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Using Trust Assets for Political Contributions in Federal Elections

January 11, 2016

Election and Political Law

Many people are surprised to learn that there are circumstances where trust fund assets can be used to make campaign contributions to federal candidates, parties and PACs. In fact, since January 2014, Federal Election Commission (FEC) reports have included nearly $9.5 million in contributions from trusts to Super PACs and over 65 contributions from trusts to candidates, parties and other PACs totaling over $115,000.[1] While federal campaign finance law is not well settled regarding all types of trusts, there is clarity on the use of some common forms of trusts for federal campaign contributions.

In this alert, we focus only on federal campaign finance law. In addition, the trust's terms themselves may limit the permissible uses of trust assets in a way that precludes their use as campaign contributions. Applicable state laws governing trusts and estates may also have an effect on the permissibility of donations and should be considered. Federal tax law precludes the use of charitable trusts as a source of campaign contributions, and state campaign finance laws may treat contributions from trusts to influence state or local races differently. Some of the key points on using trust assets to make federal campaign contributions are laid out below.

Super PAC Contributions. The most common use of trust fund contributions in this election-cycle has been to Super PACs. Super PACs do not face the same source and amount restrictions that other political committees do, so there are comparatively few restrictions on the types of "persons" that can give to a Super PAC. Freedom Partners Action Fund and the National Draft Ben Carson for President Committee have been common destinations for the trust contributions we reviewed this cycle. As with all other types of contributions, the prohibition on foreign nationals making contributions applies to giving through trusts.

Testamentary Trusts. Individuals may create trusts to make distributions after their death, including political contributions. The contributions can be made on a single date or recur each year. There are two important constraints. First, contribution limits still apply. Each contribution to a candidate, party or PAC must be of a sum equal to or less than the federal contribution limits. For example, an individual could contribute at least $3,340,000 over 10 years to her or his favorite national party committee, so long as the transfers did not exceed the then current

[1] Because the FEC encourages many types of political committees to report contributions from trust fund assets as coming from the beneficiary, the records in the FEC's database on contributions to political committees from trusts likely underestimate the actual figure.

contribution limit in any given year, which is now $334,000.[2] Second, control of the trust cannot pass to the recipient committee. This means the recipient committee cannot manage or control the trust. *See* FEC AO 2015-05 (Shaber); FEC AO 1999-14 (Council for a Livable World).

A Minor May Use the Proceeds from a Trust. Federal campaign finance law provides that a child who has beneficial ownership interest in a trust may use the proceeds from that trust to make a political contribution. *See* 11 C.F.R. § 110.19. The funds must be controlled by the child and given by the child freely and knowingly, so this option is not available to young children and cannot be used by parents that seek to use their children's funds to exceed the contribution limits. As with all other contributions from a trust, any restrictions in the terms of the trust should be considered.

Living and Revocable Trusts. An individual who is the beneficiary and trustee of a revocable trust may make contributions from trust assets. For example, an individual who places assets in trust, naming him or herself as trustee and beneficiary, has the authority to contribute those trust assets to a political campaign committee. *See* FEC AO 1999-19 (Ellis). Contributions given from a living or revocable trust are considered political contributions by the trust's beneficiary, and count towards the beneficiary's contribution limits.

Irrevocable Trusts. The law in this area is not fully developed. The terms of the trust, the power of trustees to control distributions and the nature of the ownership interest may affect how the FEC would treat a trust as a potential source of funds for contributions to candidates, parties and PACs.

REITs and Other for-Profit Trusts. A for-profit trust, such as a Real Estate Investment Trust (REIT), may make a contribution that will be attributed first to the trust itself and, then to each person with a beneficial interest in the trust on a pro rata basis in line with that interest. A trust may formulate a different method for attributing the contribution if pro rata division is inequitable or otherwise does not make sense, such as when a beneficiary is a corporation. *See* FEC AO 1981-52 (Nat'l Ass'n of Real Estate Inv. Trs.).

A Membership Organization Can Attribute a Portion of Its Contribution to Trusts. An unincorporated or pass-through entity, such as a partnership, that is otherwise eligible to make contributions that will be attributed to all of its members, may include members that are trusts. Importantly, however, the FEC has held that this type of donation must also be attributed to the individual trust beneficiaries. As a result, those trust beneficiaries must knowingly and voluntarily agree to the contribution and must have the power to make such a contribution under the trust's terms and under state law. *See* FEC AO 1978-07 (Jim Guy Tucker for Senate Campaign Comm.).

Conclusion

As the 2016 fundraising season reaches high gear, individuals who are beneficiaries and control dispositions of assets held in trust should be aware that the FEC has a history of permitting use of certain kinds of trust assets for political contributions. Those who contemplate tapping trust

[2] After the 2014 amendments to the contribution limits, individuals may annually contribute up to $33,400 to a national party committee's main account and up to $100,200 to each of three accounts for convention activities, legal expenses and building costs. These limits are adjusted for inflation every two years.

funds to make political contributions should consult counsel for specific advice applicable to their circumstances, especially as it relates to any restrictions contained in the trust's terms.

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