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ELECTION LAW *NEWS*

Developments in All Aspects of Political Law | November 2017

Federal Contractor Slapped with Civil Penalty for Prohibited Contributions to Super PAC

By D. Mark Renaud and Ken Daines

A Massachusetts corporation, Suffolk Construction Company (Suffolk), agreed in September to pay a civil penalty of $34,000 to the Federal Election Commission (FEC) because it made prohibited political contributions as a federal contractor to a federal super PAC in 2015. According to media sources, this is the first time a federal contractor has been fined by the FEC for contributing to a super PAC.

Although Suffolk works primarily as a general contractor and construction manager for privately funded projects, a small portion of its work has included federal contracts. According to FEC Matter Under Review (MUR) 7099, from December 2015 to August 2016 it completed two construction projects for the U.S. Army Corps of Engineers (USACE) stemming from an earlier contract. On July 7, 2015, Suffolk received USACE's modified contract (MOD 28) for the first

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FEC Fines PAC for Coercive Solicitations and Lack of Disclaimers

By Jan Witold Baran and Andrew G. Woodson

The Federal Election Commission (FEC or Commission) recently announced a $21,000 penalty against an Arizona Plumbers and Pipefitters union and its political action committee (PAC) for failing to include the requisite disclaimers in its solicitations. Importantly, while the matter involved the coercive conduct of union officials, the relevant legal analysis is just as applicable to corporations soliciting funds for their PACs. Matter Under Review (MUR) 7041.

In April 2016, one of the union's members filed a complaint with the FEC alleging that union officials were coercively soliciting political contributions. According to the complaint, for a number of years, the Arizona union had urged members to sign a payroll

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New Campaign Finance Disclaimer, Fundraising, and Reporting Laws in California, Michigan & New Mexico

By Carol A. Laham and Eric Wang

Significant new campaign finance laws and rules either were enacted and/or went into effect in three states during the past two months. California's new law and New Mexico's new regulations impact the donor identification and disclaimer requirements for organizations that engage in independent expenditures or issue advocacy in these states. In Michigan, individual and corporate donors may find themselves subject to more solicitations for super political action committees (PACs) by state candidates and elected officials.

California (IE Disclaimers)

California already has some of the nation's toughest campaign finance laws, and the so-called "California Disclose Act," which was signed into law recently, only adds to the existing regulatory burdens and complexity. Primarily, the new law would impose additional and exacting disclaimer requirements for organizations that sponsor independent expenditures in connection with California candidates and ballot measures. These changes are so complex that the state Fair Political Practices Commission has put out a 28-page chart (which itself is not a model of clarity) comparing the new and existing disclaimer requirements.

To begin, A.B. 249 generally expands the preexisting contributor identification requirement for independent expenditure (IE) disclaimers. Under existing law, any organization that triggers "committee" status – such as by sponsoring IEs of $1,000 or more per calendar year – is required to identify in disclaimers in its IEs its two largest contributors of $50,000 or more during the prior 12-month period. An IE is defined as an ad that "expressly advocates the election or defeat" of a candidate or the qualification, passage, or defeat of a ballot measure, or that "unambiguously urges a

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Sen. Grassley and Rep. Johnson Introduce Bill to Strengthen Enforcement, Compliance, and Oversight of Foreign Agents Registration Act (FARA)

By Tessa Capeloto

On October 31, 2017, U.S. Senate Judiciary Committee Chairman Chuck Grassley and U.S. House of Representative Judiciary Committee member Mike Johnson introduced the *Disclosing Foreign Influence Act*, which aims to strengthen the Foreign Agents Registration Act (FARA) by clarifying reporting requirements, enhancing investigative tools, and establishing new enforcement safeguards. This legislation falls closely on the heels of several high profile FARA-related developments, including the U.S. Department of Justice's (DOJ) indictment of Paul Manafort and his associate Rick Gates at the end of October for several alleged crimes, including acting as unregistered agents of the Government of Ukraine, the Party of Regions, and the Opposition Bloc, and making false and misleading FARA statements. This legislation

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particular result in an election," and that is not coordinated with a candidate or ballot measure committee. A.B. 249 increases the number of $50,000-or-more contributors that disclaimers are required to identify to the three largest such contributors.

Recognizing that disclaimers have to be spoken in radio and audio-only ads, and that the expanded disclaimer requirement may swallow the entire ad, the new law only requires the top two contributors to be identified in such ads. Moreover, if the radio or audio ad is 15 seconds or less, or if the disclaimer otherwise would last more than eight seconds, then only the largest single contributor of $50,000 or more is required to be identified.

The most dramatic change is the new disclaimer requirement for television and video ads, which must contain a disclaimer within a black box that, at a minimum, takes up the entire bottom one-third of the display screen. This black-box disclaimer must be displayed for at least five seconds in ads of up to 30 seconds, and for at least 10 seconds in ads of more than 30 seconds. The new law also contains many other exacting requirements for the text disclaimer, such as use of uppercase versus lowercase, font style, font size, which information must be underlined or center-justified, etc.

For committees that do not have any contributors of more than $50,000, or if the contributor information is not required, then the black-box disclaimer is only required to take up the bottom quarter of the display screen. (California excludes from the definition of a "contribution" any funds where "it is clear from the surrounding circumstances" that the funds were not given "for political purposes," although it is not always clear under this standard what is and is not a "contribution" that may trigger the top-three contributor identification requirement.)

Most "electronic media" ads, other than video and audio ads, are required to include a disclaimer that says, "Who funded this ad?," with a hyperlink to a landing page that displays the full required disclaimer. However, if this disclaimer is "impracticable," then the ad only has to allow viewers to click through the ad to be redirected to a landing page containing the full disclaimer.

Under the new law, penalties for disclaimer violations could be as much as three times the cost of the ad (including both placement and production costs). These expanded disclaimer requirements take effect on January 1, 2018.

Michigan (Super PACs)

Michigan recently enacted amendments to its campaign finance law that went into effect immediately. Notably, the amendments formally recognize state super PACs, and broadly permit state candidates and elected officials to raise money for super PACs, with some limitations. The candidate super PAC solicitation provision illustrates the divergent approaches different jurisdictions have adopted on this issue.

Super PACs emerged for federal races in 2010, when a U.S. Court of Appeals for the D.C. Circuit panel, applying the logic of the Supreme Court's *Citizens United* decision, held that the federal contribution limits are unconstitutional as applied to a PAC that only makes independent expenditures to support or oppose candidates. In an advisory opinion, the Federal Election Commission (FEC) subsequently extended this holding to also conclude that the federal prohibition

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against corporate and union contributions to PACs also could not apply to contributions to independent-expenditure-only PACs. These PACs became commonly known as "super PACs." Super PACs are not permitted to make direct contributions to candidates, party committees, and conventional PACs.

Congress and many states have not amended their statutes to codify super PACs into their laws. Thus, in many jurisdictions, super PACs operate pursuant to agency advisory opinions or other guidance. The new Michigan law not only codifies super PACs into the state statute, but it also broadly permits candidates to solicit contributions for super PACs. Moreover, candidates may solicit contributions for super PACs in any amount (notwithstanding Michigan's various limits that apply to contributions if they were to be made directly to candidates) and also from corporations (which are otherwise prohibited from making political contributions in the state). Importantly, however, if a super PAC only supports one candidate during an election cycle, that candidate may not solicit contributions for the super PAC.

Michigan's largely hands-off approach to candidate solicitations for super PACs diverges with two other approaches. At the federal level, the FEC has concluded that federal candidates may only solicit contributions subject to the federal amount limitations and source prohibitions that ordinarily apply to contributions to PACs (i.e, $5,000 per calendar year from individuals and other PACs only). By contrast, Minnesota, for example, generally prohibits state candidates from soliciting contributions for state super PACs. (***Election Law News*, March 2014**)

New Mexico (IE Donor Disclosure)

New rules adopted by the New Mexico Secretary of State went into effect last month that require reporting of donors by sponsors of independent expenditures and issue ads. The rules were adopted after an extended and contentious rulemaking proceeding over the summer, in which the Secretary was criticized for proposing to implement many measures similar to ones contained in a bill that the Governor had vetoed earlier this year.

The most significant part of the rules is a new requirement to report independent expenditures (IEs), which are defined as not only ads that expressly advocate the election or defeat of state candidates, but also ads that refer to state candidates within 30 days before a primary or 60 days before an election and that are targeted to the relevant electorate.

For IEs of lesser amounts, sponsors are only required to report information about donors of funds "that were earmarked or made in response to a solicitation to fund" IEs. However, for IEs of larger amounts, sponsors must report information about each donor that gave the sponsoring entity $5,000 or more during the previous 12 months. Donors that explicitly requested in writing that their funds not be used for IEs are exempt from being reported. Alternatively, sponsoring entities may pay for IEs using a segregated account, in which case only donors who gave more than $200 to the segregated account during the previous 12 months are required to be reported. ■

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project; on September 18, 2015, USACE then issued an amendment to MOD 28 for a second project.

On July 20, 2015, just thirteen days after receiving USACE's modified contract, Suffolk contributed $100,000 to Priorities USA Action, an ideologically progressive federal super PAC. Suffolk then made a second $100,000 contribution to Priorities USA on December 17, 2015.

After a complaint was brought against Suffolk, the FEC in an enforcement matter found reason to believe that Suffolk's contributions as a federal contractor violated the Federal Election Campaign Act (FECA). Relevant federal campaign finance law states that "any person . . . [w]ho enters into any contract with the United States . . . for the rendition of personal services or furnishing any material, supplies, or equipment to the United States" is prohibited from making a contribution "to any political party, committee, or candidate for public office or to any person for any political purpose or use." This prohibition applies at the beginning of contract negotiations or when proposal requests are sent out, whichever occurs first, and ends when the contract is performed or when negotiations are terminated, whichever occurs last.

Specifically, in MUR 7099 the FEC found that it could reasonably infer that MOD 28 in July was "either a contract proposal or a negotiated work order, thus making Suffolk a federal contractor" when it made its July 20, 2015 contribution to Priorities USA. Further, Suffolk's work on these projects was apparently already underway when it made its second contribution on December 17, 2015. Thus, Suffolk's contributions to the super PAC violated FECA. The FEC also rejected Suffolk's argument that its federal contract work only represented a "small fraction" of its total business: although the value of its federal contract work may have been a *de minimis* portion of Suffolk's overall work, its $200,000 contribution to Priorities USA was certainly not *de minimis*.

On September 20, 2017, the FEC accepted Suffolk's conciliation agreement where it acknowledged that its contributions violated the law and agreed to pay a $34,000 fine to the FEC. Because the record indicated that Priorities USA did not "knowingly solicit the . . . contributions at issue," however, no enforcement was brought against the committee.

As this case illustrates, violations of "pay-to-play" laws can result in costly penalties to contributors. Wiley Rein's Election Law and Government Ethics Practice has extensive experience assisting companies seeking or holding federal or state contracts in complying with federal, state, and local pay-to-play laws. Additionally, our State and Municipal Pay-to-Play Survey provides a comprehensive summary of pay-to-play laws in states and major municipalities, as well as the pay-to-play policies that many public agencies have adopted on their own, and is available as a subscription service for a fee. To order, please contact D. Mark Renaud at 202.719.7405 or mrenaud@wileyrein.com. ■

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also comes in the wake of a DOJ Inspector General report issued last September, faulting the agency's National Security Division (NSD) for its lax enforcement of the statute. Since then, the DOJ has become more aggressive in ensuring that foreign agents register their activities, as evidenced by its recent request that Russian-government backed broadcaster RT register as an agent of a foreign principal and that both Jack Abramoff and Michael Flynn retroactively register for their work for foreign principals.

The FARA statute, enacted in 1938 and administered by the FARA Registration Unit of the Counterespionage Section in the National Security Division, requires that all persons acting as an "agent of a foreign principal" must register with the DOJ, unless an exception applies. The scope of FARA is far-reaching, rendering many unsuspecting political consultants, lobbyists, public relations counsel, etc., subject to registration. The statute defines a "foreign principal" to include not only foreign governments and foreign political parties, but also foreign persons and corporations. Moreover, the statute defines an "agent of a foreign principal" to include any person who has an agency relationship with the foreign entity and engages in public relations, image-making, or political activities for or on behalf of that foreign entity.

The *Disclosing Foreign Influence Act* proposes a number of amendments to the FARA statute, including providing the Attorney General with Civil Investigative Demand authority to investigate possible violations by those who should register as foreign agents; requiring DOJ to develop a comprehensive enforcement strategy for FARA; requiring the DOJ Inspector General to report on this enforcement strategy within one year of enactment; and requiring the U.S. Government Accountability Office (GAO) to produce a report on the effectiveness of these amendments. However, the most significant of these amendments is arguably the *Disclosing Foreign Influence Act's* proposed removal of the Lobbying Disclosure Act (LDA) exception, which allows agents of non-foreign government and political parties to comply with their registration obligation through the LDA. Because registration under the LDA is generally less burdensome than FARA registration, lobbyists and PR counsel who represent foreign individuals and companies in the United States typically chose to avail themselves of the LDA exception and to register under the LDA instead of FARA. This means that if Senator Grassley's and Representative Johnson's bill is enacted, a large number of once-exempted foreign agents could find themselves having to register under FARA as well.

Given the broad scope of the statute, the potential consequences of noncompliance, and the fact that DOJ's and Congress' focus on FARA enforcement has only strengthened in recent months, it is important for individuals and companies that represent foreign interests in the United States, whether directly or indirectly, to be aware of the statue's current registration and reporting obligations (and potential changes to these obligations), and to ensure maximum compliance with the statute. ■

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deduction check-off form authorizing PAC contributions from members' paychecks without including the necessary disclaimer language. For example, while the check-off form "suggested" a "voluntary" 0.75% contribution from the member's weekly pay, the solicitation did not actually explain that the 0.75% figure was merely a guideline, with the individual free to contribute more or less, nor did it note that an individual had the right to refuse to make a contribution altogether. (The Commission specifically rejected the idea that inclusion of the word "voluntary," by itself, was sufficient to provide notice of the right to contribute free from reprisal.)

In addition to finding fault with the check-off form, the FEC heavily scrutinized the union's decision to post a list of members who did not contribute to the PAC on a public bulletin board adjacent to another list entitled "EXPELLED MEMBERS." The Commission also noted that this non-contributor list was posted in the union hall where members were verbally solicited for contributions without the relevant solicitation disclaimers (e.g., that union members had the right to refuse to contribute without reprisal).

Apart from these two issues, which formed the basis of the $21,000 penalty, the FEC's Office of General Counsel examined a third area of potential concern, i.e., whether the union used its newsletter to threaten job discrimination against PAC non-contributors. In a summer 2011 article, the union's business manager wrote that "the PAC contribution has changed to 0.75% and the new forms will reflect that change. Please be sure to complete a new form by July 1 or your standing as a member of the local may be jeopardized." The article continued: "It is obvious the majority of our local supports this increase and our ability to create any future success for you and your families through political action rests with each and every member participating by signing the PAC check-off." While concluding that the newsletter "suggests that political contributions are a condition of membership and threatens job discrimination against those who do not authorize payroll deductions," the Office of General Counsel concluded (among other things) that this activity occurred outside the statute of limitations and was therefore outside the Commission's jurisdiction. ■

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Top Ten Ethics Tips for the Holidays

By Robert L. Walker

Are there any federal, state, or local officials or employees on your holiday list? If so, before you get caught up in the spirit of giving, here are ten important tips on federal, state, and local gift rules that could impact a corporation or trade association's holiday gifting or party planning.

1. No holiday specials. Under the federal gift rules and most state and local gift rules, there is no special exception for holiday parties or gifts. Instead, the general gift rules continue to apply throughout the holiday season. (There are some exceptions at the state and local level; see below.)

2. Stricter rules for lobbyists (and some others) still apply. Remember that, throughout the year, lobbyists, lobbyist employers, contractors, and regulated businesses are often subject to more stringent gift rules. These stricter rules still apply during the holidays.

3. Good reception(s) for MOCs. If you would like to invite Members of Congress or their staff to a holiday party, the simplest way to avoid any gift issues is to follow the "reception exception." Under this exception, Members and staff may accept food and refreshments (including alcoholic beverages) of "nominal value" offered other than as part of a meal. This effectively means that "moderate" appetizers and hors d'oeuvres that are not luxury food items (*e.g.*, caviar) may be served.

4. "Widely-attended event" exception may also apply. Attendance by congressional Members and staff at a holiday party also may be acceptable under the "widely attended event" exception to the U.S. House of Representatives and U.S. Senate gift rules. This exception may be available if:

- The invitation is from the event sponsor;
- 25 or more individuals from outside Congress (and apart from the sponsor's personnel) are expected to attend;
- The event is open to members from throughout a given industry or profession or to a range of persons interested in an issue; and
- The Member or congressional staffer's attendance relates to the attendee's *official* duties. In guidance for the 2016 holiday season, the House Committee on Ethics emphasized that the "widely attended event exception does not apply to holiday parties that are purely social in nature and not related to . . . official duties."

5. Stocking stuffers? "Nominal value" only. In terms of holiday gifts – other than an invitation to a permissible event – a corporation or trade association should ensure that only "items of nominal value" are given to Members and staff, unless another exception to the House and Senate gift rules applies. Other than keeping the aggregate value of such items to any one recipient under $10, what qualifies as an "item of nominal value" varies slightly between the two houses. But adherence to the rule is absolutely necessary for lobbyists and lobbyist employers.

6. What about the executive branch? Inviting federal Executive branch employees may prove to be a bit more challenging for corporations or trade associations deemed to be a "prohibited source" under

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federal ethics law. Generally, executive branch employees – other than "political appointees" – may accept non-monetary gifts, such as attendance at a holiday party or another holiday gift, fairly valued at $20 or less (and subject to a $50 per year cap) from prohibited sources.

7. WAGs for the holidays. Under certain circumstances, Executive branch employees also may attend a prohibited source's holiday party under the "widely attended gathering" exception. But, as the Office of Government Ethics rhymed in its 2016 holiday season "advisory poem," advance clearance is necessary and a merely social event won't pass the test:

> In the case of most parties, the rule's not so clear
> As the agency must have an interest, I fear.
> If worth more than twenty
> And it's no friend true,
> Then I'd better seek guidance
> or I could be blue.

8. But no holiday WAGs or parties for political appointees. Executive branch appointees are prohibited by Executive Order from accepting gifts from lobbyists and lobbyist employers. This would include attending a holiday party hosted by a lobbyist employer.

9. Don't forget about the states. Of course, states and localities have their own gift rules that may impact how a corporation or trade association structures its holiday party if it plans to invite state or local officials or employees. Like federal law, most states do not have any specific rules related to holiday parties and gifts. Nevertheless, it is quite common for state ethics agencies to issue guidance and reminders around the holidays specifically applying their gift laws to parties and gifts. For example, the ethics agencies in Connecticut, Hawaii, and North Carolina have issued such guidance in past years, as have some localities, including Los Angeles and Chicago. Some jurisdictions, however, have adopted gift rules that specifically apply to the holiday season. The most common form of these rules, such as in the city of Atlanta, permits government employees to accept perishable items, such as gift baskets, that are meant to be shared with other employees.

10. Have fun, if you can . . . but not too much! And don't hesitate to contact the Election Law and Government Ethics Group at Wiley Rein with any questions. ■

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Increased FARA Enforcement May Lie Ahead

By Madeline J. Cohen and Daniel B. Pickard

The indictment of Paul Manafort and Richard Gates on Monday brings into focus a federal statute not often employed by prosecutors. The Foreign Agents Registration Act (FARA), once a little-known law, is now front and center in the national media. The law has been on the books since 1938, and is a disclosure statute that requires persons acting as agents of foreign principals in a political or public relations capacity to make periodic public disclosure of their relationship with the

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foreign principal, as well as their activities within the United States.

This almost 80-year-old law has also been the topic of a recent congressional hearing. On July 26 and 27, 2017, the Senate Judiciary Committee held a hearing titled "Oversight of the Foreign Agents Registration Act and Attempts to Influence U.S. Elections: Lessons Learned from Current and Prior Administrations." Throughout the hearing the committee asked numerous questions of the witnesses regarding potential foreign interference with the 2016 election, Russian attempts to revoke the Magnitsky Act, and other controversies.

For years, FARA went mostly unnoticed and was known to a relatively small circle of individuals who practiced in this specific area of the law or were involved in the business of representing foreign governments' political interests in Washington, D.C. However, in 2016, the U.S. Department of Justice Office of Inspector General issued a report on FARA, providing recommendations to improve detection of violations and increase enforcement. FARA also started cropping up in the headlines in the months leading up to the hearing. Shortly thereafter a series of stories began to run in the news regarding a variety of potential FARA violations. As stories like these bring FARA into the Washington limelight, those working on behalf of foreign entities should be cognizant of the potential for increased enforcement under the statute.

What is FARA?

FARA, 22 U.S.C. § 611 et seq., was enacted in 1938 as an effort to track German agents spreading Nazi propaganda in the United States. In its current form, the statute imposes disclosure requirements on a broad swath of individuals and entities that advocate on behalf of foreign interests.

FARA requires any agent working on behalf of a foreign interest in regard to certain "covered activities" to register with the U.S. Attorney General within 10 days of becoming an agent. The required registration statement form is provided by the DOJ and must be signed under oath. The registration statement requires information about the agent's relationship with the foreign principal, including the nature of the agent's business, the foreign principal's activities, any written agreement between the agent and principal, and a list of all contributions, income, or other things of value earned from the principal or spent by the agent. Supplemental registration statements must be filed every six months, and certain information must be updated within 10 days of any change. FARA requires these registration statements and other FARA disclosures to be made available for public inspection. The DOJ maintains a public online database where these records can be searched and reviewed.

Agents are also required to keep books and records of all activities that must be disclosed under FARA. Such books and records are subject to audit and inspection by the DOJ and the FBI. Furthermore, agents appearing before a congressional committee must furnish a copy of their most recent FARA registration statement to the committee. Similarly, an agent transmitting "informational materials" for a foreign principal must include a "conspicuous statement that the materials are distributed by the agent on behalf of the foreign principal" and that further information is available through the DOJ. Finally, agents are barred from entering into any contingent fee arrangement with a foreign principal under which payment depends "upon the success of any political activities" taken by the agent.

FARA's requirements are backed by significant enforcement provisions. Any person who

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willfully violates FARA or willfully makes a material false statement or omission on a registration statement, can be fined up to $10,000 ($5,000 for certain technical violations) or imprisoned for up to five years (six months for certain technical violations) or both. Furthermore, any noncitizen convicted of violating FARA is subject to removal under the Immigration and Nationality Act. The DOJ may also apply to the district courts for an injunction prohibiting an agent from continuing to act as such or requiring an agent to comply with FARA's obligations.

Who Should Be Concerned About FARA?

This little-known statute covers a surprising number of individuals and entities. Any "agent" conducting "political" or quasi-political activities on behalf of a "foreign principal" is potentially subject to FARA.

Agency under FARA is not limited to affiliations created by express agreement, and may encompass de facto agency relationships. An "agent" includes any person working on behalf of another person "whose activities are directly or indirectly supervised, directed, controlled, financed, or subsidized in whole or in major part by a foreign principal," if that person engages in political or public relations activity for the principal, transacts in money or other things of value for the principal, or represents their interests before the government.

"Political activities" is defined broadly to include action intended to "in any way influence" any U.S. government agency or official, or any segment of the public, regarding any domestic or foreign policy or regarding foreign interests.

The term "foreign principal" is also comprehensive, encompassing not only foreign governments and political parties, but foreign entities, noncitizens living outside of the United States, and entities that are either not registered in the United States or do not maintain their principal place of business here.

Several categories of persons are exempt from FARA's disclosure requirements, including diplomatic and consular offices and staff; officials of foreign governments; persons engaging solely in private, nonpolitical activities to further trade or commerce; persons pursuing religious, scholastic, or scientific pursuits; attorneys representing a foreign principal before a court or U.S. government agency; and certain persons acting in furtherance of national defense policies. Agents who have registered under the Lobbying Disclosure Act are also exempt, unless the agent's principal is a foreign government or political party. It should be noted however that many of the exemptions are drafted very narrowly.

Conclusion: Increased Enforcement Ahead

Although Congress clearly intended to give FARA teeth, enforcement actions under the statute have been relatively rare. Indeed, several senators raised enforcement-related issues during the Judiciary Committee's recent hearing. Additionally, the OIG report, discussed above, presented 14 specific recommendations, including the creation of a "comprehensive system" to track FARA cases, expanded resources for identifying FARA violations, and an evaluation of FARA's many exemptions.

The OIG report also noted that the DOJ's National Security Unit has sought civil investigative demand authority from Congress on several occasions to increase its ability to investigate FARA violations. During the Judiciary Committee hearing, Adam Hickey, deputy assistant attorney general for the

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Increased FARA Enforcement May Lie Ahead *continued from page 11*

National Security Division (NSD), explained that the FARA unit currently relies on publicly available information and data provided by other agencies. If granted civil investigative powers, this authority would greatly augment the DOJ's ability to identify and prosecute agents not in compliance with the statute. Hickey appeared to indicate that the NSD is working with a number of congressmen to discuss potential legislation, but did not provide any details.

The indictment of Paul Manafort and Richard Gates may be the first sign of an uptick in FARA enforcement. And with FARA appearing in newspaper headlines on an almost daily basis, it is reasonable to expect that this law is likely to get more attention from Congress in the very near future. ■

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DNC Resolves to Reject Corporate Donors that Conflict with Party Platform

By Caleb P. Burns and Louisa Brooks

In late October, the Democratic National Committee (DNC) unanimously approved a resolution banning contributions from sources that conflict with the national party's platform. The purpose of the resolution is to "reduce the corrosive influence of money in our politics" and "revive trust in [the] Party by encouraging grassroots donors." Although the breadth of the corporate ban is not entirely clear, the resolution specifically names tobacco, payday lending, and gun manufacturers among the corporate interests from which the DNC will no longer accept contributions.

The resolution comes almost two years after the DNC's February 2016 decision to roll back a ban on donations from federal lobbyists and political action committees (PACs), instituted by then-candidate Barack Obama in 2008. An earlier version of the ban was introduced in February 2017 but failed to pass amid debate over whether banning certain contributors would hurt the DNC's rebuilding efforts after its loss in the 2016 presidential election.

There remains some debate about how the non-binding resolution will be enforced. Resolution sponsor Christine Pelosi has stated in media interviews that she hopes the new ban will be implemented by the DNC's finance team, who will evaluate contributions as they are received to determine if the funds originated from appropriate sources. On Twitter, Pelosi asked DNC Chairman Tom Perez to confirm that he will enforce the resolution. Perez has not responded. ■

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9th Circuit Upholds Montana's Candidate Contribution Limits; Commissioner Immediately Reinstates Lower Contribution Limits

By Michael E. Toner and Brandis L. Zehr

In the latest chapter of the ongoing *Lair v. Motl* litigation, the U.S. Court of Appeals for the Ninth Circuit, in a 2-1 decision issued on October 23, upheld Montana's limits on contributions to candidates. In response, Montana's Commissioner of Political Practices **immediately reinstated** the lower contribution limits at issue in the litigation.

As we reported last year, the U.S. District Court for the District of Montana struck down Montana's candidate contribution limits. On appeal, the key issues before the Ninth Circuit focused on (1) whether Montana had adequately proven a "sufficiently important state interest" in imposing candidate contribution limits, and (2) whether Montana's contribution limits are "closely drawn" to the state's interest.

The district court held that Montana had not proven a "sufficient important state interest" – that is, preventing *quid pro quo* corruption or its appearance – because the state had offered only evidence of alleged *quid pro quo* transactions that were rejected. The Ninth Circuit disagreed, explaining that "Montana need not show any completed *quid pro quo* transactions to satisfy its burden." Instead, "all Montana must do is show a 'threat' or 'risk' of actual or apparent corruption" that is "not illusory" or is "more than 'mere conjecture.'" The Ninth Circuit held that Montana met this "low bar" by offering evidence of attempted *quid pro quo* transactions.

The Ninth Circuit also disagreed with the district court's holding that Montana's contribution limits were not "closely drawn" to an important state interest. First, the Ninth Circuit disagreed with the district court's holding that the limits do not "narrowly focus" on the state's anti-corruption interest. The contribution limits were enacted through a ballot measure, and the stated purpose of the ballot measure was to prevent "[m]oney from special interests and the wealthy" from "drowning out the voice of regular people." The district found that the stated purpose of the contribution limits – equalizing political speech – demonstrated that the limits did not "narrowly focus" on preventing actual or perceived *quid pro quo* corruption. The Ninth Circuit acknowledged that a state interest in equalizing political speech cannot support campaign contribution limits under Supreme Court precedent, but explained that courts should evaluate whether the "actual content and effect" of the contribution limits – not the underlying voter intent – "narrowly focus" on combatting *quid pro quo* corruption or its appearance. The Ninth Circuit found that the contribution limits narrowly focused on preventing corruption because the limits targeted only the top 10% of contributions and placed the most restrictive limits on direct contributions to candidates.

Second, the Ninth Circuit disagreed with the lower court's holding that Montana's contribution limits were too low to allow candidates to amass sufficient funds to wage an effective campaign. In reaching this conclusion, the Ninth Circuit cited evidence that only 15% of donors to 2010 house and senate races were "maxed out" donors, demonstrating that the contribution limit has not dramatically impacted candidate fundraising. The Ninth Circuit also considered

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Montana's overall contribution limit, explaining that the system did not unduly favor incumbents over challengers and preserved the ability of political parties to financially support their candidates at much higher limits.

Last week, the plaintiffs filed a petition for rehearing en banc with the Ninth Circuit. The plaintiffs' counsel, however, indicated to the press that they have not ruled out appealing to the Supreme Court in the future. Regardless, the *Lair v. Motl* litigation is far from over, and donors should take care to follow the **correct contribution limits**. ■

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RT Registers Under the Foreign Agents Registration Act in an Environment of Heightened DOJ Enforcement

By Daniel B. Pickard and Tessa Capeloto

On Monday, T&R Productions, LLC (T&R), a Washington, D.C.-based corporation that operates studios for RT, hires and pays all U.S.-based RT employees, and produces English-language programming for RT, registered as an agent of ANO TV-Novosti, the Russian government entity responsible for RT Network's global broadcasts. The U.S. Department of Justice (DOJ) has indicated that it is currently reviewing T&R's filing, which is already publicly available online **here**, for adequacy.

The Foreign Agents Registration Act (FARA) statute, enacted in 1938 and administered by the FARA Registration Unit of the Counterespionage Section in the National Security Division, requires that all persons acting as an "agent of a foreign principal" and who engage in certain covered activities must register with the DOJ, unless an exception applies. The statute defines a "foreign principal" to include not only foreign governments and foreign political parties, but also foreign persons and corporations. Moreover, the statute defines an "agent of a foreign principal" to include any person who has an agency relationship with the foreign entity and engages in public relations, image-making, or political activities for or on behalf of that foreign entity.

T&R's FARA filing comes after weeks of high profile news stories regarding issues connected with the enforcement of the statute. Given the current climate of heightened DOJ enforcement of FARA, ensuring compliance with FARA's registration and reporting requirements has become even more important. ■

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