

## ADVISORY | Election and Political Law

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### A PRIMER ON SUPER PACS WHAT THEY DO, HOW THEY OPERATE AND SOME OF THE ISSUES THEY ARE CONFRONTING IN 2012

Super PACs have dominated the 2012 presidential election press coverage, and are increasingly dominating the air waves in primary and caucus states. While the emphasis so far has been on the role Super PACs play in the presidential race, we anticipate Super PACs will also have an important role in House and Senate races, as well as gubernatorial, state legislative and judicial contests in 2012 and beyond. This advisory is a high level review of the legal basis for Super PACs, how they operate and some of the legal issues Super PACs are confronting.

#### WHAT IS A SUPER PAC?

Several court decisions in 2009 and 2010 made clear that the First Amendment protects the right of individuals, corporations and unions to spend their resources on independent political speech that advocates for the election or defeat of particular candidates. As a consequence, the Federal Election Commission (FEC) issued several advisory opinions and amended its reporting practices to explicitly permit the establishment and operation of independent-expenditure-only political committees, or Super PAC's as they are frequently called.

A Super PAC is a political action committee, registered with and reporting to the FEC, that agrees not to make contributions to federal candidates, political party committees or to PACs that contribute to candidates and political party committees, and instead to make only "independent expenditures."<sup>1</sup>

#### HOW MUCH CAN A SUPER PAC RAISE AND FROM WHOM?

Because it agrees to limit its activities to making independent expenditures, a Super PAC is not governed by many of the FEC's limits on the source of contributions (the ban on corporate and union contributions does not apply) or the amount that can be contributed to a PAC (the \$5,000 per year limit does not apply to a Super PAC). In short, Super PACs can raise unlimited sums from individuals, corporations, partnerships and unions, and use those funds to pay for independent expenditures that advocate for the election or defeat of a clearly identified candidate.

There are statutory limits on PAC contributions that the Supreme Court did not address in *Citizens United v. FEC*, though the Court's reasoning has cast doubt on the ongoing validity of some of these. These restrictions include a statutory ban on foreign nationals, government contractors, national banks and corporations organized by authority of a law passed by Congress making contributions to

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<sup>1</sup> Most state agencies and state courts that have considered the question have concluded that the right to fund and operate independent-expenditure-only PACs applies equally in state and local elections. However, the Montana Supreme Court recently ruled that the history of corruption of the political process in that state is such that a different result should follow, and held the ban on corporate expenditures, even independent expenditures, was still good law when applied to state races in Montana. *Western Tradition Partnership, Inc. v. Attorneys General*, 2011 MT 328 (Dec. 30, 2011).

influence federal elections.<sup>2</sup> While the constitutionality of these restrictions is being litigated, many Super PACs tend to operate as if these restrictions apply.

### CAN CANDIDATES AND OFFICEHOLDERS HELP RAISE MONEY FOR SUPER PACS?

A federal candidate or officeholder may attend, speak at, or be a featured guest at a Super PAC fundraising event, at which they may speak favorably of the Super PAC. However, they may only solicit contributions that are within the contribution limits for traditional PACs (up to \$5,000) and from permissible sources (e.g., from individuals and from traditional federal PACs).

If a Super PAC intends to make public communications, such as radio or TV ads, that advocate for a particular candidate's election or defeat, the appearance of that candidate at a Super PAC fundraiser could result in communications between the candidate and the Super PAC staff that taint the ability of the Super PAC to later produce independent expenditures.

### WHAT CAN A SUPER PAC DO WITH ITS MONEY?

Super PACs make independent expenditures that support or oppose a candidate for public office. The independent expenditure can come in the form of TV, radio, cable or print ads. It can also come in the form of direct mail, email or phone calls from a phone bank or prerecorded messages (robo-calls).<sup>3</sup> Social media are increasingly a core part of every political program, including those devised by Super PACs. Super PACs can also engage in more traditional forms of political activism, such as a ground campaign or opposition research. While the focus on Super PACs so far has been TV and radio ads, they have a fair amount of freedom in how they spend their funds, so long as they do so independently of the candidate and political party they support.

### WHAT MUST A SUPER PAC DISCLOSE ABOUT ITS OPERATIONS?

Like other Federal PACs, the finances of Super PACs are very transparent, though their organizational structures need not be. When it registers with the FEC, a Super PAC must identify its Treasurer and Custodian of Records, provide a mail and email address, and a website address, if it has one. A federal PAC is not required to have officers other than a Treasurer and Custodian or Records (which may be the same person). If a PAC has by-laws, a President, a Secretary or a Board, it does not have to report that fact or the identity of those individuals to the FEC. A Super PAC may incorporate for liability purposes, in which case it may have state corporate disclosure obligations.

The reporting obligations that generally apply to PACs apply to a Super PAC as well. Consequently, Super PACs report the identity of any donor who gives in excess of \$200 in a year, including his or her name, mailing address, occupation, and employer. A Super PAC must use its "best efforts" to obtain and report that information to the FEC. A Super PAC must also disclose how it spends its money, including the identity of persons paid in excess of \$200 in a year and the purpose of the payment. The FEC sometimes objects to the level of detail a political committee provides about its expenditures, and the agency has detailed some of the presumptively appropriate and inappropriate descriptors on its [website](#). Revised in part, [here](#).

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<sup>2</sup> The United States Supreme Court recently affirmed the decision of a three judge panel of the U.S. District Court for the District of Columbia, upholding the prohibition on foreign nationals making contributions or expenditures in federal elections, including direct or indirect expenditures for express advocacy communications. *Bluman v. FEC*, 2011 U.S. Dist. LEXIS 86971, affirmed, 2012 U.S. LEXIS 310 (U.S. Jan. 9, 2012).

<sup>3</sup> Note: States often regulate phone solicitations, especially those that use robo-calls and predictive dialer technology.

## WHAT IS AN INDEPENDENT EXPENDITURE AND HOW IS IT DIFFERENT FROM COORDINATED SPENDING?

Super PACs are required to operate independently of the candidates they support. Maintaining this independence is essential because spending that is not independent, i.e., spending that is coordinated with a candidate, their campaign, or a political party, may constitute an illegal in-kind contribution. A communication may lose its independence if it is made in cooperation, consultation, or concert with, or at the request or suggestion of a candidate, his or her campaign committee, a political party or their agents.

Super PAC staff generally have structures and rules in place to prevent non-public information moving from a candidate, his or her campaign, and/or a political party (or the agents of those persons) to the Super PAC in a way that might influence the decisions of those running the Super PAC. Most Super PACs have the experienced staff and resources needed to identify and pursue their goals. Consequently, they do not need to coordinate their strategy to be effective. Washington has many experienced political operatives and consultants, and to paraphrase Gore Vidal: “People who think alike don’t need to conspire.” So where may unexpected hazards lie?

**Vendors:** A Super PAC should ensure that its vendors, especially those involved in media, polling and political consulting, do not serve as a conduit of information from a candidate, campaign or political party to the Super PAC. One way to do this is for the Super PAC to only work with vendors who do not work for a candidate or political party the Super PAC supports. An alternative is for the vendor to put in place a firewall system that prevents the flow of information from those working for the candidate to those working for the Super PAC. The FEC has recognized that firewalls can be an effective barrier to coordination. Anyone selling services to candidates and Super PACs should consider whether their operations present a risk of being a conduit for information that should not pass from a candidates’ campaign or political party to a Super PAC.

**Former Staff:** If the Super PAC employs or consults with former campaign or political party staff, there is a risk of coordination. The FEC rules say that individuals who worked for the candidate or political party in the prior 120 days and who use information they gained in that capacity to prepare Super PAC communications may cause the Super PAC’s ads to lose their independence.

**Donors:** Individuals who are active supporters of a candidate and who also want to help a Super PAC may inadvertently serve as the conduit for information about the candidate’s needs, goals, strategies or other non-public information that could serve as the basis for an allegation of coordination. While the law in this area is unsettled, there can be advantages to instructing donors not to pass on information from the campaign or party to the Super PAC, or to isolate them from key decision makers in the Super PAC.

## CAN SUPER PACS WORK WITH OTHER GROUPS?

It is common for Super PACs to be associated with other organizations, with different goals and operating under other section of the tax code. For example, Super PACs often have a related social welfare organization that is focused on issues instead of electing candidates. These social welfare groups, which are also referred to as 501(c)(4) organizations for the section of the tax code they operate under, are not-for-profit entities that often advocate for legislative changes, including social goals (such as guns, abortion or immigration), or economic goals (such as aiding America’s farm families). Social welfare organizations typically are not required to disclose their donors.

Trade associations, labor unions and corporations may also sponsor a Super PAC. It is also possible for a traditional PAC, which may make contributions to candidates, to sponsor a Super PAC. Super PACs may also coordinate their activities with other Super PACs. Super PACs are free to share among each other observations, strategy and insights they have gained, so long as each Super PAC retains authority over its own spending decisions. When working with any group, however, a Super PAC needs to ensure that its partners do not pass on non-public information they gained from a campaign or political party the Super PAC is supporting.

### What about social media?

While much of the talk about Super PACs has focused on traditional TV ads, as Super PACs grow in popularity, we anticipate more mid-sized Super PACs will arise. With smaller budgets, these niche Super PACs may use viral marketing and social media, as well as traditional-budget conscious advocacy, such as drive-time radio and phones, to make an impact. Niche Super PACs with a small pool of funders will certainly be important players in some races in 2012 and beyond.

### COVINGTON'S ELECTION AND POLITICAL LAW GROUP

Covington & Burling LLP advises Super PACs and their donors. In addition, we routinely advise Fortune 500 corporations, trade associations, financial institutions, political party committees, PACs, candidates, and lobbying firms on compliance with laws governing the political process. These include federal and state campaign finance, lobbying disclosure, and government ethics laws. For more information on Covington's Election and Political Law practice, please click [here](#).

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If you have any questions concerning the material discussed in this client advisory, please contact the following members of our firm:

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