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ELECTION LAW *NEWS*

Developments in All Aspects of Political Law | July 2018

Federal PACs Contributing to Missouri State and Local Committees Must Register and Report Beginning Aug. 8

By Michael E. Toner and Brandis L. Zehr

Effective August 8, 2018, new Missouri Ethics Commission regulations require federal PACs to register and report in Missouri if the aggregate of all contributions and expenditures made to support or oppose Missouri state and local candidates and ballot measures exceeds $1,500 in the current calendar year.[1] The new regulations also require federal PACs making aggregate contributions and expenditures in connection with Missouri state and local elections of $1,500 or less in a calendar year to file "out-of-state committee" reports. Previously, the Missouri Ethics Commission did not require federal PACs to register or report in Missouri as long as the federal PACs filed reports with the Federal Election Commission.

Federal PACs expecting to make state and local contributions in Missouri should prepare for the state's detailed registration and reporting requirements.

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New/Expanded Pay-to-Play Rules in Montana and San Francisco

By D. Mark Renaud and Eric Wang

Public contractors are already subject to a bewildering array of so-called "pay-to-play" rules in dozens of states and municipalities. These rules, which may be in the form of statutes, regulations, executive orders, or even agency policies, impose certain bans, limits, and reporting requirements specifically on political contributions by government contractors and prospective contractors and certain of their affiliated individuals. These pay-to-play rules just got a little more complicated recently, as one additional state imposed a new reporting requirement for contractors and one municipality expanded its existing pay-to-play law.

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DOJ's Recently Released Redacted Advisory Opinions Shed Light on the Foreign Agents Registration Act

By Tessa Capeloto

The Foreign Agents Registration Act (FARA), 22, U.S.C. 611 *et seq.*, is a disclosure statute that applies to all persons acting as an "agent of a foreign principal." FARA aims to ensure all such agents engaged in political or quasi-political activities disclose their activities, disbursements, receipts, and relationships with foreign principals to the U.S. government. Under FARA, agents must register with the U.S. Department of Justice (DOJ) within 10 days of becoming, or agreeing to become, an agent of a foreign principal unless an exemption applies. Persons seeking an exemption may submit an advisory opinion request to the National Security Division of the DOJ.

Until recently, agency responses to advisory opinion requests were confidential (note that the requests themselves remain confidential). On June 8, 2018, the DOJ released over 50 redacted FARA advisory opinions addressing common exemptions. A full list of the advisory opinions is available **here**. Summaries of select advisory opinions addressing agency as well as the commerce, legal, and Lobbying Disclosure Act (LDA) exemptions are provided below:

- **Definition of Agency:** In response to a recent advisory opinion request, the DOJ concluded that a commentator hosting a television show that was produced by a U.S. production company registered under FARA (because it was producing programming for a foreign state-owned network) was not required to separately register under FARA given the lack of an independent contractual relationship between the commentator and the foreign state-owned network. As the DOJ explained, "[The commentator]'s contractual relationship is with [the U.S. production company], a FARA-registered U.S. entity. Therefore, it cannot be said that the [commentator] is an 'agent of a foreign principal' who is acting 'at the order, request, or under the direction or control of a foreign principal.'"
- **Commerce Exemption:** A U.S. company providing compliance and consulting services to a foreign state bank submitted an advisory opinion request seeking confirmation that FARA's commerce exemption at 22 U.S.C. § 613(d) applied. The company characterized its services for the bank as private and non-political, claiming that its services do not serve a foreign interest. The DOJ disagreed, however. Specifically, the DOJ concluded that the U.S. company did not qualify for the commerce exemption because the company's activities were intended to demonstrate the bank's fitness to establish relationships with U.S. financial institutions, thereby directly promoting the public interests of the foreign country and disqualifying the agent from the commerce exemption.
- **Legal Exemption:** A U.S. law firm submitted an advisory opinion request claiming that the legal exemption at 22 U.S.C § 613(g) applied to its representation of a foreign person and foreign bank. The DOJ agreed, noting that the law firm's activities were limited to the provision of legal services to the foreign person and foreign bank in the context of a U.S. sanctions-related investigation and enforcement proceeding and were not intended to

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influence U.S. sanction policies beyond the law firm's representation of the foreign person and foreign bank, which would have disqualified the firm from the exemption.

- **LDA Exemption:** A U.S. law firm representing a foreign bank submitted an advisory opinion request claiming the LDA Exemption 22 U.S.C. § 613(h) applied. As part of its representation of the foreign bank, the law firm intended to lobby Congress, special interest groups, and the public. The DOJ concluded that the law firm could not avail itself of the LDA exemption because the foreign bank was part of the government, making the foreign government the principal beneficiary of the law firm's efforts. As the DOJ noted, the LDA exemption does not apply where, as here, a foreign government is the principal beneficiary of an agent's activities. *See* 18 C.F.R. § 5.307.

While the DOJ's advisory opinions shed some light on its application and interpretation of the FARA statute and, in particular, its exemptions to FARA registration, they also reinforce the heavily fact-specific nature of FARA registration obligation determinations. Indeed, one small change in a fact pattern can give rise to a completely different conclusion as to whether registration is required under FARA. Given that considerable gray areas exist, we would recommend seeking counsel for specific advice on FARA registration obligations and exemptions. ■

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FEC Holds Two-Day Hearing on Internet Disclaimers; Rulemaking Faces Uncertain Future

By Jan Witold Baran and Andrew G. Woodson

As **previously reported** in *Election Law News*, late last month the Federal Election Commission (FEC) convened its first Internet-focused rulemaking hearing in over a decade, with Commissioners receiving comments on two competing proposals for altering the disclaimer rules for Internet communications. But after two days of public discussion, it is uncertain whether the Commission is any closer to reaching a consensus path forward or when any new rules will be implemented.

By way of background, the Commission announced in mid-March that it intended to open a rulemaking on the disclaimer requirements applicable to many video, audio, graphic, and text-based political advertisements disseminated through the Internet, cell phones, and other digital devices. The rulemaking reportedly generated close to 160,000 written comments from citizens, interest groups, and political actors, which argued both for and against the proposals pushed by Democratic Vice Chair Ellen Weintraub and the FEC's Republicans, respectively.

At a public hearing on June 27-28, a diverse array of organizations – including the Institute for Free Speech, Common

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Cause, the Brennan Center for Justice, and the Republican National Committee – engaged in a dialogue with Commissioners about the various proposals and their thoughts on the regulation of Internet communications generally. While Commissioners generally agreed on the importance of creating an "objective" standard that made compliance straightforward, there was no unanimity among the Commissioners on the best way to achieve that result. And particularly given that the Commission is currently operating with the bare minimum number of commissioners necessary to conduct business, unanimity will be necessary to bridge the gap between the competing Republican and Democratic proposals, as well as other ideas aired at the hearing.

As to timing, Commissioner Weintraub stressed the importance of the voters having "information to evaluate the ads that they are seeing" in advance of the 2018 elections, particularly given allegations of unlawful online electioneering by foreign powers in 2016. But the FEC's current Chair, Republican Caroline Hunter, reportedly expressed some skepticism with attempts to change the rules this year, underscoring that it would be unfair to change the rules months or even just a few weeks before the November election.

At bottom, while many observers viewed the discussion at the hearing as productive, it is clear that much more work will have to be done behind the scenes before any new regulations will emerge. ■

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Kansas Regulates Procurement Lobbying as of July 1

By Carol A. Laham and Louisa Brooks

Kansas recently enacted significant amendments to its lobbying law, expanding the scope of activities covered under the definition of "lobbying." Most notably, the lobbying law now covers communications to promote or oppose "any executive administrative matter," a term that broadly includes the following:

> "any rule and regulation, utility ratemaking decision, any agreement, contract, bid or bid process or any procurement decision, including, but not limited to, any financial services agreement, software licensing, servicing or procurement agreement, any lease, grant, award, loan, bond issue, certificate, license, permit, administrative order or any other matter that is within the official jurisdiction or cognizance of the executive agency."

Kan. Stat. § 46-225(h). Procurement lobbying communications with the state's judicial agencies are similarly covered under the amended law.

The new lobbying definition encompasses communications related to most types of government contracting activity; however, there are several exceptions, including for factual or technical communications and post-award negotiations. Communications regarding low dollar value contracts ($5,000 or less) are also excluded from the scope of the amended law.

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Maryland Enacts Broad New Disclaimer and Recordkeeping Requirements for Online "Campaign Material"

By Caleb P. Burns and Kenneth Daines

On May 26, 2018, Maryland enacted the Online Electioneering Transparency and Accountability Act, codifying and expanding existing broad regulatory restrictions on Internet speech and advertising in Maryland non-federal elections. Specifically, this law expands reporting and disclaimer requirements for any "campaign material" that is disseminated online, including a requirement that all such material contain a disclaimer stating the name and address of the person responsible for the campaign material, or of the treasurer of each PAC responsible for the campaign material.

Regulated "campaign material" is broadly defined to include any published, distributed, or disseminated "material that . . . relates to a candidate, a prospective candidate or the approval or rejection" of a ballot initiative question or prospective question. This wide-reaching definition further includes any "material transmitted by or appearing on the Internet or other electronic medium." Violations of this law, even if unintentional, are criminally punishable by up to a $1,000 penalty, a year in jail, or both.

This law also requires that sponsors of "qualifying paid digital communications" provide certain information to the online platform (such as Facebook or Google) where those campaign communications are placed or promoted. "Qualifying paid digital communication" is statutorily defined to mean an electronic communication that 1) is campaign material, 2) does not propose a commercial transaction, 3) is placed on an online platform for a fee, and 4) is disseminated to 500 or more individuals. The online platforms must then maintain records of all qualifying paid digital communications and make them publicly available for online inspection within 48 hours of purchase, as well as for the State Board of Elections upon request.

As reported by *The Baltimore Sun*, these new requirements are already having an impact. Google recently determined that it will no longer allow state and local election ads for Maryland to be run on its platform until it knows how the law will be interpreted. Google spokeswoman Alex Krasov explained that Google's systems "are not currently built to collect and provide the information in the time frame required by Maryland's new disclosure law."

Maryland Governor Larry Hogan allowed the law to be enacted by the General Assembly without his signature, explaining in a **letter** to the General Assembly's presiding officers that the legislation has several laudable goals he supports – such as "modernizing Maryland's election laws to recognize and regulate electronic communication on the web and requiring additional disclosure and transparency for those advertising on social media platforms." Governor Hogan added, however, that while he wouldn't veto the legislation, he also believes that it has serious constitutional problems, including its encroachment on freedom of the press and its "vague and overbroad language that could have the unintended consequence of stifling the free speech of citizens who are mobilizing on social media platforms." The law became effective on July 1, 2018. ■

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Kansas's registration thresholds remain unchanged: Any person who is appointed as the primary representative of an organization, who is employed "in considerable degree" for lobbying, or who makes expenditures of $1,000 or more in a calendar year for lobbying, must register prior to engaging in lobbying activity.

Our ***State Lobbying & Gift Law Guide*** contains the full amended definitions and other changes to Kansas law. And our team is always available to answer your questions about the law in Kansas or any other state. ■

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New Hampshire Steps Up Campaign Finance & Lobbying Enforcement

By Andrew G. Woodson and Karen E. Trainer

In a recent report to the state legislature, New Hampshire Attorney General Gordon J. MacDonald quietly announced that his office has begun ramping up enforcement of the state's campaign finance and lobbying laws. While past budgeting and other issues limited the state's prior emphasis on enforcement, federal PACs, and other organizations participating in the state's political processes should take note of this important change in the state's enforcement outlook.

According to the report, the Attorney General has created a separate division within his office specifically responsible for "investigating, enforcing, and prosecuting" violations of the state laws. This unit is now staffed by a full-time assistant attorney general and elections investigator. For the first time, these individuals have begun to systematically examine the disclosure statements filed by all candidates and political committees, including those filed during the 2018 primary and general election season. The office is also conducting random audits of financial disclosures. Following up on these developments, a recent news story notes that the Attorney General sent out letters to 73 political entities earlier this month related to alleged campaign finance reporting errors.

As part of his report, the Attorney General also detailed several enforcement metrics and other items of interest. For example, the Attorney General has received 130 complaints since September 2016, including 27 complaints already in 2018, with a quarter of those complaints involving political advertising or campaign finance violations. The report also notes that many robocall and push poll-related investigations remain open, including some involving allegations that date back to 2012. Thus, despite New Hampshire's small size, those engaging in the state should check to make sure they are in compliance with the applicable laws. ■

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Federal PACs Contributing to Missouri State and Local Committees Must Register and Report Beginning August 8, 2018 *continued from page 1*

First, the Missouri Ethics Commission recently clarified that only contributions and expenditures made on or after August 8, 2018 count toward the new $1,500 registration threshold. Federal PACs may contribute to Missouri state and local candidates and committees through the August 7, 2018 primary election without triggering registration or reporting.

Second, like a handful of other states, the Missouri Ethics Commission's new regulations require federal PACs to open and make their Missouri state and local contributions through a separate, in-state bank account that effectively operates as a "Missouri PAC." The federal PAC may transfer unlimited funds from its primary bank account to its Missouri PAC bank account to finance its Missouri state and local contributions. In addition to opening a Missouri bank account, a Missouri resident must serve as the treasurer of the Missouri PAC. The words "federal committee" also must appear in the Missouri PAC's name when it files its Statement of Organization with the Missouri Ethics Commission to identify it as being associated with a federal PAC.

Third, Missouri law requires a federal PAC expecting to cross the $1,500 registration threshold to register its "Missouri PAC" prior to making any contributions or expenditures in Missouri and no later than 60 days prior to the election for which it plans to make contributions or expenditures (i.e., September 7, 2018 for the 2018 general election). As noted above, the registration process involves opening a Missouri bank account, appointing a Missouri resident to serve as treasurer, and filing a Statement of Organization with the Missouri Ethics Commission – all of which require preparation.

Fourth, a federal PAC's associated "Missouri PAC" must comply with Missouri's extensive reporting requirements, which involve filing periodic disclosure reports and 24- and 48-hour contribution reports under certain circumstances. Fortunately, the Missouri Ethics Commission recently confirmed that a federal PAC's associated Missouri PAC only needs to report the transfers it receives from the federal PAC's primary bank account and the contributions and expenditures it makes in connection with Missouri state and local elections.

Finally, as noted above, federal PACs making aggregate contributions and expenditures in connection with Missouri state and local elections of $1,500 or less in a calendar year must file "out-of-state committee" reports after the new regulations take effect on August 8, 2018. Although out-of-state committee reporting does not involve opening a Missouri bank account or appointing a Missouri resident to serve as treasurer, it does involve filing multiple reports on the Missouri Ethics Commission's reporting forms. ■

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[1] In addition, a federal PAC is required to register and report in Missouri if the aggregate of all contributions it received from persons domiciled in Missouri exceeds 20% of all funds raised by the federal PAC in the preceding 12 months.

New/Expanded Pay-to-Play Rules in Montana and San Francisco

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Montana: Montana Gov. Steve Bullock issued an executive order last month that will require contractors doing business with the state's agencies to report certain of their political expenditures, nonprofit donations, and even trade association dues as part of the bidding process. The scope of covered transactions is so extensive that contractors will have to step up their monitoring of how their donations and dues payments are used, impose restrictions on such payments, or both.

Specifically, the order covers contractors seeking state contracts exceeding certain thresholds to report any "covered expenditures" of more than $2,500 that have been made during the previous two years by the contracting entity, its parent entities, affiliates, and subsidiaries. If a contract of 24 months or longer is awarded, the contractor also is required to file an updated report of its "covered expenditures" every 12 months.

A "covered expenditure" includes contributions to and "expenditures [] on behalf of" Montana state candidates and political party committees. The term also includes any "contribution, expenditure, or transfer" to another entity that: (1) pays for an "electioneering communication"; or (2) that itself makes a "contribution, expenditure, or transfer" to a tertiary entity that pays for an "electioneering communication."

An "electioneering communication" in Montana is a paid public communication that is distributed within 60 days before the start of voting in any election that can be received by more than 100 individuals in the relevant jurisdiction, and that refers to a state candidate in that election, a political party, or a ballot measure. The executive order does not further define the terms "contribution," "expenditure," and "transfer."

Corporate contributions to state candidates and political parties are already prohibited in Montana, and the practice of corporations paying for independent expenditures to support or oppose candidates is generally rare. Thus, the apparent intent of the executive order is to focus on reporting of payments made by prospective state contractors to entities such as advocacy groups and trade associations, which may either sponsor so-called "electioneering communications" themselves or make payments to other organizations that do.

The executive order applies to contracts resulting from solicitations and applications received beginning on October 1, and the state Department of Administration is charged with issuing additional guidance by September 1 to implement the executive order.

San Francisco: San Francisco enacted an array of amendments to its ethics and campaign finance laws at the end of May. Of particular interest to many *Election Law News* readers are the changes to the city's/county's existing pay-to-play law. (San Francisco operates under a unified city/county government.)

Under the prior law, San Francisco contractors with certain contracts exceeding a certain threshold and their affiliated individuals were prohibited from making a political contribution to any elected city/county official who has approval authority over the relevant contract or who sits on a board with approval authority over the contract. The law also covers contracts with state agencies if a San Francisco elected official sits on the agency's board. The prohibition applied from the time a contractor submitted a bid until the termination of negotiations or, in the case of a successful bidder, six months from the date the contract is approved.

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The recent amendments:

- Expanded the scope of contracts covered by the contribution ban;
- Lowered the ownership level at which a contractor's owners become subject to the ban;
- Doubled the time period after a contract is approved for when the ban continues to apply; and
- Raised the dollar threshold for covered contracts.

In addition, if a San Francisco local PAC receives contributions exceeding a certain threshold in a single election cycle from a business entity, the PAC must now specifically identify on its campaign finance reports whether the business entity has received any contract or grant from a San Francisco agency within the prior 24 months, and if so, certain information about the contract or grant. (The new reporting requirement only applies to PACs because corporate contributions to San Francisco candidates are otherwise already prohibited.)

San Francisco's new pay-to-play reporting requirement for recipients of political contributions is somewhat unusual in that these types of reporting requirements typically put the burden on the contractors to report their contributions. However, we are aware of at least one other jurisdiction that requires the recipients of contractor contributions to specifically identify such contributions on their campaign finance reports.

The amended/new San Francisco pay-to-play provisions go into effect on January 1, 2019. ■

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Prosecuting Public Corruption Post-McDonnell: The Sheldon Silver Update

By Robert L. Walker

On May 11, 2018, following a two-week jury trial in federal district court in Manhattan, former New York State Assembly Speaker Sheldon Silver was found guilty – for a second time – on multiple charges of honest services mail and wire fraud, Hobbs Act extortion, and money laundering arising from his role in two criminal schemes to misuse his official position for personal financial gain. Silver's retrial conviction – along with the ongoing (at the time of the writing of this article) retrial of former New York State Senate Majority Leader Dean Skelos and his son Adam Skelos on federal charges of bribery, extortion, wire fraud, and conspiracy – demonstrates that, even after the Supreme Court narrowed the definition of "official action" in its *McDonnell* decision in 2016, federal prosecutors retain powerful tools to charge and combat public corruption.

Sheldon Silver was first found guilty by a jury on honest services fraud, extortion, and money laundering charges in November 2015 and was subsequently sentenced to 12 years in prison. In charging the jury at this first trial on the meaning of "official acts" – in exchange for the performance of which, as Speaker and member of the Assembly, Silver was

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alleged to have received roughly $4 million in referral fees from third-party law firms – the district court trial judge adopted a broad definition of the term that essentially included *any* action taken by a government official under color of official authority. Although this definition was consistent with the Second Circuit's precedent at the time the jury charge was given in 2015, in June 2016 the Supreme Court – in its landmark *McDonnell* decision – adopted a much narrower definition of "official act" in connection with bribery and other "quid pro quo" public corruption offenses, including honest services fraud and Hobbs Act extortion. In his appeal of his initial conviction, Silver argued that the trial court's charging language was inconsistent with the by-then controlling *McDonnell* case. In vacating the conviction and remanding the case to the district court, the Second Circuit Court of Appeals agreed with Silver.

At the time of the remand, Acting U.S. Attorney Joon H. Kim had said: "[W]e look forward to presenting to another jury the evidence of decades-long corruption by one of the most powerful politicians in New York State history. Although it will be delayed, we do not expect justice to be denied." In its remand decision, the Court of Appeals did *not* find that the evidence presented at the first trial was insufficient for a properly instructed jury to convict Silver. And the evidence presented by the government at the retrial – in accelerated fashion: the first trial took a month, the retrial less than two weeks – was essentially the same as the evidence presented at the first trial. What changed was the jury charge on the definition of "official act," delivered by trial Judge Valerie E. Caproni this time to conform with the *McDonnell* decision, under which "official act" encompasses only "a decision or action on a question, matter, cause, suit proceeding or controversy" involving a *formal* exercise of government power. As required by *McDonnell*, the jury charge at the Silver retrial did not allow room for a jury to improperly consider that "official act" might include such informal actions by a public official as merely setting up meetings, calling other officials, or hosting an event.

As this article was being written, the Skelos jury had begun its deliberations. Dean Skelos had not testified at his initial trial, but he did take the stand in his own defense at his retrial. This unusual decision is seen by some experts as an indication that, without at least some testimonial rebuttal, the government's evidence that Skelos "sold" official acts is powerful enough to obtain a conviction – regardless of how circumscribed the definition of "official act" may be post-*McDonnell*. ■

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Court Upholds FEC Treatment of LLC Contributions

FEC divided over standard for regulating "true source" of corporate LLC funds

By Lee E. Goodman

On June 7, a federal court upheld the Federal Election Commission's (FEC or Commission) dismissal of three complaints that had alleged closely held corporate LLCs and their owners violated the Federal Election Campaign Act's prohibition against making contributions in the "name of another" or as a "straw donor." At issue were contributions made by three closely held corporate LLCs to super PACs. The contributions were given in the names of the LLCs, and the super PACs publicly reported the contributors as the LLCs. Complaints were filed alleging that the true source of the contributions was actually the individual who owned and controlled each LLC, and the use of the LLCs to make super PAC contributions constituted an unlawful concealment of the individual.

In February 2016, the Commission voted, 3-3, on motions to find reason to believe a violation occurred in each case and to open investigations. Unable to obtain the necessary four votes to proceed with the enforcement process, the Commission then voted unanimously to close the files. The three Commissioners who voted against proceeding to enforcement issued a Statement of Reasons. Because the Commission did not find reason to believe, the Statement of the three Commissioners who voted against finding reason to believe "necessarily states the agency's reasons for acting as it did," because it explains the reasoning of the Commission's "controlling group."

Explaining the Commission's action, the Statement of Reasons explained that the Commission declined to find reason to believe a violation occurred as "an exercise of the Commission's prosecutorial discretion" because the Supreme Court's decision in *Citizens United v. FEC* effected a sea change in campaign finance law, overturning the ban on corporate political speech and making it necessary to examine as "an issue of first impression" how the straw donor prohibition would apply to corporate contributions to super PACs, especially closely held corporate LLCs. The Commission also considered that (1) the Commission had previously applied the straw donor ban "almost exclusively" in situations involving "excessive and/or prohibited contributions," while the matters under review involved donations to super PACs not subject to such limitations, (2) "Commission precedent has treated funds deposited into a corporate account and then used for contributions as the funds of that corporation," (3) the Commission previously had rejected an attribution rule for corporate LLC contributions that would deem the individual owners of corporate LLCs as the makers of those LLCs' contributions, and (4) "the speech rights recognized in *Citizens United* would be hollow if closely held corporations and corporate LLCs were presumed to be straw donors – thus, triggering investigations and potential punishment – each time they made contributions."

The Commission declined to proceed with investigations of the complaints, concluding that "because past Commission decisions ... may be confusing in light of recent legal developments, principles of due process, fair notice, and First Amendment clarity counsel against applying a standard to persons and entities that were not on notice of the governing norm."

However, far from endorsing the misuse of corporate LLCs to conceal the identity of

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actual contributors, the Commissioners used the case of first impression to announce a new standard for evaluating straw donor allegations in the future. Under the new standard, the three Commissioners stated that the Commission should focus on "whether the funds used to make a contribution were intentionally funneled through a closely held corporation or corporate LLC for the purpose of making a contribution that evades the Act's reporting requirements, making the individual ... the true source."

The U.S. District Court for the District of Columbia ruled that the FEC acted lawfully and within its discretion in dismissing the complaints. The court acknowledged that the issues before the Commission implicated "intertwined concerns of fair notice and due process in a post-*Citizens United* context, confusing Commission precedent, and the obligation to protect First Amendment speech," and moreover that "whether, or under what circumstances, a closely held corporation or corporate LLC may be considered a straw donor" was an issue of first impression for the Commission. After the *Citizens United* decision, "because corporations could now legally be donors, the Commission had to consider for the first time how and when a corporation might still break the law as a straw donor." The court further observed that the FEC's regulations had not been updated or adapted to contributions by corporate LLCs. Under pre-*Citizens United* interpretations of the Act, the Commission routinely had concluded that the funds of closely held corporations were – *corporate funds*. Thus, the court recognized that the law was vague and "corporate LLCs were left with little guidance in determining when they might be considered straw donors." According to the court, the consequent "confusion supplies a rational basis for non-enforcement" of regulations restricting First Amendment rights by the Commission in the exercise of its inherent prosecutorial discretion.

Although the plaintiffs also requested a declaration that the three Commissioners' proposed new standard for evaluating corporate LLC contributions in the future – purposeful funneling of funds through an LLC to evade disclosure – the court ruled that challenge was not ripe.

A copy of the court's memorandum opinion is available **here**. An appeal of the federal district court's opinion may be taken by the complainants, two liberal organizations that support greater regulation of campaign finance. Accordingly, the issue remains open to further judicial clarification.

Going forward, corporate LLCs that make contributions to super PACs, and super PACs that receive contributions from LLCs, should carefully assess who is the "true source" of the funds contributed by an LLC. Three Commissioners believe the funds are the LLC's, and the LLC is the contributor, so long as an individual does not pass funds through the entity for the specific purpose of making political contributions and evading disclosure. Other Commissioners have taken a stricter view based on the view that all LLC contributions necessarily are the funds of the individuals who own and control the LLC and should be reported as contributions from those individuals. LLCs and super PACs should review these contributions carefully before reporting them. ■

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Events & Speeches

Non-Profits and Associations Forum: It's Campaign Season – What Can Non-Profits Do?

Caleb P. Burns, Speaker
Thomas W. Antonucci, Speaker

Assocation of Corporate Counsel National Capital Region

July 17, 2018 | Washington, DC

Workshop – Prior Approval: Compliance and Best Practices for Association PACs

Michael E. Toner, Speaker

Public Affairs Council

July 17, 2018 | Washington, DC

Basics of the Federal Election Campaign Act

Jan Witold Baran, Speaker

Practising Law Institute

August 1, 2018 | Audio Briefing

Representing Clients Before the Federal Election Commission

Eric Wang, Panelist

RNLA Annual Election Law Seminar

August 3, 2018 | St. Louis, MO

Corporate Political Activities 2018: Complying with Campaign Finance, Lobbying and Ethics Laws

Jan Witold Baran, Co-Chair
Caleb P. Burns, Speaker

Practising Law Institute

September 6-7, 2018 | Washington, DC
October 4-5, 2018 | San Francisco, CA

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Campaign Finance 101

Lee E. Goodman, Speaker

MLRC Media Law Conference 2018

September 27, 2018 | Reston, VA

Pay to Play Review: Exploring Enforcement & Compliance Challenges from Both Sides

D. Mark Renaud, Moderator

2018 Council on Governmental Ethics Laws (COGEL) Conference

December 9, 2018 | Philadelphia, PA

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