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ELECTION LAW NEWS

Developments in All Aspects of Political Law | July 2015

D.C. Circuit Unanimously Upholds Constitutionality of Ban on Federal Contractor Contributions

By Jan Witold Baran and Stephen J. Kenny

In a unanimous decision by an *en banc* panel, the D.C. Circuit this month upheld the constitutionality of the statutory ban on contributions from federal contractors. The plaintiffs in *Wagner v. FEC*, No. 13-5162, 2015 WL 4079575 (D.C. Cir. July 7, 2015) had challenged the constitutionality of the contribution ban, 52 U.S.C. § 30119, as applied to individuals who are federal contractors seeking to make contributions to federal candidates, political parties, and traditional PACs. Jurisdictional issues narrowed the question presented even further to the ban on campaign contributions by individual contractors to candidates and parties. (The ban as applied to corporate contractors was not at issue.)

Writing for the court, Judge Merrick Garland concluded that the contractor ban satisfied the "closely drawn" standard of review. The government offered two sufficiently important interests in support of the ban: the prevention of quid pro quo corruption (and its appearance) and the need to protect against interference with merit-based public administration. Acknowledging that the total ban on federal contractor contributions is a significant restriction, the court nevertheless concluded that it was a reasonable fit in the context of government contracting, which the court described as the "heartland" of the government's anti-corruption interest. The court also rejected the plaintiffs' "underinclusiveness" challenge, holding that Congress's ban on contributions from federal contractors was consistent with permitting contributions from associated PACs and corporate officers.

The court did not have occasion to address whether the ban is constitutional as applied to federal contractors' contributions to federal independent-expenditure-only committees (Super PACs). Although

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FCC Order Increases Risks for Political Calls and Texts

By Michael E. Toner and D. Mark Renaud

In June, the Federal Communications Commission (FCC) adopted an Order that expands the scope of and the liability under the Telephone Consumer Protection Act (TCPA), the federal statute that governs automated calling. The TCPA was already a broad statute: it governs not only telemarketing calls, but other calls—like political and grassroots lobbying calls—as well. With the new Order, the FCC has made it more difficult to reach consumers, constituents, and voters alike via calls or texts.

The TCPA does not allow automated calls or texts—like robocalls and robotexts—to wireless phones without proper consent. For political or grassroots calls, that consent can be either oral or written, but it must be obtained from the voter before the call is made.

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FEC Advances Two New Rulemaking Petitions for Consideration

By Caleb P. Burns and Stephen J. Kenny

On July 16, the Federal Election Commission (FEC) issued a Notice of Availability for public comment on each of two petitions for rulemaking that address Super PACs and other organizations that engage in independent expenditures and electioneering communications pursuant to *Citizens United v. FEC*. Comments are due 60 days from when the Notices are formally published in the Federal Register.

The Notice for the first petition seeks comment on whether the Commission should proceed with a rulemaking requiring any person—including so-called 501(c) organizations—that contribute directly or indirectly to Super PACs to disclose the sources of their funding.

The Notice for the second petition is more wide-ranging. It seeks comment on whether the Commission should proceed with a rulemaking concerning: (1) the disclosure of certain donor information of entities engaged in independent expenditures and electioneering communications; (2) restrictions on election-related spending by foreign nationals, including U.S. subsidiaries of foreign parents; (3) solicitation of support by corporations and labor organizations for their independent expenditures and electioneering communications; and (4) the degree to which Super PACs—especially those devoted to supporting a single candidate—must remain operationally independent from candidates and political parties.

It is worth emphasizing that these Notices are intended to seek input on whether the FEC should engage in rulemaking proceedings in the first instance. The substance of the rulemaking itself, i.e., what form possible new rules should take, will not be addressed unless the FEC decides to commence a formal rulemaking. At this stage, interested parties should comment on whether formal rulemaking proceedings are necessary to address these issues.

Wiley Rein has previously filed comments in response to Notices of Availability and has successfully persuaded the FEC to not commence formal rulemaking proceedings. ■

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The Administration's Proposed Overtime Rules Could Significantly Affect the Pool of Employees Eligible To Be Solicited for Corporate PACs

By Carol A. Laham, D. Mark Renaud, and Brandis L. Zehr

The Department of Labor's recent proposal to modify the rules governing which executive, administrative, and professional employees are "exempt" from the Fair Labor Standards Act's (FLSA) minimum wage and overtime pay requirements could potentially impact the scope of a corporation's "restricted class" for purposes of soliciting contributions to the corporation's PAC and sending partisan internal communications.

Federal campaign finance law allows a corporation to engage only a small group of salaried employees known as the "restricted class" for political activities. This class includes a corporation's stockholders as well as salaried employees in policymaking, managerial, professional, or supervisory roles. The Federal Election Commission's (FEC) regulations note that FLSA and its regulations may serve as a guideline in determining whether employees have policymaking, managerial, professional, or supervisory responsibilities.

Under FLSA, employers are not required to provide overtime pay to employees who are "exempt." Currently, this exemption applies to full-time salaried employees who perform executive, administrative, or professional duties and earn more than $455 a week ($23,660 annually). The Department of Labor's proposed rule raises the threshold to qualify for this exemption to $921 per week ($47,892 annually), which will adjust annually for inflation.

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Maryland Irons Out Its Pay-to-Play Contribution Disclosure Regime

By Carol A. Laham and D. Mark Renaud

In 2013, Maryland overhauled its campaign finance laws, including the reporting requirements for government contractors. Earlier this year, the state clarified some provisions of the new law, altered the reporting dates, and modified certain reporting requirements.

Under the Maryland reporting regime, a contractor that enters into a government contract worth at least $200,000 is required to disclose certain political contributions to the State Board of Elections. The disclosure law became effective on January 1, 2015, but it was unclear whether entities that had entered into covered contracts before that date were required to file semiannual disclosure statements. The recent legislation clarifies that these reporting requirements apply to entities that currently hold covered contracts that were entered into before January 1, 2015.

The legislation also amended the reporting periods and due dates for the semiannual disclosure statements. Semiannual reports are now due by May 31 for the period covering November 1 through April 30 and by November 30 for the period covering May 1 through October 31. However, because the legislation did not become effective until this summer, the reports for this year are due by August 31, 2015 for the period covering February 1 through July 31 and by November 30, 2015 for the period covering August 1 through October 31.

The legislation made several other changes. First, contractors that did not make applicable contributions in a cumulative amount of $500 or more to a candidate can avoid most reporting requirements. Second, the legislation permits contractors that have obtained waivers from the State Board of Elections (which are allowed if supplying information about certain contracts is "unduly burdensome") to avoid filing initial statements with the Board and file abbreviated semiannual reports. ■

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Draft Regulations in Arizona, Montana, and Texas Would Impact Campaign Finance Registration and Reporting

By Caleb P. Burns and Eric Wang

There was an uptick of regulatory activity in the states last month, as administrative agencies in Arizona, Montana, and Texas issued draft campaign finance regulations that would impact registration and reporting requirements for entities engaged in political speech. Members of the public wishing to provide input on the rulemakings may submit comments up until the beginning of August in Texas and the end of August in Montana. The comment period for the proposed rules in Arizona closed shortly before this issue was finalized.

Montana

As we reported in the last issue, Montana Governor Steve Bullock signed the "Montana Disclose Act" (SB 289) into law in April of this year (*Election Law News*, May 2015). Among other things, the legislation directed the state Commissioner of Political Practices to implement a rulemaking defining when an organization has the "primary purpose" of being a full-fledged political committee that is required to report its donors (and not merely an "incidental committee" under Montana law). Although the Commissioner's office has not released its draft rules to the general public yet, it shared an initial draft with certain interested parties at the end of June. Wiley Rein has obtained a copy of the initial draft and has been authorized to redistribute and report on it.

For groups accustomed to working with the

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Corporate Political Activities 2015: Complying with Campaign Finance, Lobbying and Ethics Laws

September 10 – 11, 2015 | Washington, DC

Jan W. Baran, Co-Chair, **Caleb P. Burns**, Speaker

Conference Overview: Federal and state lobbying, campaign finance and ethics rules are changing, making compliance with those laws more challenging than ever. Congressional ethics rules, the Lobbying Disclosure Act (LDA) and pay-to-play laws place additional responsibilities on companies and their executives and directors. To stay current on the latest developments, be sure to attend this acclaimed program led by high-level officials from the Federal Election Commission, the Department of Justice, Congressional ethics committees, and state ethics agencies, as well as corporate compliance officers and expert private practitioners.

To register, visit:
http://www.pli.edu/Content/Seminar/Corporate_Political_Activities_2015_Complying/_/N-4kZ1z129y7.

Wiley Rein clients are eligible for a 20% discount on registration for the conference. Please contact Seema Lal Meehan at slalmeehan@pli.edu for more information.

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the Federal Election Commission (FEC) maintains that the ban covers such contributions, it remains unclear whether, in the wake of *Citizens United v. FEC*, 558 U.S. 310 (2010), and *SpeechNow.org v. FEC*, 599 F.3d 686 (D.C. Cir. 2010), the FEC may constitutionally prohibit donations by contractors to Super-PACs.

Wagner exemplifies the different calculus that applies when weighing the constitutionality of restrictions on contractors' political speech, as compared to restrictions on the general public's. Every active judge on the D.C. Circuit agreed that the government's interest in preventing corruption and its appearance is more acute with respect to contractors. Whether a ban on contractors' contributions to Super PACs is sufficiently tailored to this interest is an issue likely to arise in the near future.

As a side matter, the court noted state pay-to-play laws that impose similar and more stringent requirements with respect to state and local contractors in relevant jurisdictions. For contractors, these laws, which often apply to officers and directors of contractors, present a greater compliance risk.■

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FCC Order Increases Risks for Political Calls and Texts *continued from page 1*

Calls made in violation of the TCPA come with large risks: the penalty can be as much as $1500 per violation.

The new Order expands the reach of the TCPA by taking a very broad view of what constitutes an autodialer. The Commission clarified that if the calling equipment has the *capacity* to store or produce, and dial random or sequential numbers, then it is an autodialer under the TCPA. Further, the Commission highlighted that even if the equipment is not being used as an autodialer, the potential ability for it to be used in such a way can make it fall under the TCPA's strict rules.

The TCPA applies equally to texts and calls. The new Order reaffirms that text messages are treated the same as traditional voice calls under the law.

The bottom line for campaigns, PACs, Super PACs, trade associations, 501(c)(4)s, and other political or grassroots speakers is: know the rules before you robocall or robotext (including using autodialers). The TCPA could apply and in some instances state law as well. The combination of Wiley Rein's preeminent Election Law group with its legendary Communications practice will help you navigate this minefield. ■

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The Administration's Proposed Overtime Rules Could Significantly Impact the Pool of Employees Eligible To Be Solicited for Corporate PACs *continued from page 2*

This proposed rule, if implemented, could potentially impact the scope of a corporation's restricted class in several ways.

First, many corporations use FLSA as a guideline for determining whether employees fall within the restricted class and automatically exclude employees who are not "exempt." Because the proposed rule increases the salary threshold for qualifying as an "exempt" employee, executive, administrative, and professional employees whose salaries are above $23,600, but below $47,892, will become non-exempt employees if the rule is implemented. For corporations that use FLSA as a guideline for determining whether employees fall within the restricted class, this means that these employees would no longer be part of the corporations' restricted class under this approach. (It is worth noting, however, that whether an employee is exempt or non-exempt under FLSA is not dispositive for purposes of determining whether an employee is in the restricted class. It is possible that some of these non-exempt employees can still qualify for the restricted class if they are salaried and serve in policymaking, managerial, professional, or supervisory roles.)

Second, corporations could respond to the FLSA rule change by converting the employees affected by the rule from "salaried" employees into "hourly" employees. Although non-exempt employees can be paid on a salaried basis, they are subject to FLSA's minimum wage and overtime requirements—which means that employers must track these employees' work hours. Because corporations typically have the infrastructure to track the time of hourly employees (and may not necessarily be prepared to track the time of newly non-exempt salaried employees), it is possible that some corporations might convert impacted employees from salaried to hourly. As noted above, an employee must be paid on a salaried basis in order to fall within a corporation's restricted class. Thus, individuals who are converted from salaried employees to hourly employees would no longer fall within the restricted class.

The Department of Labor is accepting comments on the proposed rule until September 4, 2015, and it is possible that the Department may make additional changes to the rule once the notice-and-comment period closes. It is expected that the Department of Labor will finalize the rule by 2016. ■

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federal tax and campaign finance rules—under which it is understood that there is generally some numerical threshold for determining a group's "primary" or "major" purpose based on its political spending—the Montana Commissioner's rules may be confounding. Under the draft rules, the term "'primary purpose' refers to a committee's major, principal, or important goal, function, or reason for existence." These concepts do not appear to be susceptible to being reduced to any numerical threshold for determining a group's "primary purpose."

Moreover, the draft rules provide that "primary purpose" may be determined not only by a group's spending, but also by its "staff or members' activity," "the number of persons, individuals, members, participants, or shareholders" an entity has, a group's "history," and any "election activity," among other things. The term "election activity" is defined extremely broadly, and includes "any action . . . that concerns, relates to, or could be reasonably interpreted as an attempt to influence or affect an election," and does not appear to be limited to activity required to be included on campaign finance reports. Under the proposed rules, the Commissioner also may consider other unspecified factors in determining a group's "primary purpose."

The Montana draft rules establish a presumption that any entity formed within or during the six months prior to voting in any election is a full-fledged political committee if the entity makes political expenditures or accepts political contributions of $250 or more during a calendar year.

The Montana draft rules also define when an "election communication," "electioneering communication," or "election activity" is deemed to be coordinated with a candidate, thereby resulting in an in-kind contribution. Of note, the proposed regulations presume that any "election activity" that is sponsored by an independent group and conducted by an individual who served as a paid agent, consultant, or vendor to a candidate within the previous 24 months is coordinated with the candidate. This is a significantly longer period of time than the 120-day cooling-off period under the federal coordination rules for former employees and vendors.

The Montana Commissioner of Political Practices' office has requested comments on the initial draft rules by July 15, after which it may modify the rules and then reissue them to the general public. The Commissioner's office has indicated that it expects to close the general public comment period on August 27.

Texas

The Texas Ethics Commission issued a revised version of its proposed rules defining what activities are considered to be "in connection with a campaign" last month. The definition of the term is crucial under Texas law to determining when speech is regulated as a "political expenditure." That, in turn, affects a group's obligations to file independent expenditure reports and to register and report as a political committee—an issue which the Ethics Commission also has addressed recently (*Election Law News*, November 2014).

Under the proposed rules first issued in April, political expenditures would include communications using the so-called "magic words" of express advocacy first articulated by the Supreme Court of the United States in *Buckley v. Valeo*, such as "vote for," "elect," "support," or "vote against." In addition, the initial draft treated as a political expenditure any speech within 30 days of a primary or 60 days of a general, special, or runoff election that references a candidate, is targeted to the geographical area the candidate seeks to represent, and, "with limited reference to external events," is "susceptible of no other reasonable interpretation than to urge the election or defeat of the candidate."

The proposal to rely on unspecified "external events" and a "reasonable interpretation" standard in determining a communication's meaning was criticized as being excessively vague, insufficiently protective of First Amendment rights, and inconsistent with key state and federal court rulings. In response, the Ethics Commission has deleted the reference to "external events" from the proposed rule, but has added that "images" and "sounds" also may be considered in determining a communication's electoral meaning. The Commission also has shortened the time window in which the "no other reasonable interpretation" standard would be applied to 30 days prior to any type of election.

Additionally, the original proposed rule treated any donations made "for the purpose of supporting or opposing a candidate" as political

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contributions and expenditures subject to regulation under the state campaign finance laws. In response to criticism that the "supporting or opposing" standard was too vague, the Commission has narrowed the proposed rule so that only donations made to preexisting political committees will be treated as political contributions and expenditures.

The next meeting of the Texas Ethics Commission is scheduled for August 6 and 7. The agency is expected to discuss the revised draft rules then and will possibly vote to enact them. Public comments on the revised proposal should be submitted to the agency before then.

Arizona

The Arizona Citizens Clean Elections Commission has been involved in an unusual regulatory turf battle over the past several months with the Arizona Secretary of State's office. The dispute began when the Clean Elections Commission ruled that a non-profit group was required to file independent expenditure reports for its advertising in Arizona last year, notwithstanding that the Secretary of State's office had already determined that the reporting requirements did not apply. The dispute continued last month when the Clean Elections Commission proposed rules expanding the independent expenditure reporting requirements and defining when groups become political committees.

Under Arizona's preexisting law and regulations, sponsors of independent expenditures expressly advocating the election or defeat of candidates are not required to report their donors if they are not otherwise political committees and do not accept political contributions. The Clean Elections Commission's proposed rules, however, appear to require certain sponsors of independent expenditures to "comply with the requirements of" political committees, which presumably includes donor disclosure.

In addition, the Commission's proposed rules address when an organization has the "primary purpose" of being a political committee. Following a federal court ruling last December declaring Arizona's political committee law to be unconstitutionally vague and overbroad, the Arizona legislature passed, and the Governor signed into law, HB 2649 in April of this year. Under the new law, an organization is not a political committee unless it accepts political contributions or makes political expenditures of more than $500 in a calendar year and has "the primary purpose of influencing" elections.

Similar to the proposed rules in Montana, the Arizona Commission's draft rules would presume that any group that is formed during a legislative election cycle or in the preceding six months has a "primary purpose" of influencing elections. For other groups, it appears that "primary purpose" is to be determined over the course of an "election cycle," although there is considerable ambiguity in the wording of the proposed regulation as well as in the term "election cycle" itself which does not have a fixed meaning under Arizona law.

The Arizona Secretary of State's office has argued that the Clean Elections Commission has overstepped its authority when attempting to regulate independent expenditures. The Commission was created in 1998 pursuant to the Citizens Clean Elections Act to administer the state's public funding system for state candidates. Under that system, candidates accepting public financing were entitled to additional public funds if they were subject to independent expenditures opposing them. The Secretary of State contends that the Clean Elections Commission no longer has any authority to regulate independent expenditures after the Supreme Court invalidated the "matching funds" feature of the Arizona law. The Citizens Clean Elections Act also does not address political committees, and thus the Commission's statutory authority to regulate political committees is similarly in dispute.

The Clean Elections Commission stopped accepting public comments on its proposed rule on July 14. ■

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SPEECHES/UPCOMING EVENTS

Understanding the Coordination Crackdown
Carol A. Laham, Speaker
The Art of Political Campaigning 2015
July 28, 2015 | Washington, DC

Funding Campaigns: What Have the Courts Said?
Eric Wang, Speaker
National Conference of State Legislatures
August 3, 2015 | Seattle, WA

PLI's Basics of the Federal Election Campaign Act 2015
Jan Witold Baran, Speaker
August 5, 2015 | Webinar

Campaign Activity on the Internet and Social Media
Eric Wang, Speaker
Republican National Lawyers Association Election Law Seminar
August 14-15, 2015 | New York, NY

PLI's Corporate Political Activities 2015: Complying With Campaign Finance, Lobbying and Ethics Laws
Jan Witold Baran and **Caleb P. Burns**, Speakers
September 10 - 11, 2015 | Washington, DC

Federal and State Campaign Finance for Contractors
D. Mark Renaud and **Caleb P. Burns**, Speakers
September 16, 2015 | Webinar