

Campaign Finance Compliance Structures More Important Than Ever in Light of Criminal Enforcement Trends

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As we enter an election year, candidates, corporations, PACs, and other organizations involved in the federal campaign space should of course be attuned to the Federal Election Commission's regulatory oversight of their activity and the need to establish and maintain effective compliance measures. However, the potential for criminal enforcement of campaign finance and related federal public corruption statutes should be understood and addressed as well. Indeed, in 2015 the U.S. Department of Justice appeared to ramp up the pace of its prosecutions for violations of campaign finance laws and, in doing so, explored the boundaries of criminal liability. A look back at several recent cases illustrates this criminal enforcement trend and highlights a number of areas where those who are engaged in federal election-related fundraising and spending should focus their compliance efforts going forward.

This past year saw the first prosecution by DOJ of a case centered on allegations that a congressional campaign and an independent committee illegally coordinated their activities. Under the Federal Election Campaign Act (FECA), independent expenditure only committees (commonly called Super PACs) must remain independent: if they donate money directly to a candidate or the candidate's committee—or coordinate expenditures with a candidate or the candidate's committee—they have effectively violated the limits set by the FECA on contributions to candidates. In 2015, DOJ brought its first case of criminal enforcement for violating these provisions against Tyler Harber, who managed the 2012 election campaign of

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Republican congressional candidate Chris Perkins. While serving in this role, Mr. Harber set up a political committee authorized to make only independent expenditures. The government charged that during the campaign, Mr. Harber directed donors to the independent committee after they had maxed out their giving to the Perkins campaign and that Mr. Harber arranged personally for the independent committee to purchase advertising worth \$325,000 to bolster Mr. Perkins' candidacy. The government also alleged that Mr. Harber impermissibly directed Super PAC funds to himself and his family members. Mr. Harber pled guilty to causing coordinated federal election contributions and making false statements to the FBI. In June 2015 he received a prison sentence of two years in jail.

Though the facts presented in the Harber case were particularly egregious, the prosecution appears to signal that federal prosecutors are, at some level, scrutinizing the activities of Super PACs. As Assistant Attorney General Leslie Caldwell indicated upon the sentencing of Mr. Harber, "As the first conviction for illegal campaign coordination, this case stands as an important step forward in the criminal enforcement of federal campaign finance laws."

In addition to the Harber case, 2015 saw DOJ pursue a prosecution that puts a new twist on an age-old crime—bribery. On April 1, 2015, an indictment was unsealed against U.S. Senator Robert Menendez charging him with receiving gifts—including luxury vacations, golf outings, and expensive flights—and political contributions in exchange for official favors. These gifts and donations allegedly came from Dr. Salomon E. Melgen, a wealthy Florida eye surgeon and political benefactor of the Senator, who also was indicted. Specifically with regard to the political contributions, the indictment indicated that Dr. Melgen gave \$700,000 through his company to a Super PAC, directing that some of this money be spent in support of Senator Menendez, and that Senator Menendez then pressed the Obama administration to make changes to Medicare reimbursement that would have benefited Dr. Melgen. Allegedly, Senator Menendez also arranged for visas for Dr. Melgen's foreign girlfriends and pushed for a port security deal related to Dr. Melgen.

The government's position in the case is aggressive and, as the head of DOJ's Public Integrity Section said at the time, "What you can see from that case and some of the others we've brought over the last several months is that this section is not going to be shy about bringing important and tough cases and we're going to try those cases." A particularly significant aspect of the prosecution is the broad scope of the government's theory of liability—that even campaign contributions to an independent, outside group can be considered the provision of "something of value" in an alleged quid pro quo arrangement with an individual federal candidate. If successful, this theory and approach could open the door to an even broader range of political fundraising activities being swept up into the purview of potential bribery prosecutions.

In the same expansionist vein, the prosecution of former Virginia Governor Bob McDonnell highlighted a different area in which DOJ is interpreting bribery rules broadly. Although tried and found guilty by a jury in 2014, former Governor McDonnell was sentenced to two years in prison in January 2015. At trial, the court had instructed the jury that the "official actions" that can sustain a bribery conviction include apparently routine and common actions such as arranging meetings and making introductions for donors. Numerous experts and commentators cited the McDonnell prosecution and conviction as an instance of the "criminalization of politics." After the Fourth Circuit Court of Appeals found in the summer of 2015 that McDonnell's actions were

sufficient to sustain a bribery conviction, the former governor petitioned the Supreme Court of the United States for review; on January 15, 2016, the Supreme Court agreed to hear the case. If the Supreme Court agrees with the lower courts on the question of what constitutes “official action,” the McDonnell case will dramatically and decisively expand the scope of behavior by federal candidates and officials that—if linked with the solicitation, offer, or acceptance of “something of value”—will be pursued and prosecuted by DOJ as bribery.

Harber, Menendez, McDonnell. The broad and aggressive approach to criminal enforcement of federal election and public corruption laws represented by these three recent cases raises the stakes for anyone involved in political fundraising, including candidates and donors, organizations and individuals. This criminal enforcement trend makes robust and comprehensive compliance measures more essential than ever.