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ELECTION LAW NEWS

Developments in All Aspects of Political Law | July 2016

"I Want You to Show Me the Way": A Unanimous Court Rejects Gov. McDonnell's Bribery Conviction, Throws Doubt on Public Corruption Prosecutions, and Boosts the Art of the Introduction

By Robert L. Walker and Louisa Brooks

Governors' Ethics Test (G.E.T.), Revised June 2016: Question 201. *As a public official, which of the following would be "official action" by you as covered by the federal bribery statute:*

A) Arranging meetings for a constituent businessman with other government officials to benefit the constituent's business (at a time when you are accepting, on an ongoing basis, over $150,000 in gifts and loans from the constituent);

B) Hosting a lunch event at your official residence for this same generous constituent's company. You invite to this event state university researchers whose research decisions your constituent is trying to influence;

C) Contacting other government officials concerning studies of your generous constituent's product;

D) None of the above

(Hint: This is not a trick question.)

If you answered "D"—and even if you didn't—you are living in the newly narrowed world of pubic corruption prosecution ushered in by the Supreme Court through its recent decision in *McDonnell v. United States*. On June 27, 2016, a unanimous Court overturned former Virginia Governor Bob McDonnell's continued on page 6

New York State Passes Changes to Lobbying and Campaign Finance Laws

By D. Mark Renaud and Eric Wang

Members of the New York state legislature pulled an all-nighter in the middle of last month to pass a hodgepodge of changes to the state's lobbying and campaign finance laws. The amendments include, among other important provisions:

- Lowering the thresholds for disclosure of donors to lobbying efforts while exempting some forms of payment; continued on page 7

ALSO IN THIS ISSUE

FEC Fines Charity for Electioneering Reporting and Disclaimer Violations

By Michael E. Toner and Karen E. Trainer

The Federal Election Commission (FEC) recently released documents from an enforcement case involving a 501(c)(3) entity's violation of rules for electioneering communications. Under FEC regulations, an electioneering communication is a broadcast, cable, or satellite communication that (1) refers to a clearly identified candidate for Federal office; (2) is made within 60 days before a general election or 30 days before a primary election; and (3) is targeted to the relevant electorate. Electioneering communications are subject to reporting and disclaimer requirements.

In March and April of 2014, the Southern Alliance for Clean Energy aired television ads referring to Senator Kay Hagan. Some of the ads aired within 30 days of North Carolina's primary and qualified as electioneering communications. The ads contained an incomplete disclaimer and were not disclosed to the FEC.

The Southern Alliance for Clean Energy reported the violations to the FEC and implemented policies to prevent similar issues in the future. As part of the settlement, the Southern Alliance for Clean Energy will pay a civil penalty of $19,000.

This settlement underscores the need to check all grassroots lobbying ads in election years for compliance not only with the lobbying laws of the given jurisdiction but also with the campaign finance laws if the ads mention or feature a candidate. The federal 30/60-day windows are fairly easy to recognize and apply only to radio and tv ads, but the states regulate a wide variety of time periods and media with their electioneering communications. Even if the ads relate directly to pending legislation, they could trigger reporting and disclaimer obligations. ■

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Federal Court Strikes Down Montana Candidate Contribution Limits as Unconstitutional; Commissioner Reinstates Higher Limits Pending Appeal

By Carol A. Laham and Stephen J. Kenny

On May 17, the United States District Court for the District of Montana struck down Montana's limits on contributions to candidates for public office. In *Lair v. Motl*, No. CV 12-12-H-CCL, 2016 WL 2894861 (D. Mont. May 17, 2016), the court concluded that the contribution limits did not serve a valid anti-corruption purpose and that, even if they did, the contribution limits were not closely drawn to that interest. In response, the Commissioner of Political Practices reinstated the higher contribution limits that were in place before the adoption of the lower contribution limits.

The *Lair* case was originally filed in 2011. After a bench trial, the court held that the contribution limits were unconstitutional, but the Ninth Circuit reversed and remanded. The Ninth Circuit held that the district court was required to apply the Circuit's "closely drawn" analytical framework to determine whether the contribution limits were constitutional. Under this framework, a court must assess whether contribution limits serve a sufficiently important state interest and, if so, whether the limits are "closely drawn." Limits are closely drawn if "they (a) focus narrowly on the state's interest, (b) leave the contributor free to affiliate with a candidate, and (c) allow the candidate to amass sufficient resources to wage an effective campaign." The district court had declined to apply this precedent, asserting it was inconsistent with more recent Supreme Court case law. The Ninth Circuit disagreed, holding this standard was still good law.

The Ninth Circuit also held, however, that what constitutes a "sufficiently important state interest" has changed in light of *Citizens United v. FEC*, 558 U.S. 310 (2010). After *Citizens United*, the court explained, the state's interest is limited to the prevention of *quid pro quo* corruption or its appearance, as opposed to a broader interest in reducing influence or leveling the playing field.

continued on page 9

State Lobbying and Gift Law Updates

By Carol A. Laham and Stephen J. Kenny

Recently, several states enacted changes to their lobbying and gift laws. Below are some of the more significant changes.

The California state senate abolished its blackout period for political contributions from lobbyist employers.

There are now stricter requirements in Texas for a public official's trip to qualify as a fact-finding trip for purposes of the gift rules.

The registration fee for executive lobbying in Kentucky has increased to $500 per employer or real party in interest.

Virginia no longer classifies gifts with a value of less than $20 as "gifts" for purposes of its ethics law. Virginia also switched from semi-annual to annual lobbyist reporting. (The next lobbyist report is due July 1, 2017.)

Rhode Island recently overhauled and consolidated its lobbyist registration and reporting statutes. The new law will go into effect January 1, 2017. ■

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FEC Commissioners Split Over Regulating Fox News, Breadth of Media Freedom in Recent Enforcement Action

By Andrew G. Woodson and Caleb P. Burns

Fireworks came early at the FEC this year, as Republican and Democratic Commissioners vigorously sparred with one another in public right before the July 4th holiday. The source of the dispute was the resolution and public release of an enforcement matter involving the decision-making process Fox News used when hosting the first Republican presidential debate of the 2016 election cycle.

The matter arose out of a complaint filed by Mark Everson, a relatively unknown candidate for the Republican presidential nomination, who was upset at his exclusion from the August 6, 2015 debate at Cleveland's Quicken Loans Arena. Originally, Fox News had announced that debate participants would be chosen, in relevant part, based upon whether a particular candidate was in the top ten of the five most recent national polls recognized by Fox News. Two months before the debate, however, Fox News announced that it wanted to stage a separate undercard debate, consisting of candidates who did not qualify for the main debate but were otherwise polling at 1% or better in the polling data. Then, a little more than a week before the debate, the criteria for inclusion in the undercard debate was expanded to include all candidates whose names were "consistently offered to respondents in major national polls (as recognized by Fox News) leading up August 4." This was reportedly done by Fox News in "a concerted effort to include and accommodate the now 16 Republican candidate field."

Federal campaign finance law prohibits corporate contributions to candidates, and corporations that help stage debates and provide free air time to participating candidates are potentially making prohibited contributions. In the late 1970s, however, the Commission created a regulatory exception to the corporate prohibition that permitted the League of Women Voters Educational Fund, a 501(c)(3) non-profit corporation, and certain other corporations to host debates and accept funds from other corporations to do—provided that various conditions were met. Among other things, the regulations require that debates must include at least two candidates, must not be structured to prefer one candidate over another, and debate organizers must employ "pre-established objective criteria to determine which candidates may participate in a debate." In a controversial move that drew congressional scrutiny and potentially conflicted with the First Amendment's press freedom guarantees, the Commission required media corporations to comply with these same requirements.

continued on page 10

IRS Issues Temporary Regulations Clarifying 501(c)(4) Notification Process

By Robert D. Benton and Stephen J. Kenny

The IRS recently issued temporary and proposed regulations explaining how 501(c)(4) social welfare organizations must comply with new requirements to notify the Service of the organization's formation. This requirement imposes minimal burdens on new 501(c)(4) organizations and requires only barebones information to comply. The new filing does not replace or remove any current filing requirements, including the need to file a Form 1024 for recognition of exemption.

In December 2015, Congress passed the Protecting Americans from Tax Hikes Act. This legislation included a new requirement that 501(c)(4) organizations notify the IRS within 60 days of formation. The regulations issued by the IRS provide a mechanism for organizations to do this. The organization must electronically submit a Form 8976, "Notice of Intent to Operate Under Section 501(c)(4)" as well as a $50 user fee. Form 8976 requires minimal information, including the name, address, and taxpayer identification number of the organization; the date and state of formation; and a statement of purpose of the organization. The IRS may impose a penalty of up to $20 on the organization for each day the notification is late (not to exceed $5,000). The IRS may also assess penalties on the managers of the organization responsible for failing to notify the IRS.

Under the temporary regulations, organizations that sought a determination letter or filed a Form 990 on or before July 8, 2016 need not submit the notification to the IRS. An organization formed on or before July 8, 2016 that has not sought a determination letter or filed a Form 990 must notify the IRS of its formation by September 6, 2016.

The IRS has stated that comments and requests for a public hearing on the proposed regulations, including the procedures outlined above, must be received by October 11, 2016. Comments can also be submitted regarding the related Revenue Procedure 2016-41, which will be considered in making any future updates to the procedures. ■

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Ontario Update: Canadian Province Bans Corporate and Union Contributions in Municipal Elections, Revises Lobbying Registration Thresholds

By D. Mark Renaud and Louisa Brooks

Recent laws enacted in Ontario may affect corporations, labor unions, non-profits, and trade associations active in the Canadian province.

Amendments to the Lobbyists Registration Act

First, amendments to Ontario's Lobbyists Registration Act went into effect July 1. Most important among these changes, Ontario has replaced its "20% rule" for in-house lobbyist registration with an annual 50-hour threshold. Under this new provision, an employee or paid director of a corporation or non-profit organization who spends at least 50 hours in a calendar year lobbying on behalf of the entity must be registered as an in-house lobbyist. Additionally, if the total time spent by all employees and paid directors on lobbying activities adds up to 50 hours in aggregate in a calendar year, each of those individuals must be registered as an in-house lobbyist. While time spent researching and preparing for a lobbying communication is not included in calculating the 50-hour threshold, any time spent managing a grassroots lobbying campaign should be included.

Another important change to the law is that the most senior paid officer of a business corporation is now legally responsible for filing the lobbyist registration for all employees, officers, and directors. In most cases, this will be the CEO or President of the corporation.

continued on page 9

Last-minute Ethics Reminders for Convention Attendees

By Jan Witold Baran and Louisa Brooks

For those traveling to Cleveland or Philadelphia for the national party conventions, we have assembled a few last-minute reminders on some of the applicable ethics guidelines.

1. The conventions are not ethics-free zones. Members and staff of the U.S. House and Senate attending the conventions are bound by their chamber's gift rules, which prohibit them from receiving a gift of any value from a federal lobbyist or a private entity that employs or retains a federal lobbyist, unless a gift rule exception applies. The most common gift rule exceptions in the convention context are for events that meet the criteria for a "widely attended event" or the "reception" exception. Among several other exceptions, a Member or staffer may also accept attendance at an event or a gift if the same is offered to all convention delegates or all delegates from a particular state or region, when the Member or staffer is also a delegate from that state or region. For specific questions regarding the House or Senate gift rules and applicable exceptions, please contact us.

2. State and Local Rules may also apply. State and local officeholders and government employees attending the convention are subject to the lobbying and gift rules of their employing jurisdictions. These rules vary widely, and it may be wise to review the restrictions in advance if you plan to have discussions with or provide meals or gifts to officials from a specific jurisdiction.

3. Corporate Contributions Prohibited. Corporations often host and sponsor social events in the convention cities. As long as such events are merely social in nature, they are not regulated by the FEC. However, keep in mind that corporations (or entities using corporate funds) may not host a general fundraising event using corporate funds, nor make a contribution in connection with a federal election.

4. New in 2016: Individuals and PACs may contribute to the party convention committees. As a result of recent statutory changes to how conventions are funded, the party convention committees may now accept up to $100,200 per calendar year from individuals, and up to $45,000 per calendar year from PACs.

5. Corporations may *not* contribute money to the party convention committees. While FEC regulations permit corporations to provide certain goods and services at a discount or at no charge to a national party's convention committee, monetary contributions by corporations are strictly prohibited. Note that corporations *may* make monetary or in-kind contributions to the Cleveland and Philadelphia host committees, which are distinct from the convention committees.

If you have questions about these or any other restrictions that may apply to your activities at the convention, please feel free to reach out to us. We have briefed a number of clients on these issues and are happy to answer any questions. ■

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Chambers USA Recognizes Wiley Rein's Top Ranked Election Law Practice

The 2016 edition of *Chambers USA*: *America's Leading Lawyers for Business* recognized Wiley Rein's Election Law & Government Ethics practice in the prestigious top tier. Additionally, Jan Witold Baran, Caleb P. Burns, Carol A. Laham, D. Mark Renaud, and Michael E. Toner were all ranked.

The directory recognized 31 Wiley Rein attorneys across 13 areas of law.

Chambers and Partners conducts research for their directories, including Chambers USA, using more than 140 full-time researchers who interview thousands of attorneys and clients around the world. According to Chambers, "This intensive, continuous research identifies the world's leading practitioners and law firms—those which perform best according to the criteria most valued by clients."

conviction for public corruption, ruling that the interpretation of the term "official act" advocated by the government and used in jury instructions was overly broad.

In 2014, Governor McDonnell and his wife Maureen were both indicted on bribery charges based on allegations that they accepted over $175,000 in gifts and loans from Jonnie Williams, a constituent/businessman/donor trying to secure government support for his dietary supplement business. To succeed, the government had to show that the former governor and his wife committed (or agreed to commit) an "official act" in exchange for the gifts and loans. At trial, the government argued, and the District Court agreed, that the term "official act" was broad enough to include arranging meetings and hosting events for Williams. Using this inclusive definition, the McDonnells were convicted. The Fourth Circuit affirmed Governor McDonnell's conviction last year, and the Supreme Court granted certiorari.

In rejecting the government's broad interpretation of "official act," the Court embraced a more "bounded interpretation" of the term encompassing only "a decision or action on a question, matter, cause, suit, proceeding or controversy" involving a formal exercise of governmental power that is similar in nature to a lawsuit before a court, a determination before an agency, or a hearing before a committee. An official act is "something that is "specific and focused that is 'pending' or 'may be brought before a public official." The definition of "official act," the Court ruled, does not include an official's setting up meetings, calling other officials, or hosting an event, "without more"—even if that "more" is limited to exerting pressure on another official to perform an "official act."

The Court recognized that elected officials regularly undertake many activities that do not fall under the definition of an official act and stated that the government's preferred interpretation of the term would raise substantial constitutional concerns. For example, the Court observed that "conscientious public officials arrange meetings for constituents, contact other officials on their behalf, and include [constituents] in events all the time . . . [r]epresentative government assumes that public officials will hear from their constituents and act appropriately on their concerns." With that in mind, the Court reasoned that, if accepted, the government's expansive reading of the statute could potentially criminalize such routine, and often necessary, acts and could "cast a pall of potential prosecution over these relationships." As such, mere constituent relations activity will no longer support bribery charges under the current federal statute.

The *McDonnell* decision raises the bar substantially for the Department of Justice for prosecutions of public officials for bribery-related conduct. But the decision does not give public officials carte blanche to accept gifts from constituents and others seeking assistance. Indeed, the Court left open the possibility that Governor McDonnell may have committed crimes: the Court remanded the case to the Fourth Circuit Court of Appeals to determine if there is sufficient evidence on which a jury could convict Governor McDonnell under the now bounded definition of "official act." Further, federal, state, and local ethics regimes continue to restrict acceptance of gifts by public officials even where such acceptance is not linked to any specific official act.

It remains to be seen whether the government will attempt to retry the McDonnell case, and what effect, if any, this decision will have on pending prosecutions of other officials. DOJ's principal pending public corruption case against a federal official, for example, is its prosecution of Senator Bob Menendez (D-NJ) in connection with a bribery scheme in which Menendez allegedly accepted gifts from Salomon Melgen, a Florida ophthalmologist, in exchange for using the power of his Senate office in the following ways to benefit Melgen's financial and personal interests:

- Influencing the immigration visa proceedings of Melgen's foreign girlfriends;
- Pressuring the U.S. Department of State to influence the Government of the Dominican Republic to abide by Melgen's multi-million dollar contract to provide exclusive cargo screening services in Dominican ports;
- Stopping U.S. Customs and Border Protection from donating equipment to the Dominican Republican, a donation that would threaten Melgen's exclusive contract; and
- Influencing the outcome of the Centers for Medicare and Medicaid Services' administrative action seeking millions of dollars in Medicaid overbillings that Melgen

continued on page 7

owed to the federal government.

Sen. Menendez's attorneys will no doubt argue that the actions taken by the Senator on behalf of Mr. Melgen were basically common constituent service activities of the kind that, post-*McDonnell*, do not rise to the level of "officials acts" that can form the "*quo*" in a *quid pro quo* bribery scheme. But, on their face, the charged official actions central to the Menendez case appear to include an element lacking in the *McDonnell* case, or at least missing from the trial judge's charge to the jury on the meaning of "official acts": the attempt to influence other government officials, the attempt to exert pressure on other government decisions and actions. In this regard, Sen. Menendez's alleged actions appear to fall within the "bounded" definition of "official act," articulated by the *McDonnell* Court as including an official's "using his official position to exert pressure on another official to perform an 'official act,' or to advise another official, knowing or intending that such advice will form the basis for an 'official act' by another official." If there are weaknesses to the government's case against Sen. Menendez, the "McDonnell problem"—failure to charge performance of specific and clear official actions—does not appear to be among them.

For future cases, however, *McDonnell* sends a strong message to government investigators and prosecutors: in investigating, charging, and trying public corruption cases, respect the boundaries of criminal statutes. ■

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- Imposing new reporting and donor disclosure requirements for non-profit groups in certain circumstances;
- Requiring registration for certain political consultants; and
- Creating new standards for when spending by independent groups is considered coordinated with candidates.

Critics on both the left and the right have panned the new law for not targeting conduct related to the recent ethics scandals that have plagued the state and dethroned the State Senate leader and Assembly Speaker.

New Lobbying Donor Disclosure Thresholds and Exemptions and 501(c)(4) Reporting Requirements. New York's lobbying law has required any lobbying entity or lobbying client that spends certain amounts on New York state lobbying to disclose certain large donors to the lobbying effort since 2012. Under the new law, those disclosure thresholds have been reduced significantly. At the same time, the new law exempts from disclosure payments for "membership dues, fees, or assessments" charged by a lobbying entity to its members. This exemption is a nod to many advocacy groups and trade associations, which had faced a difficult choice of either not lobbying in New York or having to comply with burdensome disclosure requirements.

What one hand giveth in easing disclosure burdens, however, the other taketh away. While 501(c)(3) charities generally had been exempt from disclosure under the lobbying law, the new law now requires 501(c)(3) entities that make "in-kind" donations to lobbying efforts to be disclosed if they exceed the disclosure threshold. In addition, the 501(c)(3) donors must file additional reports of their own, and also disclose certain of their own donors.

501(c)(4) entities also face additional reporting requirements if they sponsor certain public communications that "refer[] to and advocate[] for or against" elected officials or any "position" of an elected official or administrative or legislative body with respect to votes, legislation, regulations, or other official matters. These reports involve disclosure of donors as well.

PR Consultant Registration Dropped, Political Consultant Registration Added. In another example of trading one regulatory burden for another, the law eliminates a registration requirement for PR consultants while imposing a new registration requirement for political consultants. Earlier this year, the Joint Commission on Public Ethics – New York's ethics

continued on page 8

and lobbying agency – had issued an advisory opinion requiring PR consultants who contact news media to advance their clients' message or interests on certain policy matters to register and report as lobbyists. (*Election Law News*, March 2016) Several PR firms sued in federal court to overturn this holding. The new law supersedes JCOPE's interpretation by excluding this activity from the legal definition of "lobbying."

However, providers of "political consulting services" will now be required to register with the state if they represent elected officials or candidates and also have represented certain clients in matters before state or local government agencies or the legislature. While the law generally characterizes this provision as a "registration" requirement, the law also discusses the requirement with respect to a six-month "reporting period." As what is essentially a registration *and* reporting requirement, it would not be surprising to see this new law challenged in court by political consultants, just as JCOPE's registration and reporting requirement for PR consultants was challenged.

New Coordination Standards and Requirements for Independent Expenditures. On the campaign finance side, the new law provides expansive standards for when "independent expenditures" are considered to be coordinated, and therefore treated as campaign contributions that are subject to contribution limits. In New York, independent expenditures include not only certain public communications that expressly advocate the election or defeat of candidates, but also communications that refer to candidates within certain pre-election time windows.

Under the new law, these communications may be considered coordinated based on a number of factors, including whether the sponsoring entity employs or retains someone who has worked for a candidate within two years of the candidate's upcoming election, has "strategic discussions" with the candidate or his or her campaign or agents within two years of the candidate's upcoming election, or uses "strategic" non-public information obtained from someone who has worked for a candidate within two years of the candidate's upcoming election. Having immediate family members of a candidate involved in an independent expenditure effort and having a candidate raise money for the independent expenditure effort also will be considered coordination.

Sponsors of independent expenditures—even individuals—will be required to register and report as independent expenditure committees under the new law, and direct contributions to candidates and independent expenditures must now be made through different types of PACs. These requirements arguably are in tension with the Supreme Court's *Citizens United* decision, as well as a federal district court ruling that allowed for "hybrid PACs" to make both direct candidate contributions and independent expenditures.

Effective Dates. As of the time this issue was going to print, Gov. Andrew Cuomo still had not signed the bill into law, although he is widely expected to do so. The law's provisions have various effective dates, ranging from immediately upon the law's enactment to 90 days thereafter. ■

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Federal Court Strikes Down Montana Candidate Contribution Limits as Unconstitutional; Commissioner Reinstates Higher Limits Pending Appeal *continued from page 2*

The Ninth Circuit remanded for the district court to assess Montana's contribution limits under the correct standard.

On remand, the district court again held that the contribution limits were unconstitutional. The court first held that Montana failed to prove that the contribution limits furthered its interest in combating *quid pro quo* corruption or its appearance. The state relied on several incidents of alleged *quid pro quo* corruption to demonstrate the existence of an important state interest. The district court concluded, however, "that the quids in each one of the cited instances were either rejected by, or were unlikely to have any behavioral effect upon, the individuals toward whom they were directed." The public, the court continued, "would more reasonably conclude that corruption is nearly absent from Montana's electoral system—the evidence shows that despite a hand-full of opportunities, legislators chose to keep their noses clean." Because Montana could not prove the contribution limits furthered an important state interest, the court held them unconstitutional.

The court further held that, even if the contribution limits did serve an important state interest, they were not "closely drawn." First, the limits do not "narrowly focus" on Montana's interest in combating *quid pro quo* corruption because they were expressly enacted to combat the impermissible interest in equalizing political speech. Second, the limits were too low to allow candidates to amass sufficient resources to wage an effective campaign.

Montana has filed a notice of appeal, giving the Ninth Circuit and potentially the Supreme Court the opportunity to assess what evidence a state needs to offer in defense of its contribution limits. In the meantime, the state's Commissioner of Political Practices has issued a notice that the contribution limits in effect prior to the adoption of those the court struck down are reinstated. The notice can be found at http://politicalpractices.mt.gov/content/ContributionLimitPolicy (Note that the court has stayed its holding as to political party contribution limits.) ■

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Ontario Update: Canadian Province Bans Corporate and Union Contributions in Municipal Elections, Revises Lobbying Registration Thresholds *continued from page 4*

Changes to the Municipal Elections Act

Ontario also recently amended its Municipal Elections Act, enacting a ban on contributions to municipal council and school board candidates by corporations that conduct business in Ontario and trade unions representing employees in Ontario. Under the new law, a corporation or trade union may register as a "third party advertiser" if it wants to disseminate independent messaging to support or oppose a candidate or ballot question. Corporations and unions may also make contributions to other registered third party advertisers. Third party advertisers will need to register with each municipality where they wish to advertise, and such advertising must be done independently of candidates.

In related news, the Ontario Legislative Assembly is currently considering a bill that would similarly ban corporate and trade union contributions in provincial elections. We are monitoring the progress of this bill to enable us to provide the most up-to-date guidance to our clients considering political activity in Ontario. ■

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continued from page 3

Applying this existing legal framework to the Fox News matter, the Commission's Office of General Counsel recommended that the six commissioners find that the cable news network violated the law because it had altered the criteria for the undercard debate specifically to ensure that all six of the desired candidates (including Carly Fiorina, George Pataki, and Lindsey Graham) would be eligible to participate. The General Counsel's recommendation did not sit well with the three Republican FEC Commissioners, who argued that the "Commission's debate regulation cannot be used to impose government restrictions on newsroom decisions and to punish, and even censor, American press organizations." In a subsequent interview with *Politico*, GOP Commissioner Lee Goodman pressed the point further: "[n]ewsrooms everywhere should be concerned when the federal government asserts regulatory jurisdiction over their newsroom decision[s], and this is what this was."

The Commission's three members holding Democratic seats disagreed with their Republican colleagues, with Commissioners Ravel and Walther voting to find a legal violation and to fine Fox News thousands of dollars for its violation. Commissioner Ravel subsequently issued her own statement explaining her vote, calling the factual record "undisputed" and the regulatory violation "clear," while chastising her Republican colleagues for "aggrandizing the boundaries of the press exemption." For her part, Democratic Commissioner Ellen Weintraub voted to dismiss the case as an exercise of "prosecutorial discretion," a term that often connotes a belief that the law was violated but otherwise terminating further enforcement proceedings. Before closing the matter, the commissioners also split three-to-three on a separate, formal Republican motion to dismiss the case without finding a legal violation.

The Commission's 3-3 split raises a number of important questions for media outlets going forward:

What happens to other media organizations (like CNN) who adjusted their criteria specifically to allow other candidates (like Carly Fiorina) to participate in a debate? It is not known whether similar complaints are working their way through the FEC's confidential enforcement process, but if they are, a 3-3 split among commissioners seems likely. A corollary to this, however, is that a change in the Commission's composition could result in a different outcome.

More broadly, what does this vote mean for newsrooms covering or participating in the political process in the remainder of this presidential election cycle? In addition to the Fox News matter, in late 2013 the Commission split 3-3 on whether it had authority under the debate regulations to scrutinize editorial decisions involving a *Meet the Press*-style program airing on WCVB Channel 5 in Boston. Will these matters chill television, radio, and newspaper coverage of candidate appearances this fall, as editors worry about the second-guessing of their decisions by federal regulators? Or are any concerns overblown and these decisions merely outliers that are unlikely to affect newsroom judgments?

Finally, some in the media and elsewhere have raised questions about whether regulators are singling out Fox News for special scrutiny. They cite not only the recent debate-related matter, but also prior matters where Democratic commissioners voted to enforce the law against Sean Hannity but supported dismissing cases against individuals—like Michael Moore—who are perceived to be on the opposite side of the political spectrum. For his part, when speaking out on the Fox News matter, Commissioner Goodman stressed that the point he was making was not a partisan one, but rather a concern that media entities of all kinds would be subject to regulation. If so, the consequences would be significant. ■

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SPEECHES/UPCOMING EVENTS

Recent Updates in Campaign Finance Law
Eric Wang, Speaker
Republican National Lawyers Association Election Law Seminar
August 13, 2016 | Denver, CO

Corporate Political Activities 2016: Complying with Campaign Finance, Lobbying and Ethics Laws
Jan Witold Baran, Co-Chair
Caleb P. Burns, Speaker
Practising Law Institute
September 8-9, 2016 | Washington, DC

NABPAC Post-Election Conference
Jan Witold Baran, Speaker
November 16-19, 2016 | Palm Beach, FL

Looking for Data in All the Wrong Places
D. Mark Renaud, Panelist
38th Annual Council on Governmental Ethics Laws (COGEL) Conference
December 12, 2016 | New Orleans, LA

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