FEC Releases New Regulations and Notice of Rulemaking in Response to Supreme Court Decisions

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After years of partisan divisions in the wake of the Supreme Court's decision in Citizens United v. FEC allowing corporations to make independent expenditures in federal elections, the Federal Election Commission (FEC) on October 21, 2014 published regulations in the Federal Register designed to conform its rules to the Court's decision. In addition, the FEC recently issued an Advanced Notice of Proposed Rulemaking to address another Supreme Court opinion dealing with campaign finance (McCutcheon v. FEC), opening a period of public comment, to be followed by a hearing on February 11, on whether the FEC should tighten its policies and rules regarding disclosure, earmarking campaign contributions, and other matters. In further response to the McCutcheon decision, the FEC also adopted final interim regulations, which will take effect immediately, that delete rules (which the Supreme Court held unconstitutional) limiting the aggregate of all campaign contributions that individuals make to individual candidates, party committees, and PACs. The FEC's final rules in response to Citizens United are still subject to Congressional review and do not take effect until after the elections.

While there may be more public debate concerning the rules the FEC adopted, special attention should be given to the FEC's proposed rulemaking as well. In its Advance Notice of Proposed Rulemaking, responding to McCutcheon, the FEC invited public comments on a number of matters. Likely to be one of the more contentious provisions , the FEC requested comments on whether it should change its enforcement policies concerning earmarked or "conduit" contributions. A conduit contribution can occur when money that a political action committee (PAC) or a political party raised from corporations or individuals knowing or intending that the PAC or political party make a similar contribution to a candidate's committee. Currently, when there is no evidence that the original donors directed the PAC or

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political party to contribute the donations to the candidate's campaign, the FEC treats those funds as having come from the PAC or political party, not from the original donors. The FEC requested comments on whether it should tighten these enforcement policies. If it tightens those policies, the FEC might be more likely to find that the original donor made an illegal "earmarked contribution" to the candidate's campaign by funneling it through the PAC or political party. Violations of the conduit rules can result in civil fines or even criminal prosecutions, so it behooves donors to treat these issues with care. To protect themselves more effectively, corporations and their PACs should consider including a letter of intent (if they do not do so already) with each political contribution clearly spelling out to whom the contribution is intended to go and spelling out any limits that may be necessary to ensure that the funds are used for legal purposes.

The FEC's response to Citizens United was more muted, but still significant. The final rules the FEC promulgated in response to the Citizens United decision closely track rules the FEC proposed in 2011, but had not yet adopted. Under the new rules, a corporation may (but is not required) to establish a separate bank account to fund independent political expenditures to explicitly support or oppose candidates for election to federal office. If it does establish a separate bank account, the corporation must disclose donors who contribute $1,000 or more. If the corporation creates a separate political action committee (PAC), it must disclose anyone who contributes $200 or more in a single year.

Although they do not significantly change existing law, the regulations and the FEC's accompanying comments underscore that the political activities of both for-profit and non-profit corporations continue to be heavily regulated. First, any person, including a corporation, that spends more than $250 in a calendar year to support or oppose candidates for election to federal office, must report its contributions and expenditures to the FEC. With relatively few exceptions, this reporting requirement applies to everyone, not just to PACs, political parties, and candidate committees. Second, corporations are still prohibited in federal elections from making contributions to candidate committees and political parties. Some individuals and corporations - including national banks, federal contractors, and foreign nationals - are prohibited from making independent expenditures. Third, the FEC's regulations affect only federal election campaigns. They do not impact state campaign finance laws, IRS regulation of non-profit organizations or state and local pay-to-play laws.

The new regulations may be controversial in some circles because they do not impose any additional disclosure requirements. In particular, the new regulations do not require non-profit corporations to disclose donors if they had not been previously required to do so. In the only significant departure from the proposed regulations, the new regulations dropped a proposal requiring corporations and unions that solicit contributions to disclose to donors that their contributions could be used for political purposes. But the decision, in response to McCutcheon, to open a new period of public comment and hold a hearing in February will continue to keep these issues alive for the foreseeable future.

Butzel Long will be tracking these comments and hearings and will have more information as the regulations are modified or finalized. In the meantime, if your organization—either for-profit or nonprofit—has questions or issues about its political activity, please free to contact one of the

attorneys listed below or your regular Butzel Long attorney.

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