

IOWA ETHICS AND CAMPAIGN DISCLOSURE BOARD

An Independent Agency of the Executive Branch

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To: State Government Committee
From: Megan Tooker
Date: January 6, 2014
Re: Independent Expenditure Bill

1. Current statutory framework for independent expenditures

Iowa allows individuals and groups, including corporations, (hereafter person or persons) to make “independent expenditures.” An independent expenditure “means one or more expenditures in excess of seven hundred fifty dollars in the aggregate for a communication that expressly advocates the nomination, election, or defeat of a clearly identified candidate or the passage or defeat of a ballot issue that is made without the prior approval or coordination with a candidate, candidate's committee, or a ballot issue committee.” Iowa Code § 68A.404(1). A person making an independent expenditure must first register with the Ethics and Campaign Disclosure Board by filing an “initial report” at the same time as an “independent expenditure statement.” *Id.* § 68A.404(3)(a). The independent expenditure statement shall be filed within 48 hours of making the independent expenditure or within 48 hours of disseminating the communication, whichever is earlier. *Id.* § 68A.404(4)(a). In addition, a person filing an independent expenditure statement shall file ongoing reports and supplemental reports on the same schedule as legislative candidates. *Id.* § 68A.404(3)(a). These ongoing reporting requirements continue until the person making the independent expenditure files a “termination report.” *Id.* § 68A.402B(3). An “entity,”¹ except for an individual or individuals, is required to get prior authorization from its board of directors before making an independent expenditure. *Id.* § 68A.404(2)(a)-(b). A “corporation” is required to certify on the independent expenditure statement that its board of directors expressly authorized the independent expenditure. *Id.* § 68A.404(5)(g).

2. Eighth Circuit Court decision striking down parts of the independent expenditure law

¹ “Entity” is not a defined term in chapter 68A. A “person” is defined to mean, “without limitation, any individual, corporation, government or governmental subdivision or agency, business trust, estate, trust, partnership or association, labor union, or any other legal entity. Iowa Code §68A.102(17). For clarity sake, the Board’s bill proposes substituting “person” for “entity.”

Shortly after the United States Supreme Court decision in *Citizens United v. the Federal Election Commission*, a non-profit group filed suit in federal court against the Iowa Ethics and Campaign Disclosure Board alleging much of this statutory scheme for independent expenditures was unconstitutional. The United States Eighth Circuit Court of Appeals court upheld part of the law, struck down part of the law, and remanded the case back to the District Court for further consideration. See *Iowa Right to Life Committee, Inc. v. Tooker*, 717 F.3d 576 (8th Cir. 2013).

a. Event-driven reporting.

Specifically, the Eighth Circuit Court upheld event-driven reporting of independent expenditures. The Court said:

“Requiring prompt disclosure within 48 hours bears a substantial relation to Iowa's sufficiently important interest in keeping the public informed. The second sentence of Iowa Code subsection 68A.404(3)(a) [and] the entirety of Iowa Code subsection 68A.404(4)(a) . . . are constitutional as applied to IRTL and other groups whose major purpose is not nominating or electing candidates.”

Id. at 595-96 (citations and internal quotations omitted).

b. On-going reporting.

However, the Eighth Circuit Court struck down ongoing reporting. It said “[r]equiring a group to file perpetual, ongoing reports regardless of its purpose, and regardless of whether it ever makes more than a single independent expenditure, is no more than tenuously related to Iowa's informational interest.” *Id.* at 597 (citations and internal quotations omitted). It held:

“Iowa fails to advance a sufficiently important governmental interest that bears a substantial relation to the ongoing reporting requirements as applied to IRTL and other non-PAC groups. Thus, the first and third sentences of Iowa Code subsection 68A.404(3)(a) . . . are unconstitutional as applied to IRTL and other groups whose major purpose is not nominating or electing candidates.”

Id. at 597-98.

c. Supplemental reporting.

The Court also struck down the supplemental reporting requirements. It said:

“Iowa does not explain how requiring additional, redundant, and more burdensome reports fulfill a sufficiently important informational interest not already advanced by the independent expenditure statement. The perpetual supplemental reporting requirements discourage groups from participating in the open marketplace of ideas protected by the First Amendment. . . . Failing exacting scrutiny, Iowa Code subsection 68A.404(3)(a)(1) is unconstitutional as applied to IRTL and other groups whose major purpose is not nominating or electing candidates.”

Id. at 598-99.

d. Termination report.

The Eighth Circuit Court struck down the need to file a “termination report.” The Court reasoned:

“The burden of completing the short, electronic termination report is negligible. The heavier burden is, as IRTL states in its brief, choosing between ongoing reporting and giving up the constitutional speech right. The termination requirement is thus part and parcel of the ongoing reporting requirements. To speak again, the group must initiate the bureaucratic process again.”

Id. at 599-600 (citations and internal quotations omitted). The Eighth Circuit Court held Iowa Code subsection 68A.402B(3) is “unconstitutional as applied to IRTL and groups whose major purpose is not nominating or electing candidates.” *Id.* at 601.

e. Board authorization.

The Eighth Circuit Court then reviewed the statutory requirement that an “entity” must obtain authorization from its board of directors before making independent expenditures. The plaintiff in the case claimed it wanted “to decide when and how to make independent expenditures in the manner it deems appropriate” and objected to the statute requiring authorization by the group’s board of directors. *Id.* at 604. The District Court held the plaintiff lacked standing to challenge

this provision. The Eighth Circuit Court disagreed and remanded that issue back to the District Court for consideration. Thus, at this juncture, the authorization requirement has not been deemed unconstitutional.

f. Certification requirement.

The Eighth Circuit Court finally turned to the certification requirement. It noted that “[u]nlike the board-authorization requirement, the certification requirement specifically targets corporations, requiring ‘certification by an officer *of the corporation.*’ ” *Id.* at 605 (quoting Iowa Code §68A.404(5)(g)). The Court held the certification is unconstitutional under the Fourteenth Amendment on its face because it treats corporations differently than other entities without sufficient justification. *Id.* at 606. After the Court struck the offending language, the statutory provision reads:

“A certification by an officer ~~of the corporation~~ that the board of directors, executive council, or similar organizational leadership body expressly authorized the independent expenditure or use of treasury funds for the independent expenditure by resolution or other affirmative action within the calendar year when the independent expenditure was incurred.”

Id. (quoting Iowa Code § 68A.405(5)(g)). The Eighth Circuit Court noted the District Court did not consider the severability issue because it held each of the challenged provisions was constitutional. The Eighth Circuit Court remanded the issue back to the District Court to determine whether this portion of the statute can stand without the clause “of the corporation.” *Id.* Thus, at this juncture, the clause “of the corporation” is unconstitutional but the rest of the provision has not been declared unconstitutional.

3. Bill proposed by the Ethics and Campaign Disclosure Board.

The Ethics Board proposes a bill to address the Eighth Circuit Court’s decision. The bill eliminates ongoing and supplemental reporting for persons making independent expenditures, leaving only event-driven reporting of independent expenditures. The bill also eliminates the “termination report” for persons making independent expenditures. The bill requires a “person” (except an individual or individuals) instead of an

“entity” to obtain authorization from its board of directors before making independent expenditures. It strikes “of the corporation” from the certification requirement so that all “persons” who have to obtain authorization from their board of directors to make independent expenditures also have to certify to the Ethics Board on the event-driven independent expenditure statements that they have obtained authorization.