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ELECTION LAW *NEWS*

Developments in All Aspects of Political Law | September 2019

IRS Issues Proposed Regulations Eliminating Donor Disclosure Requirement for Certain Tax-Exempt Organizations

By Thomas W. Antonucci and Carol A. Laham

The Internal Revenue Service (IRS) recently announced that it was proposing regulations to eliminate donor reporting requirements for certain tax-exempt organizations. This is the latest salvo in the battle over whether 501(c)(4) organizations (referred to by some as "dark money" organizations) must disclose the identity of their donors.

As *Election Law News* reported back in July 2018, the IRS issued a revenue procedure that purported to eliminate the requirement that 501(c) organizations (other than 501(c)(3) organizations) report the names and addresses of their donors on Schedule B of Form 990. That decision was challenged in court, and a few weeks ago, a federal judge in Montana set aside the IRS's action on the basis that the IRS did not follow the notice-

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Ninth Circuit Upholds Montana Electioneering Communications Law

By D. Mark Renaud and Eric Wang

A U.S. Court of Appeals for the Ninth Circuit panel recently upheld Montana's electioneering communications law against a constitutional challenge brought by the National Association for Gun Rights (NAGR). NAGR had argued Montana's law was overly broad by regulating issue speech relating to state candidates.

Similar to federal law and the laws in many (but not all) states, Montana law regulates certain forms of public communications that refer to a candidate within a pre-election time window, and that are targeted to the

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candidate's electorate, as "electioneering communications." An organization that spends more than $250 on a single electioneering communication that refers to a state candidate or ballot measure is required to register and report as a "political committee" (often known as a "PAC") in Montana.

For organizations that only engage in independent activities and do not make monetary or in-kind contributions to Montana state candidates, political parties, or PACs, Montana distinguishes between "incidental committees" and "independent committees." Incidental committees are organizations that occasionally engage in regulated campaign finance activities, and are subject to less extensive reporting requirements. Importantly, for organizations concerned about their donors' privacy, incidental committees are not required to indiscriminately report their donors in Montana.

Independent committees are organizations that have "the primary purpose" of receiving political contributions or making political expenditures in Montana. Such organizations are subject to more extensive reporting requirements, including public identification of most of their donors.

NAGR intended to mail voter guides to Montana voters identifying which state elected officials "have supported the rights of citizens to keep and bear arms and engage in lawful self-defense, as well as those who have not done so." NAGR did not purport that its mailers would urge voters to vote for or against any particular elected officials or candidates. As a Section 501(c)(4) advocacy group under the federal tax code, political campaign activity also may not constitute NAGR's primary purpose.

NAGR maintained that Montana's electioneering communications law was unconstitutionally overbroad on its face and as applied to NAGR. NAGR argued that only communications that expressly advocate for the election or defeat of candidates, or that are the "functional equivalent" of express advocacy, may be regulated.

The Ninth Circuit panel applied the "exacting scrutiny" standard of judicial review, which asks whether a law is "substantially related to a sufficiently important governmental interest." Although NAGR's voter guides would not expressly advocate for or against candidates, the panel characterized them as "subtle and indirect communications likely to influence voters' votes." The panel therefore identified the governmental interest in Montana's electioneering communications law as "ensuring that voters have access to information about the speakers competing for their attention and attempting to win their support" and "promoting transparency and discouraging circumvention of [Montana's more general] electioneering laws."

As for whether Montana's law was "substantially related" to this governmental interest, the court reasoned that the reporting requirements were "commensurate" insofar as they did not require ongoing reports to be filed by incidental committees or public identification of a group's donors. This is in contrast to some other states' laws that have been invalidated previously that required ongoing reporting by groups that only occasionally engaged in regulated political activity, as *Election Law News* has reported on in the past.

The Ninth Circuit panel did side with the NAGR in striking down one narrow aspect of Montana's law. Montana requires PACs to have a treasurer who is a Montana registered voter. The court held that states may have a valid interest in requiring PACs to have in-state individuals "who can be held accountable for violations of electioneering laws" and for serving subpoenas in legal proceedings. However, the court held that this interest could be met just as effectively by requiring a treasurer who is a Montana resident,

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but who is not necessarily a registered voter in Montana.

Several other states similarly require PACs operating in the state to have treasurers who are state residents or to maintain bank accounts at financial institutions located in the state or that are registered to do business in the state.

Wiley Rein's Election Law Practice advises clients on the electioneering communications reporting requirements in all states that have such laws, as well as on other campaign finance laws. ■

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and-comment requirements of the Administrative Procedure Act.

In response, the IRS has issued proposed regulations, which would, among other things, "clarify that the need to provide the names and addresses of substantial contributors will generally apply only to tax-exempt organizations described in Section 501(c)(3) [and section 527 political organizations]." In the background section, the IRS emphasized that it "does not need the names and addresses of [donors] in order to carry out the internal revenue laws" and that the proposed regulations "will have no effect on information currently available to the public." The IRS explained that requiring such donor information (i) increases compliance costs for organizations; (ii) consumes IRS resources in connection with mandated redactions; (iii) has resulted in inadvertent public disclosures; and (iv) is unnecessary because the IRS can obtain the information from organizations during audit examinations.

Exempt organizations will continue to be required to report the *amounts* of contributions on Schedule B, and must maintain a record of the names and addresses of substantial contributors. The regulations, if adopted as final, would go into effect for all tax returns filed after September 6, 2019.

The comment period is open for 90 days after publication – i.e., until December 9, 2019.

If you have any questions about the proposed regulations or your organization's Form 990 reporting requirements, or would like assistance in submitting comments to the IRS, please contact:

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Ninth Circuit Strikes Down State Ban on Political Robocalls

By: Scott D. Delacourt, Kevin G. Rupy, Megan L. Brown, and Kathleen E. Scott

On September 10, the U.S. Court of Appeals for the Ninth Circuit issued an **opinion** in *Victory Processing LLC et al. v. Tim Fox* (18-35163), concluding that a Montana law banning political robocalls "strikes at the heart of the First Amendment" and disproportionately impacted candidates with fewer resources. The court overturned a 2018 district court decision that found the law constitutional. [1]

Addressing robocalls has been a high-priority issue for federal and state lawmakers and regulators in recent years. This is no surprise, as such calls have consistently topped the list of consumer complaints at both the Federal Trade Commission (FTC) and the Federal Communications Commission (FCC) for several years running. The recent decision out of the Ninth Circuit suggests that courts will continue to closely scrutinize these efforts that seek to curtail the delivery of robocalls, particularly when those efforts focus on the content of particular calls.

Below is a summary of the Ninth Circuit's decision, as well as a reminder about how federal law under the Telephone Consumer Protection Act (TCPA) deals with political robocalls.

Ninth Circuit Decision

The court's opinion addressed whether **Montana Code section 45-8-216(1)(e),** which restricts automated telephone calls promoting a political campaign or any use related to a political campaign, violated the First Amendment. The Appellant in the case, Victory Processing, LLC, utilized automated telephone calls (*i.e.*, robocalls) to communicate political messages and collect public opinion data for both its clients and its own use. Although it desired to deliver such robocalls in Montana, Victory Processing refrained from doing so on advice of counsel since its activities would violate the 1991 state law.

Given the First Amendment implications, the court applied the traditional strict scrutiny standard since the Montana statute at issue was "plainly content-based" (*i.e.*, political robocalls). [2] Under the strict scrutiny standard, content-based laws are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests. [3] Although the court concluded that Montana had demonstrated a compelling state interest in regulating robocalls, it found that the statute was not narrowly tailored to further the state's interest in protecting privacy.

The court concluded that the statute failed the strict scrutiny standard since it was both underinclusive and overinclusive. In reaching its conclusion, the court cited to a recent decision by the U.S. Court of Appeals for the Fourth Circuit, which overturned a similar state law that prohibited all consumer and political robocalls. [4] Taking a similar approach in its review, the Ninth Circuit reasoned that "by singling out only five topics of robocalling for regulation—including messages related to political campaigns—the [Montana statute] leaves consumers open to an 'unlimited proliferation' of robocalls on other topics."

The court also found that the statute was overinclusive because robocalls related to political campaigns had not been shown to pose a greater threat to individual privacy. It emphasized recent research suggesting that "robocall scams pose one of the biggest threats to consumers, constituting 40% of all robocalls." [5] In contrast, the court concluded that political robocalls had not been shown to pose a threat to individual privacy. The court ultimately concluded that by regulating categories of robocalling that have not been shown to pose a threat, the statute was "overinclusive in its efforts to further Montana's compelling interest in protecting privacy."

In sum, the decision out of the Ninth Circuit suggests that courts will closely scrutinize

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government efforts to curtail robocalls, particularly when they focus on the content of particular calls. While the Fourth Circuit and Ninth Circuit have recently overturned such laws, a 2017 decision out of the U. S. Court of Appeals for the Seventh Circuit upheld an Indiana anti-robocall law. [6] In that case, however, the court ruled Indiana's statute did not discriminate by content, and instead regulated who may be called, as opposed to the content of the message.

Political Robocalls Under the TCPA

The TCPA treats political robocalls—that is political calls made using an autodialer or with an artificial or prerecorded voice—differently depending on what type of number is dialed. If these calls are placed to a wireless number, then they are generally prohibited unless the caller first obtains prior express consent. However, no prior express consent is required if these calls are placed to landlines. These same rules apply to political robo-texts, as well. Further, there are other requirements imposed on these calls under the TCPA, including that a caller placing a prerecorded call must identify itself at the beginning of each call.

The TCPA rules are complex and nuanced, and the stakes of a misstep are high. For more detailed information about how political calls and texts are handled under the TCPA, see our earlier post **here**, or reach out with specific questions. ■

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[1] *Victory Processing, LLC v. Fox*, 307 F. Supp. 3d 1109, 1121 (D. Mont. 2018).

[2] *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2228 (2015).

[3] *Id.* at 2226.

[4] *Cahaly v. Larosa*, 796 F.3d 399 (4th Cir. 2015).

[5] *See* Kate Fazzini, *Robocalls Jumped 60 Percent in the U.S. Last Year and Scammers Are Finding More Ways to Make Money*, CNBC, Jan. 4, 2019, **https://www.cnbc.com/2019/01/02/as-robo-calling-ramps-up-consumers-increasingly-wonder-why-carriers-cant-stop-scammers-from-spoofing-their-phone-numbers.html** (last visited September 11, 2019).

[6] *Patriotic Veterans, Inc. v. Zoeller*, 845 F. 3d 303 (2017).

Do You Take Money from the Government? Federal Grant Risks and How to Avoid Them

By Brian Walsh and Sarah B. Hansen

Entities that do business with the federal government have long known the risks of False Claims Act (FCA) allegations and suspension and debarment. But federal grantees should know that operating programs with federal grant funds comes with the same pitfalls.

Federal grant recipients are facing increased scrutiny on multiple fronts, increasing compliance and enforcement risks for grantors and grantees. On the regulatory front, the implementation of the Super Circular requirements has imposed more "contract-like" requirements on grantees over the past few years. On the administrative front, agencies are facing increased political and fiscal pressure to manage grants and control costs. And, on the responsibility front, the efforts spurred by the U.S. Government Accountability Office's recommendation in 2011 for agencies to increase suspension and debarment actions have spread beyond traditional government contractors to include federal grantees as well.

Along the same lines, the U.S. Department of Justice and FCA whistleblowers have increasingly targeted grant recipients with FCA allegations related to performance of grant programs. For example, in November 2015, a former Duke University employee filed an FCA complaint against the university alleging that the university had made false representations in over 60 grant applications relating to over $200 million in grant awards. In March 2019, Duke agreed to pay $112.5 million to settle the case, with nearly $34 million being awarded to the former employee who first brought the case.

In this environment, federal grantees face serious pitfalls if they do not adequately monitor representations in grant applications and their use of grant funds. Suspension or debarment by one agency can often apply government-wide. Beyond suspension and debarment, a company or nonprofit can face massive liability for violating the FCA in performing under a federal grant – sometimes as much as triple the entire grant value, along with other substantial penalties. FCA allegations also bring a host of other potential harms to a company's business and reputation, including negative publicity; placement on ''watch status,'' which reduces agency flexibility to administer an award; and special terms and conditions on future government contracts and grants.

To avoid these pitfalls, federal grantees should ensure they have all required policies and procedures in place before an issue arises. Further, federal grantees should review their internal controls to ensure sufficient oversight over grant applications and accounting of grant funds. Grantees should bear in mind their obligation to monitor subcontractors' use of grant funds, as their misuse can create liability for the prime grantee. Grantees should also be aware of specialized rules governing grants. For example, many agencies, such as the U.S. Department of Health and Human Services, have issued supplements to the Super Circular that contain additional rules on the award and administration of grants. Wiley Rein's Government Contracts Practice is available to assist your organization with its federal contract and grant compliance needs. ■

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For Federal Contractors with Lobbying and Political Costs, DCAA Offers Some Relief from Recent 'Expressly Unallowable' Cost Decisions, But Risks Remain

By George E. Petel

Following several decisions from the Armed Services Board of Contract Appeals (ASBCA) on "expressly unallowable costs" from recent years – including disputes over some costs associated with lobbying and political activities – the Defense Contract Audit Agency (DCAA) has updated its "expressly unallowable costs" guidance. *See* DCAA MRD 19-PAC-002(R) (May 14, 2019). The guidance was last updated in 2015. The inclusion of expressly unallowable costs in submissions to the government can result in penalties up to two times the amount of the disallowed cost. Given the Board's decisions, and DCAA's role in reviewing contractor cost submissions generally in the first instance, this updated guidance should provide increased predictability for U.S. federal contractors when identifying allowable and unallowable costs before submission to the government for reimbursement. But questions still remain, particularly for arbitrary lines between certain types of compensation for lobbying and political activity costs.

FAR Cost Principles and Lobbying and Political Activities

U.S. federal government contractors must adhere to many regulations, starting with the Federal Acquisition Regulation (FAR) that include cost principles in FAR Part 31. These cost principles, among other things, describe the types of costs that are "expressly unallowable" as charges to the government under cost-type contracts. The FAR, as well as the Cost Accounting Principle 405, define an "expressly unallowable cost" as "a particular item or type of cost which, under the express provisions of an applicable law, regulation, or contract, is specifically named and stated to be unallowable."

FAR 31.206, Accounting for Unallowable Costs, prescribes the appropriate treatment of these costs. Contractors must identify and exclude unallowable costs from all invoices, bills, or proposals submitted under a U.S. government contact, such as in annual incurred cost submissions under FAR 52.242-3. FAR 31.206(a) further provides that "[a] directly associated cost is any cost that is generated solely as a result of incurring another cost, and that would not have been incurred had the other cost not been incurred. When an unallowable cost is incurred, its directly associated costs are also unallowable." Contractors and the government often dispute whether submitted costs later found to be unallowable are "expressly unallowable," because only "expressly unallowable" costs are subject to significant monetary penalties and not merely exclusion from payment.

One of the FAR cost principles, FAR 31.205-22, Lobbying and Political Activity Costs, was at issue in recent expressly unallowable cost cases that likely precipitated DCAA's updated guidance. FAR 31.205-22(a) prohibits contractors from charging the U.S. government for these activities:

1. Attempts to influence the outcomes of any federal, state, or local election, referendum, initiative, or similar procedure, through in-kind or cash contributions, endorsements, publicity, or similar activities;
2. Establishing, administering, contributing to, or paying the expenses of a political party, campaign, political action committee, or other organization established for the purpose of influencing the outcomes of elections;
3. Any attempt to influence (i) the introduction of federal, state, or local legislation, or (ii) the enactment or modification of any pending federal, state, or local legislation

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through communication with any member or employee of the Congress or state legislature (including efforts to influence state or local officials to engage in similar lobbying activity), or with any government official or employee in connection with a decision to sign or veto enrolled legislation;

4. Any attempt to influence (i) the introduction of federal, state, or local legislation, or (ii) the enactment or modification of any pending federal, state, or local legislation by preparing, distributing or using publicity or propaganda, or by urging members of the general public or any segment thereof to contribute to or participate in any mass demonstration, march, rally, fundraising drive, lobbying campaign, or letter writing or telephone campaign;
5. Legislative liaison activities, including attendance at legislative sessions or committee hearings, gathering information regarding legislation, and analyzing the effect of legislation, when such activities are carried on in support of or in knowing preparation for an effort to engage in unallowable activities; or
6. Costs incurred in attempting to improperly influence (see 3.401), either directly or indirectly, an employee or officer of the Executive branch of the federal government to give consideration to or act regarding a regulatory or contract matter.

There are exceptions further explained in the FAR, but generally a contractor must exclude costs for attempts to influence elections, legislation, or referendums; legislative liaison activities when in support of an effort to engage in unallowable activities; attempts to improperly influence congressional or federal employees to give consideration to or act regarding a regulatory or contract matter; and contributions to political parties, political action committees (PACs), or similar organizations.

ASBCA Expressly Unallowable Lobbying Cost Decisions

The government bears the burden of proving that a cost is unallowable, and the ASBCA requires the government to "show that it was unreasonable under all the circumstances for a person in the contractor's position to conclude that the costs were allowable." In *Raytheon Co.*, ASBCA No. 57743, 17-1 B.C.A. ¶ 36,724 (Apr. 17, 2017), the contractor disputed several cost issues that arose from its annual incurred cost submissions, and ultimately prevailed on many of those issues during negotiations. But the Board found against Raytheon on a remaining dispute of whether salaries related to unallowable political activity costs were "expressly unallowable" and thus subject to penalties.

After a DCAA audit and subsequent negotiations with its Administrative Contracting Officer (ACO), the contractor filed an appeal at the Board on the remaining disputes. Among the costs remaining at issue for appeal were salaries and other employment expenses for employees who at times engaged in lobbying activity. The Board upheld DCAA's determination that such costs were "expressly unallowable costs" and thus subject to penalties.

The lobbying cost principle, FAR 31.205-22, does not specifically mention salaries or compensation. The contractor had thus argued that even if the costs were unallowable, FAR 31.201-6(e)(2)[1] provides that the salaries for staff participating in unallowable costs – such as lobbying – are "directly associated costs," which are separately defined in the FAR from "expressly unallowable costs." Indeed, previously, the Board had held that bonus and incentive compensation (BAIC) for employees of the same contractor who were engaged in lobbying activities were not "expressly unallowable," even if they were unallowable as directly associated costs. *Raytheon Co.*, ASBCA No. 57576, 15-1 BCA ¶ 36,043 (June 26, 2015). The Board had stated that "[n]either 'BAIC' cost

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nor 'compensation' cost are specifically named and stated as unallowable under [FAR 31.205-22], nor are such costs identified as unallowable in any direct or unmistakable terms." Yet the Board in the later case held that the salary costs were expressly unallowable, stating that "[M]aterial salary expenses of employees who engage in activities that generate unallowable lobbying costs are named and stated to be unallowable under the combination of FAR 31.201-6(a) and FAR 31.201-6(e)(2)."

By going beyond the plain language of the lobbying cost principle and relying on these other sections of FAR Part 31, as well as its "common sense" that salaries were obviously an "express" part of unallowable lobbying costs, the Board appeared to expand the range of costs that could be subject to penalties for inclusion in the submission.

DCAA Guidance

DCAA has provided its auditors guidance on determining whether FAR and Defense Federal Acquisition Regulation Supplement (DFARS) cost principles amount to "expressly unallowable costs" through Memorandums for Regional Directors (MRD). Contractors also use these MRDs to anticipate how auditors will treat various costs, and to structure their accounting practices accordingly. The MRDs specifically provide lists of FAR and DFARS cost principles that DCAA presumes to be "expressly unallowable," although with the caveat that the list is not "comprehensive." DCAA has sought before to expand the scope of what costs are "expressly unallowable," even where the cost principles are not so explicit.

For example, despite stating that the list contains those "expressly unallowable costs," DCAA's 2014 MRD included multiple FAR and DFARS cost principles that did not include costs "specifically named or stated to be unallowable," such as certain lease costs under FAR 32.201-11(h)(1) (stating limits on an "allowable" cost rather than referring to a cost as "unallowable"). In 2015, DCAA issued another MRD that it claimed "enhanced" the 2014 MRD, and which further emphasized that "[t]he mere fact that the cost principle does not include the word unallowable or phrase not allowable does not mean that costs questioned based on that cost principle are not expressly unallowable." Contrary to the FAR definition of "expressly unallowable costs," but consistent with the Board's decisions that also expanded the scope beyond a plain reading of the term "express," contractors were left without clear direction.

The May 2019 MRD, which "supersedes" the prior guidance, addresses the most glaring discrepancies between the earlier guidance and case law and the language of the FAR. The new guidance deletes the explanation from the 2015 MRD for how DCAA auditors should determine whether an unallowable cost may still be "expressly unallowable" even if it is not expressly stated in the FAR. The 2019 MRD also deletes all references to *Emerson Electric Co.*, ASBCA No. 30090, 87-1 BCA ¶19,478 (Nov. 19, 1986), which was cited as a basis for finding implicit "expressly unallowable costs" in previous MRDs. In *Emerson*, the Board held that "expressly" should be defined "in the 'broad dictionary sense,'" meaning that where the "only logical interpretation" is that costs are unallowable, they are expressly unallowable. DCAA's previous MRDs referred extensively to *Emerson* to justify listing many cost principles as "expressly unallowable." These 2019 MRD changes in approach thus sharply contrast the previous MRDs.

The 2019 MRD also cut DCAA's list of presumptively expressly unallowable cost principles from 110 to 91. But the updated guidance leaves FAR 31.205-22 on the list in its entirety. The MRD, however, revised the "notes" regarding certain cost principles, including FAR 31.205-22. For example, the new MRD notes

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incorporate the two *Raytheon* lobbying cost decisions from the Board discussed above. The notes reflect these contradictory decisions by drawing the same distinction as the Board for when costs are expressly unallowable: bonus and incentive compensation costs versus salaries.

Conclusion

Wiley Rein has extensive experience in assisting government contractors throughout the entire contracting and compliance life cycle, including DCAA audits and cost accounting litigation at the Boards of Contract Appeals. The updated MRD should come as a welcome relief to contractors which will have more certainty on how DCAA intends to treat "expressly unallowable costs." Yet questions remain on how the new guidance will be implemented in practice by DCAA auditors on the ground, and whether any further updates will be made to address the inconsistencies that remain between the guidance and the FAR language. That DCAA issued this new MRD on "expressly unallowable costs" may also signal that the agency intends to focus on its updated list of expressly unallowable cost principles to more vigorously pursue penalties against contractors that submit such costs to the government. ■

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Endnotes

[1]FAR 31.201-6(e)(2): "Salary expenses of employees who participate in activities that generate unallowable costs shall be treated as directly associated costs to the extent of the time spent on the proscribed activity, provided the costs are material in accordance with subparagraph (e)(1) above (except when such salary expenses are, themselves, unallowable)."

Will DOJ Defend FEC?

By Lee E. Goodman and Michael E. Toner

A **previous article** of ELN explained the possibility that the Barr Justice Department might defend the Federal Election Commission's (FEC) enforcement dismissal actions in the event such an action were challenged in court and one of four commissioners voted against a defense.

The FEC requires a minimum of four commissioners to meet and make enforcement decisions. With the departure of a commissioner on August 31, the FEC, which was down to four commissioners for the last 18 months, lost a quorum. Without a quorum, the FEC cannot vote to authorize its General Counsel to defend new lawsuits challenging its enforcement actions taken shortly before losing a quorum. Likewise, the FEC cannot vote to authorize its General Counsel to defend "delay" lawsuits challenging the FEC's inaction on pending complaints. Some complainants might take advantage of the absence of a quorum to sue the agency over "delay" and seek as relief an order authorizing them to stand in the agency's shoes to bring enforcement actions, similar to private attorney general actions.

The Barr Justice Department might decide to defend the agency while it has no quorum and cannot defend itself against new lawsuits. Even if there is ambiguity in the statutes providing for the agency to defend itself and the DOJ's own plenary authority to represent agencies, a federal court is unlikely to resolve such an ambiguity in a way that leaves an agency unable to vote to defend itself without any counsel at all.

One lawsuit pending that might serve as a test case for the Barr Justice Department is *Campaign Legal Center v. FEC*, a legal challenge to the FEC's dismissal of the CLC's complaint against Correct the Record and Hillary for America. That case is pending in the U.S. District Court for the District of Columbia. ■

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FEC Issues Audit of Trade Association PAC

By Caleb P. Burns

Earlier this month, the Audit Division of the Federal Election Commission (FEC) issued its final audit report of the Ambulatory Surgery Center Association PAC (ASCAPAC). The audit report covered receipts, records, and the disclosure of ASCAPAC contributions made between January 2015 and December 2016 and found five major points of error:

- Misstatement of financial activity by understating receipts;
- Receipt of contributions from prohibited sources;
- Inadequate documentation of receipts and recordkeeping;
- Failure to directly disclose contributions; and
- Untimely deposit of contributions.

ASCAPAC accepted contributions from Limited Liability Companies (LLCs), Corporations, Professional Limited Liability Companies (PLLCs) and Limited Liability Partnerships (LLPs), all of which are subject to limitations and prohibitions under 52 U.S.C. § 30118. ASCAPAC responded that it applied its best efforts to determine the corporate status of its contributors and would issue refunds or eligible charitable donations in response to the $80,028 received from prohibited donors. The audit also notes that ASCAPAC did not maintain a separate bank account for contributions made from questionable donors, a requirement under 11 CFR § 103.3(b)(1).

ASCAPAC also incorrectly disclosed $193,623 of contributions, and its reports did not satisfy various legal requirements such as including the contributor's full name, date, dollar amount, and business entity. The Commission required ASCAPAC to amend its disclosure reports, which they were able to for $5,000 of contributions. According to the final audit report, ASCAPAC has yet to correctly disclose $187,623 worth of contributions.

In response to the Draft Final Audit Report, ASCAPAC stated that it has updated its policies and procedures to adhere to lawful and timely recordkeeping of receipts, created information-sharing systems, issued refunds of prohibited contributions, and amended its disclosure reports for missing information. The Commission has not yet imposed a penalty on ASCAPAC, but may initiate enforcement proceedings on a result of this audit. ■

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Lee Goodman Pens Op-Ed on Honest Ads Act

Wiley Rein partner Lee E. Goodman has penned a widely read editorial in *The Hill* titled "**'Honest' Political Ads: Watch Out Drudge, You're Next.**"

Mr. Goodman addresses the implications of the Honest Ads Act, a bill pending in Congress, for the political privacy and free speech rights of American citizens. Mr. Goodman argues that American citizens would be chilled from discussing public policy issues under the bill's provision mandating that media and tech platforms collect and publish the names and addresses of advertisers who spend as little as $500 on ads discussing public policy. "When Congress returns to business next week, it will take up … the **Honest Ads Act**, a bill severely restricting the First Amendment rights of American citizens and media companies but barely impacting foreign meddlers," Mr. Goodman writes.

Mr. Goodman concludes that the Honest Ads Act would be ineffective at preventing foreign meddling in U.S. elections, which is its stated objective. Mr. Goodman posits instead that Congress could more effectively confront foreign propaganda by amending the Foreign Agents Registration Act, a bill that regulates, but does not prohibit, the dissemination of foreign-sponsored information in the United States with appropriate disclaimers identifying the foreign sponsor.

Mr. Goodman previously wrote about the federal district court's **decision** in *The Washington Post v. McManus*, a ruling that enjoined Maryland's analog to the Honest Ads Act, because the law would force media companies to publish information about their advertisers they desire not to publish. Maryland has **appealed** that decision to the U.S. Court of Appeals for the Fourth Circuit.

The First Amendment Right to Political Privacy, Chapter 6 - Campaign Finance and Other Very Public Exceptions to Privacy

By Lee Goodman

Introduction – The Right and Its Exceptions

Previous chapters have traced the origin and development since the 1940s of the First Amendment right to privacy in the political sphere. That right manifested as the right to associate, speak, and access information for political purposes free from government compelled exposure.

Over the same period of time, the U.S. Supreme Court was grappling with discrete realms of government-compelled exposure and carving exceptions to the constitutional protection. The exceptions were drawn narrowly upon the Court's findings that "substantial" government objectives outweighed the constitutional right under one form or another of constitutional scrutiny. The most prominent exceptions were compelled disclosure of financial contributions to direct lobbying of members of Congress and contributions to candidates' campaigns. This chapter summarizes the jurisprudence of exceptions to the right of political privacy.

The Lobbyist Disclosure Exception (1950s)

Beginning with the Buchanan Committee's[1] inquisition of Edward Rumely's Committee for Constitutional Government (CCG) in 1951, the Supreme Court recognized that Congress' authority to demand disclosure of those who provide funding to support "lobbying" activities runs into First Amendment protections. To avoid the conflict, the Court interpreted the term "lobbying activities" narrowly to authorize Congress to require disclosure of CCG funders only in connection with CCG's "representations made directly to the Congress, its members, or its committees." [2] But Congress would run into the "prohibition of the First Amendment" if it attempted to exercise "power to inquire into all efforts of private individuals to influence public opinion through books and periodicals, however remote the radiation of influence which they may exert upon the ultimate legislative process."[3]

A year later, the Court was presented with a direct First Amendment challenge to lobbyist registration and funder disclosure mandated by the Federal Regulation of Lobbying Act. In *United States v. Harriss*,[4] the Court restricted the realm of disclosure, citing Rumely, to direct communications with members of Congress that were funded with that "principal purpose" as the object of the funding.[5]

In fact, the Court performed so much narrowing surgery to the scope of "lobbying" subject to mandated disclosure that Justices Douglas and Black, in loyal dissent, chastised the majority for rewriting the statute to save it from First Amendment infirmity. "The difficulty is that the Act has to be rewritten and words actually added and subtracted to produce the [constitutional] result," wrote the dissent.[6]

The extent of statutory narrowing to save the statute is one indication of how narrow the court conceived the exception to privacy in the realm of issue advocacy in *Harriss*. Indeed, 40 years later, in *McIntyre v. Ohio*,[7] the modern Court characterized *Harriss* as "limited disclosure requirements for lobbyists" justified only because lobbyists "have direct access to elected representatives," which "if undisclosed, may well present the appearance of corruption."[8] And the exception to political privacy was limited in scope to compensated communications to directly influence elected officials.

To read the entire Chapter, click here.
https://www.wileyrein.com/newsroom-newsletters-item-The-First-Amendment-Right-to-Political-Privacy-Chapter-6-Campaign-Finance-and-Other-Very-Public-Exceptions-to-Privacy.html

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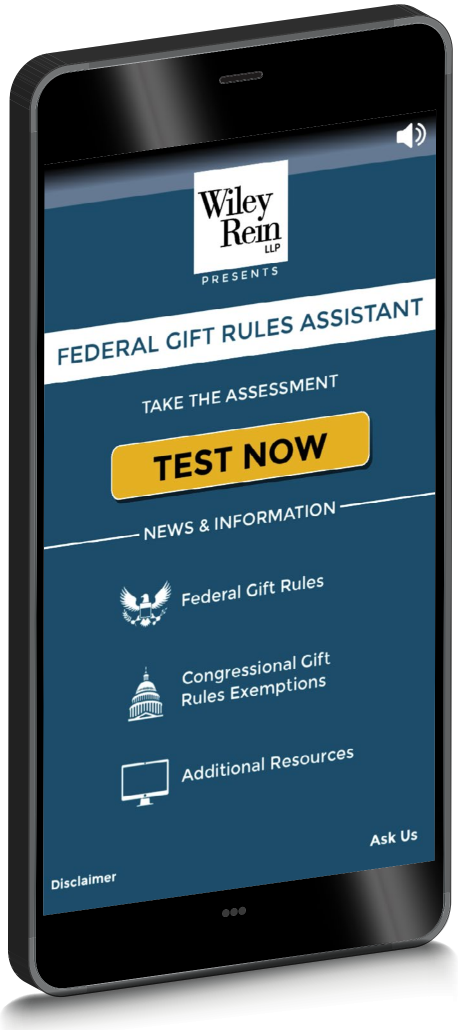

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