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ELECTION LAW NEWS

Developments in All Aspects of Political Law | May 2015

Supreme Court Upholds Judicial Campaign Finance Restrictions; Effect May Be Limited

By Jan Witold Baran and Stephen J. Kenny*

Thirty nine states elect some or all of their judges through various forms of partisan, or non-partisan or retention elections. State laws as well as judicial codes of conduct impose restrictions on judicial campaigns including methods on how candidates may solicit and accept contributions.

Last month, the United States Supreme Court decided *Williams-Yulee v. Florida Bar*, 135 S. Ct. 1656 (Apr. 29, 2015), a challenge to a provision of Florida's Code of Judicial Conduct that prohibits judicial candidates from personally soliciting campaign funds. The petitioner was disciplined by the Florida Supreme Court for signing and distributing a letter requesting campaign funds in connection with her campaign for a Florida judgeship. The petitioner appealed her punishment to the United States Supreme Court.

Writing for the Court, Chief Justice John Roberts upheld the solicitation ban as consistent with the First Amendment. Noting first that the restriction was subject to "exacting scrutiny," the Chief Justice concluded that the ban was narrowly tailored to serve a compelling government interest. The Court identified the compelling interest as maintaining "public confidence in judicial integrity" and determined that the ban was sufficiently narrowly tailored to satisfy this level of scrutiny. In reaching the conclusion that the restriction was narrowly tailored, the Court determined that only a "narrow slice" of speech was prohibited and pointed out that judicial candidates have plenty of other means under Florida law to raise and spend money during the campaign including sending a signed thank you letter to each contributor. Judicial candidates also may establish campaign committees to solicit contributions on the candidates' behalf.

Four Justices dissented. Justice Scalia, writing the principal dissent, asserted that the majority had not shown that the solicitation ban substantially advances the state's interest in maintaining judicial integrity.

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FEC Deadlocks on Foreign National Contributions

By D. Mark Renaud and Eric Wang

The question of whether foreign nationals may make political contributions in connection with U.S. elections is an issue that comes up with some frequency, but there is often not a lot of understanding about what is and is not permitted. A recent 3-3 deadlock by the commissioners at the Federal Election Commission (FEC) is a reminder of the obscurity regarding this issue, and the potentially serious consequences of violating the law.

As a general matter, the federal campaign finance laws address activities in connection with elections for federal office, while state campaign finance laws address activities in connection with state

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Changes to Arkansas and New York Lobbying and Gift Laws

By Carol A. Laham and Brandis L. Zehr

Below is a summary of recent changes to state lobbying and gift rules.

Arkansas

On the heels of a citizens-initiated constitutional amendment to strengthen Arkansas's gift laws, the state legislature has tweaked the new constitutional provisions in several important ways. At last year's general election, Arkansas voters approved Constitutional Amendment 94, which prohibits certain public officials from accepting gifts from lobbyists and lobbyist employers.

In April, state lawmakers made a number of changes to that regime. For example, the class of public officials subject to the state gift restrictions has been expanded to include a range of judges and prosecutors. In addition, the legislative changes have altered and clarified a number of the exceptions to the gift ban. To give just one example, Constitutional Amendment 94 drew an exception for "[f]ood or drink available at a planned activity to which a specific governmental body is invited." The new legislation elaborates what types of "planned activities" are covered by the exception, as well as limiting the number of times a lobbyist or lobbyist employer can claim the exception.

The legislation also empowers the Arkansas Ethics Commission to exercise regulatory and enforcement jurisdiction over the gift provisions. (Constitutional Amendment 94 directed the legislature to pass this sort of authorizing provision.) Given the Commission's new power over these gift provisions, further regulations may appear in the coming months.

New York

Effective April 13, 2015, New York made a significant change to the state's lobbying law. Until now, contacts with municipal personnel qualified as "lobbying" only if the political subdivision had a population of more than 50,000 people. This meant that communications with small municipalities would not be governed by state lobbying law (though municipalities might enact their own lobbying rules).

With last month's amendments, the population threshold has been cut to 5,000, meaning that a much broader class of local lobbying is regulated under New York state law. Not only do these amdendments require more individuals to register and report as lobbyists with state regulators, they also expand the reach of New York's lobbying-specific gift laws by defining more covered donors and donees. ■

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"Montana Disclose Act" Signed Into Law; Important Details To Be Determined

By Caleb P. Burns and Eric Wang

Montana Governor Steve Bullock signed the "Montana Disclose Act" into law late last month after several attempts to enact similar measures had failed in prior legislative sessions. Bullock hailed the law in a press release as an important measure in "requiring improved disclosure" that "will make Montana elections the most transparent in the nation." However, a closer examination of the final bill text that was signed into law reveals that the legislation punts the most important issue it purports to address over to the state's Commissioner of Political Practices. How the law will function in practice thus remains to be determined by administrative rulemaking.

The most significant and contentious issue that proponents of the Montana Disclose Act sought to tackle was so-called "dark money" groups that sponsor advertisements and other public communications deemed to be election-related, but that have not been required to disclose their donors. Similar to many other jurisdictions, Montana's preexisting law provided that a group whose "primary purpose" is "for the purpose of influencing the results of an election" must register with the state as a political committee and report its expenditure and contributor information on publicly available disclosure reports. Under Montana's current administrative regulations, entities that engage in election-related activities,

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Even Ethics Officials Sometimes Ask Questions: OGE Clarifies Exception from Gift Rules

By Robert L. Walker and Karen E. Trainer

On April 6, the Office of Government Ethics (OGE) issued an advisory to agency ethics officials on attendance at events by agency employees. The advisory was issued in response to a question from an agency ethics official.

The agency ethics official asked whether an executive branch employee that accepts an offer of free attendance at an event may also accept free attendance at a reception or meal that is offered only to other attendees that pay an additional fee. The advisory clarifies that the reception or meal would have to separately meet the requirements for an exception from the gift rules in order for the executive branch employee to attend without paying the fee.

An executive branch employee may accept free attendance at an event at which he or she is presenting information on behalf of an agency or at an event that qualifies as a "widely attended gathering." Under these exceptions, the executive branch employee may only accept food and refreshments that are provided to all attendees. Accordingly, a reception or meal open only to attendees that pay an additional fee should be separately examined to determine whether it meets the definition of a widely attended gathering or falls within another exception.

The advisory serves as a reminder that even agency ethics officials sometimes have questions about the gift rules. Navigating gift rules of any kind—much less the federal rules for career civil servants and political appointees—can be very difficult. In order to avoid the many pitfalls, remember to consult with Wiley Rein attorneys before offering anything of value to government officials or employees. ■

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but that do not have such activities as their "primary purpose," are deemed to be "incidental committees." Incidental committees are required to register and report their expenditure information, but are required to report information about contributors only if they provided funds "earmarked for a specified candidate, ballot issue, or petition for nomination."

The point at which an entity engaging in political speech in Montana must disclose information about all of its donors (as opposed to only those who earmark their contributions) has thus depended on two interrelated factors: 1) whether its activities are political "expenditures" (i.e., made "for the purpose of influencing" elections); and 2) whether such activities are its primary purpose. The Montana Disclose Act does not deviate from this basic framework, but puts a finer point on these two issues.

Montana's preexisting law does not clearly define when an activity is deemed to be a political expenditure, although the regulations provide that communications "expressly advocating the success or defeat of a candidate or ballot issue" are "independent expenditures" if they are made independently of any candidate or political committee. In addition, the Commissioner of Political Practices, relying on a 1987 opinion by the U.S. Court of Appeals for the Ninth Circuit, has stated that political expenditures may include speech that, "when read as a whole, and with limited reference to external events, [is] susceptible of no other reasonable interpretation but as an exhortation to vote for or against a specific candidate."

The Montana Disclose Act expands the universe of speech deemed to be political expenditures by including not only express advocacy and communications "susceptible of no other reasonable interpretation," but also "electioneering communications," which are certain public communications made within 60 days of the start of voting in an election and that merely refer to candidates running in the election.

With respect to the dividing line between when an entity is an "incidental committee" and when its "primary purpose" is that of a full-blown political committee required to report all of its donors, the preexisting Montana statute and regulations do not provide any guidance on this issue. The Montana Disclose Act leaves this question to the

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(and in many cases local) elections. We have seen many instances in which individuals and entities involved in state and local elections have unwittingly run afoul of the law with respect to foreign national contributions because they failed to consult the federal law and only checked the state laws, which frequently are silent on this issue. Under federal law, foreign nationals are specifically prohibited from making contributions in connection with state and local elections, in addition to federal elections.

The FEC's recent split decision on this issue arose out of an enforcement matter involving contributions made by two foreign corporations to a committee that opposed a Los Angeles County ballot measure in 2012. Specifically, the FEC commissioners differed on whether the "elections" covered by the foreign national contribution prohibition includes only elections for political office, or whether it also applies to ballot measure elections.

In written statements, two of the three Democratic commissioners who voted to find that the contributions violated the law cited changes made to the statutory language by the 2002 Bipartisan Campaign Reform Act (BCRA). Whereas the statute previously had prohibited foreign national contributions in connection with "an election to any political office," the 2002 legislation amended the statute to cover any "Federal, State, or local election." The Democratic commissioners viewed this language change as broadening the scope of the prohibition to apply to ballot measure elections. The Democratic commissioners also cited the general policy of not permitting foreigners to participate in processes of "democratic self-government" where they are not part of the political community.

The three Republican commissioners, who voted to dismiss the matter, cited long-standing agency interpretations that the federal statute generally does not cover ballot measure activities. They also pointed to a guidance document specifically addressing foreign nationals that the agency issued after the passage of BCRA continuing to suggest that "foreign nationals could make disbursements solely to influence ballot issues."

Although the latest FEC enforcement matter may not have definitively settled the question of whether foreign nationals may make contributions in connection with state and local ballot measures, it serves as a helpful reminder that there are a whole host of other complex issues that candidates, Political Action Committees (PACs), and corporations should keep in mind when dealing with foreign nationals. As a preliminary matter, a "foreign national" is not necessarily synonymous with someone who is not a citizen. A permanent resident who has a "green card" is not treated as a "foreign national."

While foreign nationals may not make political contributions or sponsor independent expenditures, they may volunteer on political campaigns and may even solicit contributions, but not from other foreign nationals. In a matter arising from the 2008 elections, the FEC notably determined that British singer Elton John could headline a fundraising concert for Hillary Clinton's presidential campaign. The FEC also recently determined that a foreign national could act as a volunteer in creating intellectual property for a PAC where the PAC would assume joint ownership of the intellectual property, even though, as a general matter, foreign nationals may not make in-kind political contributions.

Foreign nationals also may not help manage a political campaign or PAC. This issue arises frequently in the context of PACs administered by the domestic subsidiaries of foreign corporations. While domestic subsidiaries of foreign corporations may sponsor PACs, no part of the corporate funds used to establish, administer, or fundraise for the PAC may come from the foreign parent company. Additionally, no foreign national may be involved in the PAC's operation or decisionmaking.

PACs, campaign committees, and political party committees should review their compliance policies and procedures to ensure that they are properly screening for foreign contributions and preventing foreign nationals from having any operational, managerial, or decisionmaking role. Violations of the foreign national prohibitions may carry not only serious legal penalties, they also may result in negative publicity about foreigners and foreign money influencing American elections. ■

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Moreover, the dissenters argued that the ban is both over and under-inclusive in the conduct the state regulates to achieve its stated purpose. The availability of less restrictive options, such as banning only solicitations from litigants who might appear before the court, meant that the Florida rule restricts more speech than is necessary.

Although *Williams-Yulee* represents somewhat of a departure from the Court's campaign finance jurisprudence over the last decade, it is unlikely to unsettle the framework the Court has established in assessing the constitutionality of campaign finance laws. As it has done when assessing other restrictions on political speech, the Court applied exacting scrutiny to Florida's solicitation ban. Moreover, the Court explicitly stated that the government's interest in ensuring public confidence in an impartial judiciary "extends beyond" the government's interest in preventing the appearance of corruption in executive and legislative elections. This is so because elected officials are expected to be responsive to supporters while judges most certainly are not. In short, this case is unlikely to mark a change in direction of the Court's approach to most campaign finance cases that enter its docket.

Nevertheless, as the dissent points out, the distinction between political speech during judicial election campaigns and speech made in connection with executive legislative branch campaigns raises some significant questions about how states can restrict speech without running afoul of the First Amendment. Some states may see this decision as a green light to apply stricter campaign finance regulations to judicial candidates and campaigns. On the other hand, the Chief Justice seems to limit the scope of speech bans just to solicitations and only by judicial candidates. Time will tell whether this case is a unique First Amendment outlier or a mischievous basis for more campaign regulation. ■

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Commissioner of Political Practices to decide by administrative rulemaking, but specifies that the Commissioner must consider "criteria such as the allocation of budget, staff, or members' activity or the statement of purpose or goal of the person or individuals that form the committee." The new law does not specify, however, any numerical threshold for determining an entity's "primary purpose," or how low the Commissioner may set such a threshold. In short, sponsors of political messages or issue advocacy mentioning candidates in the 60 days before an election are at the mercy of the Commissioner in terms of whether they must disclose their donors, much as they were before.

The Montana Disclose Act also makes a number of other important changes to the state's campaign finance laws. Whereas labor unions have been permitted up to this point to make contributions to candidates in Montana, as an apparent inducement to gain legislative support for the bill, the law now prohibits such contributions, thus putting unions on equal footing with corporations. At the same time, the law now permits both corporations and unions to make contributions to state PACs; under preexisting Montana law, corporations have been prohibited from contributing to state PACs. As before, corporations and unions also may establish "separate segregated funds" to solicit and accept voluntary political contributions from their employees, shareholders, and members.

Additionally, the Montana Disclose Act imposes new disclaimer requirements for election-related communications, alters the reporting deadlines for political committees, and provides for a somewhat less extensive reporting schedule for incidental committees.

The Montana Disclose Act does not contain an effective date. As a general matter, the default effective date in Montana for new legislation is the first day of October following passage by the legislature and approval by the governor. ■

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SPEECHES/UPCOMING EVENTS

State Ethics — The Slippery Slope
Carol A. Laham, Speaker
Washington Area State Relations Group Luncheon
June 6, 2015 | Washington, DC

The Foreign Corrupt Practices Act: Enforcement Priorities of 2015
Ralph J. Caccia, Gregory M. Williams, and **Brandon J. Moss**, Speakers
June 11, 2015 | Wiley Rein Webinar

Congressional Ethics Rules
Jan Witold Baran and **Robert L. Walker**, Speakers
Congressional Institute House Republican Chiefs of Staff Retreat
June 19, 2015 | Williamsburg, VA

A Dialogue with the FEC Chair: PAC Compliance and Other Campaign Finance Issues
Jan Witold Baran, Speaker
National Association of Business Political Action Committees
July 14, 2015 | Washington, DC

PLI's Basics of the Federal Election Campaign Act
Jan Witold Baran, Speaker
August 5, 2015 | Washington, DC

PLI's Corporate Political Activities 2015: Complying With Campaign Finance, Lobbying and Ethics Laws
Jan Witold Baran and **Caleb P. Burns**, Speakers
September 10 - 11, 2015 | Washington, DC