independent expenditures are not deductible

Trade association solicits contributions from members and others for specific purpose of making independent expenditures	Will either have to file independent expenditure reports disclosing donors or register as a political committee with FEC and file regular reports disclosing donors	Contributions are not deductible; depending how funds are segregated there may be a tax on lesser of funds used for independent expenditures (and state contributions) or net investment income at the highest corporate tax rate
Political committee formed for purpose of making independent expenditures	Likely will have to register and report to FEC as a political committee disclosing donors	Contributions are not deductible, but political committee likely not subject to taxation

As shown in the chart, under most scenarios, the identity of the donors funding the independent expenditure will have to be disclosed, although there are some options for limiting disclosure, if an association is willing to pay taxes under section 527(f) of the Internal Revenue Code. Both the D.C. Circuit and the Supreme Court have upheld disclosure requirements and appear likely to continue to do so.

There are still some open questions about whether an entity will have to become a political committee, or whether an entity will have to treat a particular account as a political committee. For example, if an association creates an independent expenditure account, will it have to register the account with the FEC as a political committee (i.e., like a separate segregated fund or PAC)? What if it registered the account with the IRS for purposes of avoiding the tax? Will it then be able to file independent expenditure reports with the FEC or will it still be forced to become a political committee?

In the *Emily's List* case, the concern about forcing an entity to be a political committee was the limitation on funds (\$5,000 per year from individuals only). Now that the limits have been removed, will the FEC insist on treating entities that make independent expenditure as political committees even though the limitations have been held to be unconstitutional? SpeechNow.org did not fight the issue of whether it should be a political committee aggressively—it conceded that it would ultimately have to disclose contributions and expenditures. It is not clear, however, how independent expenditure funds associated with other organizations will be allowed to operate. The exact mechanism used—particularly as corporations begin contributing to their associations and other political committees—will likely be the hot issue for the 2010 elections.

If you would like to learn more about how to make independent expenditures or how to contribute to an entity that will make independent expenditures, please contact either [Ron Jacobs](#) or [George Constantine](#).

CALIFORNIA MARYLAND NEW YORK VIRGINIA WASHINGTON, DC

1.888.VENABLE | www.Venable.com

©2010 Venable LLP. This alert is published by the law firm Venable LLP. It is not intended to provide legal advice or opinion. Such advice may only be given when related to specific fact situations that Venable has accepted an engagement as counsel to address.