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Compliance with Ban on Contributions from Foreign Nationals

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Election and Political Law

Federal law prohibits contributions and expenditures made "directly or indirectly" by foreign nationals "in connection with a federal, state, or local election." 52 U.S.C. § 30121; 11 C.F.R. § 110.20. It is also unlawful to provide substantial assistance to help foreign nationals violate that ban, or to solicit, receive, or accept contributions from foreign nationals. 11 C.F.R. § 110.20(h). Violations of this prohibition may lead to fines or imprisonment. While companies are generally familiar with the prohibition, there are several issues which deserve particular attention.

Key Issues

While the regulations define "foreign nationals" as individuals who are not U.S. citizens or lawful permanent residents, it may not always be obvious who qualifies as a "foreign national." The statutory term "lawful permanent resident alien" is generally understood to only cover "green card" holders, and not those lawfully present in the United States on work visas, even if long-term.

The foreign nationals ban includes soliciting, as well as accepting, a contribution. This has been a growing problem for global companies that increasingly draw executive talent from around the world and that expect many of those individuals to spend at least a portion of their career in the United States. Routine solicitations during a meeting of senior executives can become difficult if foreign nationals are present. The FEC has given no guidance on whether an appropriate disclaimer—making clear the solicitation is not directed at foreign nationals—would be considered compliant with the law. This also puts a premium on ensuring the foreign national restriction is considered when evaluating which employees fall within the restricted class.

The restriction is also understood to prohibit foreign nationals from controlling a PAC, including having the power to appoint those who operate the PAC. This can be important if a senior executive who is a foreign national is appointed to oversee government affairs and the company's PAC. In some circumstances, it may be wise to re-adjust lines of authority to prevent allegations of improper indirect contributions by means of an executive's oversight of the PAC.

The ban on contributions from foreign nationals can be an issue for companies (and their PACs) that are foreign-owned or controlled. The foreign parent corporation must not finance the PAC's establishment, administration, or solicitation costs, and foreign nationals may not participate in the operation or selection of persons who operate the PAC. 11 C.F.R. § 110.20(i); *see also* AOs 2000-17, 1995-15. American subsidiaries of foreign companies are generally permitted to operate a federal PAC, presuming the U.S. subsidiary generates sufficient domestic revenue to

cover the cost of the PACs operation, and only U.S. citizens and lawful permanent resident aliens contribute.

Finally, PACs should be aware that listing foreign addresses for donors will sometimes prompt the FEC's Reports Analysis Division to formally inquire as to the donor's citizenship status. Assuming all of the appropriate internal controls are in place and have been followed, this sort of an inquiry can be promptly resolved, but it does present a public test of internal controls.

Enforcement

In the past, the FEC has aggressively enforced the foreign national ban when there was evidence of an intent to violate the law, or where the respondent disregarded facts that would lead a reasonable person to question the validity of a contribution. *See, e.g.*, MURs 4530/4531/4547/4642/4909 (International Buddhist Progress Society, Inc., DNC Services Corporation/ Democratic National Committee, John Huang, et. al.) (multiple violations including foreign national contributions led to $719,500 in civil penalties); MUR 4398/PM 307 (Thomas Kramer et. al.) (foreign national contributions and contributions in the name of another led to $426,000 in civil penalties); and MUR 6129 (American Resort Development Association Resort Owners Coalition PAC) (multiple violations including foreign national contributions from off-shore addresses led to $300,000 in civil penalties).

Recent enforcement actions show the FEC is continuing this trend and pursuing cases even when companies take significant steps to avoid or address the violation.

- In November 2014, the FEC enforced the ban against a PAC that accepted a contribution from a single foreign national. ADR Case 708 (2014) (Marsh & McLennan Companies, Inc. PAC). An employee contributor had raised a concern that his L-1A visa (for intracompany transfers of executive or management-level employees) might not be the same as a green card for purposes of the FEC's rules. The PAC had limited its solicitations to U.S. residents working in its U.S. facilities, had a policy to confirm immigration statuses when questions arose, and required contributors to check a box indicating U.S. citizen or lawful permanent resident status. The PAC had errantly accepted the employee's contributions despite these safeguards and quickly refunded all contributions upon learning of the mistake. After raising the issue *sua sponte* with the FEC, however, the FEC required the PAC to admit it violated the law and pay a $3,000 penalty.
- Similarly, the FEC "found reason to believe that" the Michael Grimm for Congress Committee knowingly and willfully solicited and received contributions from foreign nationals, and that some of these contributions were made in the names of others. MUR 6528 (2015). The committee allegedly solicited campaign contributions from foreign nationals through the use of false names and the aid of a foreign national. In light of the statute of limitations, the FEC closed the case with no official action. However, had the FEC gone forward with the case, the committee could have faced severe penalties.

Ballot Initiatives and Volunteer Activities

The FEC does not have a uniformly strict approach to the issue of foreign nationals' participation in elections.

- In 2014, a divided FEC held a PAC could accept uncompensated volunteer services from foreign nationals, including help in developing website code and other intellectual property for the PAC's use, because volunteer services are exempt from the definition of a "contribution" and hence from the ban. AO 2014-20.
- In 2015, the FEC deadlocked 3-3 over whether to enforce the ban against a foreign national who provided more than $300,000 to defeat a local ballot measure in Los Angeles. MUR 6678 (2015) (Manwin Licensing International). Three commissioners concluded that a ballot initiative was not an "election" covered by the foreign nationals ban. It appears that, for the time being, a controlling block of commissioners view the ban on contributions and expenditures to apply only when made "in connection with a federal, state, or local election" and not for ballot measures.

Conclusion

The ban on contributions from foreign nationals remains an important landmine for companies to avoid. Awareness of these issues and sound internal controls can help avoid even an inadvertent violation. However, the FEC's near "zero tolerance" policy for foreign national contributions and the growing presence of foreign nationals in the executive ranks of global companies highlight the importance of reviewing compliance practices and policies that address this issue.

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