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ELECTION LAW NEWS

Developments in All Aspects of Political Law | January 2016

Republication of Campaign Material Leads to Hefty Civil Penalty

By Caleb P. Burns and Louisa Brooks

In a case of first impression, "Restore Our Future," the super PAC that supported Mitt Romney's 2012 presidential run, has agreed to pay a $50,000 civil penalty as part of a Conciliation Agreement (Agreement) with the Federal Election Commission (FEC). The Agreement took shape after the Commission unanimously found reason to believe that Restore Our Future made an impermissible contribution to Romney's official campaign committee by republishing campaign materials.

During the 2012 election cycle, Restore Our Future spent a reported $4.3 million to run a television ad that borrowed substantial parts of an ad run by Romney's 2008 presidential campaign, Romney for President.

Under the Federal Election Campaign Act of 1971, as amended (Act), and the FEC's regulations, the republication of campaign materials prepared by the candidate or his campaign is considered a contribution for purposes of contribution limitations and reporting requirements.

Thus, in a Complaint filed with the FEC, the Campaign Legal Center alleged that Restore Our Future's republication constituted a contribution to Romney's presidential campaign. At $4.3 million, such a contribution would far exceed any applicable limitation and thus be impermissible.

Seemingly straightforward, the matter contained a significant legal wrinkle: Restore Our Future ran the ad during the 2012 election cycle, while the campaign material it republished was created five years earlier by Romney's 2008 presidential campaign. Restore Our Future contended that Romney's 2008 presidential campaign was legally distinct from his 2012 presidential campaign and thus the materials ROF borrowed from the 2008 campaign ad were not

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New IRS Notification Requirement and Other 501(c)(4) Provisions Become Law

By Robert D. Benton and Eric Wang

The omnibus appropriations and "tax extender" bills that were signed into law in December contained a series of sundry legislative riders, many of which were responses to allegations of the IRS's recent mistreatment of 501(c)(4) social welfare and advocacy organizations. As a result of these provisions:

- Newly formed 501(c)(4) organizations will be required to notify the IRS of their operation within 60 days, while certain existing organizations that formed recently must notify the agency by June 15, 2016. In return, the IRS will issue an acknowledgement of the filing to those organizations.

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Campaign Finance Compliance Structures More Important Than Ever in Light of Criminal Enforcement Trends

By Andrew G. Woodson, Robert L. Walker, and Shane B. Kelly

As we enter an election year, candidates, corporations, PACs, and other organizations involved in the federal campaign space should of course be attuned to the Federal Election Commission's regulatory oversight of their activity and the need to establish and maintain effective compliance measures. However, the potential for criminal enforcement of campaign finance and related federal public corruption statutes should be understood and addressed as well. Indeed, in 2015 the U.S. Department of Justice appeared to ramp up the pace of its prosecutions for violations of campaign finance laws and, in doing so, explored the boundaries of criminal liability. A look back at several recent cases illustrates this criminal enforcement trend and highlights a number of areas where those who are engaged in federal election-related fundraising and spending should focus their compliance efforts going forward.

This past year saw the first prosecution by DOJ of a case centered on allegations that a congressional campaign and an independent committee illegally coordinated their activities. Under the Federal Election Campaign Act (FECA), independent expenditure only committees (commonly called Super PACs) must remain independent: if they donate money directly to a candidate or the candidate's committee—or coordinate expenditures with a candidate or the candidate's committee—they have effectively violated the limits set by the FECA on contributions to candidates. In 2015, DOJ brought its first case of criminal enforcement for violating these provisions against Tyler Harber, who managed the 2012 election campaign of Republican congressional candidate Chris Perkins. While serving in this role, Mr. Harber set up a political committee authorized to make only independent expenditures. The government charged that during the campaign, Mr. Harber directed donors to the independent committee after they had maxed out their giving to the Perkins campaign and that Mr. Harber arranged personally for the independent committee to purchase advertising worth $325,000 to bolster Mr. Perkins' candidacy. The government also

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Lobbying & Gift & Pay-to-Play Updates from Around the Country

By Carol A. Laham and Stephen J. Kenny

New lobbying and gift and pay-to-play restrictions went into effect in several states and municipalities recently. Below are summaries of some of the more significant ones.

Allentown / Lehigh County, PA. In the wake of a federal investigation into pay-to-play scandals, Allentown and Lehigh County adopted separate (but similar) pay-to-play laws. Both laws allow contractors and prospective contractors to contribute no more than $250 to certain candidates and elected officials. The laws also require aggregation of contributions from affiliated individuals and entities, including PACs. Both laws also contain disclosure requirements.

Seattle. In November, Seattle voters approved a ballot initiative, I-122, containing several campaign finance reforms, including a pay-to-play restriction. The pay-to-play provision prohibits the Mayor, a City Council member, and the City Attorney (and a candidate for these offices) from accepting any contribution "directly or indirectly" from an entity or person who has earned or received more than $250,000 in the prior two years under a contractual relationship with the City. The title of the section demonstrates that this ban is meant to cover contributions from contractors' PACs as well. The provision is silent, however, with respect to individuals associated with a contracting entity, such as officers and directors.

Virginia. New gift restrictions went into effect on January 1, 2016. Among other changes, the law reduced the limit on the value of gifts from lobbyists, lobbyist principals, and certain prospective contractors to covered officials to $100 in a calendar year. The law provides several new exceptions to what constitutes a "gift," including refreshments at "widely-attended events" and gifts of travel approved by the new Conflict of Interest and Ethics Advisory Council.

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MSRB and FINRA Send Pay-to-Play Rules to the SEC

By D. Mark Renaud and Stephen J. Kenny

On December 16, 2015, the Municipal Securities Rulemaking Board (MSRB) and the Financial Industry Regulatory Authority (FINRA) each sent proposed pay-to-play rules to the Securities and Exchange Commission (SEC). The SEC then published a summary of each set of rules and asked for comments. Comments on the proposed rules are due by January 20, 2016.

The MSRB rules are an extension of its current pay-to-play Rule G-37 to cover "municipal advisors" and certain of their employees. The municipal advisor rule additions make no changes to the general parameters of Rule G-37. This means that municipal advisors may not receive compensation from states or localities for certain types of municipal advisory activities within two years of a direct or indirect prohibited contribution being made to a covered officer of a given jurisdiction. There is, however, an exception for, among other things, a de minimis contribution of $250 or less per election from a natural person who is able to vote for the recipient candidate. In addition, there is a ban on certain coordination and solicitation activity.

The FINRA rules are for broker dealers that act as placement agents and third-party solicitors for affiliated investment advisers. The FINRA rule tracks the SEC's pay-to-play rules for investment advisers, prohibiting the receipt of compensation from state or local government agencies for solicitation and distribution activities within two years of a prohibited contribution by a broker-dealer or one of its covered associates. There is, however, a de minimis exception for contributions by natural person covered associates of $350 per election if the individual can vote for the candidate and $150 per election if not. The Rule also prohibits indirect contributions to covered government officials through family members, PACs, or other persons. In addition, there is a ban on certain coordination and solicitation activity.

The proposed FINRA rule and related documents can be found at http://www.sec.gov/rules/sro/finra/2015/34-76767.pdf. The MSRB file can be found at http://www.msrb.org/~/media/Files/SEC-Filings/2015/MSRB-2015-14.ashx. ■

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Political Intelligence and Insider Trading: An Enforcement Update

By Robert L. Walker

The closing weeks of 2015 brought two significant developments in the ongoing efforts of the U.S. Securities and Exchange Commission (SEC) to police the misuse of "political intelligence"—inside information about prospective government actions derived from government sources—in trading in the securities of public companies. On November 13, 2015, in the Southern District of New York, U.S. District Court Judge Paul G. Gardephe issued a ruling granting in part, and denying in part, the SEC's application for an order to enforce investigative subpoenas served on the Committee on Ways and Means of the U.S. House of Representatives (and on the former Staff Director of the Committee's Health Subcommittee) in connection with the agency's insider trading investigation involving the alleged leak of material, nonpublic government information. In a separate development, on November 24, 2015, the SEC issued an administrative order instituting cease-and-desist proceedings and announced the agreement by Marwood Group Research LLC—"a political intelligence firm" and registered broker-dealer—to admit wrongdoing and pay a $375,000 penalty for compliance failures arising from the manner in which "Marwood sought and received from government employees information about pending regulatory or policy issues involving the agencies that employed them."

The subpoenas at issue in Judge Gardephe's ruling were served by the SEC as part of its investigation into allegations that spikes in the trading volume and in the value of the securities of certain health insurance companies on April 1, 2013, may have resulted from the leak from the federal government of material, nonpublic information regarding a change in Medicare Advantage reimbursement rates. Although long-

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Congress Preempts SEC and Federal Contractor Political Reporting Requirements

By D. Mark Renaud and Eric Wang

For the past several years, activists have been urging the Securities and Exchange Commission (SEC) and the White House to adopt by regulation and executive order new requirements for publicly traded corporations and federal contractors to report their political spending. While the SEC and White House had not given any indication that they were coming any closer to adopting such measures this year, Congress conclusively preempted these measures in the omnibus appropriations bill that was signed into law in December, at least for the 2016 fiscal year.

Ever since the Supreme Court of the United States' 2010 *Citizens United v. FEC* decision permitted corporations to make independent expenditures to support and oppose candidates, activists have been urging the SEC to adopt rules requiring publicly traded corporations to file public reports of their political spending in addition to the existing reporting requirements under federal campaign finance laws. Although the SEC never introduced any formal proposal, the contemplated disclosures generally may have applied not only to the corporation's own direct spending on political activities, but also to contributions and dues paid to non-profit organizations and trade associations that may engage in political activities, as well as political contributions made by the corporation's officers, directors, and PAC.

While the SEC included corporate political reporting on its 2013 list of rulemaking priorities, the agency dropped the measure from its rulemaking priorities in subsequent years. Nonetheless, as part of the omnibus spending agreement, Congress and the White House agreed to bar the SEC from using any funds during the 2016 fiscal year to finalize, issue, or implement any rule requiring publicly traded corporations to publicly report any political contributions, contributions to tax exempt organizations, or dues paid to trade associations.

In the absence of an SEC rulemaking on this issue, activist groups and certain state and union pension fund investors have attempted to use shareholder meetings to force publicly traded corporations to adopt political reporting requirements. Groups such as the Center for Political Accountability also have been pressuring public corporations through rankings on the "CPA-Zicklin Index" to adopt their own voluntary political reporting and spending policies. Wiley Rein's Election Law practice has advised many clients on how to best address the CPA-Zicklin Index and shareholder resolutions on political spending.

Just as the SEC has been mulling for several years the corporate political reporting

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Michigan Eliminates Annual Consent for PAC Payroll Deductions

By Caleb P. Burns and Eric Wang

Earlier this month, Michigan Governor Rick Snyder signed into law a number of amendments to the state's campaign finance laws that took effect immediately. Of particular interest to many *Election Law News* readers is the elimination of Michigan's erstwhile requirement for companies to seek annual affirmative consent from their employees in order to obtain PAC contributions using payroll deductions. While the new law brings corporate federal PACs one step closer to being able to make contributions in Michigan directly, there are still some additional hurdles with which companies must contend.

Under federal law, a corporate-sponsored PAC may obtain contributions from the corporation's eligible personnel using payroll deductions, provided that they obtain an employee's written authorization in advance. The authorization is only required once. Previously, Michigan law had required corporate PACs making contributions in connection with state and local elections to seek employees' affirmative consent annually if they relied on payroll deductions to obtain PAC contributions. Obtaining annual consent from all employees was a significant burden. Thus, most corporations that wished to participate in Michigan elections chose to set up separate Michigan state PACs, and obtained annual consent from only a subset of their employees who wished to contribute to the Michigan state efforts.

Under the new Michigan law, the Michigan

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Foreign Corrupt Practices Act: News and Developments

By Ralph J. Caccia and Gregory M. Williams

As regular feature moving forward, we will include in the newsletter an update on developments related to the Foreign Corrupt Practices Act (FCPA). We will use this inaugural update to preview two upcoming FCPA publications. The first is *FCPA: Year in Review*, which will be published later this month. The *Year in Review* summarizes enforcement actions brought against corporations and individuals in 2015, highlighting the most significant cases and government statements concerning the state of this important area of the law. It is designed to be comprehensive in scope, but sufficiently succinct to provide a basic understanding of the current enforcement climate in an easily digestible form.

The second, *Pocket Part to the FCPA Resource Guide*, is a unique publication that we will release in February. In November 2012, the Department of Justice and Securities and Exchange Commission released the *Resource Guide to the U.S. Foreign Corrupt Practices Act* (*Guide*), addressing a broad range of topics regarding the interpretation and enforcement of the FCPA. Given the paucity of judicial precedent under the FCPA, the government's pronouncements regarding the meaning of the anti-corruption law carry substantial weight. U.S. officials, however, have announced that they do not intend to update or supplement the *Guide*. Wiley Rein, therefore, has created a "Pocket Part" to address subsequent FCPA developments. The *Pocket Part* will not summarize the factual details of every FCPA matter. Rather, it will selectively address the key FCPA settled actions and other related developments that either underscore the central lessons of the *Guide* or illustrate developing trends in FCPA enforcement. The document is intended to sit on your shelf next to *Guide* as a resource for counsel and compliance professionals confronting challenging FCPA compliance and investigatory questions. ■

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Michigan Eliminates Annual Consent for PAC Payroll Deductions *continued from page 4*

and federal requirements for administering corporate PACs are now substantially similar. Notably, however, while federal law permits corporations to solicit the immediate family members of stockholders and eligible employees for PAC contributions, Michigan law limits such solicitations only to the spouses of such individuals. Thus, if a corporation has solicited beyond its stockholders, eligible employees, and their spouses for contributions to its federal PAC, then it may still need to form a separate Michigan state PAC in order to make contributions in Michigan.

If a federal PAC has not solicited outside of the permitted universe of contributors under Michigan state law and is eligible to make contributions in Michigan, it must still meet the registration and reporting requirements in Michigan. Relatedly, the new law also appears to amend the quarterly reporting schedule for many PACs registered in Michigan. It is not entirely clear whether the prior or new deadline applies for the first quarterly report due this year for PACs registered in Michigan under the old law. The Michigan Secretary of State's office has indicated that it intends to issue guidance on the new law soon, and the reporting deadline and corresponding reporting coverage period is an issue that may be addressed in the guidance.

The change in Michigan's law illustrates how many states have requirements for corporate PACs that vary from the federal requirements. Corporations interested in using their federal PACs to make PAC contributions in connection with state and local elections must be mindful of the requirements before proceeding. ■

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Political Intelligence and Insider Trading: An Enforcement Update *continued from page 3*

awaited—the subpoena enforcement action against the House and former House staffer had been pending since July 2014—Judge Gardephe's Memorandum Opinion and Order was correspondingly both comprehensive and carefully argued. The Opinion made relatively quick work of dismissing several of the arguments put forward by the House respondents—as represented by the Office of General Counsel of the House—in objecting to the SEC's application for an order to enforce its investigative subpoenas, including arguments that: enforcement of the SEC's subpoenas against the House is barred by "sovereign immunity"; the court lacks personal jurisdiction over the House respondents; venue in the Southern District of New York is improper.

The crux of Judge Gardephe's Opinion concerned the House respondents' objection that enforcement of the SEC investigative subpoenas is barred by the Speech or Debate Clause of the U.S. Constitution because, in the respondents' words, "the documents and testimony at issue are protected absolutely against compelled disclosure" by that Clause. In his Opinion, Judge Gardephe provided an extended exposition of the meaning and scope of the Speech or Debate Clause, which provides that "for any Speech or Debate in either House, [Members] shall not be questioned in any other Place." U.S. Const., art. I, § 6, cl. 1. Judge Gardephe also undertook a close and careful analysis of which of the categories of documents subpoenaed by the SEC from Ways and Means and from the former Subcommittee staffer constitute or reflect "legislative activity" falling within the protection from disclosure provided by the Speech or Debate Clause and which of the categories of subpoenaed documents—for example, statements to "members of the public" (including lobbyists)—fall outside of this protection and are, therefore, subject to production to the SEC.

What is essentially at stake in this SEC subpoena enforcement matter is the question of whether, notwithstanding the much ballyhooed STOCK Act of 2012, Members and staff of the Congress can really be investigated (and prosecuted) for insider trading based on information obtained by them in the course of their government service? The answer to this question provided by Judge Gardephe's ruling is, "Yes" (even if a qualified "yes"). Not surprisingly, therefore, on November 30, 2015, the U.S. House respondents filed a notice of appeal and a motion to stay Judge Gardephe's order pending appeal. On December 7, Judge Gardephe, citing the "serious questions" at issue, granted the motion for a stay. Almost certainly, this matter will find its way to the Supreme Court for ultimate resolution.

The potential misuse of material nonpublic information to inform securities trades is also at the heart of the SEC's administrative action and order in the matter of Marwood Group Research LLC. As noted, Marwood, with offices in Manhattan and in Washington, D.C., is both a registered broker-dealer and what the SEC

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Congress Preempts SEC and Federal Contractor Political Reporting Requirements *continued from page 4*

requirement, the White House first released a draft executive order in 2011 that would have required federal contractors to include information on their bids regarding certain contributions and expenditures made to or on behalf of federal candidates, political party committees, and third-party sponsors of independent expenditures or electioneering communications by the contractor, its officers and directors, and its affiliates and subsidiaries. (Direct federal contractor contributions to federal candidates, PACs, and political party committees already are prohibited under federal campaign finance law.)

While the White House never finalized the executive order, the omnibus spending bill preempts the administration from implementing its proposal for those seeking federal contracts during the 2016 fiscal year. The president may still act with respect to current contracts.

Notwithstanding the lack of a government contactor reporting requirement for political spending at the federal level, many states have substantially similar reporting requirements (in addition to contribution prohibitions and restrictions) state contractors, their employees, subsidiaries, affiliates, and PACs. Wiley Rein's Election Law practice routinely advises clients on these state "pay-to-play" laws. ■

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FEC, IRS, and Lobbying Disclosure Filing Dates for 2016

Monthly FEC Filing Dates for PACs

1/31/16	2015 Year-End Report
2/20/16	February Report
3/20/16	March Report
4/20/16	April Report
5/20/16	May Report
6/20/16	June Report
7/20/16	July Report
8/20/16	August Report
9/20/16	September Report
10/20/16	October Report
10/27/16	12-Day Pre-General Election Report
12/08/16	30-Day Post-General Report
1/31/17	2016 Year-End Report

Note: Filing dates that fall on a weekend or holiday are not extended to the next business day. Paper filers must submit their reports on the previous business day. In addition, reports must be received by these filing dates. Only reports sent by registered or certified mail may be postmarked by the filing date, and reports sent by overnight mail must be received by the delivery service by the filing date.

Additional information on FEC reporting is available at www.fec.gov/info/report_dates.shtml.

Monthly IRS Filing Dates

1/31/16	2015 Year-End Form 8872
2/20/16	February Form 8872
3/15/16	Form 1120-POL[1]
3/20/16	March Form 8872
4/20/16	April Form 8872
5/15/16	Form 990[2]
5/20/16	May Form 8872
6/20/16	June Form 8872
7/20/16	July Form 8872
8/20/16	August Form 8872
9/20/16	September Form 8872
10/20/16	October Form 8872
10/27/16	12-Day Pre-General Form 8872
12/08/16	30-Day Post-General Form 8872
1/31/17	2016 Year-End Form 8872

Note: Federal PACs and most state PACs are not required to file Form 8872.

[1] For political organizations that account on a calendar-year basis.

[2] Need not be filed by Federal PACs registered with the FEC.

Additional information on IRS reporting, including semi-annual/quarterly reporting dates, is available at www.irs.gov/charities/political.

FEC, IRS, and Lobbying Disclosure Filing Dates for 2016 (continued)

Semiannual/Quarterly FEC Filing Dates for PACs

01/31/16	2015 Year-End Report	10/27/16	12-Day Pre-General Election Report
04/15/16	First Quarter Report	12/08/16	30-Day Post-General Election Report
07/15/16	Second Quarter Report	01/31/17	2016 Year-End Report
10/15/16	Third Quarter Report		

Note: A PAC that is a semiannual/quarterly filer and makes contributions in connection with special elections or primary elections will have additional reports due. The 12-Day Pre-General Election Report is only required if a PAC makes contributions or expenditures in connection with the general election during the reporting period. Filing dates that fall on a weekend or holiday are not extended to the next business day. Paper filers must submit their reports on the previous business day. In addition, reports must be received by these filing dates. Only reports sent by registered or certified mail may be postmarked by the filing date, and reports sent by overnight mail must be received by the delivery service by the filing date.

Additional information on FEC reporting is available at www.fec.gov/info/report_dates.shtml.

Quarterly House and Senate Candidate Committee Filing Dates

01/31/16	2015 Year-End Report	10/27/16	12-Day Pre-General Election Report
04/15/16	First Quarter Report	12/08/16	30-Day Post-General Election Report
07/15/16	Second Quarter Report	01/31/17	2016 Year-End Report
10/15/16	Third Quarter Report		

Note: Filing dates that fall on a weekend or holiday are not extended to the next business day. Paper filers must submit their reports on the previous business day. In addition, reports must be received by these filing dates. Only reports sent by registered or certified mail may be postmarked by the filing date, and reports sent by overnight mail must be received by the delivery service by the filing date. Campaigns for a candidate participating in a primary, special, or runoff election are subject to additional pre-election reporting requirements. Campaigns for candidates that are not participating in the 2016 general election are not required to file pre- and post-general reports.

Additional information on FEC reporting is available at www.fec.gov/info/report_dates.shtml.

Lobbying Disclosure Act Filing Dates

01/20/16	2015 Fourth Quarter Activity Report (LD-2) covering October 1-December 31, 2015
01/30/16	Second Semiannual § 203 Contribution Report (LD-203) covering July 1-December 31, 2015
04/20/16	First Quarterly Activity Report (LD-2) covering January 1-March 31, 2016
07/20/16	Second Quarterly Activity Report (LD-2) covering April 1-June 30, 2016
07/30/16	First Semiannual § 203 Contribution Report (LD-203) covering January 1-June 30, 2016
10/20/16	Third Quarterly Activity Report (LD-2) covering July 1-September 30, 2016
01/20/17	Fourth Quarterly Activity Report covering (LD-2) October 1-December 31, 2016
01/30/17	Second Semiannual § 203 Contribution Report (LD-203) covering July 1-December 31, 2016

Note: When the due date falls on a weekend or holiday, it is extended to the next business day.

Additional information on Lobbying Disclosure Act reporting is available online at http://lobbyingdisclosure.house.gov/ and http://www.senate.gov/pagelayout/legislative/g_three_sections_with_teasers/lobbyingdisc.htm

Republication of Campaign Material Leads to Hefty Civil Penalty *continued from page 1*

"campaign materials prepared by the candidate" for purposes of the 2012 election.

The Act and the regulations are silent as to whether the relevant provisions are limited to campaign materials prepared during the same election cycle in which a third party republishes the materials. The FEC acknowledged that the question was one of first impression and, further, that Restore Our Future's interpretation of the regulation's scope was not unreasonable.

Still, as the law refers to materials prepared by a candidate's "campaign committees," plural, the FEC concluded that nothing in the law limited its application to materials prepared for the concurrent election cycle. The FEC thus unanimously found reason to believe that Restore Our Future violated the Act by making prohibited and excessive in-kind contributions to Romney for President when it republished the campaign materials, and by failing to disclose the expenditures as contributions to Romney for President.

Perhaps easing the path to a "reason to believe" finding is the fact that Romney did not form a new and separate campaign committee for the 2012 election. Instead, Romney for President maintained its registration with the FEC following the 2008 election, and Romney eventually designated this same committee as his principal campaign committee for the 2012 election. Thus, there was no legal separation between his 2008 campaign and his 2012 campaign.

Given the unique circumstances and lack of precedent on the question, the FEC elected not to open an investigation. Rather, the FEC negotiated the Agreement with Restore Our Future, in which the super PAC agreed not to contest the FEC's conclusion that Restore Our Future made excessive in-kind contributions to Romney for President and failed to report the expenditures as contributions, and further agreed to a civil penalty of $50,000.

Notably, Commissioners Ravel and Weintraub voted against the Agreement, balking at a $50,000 penalty as far too low for "a high-dollar, clear-cut violation." The two Commissioners also disputed that Restore Our Future's interpretation of the law was "not unreasonable," and opposed the FEC's inclusion of this acknowledgment in its factual and legal analysis.

Following the resolution of this matter, super PACs would be wise to avoid republication of campaign materials even from previous election cycles and prior campaigns. And, in some cases, candidates may be wise to consider forming new campaign committees instead of re-designating their previous ones. ■

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Lobbying & Gift & Pay-to-Play Updates from Around the Country *continued from page 2*

A new pay-to-play provision went into effect at the same time. The law prohibits the Governor, his campaign committee, and any political action committee established on his behalf from knowingly soliciting or accepting a contribution, gift, or other item with a value greater than $100 from persons and entities seeking loans or grants from the Commonwealth's Development Opportunity Fund. The restriction also applies to loan and grant recipients in the one-year period immediately after the award of the loan or grant. The restriction covers an entity's officers, directors, and owners with a controlling ownership interest. ■

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- All 501(c) organizations (instead of only 501(c)(3) organizations) that apply for determination by the IRS of their status will be able to seek expedited judicial review if the IRS delays the determination.

- The IRS is barred from issuing the anticipated new regulations, as well as any revenue rulings, or other guidance on political activity by 501(c)(4) organizations during the 2016 fiscal year.

- The IRS is permanently barred from applying the "gift tax" to donors to 501(c)(4) organizations.

New 501(c)(4) IRS Notification and Documentation Requirement. Newly formed 501(c)(4) entities are now required to notify the IRS of their intent to operate as such within 60 days after they are established. Per a recent IRS bulletin, the 60-day deadline will go into effect once the IRS has issued new regulations to implement the legislation. The notification must include the organization's name, address, taxpayer identification number, the date and the state under whose laws the entity was organized, and a statement of the organization's purpose. The IRS is required to provide the organization with an acknowledgment of the agency's receipt of the notification within 60 days thereafter. The IRS is authorized to charge organizations a "reasonable user fee" for the submission.

Existing 501(c)(4) entities that have not applied to the IRS for a formal determination of their tax-exempt status, and that also have not filed their first tax return yet, are required to notify the IRS of their operation within 180 days of the December 18, 2015 date the "tax extenders" bill was signed into law (*i.e.*, by June 15, 2016).

Failing to file the initial notification can result in penalties of $20 per day, up to a maximum of $5,000. Along with its first tax return, a newly formed 501(c)(4) organization also will be required to submit any supporting information the IRS may require by regulation to demonstrate the organization is operating appropriately under Section 501(c)(4) of the tax code.

Prior to the new notification requirement, 501(c)(4) entities that chose to forgo the formal process for IRS recognition of their tax-exempt status were permitted to "self-declare" and operate as 501(c)(4) entities and simply file their annual tax returns with the IRS.

While the new notification requirement may create an additional administrative burden for newly formed 501(c)(4) entities in many instances, it also may confer a certain imprimatur of IRS approval or acknowledgment for entities that otherwise would have "self-declared" without going through the entire process of applying for a formal determination of their tax-exempt status by the IRS. Nonetheless, the formal determination process is still available for entities that may wish to receive additional agency assurances that their contemplated activities are appropriate for 501(c)(4) entities or need a determination for state law compliance or other purposes. Any 501(c)(4) organization that is considering whether to apply for a formal IRS determination should consult with Wiley Rein's Election Law practitioners, who routinely obtain IRS determinations on behalf of clients, to discuss whether this is the best option.

At this time, the IRS has not provided a timeframe for when the new notification forms are expected to be available, or when the implementing regulations are expected to go into effect.

Expedited Judicial Review for Determination Requests. Any 501(c) organization that submits a request for determination by the IRS confirming its tax-exempt status may now seek a declaratory judgment from the United States Tax Court, the United States Court of Federal Claims, or the United States District Court for the District of Columbia if the IRS fails to act on the request within 270 days of when it is submitted. The expansion of this expedited judicial review process for IRS determinations, which previously had been available only to 501(c)(3) and certain other entities, is apparently a response to the substantial delays by the IRS in processing certain 501(c)(4) determinations, which the agency first acknowledged in 2013.

501(c)(4) Political Activity Regulations Put on Ice. For Fiscal Year 2016, the IRS is now effectively prohibited from "issu[ing], revis[ing], or finaliz[ing] any regulation, revenue ruling, or other guidance" of general applicability "relating to the standard which is used to determine whether an organization is operated exclusively for the promotion of social welfare for purposes of section 501(c)(4)" of the tax code. Despite the broad language of this provision, its principal aim appears to be directed at the proposed rulemaking the IRS released in November 2013, which sought to clarify the types of activities the IRS would regard as being political campaign intervention, and therefore restricted, for 501(c)(4) organizations.

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New IRS Notification Requirement and Other 501(c)(4) Provisions Become Law *continued from page 10*

After the IRS received approximately 160,000 comments, the vast majority of which opposed the proposed rule for being overly restrictive, the IRS withdrew the rulemaking. Several times since the withdrawal, the IRS has indicated that it nonetheless intended to revise the proposed rule as early as 2016, and to possibly also broaden it to apply a more uniform standard for defining political activity for all types of 501(c) organizations and for 527 political organizations as well. While many critics generally fault the current IRS standards on political campaign intervention as being excessively vague, the legislative action to block the IRS from issuing new regulations reflects a widespread view that the agency would probably make its existing standards even worse with a new rulemaking.

501(c)(4) Donations Freed from Gift Tax. The "tax extenders" bill permanently prohibits the IRS from applying the 40 percent "gift tax" to certain donors who give to 501(c)(4) social welfare/advocacy organizations, (c)(5) labor unions, and (c)(6) trade associations. Under the preexisting law, donations to 501(c)(3) organizations and 527 political organizations have not been subject to the gift tax, but the tax treatment of donations to 501(c)(4) entities has been unclear. In 2010, the IRS investigated several donors to 501(c)(4) organizations on the basis that they may have failed to pay the gift tax on their donations. While the IRS subsequently backed away from its posture, the legislation enacted last month clarifies once and for all that donations to 501(c)(4), (c)(5), and (c)(6) organizations are not subject to the gift tax. ■

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Political Intelligence and Insider Trading: An Enforcement Update *continued from page 6*

specifically labels a "political intelligence firm," that is, a provider to clients, including hedge funds, of "research and analysis . . . as to the likely outcome of legislative and regulatory events occurring at both state and federal levels." As part of the research process, Marwood analysts, at the encouragement of Marwood's management, "sought and received from government employees information about pending regulatory or policy issues involving the agencies that employed them." According to the SEC order, during 2010 "[s]ome of the information . . . presented a substantial risk that it could be [material non-public information]" and that, "[b]ased in part on that information, Marwood drafted research notes and distributed those research notes to its client, or otherwise communicated Marwood's conclusions to its clients, who were likely using that information to inform securities trading." Marwood agreed that this conduct violated its statutory obligation, as a registered broker-dealer, "to establish, maintain, and enforce written policies and procedures reasonably designed to prevent the misuse of material nonpublic information."

The Marwood matter involved no finding that an actual insider trading violation based on the use of government information occurred, and the legal force of the ruling applies directly only to regulated entities subject to the SEC's jurisdiction. Nonetheless, like the SEC's ongoing pursuit of enforcement of its investigative subpoenas to the U.S. House, the agency's action and order in Marwood should be taken as a clear signal to securities firms that use—and to firms and individuals, whether regulated by the SEC or not, that provide—political intelligence: The SEC will continue to shine a searchlight on the potential misuse of political intelligence in connection with trading in the securities markets, so establishing, and following, effective compliance measures is essential. ■

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alleged that Mr. Harber impermissibly directed Super PAC funds to himself and his family members. Mr. Harber pled guilty to causing coordinated federal election contributions and making false statements to the FBI. In June 2015 he received a prison sentence of two years in jail.

Though the facts presented in the Harber case were particularly egregious, the prosecution appears to signal that federal prosecutors are, at some level, scrutinizing the activities of Super PACs. As Assistant Attorney General Leslie Caldwell indicated upon the sentencing of Mr. Harber, "As the first conviction for illegal campaign coordination, this case stands as an important step forward in the criminal enforcement of federal campaign finance laws."

In addition to the Harber case, 2015 saw DOJ pursue a prosecution that puts a new twist on an age-old crime—bribery. On April 1, 2015, an indictment was unsealed against U.S. Senator Robert Menendez charging him with receiving gifts—including luxury vacations, golf outings, and expensive flights—and political contributions in exchange for official favors. These gifts and donations allegedly came from Dr. Salomon E. Melgen, a wealthy Florida eye surgeon and political benefactor of the Senator, who also was indicted. Specifically with regard to the political contributions, the indictment indicated that Dr. Melgen gave $700,000 through his company to a Super PAC, directing that some of this money be spent in support of Senator Menendez, and that Senator Menendez then pressed the Obama administration to make changes to Medicare reimbursement that would have benefited Dr. Melgen. Allegedly, Senator Menendez also arranged for visas for Dr. Melgen's foreign girlfriends and pushed for a port security deal related to Dr. Melgen.

The government's position in the case is aggressive and, as the head of DOJ's Public Integrity Section said at the time, "What you can see from that case and some of the others we've brought over the last several months is that this section is not going to be shy about bringing important and tough cases and we're going to try those cases." A particularly significant aspect of the prosecution is the broad scope of the government's theory of liability—that even campaign contributions to an *independent, outside group* can be considered the provision of "something of value" in an alleged *quid pro quo* arrangement with an individual federal candidate. If successful, this theory and approach could open the door to an even broader range of political fundraising activities being swept up into the purview of potential bribery prosecutions.

In the same expansionist vein, the prosecution of former Virginia Governor Bob McDonnell highlighted a different area in which DOJ is interpreting bribery rules broadly. Although tried and found guilty by a jury in 2014, former Governor McDonnell was sentenced to two years in prison in January 2015. At trial, the court had instructed the jury that the "official actions" that can sustain a bribery conviction include apparently routine and common actions such as arranging meetings and making introductions for donors. Numerous experts and commentators cited the McDonnell prosecution and conviction as an instance of the "criminalization of politics." After the Fourth Circuit Court of Appeals found in the summer of 2015 that McDonnell's actions were sufficient to sustain a bribery conviction, the former governor petitioned the Supreme Court of the United States for review; on January 15, 2016, the Supreme Court agreed to hear the case. If the Supreme Court agrees with the lower courts on the question of what constitutes "official action," the McDonnell case will dramatically and decisively expand the scope of behavior by federal candidates and officials that—if linked with the solicitation, offer, or acceptance of "something of value"—will be pursued and prosecuted by DOJ as bribery.

Harber, Menendez, McDonnell. The broad and aggressive approach to criminal enforcement of federal election and public corruption laws represented by these three recent cases raises the stakes for anyone involved in political fundraising, including candidates and donors, organizations and individuals. This criminal enforcement trend makes robust and comprehensive compliance measures more essential than ever. ■

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SPEECHES/UPCOMING EVENTS

The Past and Future of *Buckley v. Valeo*
Jan Witold Baran, Speaker
Presented by the Cato Institute and the Center for Competitive Politics
JANUARY 26, 2016 | WASHINGTON, DC

The Lawyer Is In: Legal Advice and Guidance for Your PAC
Michael E. Toner, Speaker
2016 National PAC Conference
MARCH 8, 2016 | MIAMI, FL

Association PAC Legal Rules: Keeping Your PAC Compliant
Michael E. Toner, Speaker
2016 National PAC Conference
MARCH 8, 2016 | MIAMI, FL

Election Law Compliance in This Critical Year: Avoiding the Pitfalls
Jan Witold Baran, Panelist
Corporate Counsel Institute: An Insider's Guide to Washington
MARCH 11, 2016 | WASHINGTON, DC

Lawline's Campaign Finance, Election, & Political Law Program
Caleb P. Burns, Speaker
APRIL 7, 2016 | WEBINAR

Seventeenth Annual Private Equity Forum
Carol A. Laham, Speaker
JUNE 29-30, 2016 | NEW YORK, NY

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