

PARTICIPATION OF FOREIGN NATIONALS IN U.S. ELECTIONS: PROHIBITED

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The another election year approaches. It marks the beginning of that ritual, unique to attorneys practicing in and around Washington, D.C., of being consulted by federal political campaigns and their contributors on the labyrinthine regulatory obligations set forth in the Federal Election Campaign Act (FECA)¹ as amended by the Bipartisan Campaign Reform Act of 2002 (BCRA) and the regulations.² Many attorneys are tempted to render such advice on an *ad hoc* basis. However, FECA-BCRA law is a highly technical, complicated and comprehensive regulatory system with its own terminology, logic and concepts.³

Money in politics has been an issue in political and public life since the early days of the Republic. There has always been a tension between financial power and voting power as the predominant influence in American politics. Over the decades, Congress has made certain fundamental policy decisions with respect to the dynamics of this tension by excluding certain categories of persons from financially participating in federal election campaigns . These prohibited categories are:

- Corporations, Labor Organizations and National Banks
- Federal Contractors
- Foreign Nationals

The United States Supreme Court is reconsidering the prohibition on contributions from corporations, labor organizations and national banks.⁴ The prohibition on federal contractors is comparatively straightforward and on par with the many restrictions and limitations to which

business persons subject themselves under federal contracting law when they choose to become federal contractors. The foreign national prohibition is conceptually and qualitatively different from the other two prohibitions.⁵ Rather than merely a means of regulating the influence of money in politics, this prohibition reflects a visceral fear embedded in the American psyche that “un-American forces” seek to manipulate and control the American political system.⁶

THE FOREIGN NATIONAL PROHIBITION

A foreign national prohibition is comprehensive.⁷ The penalties for violating the foreign national prohibition are both criminal and civil.⁸ The FECA-BCRA specifies the items that a foreign national cannot give, to whom such items cannot be given and the purpose for which a prohibited item cannot be given. Also the FECA-BCRA mandates that a prohibited item cannot be given either directly or indirectly nor can a foreign national promise either expressly or impliedly to give a prohibited item. Even if the purpose of the foreign national in giving the prohibited item is somehow not to influence the political process, it is still a violation merely because it comes from a foreign national.

In Connection with Federal, State or Local Election

Under FECA-BCRA, a foreign national cannot give any of the following prohibited items in connection with a federal, state or local election:

- a contribution
- a donation of money
- thing of value⁹

Under the regulations, a foreign national cannot give any of the following prohibited items in connection with a federal, state or local election:

- expenditure
- independent expenditure
- disbursement¹⁰

Contribution Defined

The term “contribution” means anything of value that is given by any person for the purpose of influencing any election for federal office or the payment of compensation to any person who renders personal services to a political committee without being compensated for those services by the political committee.¹¹ The FECA-BCRA does not further define the term “anything of value” but provides descriptions of items that constitute contributions. Also, items that are contributions are set forth in FECA-BCRA and the regulations but in Advisory Opinions (AOs) issued by the FEC and case law. Whether an item is a contribution is analyzed as follows:

- Is the item a “thing of value”?
- If so, is it an item that is described as a contribution under FECA-BCRA, its regulations, AOs or case law?
- If not, is the item sufficiently similar to any item which is described as a contribution that the item should be deemed a contribution as well?

Items That Are Contributions. The most common form of a contribution is a gift of cash to or for the use of the campaign. An “in-kind” contribution is deemed to be a “thing of value”.¹² An “in kind” contribution is any good or service that is made available to the campaign for which the campaign pays nothing or pays less than the commercial or normal price of the good or service other wise payable at the time of the contribution and which is not excluded from the term “contribution” by FECA-BCRA.¹³ Where the campaign pays less than the commercial or normal price, the difference between the price actually paid and the commercial or normal price is the

dollar value of the contribution.

Contributed Expenditure. A contributed expenditure is a purchase paid to a vendor for or on behalf of the campaign from the assets or accounts of a person other than the candidate or his or her campaign. It is usually but not always an “in kind” contribution and it is treated in the same manner as a contribution directly to the campaign.

Items That Are Not Contributions. The FECA-BCRA excludes certain items of value from the meaning of contributions. Although such items are “things of value”, they are not contributions. These items are, *inter alia*,:

- dollar value of volunteer services rendered by any individual to or on behalf of a candidate or a political committee,
- dollar value of the regular use of personal property as well as the cost of food, beverages and invitations within certain dollar limits,
- the sale of food or beverages by a vendor for use in connection with the campaign at less than commercial rates as long as the dollar amount of the sale is equal to the cost to the vendor of the food or beverage,
- a loan from a financial institution made in the ordinary course of business or a loan received as an advance on a personal asset of the candidate such as home equity line of credit or credit cards obtained in the ordinary course of business,
- an honorarium received by the candidate for being the featured speaker at a political party fundraising event,
- certain payments made by a local committee of a state or national party¹⁴
- dollar amounts made to or on behalf the campaign by the candidate from his or own personal funds.¹⁵

Donation of Money

The term “donation” means a payment, gift, subscription, loan, advance, deposit, or

anything of value given to a person, but not any item that is a contribution.¹⁶

Anything of Value

The term “anything of value” is not defined in FECA-BRCA or the regulations. It should be construed according to its common meaning and consistent with the purpose of FECA-BRCA.

Independent Expenditures and Disbursements

Independent Expenditure. An independent expenditure is a kind of expenditure that is neither a contributed expenditure nor an operating expenditure. An independent expenditure is made by a person who not in or part of the campaign which expressly advocates the election or defeat of a clearly identified candidate and which is made without the cooperation, request or assistance of the candidate or his or her campaign.¹⁷ A purported independent expenditure which fails to satisfy the foregoing definition will be considered a coordinated communication and treated as a contribution from the person making the expenditure.¹⁸

Disbursement. A disbursement is any purchase or payment made by a political committee or by any person that is not a political but is subject to FECA-BCRA.¹⁹

Any Election in the United States

The prohibition extends to any election for any office in the United States. By its terms, the prohibition pre-empts any state or local which may permit a foreign national to give a prohibited item in connection with a state or local election.

To a Committee of a Political Party or Organization of a Political Party

A foreign national cannot give either of the following prohibited items to a committee of a political party:

- a contribution

-- a donation²⁰

Interestingly, a foreign national appears able to give a “thing of value” to a committee of a political party as long as it is not a contribution or a donation.

Committee of a Political Party. This term includes a national political party committee, a national congressional campaign committee, a state, district or local party committee as well as the non-federal account of a state, district or local party committee.²¹ It also includes any committee the purpose of which is to purchase or construction an office building.²²

Organization of a Political Party. This term means any organization of a political party which is not a committee of a political party.²³

Inaugural Committee. A foreign national is prohibited from making a donation to an inaugural committee.²⁴

Expenditure for Electioneering Communication

A foreign national is prohibited from making any of the following for an electioneering communication:

- expenditure
- independent expenditure
- disbursement²⁵

An electioneering communication is any broadcast, cable, or satellite communication which refers to a clearly identified candidate for federal office made within 60 days before a general, special, or runoff election for the office sought by the candidate or 30 days before a primary election or a nominating convention or caucus. If the communication refers to a candidate for an office other than President or Vice President, it must be targeted to the relevant electorate to be

an electioneering communication.²⁶

Non-Financial Participation in connection with Elections

In addition to the financially based prohibitions, a foreign national is prohibited from participating in any way in the decision making process of any person in connection with the election related activities or administration of such person in connection with any election.²⁷ The term “person” includes a corporation, labor organization, political committee such a political action committee (PAC) or political organization.

In several Advisory Opinions, the FEC has considered whether a foreign national may participate in the activities of an election campaign in the form of services to a person. The key issues are whether the services constitute a prohibited item and whether the services constitute participation in the decision making process of the person.

Services by a Foreign National

Because services are not a contribution, not a donation of money and not a thing of value, then services are not a prohibited item so that a foreign national can render services.²⁸ The person may even compensate the foreign national for such services from campaign funds as an authorized expenditure of the campaign.²⁹ The FEC has distinguished the circumstance where the services of the foreign national are the creation of artwork which is used by a campaign for fundraising purposes. In this circumstance, the artwork is a contribution or, at least, a thing of value and therefore a prohibited item.³⁰

No Participation in Decision Making Process

Whatever services a foreign national renders to a person, those services cannot consist of participation in the decision making process of the person. The foreign national cannot manage

any aspect of the campaign including decisions about making contributions, donations or expenditures or decisions about receipts and disbursements.³¹ The types of services which a foreign national can perform are lit drops, door to door canvassing, handing out literature at transit stations, telephone banking and get out the vote activities.³²

A FOREIGN NATIONAL

Foreign National Defined

The FECA-BCRA defines a foreign national as any individual who is not either a citizen of the United States or an individual lawfully admitted to the United States as a permanent resident, commonly referred to as a Green Card holder.³³

A foreign national is also a foreign principal as that term is defined in 22 USC §611(b).³⁴

That provision defines a foreign principal as any of the following:

- the government of a foreign country,
- a foreign political party,
- a person outside of the United States, but not
 - an individual who is either a U.S. citizen or a legal permanent resident of the U.S. or
 - a person who is not an individual and 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., and
- a partnership, association, corporation, organization, or other combination of persons organized under the laws of or having its principal place of business in a foreign country.

U.S. Subsidiary of a Foreign Principal

Foreign entities which satisfy the definition of a foreign principal often do business in the

United States through subsidiaries. The subsidiary is usually formed as a corporation or limited liability company under state law. As a threshold issue, the subsidiary is subject to any applicable prohibitions or limits placed on the entity form of the subsidiary under FECA-BCRA. of a foreign principal may establish a separate segregated fund (PAC) which may operate in the same manner and under the same rules as any other corporate PAC. However, the PAC is subject to the following:

- The foreign parent cannot finance any of the activities of the PAC, either directly or indirectly, and
- No foreign national including the foreign principal can participate in the operation of the PAC, the appointment of principals of the PAC nor in any decision as accepting or making any contribution or making any expenditure.

The authority for establishing the foregoing PAC is not contained in the FECA-BCRA nor in any regulation. It has been developed by the FEC through Advisory Opinions (AOs).³⁵

Before the BCRA was enacted, the foreign national prohibition appeared to impose strict

liability on any person who solicits, accepts or receives an item of value from a foreign national. The BCRA regulations clarify this issue by setting forth a “knowing” requirement and standards for determining whether the act was knowingly committed.³⁶ A person knows that it has solicited, accepted or received an item of value from a foreign national or substantially assisted any of the foregoing acts if the person:

- actually knows that a foreign national is the source, or
- is aware of facts that would lead a reasonable person to conclude that there is a substantial probability that the source is a foreign national, or
- is aware of facts that would lead a reasonable person to inquire whether the source is a foreign national and the person fails to make that inquiry.³⁷ The person has conducted a reasonable inquiry if it seeks and obtains copies of current and valid passport papers of U.S. citizen presumably which show that the source is a U.S. citizen.³⁸

Examples of the types of facts that would satisfy the foregoing “knowing” requirement are when the purported giver:

- uses a foreign passport or passport number for identification,
- provides a foreign address
- makes the purported contribution or donation with an instrument drawn on a foreign bank or by wire transfer from a foreign bank.³⁹

Contributions in the Name of Another Person. If a person contributes to a campaign through or using the name of another person, the person making the contribution is a prohibited source.⁴⁰ Moreover, the act of knowingly allowing oneself to be used to make a contribution and the act of knowingly accepting such a contribution are separate violations of the prohibition. The prohibition means that an employer cannot reimburse an employee for a contribution made by the employee.

Dollar Limits on Contributions. After the contribution is deemed to derive from a source that is not a prohibited source, the next inquiry is whether the contribution exceeds the applicable dollar limits. Contributions in the form of U.S. or foreign currency are limited to \$100.⁴¹ The dollar limits contained in the FECA as it was originally enacted in 1971 remained in effect until the BCRA was enacted. The BRCA increased many of the contribution limits and some limits are indexed for inflation.⁴²

The increase in the dollar limit that individuals can contribute was one of the most significant increases. The limit on individuals which had been \$1,000 per election since 1971 was increased to \$2,000 per election as of January 1, 2003 and the limit is indexed for inflation. The limit applies to each federal election so that an individual may contribute up to \$2,000 for each primary, run-off, general or special election in which his or her chosen candidate runs. In every two year period, an individual can contribute no more than \$37,500 to all candidates and no more than \$57,500 to all political parties and PACs of which no more than \$37,500 can be contributed to state and local parties and PACs.⁴³

1. 2 USC §431 *et seq.*
2. PL 107-155; 11 CFR §100 *et seq.*
3. See generally Nicholas G. Karambelas, “The Role of Counsel to Political Campaigns under the FECA”, Vol. 18 No.9 The Washington Lawyer, May, 2004
4. *Citizens United v. Federal Election Commission*, No. 08-205 US Sup Ct., rehearing September 9, 2009. The issue at the rehearing was whether *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990) and *McConnell v. Federal Election Commission*, 540 U.S. 93 (2003) which upheld the constitutionality of the prohibition should be reconsidered.
5. For an articulate but unpersuasive argument that the foreign national prohibition is unconstitutional, see Evan C. Zoldan, “Strangers in a Strange Land: Domestic Subsidiaries of Foreign Corporations and the Ban on Political Contributions From Foreign Sources”, 34 Law & Policy in International Business 573 (Winter 2003)
6. See Richard Hofstadter, “The Paranoid Style in American Politics” Harper’s Magazine November, 1964
7. 2 USC §441e
8. 2 USC §437(g)
9. 2 USC §441e(a)(1)(A)
10. 11 CFR §110.20(f)
11. 2 USC §431(8)(A)
12. 11 CFR §100.52(d)(1)
13. 11 CFR §100.52(d)(2)
14. 2 USC §431(8)(B)
15. 11 CFR §110.10; 2 USC §431(26)
16. 11 CFR §300.2(e)
17. 2 USC §431(17); 11 CFR §109.1 *et seq.*
18. 11 CFR §109.21
19. 11 CFR §300.2(d)

20. 2 USC §441e(a)(1)(B)
21. 11 CFR §110.20(c)(1)
22. 11 CFR §110.20(d)
23. 11 CFR §110.20(c)(2)
24. 11 CFR §110.20(j); 11 CFR 104.21(a)(1)
25. 2 USC §441e(a)(1)(C)
26. 2 USC §434(f)(3)
27. 11 CFR §110.20(i)
28. AO 2004-26
29. AO 2007-22
30. AO 1981-51; AO 1987-25
31. AO 2007-22
32. Ibid.
33. 2 USC §441e(b)(2)
34. 2 USC §441e(b)(1)
35. AOs 2000-17, 1995-15, 1992-16, 1990-8 and 1985-3
36. 11 CFR §110.20(a)(4)
37. 11 CFR §110.20(a)(4)(i)-(iii)
38. 11 CFR §(a)(7); This provision is described as a “safe harbor”. It is too poorly drafted to provide the comfort of a “safe harbor”.
39. 11 CFR §110.20(a)(5)
40. 2 USC §441f
41. 2 USC §441g
42. 67 FR 69928 (November 19, 2002); See also www.fec.gov/pages/bcra.

43. *Ibid.*