

Enforcement Down at the Four-Member FEC, but Risks Remain for the Unwary

July 11, 2018

Election and Political Law

After a surprisingly active 2017, the Federal Election Commission's enforcement efforts have slowed noticeably in the early months of 2018. In February, former Commission Lee Goodman's [departure](#) from the agency left the Commission with only four members. While the remaining Commissioners can still form a quorum, unanimity is required for all official agency action. Perhaps unsurprisingly, then, the Commission's enforcement activities have declined during the first half of 2018. Still, while it may be tempting to conclude that the FEC has gone entirely idle, the Commission has pursued a number of recent cases that point to continued areas of enforcement risk.

Declines in Overall Enforcement Activity

After three straight years of increasing [enforcement activity](#), the FEC had its most active year in nearly a decade during fiscal year 2017. Between October 2016 to September 2017, the Commission obtained nearly \$1.7 million in total penalties associated with close to 375 enforcement actions across the agency. Meanwhile, the current fiscal year started off with a bang, with the Commission obtaining a \$350,000 [civil penalty](#) in a negotiated settlement with the American Conservative Union in connection with allegations that the organization illegally funneled \$1.71 million to a conservative super PAC during the 2012 election cycle.

More recently, however, enforcement activity has flagged. Indeed, during the first six months of 2018, the FEC appears to have obtained just over \$185,000 in total civil fines and penalties across all of its enforcement efforts. This apparent stall is particularly pronounced in the FEC's resolution of matters under review ("MUR"). Indeed, after a lull of roughly six months, the agency recently collected its first civil fines in connection with a MUR in 2018. Absent one or more large penalties in the coming months, the Commission could be on pace for its least productive enforcement year since 2014, and its second-lowest penalty total in 20 years.

However, even as overall enforcement has lagged, certain kinds of FEC enforcement actions have continued apace. For example, since last October, the agency has already collected nearly \$140,000 in civil penalties through the agency's Alternative Dispute Resolution ("ADR") program, far outpacing total ADR penalties collected in 2016 and 2017. Notably, the agency has continued to obtain penalties in these cases throughout 2018, perhaps signaling the short-handed Commission's continued interest in pursuing negotiated settlements outside of the general enforcement process.

State Parties in the Crosshairs

Among the most significant ADR settlements in 2018 are those involving state parties. In May 2017, the Commission [imposed](#) a \$500,000 civil fine—one of the largest civil fines in FEC history—in connection with longstanding accounting and reporting violations related to “bingo” events organized by the Michigan Democratic Party. While the Michigan case demonstrated the particular risks associated with unorthodox fundraising efforts, the Commission has shown a continued interest in scrutinizing state parties throughout the early months of this year. In fact, six of the largest enforcement penalties—and roughly a quarter of all ADR settlements resulting in a penalty thus far in 2018—have involved state party committees.

For example, on a single day in February, the Commission resolved three separate enforcement actions against state party committees in [Arizona](#), [Michigan](#), and [Arkansas](#). Each action was initiated by the Commission following the identification of reporting errors and apparent discrepancies in activity reports filed in connection with the 2015-2016 election cycle. Beyond certain administrative errors, the Commission highlighted various excessive and prohibited contributions, including contributions from corporations and unregistered political committees. Though each potential violation was resolved through negotiated settlement, with the parties avoiding a finding of liability, the Commission imposed a total of \$42,000 in civil fines through these actions.

With high-profile races up and down the ballot in many states in 2018, the FEC’s recent focus on state parties serves as a reminder that activities ostensibly focused on state races are not free from scrutiny at the Commission. As such, clients working with state parties or other in-state actors must remain mindful of their obligations under federal law.

Costly Reporting Errors

Beyond this small handful of larger penalties, the Commission has continued to investigate and penalize smaller violations among corporate PACs and other political actors. For the most part, these proceedings have stemmed from apparent violations identified through the ongoing work of the Commission’s Reports Analysis and Audit Divisions.

For example, during the course of a routine audit, the Commission [identified](#) irregularities in reports filed by the American Financial Services Association PAC in connection with its activities during the 2014 election cycle. Although the PAC filed amended reports correcting certain of these errors, the Audit Division found that the PAC failed to disclose over \$11,000 of its receipts during the relevant period. In February, the PAC [entered](#) into a negotiated settlement with the Commission to resolve these apparent violations. In addition to retaining a new preparer for all future filings with the Commission, the PAC agreed to pay an \$11,000 civil penalty.

Similarly, in late January, the Commission [agreed](#) to a negotiated settlement with Citizens United super PAC stemming from the PAC’s failure to comply with heightened disclosure requirements for certain independent expenditures. Again, these reporting failures came to light through the Commission’s general analysis of reports filed by all registered PACs. In particular, the Commission identified roughly \$76,000 in independent expenditures previously undisclosed on the PAC’s quarterly report. Because the expenditures were made within 20 days of Election Day, Citizens United was required to file a special disclosure report within 24 hours of their dissemination. As a part of the negotiated settlement, the PAC agreed to pay a civil penalty of \$5,850.

More recently, in June, the FEC [entered](#) into a conciliation agreement with a super PAC called “Let America Work” resolving similar IE-specific reporting failures. In contrast to the cases mentioned above, Let America Work itself brought these reporting errors to the Commission’s attention through a *sua sponte* submission in which it acknowledged that it made nearly \$325,000 in opposition to former Senator Russ Feingold’s 2016 Senate campaign without filing the required 24-Hour Report. Although the committee ultimately did include these expenditures on its regular disclosure reports, it agreed to pay a \$12,500 civil penalty for failing to file the required 24-Hour Report.

These continued efforts to pursue meaningful civil penalties in connection with improper disclosures serve as a reminder that even inadvertent reporting errors can lead to costly penalties. Likewise, even as the agency’s more active investigatory efforts appear to have slowed, these recent cases demonstrate that the agency’s general monitoring and auditing work remains a ready source of potential enforcement actions.

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While the FEC’s investigation and enforcement efforts appear to be lagging, the Commission may soon lose its ability to act entirely. For months, [speculation](#) has grown that one or more of the remaining Commissioners may join former Commissioner Goodman in leaving the Commission. Since 2013, all of the current Commissioners have served beyond their statutory terms, and there remains the possibility that one or more Commissioner will step down prior to the nomination and confirmation of his or her replacement. Were that to happen, the Commission would lack the ability to take any official action to carry out its enforcement responsibilities. For now, however, even a four-member FEC presents potential liability for political committees and corporate actors alike.

If you have any questions concerning the material discussed in this client alert, please contact the following members of our Election and Political Law practice:

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