
2017 ETH 04
CAMPAIGN FINANCE – SPENDING ON CANDIDATE RECRUITMENT

You are an attorney that advises organizations on campaign finance matters. You have asked for an advisory opinion regarding treatment under Chapter 11 of expenses incurred by organizations when recruiting candidates to run for elective office who are not already holding state or local public office.

Summary:

It is the opinion of the Commission that:

1. There are no registration or reporting requirements triggered solely by an organization's candidate recruitment activities;
2. There is no source restriction or contribution limit applicable to money spent in connection with an organization's candidate recruitment activities; and,
3. Tangible personal property provided by an organization to an individual being recruited is not an in-kind contribution from the organization. If an individual receives such property and subsequently contributes it to his or her campaign, it is treated as an in-kind contribution from the candidate to the campaign if there is any residual value to be reported at that time.

This opinion is limited to activities to recruit individuals who are not already holding state or local public office. If an individual already holds state or local public office, recruitment efforts would also be regulated by the state code of ethics for public officials, lobbying, and campaign finance laws.

Analysis:

1. Registration and Reporting Requirements for Recruitment Activity

The definition of a candidate changed with 2015 Act 117. Under prior law, a candidate was broadly defined as:

"every person for whom it is contemplated or desired that votes be cast at any election held within this state, other than an election for national office, whether or not the person is elected or nominated, and who either tacitly or expressly consents to be so considered." [WIS. STAT. § 11.01\(1\) \(2013\)](#) (repealed by 2015 Wisconsin Act 117).

2015 Wisconsin Act 117 narrowed the definition of a candidate to more objective criteria:

"Candidate" means an individual about whom any of the following applies:

(a) The individual takes any of the following affirmative actions to seek nomination or election to a state or local office:

- 1. Files nomination papers with the appropriate filing officer.*

2. *Is nominated as a candidate for state or local office by a caucus under s. 8.05 (1) or by a political party and the nomination is certified to the appropriate filing officer.*

3. *Receives a contribution, makes a disbursement, or gives consent for another person to receive a contribution or make a disbursement in order to bring about the individual's nomination or election to a state or local office.*

(b) *The individual holds a state or local office and is the subject of a recall petition.*

(c) *The individual holds a state or local office.*

[Wis. STAT. § 11.0101\(1\) \(2015\).](#)

The Federal Elections Commission (FEC) has examined the issue of recruitment activity. Federal regulations state:

“Funds received solely for the purpose of determining whether an individual should become a candidate are not contributions. Examples of activities permissible under this exemption if they are conducted to determine whether an individual should become a candidate include, but are not limited to, conducting a poll, telephone calls, and travel.”

11 C.F.R. § 100.72(a); accord 11 C.F.R. § 100.131(a).

Under the new definition of “candidate” the individual must take specific affirmative steps to qualify as a candidate. As the recruitment activity described in your request necessarily comes before circulation of nomination papers or nomination by caucus and is intended to persuade the individual to seek elected office, the individual has not yet met the statutory definition of a candidate and therefore the recruitment activity cannot be a contribution or disbursement with the consent of the candidate to bring about the individual’s nomination or election. If the recruitment activity is neither a contribution nor a disbursement, there is no need for the recruiting organization to register or report to the Commission.

2. Source Restrictions or Contribution Limits on Recruitment Activity

As described above, if the individual has not taken the specific affirmative steps to qualify as a candidate; has not received a contribution or made a disbursement to bring about the individual’s nomination or election; or consented for another to do the same, there is no contribution that would be regulated by either source restrictions or contribution limits.

3. Subsequent Reporting of Items with Residual Value

If the recruitment process is successful and the individual decides to seek nomination or election to state or local office, there is still no obligation for the recruiting organization to register or report. If any assets given to the individual to persuade them to become a candidate are given to the campaign and still have any residual value those assets would be reported as an in-kind contribution from the candidate to the committee, not as contributions from the recruiting organization. As most items given to an individual as part

of the recruitment process would have no residual value, the most likely scenario would be the results of a survey or poll conducted by the recruiting organization to persuade the candidate to enter the race. In that case, the candidate would report the value of the opinion poll data as an-kind contribution to the committee from the candidate according to the valuation process described in [WIS. STAT. § 11.1111](#).

[REDACTED]

July 14, 2017

VIA HAND DELIVERY

Wisconsin Ethics Commission
212 East Washington Ave.
Madison, WI 53703

Spending on Candidate Recruitment

Dear Chairperson Halbrooks:

Pursuant to Wis. Stat. § 19.46(2), we are seeking the Wisconsin Ethics Commission's (the "Commission's") opinion regarding treatment under Chapter 11 of the Wisconsin Statutes ("chapter 11") of expenses incurred by organizations when recruiting candidates to run for elective office. We make this request in our personal capacity and not on behalf of a single client. In that context, the Commission's advisory opinion will benefit the numerous organizations we advise on campaign finance matters by confirming our understanding that their candidate recruitment activities are not regulated by chapter 11. We do not advise candidates.

Specifically, we are seeking confirmation of the following:

- There are no registration or reporting requirements triggered solely by an organization's candidate recruitment activities;
- There is no source restriction or contribution limit applicable to money spent in connection with an organization's candidate recruitment activities; *and*,
- Tangible personal property provided by an organization to an individual being recruited is not an in-kind contribution from the organization if subsequently used by a candidate committee.

Organizations including trade associations, businesses and labor organizations often engage in the recruitment of candidates for elective office in Wisconsin. An organization may incur expenses for staff time, travel or polling and pay for these expenses with general treasury funds. Staff members may communicate via e-mail, telephone or U.S. mail on these matters or travel to and attend meetings for the purpose of recruiting individuals to become candidates. They may also prepare memorandums addressing the positive and negative aspects of an individual's potential candidacy. At times, an organization may conduct surveys and share polling results to illustrate why an individual should or should not become a candidate.

[REDACTED]

WEC 14JUL2017 PM02

Definition of a Candidate

A candidate as defined under chapter 11 includes both individuals who hold a state or local office and individuals who do not. Efforts to recruit a sitting public official to run for re-election or to seek a different elective office would be regulated by state ethics, lobbying and campaign finance laws and this advisory opinion request does not apply to such efforts.

This request applies to individuals who do not hold state or local office at the time of the recruitment. These individuals must take affirmative steps to become a candidate under Wis. Stat. § 11.0101(1):

(1) "Candidate" means an individual about whom any of the following applies:

(a) The individual takes any of the following affirmative actions to seek nomination or election to a state or local office:

1. Files nomination papers with the appropriate filing officer.
2. Is nominated as a candidate for state or local office by a caucus under s. 8.05 (1) or by a political party and the nomination is certified to the appropriate filing officer.
3. Receives a contribution, makes a disbursement, or gives consent for another person to receive a contribution or make a disbursement in order to bring about the individual's nomination or election to a state or local office.

Subdivisions 1. and 2. are not relevant to this request because recruitment activity will always occur before nomination papers are filed or an individual is nominated by a caucus or party. Furthermore, subdivision 3. does not apply to the recruitment activities described above since they are taking place precisely because the individual has not yet decided to seek nomination or election. Accordingly, these individuals are not "candidates" at the time of the recruitment.

Spending to Bring About Election or Nomination

Money spent to recruit a candidate and a disbursement to bring about an individual's nomination or election under Wis. Stat. § 11.0101(1)(a)3. have decidedly different audiences and purposes. The former targets the individual and possibly his or her immediate family and is designed to secure the individual's commitment to seek office. The later targets the public and is designed to obtain enough signatures to appear on a ballot, enough votes to be nominated at a caucus or enough votes to prevail on election day. Disbursements to bring about an individual's nomination or election are intended to influence the outcome of a specific event.

Election to state or local office means winning a public primary or election¹ and nomination to state or local office occurs under the following circumstances:

- An individual files valid nomination papers for state or local office with the required number of signatures.²
- An individual is nominated for a town or village office by a caucus of qualified electors.³
- A candidate receives the greatest number of votes in a partisan primary.⁴
- A candidate receives the greatest number of votes in a spring primary.⁵

In each case, nomination or election only occurs after action by constituents and voters. Accordingly, only an organization's spending to influence the public, rather than the potential candidate him or herself, is a disbursement in order to "bring about" nomination or election. Examples of such disbursements include the use of organization resources to design, print or circulate nomination papers, to promote an individual in advance of a caucus, to support partisan canvassing or get-out-the vote activities and to sponsor express advocacy communications.

No Registration or Reporting for Candidate Recruitment Activities

An organization's efforts to recruit an individual to run for office do not render him or her a candidate and trigger the requirement to register a candidate committee.⁶ Thus, spending on candidate recruitment is not subject to chapter 11 regulation; an organization is not required to register as a committee, report its spending or abide by any contribution limits or source restrictions. As a result, corporations, cooperatives, labor organizations and federally-recognized Indian Tribes are permitted to spend unlimited general treasury or tribal funds on candidate recruitment activities.

Tangible Items with Residual Value

Under chapter 11, spending on candidate recruitment is not transformed into a disbursement once an individual becomes a candidate. There is no such lookback in chapter 11 and thus, such spending is not an in-kind contribution that must be reported by a candidate committee once

¹ See Wis. Stat. § 5.02(4).

² Wis. Stat. §§ 8.05(3), (4); 8.10; 8.15.

³ Wis. Stat. § 8.05(1).

⁴ Wis. Stat. § 8.16(1).

⁵ Wis. Stat. § 8.11.

⁶ See Wis. Stat. §§ 11.0101(2); 11.0202(1).

formed. This remains true when the spending is for tangible personal property provided to the individual during the recruitment process.

Tangible items received prior to becoming a candidate are the property of the receiving individual and may subsequently be contributed to his or her own campaign committee. This is no different than any other instance in which a candidate provides resources to his or her own campaign, whether via a loan or contribution.

Accordingly, use of items received while being recruited may result in an in-kind contribution from the candidate to his or her campaign committee.⁷ For this to occur, the item must have residual value. Tangible items must be valued at their fair market value at the time of the contribution, except for poll data which is subject to a statutory valuation formula.⁸

Conclusion

In sum and based on the forgoing, we are seeking the Commission's confirmation of our interpretation of state law:

- Spending by an organization to recruit an individual to run for elective office is separate and distinct from disbursements to bring about an individual's nomination or election to state or local office and such spending does not render the individual a candidate under chapter 11.
- An organization's spending on candidate recruitment does not trigger registration and reporting requirements and it not subject to contribution limits or source restrictions. A corporation, cooperative, labor organization or federally-recognized Indian Tribe may spend unlimited general treasury or tribal funds on candidate recruitment activities.
- An organization's spending on candidate recruitment does not become an in-kind contribution after the fact if an individual becomes a candidate, regardless of whether money was spent on a tangible item provided to the individual.
- If an individual receives a tangible item while being recruited and subsequently contributes it to his or her campaign, it results in an in-kind contribution from the candidate if it has residual value.

⁷ Wisconsin Elections Board Informal Opinion issued [REDACTED] July 20, 2007, advising that items with residual value that are used by a candidate are in-kind contributions from the candidate.

⁸ Wis. Stat. §§ 11.1105; 11.1111.

Wisconsin Ethics Commission

July 14, 2017

Page 5

Please let us know if you have questions or need any additional information. We look forward to receiving the Commission's reply.



cc: Brian Bell (via hand delivery)
David Buerger (via hand delivery) —

