

Court Upholds FEC Treatment of LLC Contributions

FEC DIVIDED OVER STANDARD FOR REGULATING “TRUE SOURCE” OF CORPORATE LLC FUNDS

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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

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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 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.