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Three Possible (And Possibly Significant) Election Law Developments In 2013

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As usual, the beginning of a new year and a new election cycle promises the customary, but still important, compliance developments and issues: new contribution limits, new fundraising challenges, new legislative sessions, and audits and reviews of the previous year and previous cycle. In 2013, however, corporations, trade associations, and other private-sector entities are confronted by three new issues that will require analysis, discussion, and possible action. These three issues are (1) a potential Securities and Exchange Commission (SEC) rulemaking on corporate political disclosure; (2) potential federal legislation on corporate political activity; and (3) an expected push for publicly disclosed corporate expenditures in federal elections in 2014.

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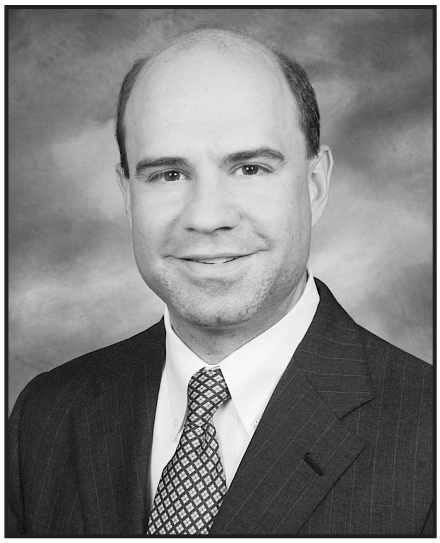

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Possible SEC Rulemaking

Last fall, staff at the SEC indicated that they were seriously considering a petition for rulemaking that would require public corporations to disclose political activity to their shareholders. In this way, the petitioners said, shareholders and regulators could confirm that executives and board members are furthering company interests. Recently, the SEC posted an entry about a possible rulemaking on the regulatory rulemaking calendar at the Office of Management and Budget. The calendar entry indicated preliminarily some sort of action by April 2013.

Although disclosure of corporate donations to 501(c)(4) organizations and other entities engaged in activities in the public arena has twice been explicitly rejected by Congress in recent years, the SEC may still attempt to impose such a requirement in the area that it regulates – public companies. The academics' petition for rulemaking is vague, so the extent of the potential burden will not be known until, or if, the rulemaking is published. The rulemaking may be unexceptional; if the proposed disclosures involve only contributions and independent expenditures relating to candidates, PACs, and party committees, the rule would simply duplicate the existing federal and state disclosure regimes. But the proposed rule could give cause for concern were it to sweep beyond these types of clear campaign finance activity to capture intermediate donations to entities that engage in other types of First Amendment activity (such as grassroots lobbying). Should the SEC propose launching this type of wholesale disclosure scheme, public companies and the organizations that depend on their support will need to prepare their best counterarguments, for unilateral disclosure would chill core political expression and association and put the companies and the issues they support at a comparative disadvantage.

The comparative disadvantage is particularly notable because of the recent efforts to regulate – some say overregulate – the private sector and move against market mechanisms. Daylight may well prove to be an effective disinfectant and shut down funding to entities that engage in grassroots lobbying and other related activities – although the term "disinfectant" presupposes a "wrongness" with business entities undertaking legal, economically advantageous activity that may be more effective when done without disclosure. What is sought to be disinfected then is the type of activity opposed by the progressive proposers of this type of reg-

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ulation, and the SEC would be a collaborator in this imbalance if this is put into effect. The possible collateral damage of holding back one group of possible rent seekers to the advantage of a different, and perhaps more favored, group of rent seekers should be cause for a pause in regulatory action.

The previous chairman of the SEC was not averse to targeting public companies and adding to their regulatory burdens even when the burden was tremendous and the effects less than evenly distributed – see, for example, the 2010 pay-to-play regulations for investment advisers. The views of the President's pick to be the successor are not fully known in this area, and nothing is likely to happen until a new chairman is confirmed.

Possible Federal Legislative Activity

As noted above, Congress has rejected certain types of corporate and nonprofit disclosures already, but proponents of the DISCLOSE Act are pressing for further consideration in the 113th Congress. At first blush, this renewed push does not mean that the "new" DISCLOSE Act has legs, particularly in light of the Republican majority in the House of Representatives. Yet efforts to regulate political activity can cross party lines. As the 2002 campaign finance reforms illustrated – when the McCain-Feingold law passed a Republican-controlled House through a discharge petition – incumbents of both parties do not appreciate attacks by others exercising their First Amendment rights.

The risk of losing the powers and perquisites of office sometimes hinders a full-throated defense of the freedom of speech and freedom of association. As a result, there could be some sort of compromise legislation put forward that permits higher limits for candidates and parties in exchange for some increased disclosure requirements and the like. Senators Lisa Murkowski (R-AK) and Ron Wyden (D-OR) also are working on their own proposal that retains many of the elements present in the DISCLOSE Act. If this type of legislation advances, groups engaged in grassroots and other lobbying activities will need to act swiftly to protect their interests.

The Wyden-Murkowski proposal is troubling on many levels, not least because of the following:

- The proposal would cover indirect political activity at a $501 threshold, redefining the scope of freedom of association for individuals and entities alike, even when political activity may be far in the future or contingent on a variety of circumstances coming into play (for example, as a defensive posture);
- The proposal would not necessarily define in the statute what is covered "election-related activity" and instead would leave such decisions that impact core First Amendment freedoms wholly to unelected agencies;
- The proposal would require burdensome and perpetual registration and recordkeeping by organizations if there were even the possibility that they might want to impact elections or politicians in the future; and
- The forced speech of lengthy disclaimers would squeeze out the core political speech of private sector speakers in expensive and time-limited media.

Possible Need For Public Corporate Political Contributions In 2014

The 2012 election featured the rise of Super PACs, which engage in independent expenditures to support the election or defeat of candidates and which report all of their contributions to government agencies. At the federal level, most of the large contributions to Super PACs came from unions, wealthy individuals, and their closely held entities. Nonetheless, at least one large publicly traded corporation, Chevron, made a sizeable publicly disclosed contribution to a Super PAC at the peak of the 2012 election season. Now that Chevron has set the precedent, political directors and others at large companies will have to grapple with mounting requests from Super PACs as the 2014 election cycle heats up. Contributing to these Super PACs brings with it a battery of administrative considerations, from budgetary issues to compliance procedures. Above all, however, company officials will need to analyze the effectiveness of such contributions and their impact on corporate operations, goodwill, and culture, not to mention the consequences for corporations' own federal PACs.

The public disclosure of direct political activities by public companies is not something new. Many such companies already sponsor political action committees and/or participate in state or local elections. The beneficiaries of their support and objects of their opposition are already readily and publicly known. The difference with the possible Super PAC contributions is three-fold. First, the size of the contributions, if made, will likely draw some press, much of which is guaranteed to be unfavorable. Second, these large funds would be given to organizations that by law are outside the traditional candidate and party structure. Third, as structural outsiders, the Super PACs are more likely to take positions against the administration, Congressional leadership, or both. Of course, these last two traits could be appealing to some public companies who have seen their interests gored by the administration and/or Congress and could make any such contributions outweigh the risks.

The three issues discussed above are not the only political law issues that exist in 2013. State legislators across the nation are attempting to regulate more thoroughly corporations, trade associations, candidates, parties, and political committees. In other jurisdictions there may be attempts to liberalize the campaign finance regime and make immediate disclosure the keystone of a new system. At the federal, state, and local levels, companies and their general counsel and compliance departments must be ready to see how these proposals will affect them and their communities and take action if necessary.