

FEC Commissioners Disagree on Whether to Limit Political Activities of Foreign-Owned U.S. Subsidiaries

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In a contentious Federal Election Commission (FEC or Commission) meeting earlier this month, the FEC's Republican and Democratic commissioners sparred over three separate proposals designed to address the potential flow of foreign money into U.S. elections. The debate at the September 15th meeting was certainly high on media-worthy rhetoric, but there also were many important substantive points for campaign finance practitioners to take away from the discussion and the underlying proposals.

The genesis for the debate occurred on August 9, when Democratic Commissioner Ann Ravel called upon her colleagues to prohibit U.S. subsidiaries of foreign parents from participating in federal, state, or local elections – either directly or through a corporate political action committee (PAC) – even when decisions about political spending are made by American citizens. Commissioner Ravel's motion specifically requested that the FEC rescind a 2006 advisory opinion issued to TransCanada Corporation, a Canadian entity that garnered national attention for its efforts to build the Keystone XL crude oil pipeline. (The Obama administration ultimately rejected the project late last year.) In the 2006 opinion, the FEC recognized that TransCanada's two wholly owned U.S. subsidiaries could themselves contribute to state and local candidates – where permissible under applicable law – when the contributed funds (1) "derive entirely from funds generated by the Subsidiaries' U.S. operations;" and (2) "all decisions concerning the donations and disbursements will be made by individuals who are U.S. citizens or permanent residents, except for setting overall budget amounts." Commissioner Ravel's proposal also

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targeted a second advisory opinion for repeal, issued to Mercedes-Benz USA in 2009, that formally extended the rationale of the TransCanada opinion to permit foreign-owned U.S. subsidiaries to establish an employee PAC. These two opinions were themselves grounded in several decades of earlier precedent approving such practices.

The theory underlying Commissioner Ravel's proposal appears to have been that even though Americans are the ones making the decisions about who the U.S. subsidiary and/or its PAC should be supporting, principles of corporate law dictate that the subsidiaries' decisions will be made with the foreign parents' interests in mind. Commissioner Ravel also posited that the issue of foreign influence is more acute now than ever before because the Supreme Court's Citizens United decision, combined with rulings from lower federal courts, have made the "American campaign finance system . . . vulnerable to influence from foreign nationals and foreign corporations through [d]omestic subsidiaries and affiliates in ways unimaginable a decade ago."

Commissioner Ravel's concerns ultimately failed to persuade her Republican colleagues, with her proposal rejected by a 3-3 vote. While Republicans had substantive objections to limiting American workers' rights to participate in the political process, Commissioner Ravel's proposal also faced procedural and other challenges. For example, an FEC regulation prohibits reconsideration of an advisory opinion more than thirty calendar days after its issuance, and Commissioner Ravel's motion was coming ten years after-the-fact. Moreover, when this concept was previously debated during a 2002 rulemaking, some questioned the constitutionality of discriminating against the First Amendment rights of U.S. employees based on the foreign ownership of their domestic employer.

Apart from Commissioner Ravel's motion, Democratic Commissioner Ellen Weintraub released her own proposal in advance of the meeting calling on her colleagues to commence a broader rulemaking on foreign money. Among other items, Commissioner Weintraub proposed an examination of the following concepts:

- Whether "U.S. corporations that reincorporate in other countries to avoid U.S. taxes should retain the ability to spend in U.S. elections;"
- The "possibly divided loyalties of both U.S. based companies with global assets and foreign companies with U.S. subsidiaries;" and
- A possible certification requirement where corporations affirmatively certify "that no foreign money was spent on U.S. political activity."

Ultimately, Commissioner Weintraub's proposal was also defeated on a 3-3, party-line vote. But perhaps even more important than her actual proposal, however, was a key observation that Commissioner Weintraub made during the meeting. Despite decades of precedent clearly permitting such activity, Commissioner Weintraub warned that the public should know that there is "no longer a consensus, no longer can we get four votes to give safe harbor for the political activities of domestic subsidiaries." Given this statement, it will be very interesting to see what happens in future enforcement matters involving U.S. subsidiaries of foreign parents.

For their part, the FEC's three Republicans put forward a plan to set up a "safe harbor" certification program for corporations contributing to super PACs and other entities that can lawfully accept corporate funds under state/local law. Such entities could satisfy their obligation to investigate whether a suspect contribution was made from foreign national funds by requesting an authorized representative of the corporation certify that:

- The contributing corporation is organized under or created by the laws of the U.S. or of any State or other place subject to the jurisdiction of the U.S. and has its principal place of business within the U.S.;
- No foreign nationals directed, dictated, controlled, or directly or indirectly participated in the decision-making process of the corporation with regard to the making of the corporation's contribution or donation; and
- The corporation used only its net earnings generated from U.S. operations to make the contribution or donation.

This proposal failed on a 3-3 vote as well, with the FEC Democrats claiming that the proposal did not go far enough. Commissioner Weintraub indicated, however, that she may revisit this issue in the coming months as part of an effort to move forward with a narrower, consensus-driven proposal to address foreign money in U.S. elections.